FOURTH DIVISION
March 31, 2016

1-14-2798

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH BACHEWICZ and TERRY HARB,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 08 L 11814
	)	
COLDWELL BANKER REAL ESTATE, LLC and	)	
KELLY WONG,	)	Honorable
	)	Michael R. Panter,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's judgment, which granted defendants' motion for directed verdict at close of plaintiffs' case, is affirmed; plaintiffs failed to make a *prima facie* case of their claim of fraud against a real estate agent for alleged misstatements related to purchase of two parcels of land plaintiffs wanted to develop but did not.

¶ 2 Plaintiffs, Joseph Bachewicz and Terry Harb, purchased two properties in Chicago with the assistance of defendant, Kelly Wong, a real estate agent. Wong is affiliated with defendant Coldwell Banker Real Estate, LLC (Coldwell). Plaintiffs purchased the properties for purposes

of development and sale. Plaintiffs allege Wong made certain representations to induce them to purchase the properties for development that were not true. The developments failed to materialize or did not realize the profits plaintiffs expected. Plaintiffs sued Wong and Coldwell for fraud. At the close of plaintiffs' case, Wong and Coldwell moved for a directed verdict. The circuit court of Cook County granted Wong and Coldwell's motion.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 We will limit our discussion of the proceedings below to those matters that are necessary to an understanding of our disposition.

¶ 6 A. The Complaint

¶ 7 According to the complaint, plaintiffs began discussing developing real estate on the north side of Chicago in Winter and early Spring 2005. Bachewicz described himself as a real estate developer and Harb described himself as a real estate developer and construction manager. Harb recommended retaining Wong in connection with acquiring and developing property. Harb and Wong had purchased, developed, and sold property together on other occasions. All three allegedly discussed working together to develop residential real estate using Wong as both a real estate broker, reseller of the developed properties, and real estate development consultant. The complaint alleges plaintiffs relied on Wong's representations and decided to work with him. Plaintiffs' complaint alleges each party was to have a specific role in their business relationship. In sum, Bachewicz was to secure financing, Harb was to manage construction and manage properties, and Wong was to advise on developments, develop marketing plans, and resell properties.

¶ 8 Wong allegedly approached Bachewicz and Harb about a property at 7321 North Oakley in Chicago. Plaintiffs alleged Wong misrepresented that he had the ability to obtain all necessary

permits for the development of a new building on the property on an expedited basis and that he (Wong) knew the local alderman very well, which, according to plaintiffs' complaint, would "be very beneficial to the acquisition and development activities that the parties were undertaking together." The complaint alleges that plaintiffs relied on Wong's statements as to the unique zoning of the Oakley property (which would permit construction of a condominium in place of a single-family residence), his connections with the local officials, and the numbers projected in a pro forma to secure an investor for the Oakley property. Plaintiffs allegedly later discovered the projections were "recklessly aggressive" and "overly optimistic," and were unable to obtain the building permit on a "fast track," which delayed the development indefinitely.

¶ 9 Around the same time, Wong allegedly also brought an opportunity to plaintiffs to purchase a property at 3217 West Bryn Mawr in Chicago. The Bryn Mawr property contained rental units but Wong allegedly represented that they could be remodeled and sold as owner-occupied units within six to nine months. The complaint alleges Wong was only able to sell one unit in the Bryn Mawr building 16 months later. After a year, however, six units were sold and at the time of filing the complaint, nine units were sold.

¶ 10 Count I of plaintiffs' complaint alleged Wong acted with the intention to misrepresent the facts as set forth in the complaint, or recklessly made the misrepresentations alleged in the complaint, with regard to the development of a three-story condo on Oakley and the ability to sell condominium units on Bryn Mawr with conscious disregard of their truth. Plaintiffs alleged that Wong held himself out as an experienced development consultant with established business connections with special knowledge of residential development deals and of the area. Based on those representations and plaintiffs' lack of knowledge of the market or Wong's connections, plaintiffs alleged, their reliance on Wong's misrepresentations regarding Wong's ability to complete the projects on an expedited basis and the investment potential of the two properties

was reasonable. The complaint also alleged Coldwell is directly and vicariously liable for Wong's wrongful actions because Wong acted as Coldwell's employee and monitored and supervised Wong's efforts in working for plaintiffs.

¶ 11 B. The Trial

¶ 12 In August 2014 the matter proceeded to trial before a jury.

¶ 13 1. Wong's Testimony

¶ 14 Plaintiffs called Wong to testify as an adverse witness. In pertinent part, Wong testified he met Harb in 2001 when Harb called Wong on one of Wong's listings for a lot Wong owned. There came a time when Wong showed Harb the Oakley property, and Harb instructed Wong to put in an offer on the property. The property is located between the East Rogers Park and West Ridge neighborhoods. Wong testified that he believed he met Bachewicz prior to the Oakley property closing, but he did not know Bachewicz and Harb were partners.

¶ 15 Wong testified it was "not necessarily" important to have the support of the neighborhood alderman when seeking to build or rehab property. When asked if it was "not bad to have that" and if it is "desirous to have the support of the alderman and the neighborhood" Wong said "I don't' know." He later elaborated:

> "I mean, if you can build it, why do you need to go talk to the alderman if you don't need anything extra? If you're just building, if you're trying to vacate an alley or something like that, maybe you want to go talk to the alderman; but if you've got your plans and permits why do you need to go talk to the alderman?"

¶ 16 Wong testified he never discussed Alderman Moore with Harb prior to Harb's purchase of the Oakley property. Wong said he never met Alderman Moore. Wong never told Harb they would have Alderman Moore's cooperation. Wong also never discussed with Harb that he (Wong) could get the cooperation and support of Alderman Moore's chief of staff. On cross-

examination, Wong testified he, Bachewicz, and Harb had a meeting with Alderman Moore's chief of staff in Spring 2005. The meeting lasted 45 minutes to an hour. Wong could not recall if that meeting took place before or after the purchase of the Oakley property closed. The issue of a need for a "fast track" construction schedule for the Oakley project never came up between Wong and Harb.

¶ 17 Wong testified the Bryn Mawr property was a ten-unit apartment building with a commercial storefront on the first level. The contract for the purchase of the Bryn Mawr property is dated September 6, 2005 with a purchase price of 1.7 million dollars. Wong never discussed the timing of the sale of units in the Oakley project with Bachewicz or Harb or how quickly the ten units at Bryn Mawr could be sold once completed. Wong testified he never used the word "blowout" in connection with Bryn Mawr. Wong testified he was hired to sell the units in the Bryn Mawr building. Wong testified he obtained six offers for units in the Bryn Mawr property that Harb turned down.

¶ 18 2. Bachewicz's Testimony

¶ 19 Bachewicz testified that he was not a developer. He was an investor and was not involved in the construction of projects he invested in. Harb introduced Bachewicz to Wong. Bachewicz testified he met Wong at the Oakley property and that Wong told Bachewicz that because of the lot size and zoning the single-family residence on the property should be torn down and a three-and-a-half-story building with four to five units built. At that meeting on Oakley, Bachewicz testified Wong told him that the "market is strong" and that to be prepared to sell in Spring 2006 Bachewicz and Harb should get the foundations in during Fall 2005. Wong also made it known to Bachewicz that Wong "had a very strong relationship with the alderman." Bachewicz testified he wanted the support of the alderman to "go ahead on a fast track." Bachewicz stated: "I wanted the support of the alderman. I didn't want opposition. I just

wanted him to support it. And on the basis of my feeling that [Wong] had, was going to be able to get the support, I went ahead and bought the building without a construction loan." When asked why the alderman's support was so important to him, Bachewicz testified as follows: "If you're in Chicago, if you're doing anything in Chicago, the alderman is—he's like the old feudal king. He's got a little kingdom, it's called a ward, and he is the king of that, of that area. *** The alderman, you have to have his blessing to go ahead on anything in Chicago."

¶ 20 After the purchase of the property closed, Harb set up a meeting with the alderman's office. Bachewicz testified he, Harb, and Wong went to the alderman's office to present their project. They met with the chief of staff and, according to Bachewicz, "we definitely found out that we were going to get opposition." After the meeting, Bachewicz said to Wong "I wouldn't have bought this building if I knew we weren't going—we were going to be opposed by this [*sic*] from the alderman." Bachewicz later testified about what occurred at the meeting. The chief of staff told them that the community was not interested in their type of project and that they would have to have a meeting with neighborhood groups. Bachewicz testified he felt the neighborhood groups "had a vote on whether they wanted this building over there or not." The chief of staff also stated that he wanted "face brick" all around the building and not just in the front.

¶ 21 Bachewicz testified that had he known that all of those things would be required before he purchased the Oakley property, he would not have purchased the property. The things the chief of staff said in their meeting were not the kind of support Bachewicz was looking for from the alderman's office. Bachewicz later testified that he believed Wong lied to him and misrepresented his relationship with the alderman. Bachewicz was unaware of whether building permits for the Oakley project had been issued. He did not ask Harb if the permits had been issued or if the alderman had any objections to issuing the permits. On cross-examination, Bachewicz testified that there is a three-story condominium building next door to the Oakley

property and there is another three-story apartment building next door on the other side of the Oakley property. When questioned about the conversation in the alderman's office on cross-examination, Bachewicz admitted the alderman did not say "no," but, Bachewicz stated: "when the chief of staff says that you have to put, you know, face brick all around it and that you have to go in front of the neighborhood committee, neighborhood community, you have to do it." Harb relisted the Oakley property with Wong for a price of $550,000.

¶ 22 Sometime prior to September 2005 Harb told Bachewicz about the ten-unit building on Bryn Mawr. Harb asked Bachewicz if he (Bachewicz) could get financing for the project. Their plan was to sell four units to the four existing tenants, and have Harb renovate the remaining six vacant units for resale. Bachewicz obtained a mortgage and an investor for the Bryn Mawr project. The Bryn Mawr sale closed in November 2005. Bachewicz testified he had a conversation with Wong on the day of the closing regarding when the Bryn Mawr units would be sold. Bachewicz testified he, Harb, and Wong discussed the time it would take to sell all the units before they closed the purchase of the Bryn Mawr property. Wong told Bachewicz they would be "out" of the property in six or nine months. At the closing, Bachewicz testified he asked Wong "how long is it going to take again?" and Wong replied "six, nine months max."

¶ 23 Bachewicz testified problems arose after closing on the Bryn Mawr property. It took longer than six to nine months to sell all of the units in the Bryn Mawr building. Bachewicz testified that had he known it would take longer to sell the units he would not have invested in the Bryn Mawr project.

¶ 24 3. Harb's Testimony

¶ 25 Harb testified he is a general contractor engaged in residential and commercial building. Harb testified Wong brought him (Harb) the Oakley property and Harb was going to build a multiunit building on it. Harb testified that Wong scheduled a meeting with the alderman's chief

of staff. Harb testified: "Typically on all my projects I handle that myself, okay; but Kelly Wong and Mr. Anderson, I believe Kelly Wong was getting his push from Mr. Anderson, the guy who sold us the deal." Harb explained what he meant by "getting his push." Harb testified that "without the alderman's push, I didn't build in any ward." Harb explained that Wong had looked for properties in the wards where Harb knew the alderman and the alderman's chief of staff. Harb stated he was trying to establish a new relationship in Rogers Park with Alderman Moore in that area and his chief of staff. Harb testified that Wong and "the other realtor who sold us the project, Anderson, convinced us that they had the push there and that we [*sic*] would be no problem." Harb opined that if you do not have "push" you have nothing and you cannot do anything.

¶ 26 Harb testified he had problems in connection with the construction of the building he wanted to build on Oakley. Harb stated that his design, which he said was "a matter of right," was for face brick on the facade and cinder block on the sides, which was how he had constructed another multiunit building. Harb explained the building he wanted to build was a matter of right because the lot was zoned R4. Harb explained the R4 zoning requirements and testified that the architects designed the building according to an R4 lot. Harb stated that "even if you have a matter of right *** they will still shut you down." Therefore, Harb testified, they went to the alderman's office to introduce themselves and explain what they wanted to do.

¶ 27 Harb, Bachewicz, and Wong were present at the meeting. Harb testified the alderman's chief of staff "wouldn't let us do anything but face brick" around the entire building. The chief of staff also told them they needed a community group meeting. Harb testified that was a major problem for him. He testified as follows:

> "A. Well, because through my experience of building, I know once an alderman's chief of staff says community group meeting, it's basically his way of

saying no, that they're not going to approve anything. And he makes us do a meeting with the community whether the project should be approved or not.

But this project was a matter of right to begin with. R4 zoning, I wasn't designing anything that was—it was R4, and I designed it for an R4 building. It's not like I was asking the alderman for a zoning change. Zoning changes are typically when community group meetings are required. But if a community group meeting is required, that means that they're going to say no to the project, you know. They're using the community as their deflection basically.

And the fact that he insisted on face brick around the whole building, which was absolutely ridiculous, and that increases the cost by at least 20 percent for the whole construction of the building because you have to do two courses of brick rather than one course of brick on all three sides. The long sides of the building and the back of the building, you would have to do two courses of brick, one for structure, one just for aesthetics, which is the face brick."

¶ 28 Harb testified that had he known he would face these problems on Oakley he would not have purchased the property. Harb testified he was not sure whether the buildings on either side of the Oakley property had any impact on his ability to tear down the residence and build what he wanted to build. He said it was the same kind of building that he would build. Harb testified the face brick issue was not told to him prior to the purchase. Harb stated: "What I was told very specific [*sic*] by Kelly Wong is that he had the push with the alderman in Rogers Park. *** That's what I was counting on with this project. If he didn't have the push, I wouldn't have even entered into a contract on this deal."

¶ 29 Harb testified he hired an "expediter"[1] to get permits, but he never received permits for the Oakley project. He also testified they never went to a community group meeting. Harb testified "the alderman put the stop on it." Harb continued: "The way he put the stop on it is community group meeting and face brick all the way around. *** Those actions were to say no, not to say yes." Harb opined that even though "it's a matter of right *** if you don't have the aldermanic push, you still can't do it." This issue with "push" had never arisen in Harb's dealings with Wong. Harb testified in the other areas they worked in "I had the political push."

¶ 30 Harb testified he subsequently gave Wong the listing for the Oakley property and the Bryn Mawr property. Plaintiffs also called a witness to testify as to their damages. Plaintiffs' expert testified that due to Wong's alleged misrepresentations, plaintiffs lost $482,000 on the Oakley property and $520,000 on the Bryn Mawr property. Plaintiffs rested their case.

¶ 31 Defendants filed a motion for directed verdict. Following argument by the parties, the trial court granted defendants' motion for directed verdict.

¶ 32 This appeal followed.

¶ 33 ANALYSIS

¶ 34 "If a plaintiff fails to produce a required element of proof, *i.e.*, there is a total failure or lack of evidence to prove a necessary element of the plaintiff's case, then entry of a directed verdict for the defendant is proper. [Citation.] Verdicts should be directed only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand. [Citations.]" *Benford v. Everett Commons, LLC*, 2014 IL App (1st) 130314, ¶ 28. To establish a

---

[1] Harb testified: "An expediter is licensed by the city of Chicago to walk our permits through the city of Chicago and the building department and to address any issues that the city may have or the building department may have with our project."

prima facie case of common law fraud to survive a motion for a directed verdict a plaintiff must show, by clear and convincing evidence (1) that the defendant made a statement; (2) of a material nature as opposed to an opinion; (3) that was untrue; (4) that was known or believed by the person making the statement to be untrue, or made in culpable ignorance of its truth or falsity; (5) that the victim relied upon to his detriment; (6) that the statement was made for the purpose of inducing reliance; and (7) that the victim's reliance led to his injury. *Salkeld v. V.R. Business Brokers*, 192 Ill. App. 3d 663, 673 (1989). "We review *de novo* the trial court's grant of a motion for directed verdict. [Citation.]" *Benford*, 2014 IL App (1st) 130314, ¶ 28.

¶ 35 Plaintiffs assert the trial court removed questions of fact from the jury. Plaintiffs argue they established that Wong made a statement of a material nature that was untrue by telling defendants he knew the alderman and would get the alderman's support for the Oakley project. Plaintiffs' position is that the trial court should have accepted their version of what Wong told them as to his relationship with the alderman as true for purposes of defendants' motion for directed verdict. Plaintiffs argue they relied upon those alleged statements to their detriment because they would not have made the Oakley purchase but for Wong's representations and they lost money on the Oakley project. They argue Wong's alleged statements he knew and could get the support of the alderman for the Oakley project was not an opinion because, they argue, he stated it "as an affirmative fact material to the transaction." Specifically, they assert Wong "assured Plaintiffs his relationship with the Alderman was strong enough to push any building plans through quickly."

¶ 36 Initially, we note that plaintiffs' opening brief only discusses Wong's allegedly false statements regarding his relationship with the alderman and whether that relationship would allow plaintiffs to complete the project quickly. Based on the evidence at trial, the only "project" to which those allegedly false statements could apply was the Oakley project. There was no

testimony that the alderman's cooperation was necessary to sell the condominium units on Bryn Mawr within six to nine months. Plaintiffs' opening brief makes passing references to "sale time" and the time to sell units in Rogers Park, but plaintiffs do not argue or cite to the record or any authority pertaining to their claim that Wong's statement that the units in the Bryn Mawr building could be sold in six to nine months was false, that Wong knew it was false, or that he said it with reckless disregard for its truth. The same is true for any other allegation in support of their fraud claim.

> "Illinois Supreme Court Rule 341(h) (eff. Feb. 6, 2013) requires parties' briefs to include cohesive argument and citations to relevant authority for each of its claims. The appellate court is not merely a repository into which an appellant may dump the burden of argument and research, nor is it the obligation of this court to act as an advocate or seek error in the record. [Citations.] The failure to provide an argument and to cite to facts and authority, in violation of Rule 341, results in the party forfeiting consideration of the issue. [Citation.]" (Internal quotation marks omitted.) *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18.

¶ 37 Accordingly, we will only address plaintiffs' argument they made a *prima facie* case that Wong's statement regarding his relationship with the alderman that could help them complete the Oakley project quickly was a material misstatement of fact that plaintiffs detrimentally relied on resulting in a loss. Plaintiffs have forfeited consideration of any other issues. *Id.* See also *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23 ("According to Rule 341(h)(7), points not argued in the appellant's brief 'are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.' Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)."). We hold plaintiffs failed to establish Wong made a material misstatement of fact with

regard to his relationship with the alderman on which plaintiffs reasonably relied to their detriment. Plaintiffs failed to make a *prima facie* case that any statement Wong allegedly made regarding the alderman was a material misstatement of fact.

¶ 38 Bachewicz offered no testimony that Wong told Bachewicz that because of his relationship with the alderman they could complete the project quickly or that the alderman would support the project. Bachewicz testified Wong made it known to Bachewicz that Wong "had a very strong relationship with the alderman." There is no evidence that is a false statement. The fact Bachewicz, Harb, and Wong met with the alderman's chief of staff rather than the alderman himself is not evidence Wong did not have a strong relationship with the alderman and does not permit that reasonable inference, primarily because there is no evidence of what "a strong relationship" means. Bachewicz also testified that "on the basis of my feeling that [Wong] had, was going to be able to get the support," he bought the building without a construction loan. The only thing Bachewicz's testimony proves is that he drew his own conclusion as to what a "strong relationship" meant. Drawing the wrong conclusion does not transform Wong's statement, assuming for purposes of defendants' motion he made it, into a misrepresentation.

¶ 39 Harb testified slightly more specifically. Harb testified: "What I was told very specific [*sic*] by Kelly Wong is that he had the push with the alderman in Rogers Park. *** That's what I was counting on with this project. If he didn't have the push, I wouldn't have even entered into a contract on this deal." Assuming Wong made the statement "I have push with the alderman in Rogers Park" or something similar, the evidence does not establish a material misstatement of fact. Even if Wong said it, it would be no more than his opinion. Plaintiffs could not reasonably treat Wong's alleged statement as an affirmative fact. "A statement which is merely an expression of opinion or which relates to future or contingent events, expectations or

probabilities, rather than to pre-existent or present facts, ordinarily does not constitute an actionable misrepresentation." *Metropolitan Bank & Trust Co. v. Oliver*, 4 Ill. App. 3d 975, 978 (1972). Wong's statement that he had a "strong relationship" or "push" with the alderman, or that the alderman would assist them to complete the project quickly, was, taken as true, a statement of Wong's expectation or of a probability of what the alderman would do, and specifically related to a future or contingent event (the alderman's agreement with the project); but it was not a statement of existing fact.

¶ 40 Construing the testimony very liberally in plaintiffs' favor for purposes of the motion, assuming Wong was informing Harb the relationship between Wong and the alderman was such that the alderman would support Wong's projects, that is not a fact, it is an opinion. "As a general rule, a fraud claim cannot be based on a matter of opinion." *Abazari v. Rosalind Franklin University of Medicine & Science*, 2015 IL App (2d) 140952, ¶ 19 (citing Restatement (Second) of Torts § 538A, Explanatory Note, at 83 (1977) ("which defines 'opinion' in part as 'a statement of the maker's judgment as to quality, value, authenticity or similar matters as to which opinions may be expected to differ")). Wong cannot know from one moment to the next what the alderman is or is not going to support and it is possible that their relationship was one where the alderman would support some projects and not others. There is no allegation Wong said anything like "The alderman will do whatever I tell him to do." Therefore, Wong's statement, accepting plaintiffs' testimony he made it and what it meant, was no more than an opinion. See *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1299 (1993) (holding statement that horse breeding partnership would use horses "of the highest quality" and would be managed "by competent General Partners" was no more than an opinion).

¶ 41 Wong's statement could also be construed as a statement of an expected future outcome from his efforts. However, Wong's statement still would not qualify as "describing a current or

past state of affairs." See *Abazari*, 2015 IL App (2d) 140952, ¶ 15. There is nothing in Wong's alleged statement or plaintiffs' vague definition of "push" to establish any existing promises from the alderman or any obligation on the part of the alderman to do anything, even accepting all of plaintiffs' testimony as true. "[U]nder Illinois law there is no action for promissory fraud, meaning that the alleged misrepresentations must be statements of present or preexisting facts, and not statements of future intent or conduct. [Citation]" *Id.* In *Abazari*, the plaintiff sued the defendant, a podiatry school, when the plaintiff graduated but was unable to obtain the residency he would require to be able to practice podiatric medicine. *Id.* ¶ 7. The plaintiff alleged the school had made false statements that led him to enroll, including "statements about 'unprecedented' and 'limitless' opportunity in the field of podiatric medicine." *Id.* ¶ 25. The court held the statements were not actionable because they are merely "puffing." *Id.* " 'Puffing' denotes the exaggerations reasonably to be expected of a seller as to the degree of quality of his or her product, the truth or falsity of which cannot be precisely determined." *Id.* ¶ 25. Wong's alleged statement of a "strong relationship" or "push" with the alderman is similar. Assuming part of Wong's "product" (his services as a real estate agent) is his relationships, it is impossible to precisely determine Wong's "push" with the alderman. If Wong did state that he had "push" with the Alderman, the evidence only establishes that Wong overestimated the strength of that relationship, which would amount to no more than puffing; or that he was projecting the outcome of his own future performance, and "projections of future events generally will not support a fraud-related claim." *Id.* ¶ 28.

¶ 42 Any statement by Wong that he had "push" with the alderman in Rogers Park is not actionable as a misstatement of fact. Therefore, plaintiffs failed to produce evidence to prove a necessary element of their case for fraud based on that alleged statement. Plaintiffs forfeited

review of any other claims. The trial court's judgment granting defendants' motion for directed verdict was proper.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 45 Affirmed.