2019 IL App (5th) 160066-U

NO. 5-16-0066

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JAMES BOLLMEIER and ELLEN BOLLMEIER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellees,	)	St. Clair County.
	)	
v.	)	No. 13-L-429
	)	
PATRICK ROY,	)	
	)	
Defendant and Counterplaintiff-Appellant,	)	
	)	
and	)	
	)	
ELIZABETH ROY, n/k/a ELIZABETH SCOTT,	)	Honorable
	)	Heinz M. Rudolf,
Defendant and Counterdefendant-Appellee.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Overstreet and Justice Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: Where genuine issues of material fact exist, the trial court's entry of summary judgment against Patrick Roy and in favor of James and Ellen Bollmeier on two alleged promissory notes was in error, and the trial court's order is reversed and the cause remanded. Where Patrick was unable to establish his right to monetary damages for cloud on title, summary judgment on his counterclaim against the Bollmeiers is affirmed. Where Patrick was unable to establish his claim that the Bollmeiers tortiously interfered with a contract, summary judgment on his counterclaim against the Bollmeiers is affirmed. Where the divorce court in *In re Marriage of Roy* entered judgment holding Elizabeth responsible to

indemnify Patrick if the Bollmeiers collect on their judgment against him, we find that Patrick's argument regarding the dismissal of his cross-claim against Elizabeth will become moot when that order becomes final, and we decline to address this issue.

¶ 2 This case began when James and Ellen Bollmeier (the Bollmeiers) provided money to their daughter, Elizabeth Scott (Elizabeth), and her former husband, Patrick Roy (Patrick). Although the Bollmeiers provided money to Elizabeth occasionally in the past without expectation of repayment, on the two occasions at issue here, the Bollmeiers argue that the money was a loan and they intended Elizabeth and Patrick to repay them.

¶ 3 At issue in this appeal is whether the trial court erred in entering judgment against Patrick for the total amount of the two notes, in granting summary judgment on his counterclaim against the Bollmeiers; in striking some of his affirmative defenses; and in dismissing his cross-claim for indemnity and/or contribution against Elizabeth.

¶ 4 For the reasons that follow in this order, we reverse in part, affirm in part, and remand.

¶ 5 BACKGROUND

¶ 6 Elizabeth and Patrick were married in July 1997. Two children were born during the marriage: a daughter born in December 1997 and a son in September 2000.

¶ 7 The Bollmeiers alleged that they lent Elizabeth and Patrick $23,065.38 on or about February 6, 1999. This loan was memorialized by a typed note, presumably signed by both Elizabeth and Patrick, that states: "We, Elizabeth Roy and Patrick Roy, owe James and Ellen Bollmeier $23,065.38. Payments will be made monthly starting on February 6th, 2000. The interest rate is 6.6%." The Bollmeiers also alleged that they lent Elizabeth

and Patrick $26,000 on or about October 22, 2000. A handwritten note memorializing the loan, presumably signed by both Elizabeth and Patrick, states: "Patrick Roy and Elizabeth Roy owe James and Ellen Bollmeier $26,000 Payable over 5 years in payments of $478.83."

¶ 8 In June 2009, Elizabeth filed a petition for dissolution of her marriage and Patrick filed a counterpetition the following month. What followed was a contentious and lengthy divorce case, lasting almost 10 years and involving two appeals. *In re Marriage of Roy*, 2014 IL App (5th) 130260-U, ¶ 4. The records in both this case and the second divorce appeal reflect significant animosity between Elizabeth and Patrick and between the Bollmeiers and Patrick.

¶ 9 In the second appeal of the divorce case,[1] one issue involved the "loans," made by the Bollmeiers to Elizabeth and Patrick, and who was responsible for repayment. On August 31, 2017, we consolidated the record in this case, *Bollmeier v. Roy*, with the 2017 record in the divorce case, *In re Marriage of Roy*, because the cases are intertwined by the alleged marital debt held by the Bollmeiers. The factual background for this appeal necessarily contains factual references from the record in *In re Marriage of Roy*.

¶ 10 On May 3, 2011, the Bollmeiers filed this case against Elizabeth and Patrick seeking repayment of the two alleged loans. They sought judgment against both Elizabeth and Patrick, jointly and severally. In response to the complaint, Patrick denied the allegations and filed several affirmative defenses, most notably alleging that he was

[1]The order in *In re Marriage of Roy*, 2019 IL App (5th) 170087-U, was filed on the same date as this order.

fraudulently induced to sign the promissory notes. Patrick filed a counterclaim seeking contribution and/or indemnity from Elizabeth in the event that he is found liable to the Bollmeiers.

¶ 11 On July 19, 2011, Elizabeth confessed judgment in the *Bollmeier v. Roy* case, and the judgment order was entered for $54,797.82. The Bollmeiers filed a memorandum of judgment in that amount against Elizabeth with the St. Clair County Recorder of Deeds on September 21, 2011.

¶ 12 In October 2011, Elizabeth and Patrick came to a settlement in the divorce case. Although the Bollmeiers were not parties in the divorce case, Elizabeth's attorney represented to the court that the Bollmeiers had agreed to dismiss the *Bollmeier v. Roy* case with prejudice as part of the conclusion of their daughter's divorce.

¶ 13 By January 27, 2012, the Bollmeiers withdrew their proposed dismissal of this case to effectuate the divorce settlement. Elizabeth's attorney advised the divorce court that the Bollmeiers would not dismiss the suit and would not vacate the lien judgment filed against the marital residence.

¶ 14 The trial court dissolved the marriage of Elizabeth and Patrick on April 24, 2012. Not all issues were resolved at that time, and the trial court entered two additional judgments on later dates.

¶ 15 In May 2012, the parties announced in the divorce case that buyers had been found for the marital residence. Because the Bollmeiers had filed the memorandum of judgment as a lien against the marital residence in September 2011, there were substantial issues in trying to successfully obtain title insurance. In June 2012, the divorce court entered an

order declaring that the memorandum of judgment filed by the Bollmeiers was invalid and unenforceable. However, the title company indicated that the divorce court order invalidating the memorandum of judgment was insufficient. The title company required a judicial release of the lien on the marital residence. Patrick asked the trial court in *Bollmeier v. Roy* to order a judicial release, and the trial court did so on June 14, 2012, over the Bollmeiers's objections. Despite the efforts of both courts, the sale of the marital residence was never finalized.

¶ 16 On November 21, 2012, the Bollmeiers filed a motion for partial summary judgment or alternatively to strike all of Patrick's affirmative defenses in this case. The primary argument in their motion was that by failing to timely respond to their written discovery requests, Patrick had "admitted" that none of his defenses were factually supported.

¶ 17 One month later, Elizabeth filed her own motion for partial summary judgment or alternatively for dismissal of Patrick's cross-claim. Elizabeth's argument was based upon her assertion that Patrick had not yet sustained damages in *Bollmeier v. Roy* because there was no judgment entered against him and therefore his cross-claim was seeking contribution and/or indemnity against the possibility of future damages. Without current damages, Elizabeth argued that Patrick could not sustain his cross-claim.

¶ 18 In response to both the Bollmeiers's and Elizabeth's motions, Patrick filed his sworn affidavit on January 11, 2013. Patrick asserted that before he signed the "loan" document connected to the house down-payment money, Ellen Bollmeier told him that she did not intend for him to pay the money back as long as he treated Elizabeth well and

kept the two children enrolled in a private Catholic school. He claims that he signed this paper because of Ellen's assurances. In addition, the Bollmeiers had not asked for repayment in the 11 years since the notes were signed up until the time that they learned Patrick was seeking a share of the equity in the event that the marital residence sold. Patrick also stated that the monetary gift used for the down payment on their house (the first "loan") occurred weeks before Ellen asked him to sign the document. Patrick could not recall signing the second note for the money used to purchase the minivan. He stated that Elizabeth had acknowledged that the "loan" amounts were incorrect by at least $4500, and that she claimed she made payments to her parents for various monies that were loaned, as well as for items "for the benefit of her parents." Patrick claims that there are actual damages because he and Elizabeth were unable to sell the home because of the judgment lien.

¶ 19 In Patrick's answers to request for admissions submitted by the Bollmeiers, he denied having made any payments on the "loans," and also asserted that he did not know that Elizabeth was making payments.

¶ 20 On February 7, 2013, the trial court granted the Bollmeiers's motion for partial summary judgment as to four of his affirmative defenses: the Bollmeiers's negligence, unconscionability of the note, contributory negligence of third parties, and the Bollmeiers's failure to mitigate damages. The court reserved ruling on the issue of the statute of limitations and denied the Bollmeiers's motion on the remaining four affirmative defenses: fraudulent inducement to sign the notes, that the promissory notes

were procured by fraud, that the promissory notes were procured by misrepresentation, and that the Bollmeiers should be estopped by their own conduct.

¶ 21 On March 14, 2013, Patrick filed his amended cross-claim against Elizabeth and counterclaim against the Bollmeiers. On this same date, Patrick filed another sworn affidavit that reiterated what he stated in the first affidavit. Patrick elaborated that when Ellen Bollmeier asked him to sign the first note weeks after funds were given to Elizabeth, he was not advised that it represented confirmation of a loan subject to repayment. Furthermore, he stated that Ellen coaxed him into signing the form by telling him that she did not intend to seek repayment, but just wanted to ensure that he continued to treat Elizabeth well and enrolled the children in a private Catholic school. While they were married, Elizabeth also asked for and received additional monies from her parents to pay off credit card bills. He believes that she repaid her parents in those cases, but was uncertain because Elizabeth controlled the marital financial books and records.

¶ 22 On April 29, 2013, the divorce court entered its supplemental judgment of dissolution resolving some of the issues in the divorce case. The trial court noted that Elizabeth admitted to the alleged debt from the *Bollmeier v. Roy* case and that the debt was marital in nature. The court found that the alleged loans and the balances owed on each were not supported by credible testimony or evidence, and opined that Elizabeth and the Bollmeiers took actions in *Bollmeier v. Roy* with the intent to only bind Patrick and that Elizabeth's parents "have no intention of seeking to enforce the judgment against her." The trial court also ordered Elizabeth to pay the judgment entered in *Bollmeier v. Roy* and to hold Patrick harmless and indemnify him.

¶ 23 On May 7, 2013, the Bollmeiers amended their complaint against Elizabeth and Patrick in this case to reflect the missing "payment" that Elizabeth contended she made. Along with the amended complaint, Patrick filed an amended cross-claim against Elizabeth and counterclaim against the Bollmeiers. Elizabeth and the Bollmeiers filed motions to dismiss. In September 2013, the Bollmeiers amended the complaint a second time to increase the amount of the claim to include accrued interest. In December 2013, Patrick filed a third amended counterclaim/cross-claim. Patrick's third amended counterclaim against the Bollmeiers alleged damages for the cloud on the title of the marital residence and tortious interference with a contract because of the loss of the potential sale of the marital residence. Patrick's third amended cross-claim against Elizabeth requested indemnity and/or contribution.

¶ 24 On December 27, 2013, the Bollmeiers filed motions for summary judgment on the two counts of Patrick's third amended counterclaim. In response to Patrick's tortious interference count, the Bollmeiers argued that his claim must fail because the filing date of the memorandum of judgment predated the real estate purchase contract for the marital residence. As a result, the Bollmeiers argue that they could not have induced or persuaded the prospective buyers to breach the contract by filing the memorandum of judgment. In response to Patrick's cloud on title claim, the Bollmeiers allege that the memorandum of judgment was not false and did not disparage Patrick's title, and that any claimed damages would be speculative. On January 23, 2014, the trial court granted both motions for summary judgment

¶ 25 On February 3, 2014, Elizabeth filed a motion to dismiss Patrick's third amended cross-claim in this case, asserting the doctrine of *res judicata*. She argued that the April 29, 2013, supplemental judgment of dissolution, in which the divorce court ordered Elizabeth to pay the judgment in the *Bollmeier v. Roy* case and to indemnify Patrick, precluded Patrick's cross-claim. The trial court denied Elizabeth's *res judicata* argument because the divorce case was not then final. The court stayed Patrick's cross-claim against Elizabeth.

¶ 26 On April 28, 2014, the Bollmeiers filed their motion for summary judgment directed towards Patrick's affirmative defenses, most notably that the Bollmeiers either intended the "loans" as gifts or that enrollment of the children in a private Catholic school effectuated an accord and satisfaction. The Bollmeiers filed two affidavits in support of this motion. The first affidavit asserted that Elizabeth and Patrick made various payments on the two "loans." In the second affidavit, the Bollmeiers asserted that they never had an intention to make gifts to Elizabeth and/or Patrick. On July 29, 2014, the trial court granted summary judgment for the Bollmeiers on all of Patrick's affirmative defenses.

¶ 27 On September 15, 2015, although the trial court had stayed Patrick's cross-claim against Elizabeth, Elizabeth filed a second motion to dismiss Patrick's cross-claim on the basis of *res judicata*. The trial court had previously rejected this argument on March 6, 2014.

¶ 28 Elizabeth also filed a motion for partial summary judgment. The allegations in this pleading did not address Patrick's cross-claim but served to support her parents' claim

against Patrick. Elizabeth stated that she and Patrick signed loans and agreed to repay her parents. "There is absolutely no question whatsoever as to the money being received and the money being used by and for the benefit of your movant and her then husband." Elizabeth then extensively quoted Patrick's deposition testimony to support her claim that the loans were legitimate and that her parents committed no fraud to encourage Patrick to sign the notes. In her prayer for relief, Elizabeth implored the court to enter summary judgment for her parents and barring Patrick from introducing any contradictory evidence. On September 24, 2015, Elizabeth filed a sworn affidavit to support this motion. In the affidavit, she affirmed that her parents loaned money to her and Patrick. Elizabeth stated that she made payments on both loans and assumed that Patrick was aware of the payments. Elizabeth finally stated that soon after the lawsuit was filed by her parents, she confessed judgment because "[t]o do otherwise would have required me to lie under oath which I refused to do."

¶ 29 The Bollmeiers filed a motion for summary judgment in late September 2015 asking the court to enter judgment against Patrick for the amounts of both loans. The Bollmeiers argued that there was no genuine issue of material fact remaining because the court had previously ruled against Patrick on July 29, 2014, on his claim that the loans were gifts. In addition, the Bollmeiers argued that the issue of payments made on the loans was settled. In support of their motion, the Bollmeiers filed two affidavits. In the first affidavit, the Bollmeiers outlined the payments allegedly made on both loans, and stated that on or about May 6, 2002, "the parties agreed to defer the payments under both of said loans, and to put the payments 'on hold' for an unspecified time." No documents

were attached to the affidavit as exhibits. In the second affidavit, the Bollmeiers asserted that they had no intention of gifting Elizabeth and Patrick the balances owed on the loans. On October 20, 2015, the trial court granted summary judgment for the Bollmeiers and entered judgment against Patrick in the amount of $54,479.15. The trial court denied Patrick's motion to reconsider on December 28, 2015.

¶ 30 On January 6, 2016, Elizabeth filed her third motion to dismiss the cross-claim, arguing that *res judicata* barred Patrick's indemnity and/or contribution claims because of the divorce court's April 29, 2013, judgment. Although the trial court had previously concluded that the trial court's April 29, 2013, order was not final and thus could not bar Patrick's cross-claim, on January 15, 2016, this time the trial court dismissed Patrick's cross-claim against Elizabeth for indemnity and/or contribution. In this order, the court noted that although it had concurrent jurisdiction with the divorce court on the issue of indemnity and/or contribution, the issue belonged solely in the divorce case.

¶ 31 On February 12, 2016, Patrick filed his appeal in *Bollmeier v. Roy*.

¶ 32 In the divorce case, the trial court entered an order on March 11, 2016, finding that the judgment against Patrick was a marital debt; assigned the total amount to Elizabeth; and ordered Elizabeth to indemnify Patrick for any monies her parents collected from Patrick.

¶ 33 The divorce court entered its third judgment in the divorce case on December 12, 2016. In that judgment, the court reaffirmed its March 11, 2016, order.

¶ 34 LAW AND ANALYSIS

¶ 35 On appeal, Patrick appeals from summary judgment orders in favor of the Bollmeiers: from the judgment on the notes Patrick signed, from judgment on his counterclaims for cloud on title and tortious interference with a contract, and from judgment on some of his affirmative defenses. He also appeals from the trial court's order dismissing his cross-claim for indemnity and/or contribution against Elizabeth.

¶ 36 A party is entitled to summary judgment as a matter of law if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." 735 ILCS 5/2-1005(c) (West 2014). The trial court should deny summary judgment if there are outstanding genuine issues of material fact. *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476, 723 N.E.2d 321, 323 (1999). " 'A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.' " *Monson v. City of Danville*, 2018 IL 122486, ¶ 12, 115 N.E.3d 81 (quoting *Adames v. Sheahan*, 233 Ill. 2d 276, 296, 909 N.E.2d 742, 753 (2009)); see also *Koziol*, 309 Ill. App. 3d at 476.

¶ 37 Illinois courts do not routinely grant summary judgments because the remedy is considered extremely harsh. Therefore, summary judgment should only be granted if the movant's right to judgment is unquestionable. *Monson*, 2018 IL 122486, ¶ 12 (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43, 809 N.E.2d 1248, 1256 (2004)); *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 357, 726 N.E.2d 1171, 1176 (2000). The trial court must strictly construe all evidence in

the record against the moving party and liberally in favor of the opponent. *Monson*, 2018 IL 122486, ¶ 12 (citing *Adams*, 211 Ill. 2d at 42); *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986); *Koziol*, 309 Ill. App. 3d at 476. Summary judgment orders are reviewed on a *de novo* basis. *Monson*, 2018 IL 122486, ¶ 12 (citing *Barnett v. Zion Park District*, 171 Ill. 2d 378, 385, 665 N.E.2d 808, 811 (1996)); *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 72, 587 N.E.2d 494, 497 (1992).

¶ 38 Judgment Against Patrick on the Bollmeiers's Notes

¶ 39 In order for the trial court to have concluded that the Bollmeiers were entitled to summary judgment against Patrick, the evidence must have been unquestionable. Here, the Bollmeiers filed affidavits asserting that they never intended for the "loans" to have been gifts. Although a named defendant in her parents' suit, Elizabeth filed pleadings to adamantly confirm the assertions in her parents' affidavits. In opposition, Patrick stated that his then mother-in-law, Ellen Bollmeier, presented one of the notes weeks after the money had been given to Elizabeth. When Ellen asked Patrick to sign the note, she inferred that the note was a matter of "insurance" that required Patrick to treat her daughter well and to enroll her grandchildren in a private Catholic school. From our review of the record, we find that the Bollmeiers do not specifically dispute that Ellen made these statements to Patrick. In addition, the Bollmeiers do not state that the notes were contemporaneous with the transfers of money.

¶ 40 A promissory note is treated as a contract, and therefore the Bollmeiers were required to plead and prove that there was an offer, acceptance of the offer, and consideration. *Trapani Construction Co. v. Elliot Group, Inc.*, 2016 IL App (1st) 143734,

¶ 42, 64 N.E.3d 132 (citing *Brody v. Finch University of Health Sciences/The Chicago Medical School*, 298 Ill. App. 3d 146, 154, 698 N.E.2d 257, 265 (1998)); see also *Johnson v. Johnson*, 244 Ill. App. 3d 518, 527, 614 N.E.2d 348, 355 (1993) (stating that "[u]nder a contract theory, the plaintiffs carry the burden to prove all elements of a contract including consideration"). The acceptance of the offer "must be objectively manifested, for otherwise no meeting of the minds would occur." *Rosin v. First Bank of Oak Park*, 126 Ill. App. 3d 230, 234, 466 N.E.2d 1245, 1249 (1984). Generally, the acceptance of an offer to enter a contract cannot be implied by silence. *Id.* Consideration must generally be given contemporaneously with the "promise." "[I]f the alleged consideration for a promise has been conferred prior to the promise upon which alleged agreement is based, there is no valid contract." *Gladstone v. McHenry Medical Group*, 197 Ill. App. 3d 194, 202, 553 N.E.2d 1174, 1180 (1990); *Johnson*, 244 Ill. App. 3d at 528. There are the following specific exceptions to this general rule:

> "(1) the consideration was rendered at the request of the promisor; (2) the alleged consideration was of a 'beneficial' or 'meritorious' nature which placed the promisor under a moral duty or obligation such that consideration for the promise will be implied; (3) the promise is to pay a 'debt due in conscience,' such as a promise to support an illegitimate child; or (4) the promise is founded upon an antecedent legal obligation, such as a debt which has become barred by the statute of limitations." *Worner Agency, Inc. v. Doyle*, 133 Ill. App. 3d 850, 857, 479 N.E.2d 468, 473 (1985) (citing *Carson v. Clark*, 2 Ill. 113, 114-15 (1833)).

¶ 41 In this case, both notes are dated and signed by Elizabeth and Patrick. The Bollmeiers did not sign the notes, but the wording utilized in both notes (see *supra* ¶ 7) indicates that Elizabeth and Patrick owe the Bollmeiers for the monies provided. Patrick testified that he did not remember signing the 1999 note (for the minivan), but does

remember signing the 2000 note (down payment for a house). The 2000 note was presented to Patrick in the presence of Ellen Bollmeier, who allegedly made the statements about the note being conditioned upon Patrick's continued good treatment of Elizabeth and providing the children with a Catholic school education. Patrick testified that the note was presented long after Elizabeth received the payment for the house down payment. If we applied the general consideration rule to the 2000 note, there would potentially be no enforceable contract because the consideration was provided prior to the creation of the note. Looking at the exceptions to this general rule, if Patrick asked the Bollmeiers for the "loan," then the contract could still be valid despite the extended gap in time between the receipt of the consideration and execution of the note. Here, the record on appeal contains no evidence that Patrick asked the Bollmeiers for money. Furthermore, the Bollmeiers do not dispute that there was a gap in time between receipt of the consideration and execution of the note. The record on appeal is unclear as to whether the 1999 note was created at a later date than the receipt of the money. These issues regarding the notes raise genuine issues of material fact that should have precluded entry of summary judgment.

¶ 42 Additionally, we find that all factual issues regarding the alleged payments made on these two notes are not without question. By way of affidavits, the Bollmeiers and Elizabeth attest to payments having been made on both notes. From our review of the record, we find that there is confusion about the payments and the potential that the alleged payments were not connected to these two notes. Patrick testified that Elizabeth frequently obtained money from her parents to address immediate short-term debt—

things like credit card bills and on one occasion a vacation to Mexico. With respect to the credit card bills, Patrick testified that Elizabeth repaid those amounts. He testified that he was not aware that Elizabeth had made any payments on the two notes. From the record on appeal, we see no way to adequately conclude that these payments were unquestionably related to these two notes. Despite the self-serving affidavits filed by the Bollmeiers and Elizabeth claiming that all listed payments were related to the notes, we find that the evidence in the record on appeal is far from certain. The evidence consists of dates, some check numbers, and dollar amounts. Merely stating those details in affidavits falls short of unquestionable proof that those checks were designated to apply to those notes as opposed to other debts between Elizabeth and the Bollmeiers.

¶ 43 Elizabeth filed certain pleadings and an affidavit in his case, ostensibly to bolster her parents' efforts to obtain a judgment against Patrick. The Bollmeiers filed this claim against both Elizabeth and Patrick claiming joint and several liability. Elizabeth immediately confessed to having a judgment entered against her. As this case continued, the trial court stayed Patrick's cross-claim from proceeding against Elizabeth. Then, despite the stay, Elizabeth asked the court for the third time to dismiss the cross-claim and the court did so. The Bollmeiers had not made any attempt to collect upon the judgment that Elizabeth confessed. Then, when her parents sought summary judgment on the notes against Patrick, Elizabeth inserted herself into her parents' motion and filed pleadings to reinforce her parents' claims against Patrick. The Bollmeiers did not file a complaint or otherwise make any collection attempt to obtain full repayment of the "loans" for over 11 years. Three years after the Bollmeiers provided the house down-

payment money, Elizabeth and Patrick sold that house and purchased another house. The Bollmeiers did not attempt to impede that sale and seek repayment of that "loan" from the equity at the closing on that sale. The Bollmeiers filed their complaint against Elizabeth and Patrick only after Patrick sought an equitable share of the marital residence as part of the property settlement in the divorce. We find that Elizabeth's actions and the allegations included in her pleadings filed in support of her parents' request for judgment against Patrick are dubious and suggest that the Bollmeiers will not seek collection from her.

¶ 44 Counterclaim for Cloud on Title

¶ 45 Patrick claims that the trial court erred in granting summary judgment in favor of the Bollmeiers on his cloud on title counterclaim. He argues that the Bollmeiers prematurely filed the memorandum of judgment with the St. Clair County Recorder of Deeds office, and that by filing that judgment, a cloud was placed upon the title of the marital residence which precluded its sale. In opposition, the Bollmeiers state that the memorandum of judgment was not a false document because Elizabeth had confessed to the underlying judgment.

¶ 46 There is no question that the memorandum of judgment was prematurely filed. Illinois Supreme Court Rule 304(a) provides a procedural vehicle for appealing a final judgment that did not dispose of the entire case. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). If the party does not obtain a special finding "that there is no just reason for delaying either enforcement or appeal or both," then "any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or

appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties." *Id.* Ultimately, after Judge Cruse entered an order in the divorce case on June 1, 2012, citing Rule 304 and stating that the recorded judgment was not a proper lien on the real estate, the trial court in this case struck the memorandum of judgment on June 14, 2012. As a result of these two orders, although the Bollmeiers still had a judgment against Elizabeth, the recorded memorandum of judgment was no longer on file.

¶ 47 We briefly review the law on judgment liens. A judgment entered by the trial court does not automatically create a lien upon the real estate of the debtor. *Dunn v. Thompson*, 174 Ill. App. 3d 944, 947, 529 N.E.2d 297, 299 (1988). A judgment lien is based on statute. *Id.* Section 12-101 of the Code of Civil Procedure provides that the judgment that constitutes a lien against real estate is effective after "a transcript, certified copy or memorandum of the judgment is filed in the office of the recorder in the county in which the real estate is located." 735 ILCS 5/12-101 (West 2014); *Dunn*, 174 Ill. App. 3d at 947. The memorandum of the judgment is defined in the statute as:

> "a memorandum or copy of the judgment signed by a judge or a copy attested by the clerk of the court entering it and showing the court in which entered, date, amount, number of the case in which it was entered, name of the party in whose favor and name and last known address of the party against whom entered." 735 ILCS 5/12-101 (West 2014).

¶ 48 A valid judgment that creates a lien must have the following two qualifications: "(1) it must be final, valid, and for a definite amount of money; and (2) it must be such a judgment that execution may issue thereon." *Dunn*, 174 Ill. App. 3d at 947 (citing *Noe v. Moutray*, 170 Ill. 169, 177, 48 N.E. 709, 712 (1897)). The lien is limited to the "actual

interest the judgment debtor has in the property." *East St. Louis Lumber Co. v. Schnipper*, 310 Ill. 150, 156, 141 N.E. 542, 544 (1923).

¶ 49 A cloud on title exists when there is an instrument or a written proceeding on record which casts doubt upon the recorded title. *Trustees of Schools v. Wilson*, 334 Ill. 347, 350, 166 N.E. 55, 56 (1929). If a cloud on the recorded title exists, the cloud can be removed by a court of equity. *Id.* A cloud on a title can also be "a claim of an interest in lands appearing in some legal form, but which is in fact unfounded." *Allott v. American Strawboard Co.*, 237 Ill. 55, 60, 86 N.E. 685, 688 (1908). The types of clouds on title that a court of equity can remove are "instruments or other proceedings in writing which appear upon the records and thereby cast doubt upon the validity of the record title." *Id.*

¶ 50 In this case, whether or not the Bollmeiers's recordation of the memorandum of judgment amounted to a cloud on title is questionable. Nothing about the memorandum of judgment asserted a claim to title to the marital residence. While the memorandum certainly would have given the Bollmeiers foreclosure rights, the Bollmeiers did not change the character of the jointly-held title to the marital residence. Regardless of the recorded memorandum of judgment, title to the marital residence remained in the names of Elizabeth and Patrick. Accordingly, we do not find that the facts of this case present a common law cloud on title case. Furthermore, Patrick seeks a remedy that is inconsistent with a cloud on title action. The appropriate remedy is removal of the documents that assert title to the property that are in conflict with the true property owners–not damages.

Accordingly, we find that the trial court's summary judgment on the counterclaim for cloud on title of the marital residence was proper.[2]

¶ 51 Counterclaim for Tortious Interference With a Contract

¶ 52 Patrick next claims that the trial court incorrectly entered summary judgment on his counterclaim for tortious interference with a contract. He contends that his ability to sell the marital residence to the prospective buyers was impaired when the Bollmeiers filed the memorandum of judgment. Elizabeth and the Bollmeiers counter that Patrick cannot state a claim for tortious interference because the memorandum of judgment was recorded in September 2011, well before the house was listed for sale, and thus it was chronologically impossible for their filing to have induced a breach of the then nonexistent real estate contract.

¶ 53 The elements of a claim for tortious interference with a contractual relationship are:

> "(1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of this contractual relation; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's wrongful conduct; and (5) damages." *Belden Corp. v. InterNorth, Inc.*, 90 Ill. App. 3d 547, 551-52, 413 N.E.2d 98, 101 (1980) (citing *Zamouski v. Gerrard*, 1 Ill. App. 3d 890, 897, 275 N.E.2d 429, 433 (1971)).

[2]Elizabeth and the Bollmeiers assert that Patrick's cause of action was actually one for "slander of title." "Slander of title is a false and malicious publication, oral or written, of words which disparage a person's title to property resulting in special damages." *Whildin v. Kovacs*, 82 Ill. App. 3d 1015, 1016, 403 N.E.2d 694, 695 (1980). Malicious recordation of a document that casts a cloud upon another person's title to real estate is an example of a slander of title case. *Id.* While Elizabeth and the Bollmeiers may be accurate in their presentation of Patrick's cause of action, that is not what Patrick argues. We will not address this alternate theory.

The law on tortious interference with a contractual relationship recognizes that there is a property interest in a person's business relationships and that property interest is entitled to protection from unjustified tampering. *The Film & Tape Works, Inc. v. Junetwenty Films, Inc.*, 368 Ill. App. 3d 462, 468, 856 N.E.2d 612, 618 (2006) (quoting *Belden Corp.*, 90 Ill. App. 3d at 551).

¶ 54 Here, Patrick is not able to establish the elements of this tort because of the timing of the two events: the recordation date of the memorandum of judgment and the contract for sale of the marital residence. For a valid claim of tortious interference, there needs to be a nexus of time between the alleged intentional interference and the valid business contract. As stated in the Restatement of Torts: "To be subject to liability ***, the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract." Restatement (Second) of Torts § 766, cmt. i (1977). The third element of this tort requires proof that the other party intentionally interfered with the contract by inducing or causing a breach of the contract. We note that when the Bollmeiers filed the memorandum of judgment in September 2011, the divorce case was pending and at that time there was no order or plan to list the marital residence for sale. On October 4, 2011, the divorce court awarded the marital residence to Elizabeth and ordered her to refinance the mortgage. On October 11, 2011, the parties came to the divorce court with a settlement plan that included sale of the marital residence. The sales contract at issue did not occur until June 2012. Patrick is not able to prove the elements of this tort because the contract for sale postdated the filing of

the memorandum of judgment and therefore that filing could not have induced a breach of the June 2012 contract.

¶ 55 Patrick did not then have a protectable interest. We conclude that the trial court's summary judgment order on this issue was correct.

¶ 56 Dismissal of Cross-Claim Against Elizabeth for Indemnity and/or Contribution

¶ 57 After Patrick filed this appeal, Judge Julia R. Gomric entered the second supplement judgment of dissolution in December 2016 reaffirming the court's earlier rulings that if the Bollmeiers attempted to collect on their judgment against Patrick, Elizabeth must indemnify him. On appeal in the divorce case, Elizabeth claimed that the trial court's order was erroneous. In our order in *In re Marriage of Roy*, 2019 IL App (5th) 170087-U, this court affirmed Judge Gomric's order.

¶ 58 Pending finality of this court's order in *In re Marriage of Roy*, Patrick's appeal of this issue will become moot. We decline to address this issue.

¶ 59 Other Issues Raised by Patrick

¶ 60 Because we have already concluded that there are genuine issues of material fact regarding the nature and intent of the loans, and regarding payments allegedly made by Elizabeth, we decline to address Patrick's claims that the trial court erroneously found that the notes created joint and several liability; that entry of the judgment on the notes provided the Bollmeiers with an impermissible double recovery; and that the trial court erred in entering judgment striking his affirmative defenses of fraud in the inducement and statute of limitations.

¶ 61 CONCLUSION

¶ 62 For the reasons stated in this order, we reverse the judgment of the circuit court of St. Clair County in part, affirm the judgment in part, and remand for further proceedings.

¶ 63 Reversed in part; affirmed in part; and remanded.