SECOND DIVISION
MARCH 31, 2011

1-10-0756

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LESLIE ROSENTHAL, Plaintiff-Appellant, v. BATTERY PARTNERS VI, L.P., a Delaware limited partnership; and BLACKSTONE F12 CAPITAL PARTNERS (CAYMAN), L.P.; BLACKSTONE FI OFFSHORE CAPITAL PARTNERS (CAYMAN), L.P.; BLACKSTONE FAMILY INVESTMENT PARTNERSHIP (CAYMAN) III, L.P.; BLACKSTONE FI COMMUNICATIONS PARTNERS (CAYMAN), L.P.; BLACKSTONE FAMILY COMMUNICATIONS PARTNERSHIP (CAYMAN), L.P., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 08 L 001044 Honorable Allen S. Goldberg, Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment.

ORDER

Held: The trial court properly granted summary judgment in favor of the defendants where the plaintiff failed to establish a claim for breach of contract or a claim for promissory estoppel.

This appeal arises from the February 25, 2010 order entered by the circuit court of Cook

County, which granted summary judgment in favor of the defendants, Battery Partners VI, L.P. (Battery), and Blackstone F12 Capital Partners, L.P.; Blackstone FI Offshore Capital Partners, L.P.; Blackstone Family Investment Partnership III, L.P.; Blackstone FI Communications Partners L.P.; and Blackstone Family Communications Partnership, L.P. (collectively, Blackstone). On appeal, the plaintiff, Leslie Rosenthal (Rosenthal), argues that the trial court erred in granting Battery and Blackstone's motions for summary judgment because he had established: (1) a claim for breach of contract against Battery and Blackstone based on a valid and enforceable oral agreement he had entered into with them; and (2) a claim for promissory estoppel against Battery and Blackstone. For the following reasons, we affirm the judgment of the circuit court of Cook County.

BACKGROUND

In 1999, Battery, a private venture capitalist firm, became interested in investing in the futures industry. Subsequently, Scott Tobin (Tobin), a general partner of Battery, met with Rosenthal, an individual who was experienced in the financial futures industry, to discuss potential investment opportunities for Battery. At that time, Rosenthal introduced Tobin to Rosenthal's colleague, Richard Sandor (Sandor), who was also a well-known industry figure. Thereafter, Battery, Rosenthal and Sandor explored investing in several U.S.-based futures exchanges.

According to Rosenthal's deposition testimony, in early 2000, he spoke with Brian Williamson (Williamson), Chairman of the London International Financial Futures Exchange (LIFFE), about possible investment opportunities for Battery, to which Williamson showed interest. Rosenthal testified that a few days after his discussion with Williamson, Rosenthal asked Sandor to speak with Williamson further on the matter, since "[Sandor] would add some further weight to the

negotiations" because Williamson was more acquainted with Sandor than he was with Rosenthal. Subsequently, Sandor arranged a meeting to introduce Williamson to various representatives of Battery–Tobin, Oliver Curme (Curme) and Michael Brown (Brown). Rosenthal was not present at that meeting.

On May 22, 2000, LIFFE and Battery signed a "Summary Term Sheet" that outlined the potential investment by Battery through the purchase of between £40 to £60 million (pounds sterling) worth of LIFFE shares. The Summary Term Sheet expressly stated that it was "not intended to be legally binding" until a subsequent written agreement was executed. In May 2000, after Battery and LIFFE signed the Summary Term Sheet, Sandor contacted Battery to discuss the possibility of receiving compensation for him and Rosenthal in the LIFFE transaction. According to Sandor's deposition testimony, he testified that he had the following discussion with Tobin in a May 2000 telephone conversation:

> "A: The conversation then came down to the point where we had to either agree to come to a final number or agree to disagree. [Tobin] indicated that he would, you know, go to $9 million. I said to him, [w]ell, [Rosenthal] and I were parties to that 9 million; that is, we would each get 4 and a half million; and I really didn't have the authority to act on [Rosenthal's] behalf, but we had to do that together.
>
> So I conference [Rosenthal] in. I – and [Tobin] said at that time, [w]ell, we can – we can make it $9 million, you know, if – if

you would go along with that number, that would be fine; and he said – and there was hesitancy. Nobody responded on our side.

So he said, [l]ook. If you really press me, I guess I can go to 9 and a half; but I would rather stay at 9. And [Rosenthal] said, [l]et's do it at 9 and a half. Thanks, and we have a deal.

Q: And *** what did [Tobin] respond to that?

A: Fine.

Q: So after that, what was the deal that was negotiated concerning fees for you and [Rosenthal]?

***

A: The final deal was then we would get nine and a half million dollars. [Rosenthal] would get four and three-quarter million, and I would get four and three-quarter million payable in equity and warrants because we didn't know what that investment, you know, would be.

So we would put the – put it in the terms of equity and warrants equal to $4,750,000."

Likewise, Rosenthal's deposition testimony revealed the following about the May 2000 telephone conversation, which he testified had lasted approximately 10 to 15 minutes:

"A: So Sandor had some ongoing discussions with [Curme], then had some discussions with [Tobin], and they came to a decision

at some point when they were talking in negotiations, and then [Sandor] didn't want to make the commitment without conferencing me in to get my agreement, approval, however you want to phrase it. So he conferenced me in on the telephone conversation that he was having with [Tobin] at which the three of us agreed to this 4.75 million figure.

***

Q: What did you say in that phone conversation and what did [Sandor] say and what did [Tobin] say? ***

A: [Sandor] and [Tobin] did most of the talking. And most of the talking was centered on what the amount in discussion was and it was running between something like 9 million and 9 ½ million or 9 million and 10 million. And at one point in time, [Tobin] said something about, I think the highest I could go is 9 ½ million. And [Sandor] asked me whether or not it's okay with me if we took that figure and I said yes.

So my conversation was limited –

Q: To the word yes?

A: To the word yes.

Q: Okay. Now can you recall, other than what you just testified to, is there anything else about that phone conversation that

you can remember being said by anybody?

A: I think there was some discussion which was a little bit hard for me to grasp, but I think there was some discussion between Tobin and Sandor about how it was to be broken up.

Q: You mean dividing – well, first of all, to be clear, although you used dollar figures, there was never any contemplation of either one of you being on the receiving [end] of dollar bills, correct?

A: I think the value was determined in dollar figures, but I think that the conveyance was going to be something in the terms of equity and warrants and whatever the terminology was. But as I said, I think Sandor was more familiar with that type of negotiation than I was, so he was the one that basically was carrying the ball for he and I on that level."

In approximately April or May 2000, representatives from Battery contacted Blackstone about participating in the LIFFE transaction as a co-investor. In June 2000, Blackstone joined the potential LIFFE transaction as a co-investor by signing an addendum agreeing to the terms of the May 22, 2000 Summary Term Sheet. The addendum stated that Blackstone would invest alongside Battery "to the extent of 50% of the [i]nvestment, and will share equally in the rights provided to [Battery] under the [Summary] Term Sheet."

On June 8, 2000, the LIFFE transaction was publicly announced by press release. On the next day, June 9, 2000, Rosenthal directed his company, Rosenthal Collins Group (RCG), to

purchase LIFFE securities over a number of days.

On June 16, 2000, Sandor and Rosenthal jointly hired attorney Gerald Fishman (Attorney Fishman) to represent them in connection with their proposed participation in the LIFFE transaction.

On July 7, 2000, LIFFE discovered that Rosenthal had made recent security purchases of LIFFE shares without the knowledge of the investors, Battery and Blackstone. Upon this discovery, Williamson, Chairman of LIFFE, became "visibly upset" because: (1) Rosenthal's improper trading put the entire proposed LIFFE transaction in jeopardy; (2) Rosenthal's conduct appeared unethical and risked blemishing LIFFE's reputation; and (3) Rosenthal's conduct required LIFFE "to go to the relevant British securities authorities in an effort to salvage the proposed transaction." On July 9, 2000, Williamson informed Tobin about the discovery regarding Rosenthal's improper conduct in purchasing LIFFE shares. LIFFE considered Rosenthal's conduct to have violated certain British securities and otherwise bore the appearance of impropriety because Rosenthal was connected to the proposed LIFFE transaction. Subsequently, Williamson expressed his anger and concerns over Rosenthal's trading activities, and the "LIFFE Board unanimously agreed that any connection between Rosenthal and the proposed transaction had to be severed, and that [Williamson] would deliver the message to representatives of the Battery/Blackstone group of investors." In a letter dated July 12, 2000, Attorney Fishman, counsel for Rosenthal, informed Brown, a representative of Battery, that while Rosenthal "may be deemed an 'access insider' by virtue of his consultative relationship and involvement with the Battery/Blackstone transaction with LIFFE," his actions were made without any intent to breach British laws.

As a result of Rosenthal's conduct in directing his company, RCG, to purchase LIFFE shares,

the London Panel on Takeovers and Mergers (Takeover Panel) launched an inquiry into the LIFFE transaction. Subsequently, the Takeover Panel made a ruling that Rosenthal's trading in LIFFE shares constituted an inadvertent breach of the UK City Code and that Rosenthal must sell to independent parties the LIFFE shares which he had purchased after the June 8, 2000 public announcement of the proposed investment was made. Nothing in the Takeover Panel's ruling forbade Rosenthal from participating in the LIFFE transaction. In September 2000, Rosenthal received a copy of the Takeover Panel's ruling. From September 18 to September 21, 2000, in compliance with the Takeover Panel ruling, Rosenthal directed RCG to sell all LIFFE shares that it had purchased after June 8, 2000.

Subsequently, however, Brown, a representative of Battery, informed Attorney Fishman that Rosenthal could no longer participate in the potential transaction. Tobin also informed Rosenthal directly that Rosenthal could not participate in the LIFFE transaction because the management of LIFFE "did not want to have anything to do with him and that *** there would be no deal with LIFFE if [Rosenthal] was involved." According to his deposition, Rosenthal testified that various representatives from Battery–Brown, Tobin and Curme–have acknowledged to Rosenthal "that they have an agreement to compensate [Rosenthal]," and that they would "figure out something of equal value" for Rosenthal on another transaction in the future because they were unable to pay him in LIFFE shares and warrants. On September 25, 2000, Rosenthal, through his counsel, Attorney Fishman, conveyed to Tobin that Rosenthal would "take his word on the LIFFE deal (up to a year)."

In October 2000, over the course of several weeks, LIFFE, Battery, Blackstone and Sandor negotiated, drafted and finalized written agreements that were formally executed and which related

to the LIFFE transaction. Attorney Fishman, acting as Sandor's counsel, was involved in the process of negotiating, drafting and finalizing Sandor's written agreement. In November 2000, the LIFFE transaction closed, at which point Sandor received, pursuant to the terms of his written agreement, LIFFE shares and warrants "in consideration of services provided by [Sandor] in the evaluation of investment opportunities." Rosenthal admitted, in his deposition testimony, that at the time the LIFFE deal closed, he knew that he would not be compensated with any stocks, warrants, or other LIFFE securities at that time.

In September 2001, ten months after the LIFFE transaction closed, Battery, Blackstone and Sandor sold their LIFFE holdings to Euronext, a European financial exchange, for approximately $12.5 million. As a result, on September 28, 2001, Fishman, as counsel for Rosenthal, sent Tobin an email stating the following:

> "An idea for your consideration. [Rosenthal] can't be a 'concert party,' but once a deal is struck and a buyout occurs, there should be no reason why he can't receive the same net that [Sandor] receives, as if you all have been an 'informal nominee,' though he isn't part of the deal currently or officially. I'm sure you're aware that his prior inadvertency was not intended for his benefit and occurred only due to his lack of familiarity with the specific local Takeover Panel rules in the UK, as explained in his prior written submissions to the [Takeover] Panel. By getting him those net proceeds (equivalent to [Sandor's]) everyone ends up where they

should be."

On that same day, September 28, 2001, Tobin emailed Fishman with the following email response:

> "It won't fly. Blackstone won't do it and [Battery] won't alone. I am sorry but I will try to figure out something on another deal. It may be the best I can do."

On November 7, 2001, Rosenthal filed a lawsuit in the U.S. District Court of the Northern District of Illinois, alleging breach of contract and equitable estoppel claims against Battery and Blackstone. Subsequently, however, after many years of discovery, the federal court dismissed the cause of action for lack of subject matter jurisdiction.

On January 30, 2008, Rosenthal re-filed the instant cause of action in the circuit court of Cook County, alleging breach of an oral contract and promissory estoppel claims against Battery and Blackstone. The complaint requested that Rosenthal be granted specific enforcement of an alleged oral contract entered into between Rosenthal and Battery and Blackstone, or, in the alternative, damages in the amount of "not less than $12 million." On March 25, 2008, Rosenthal filed an amended complaint, which alleged the same claims as the original complaint except that it named all of the proper Blackstone entities in this case.

On October 14, 2008, Battery and Blackstone separately filed their answer and affirmative defenses in response to Rosenthal's amended complaint. In addition, Battery filed two counterclaims against Rosenthal, alleging negligence (count I) and unfair or deceptive acts or practices (count II).

On October 16, 2008, Battery and Blackstone each filed a motion for summary judgment. On February 25, 2010, the trial court granted Battery and Blackstone's motions for summary

judgment. On March 16, 2010, Rosenthal filed a notice of appeal before this court. On April 28, 2010, the trial court entered an agreed order pursuant to Supreme Court Rule 304(a) (210 Ill. 2d R. 304(a)), finding that "there is no just reason to delay an appeal from its February 25, 2010 *** [o]rder granting [Battery's and Blackstone's] motions for summary judgment."

ANALYSIS

The sole issue on appeal is whether the trial court erred in granting summary judgment in favor of Battery and Blackstone. The trial court's April 28, 2010 agreed order conferred jurisdiction upon this court pursuant to Rule 304(a).

Initially, we note that the statement of facts outlined in Battery's brief contain numerous argumentative statements in violation of Illinois Supreme Court Rule 341(i) (eff. Sept. 1, 2006) (appellee's brief shall conform to the requirements of Rule 341(h), which states that facts shall be "stated accurately and fairly without argument or comment"). We caution that adherence to our supreme court's rules is paramount. However, we note that the argumentative facts presented in Battery's brief does not hinder our resolution of the issue in the case.

Turning to the merits of the appeal, we determine whether the trial court erred in granting summary judgment in favor of Battery and Blackstone. We review this issue *de novo*. *Hahn v. Union Pacific Railroad Co.*, 352 Ill. App. 3d 922, 929, 816 N.E.2d 834, 840 (2004).

Rosenthal argues that he entered into a valid and enforceable oral contract with Battery and Blackstone during the May 2000 telephone conversation between Rosenthal, Sandor and Tobin. Specifically, he contends that the parties agreed to provide he and Sandor with a "finder's fee" of $9.5 million in LIFFE shares and warrants because they "served up the deal." Rosenthal maintains

that the oral agreement contained all of the essential elements of a binding contract, and that the parties did not intend for the oral agreement to be reduced to writing in order to be binding. Further, Rosenthal argues that his "inadvertent breach" of U.K. laws in directing his company, RCG, to purchase LIFFE securities was not a material breach of the contract so as to discharge Battery and Blackstone from performance or otherwise render performance impossible.

Battery counters that there were no genuine issues of material fact as to Rosenthal's claims. Specifically, Battery argues that the parties intended to finalize any agreement in a written contract as it pertained to Rosenthal, which they never did. Further, Battery contends that no valid contract existed because consideration was conferred *prior* to the promise on which it was based, and that the September 28, 2001 email sent from Attorney Fishman to Tobin contradicted Rosenthal's assertion that there was any prior agreement between the parties. Moreover, Battery argues that the alleged oral contract lacked definite and certain terms and thus, was not an enforceable contract. Battery also maintains that, even if a binding oral contract existed between the parties, Battery was not obligated to perform under the contract because Rosenthal's conduct in engaging in insider trading jeopardized the entire LIFFE transaction.

Likewise, Blackstone argues that Rosenthal had not established a claim for breach of contract as a matter of law. Blackstone argues that the undisputed evidence shows that the essential elements of the contract were never discussed, and that Rosenthal's "finder's fee" claim fails because no consideration was provided. Blackstone further argues that the evidence shows that the parties did not intend to be bound without a written agreement. Moreover, Blackstone argues that even if a binding agreement had been formed, Rosenthal's improper trading in LIFFE securities triggered

Blackstone's unilateral right to terminate the agreement and rendered performance of the agreement impossible.

Summary judgment is proper where "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 and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). "In considering a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party." *Pielet v. Pielet*, ___ Ill. App. 3d ___, ___, ___ N.E.2d ___, ___ (2010). "The purpose of summary judgment is not to try a question of fact, but to determine whether one exists" that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421, 432, 781 N.E.2d 249, 254, 260 (2002). "Thus, although the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment." *Id.* at 432, 781 N.E.2d at 260.

"Ordinarily, the intent of the parties to an oral contract is a question to be determined by the trier of fact." *Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc.*, 114 Ill. 2d 133, 141, 500 N.E.2d 1, 4 (1986). However, the parties' intent to an oral agreement "may become a question of law 'if the facts are undisputed and there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them.' " *Id.* at 142, 500 N.E.2d at 4 (quoting *York v. B.F. Goodrich Co.*, 130 Ill. App. 3d 220, 223, 474 N.E.2d 20, 22 (1985)).

"[W]here the parties have assented to *all* the terms of the oral agreement the mere reference to a future written document does not negate the existence of a present contract." (Emphasis added.)

Id. at 143, 500 N.E.2d at 5. However, "even where the essential terms have been agreed upon, 'if the clear intent of the parties is that neither will be legally bound until the execution and delivery of a formal agreement, then no contract comes into existence until such execution and delivery.' " *Id.* at 143-44, 500 N.E.2d at 5, quoting *Chicago Title & Trust Co. v. Ceco Corp.*, 92 Ill. App. 3d 58, 69, 415 N.E.2d 668, 677 (1980)). Moreover, in the absence of an anticipated written document, the parties' *conduct* and *statements* made subsequent to the oral agreement "may be decisive of the question whether a contract had been made." (Emphases added.) *Id.* at 144, 500 N.E.2d at 5.

Our supreme court in *Ceres* set forth the following factors in determining whether parties to an agreement intended that it be reduced to writing before the agreement would be legally binding upon the parties: (1) whether the contract is one usually put into writing; (2) whether there are a few or a great many details; (3) whether the amount of money involved is large or small; (4) whether the agreement requires a formal writing for the full expression of the covenants; and (5) whether the negotiations themselves indicated that a written document was contemplated as their conclusion." *Id.*

Applying these factors to the instant case, we find that the undisputed facts show that the parties did not intend to be legally bound by the May 2000 conversation between Tobin, Sandor and Rosenthal until the agreement was reduced to writing. First, the alleged contract in this case is of the type that parties usually put into writing. The record shows that Fishman, counsel for Sandor and Rosenthal, testified that the parties contemplated that the terms regarding any securities to be received by Sandor and Rosenthal would be set forth in writing:

"Q: And the terms through which securities of LIFFE were

> going to be conveyed to either *** Sandor or *** Rosenthal were ultimately going to be incorporated into written agreements, correct?
>
> A: Well, LIFFE wasn't going to give them stuff without written agreements, sure."

The evidence shows that in June 2000, after the May 2000 telephone conversation at issue, Rosenthal and Sandor jointly retained Fishman as counsel in order to "work on written documents" to finalize their investment in the LIFFE transaction. It is also undisputed by the parties that Rosenthal never entered into any written agreements with either Battery or Blackstone, but that Battery and Blackstone entered into a written agreement solely with Sandor–the negotiation and finalization of which was performed by Fishman. Both Fishman and Sandor testified that in their experience, the terms of a warrant agreement are always reduced to writing. Nonetheless, Rosenthal argues that Brown, a representative of Battery, testified in his deposition that Brown had "no knowledge that anyone ever discussed the necessity of a written agreement" with regard to Tobin's May 2000 telephone conversation with Rosenthal and Sandor. However, our review of the record shows that Brown did not *remember* whether the necessity of a written agreement was discussed, and that Brown further testified that "I think it was as part of this process it was understood by all parties that a transaction of this complexity would eventually be codified in a written document. That's customary to how we do business." Thus, the undisputed evidence shows that the agreement is one usually put into writing.

Second, the alleged oral agreement was one that involved great detail. Sandor testified in his deposition regarding the complexity of the mathematical formulas used to determine the number of

LIFFE shares and warrants that Sandor was to receive pursuant to his written agreement:

> "A: The way it worked is we agreed in May [2000 during the telephone conversation at issue] on a dollar figure, and then depending on how many shares were tendered, you had to develop formulas which would backtrack and give you that dollar figure. So we couldn't have known the formulas until we saw how many shares were tendered for.
>
> * * *
>
> Q: And –ultimately, it's the actual wording of those formulas that's going to drive the specific number of shares and the specific number of warrants that you ultimately get on the agreement, is that right?
>
> A: Yes.
>
> * * *
>
> [I]t was all about lawyers drafting formulas and economists on the other side trying to figure out how many warrants. We could not get – the formula that was drafted, I don't know, by – by the attorneys on both sides didn't get at the fact that the amount of warrants I would be getting would be subject to the amount of shares that were tendered under the offering. So we had to go through a couple of iterations to explain what X was and Y was, and it was just – it took

us couple of times to get it right."

Like *Ceres*, Sandor's final written agreement was not simply a memorialization of the parties' oral agreement. See *id*. at 145, 500 N.E.2d at 5. Rather, it contained a fair number of provisions regarding details which Sandor, Rosenthal and Tobin had not previously discussed in their May 2000 telephone conversation. These provisions included the mathematical formulas used to determine the number of shares and warrants Sandor would receive, the date used to determine the value of the shares Sandor would receive, and the specific number of LIFFE shares and warrants to be given to Sandor. Further, Fishman, on behalf of Sandor, reviewed a number of written documents which related to the shares and warrants that Sandor received in connection with the LIFFE connection–such as "a declaration of trust, a voting trust document, a warrant instrument, a warrant certificate, a side letter agreement with Battery and Blackstone, and a side letter agreement with LIFFE." Sandor ultimately signed several of these documents in connection with his written agreement with Battery and Blackstone. Thus, we find that the undisputed evidence shows that the alleged oral agreement involved great detail and no genuine issue of material fact has been raised to show otherwise.

Third, the amount of money involved in the alleged agreement was substantial. It is undisputed that in the May 2000 telephone conversation, Rosenthal, Sandor and Tobin discussed the compensation of $9.5 million in LIFFE shares and warrants upon the closing of the LIFFE transaction with Battery and Blackstone. Like *Ceres*, in which our supreme court determined that the $480,000 involved in the agreement was substantial, we find that this factor also weighs in favor of finding that the $9.5 million of compensation involved in the instant case was substantial. Thus,

there are no genuine issues of material fact as to the size of the proposed monetary compensation.

Fourth, the alleged contract in this case required a formal writing for the full expression of the covenants. Here, the only term discussed in the May 2000 telephone conversation between Tobin, Rosenthal and Sandor pertained to the proposed amount of compensation that Rosenthal and Sandor would receive upon the close of the LIFFE transaction. Many key detailed provisions, as discussed, were included in Sandor's final written agreement with Battery and Blackstone, which were absent from the May 2000 telephone conversation. We find that no genuine issue of material fact has been raised regarding whether the May 2000 telephone conversation encompassed all of the covenants of the agreement so as to enable the parties to fully execute and perform the alleged contract without a written agreement detailing the specific terms. See *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 29-30, 578 N.E.2d 981, 984 (1991).

Finally, the parties' negotiations indicate that a formal written document was contemplated at the conclusion of the negotiation process. After the May 2000 telephone conversation, Rosenthal and Sandor jointly retained Fishman as counsel in order to "work on written documents" to finalize their investment in the LIFFE transaction. The Summary Term Sheet, which was signed by LIFFE, Battery and Blackstone, expressly stated that it was "not intended to be legally binding" until a subsequent written agreement was executed. Further, Fishman, as Sandor's counsel, negotiated and reviewed various drafts of written agreements during the negotiation process, and that Sandor eventually signed a final written agreement outlining the terms under which he would receive his $4.75 million in LIFFE shares and warrants. It is undisputed that Rosenthal never executed a written agreement with either Battery or Blackstone. Fishman, as counsel for Rosenthal and Sandor,

testified that had Rosenthal remained in the LIFFE transaction, Fishman would have made sure that Rosenthal also executed a written agreement similar to Sandor's written agreement. Thus, we find no genuine issue of material fact regarding the parties' uniform objective conduct showing their intent to reduce any oral agreement to writing in order to have a legally binding effect on the parties. Therefore, because the facts are undisputed as to the intent of the parties and as to the fact that Rosenthal never executed a written contract with Battery and Blackstone, we hold that Rosenthal had not established a claim for breach of contract as a matter of law and summary judgment was properly granted in favor of Battery and Blackstone on this claim.

Even if the parties did not intend to reduce any oral promises into writing, we find that the May 2000 telephone conversation involving Tobin, Rosenthal and Sandor did not constitute a binding oral contract because it lacked consideration. "In alleging a breach of contract by a defendant, a plaintiff should *** allege the factual circumstances surrounding the formation of the agreement, specifically, the offer, acceptance and existence of valuable consideration." *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 199, 721 N.E.2d 605, 611 (1999). Any act or promise which benefits one party or disadvantages the other party is sufficient consideration. *Johnson v. Johnson*, 244 Ill. App. 3d 518, 527-28, 614 N.E.2d 348, 355 (1993). However, "if the alleged consideration for a promise has been conferred *prior* to the promise upon which alleged agreement is based, there is no valid contract." (Emphasis added.) *Id.* at 528, 614 N.E.2d at 355. Exceptions to the general rule that past consideration is not valid consideration include: "(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* (1833), 2 Ill. 113, 114-15. Whether consideration exists for an agreement is a question of law. *Id.*

In the case at bar, Rosenthal argues that consideration was provided to form a valid and enforceable oral contract because he "clearly brought Battery/Blackstone and LIFFE together for the purpose of Battery/Blackstone making an investment," that he was the one who "first approached LIFFE to gauge interest in venture capitalist investment, discussed the transaction with Battery and Sandor, and then proposed that Sandor introduce Battery to LIFFE." Rosenthal further argues that his action of "serving up the deal" resulted in Battery's agreement in the May 2000 telephone conversation to compensate him and Sandor equally with a "finder's fee" equal to $9.5 million of LIFFE shares and warrants "should the transaction close." Rosenthal also argues that an internal investment memorandum prepared by Blackstone representatives, in contemplation to co-invest with Battery, showed, as an expense, the calculated shares to be compensated to Rosenthal. Moreover, Rosenthal argues that he and Sandor used their expertise to provide Battery with other possible investment opportunities in 1999.

We find that the record shows that no consideration existed to form a valid and enforceable oral contract at the time of the May 2000 telephone conversation. Rosenthal's actions in "serving up the deal" by making possible the opportunity for representatives from Battery to meet Williamson, chairman of LIFFE, and by exploring other investment opportunities for Battery in

1999, amounted to consideration that was conferred *prior* to Battery's May 2000 promise to compensate Rosenthal and Sandor for a total of $9.5 million. Such past consideration does not form a valid and enforceable contract upon which Rosenthal can assert his claim for breach of contract. The record shows that Tobin testified in his deposition that Battery had an interest in the proposed participation of Rosenthal in the LIFFE transaction because of the "value going forward" that Rosenthal's industry expertise would have brought to the transaction. The record also shows that the Summary Term Sheet, which was signed by LIFFE, Battery and Blackstone, expressly stated that the parties had no binding obligations absent a written agreement. Moreover, a "Share Subscription Agreement," which detailed the LIFFE transaction and which was incorporated by reference into Sandor's written agreement with Battery and Blackstone, expressly stated that no finder's fee agreement was made by anyone. While an internal Blackstone investment memorandum, prepared for presentation to Blackstone's investment committee, listed an estimate of Blackstone's potential compensation to Rosenthal and Sandor, this alone does not raise a genuine issue of material fact that proper consideration was provided by Rosenthal to form an enforceable oral contract. Rather, as David Stonehill (Stonehill), principal of Blackstone testified, there was no specific agreement with Sandor or Rosenthal at the time Blackstone prepared its internal investment memorandum, but that "an estimate of [Sandor's and Rosenthal's] fee [was] included so that [Blackstone] could assess the potential effect that would have on returns" in connection with the LIFFE transaction."

Nonetheless, Rosenthal argues that one of the exceptions to the general rule regarding past consideration applies, so as to render *prior* consideration as adequate consideration to form an enforceable oral agreement, and cites to *Worner Agency, Inc. v. Doyle*, 133 Ill. App. 3d 850, 857-59,

479 N.E.2d 468, 473-74 (1985) (finding an exception to the rule that prior consideration is not valid consideration when sufficient evidence in the record shows that a benefit was conferred on the defendants and this benefit is deemed adequate consideration for their promise to pay the finders' fee), *Polybrite International, Inc. v. Westinghouse Lighting Corp.*, 2007 WL 707547 (N.D. Ill. March 5, 2007) (recognizing an exception to the past consideration rule where consideration was rendered at the request of the promisor), and *Siegel v. General Star Management Co.*, 2007 WL 1239058 (N.D. Ill. April 26, 2007) (citing *Worner* regarding exceptions to the general rule that past consideration does not establish a valid contract), for support.

We find these cases to be distinguishable from the facts of the instant case where, as discussed, a "Share Subscription Agreement," which detailed the LIFFE transaction, expressly stated that no finder's fee agreement was made by anyone, where Tobin testified that Battery had an interest in the proposed participation of Rosenthal in the LIFFE transaction because of the "value going forward" that Rosenthal would have provided rather than any past acts performed by Rosenthal, and where the undisputed evidence shows that it was Sandor who introduced Williamson to Battery and Blackstone, and that neither Battery nor Blackstone specifically requested Rosenthal or Sandor to introduce them to LIFFE representatives. Thus, we find that no genuine issue of material fact was raised to show that adequate consideration was conferred to form a valid and enforceable oral contract. Rosenthal, as the nonmovant, has not presented a factual basis that would arguably entitle him to judgment, and there is no matter reserved for trial because there are no genuine issues of material fact for the jury to decide. Therefore, the trial court properly granted summary judgment in favor of Battery and Blackstone and we need not address Rosenthal's alternative arguments

regarding his claim for breach of contract.

Rosenthal next argues that even if no enforceable oral contract was formed, he has established a claim of promissory estoppel to survive summary judgment. He argues that there are genuine issues of material fact as to whether Battery had actual or apparent authority to act on Blackstone's behalf, whether Blackstone ratified Battery's acts, or whether Battery and Blackstone entered into a joint venture, when representatives from Battery promised Rosenthal that he would be compensated in a future deal after Rosenthal was excluded from the LIFFE transaction. Rosenthal contends that Battery and Blackstone's actions indicated an intent to remunerate him for his work on the LIFFE transaction that were sufficient to create a "promise" for the purpose of establishing a claim for promissory estoppel. Further, Rosenthal argues that he had relied, to his detriment, on Battery and Blackstone's promise to compensate him when he complied with the Takeover Panel's ruling by selling the improperly acquired LIFFE shares at a loss, by agreeing to "not vote the historically owned shares," and by his willingness to "take [Tobin's] word on the LIFFE deal (up to one year)."

Battery counters that summary judgment was properly granted on Rosenthal's claim for promissory estoppel because Rosenthal could not establish that he reasonably relied to his detriment on an unambiguous promise made by Battery. Specifically, Battery contends that alleged statements made by representatives of Battery to Rosenthal that Battery and Blackstone would "figure out some other way" to pay Rosenthal in the indefinite future by putting him in an unspecified future deal was, "at most, an aspiration, not an unambiguous promise on which a sophisticated businessman like Rosenthal could have reasonably relied." Battery further argues that Rosenthal's promissory

estoppel claim also fails because "he did not rely to his detriment on any promise," that "Rosenthal has failed to identify any act or omission that he allegedly took in reliance on any alleged promise," and that any detriment suffered by Rosenthal as a result of selling the improperly acquired LIFFE shares and in not voting his historical holdings in LIFFE "was the result of his own improper conduct" rather than the result of any alleged promise by Battery or Blackstone.

Similarly, Blackstone argues that none of the alleged promises regarding payment to Rosenthal on future deals involved Blackstone. Even if Blackstone had made these assertions, it argues that Rosenthal could not meet his burden of establishing a claim of promissory estoppel as a matter of law because he could not identify an unambiguous promise upon which he could have reasonably relied, nor could he establish that he has suffered any detriment because "he had nothing to give up."

To prove a claim for promissory estoppel, Rosenthal must establish that: (1) Battery and Blackstone made an unambiguous promise to him; (2) Rosenthal relied on such promise; (3) Rosenthal's reliance was expected and foreseeable; and (4) Rosenthal relied on the promise to his detriment. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51, 906 N.E.2d 520, 523-24 (2009). A promise for the purpose of a promissory estoppel claim is one which is a " 'declaration that one will do or refrain from doing something specified' " *Derby Meadows Utility Co., Inc. v. Inter-Continental Real Estate*, 202 Ill. App. 3d 345, 361, 559 N.E.2d 986, 995 (1990) (quoting Webster's Third International Dictionary 1851 (1986)). "A plaintiff's reliance must be reasonable and justifiable." *Ross v. May Co.*, 377 Ill. App. 3d 387, 393, 880 N.E.2d 210, 217 (2007). Further, a detrimental reliance by a plaintiff upon the reasonable reliance on a promise may include

an inducement to action or forbearance on the part of the promisee based on that promise. See *Newton Tractor Sales, Inc.*, 233 Ill. 2d at 51, 906 N.E.2d at 523 (citing Restatement (Second) of Contracts, § 90).

In the instant case, the trial court found that the assortment of alleged promises made by Tobin, as a representative of Battery, were "too scattered, vague, and inconsistent to constitute a binding promise," that they were "aspirational in what might be a possibility," and that Rosenthal was "unable to identify an unambiguous promise upon which he reasonably relied." Further, the trial court found that Rosenthal had not demonstrated that he suffered any detriment due to his reliance on the alleged promises to support a claim of promissory estoppel. We agree.

According to his deposition, Rosenthal testified that various representatives from Battery–Brown, Tobin and Curme–have acknowledged to Rosenthal "that they have an agreement to compensate [Rosenthal]," that they would "figure out something of equal value" for Rosenthal on another transaction in the future because they were unable to pay him in LIFFE shares and warrants after LIFFE refused to proceed with the transaction unless Rosenthal was excluded from the deal. Rosenthal also testified that figuring out how to compensate him even though he was excluded from the LIFFE transaction became the "theme" "woven through" several conversations with representatives from Battery in 2000. We find that the alleged assertions made by Battery do not show an "unambiguous promise" upon which Rosenthal could reasonably rely because they lacked "definiteness" in their terms and merely expressed the hopes of finding an alternative way to compensate Rosenthal. See *Nibeel v. McDonald's Corp.*, 1998 WL 547286, at *12 (N.D. Ill. Aug. 27, 1998) (granting summary judgment against plaintiff on claim of promissory estoppel where

defendant's expressions that plaintiff would be given "opportunities" and be "taken care of" did not have the "requisite definiteness" to be reasonably relied upon and merely expressed a hope for a continued business relationship with plaintiff).

Even if the May 2000 telephone conversation during which Tobin, Rosenthal and Sandor agreed on a compensation of a total of $9.5 million constituted an unambiguous promise, we find that Rosenthal cannot establish a claim for promissory estoppel because he has failed to raise a genuine issue of material fact showing that he suffered detriment in reasonable reliance on any promises. Rosenthal's actions in selling the improperly acquired LIFFE shares at a loss, or by agreeing to "not vote the historically owned shares," were voluntarily performed in compliance with the Takeover Panel's ruling and not as a result of any inducement by either Battery or Blackstone. Similarly, Rosenthal's alleged statement to Tobin on September 25, 2000, through his counsel, Fishman, that Rosenthal would "take [Tobin's] word on the LIFFE deal (up to one year)" did not amount to "forbearance" sufficient to establish detrimental reliance because the statement was made in response to Tobin's assertion that "they would figure out something of equal value" for Rosenthal, which, as discussed, did not amount to an unambiguous promise, and which did not specify a definite time beyond which Rosenthal would have to "forbear" from asserting his legal right to enforce. Thus, there is no genuine issue of material fact presented to establish a claim for promissory estoppel and we need not address Rosenthal's remaining arguments regarding whether Battery had actual or apparent authority to act on Blackstone's behalf, whether Blackstone ratified Battery's acts, or whether Battery and Blackstone entered into a joint venture. Therefore, we find that the trial court properly entered summary judgment in favor of Battery and Blackstone.

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.