FIRST DIVISION
June 29, 2012

No. 1-10-0973

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIRST ATTORNEY CONSULTANTS, LTD.,	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	07 L 7733
	)	
PILLSBURY WINTHROP SHAW PITTMAN LLP,	)	Honorable
	)	Charles R. Winkler,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices KARNEZIS and ROCHFORD concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in granting summary judgment in favor of defendant-appellee, Pillsbury Winthrop Shaw Pittman LLP (Pillsbury).

¶ 2 Plaintiff-appellant, First Attorney Consultants, LTD. (FAC), appeals from an order of the trial court granting summary judgment in favor of Pillsbury in FAC's action for breach of contract and other claims. For the reasons that follow, we affirm.

¶ 3 In 2004, FAC, a legal recruiter, sent a resume to Pillsbury. A few months later another recruiter sent Pillsbury the same resume. Pillsbury hired the attorney and paid the recruitment fee to the second recruiter. FAC sued Pillsbury for breach of a written contract from 1994. The trial court granted summary judgment for Pillsbury.

¶ 4 On appeal FAC argues that Pillsbury breached a contract dated 1987 and an oral contract formed in 2004. We reject both arguments because FAC never amended its complaint to state causes of action for breach of a contract written in 1987 or for breach of a 2004 oral contract. Because FAC presented no evidence that could support a finding that Pillsbury accepted the written offer FAC made in 1994, we affirm summary judgment for Pillsbury.

¶ 5 BACKGROUND

¶ 6 On December 6, 2004, FAC sent Linda Williams's resume to Pillsbury. Payson Coleman, a partner in Pillsbury, responded that same day to tell FAC that Pillsbury had previously interviewed Williams and decided not to hire her.

¶ 7 A few months later, another legal recruiter, named Lucas Group, sent Williams's resume to Pillsbury. This time the resume reached Michael Schumaeker, another partner in Pillsbury. Schumaeker interviewed Williams and, on Schumaeker's recommendation, Pillsbury decided to hire her. Williams worked for Pillsbury from April 4, 2005 until March 31, 2006. Pillsbury paid Lucas Group $140,000 for helping the firm find Williams.

¶ 8 When FAC learned that Pillsbury had hired Williams, FAC demanded payment of

its fee as a legal recruiter. Pillsbury refused. FAC then sued Pillsbury for the fee. The complaint included only two counts, one for breach of contract and one for *quantum meruit*. In the breach of contract count FAC identified a letter FAC's president, Joe Marovitch, sent to Pillsbury in 1994 as the written contract Pillsbury breached. In that letter, which FAC attached to its complaint, Marovitch wrote:

> "The following sets forth our proposal for recruiting attorneys for your firm from time to time. *** Of course, your firm would have no obligation to us whatsoever unless we effect a placement with your firm. If we effect a placement with your firm, your obligation to us is limited to paying us a placement fee equal to 27.5% of the first year's compensation you agree to pay such attorney. ***
>
> Recognizing again that your firm has no obligation to us unless we effect a placement of an attorney with your firm, we will assume that the foregoing proposal meets with your approval if we effect a placement of an attorney with your firm."

Pillsbury did not respond to the letter.

¶ 9 According to the first amended complaint, Dorrie Ciavatta, Pillsbury's recruiting coordinator, called Marovitch in June 2004 and asked him to send to Pillsbury resumes from high-level attorneys. FAC alleged that it fully performed its obligations under the 1994 contract when it sent Williams's resume to Pillsbury. FAC explained that industry

custom and practice established that FAC "effect[ed] a placement" of Williams with Pillsbury when Pillsbury hired Williams less than six months after FAC identified Williams as a candidate for placement with Pillsbury, and FAC so identified Williams before any other recruiter so identified her within the six month period before Pillsbury hired her.

¶ 10 Pillsbury moved for summary judgment on the complaint. It supported the motion with Marovitch's deposition. Marovitch testified that in 1987 FAC sent Pillsbury a letter very similar to the 1994 letter. In 1988 Pillsbury hired an attorney FAC found for Pillsbury, and Pillsbury paid FAC its fee. Marovitch testified that some time after he sent the 1994 letter, he sent Pillsbury resumes from other candidates, and Pillsbury never objected to the terms of the 1994 letter. Marovitch said that he found that between 2001 and the time of the deposition in 2009, he sent Pillsbury names of at least 10 attorneys. However, Pillsbury did not hire any other candidates from FAC between 2001 and 2009 other than Williams. For one candidate, also identified in 2004, Ciavatta notified Marovitch that Pillsbury had received a resume for the same candidate from a different recruiter ten minutes before FAC sent the resume to Pillsbury.

¶ 11 In June 2004, Ciavatta sent Marovitch an email in which she said,

> "I wanted to let you all know I made a career change within the firm ***. I transitioned out of recruiting ***. It has truly been a pleasure working with you."

¶ 12 In support of the motion for summary judgment, Pillsbury argued that FAC had no

evidence that Pillsbury accepted the terms of the 1994 letter, and therefore that letter did not become a contract. In response, FAC argued that Pillsbury accepted the 1987 letter as a binding agreement in 1988, and that Ciavatta created an oral implied contract in 2004 when she asked Marovitch to send her names of candidates. FAC did not seek leave to amend its complaint to state causes of action based on the alleged 1988 written contract or the alleged 2004 oral contract. Pillsbury moved to strike part of FAC's response on grounds that FAC had not pled the two contract causes of action which it claimed should preclude the entry of summary judgment in favor of Pillsbury.

¶ 13 The trial court never ruled on Pillsbury's motion to strike part of FAC's response. The trial court granted summary judgment in favor of Pillsbury. In its ruling from the bench, the court said, "The custom and usage and the first-time-in rule, I can't buy into it because there are so many fuzzy things over here in my mind that would support that theory." FAC now appeals.

¶ 14 ANALYSIS

¶ 15 We review *de novo* an order granting a motion for summary judgment. *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 909 (1994). The trial court should grant a motion for summary judgment only if the pleadings, depositions, admissions and affidavits show that no issue of fact remains for a trier of fact to resolve. *Pagano*, 257 Ill. App. 3d at 908-09. We may affirm a decision granting a motion for summary judgment on any basis supported by the record. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 16 FAC argues on appeal that Pillsbury breached three separate contracts when it failed to pay FAC for sending Pillsbury Williams's resume. FAC claims that the letter it sent to Pillsbury in 1987 constituted one written contract, which Pillsbury accepted in 1988 when it hired an attorney who FAC identified for Pillsbury, and Pillsbury paid FAC its fee. In 1994 FAC sent Pillsbury a similar letter setting out the terms of a contract, and FAC argues that Pillsbury accepted this second contract when it considered some resumes that FAC sent to Pillsbury. FAC also contends that Pillsbury created a third contract when Ciavatta contacted FAC in 2004 and asked FAC for resumes.

¶ 17 Pillsbury points out that in its amended complaint, FAC seeks relief only on the basis of the alleged 1994 written contract. Pillsbury argues that this court should not reverse the summary judgment entered here on the basis of causes of action not presented in FAC's complaint. The appellate court in *Pagano*, 257 Ill. App. 3d 905, stated the applicable principles. In *Pagano*, as here, the trial court entered a summary judgment for the defendant, and on appeal the plaintiff argued for reversal based on a claim not pled in the complaint. The plaintiff in *Pagano* pled causes of action for strict liability and for negligence in supervising and helping the plaintiff with his work, but on appeal he sought reversal based on a theory that unsafe conditions on the defendant's property led to the plaintiff's injuries. The *Pagano* court said,

> "A plaintiff fixes the issues in controversy and the theories upon which recovery is sought by the allegations in his complaint. The very purpose of a complaint is to advise the defendant of the claim

> it is called upon to meet. [Citation.] In ruling on a motion for summary judgment, the court looks to the pleadings to determine the issues in controversy. If the defendant is entitled to judgment as a matter of law on the claims as pled by the plaintiff, the motion will be granted without regard to the presence of evidentiary material which might create a right of recovery against the moving defendant on some unpled claim or theory. *** [A] plaintiff's remedy in such a circumstance is to move to file an amended complaint [under section 2-616(a) or section 2-1005(g) of the Code of Civil Procedure]. Having failed to seek relief under either section, the plaintiff will not be heard to complain that summary judgment was inappropriately granted because of the existence of evidence supporting a theory of recovery that he never pled in his complaint." *Pagano*, 257 Ill. App. 3d at 911.

¶ 18 Pillsbury raised the argument about the inadequate pleading in the trial court, when it moved to strike from FAC's response to the summary judgment motion all argument about a 1987 contract and a 2004 oral contract. FAC contends that Pillsbury waived any objection to the inadequacy of the pleadings when it failed to obtain a ruling on its motion to strike part of FAC's response. See, *e.g.*, *Moran v. Gust K. Newberg*, 268 Ill. App. 3d 999, 1004 (1994) ("failure to obtain a ruling on the motion to strike results in a waiver of the issue on appeal"). We must disagree.

¶ 19 At the close of oral argument on Pillsbury's motion for summary judgment, instead of ruling on Pillsbury's motion to strike, the trial court stated that since it was granting Pillsbury's motion for summary judgment, it was "not necessary for [the court] to address what [could be] considered the counter-request of the plaintiff for summary judgment. The holding in *Moran* does not apply in this case.

¶ 20 FAC also cites authorities that hold that a failure to obtain a ruling on an evidentiary objection waives the objection to the evidence. *Tomlinson v. Dartmoor Construction Corp.*, 268 Ill. App. 3d 677, 685 (1994); *McCullough v. Gallagher & Speck*, 254 Ill. App. 3d 941 (1993). But Pillsbury did not object to any evidence. Pillsbury objected only to an argument FAC raised in its response to the motion for summary judgment. We will consider FAC's argument and all of the evidence it presented, but we will consider the evidence and argument only insofar as they support the cause of action FAC pled, for breach of a contract written in 1994.

¶ 21 We apply *Pagano* and we adopt the reasoning of the appellate court in *Gold Realty Group v. Kismet Café*, 358 Ill. App. 3d 675, 680 (2005), where the court said,

> "We are puzzled by the plaintiff's failure to amend its complaint to include the issues advanced in its summary judgment motion, especially given the number of other motions and responses generated by the parties. The plaintiff argues the facts alleged in the complaint were sufficient to give the defendants notice of the issue. Not really. The theory [argued on appeal] never

was pled in its complaint, directly or indirectly. We cannot condone this omission."

¶ 22 Because FAC never amended the complaint to attempt to state causes of action for breach of a 1988 contract or a 2004 oral contract, we reject the argument that those purported contracts preclude the entry of summary judgment for Pillsbury on this complaint, in which FAC alleges a cause of action for breach of a written contract dated 1994.

¶ 23 To obtain relief on a cause of action for breach of contract, a plaintiff must first prove that the parties made a contract. *Village of South Elgin* , 348 Ill. App. 3d 929 (2004). That is, the plaintiff must show an offer, an acceptance, consideration, and sufficiently definite terms for the contract. *South Elgin*, 348 Ill. App. 3d at 940. Here, in 1994, FAC expressly offered to send Pillsbury resumes of eligible attorneys, and it asked Pillsbury to pay FAC the specified placement fee if FAC "effect[ed] a placement" with Pillsbury.

¶ 24 The parties have no contract unless the party who receives the offer makes some objective manifestation of its acceptance of the contract. *Martin v. Government Employees Insurance Co.*, 206 Ill. App. 3d 1031 (1990). The court cannot infer acceptance from the silence of the recipient of the offer. *Martin*, 206 Ill. App. 3d at 1040.

¶ 25 FAC presented no evidence that Pillsbury responded to the letter, or contacted FAC for any reason prior to 2004. FAC did not even present any evidence that it

contacted Pillsbury after sending the letter in 1994 and before 2001. In particular, Marovitch testified only that he sent Pillsbury some resumes after 1994, but he could not remember when. According to Marovitch, FAC's records showed that it sent about 10 resumes to Pillsbury after 2001 and before Marovitch's deposition in 2009. Marovitch did not specify the dates on which he sent any resumes apart from Williams's and a second one in 2004.

¶ 26 FAC presented no evidence of any objective manifestation of acceptance prior to 2004, when Marovitch says Pillsbury solicited resumes from FAC. We hold that the evidence cannot support a finding that Pillsbury accepted the offer FAC made in its 1994 letter within a reasonable time. Without evidence that Pillsbury accepted FAC's 1994 offer, FAC cannot show that Pillsbury breached the 1994 contract. Thus, the trial court correctly granted Pillsbury summary judgment on count I of the complaint, in which FAC stated a cause of action for breach of a written contract dated 1994, and to which FAC attached a copy of Marovitch's 1994 letter to Pillsbury as a copy of the alleged written contract.

¶ 27 Because FAC offers no argument for reversal of the judgment on count II, for *quantum meruit*, we affirm the judgment on that count also. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 28 CONCLUSION

¶ 29 FAC argued, both in the trial court and on appeal, that Pillsbury breached a written contract Pillsbury accepted in 1988 and an oral contract Pillsbury and FAC

formed in 2004. However, FAC in its complaint did not state causes of action based on either of these alleged contracts. Instead, FAC pled only a cause of action for breach of an agreement written in 1994. But FAC presented no evidence that could support a finding that Pillsbury accepted the terms of the 1994 letter within a reasonable time after FAC sent the letter. Without proof of acceptance, FAC cannot show that the 1994 letter ever became a contract, and therefore FAC cannot show breach of that alleged contract. Accordingly, we affirm the trial court's decision granting Pillsbury summary judgment on this complaint.

¶ 30 Affirmed.