2014 IL App (1st) 132772-U

FIFTH DIVISION
June 27, 2014

No. 1-13-2772

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES D BENAK, Plaintiff-Appellant, v. WILLIAMS MONTGOMERY & JOHN, LTD., Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County No. 13 L 2110 Honorable Margaret Ann Brennan, Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

ORDER

¶1 *Held*: The judgment of the circuit court of Cook County granting summary judgment in favor of defendant on plaintiff's breach of contract claim based on his allegedly deficient annual bonus was affirmed where there was no contract upon which plaintiff could assert his claim, where, alternatively, the terms of any such contract were too indefinite to enforce and where there was no issue of material fact as to whether defendant acted in good faith when it evaluated plaintiff for a bonus.

¶2 This case involves a breach of contract claim brought by James Benak (plaintiff), against his former law firm Williams Montgomery & John, Ltd (defendant or "the firm"). Plaintiff

claimed that the 2007 year-end bonus he received failed to meet the terms of his contract with defendant because it did not reflect the contingent fee defendant received for a case on which plaintiff did a substantial amount of work. The circuit court of Cook County granted summary judgment in favor of defendant. Plaintiff now appeals, claiming that issues of material fact exist which preclude entry of summary judgment. For the reasons that follow, we affirm.

¶3 Plaintiff filed a complaint against defendant on February 27, 2013. According to the complaint, plaintiff was employed by defendant as a partner from January 2006 until September 2008. In November of 2005, while working as an attorney at another firm, plaintiff began having discussions with C. Barry Montgomery, a partner at the firm, about working for defendant. During those discussions, Montgomery told plaintiff that his salary and bonus would be based on a percentage of the revenue he generated for the firm. On December 13, 2005, plaintiff and defendant agreed that plaintiff would join the firm as a lateral partner. The following day, December 14, defendant sent plaintiff the following letter:

> "We are delighted that you will be joining our firm. Peter [John] and I are anxious to introduce you to other members of the firm and I will be calling you to see if there is an opportunity to do so before the end of the year.
>
> As outlined to you yesterday at our breakfast meeting, you will be paid a base salary of $250,000 per year plus a year-end bonus as a non-equity partner. Our fiscal year ends at the end of February each year. Your base salary will remain in effect until the end of February 2007. At that time your performance for the past fourteen months will be reviewed for bonus purposes. Your bonus will be based upon fees received that you generate from business that you produce as well as fees received from work you perform on other matters. Obviously, there are other considerations which go into the

bonus decision such as quality of work, business generation efforts, your overall performance on matters affecting the firm and its clients and the overall profitability of the firm. At the end of fiscal ’07 (February, 2007) you will be considered for equity partner in the firm."

¶4 Plaintiff further alleged that his agreed start date with the firm was January 1, 2006. Near the end of December of 2005, a partner with defendant, Peter John, contacted plaintiff to discuss a new matter for a client. John asked plaintiff to evaluate the client's case and develop a theory of recovery. Plaintiff did so and, based upon that theory, the client hired the WMJ firm to proceed on the matter (the TMK matter). Plaintiff handled the majority of the work on the case and was often the client's only contact on the matter. From January 2006 through July 2007, plaintiff spent almost all of his time on the TMK matter and was therefore unable to devote any significant time to other clients or developing other business for the firm. Plaintiff's work on the case included meeting with the client, appearing in court and drafting various pleadings. The matter went to mediation in July of 2007 and ultimately settled for a "significant" payment to the client. Defendant's contingent fee for the case was approximately $4,000,000.

¶5 In October of 2007, plaintiff asked John if his compensation for his work on the TKS matter had been determined, and John responded that his compensation for the case would be part of his 2007 annual bonus to be awarded in April of 2008. Based upon the terms of his contract with defendant, plaintiff expected a bonus based upon the revenue he generated, and John and Montgomery had both told plaintiff that his work on the TKS matter was exceptional. Despite these representations and the terms of his contract with defendant, plaintiff did not receive credit for the fee he generated on the TKS matter and received a $40,000 bonus for 2007. Plaintiff expressed his disappointment to defendant in August of 2008 but was told by

Montgomery that "anyone in this firm could have done that work," that plaintiff was a "liar" and that Montgomery did not want plaintiff to work at the firm any longer. Immediately thereafter, Montgomery sent plaintiff an accounting of plaintiff's fees collected and his total salary in an attempt to show plaintiff that he had not generated any profit for the firm. However, that accounting, attached to the complaint, showed that plaintiff received no credit for any portion of the contingent fee he generated on the TKS matter. Plaintiff's last day of employment under his December 2006 agreement was August 31, 2008. Plaintiff transitioned out of the firm during September of 2008 under an agreement memorialized in an August 27, 2008, letter from defendant to plaintiff. That letter, attached to the complaint, stated that plaintiff would be paid his current salary through the end of August 2008 and that plaintiff would thereafter receive one-third of the amount billed and collected on work he performed after September 1, 2008. The letter stated that his arrangement would be in place for 30 days so that plaintiff could transition to another firm.

¶6 Count I of plaintiff's complaint asserted a claim for breach of contract. Plaintiff claimed that he and defendant had agreed that plaintiff would be compensated based upon fees he generated from business that he produced as well as fees received from work he performed. Plaintiff claimed that he performed all of his obligations under his contract with defendant and that defendant breached its contract with plaintiff when it failed to give him credit for the $4,000,000 contingent fee from the TKS matter in plaintiff's $40,000 bonus. Count II of the complaint asserted a claim of unjust enrichment based upon essentially the same allegations set forth above.

¶7 Defendant moved for summary judgment on both counts of the complaint. Defendant asserted that it did not contractually agree to provide plaintiff a specific bonus. Defendant

asserted that the December 14, 2005, letter from Montgomery to plaintiff was not clear or definite with regards to plaintiff's alleged entitlement to a bonus so as to be enforceable through a breach of contract claim. Defendant also claimed that although the letter did not promise plaintiff any specific or minimum bonus, the letter did indicate that any bonus plaintiff did receive was within defendant's discretion and that such a discretionary bonus is not sufficiently definitive to enforce through a contract claim.

¶8 Attached to the motion for summary judgment was plaintiff's deposition in which he acknowledged that Montgomery's December 14, 2005, letter did not state any formula or specific amount for any bonus. Plaintiff further testified that he did not reach any agreement with the firm as to what a percentage of fees he was entitled to as part of his bonus but that he believed the percentage had to be reasonable and arrived at in good faith. Plaintiff acknowledged that he never met the 1800 minimum billable hour requirement at the firm but claimed that he was never aware or informed of such a requirement. Plaintiff billed 1723 hours in 2007 and 1461 in 2008. Plaintiff received a $10,000 bonus for the work he performed at the firm from January 2006 through the end of the firm's fiscal year, February 28, 2007. In April of 2008, plaintiff received a $40,000 bonus for his work at the firm from March 1, 2007, though February 29, 2008.

¶9 Attached to the summary judgment motion was a report of plaintiff's profitability at the firm from his start date to July 31, 2008. The report indicates it was generated on August 6, 2008. The report sets out hours worked, working attorney fees collected, compensation, overhead and total cost.

¶10 Montgomery's deposition was also attached to defendant's motion for summary judgment. Montgomery testified that during his meetings with plaintiff before December 14, he "made it abundantly clear to plaintiff" that he was not guaranteed a bonus, that any bonus he did receive

was within discretion of the firm's executive committee and board of directors and that many factors would be considered in determining what, if any, bonus plaintiff received. Plaintiff acknowledged to Montgomery that he understood this information. Plaintiff's bonus was arrived at after consulting with the firm's compensation committee and was based upon the revenues generated by plaintiff, the costs and expenses the firm expended on plaintiff, plaintiff's profitability and his prospects for the future. Moreover, The TKS contingency fee and the time plaintiff put into the case were considered in determining plaintiff's bonus. Montgomery specifically testified that plaintiff "got credit" for the TKS contingent fee and that the contingent fee was "obviously discussed and considered" when determining plaintiff's bonus. However, any bonus given by the firm, including plaintiff's bonus, is based upon an attorney's activities for the entire year and not on any one case unless the attorney is the originator of the case. Plaintiff received the $40,000 bonus in April 2008 and complained about the bonus to Montgomery in late July or early August of 2008.

¶11 Montgomery testified that plaintiff originally told him that he could bring the firm between one and two million dollars worth of business. However, plaintiff never brought that much business in for the firm and that was also considered in arriving at plaintiff's bonus. Montgomery also testified that the profitability report attached to plaintiff's complaint was sent to plaintiff because plaintiff "made quite a statement at various times that [he] wanted to see some numbers regarding [his] compensation issues." The profitability report was a "fair statement" as to the figures on the report but it did not represent the "only factor" taken into account regarding plaintiff's compensation and bonus. He agreed that that the chart represented a "significant factor into [plaintiff's] financial performance at the firm." Montgomery further testified that the "fees collected" portion of the chart reflected credit given for the TKS

contingent fee. When asked if the entire "3.8 million [TKS] contingent fee" was included on the chart, Montgomery initially said "no, the 3.8 million contingent fee is not indicated on here." When further questioned on the matter, Montgomery testified "yes," the fee collected on the TKS matter that were generated by plaintiff, based upon his hours worked and time spent on the case, was reflected on the chart. Montgomery further clarified that the contingent fee was not listed as a "separate line item" on the chart but that the fee was considered when determining plaintiff's compensation and bonus.

¶12 Peter John's deposition was also attached to defendant's motion for summary judgment. John testified that the firm's compensation committee recommended that plaintiff not receive a bonus for fiscal year ending in February of 2008 based on plaintiff's performance in 2007. John, who was a member of the executive committee, proposed that plaintiff receive a $50,000.00 bonus because of plaintiff’s support on the TKS case and because he hoped plaintiff would develop more business even though he had done little work since the TKS case ended. Other members of the executive committee objected to that amount and plaintiff was ultimately awarded a $40,000 bonus. John also testified that plaintiff mismanaged a deposition early in the TKS matter and after that John concluded that he could not let plaintiff "do anything significant in the case after that." This performance, plaintiff's failure to meet the minimum billable hour requirement for two years and plaintiff's failure to bring in the business he had said he would were all considered in arriving at plaintiff's bonus. John was the lead attorney on the TKS matter.

¶13 The firm's policy manual was also attached to the motion for summary judgment. It states that "income partners have no right to or interest in a special bonus until actually paid and received by the Income Partner." The manual also states that non-equity partners, such as

plaintiff, are required to bill a minimum of 1800 hours per year that could be charged to clients.

¶14 Plaintiff filed a response to defendant's motion for summary judgment. Plaintiff attached his own affidavit to that response in which he stated that he had put in a substantial amount of work into the TKS matter at the expense of developing other clients and cases, that the TKS matter generated a significant contingent fee for the firm, and that his $40,000 bonus did not fully take into account the money he made for defendant from the TKS matter. Plaintiff denied that he was ever told that his bonus was within defendant's discretion or that he was told he was not guaranteed a bonus. Finally, plaintiff stated that the profitability report he was given by Montgomery did not include credit for the contingent fee from the TKS matter.

¶15 The trial court granted defendant's motion for summary judgment as to both counts of plaintiff's complaint. Plaintiff now appeals only the entry of summary judgment with respect to its breach of contract claim.

¶16 Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). In determining whether the moving party is entitled to summary judgment, the pleadings and evidentiary material in the record must be construed strictly against the movant. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002). The circuit court’s decision to grant or deny a motion for summary judgment is reviewed de novo. *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 470-71 (2001).

¶17 In general, the construction or interpretation of a contract is a matter to be determined by the court as a question of law. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005). When construing the language of a contract, our primary objective is to give

effect to the intent possessed by the parties at the time they entered the agreement. *Regency Commercial Associates, LLC v. Lopax, Inc.*, 373 Ill. App. 3d 270, 277 (2007). The agreement is to be interpreted as a whole and, when possible, effect and meaning must be given to every provision in the contract. "Where the terms of a contract are clear and unambiguous, they will be given their natural and ordinary meanings." *Thakral v. Mattran*, 156 Ill. App. 3d 849, 854 (1987). In the absence of an ambiguity, the parties' intent is ascertained solely from the words of the contract itself, and we will not interpret a contract in a manner that would nullify or render provisions meaningless or that is contrary to the plain and obvious meaning of the language used. *Id.*; *Regency Commercial Associates, LLC*, 373 Ill. App. 3d at 277.

¶18 Plaintiff contends that summary judgment was improperly entered because there is an issue of material fact as to whether defendant breached its contractual obligation to base plaintiff's 2007 year-end bonus of the fees received from his work on the TKS matter. Plaintiff claims that even if defendant had discretion as to the amount of any bonus he received, there is an issue of material fact as to whether defendant exercised that discretion in good faith when determining his 2007 bonus. On the other hand, defendant claims that summary judgment was properly entered because there was no enforceable contract obligating defendant to pay plaintiff a 2007 bonus. Defendant further argues that even if there were such a contract, the award of any bonus was discretionary and therefore too indefinite to enforce. Finally, defendant argues that there are no facts supporting plaintiff's claim that defendant did not consider plaintiff's work on the TKS matter in awarding him a $40,000 bonus and that, to the contrary, the unrefuted facts established that the TKS matter and numerous other aspects of plaintiff's performance at the firm were considered in determining plaintiff's 2007 bonus. We agree with defendant.

¶19 First, we find that summary judgment was properly entered because there is no contract

requiring defendant to pay plaintiff a bonus for his work in 2007. Plaintiff refers to Montgomery's December 14 letter as the "agreement" providing for his salary and year-end bonus. However, that letter only set forth plaintiff's compensation for the period of 2006 to February of 2007, and plaintiff received a $10,000 bonus for that period. Montgomery's letter does not address a salary or, more importantly, a bonus for his work in 2007. The letter specifically states "[y]our base salary will remain in effect until the end of February 2007." There was no evidence presented regarding a contract or the terms under which plaintiff continued to work for defendant after February 2007. The fact that plaintiff nevertheless received a $40,000 bonus for his work in 2007 does not in itself establish the terms of any contract under which plaintiff continued to work for defendant.

¶20 Plaintiff claims that defendant is "estopped" from claiming that the letter did not address his 2008 compensation because defendant did not deny the statement in plaintiff's complaint that his "last day of employment under his December 2006 agreement with defendant was August 31, 2008." The remaining portion of the paragraph of the complaint that plaintiff refers to alleges that plaintiff transitioned out of the firm in September of 2008 and opened his own office on October 1, 2008. Defendant's response to this allegation was that it had "insufficient knowledge as to when Plaintiff opened his own office." Based upon this response, plaintiff essentially argues that it must be taken as true that he continued to work for defendant until August 31, 2008, under the terms of Montgomery's letter. See 735 ILCS 5/2-610(b) (West 2010) ("Every allegation *** not explicitly denied is admitted, unless the party states in his or her pleading that he or she has no knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge, or unless the party has had no opportunity to deny controvert the statement in plaintiff's statement of facts in his opening brief in this court").

¶21 However, Illinois is a fact pleading state and only well-pled facts that are not denied, as opposed to legal conclusions, are taken as true. See *Florsheim v. Travelers Indemnity Co. of Illinois*, 75 Ill. App. 3d 298 (1979); *Bratkovich v. Bratkovich*, 34 Ill. App. 2d 122 (1962). Plaintiff's allegation that his "last day of employment under his December 2006 agreement with defendant was August 31, 2008" amounts to a legal conclusion that he had a contract to continue to work for defendant after the initial 14-month period of employment ended. However, it is not a well-pled fact that must be taken as true. Among other things, there are no facts alleged that an agreement was reached with defendant to continue to work pursuant to that letter, if there was an agreement as to plaintiff's salary for 2007 or if there was an agreement that the language in the letter regarding a bonus was applicable to plaintiff's work in 2007. There were no facts alleged as to the term of plaintiff's second year at the firm. Ultimately, we find that the allegation in the complaint was a conclusion that is insufficient to defeat the motion for summary judgment or to establish that plaintiff had a contract to work for defendant in 2007 or, finally, to establish the terms of such a contract. Moreover, the language in Montgomery's letter contradicts the allegation in plaintiff's complaint. The letter only provides for plaintiff's employment and compensation until February of 2007. There is no language in the letter indicating regarding an extension of plaintiff's employment with defendant or the relevant terms of such employment. For these reasons, we find that plaintiff cannot rely upon Montgomery's letter as the basis for his breach of contract claim regarding his 2007 year-end bonus.

¶22 Additionally, even if the letter constitutes the "contract" under which plaintiff worked in 2007, the terms of the letter are too indefinite to enforce by way of a breach of contract claim. As with any contract, the terms of an employment contract must be clear and definite to be enforceable by way of a breach of contract action. *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d

482, 485 (1997).

¶23 In this case, plaintiff focuses on the language in Montgomery's letter stating that plaintiff would be paid a salary of $250,000 "*plus a year end bonus*" to support his assertion that defendant contractually agreed to award plaintiff a bonus. However, the issue is not whether defendant was contractually obligated to award plaintiff any bonus because plaintiff was given a $40,000 bonus for his work in 2007. The issue instead is whether the terms of the letter providing that plaintiff would receive a bonus were sufficiently clear and definite so as to be enforceable through a breach of contract claim. After considering the language of the letter as a whole, we conclude that they were not. See *Northwest Podiatry Center, Ltd. v. Ochwat*, 2013 IL App (1st) 120458, ¶ 40 (observing that "because words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others" and that "[i]t is improper to determine the parties' intent by looking at a contract clause or provision in isolation").

¶24 In addition to the phrase quoted by plaintiff, the letter goes on to state that at the end of February 2007, plaintiff's performance would be "reviewed for bonus purposes." The letter then states that the bonus would be based on fees received that plaintiff generated as well as fees received from work that plaintiff performed on other matters. The letter concludes by stating, "[o]bviously, there are other considerations which go into the bonus decision such as quality of work, business generation efforts, your overall performance on matters affecting the firm and its clients and the overall profitability of the firm." The letter also does not promise plaintiff a minimum amount for his bonus. Plaintiff is correct that there is no language in the letter explicitly stating that the award of any bonus was "discretionary." Nevertheless, when the language of the letter is considered as a whole, it is clear that the amount of plaintiff's bonus was

within defendant's discretion and would be based on a number of factors. Although some of those factors are listed in the letter, it is also evident that the list is not exhaustive and that there was no precise formula that would be used to arrive at the determination as to the amount of a bonus.

¶25 In *Collins v. Associated Pathologists Ltd.*, 676 F. Supp. 1388, 1408 (1987), the court considered language in an employment contract stating "[t]he employee's compensation shall be fixed from time to time by the corporation's board of directors, and shall consist of a basic salary with or without supplementation by way of bonuses." The plaintiff in that case did not receive a bonus and brought a breach of contract action. In entering summary judgment on that claim, the court considered whether the plaintiff was promised a bonus or whether the contract created a mere expectancy of a bonus. The court reasoned:

> "The Court finds that the contract language quoted above unambiguously sets forth the compensation to which an APL member is entitled. It is clear from the contract that the payment of a bonus is within the discretion of the board of directors: the board is given the power to fix an employee's compensation, and there is no other language in the contract which limits that discretion or details how it must be exercised. The law is clear in Illinois that where the award of a bonus is discretionary, an employee may not compel payment as a matter of right. *Mosow v. National Lock Co.*, 119 Ill. App. 2d 232, 255 N.E.2d 500 (2nd Dist.1970) (employee not entitled to receive a bonus where letters that indicated he would be a participant in a 'contingent compensation plan' indicated that the decision whether to pay an employee a bonus was subject to the discretion of the board of directors)." *Id*. at 1409.

As relevant to this appeal, the court then considered whether, even if the contract promised a

bonus, such a promise was enforceable through a breach of contract action. The court observed:

> "Moreover, there is nothing in the evidence submitted by the parties which suggests that a particular predetermined formula was in place which established a means of calculating the amount of bonuses that would be paid to APL pathologists. Thus, not only does the contract establish that the bonus is discretionary, but the Court would not be able to enforce a contractual term requiring payment of a bonus because the Court cannot enforce a promise that is uncertain and indefinite." *Id.*

¶26 We recognize that this case is not entirely factually analogous to the present case and that federal decisions are not binding on this court. See *Wilson v. County of Cook*, 2012 IL 112026, ¶ 30. Nevertheless, we agree with the reasoning regarding whether the promise to pay a discretionary bonus is enforceable through a breach of contract claim. In this case, it is clear that the amount of plaintiff's bonus was within defendant's discretion and that there were a number of factors that went in to that determination. There was also no predetermined formula which established a method for determining plaintiff's bonus. Accordingly, we find that under the facts of this case, where plaintiff received a bonus and is only disputing the amount of the bonus, the terms of the letter requiring payment of a bonus are too uncertain and indefinite to enforce through a breach of contract claim. For this reason as well, we find that summary judgment was properly entered.

¶27 Plaintiff claims that summary judgment was improper because there is an issue of material fact as to whether defendant breached the agreement by failing to base his bonus on fees received from work that plaintiff performed. Essentially, plaintiff's entire breach-of-contract argument rests on the notion that if defendant had considered the TKS contingent fee in determining his bonus, such consideration would have been demonstrated by a larger sum of

money than the $40,000 he received.

¶28 However, no minimum amount for any bonus was set in the agreement and the amount of any bonus awarded to plaintiff was within defendant's discretion. Moreover, there were a number of factors that went into the decision with respect to plaintiff's bonus, and fees generated from work that plaintiff performed was only one of those factors. Further, Montgomery's as well as John's testimony established that the TKS contingent fee and the time plaintiff put into that case were considered when determining plaintiff's bonus and that plaintiff's bonus reflected that credit he was given for his work on the TKS matter and the successful contingent fee the case generated. The testimony on this issue was unrefuted and therefore it must be taken as true. See *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986) (When a party fails to contradict, by counter-affidavit or deposition, statements in the depositions or affidavits presented by the moving party, the statements are taken as true for purposes of a summary judgment motion). Further, John testified that "bonuses are based on yearly merit in the firm, and we take into consideration just about everything a lawyer does or does not do during that period of time."

¶29 Plaintiff claims that the profitability report generated by defendant shows that the TKS contingent fee was not considered in determining his bonus and profitability to the firm. However, the profitability report was not created until August of 2008, four months after plaintiff received his bonus in April of 2008. As such, this report was not before the compensation committee and the executive committee when plaintiff's 2007 bonus was determined. Moreover, Montgomery testified that the TKS fee was considered in the hours worked and the working attorney fees collected along with the hours worked and fees collected by plaintiff in other matters. Montgomery also testified that although the contingent fee was not listed as a "separate line item" on the chart, the fee was considered in determining plaintiff's bonus. Montgomery

also explained that contingent fees are not broken out for non-equity partners unless the fee is generated from business the income partner produced himself, and it is undisputed that plaintiff did not produce the TKS work.

¶30 For these reasons, we reject plaintiff's claim that summary judgment was improperly entered because an issue of material fact exists as to whether the TKS contingent fee was considered in arriving at plaintiff's bonus. The unrefuted testimony establishes that the TKS fee and the work plaintiff put into the case were considered in determining plaintiff's bonus.

¶31 Plaintiff's final claim is that even if defendant had discretion as to the amount of his bonus, there is an issue of material fact as to whether defendant exercised that discretion in good faith. Plaintiff claims that defendant did not do so because it did not give him credit for the TKS contingent fee.

¶32 We initially note that this argument is essentially a recasting of plaintiff's previous argument folded under the rubric of the covenant of good faith and fair dealing. As with that argument, we find no issue of material fact on whether defendant breached the covenant of good faith and fair dealing.

¶33 Every contract contains an inherent duty of good faith and fair dealing. *Bass v. SMG, Inc.*, 328 Ill. App. 3d 492 (1st Dist. 2002); *Nathan v. Morgan Stanley Renewable Development Fund*, 2012 WL 1886440 (N.D. Ill.). It is generally true that where one party to a contract is given broad discretion in performance, it must exercise that discretion reasonably and with a proper motive. *Bass*, 328 Ill. App. 3d at 505. Plaintiff points to the portion of the letter stating "[y]our bonus *will be based upon* fees received …," and claims that defendant had no discretion as to whether to consider the TKS contingent fee. Plaintiff also claims that defendant submitted "no proof" that it relied upon other factors besides the TKS matter to determine plaintiff's bonus.

We disagree.

¶34 As noted above, the unrefuted testimony established that the TKS matter was considered in arriving at plaintiff's bonus. However, the letter also set forth a number of other factors that would be considered in determining plaintiff's bonus. The letter set forth no formula for determining a bonus and thus did not indicate that fees earned from work that plaintiff performed was the only factor or even the most relevant factor in a bonus determination. The unrefuted testimony established that defendant considered a number of other factors in its bonus determination in addition to the TKS contingent fee. Those included plaintiff's work on a deposition, his failure to meet the minimum billable hour requirement and his failure to bring into the firm the amount of business plaintiff had indicated he would. Plaintiff points only to the amount of his bonus as evidence that defendant did not evaluate plaintiff in good faith and claims that, had defendant done so, his bonus would have had to have been more. We find plaintiff's argument circular and it does not address the unrefuted testimony the factors that defendant considered in determining plaintiff's bonus. There is nothing in the record creating an issue of material fact as to whether defendant acted in good faith when it evaluated plaintiff for a bonus.

¶35 In reaching this conclusion, we note that the case relied upon by plaintiff, *Nathan*, is inapplicable to the present case. In that case, the plaintiff did not receive a discretionary annual bonus and claimed that the defendant breached the contract by failing to evaluate the award of any bonus in good faith. *Nathan*, 2012 WL 1886440 at 13. The only issue in *Nathan* was whether that allegation stated a claim upon which relief could be granted and the court found that it did state such a claim. However, this appeal did not arise after the granting of a motion to dismiss for failure to state a claim and therefore the holding in *Nathan* has no applicability to this case. The procedural posture of this case is entirely different and the question before us is if

there is an issue of material fact as to whether defendant did not act in good faith in evaluating plaintiff for a bonus. As we have already concluded, there is no such issue of material fact.

¶36 For all these reasons, we find that summary judgment was properly entered against plaintiff and we therefore affirm the judgment of the circuit court of Cook County.

¶37 Affirmed.