2012 IL App (2d) 110101-U
No. 2-11-0101
Order filed March 30, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NANCY E. WARNER, as Trustee of the Nancy E. Warner Trust dated May 27, 1994,	)	Appeal from the Circuit Court of Lee County.
Plaintiff-Appellant,	)	
v.	)	No. 07-L-21
JOHN RYAN, KELLY RYAN, MICHAEL SCHELKOPF, STEVE FEUERBACH, and MARK APPELQUIST,	)	Honorable Charles T. Beckman,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: While the trial court correctly found no basis for the alleged fraudulent concealment, there exist genuine issues of material fact concerning the alleged misrepresentation of the old right-of-way and the proposed use of the Ryan property and plaintiff's reliance thereon to execute an easement; summary judgment affirmed in part and reversed in part, cause remanded.

¶ 1 Plaintiff, Nancy E. Warner, appeals from the trial court's grant of summary judgment in favor of defendants, John and Kelly Ryan, Michael Schelkopf, Steve Feuerbach, and Mark Appelquist. On appeal, plaintiff contends that the trial court erred in granting defendants' motions for summary

judgment because there existed evidence that defendants conspired to defraud her. For the reasons that follow, we affirm in part and reverse in part, and remand the cause for further proceedings.

¶ 2 BACKGROUND

¶ 3 In June 2007, plaintiff filed a complaint against defendants sounding in conspiracy to defraud. The following facts are taken from the complaint, depositions, affidavits, and exhibits in the record. Plaintiff was the trustee of the Nancy E. Warner Trust dated May 27, 1994, which held some property located in Lee County (Warner property). The Warner property was previously owned by Nancy Warner's parents, Henry and Lucille Warner. In June 2003, the Ryans entered into a purchase agreement to buy 180 acres adjacent to the Warner property (Ryan property). Shortly thereafter, but before the Ryans had closed on the purchase of the Ryan property, Schelkopf and Feuerbach approached the Ryans about purchasing a portion of the Ryan property for the construction and operation of a hog confinement facility. On July 21, 2003, the Ryans entered into an agreement to sell 11 acres of the Ryan property to Precision Pork, LLC, the entity that would run the hog facility. The Ryans, Schelkopf, Feuerbach, and Appelquist, an employee of Commonwealth Edison (ComEd), discussed the fact that the portion of the Ryan property that would be used for the hog facility did not have electrical service. Appelquist told the others that, although there existed a right-of-way across a portion of the Warner property, it did not extend to the hog facility site and a new easement across the Warner property would be required. Defendants agreed that the Ryans would contact plaintiff to obtain an easement and that they would not disclose the intended use of the property to plaintiff.

¶ 4 The Ryans sent a letter to plaintiff, dated July 23, 2003, requesting an easement across the Warner property so that electricity could be run to the Ryan property. According to the letter, the

Ryans believed that "for future possibilities of grain storage or a building, it would be better to have the access to power in place now than later." The letter referred to the old right-of-way, but the Ryans stated that ComEd wanted to "modernize" its records with a new easement. The letter also referred plaintiff to Appelquist. The Ryans closed on the purchase of the Ryan property on August 7, 2003. Five days later, the Ryans sent a second letter to plaintiff requesting an easement across the Warner property to run electricity to the Ryan property. Copies of both letters were sent to Schelkopf, Feuerbach, and Appelquist. On August 20, 2003, a second agreement for the purchase of the hog facility site was executed, this time conditioned upon the obtention of electrical services for the site.

¶ 5 Plaintiff contacted Appelquist to discuss the possibility of an easement. During those conversations, Appelquist did not disclose that the old right-of-way did not run all the way to the Ryan property or that the other defendants intended to construct and operate a hog facility on the Ryan property. On October 28, 2003, believing that the old right-of-way was difficult to understand, ComEd needed its records modernized, and the Ryans intended the easement to supply electricity for grain storage and other buildings, plaintiff executed the easement documents.

¶ 6 Shortly thereafter, the purchase of the hog facility site was completed and a notice of intent to construct the hog facility was sent to the neighboring landowners. In response, in January 2004, plaintiff and over 100 other neighbors filed a nuisance suit against Precision Pork and Bethany Swine Management Services, LLC.

¶ 7 All of the defendants filed motions for summary judgment, which the trial court granted following a hearing. Specifically, the trial court found that there was no agreement between defendants, Appelquist did not owe a duty to plaintiff to disclose the intended use of the easement,

Schelkopf and Feuerbach were not involved in the obtention of the easement, other than talking to the Ryans, and although the letters from the Ryans were misleading, they were not fraudulent. Plaintiff then brought this timely appeal.

¶ 8 ANALYSIS

¶ 9 On appeal, plaintiff contends that the trial court erred in granting defendants summary judgment because there was, in fact, evidence that defendants conspired to defraud plaintiff. Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008). Because summary judgment is a drastic means of disposing of litigation, it should be granted only when the right of the moving party is clear and free from doubt. *Swann & Weiskopf, Ltd. v. Meed Associates, Inc.*, 304 Ill. App. 3d 970, 974 (1999). This court reviews *de novo* an order granting summary judgment (*Shannon v. Boise Cascade Corp.*, 208 Ill. 2d 517, 524 (2004)), and we will view the evidence, and all reasonable inferences drawn therefrom, strictly against the movant and liberally in favor of the opponent. *Harris v. Old Kent Bank*, 315 Ill. App. 3d 894, 899 (2000). In response to a motion for summary judgment, the movant is not required to establish his or her case as he or she would at trial, but he or she must present some factual basis that would arguably entitle him or her to a judgment. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill.2d 17, 31 (1999).

¶ 10 "Civil conspiracy consists of a combination of two or more persons for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means." *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 62 (1994). A plaintiff can succeed on a claim of

civil conspiracy only if he or she establishes that one of the parties to the agreement committed a tortious or unlawful act in furtherance of the agreement. *Adcock*, 164 Ill. 2d at 63. The tortious or unlawful nature of the overt act is key: "To state a cause of action for conspiracy, a plaintiff must allege not only that one of the conspirators committed an overt act in furtherance of the conspiracy, but also that such act was tortious or unlawful in character." *Adcock*, 164 Ill. 2d at 63.

¶ 11 Plaintiff alleges that the tortious act defendants committed was fraud. Fraud may be committed in two ways: fraudulent misrepresentation and fraudulent concealment. See *Doe v. Dilling*, 228 Ill. 2d 324, 342-43 (2008) (fraudulent misrepresentation); *Doe v. Brouillette*, 389 Ill. App. 3d 595, 616 (2009) (fraudulent concealment). The elements for each are different; therefore, it is important to identify which type of fraud plaintiff is alleging. In her complaint and her brief on appeal, plaintiff alleges that defendants both made fraudulent misrepresentations in the Ryans' letters to her and intentionally concealed the intended use of the property. Although plaintiff's ultimate complaint seems to be that defendants never disclosed their intention to use a portion of the Ryan property for a hog facility, and although plaintiff seems to take issue with the alleged misrepresentations primarily because they do not reveal defendants' intended use for the property, we will address plaintiff's claims as claims for both fraudulent misrepresentation and fraudulent concealment.

¶ 12 Fraudulent Misrepresentation

¶ 13 First, plaintiff alleges that defendants made fraudulent misrepresentations in the Ryans' letters to plaintiff. According to plaintiff, defendants misrepresented (1) the status of the old right-of-way signed by plaintiff's father, and (2) the intended use of the property.

¶ 14 To maintain a claim for fraudulent misrepresentation, plaintiff must establish the following: (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce plaintiff to act; (4) action by plaintiff in justifiable reliance on the truth of the statement; and (5) damage to plaintiff resulting from such reliance. *Dilling*, 228 Ill. 2d at 342-43.

¶ 15 "In order to survive a motion for summary judgment, the nonmoving party must come forward with evidentiary material that establishes a genuine issue of fact." *Dash Messenger Service, Inc. v. Hartford Insurance Co.*, 221 Ill. App. 3d 1007, 1009 (1991). The materiality of a misrepresentation is a question of fact to be determined by the trier of fact. *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 287 (2006). Moreover, the opponent of a motion for summary judgment may rely on reasonable inferences drawn from the materials on the motion and such inferences are resolved in favor of the party opposing the motion. *Certified Mechanical Contractors, Inc. v. Wight & Co., Inc.*, 162 Ill. App. 3d 391, 399-400 (1987). "If the undisputed material facts could lead reasonable observers to divergent inferences, or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007).

¶ 16 Plaintiff alleges in her complaint that she relied upon the written representations of the Ryans' letters and that they misrepresented the present status of the right-of-way for electrical services. It was plaintiff's understanding that ComEd wanted to update the easement previously signed by her father. In opposition to defendants' motions for summary judgment, plaintiff noted that Applequist clearly stated at his deposition that power *never* ran to the Ryan property and, at least at the present time, the old right-of-way was insufficient to erect new power lines to the Ryan property. However, the Ryans' letter specifically states that the old right-of-way "was produced by

Henry Warner to allow electricity to go to the farm that [the Ryans were] buying." The Ryans further wrote that "[p]ower was at one time going to the farm," and that the Ryans were "trying to get electricity back to it again" by routing power lines up "where they once were." We believe that a comparison of the Ryans' statements to Applequist's is sufficient to raise a question of material fact as to whether defendants made false and misleading statements to plaintiff regarding the status of the right-of-way.

¶ 17 We further believe that a material question of fact exists as to whether plaintiff's reliance on the Ryans' representation that they were the intended users of the electricity was reasonable. The trial court, without saying it directly, suggested that plaintiff's reliance on the Ryans' representation was unreasonable. In its ruling, the court stated: "Nothing else was done by her as far as determining the nature or use of that ***." The record reveals that John Ryan was a farmer who had not owned any livestock for 24 years. Rather than simply relying on the Ryans' letters, plaintiff did make inquiries about John Ryan through her nephew. She also consulted an attorney, David Fritts, a retired judge from Lee County. Anyone looking into John Ryan's background on plaintiff's behalf would not have suspected that John Ryan intended to sell a portion of the land to be used as a hog facility. The trial court dismissed the idea that plaintiff was concerned about the potential use of the land because all she did was consult her nephew and Fritts. We disagree with this assumption. That plaintiff consulted an attorney is an important fact. Attorneys are presumed to have exercised reasonable care and skill in serving their clients. See *Bronstein v. Kalcheim & Kalcheim, Ltd.*, 90 Ill. App. 3d 957, 959 (1980). In ruling on a motion for summary judgment, the court is required to construe all evidentiary material strictly against the movant and liberally in favor of the opponent. *Westbank v. Maurer*, 276 Ill. App. 3d 553, 558-59 (1995). The trial court in this case failed to

construe this evidentiary material liberally in plaintiff's favor and instead implied that she had a duty to do more "as far as determining the nature or use *** [of the Ryan property]."

¶ 18 Additionally, the trial court focused on the fact that the Ryans never spoke to plaintiff directly "concerning the easement other than the letter[s]," which the court found to be "misleading but not fraudulent." What the trial court ignored is the fact that, in both of the letters, the Ryans directed plaintiff to speak to Applequist, who could not by rule disclose the intended use of the electricity. Generally speaking, the law does not permit a person to enter into a transaction with eyes closed to material facts and then claim fraud by deceit. *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 651 (2001). However, the right to rely depends on the consideration of all the surrounding circumstances. *Id.* The Ryans' letters clearly conveyed that they were the intended users of the electricity. The last two lines of the August 12, 2003, letter read:

> "Mark (Applequist) needs a contact with you[,] [t]he adjoining owner to *our farm*, to get an easement in place for us. Hope things are good in California. *Our crops* here look wonderful." (Emphases added.)

Plaintiff was 80 years old and had been living in California for over 30 years. She was directed to speak to a person who was prohibited by rule from telling her the intended use of the electricity; she checked into the Ryans' background through her cousin, and she consulted an attorney regarding the old right-of-way and whether she should agree to a new easement. These surrounding circumstances raise, at the least, a material issue of fact as to whether plaintiff's reliance on the Ryans' representation that they were the intended users of the electricity was reasonable.

¶ 19 Plaintiff also alleged that defendants fraudulently misrepresented the intended us of the property when the Ryans stated in their letter that, "for future possibilities of grain storage or a

building, it would be better to have the access to power in place now than later." According to plaintiff, this was a misrepresentation because defendants did not plan to use the property for grain storage and there was no mention of defendant's intention to use it for a hog facility. With respect to the former, the Ryans did not state that they intended to use the property for *only* grain storage; rather, they stated that the property may be used for grain storage "*or a building*." (Emphases added.) Certainly, a hog facility might fall within the ambit of a building, at least with respect to what the easement would be supplying with electrical access. However, the following colloquy took place during plaintiff's deposition:

"Q. Could you tell me specifically how you believe John and/or Kelly Ryan lied to you?

A. Exhibit 2, I think for future possibilities of grain storage or a building he would like to have access—better access to power in place now than later for the purposes of grain storage or a building.

Q. And why do you believe that was a lie when they told you that in the future they may want to put a building there or that someone may put a building there? Why did you believe that was a lie?

A. I now believe that was a lie; I didn't believe it then.

Q. Why do you now believe?

A. Because there is something down there called a hog farm.

Q. Is it in a building?

A. Certainly is.

Q. You have seen it?

A. Outside.

Q. And it's one building?

A. So far.

Q. So there is a building there?

A. Uh-huh.

Q. Is that yes?

A. That's a yes.

Q. And there's nothing else there at this time but a building, correct?

A. I couldn't say for sure. One is forbidden to enter that property.

Q. To the best of your knowledge from all the information you have and from your personal observations or from anyone's communications to you, do you believe there's anything there now but a building?

A. I'm not sure. I don't know.

Q. As long as there is a building there though you would agree with me that's consistent with that letter that's marked as Exhibit 2 today; is that correct?

A. Yes."

The initial burden of proof in a motion for summary judgment lies with the movant to come forward with competent evidentiary material, which if uncontradicted, entitles the movant to summary judgment as a matter of law. *Caburnay v. Norwegian American Hosp.*, 2011 IL App (1st) 101740 ¶ 30. Here, the statements made by plaintiff did not unequivocally state that only one building was on the property. It does not conclusively establish only one building was planned or built. Moreover, defendants do not point to any evidence as to what the site plan looked like or how many

buildings they had planned. This raises a question of material fact as to whether defendants misrepresented the use of the property by stating that they planned on erecting only a single building.

¶ 20 Plaintiff's true issue with the Ryans' statement regarding why they wanted electrical access for the property is that they failed to specifically mention the hog facility. This failure, however, is not a misrepresentation, but an omission, and thus falls in the realm of fraudulent concealment, not fraudulent misrepresentation.

¶ 21 Fraudulent Concealment

¶ 22 In addition to being part of her claim of fraudulent misrepresentation, plaintiff's contention that defendants concealed the fact that they intended to use a portion of the Ryan property for a hog facility forms the basis of her fraudulent concealment claim. In order to constitute fraud "a false statement of material fact known or believed by the maker to be false must have been made with the intent to induce another to act and must have been reasonably believed and justifiably relied upon by the other party to his detriment." *Warner v. Lucas*, 185 Ill. App. 3d 351, 353-54 (1989). "Fraud also may consist of the intentional omission or concealment of a material fact under circumstances creating an opportunity and duty to speak." *Warner*, 185 Ill. App. 3d at 354.

¶ 23 The existence of a duty owed by the defendant to a plaintiff is a question of law, which may be determined on a motion for summary judgment. *Jacob v. Greve*, 251 Ill. App. 3d 529, 534 (1993).

¶ 24 Of most importance here is the requirement that plaintiff demonstrate the existence of a special or fiduciary relationship between the parties that gave rise to a duty on the part of defendants to inform plaintiff that defendants intended to use the property for a hog facility. See *Illinois Non-Profit Risk Management Ass'n v. Human Service Center of Southern Metro-East*, 378 Ill. App. 3d

713, 723 (2008). Absent such a relationship between the parties, there is no duty to speak. *Neptuno Treuhand-Und Verwaltungsgesellschaft MBH v. Arbor*, 295 Ill. App. 3d 567, 573 (1998).

¶ 25 Plaintiff did not allege in her complaint any special or fiduciary relationship between her and any of the defendants. Nor did she present evidence at summary judgment of any special or fiduciary relationship between her and any of the defendants. In fact, though all of the defendants raise on appeal the lack of a special or fiduciary relationship giving rise to the duty to speak, plaintiff did not address the issue at all in her reply brief. This failure to address, much less present any evidence of, a special or fiduciary relationship giving rise to a duty to speak requires affirming the trial court's grant of summary judgment in favor of defendants on plaintiff's claim of fraudulent concealment.

¶ 26 CONCLUSION

¶ 27 For the reasons stated, the trial court correctly found no basis for the alleged fraudulent concealment of the proposed use of the Ryan property; however, there exist genuine issues of material fact concerning the alleged misrepresentation of the old right-of-way and the proposed use of the property and plaintiff's reliance thereon to execute a new easement. Accordingly, the judgment of the circuit court of Lee County is affirmed in part, and reversed in part, and the cause is remanded for further proceedings.

¶ 28 Affirmed in part, reversed in part, and remanded.