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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> ESTATE OF LILLIAN McMULLEN, Deceased,)	Appeal from the Circuit Court of Kendall County.
)	
)	No. 07-P-90
)	
(James Ismiel and Mary Ann Snyder, Plaintiffs-Appellants, v. Timothy Ismiel and Catherine Ismiel, Defendants-Appellees).)	Honorable Timothy J. McCann, Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

Held: The trial court's finding that the parties did not enter into an oral contract to share the proceeds from the sale of decedent's home was not against the manifest weight of the evidence. As the remaining claims in plaintiffs' complaint derived from their allegations of an alleged agreement, the court's ruling on the contract issue necessarily disposed of all claims. Affirmed.

¶ 1 After Lillian McMullen's death, plaintiffs, James Ismiel and Mary Ann Snyder, petitioned to invalidate her will, raising claims related to an alleged oral contract with defendants, Timothy and Catherine Ismiel, to share in the proceeds from the sale of Lillian's home. Following a bench trial, the trial court found that the parties did not enter into an oral contract. Plaintiffs appeal. We affirm.

¶ 2

I. BACKGROUND

¶ 3 Lillian McMullen died on August 11, 2006. Her heirs at law and next of kin were as follows: James Ismiel (nephew), Timothy Ismiel (nephew), and Mary Ann Snyder (niece). James, Timothy, and Mary Ann are siblings. At the time of Lillian's death, her estate was worth about \$450,000, the primary asset of which was her home at 5237 North Spaulding in Chicago.

¶ 4 On September 6, 2007, James Ismiel petitioned to probate Lillian's May 20, 2006, will and letters testamentary. In this will, Lillian essentially bequeathed her estate equally to James, Timothy, and Mary Ann. In the petition, James asserted that a subsequent will, dated June 9, 2006, and which bequeathed the estate to James and several relatives in Ireland, was believed to be destroyed. James also stated that he believed that a third will, dated July 28, 2006, which gave rise to this litigation, was invalid due to fraud and undue influence. In the third will, Lillian bequeathed her estate to defendants (Timothy and Catherine, Timothy's wife).

¶ 5 On November 20, 2007, the third will was admitted to probate, letters testamentary were granted and issued, and an independent administrator was appointed. Subsequently, James and Mary Ann each separately petitioned to invalidate Lillian's third will, asserting claims challenging the third will's validity and claims related to an alleged oral agreement concerning the distribution of the proceeds from the sale of Lillian's home. As to the home sale, James and Mary Ann alleged that, on or about December 2006, a contract was received to sell Lillian's house. Further, at this time (late 2006 and early 2007), Timothy, James, and Mary Ann spoke several times in person and on the telephone and agreed that the house would be sold and the proceeds equally divided among them. They further alleged that Timothy reaffirmed the parties' agreement to equally divide the proceeds on January 23, 2007, after Timothy contacted James to inform him of the January 31, 2007, closing on the property. According to plaintiffs, Timothy requested that they each sign a power of attorney (to Timothy) and a deed in order to promptly complete the home sale. James and Mary Ann each

executed the documents. They alleged that Timothy did not divide the proceeds as agreed and, instead, pursuant to a letter of direction to the title company, all of the proceeds were paid to Timothy and Catherine.

¶6 In subsequent pleadings, James and Mary Ann voluntarily dismissed their claims challenging the third will's validity. James's remaining claims were: promissory fraud, constructive trust, civil conspiracy, breach of fiduciary duty, and breach of contract. The claims remaining in Mary's petition were: fraud, constructive trust, breach of fiduciary duty, and breach of contract. In their breach-of-contract counts, plaintiffs alleged that, in exchange for dividing the proceeds, James and Mary Ann executed powers of attorney and signed the deed and other closing documents and did not pursue any claims that they may have had on the third will. They further alleged that Timothy received the ability to immediately close on the home sale and have immediate access to the proceeds. They further asserted that the parties' agreement was memorialized in two letters from Steven Titiner, Timothy's attorney, wherein Titiner confirmed that Timothy would share with plaintiffs the proceeds.

¶7 In his first letter, dated January 3, 2007, and sent to plaintiffs, Titiner notified plaintiffs that he represented Timothy in regards to Lillian's estate and noted that he had attached a copy of Lillian's third will and a receipt of the copy filed with the trial court on August 23, 2006. He further stated that he found Lillian to be of sound mind to execute the document and that she "left everything" to Timothy and Catherine. Titiner further stated:

"Nevertheless, your brother has advised me that he would like to make arrangements with you to share in the proceeds of the sale of the home. After you've had an opportunity to review this correspondence please contact me in order to discuss this matter more fully. Thank you in advance for your prompt attention and assistance in this matter."

¶ 8 In the second letter, dated January 15, 2007, and also addressed to plaintiffs, Titiner first noted that he was enclosing a deed and power of attorney (to Timothy) to effectuate the sale of Lillian's home. He further stated: "It is Tim's request that you execute these documents in lieu of the monies and personal property which you have already taken from the home as well as the future monies which Tim will be transferring to you after the sale is completed." Titiner then noted that the closing was imminent and requested prompt execution of the documents.

¶ 9 The bench trial, the focus of which were the (identical) breach-of-contract claims, commenced on May 23, 2011. James testified that, some time after Lillian executed her second will, but before she had passed away, James, Timothy, Mary Ann, and Tim (Mary Ann's husband) first discussed the division of Lillian's estate¹ (while at their aunt's apartment). They agreed that they would divide everything three ways. A similar conversation occurred during a mid-July 2006 telephone conversation between James and Timothy. James further testified that, after Lillian's funeral, he, Timothy, and Catherine, while in a restaurant parking lot, again discussed the equal division of the estate. According to James, during all of the conversations, Timothy agreed to the division. During the final conversation, however, Catherine stated that she was going to decrease the amount that Mary Ann was going to receive. It was at this time that James first became concerned about the division of the proceeds. James signed the documents enclosed with Titiner's January 15, 2007, letter to ensure that the home sale proceeded quickly. James read the second letter

¹The witnesses alternatively testified as to an alleged agreement to share in the proceeds of the home sale and/or the entire estate. For purposes of our analysis below, we refer only to the home sale, as this was the allegation contained in their petitions.

to mean that, if he signed the documents, he would promptly receive his one-third-share of the sale proceeds. He never received the proceeds.

¶ 10 James further testified that, after Timothy had confirmed the sale had closed, James contacted him “many times ;” he also spoke to Catherine. Both informed him that there were inheritance taxes that needed to be paid out of the proceeds. In mid-February 2007, James went to Timothy’s home and spoke to Catherine, who accused him of harassing them. A couple of days later, he called Catherine, who again accused him of harassment. This was the last time he spoke to Timothy or Catherine about the sale. At this point, James believed that he was not going to receive his share of the proceeds.

¶ 11 Mary Ann testified that, in May 2006, prior to Lillian’s death, she spoke to Timothy on the telephone and he stated that he had spoken with James and that Lillian’s estate would be divided three ways between them. She also corroborated James’ testimony concerning the apartment conversation about the topic. Mary Ann further testified that another conversation occurred at Timothy’s home in August 2006 and that Timothy stated to her that Lillian’s will left her estate to him and Catherine. When Mary Ann inquired if he was going to “share” it, he responded in the affirmative. They discussed how they would spend the money. Addressing Titiner’s letters, Mary Ann testified that she expected that she would receive one-third of Lillian’s estate if she executed the documents to effectuate the home sale. She did not contact Titiner to inquire as to whether the estate would be equally divided. Mary Ann would not have signed the documents if not for her understanding that she would receive one third of the estate. She conceded that, during the apartment conversation, Timothy did not say anything when the others discussed equally dividing the estate. When asked if Timothy ever stated to her that he was going to give Mary Ann one third of the proceeds of the home sale, Mary Ann stated: “He never said those words.”

¶ 12 Steven Titiner testified that he drafted Lillian's July 28, 2006, will, under which Timothy and Catherine were sole legatees. After Lillian passed away, he spoke to Timothy about whether the title company would authorize the home sale (and clear title on it) based only upon the will or if the estate had to go through probate. Timothy and Catherine told Titiner that they wished to sell Lillian's home. The title company advised Titiner that, if he obtained the signatures of all of the heirs, the home could be sold without going through probate.

¶ 13 Addressing the two letters, Titiner testified that he included the disputed language at Timothy's direction. He testified:

“There had been discussions between Tim and I that at some point he may or may not have an interest in sharing the proceeds with his brother or sister. That was the nature of the original letter on January 3rd.

By January 15th obviously I had had additional conversations with him, and I knew about additional monies and personal property, and continued to follow up with the information in the letter.”

¶ 14 Titiner and Timothy never discussed “a dollar amount.” In a conversation at Mary Ann's house, Mary Ann asked Titiner if she was going to receive any funds and Titiner told her that he did not know if Timothy was going to share any proceeds with her.

¶ 15 Timothy testified that he told Titiner that he wanted to share the home sale proceeds with his siblings. As to Titiner's second letter, Timothy requested that Titiner have James and Mary Ann sign the documents in exchange not only for monies that they had but also for future proceeds from the home sale. He has not given them any of those funds and currently has no intention to do so. Timothy testified that he did not provide Titiner with any specific information about his intentions

or make reference to *equally* sharing the proceeds. Timothy explained that, at the time, he had not determined what he was going to give them.

¶ 16 Addressing a July 2006 conversation with James, Timothy testified that James stated that he expected to receive one third of Lillian's estate. Timothy responded that he was going to wait to ensure everything settled; he never told James that he was going to share the estate by giving him one third of it or the sale proceeds. Timothy also denied that he ever told Mary Ann that he would give her one third of Lillian's estate or the sale proceeds. Whenever the subject came up with James and Mary Ann, Timothy always responded in the negative and that he would wait and finalize everything. According to Timothy, James told him in August or September that he believed that Mary Ann should receive less than one third because she did not help clean up Lillian's house, did not like her very much, and was taking items out of the house.

¶ 17 Catherine Ismiel testified that she never promised James or Mary Ann any funds. She denied that she and James discussed the topic in a parking lot after Lillian's funeral; neither one brought it up.

¶ 18 On October 11, 2011, the trial court denied plaintiffs' petitions to invalidate the will, finding that plaintiffs did not establish by a preponderance of the evidence either the existence of an enforceable oral contract or a contract to make a valid gift. The court noted that "it is not the province of this Court to enforce a moral agreement." Plaintiffs appeal.

¶ 19

II. ANALYSIS

¶ 20 Plaintiffs argue that the trial court erred in denying their petitions on the basis of its finding that there was no oral agreement to equally share the home sale proceeds. Alternatively, they also argue that, because the court did not make any findings on their remaining claims, the matter should

be remanded for entry of judgment on those counts. For the following reasons, we reject plaintiffs' arguments.

¶ 21 “The elements of a breach of contract claim are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff.” *Henderson-Smith & Associates, Inc. v. Nahamani Family Service Center, Inc.*, 323 Ill. App. 3d 15, 27 (2001). The first element is the central issue in this appeal. “A contract may be enforced even though some contract terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.” *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 30 (1991). For example, “[w]here the parties have agreed on the essential terms, such as price and the items to be delivered for that price, a contract has been formed.” *Prignano v. Prignano*, 405 Ill. App. 3d 801, 816 (2010). It is not necessary that the parties share a subjective understanding as to the contract's terms; their conduct may indicate an agreement to the terms. *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 330-31 (1977). The existence of an oral contract, its terms, and the intent of the parties are questions of fact, and the trial court's determinations on those questions will be disturbed only if they are against the manifest weight of the evidence. *Laughlin v. France*, 241 Ill. App. 3d 185, 195 (1993).

¶ 22 Plaintiffs argue that the testimony and Titiner's letters were sufficient to establish a breach of oral contract. They assert that Timothy promised on numerous occasions to equally divide the sale proceeds and that his promise was reaffirmed in both of Titiner's letters. They contend that the parties agreed that, in exchange for plaintiffs signing the power of attorney and deed, Timothy and Catherine would share with them the home sale proceeds (in the amount of one third each to Timothy, Mary Ann, and James). Further, they argue that Timothy and Catherine “needed”

plaintiffs' signatures on the documents in order to clear title on the home and effectuate the sale. Plaintiffs further assert that they changed their position to their detriment by giving up any right to contest the third will "on an equal playing field" with defendants. They contend that they could have refused to sign the sale documents and forced defendants to open an estate and conduct the sale with court supervision. In exchange, they would have had the opportunity to contest the third will while the proceeds of the sale were escrowed with the court.

¶ 23 Defendants respond that a contract was never formed because there was never a meeting of the minds as to the *amount* of any gift. They argue that their representations and actions constituted only an oral promise to make a future gift, which was revocable until any delivery. See *Hofferkamp v. Brehm*, 273 Ill. App. 3d 263, 271 (1995) ("A promise to make a gift in the future is not a gift, is generally unenforceable, and is revocable at any time until the gift is executed").

¶ 24 We conclude that the trial court's finding that there was no enforceable oral contract was not against the manifest weight of the evidence. "Included in the formation of a valid contract are offer and acceptance, consideration, and definite and certain terms." *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813, 823 (2005). Although the trial testimony conflicted as to whether defendants had promised to equally share the home sale proceeds, we cannot conclude that the trial court erred in assessing the parties' credibility and essentially adopting Timothy's testimony that the parties never agreed to an essential term—the equal division of the proceeds.

¶ 25 James testified about three conversations wherein Timothy allegedly agreed to an equal division of the home sale proceeds. However, he testified that, during the final conversation, Catherine stated that Mary Ann would receive less than the other two heirs. This undermines James' testimony that the parties came to an agreement to equally divide the proceeds. Similarly, during

her testimony, Mary Ann stated that the parties discussed an equal division of the proceeds, but she also testified that, during the apartment conversation, Timothy was silent while plaintiffs discussed the division of the estate. Significantly, she also testified, when asked if Timothy ever told her that he would give her one third of the proceeds, that: “He never said those words.” During his testimony, Timothy testified that he initially wanted to share the proceeds with his siblings, but that he subsequently changed his mind. He denied *ever* telling his siblings that he would *equally* divide the estate. Further, he stated that James told him that Mary Ann should receive less than one third. Timothy also denied providing Titiner with any specific information about his intentions or that he made any reference to an equal division of the proceeds, a point that Titiner corroborated. “In a bench trial, the trial court sits as the trier of fact, hearing the witnesses and reviewing the direct presentation of the evidence, and it therefore is in the best position to make credibility determinations and factual findings.” *Prignano*, 405 Ill. App. 3d at 810. Because Timothy and Catherine’s testimony was not inherently incredible, we cannot conclude that the trial court erred in essentially adopting defendants’ version of events.

¶ 26 The letters Titiner sent to plaintiffs offer no support for their arguments because neither one reflects that the parties agreed on the essential terms of their alleged oral contract. The first letter informs plaintiffs only that Timothy desired to make arrangements to *share* the sale proceeds and instructed them to contact him to discuss the matter. The second letter stated that “in lieu of” the money and personal property that plaintiffs had already taken “as well as the future monies Tim will be transferring to you after the sale is completed,” Timothy desired that plaintiffs sign the power of attorney and deed. Titiner explained that the purpose of the documents was to effectuate the home sale. The second letter does not reference any specific amount that Timothy would be transferring

to them. The absence of this essential term precluded a finding that the letters memorialized any agreement.

¶ 27 Plaintiffs' claim that their signatures on the documents provided consideration for the contract is not well-taken. "Valuable consideration for a contract consists either of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other." *White v. Village of Homewood*, 256 Ill. App. 3d 354, 356-57 (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.) *Johnson v. Johnson*, 244 Ill. App. 3d 518, 528 (1993). Here, again, deferring to the trial court's credibility determinations, at the time of the second letter, the parties had not agreed on any specific allocation of the sale proceeds. Therefore, to the extent plaintiffs' signatures constituted any consideration, that consideration *predated any promise* on defendants' part to *equally* share the proceeds, or to share any other *specific* amount. Accordingly, there was no contract. See *id.*

¶ 28 Furthermore, plaintiffs grossly overstate the value of any consideration they may have given. They do not contest defendants' position that their execution of the power of attorney and deed permitted defendants to sell the house (plaintiffs' and defendants' goal) earlier than if the estate had to go through the probate process. Indeed, even if the sale occurred after the third will was probated, Timothy and Catherine, as legatees under the third will, would have almost certainly been entitled to all of the proceeds. Plaintiffs voluntarily dismissed their claims challenging the third will's validity. Thus, whether or not they executed the power of attorney and deed, the home would ultimately have been sold (which was their goal) and, under the terms of the third will, defendants would have received all of the proceeds.

¶ 29 Finally, we reject plaintiffs’ alternative argument that we remand the cause for the court to enter judgment on the remaining counts. The trial court found that plaintiffs did not establish by a preponderance of the evidence either the existence of an enforceable oral contract or a contract to make a valid gift. It did not specify that its finding necessarily related only to plaintiffs’ breach-of-contract count, and we do not read any such limitation in the court’s order because the remaining counts—promissory fraud, constructive trust, civil conspiracy, and breach of fiduciary duty—were premised on the existence of an agreement between the parties, an argument that is also the core of the breach-of-contract claims. For example, in their promissory fraud, constructive trust, and civil conspiracy counts, plaintiffs alleged that Timothy “promised to divide equally” the sale proceeds. In the breach of fiduciary duty count, they re-alleged the foregoing and further pleaded that Timothy “refused to divide [the proceeds] in thirds per the parties’ agreement.” In other words, the existence of a promise to equally divide the sale proceeds was the core allegation of all of plaintiffs’ counts. Further, the focus of the trial was whether the parties reached an agreement, and, in their closing arguments, plaintiffs addressed only the existence of an oral agreement.

¶ 30

III. CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed.

¶ 32 Affirmed.