2017 IL App (2d) 160195-U
No. 2-16-0195
Order filed March 9, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MEDLINE INDUSTRIES, INC.,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff,	)	
	)	
v.	)	No. 14-L-369
	)	
INNOVATIVE MANUFACTURING and	)	
DISTRIBUTION SERVICES, INC., and	)	
WILLIAM and BARBARA HAINES,	)	Honorable
	)	Jorge L. Ortiz,
Defendants.	)	Judge, Presiding.

INNOVATIVE MANUFACTURING and	)	Appeal from the Circuit Court
DISTRIBUTION SERVICES, INC., and	)	of Lake County.
WILLIAM and BARBARA HAINES,	)	
	)	
Counter-Plaintiffs-Appellants,	)	
	)	
v.	)	No. 14-L-369
	)	
MEDLINE INDUSTRIES, INC.,	)	Honorable
	)	Jorge L. Ortiz,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Release contained in note barred defendants' counterclaims and affirmative defenses that predated the note; plaintiff's failure to continue business relationship with defendants did not constitute a failure to mitigate damages.

¶ 2 I. INTRODUCTION

¶ 3 Defendants and counter-plaintiffs, Innovative Manufacturing and Distribution Services, Inc. (IMDS), William Haines, and Barbara Haines, appeal the judgment of the circuit court of Lake County dismissing various counterclaims and affirmative defenses they asserted against plaintiff and counter-defendant, Medline Industries, Inc. The trial court also granted plaintiff's motion for summary judgment on a promissory note. For the reasons that follow, we affirm.[1]

¶ 4 II. BACKGROUND

¶ 5 Plaintiff is in the business of developing and selling medical supplies. Part of plaintiff's business includes prepackaged kits used in various medical procedures. Defendants are in the business of, *inter alia*, assembling medical procedure kits. Defendant IMDS is a minority business enterprise (MBE), which gave plaintiff certain advantages in acquiring and retaining business relationships under federal law when plaintiff used IMDS as a supplier.

¶ 6 The parties had been involved in a business relationship that lasted several years (1996-2014, as alleged). During the course of that relationship, plaintiff loaned defendants $896,666.69. In 2013, the parties executed an "amended and restated promissory note," in which plaintiff advanced defendant an additional $100,000 and forgave $200,000 in debt, which left an amount of $796,666.69 due. Defendants allegedly defaulted, plaintiff accelerated the balance, and added default interest in accordance with the terms of the note. Plaintiff subsequently instituted the present action. In a three-count complaint, plaintiff alleged the default, unjust

[1] Defendants have filed a motion to belatedly file a reply brief; that motion is granted.

enrichment, and that defendants' failed to return money plaintiff paid them for work they never performed (apparently breach of contract, though the complaint does not use that term).

¶ 7 Defendants filed an answer, asserting various affirmative defenses and counterclaims. The affirmative defenses asserted by defendants were (1) unclean hands, waiver, laches, and equitable estoppel; (2) fraudulent inducement; (3) breach of the duty of good faith and fair dealing; (4) voidness or unenforceability; and (5) failure to mitigate. Counterclaims were (1) fraud; (2) fraudulent inducement; (3) promissory estoppel; (4) unjust enrichment; and (5) "set-off/recoupment. Underlying defendants' claims and defenses are two propositions. First, defendants alleged an agreement "on or about 2002 or 2003" (also citing the course of dealings between the parties) that if defendants "bid for [a] kit was at least 5% less than [plaintiff's] production costs," plaintiff would purchase that kit from defendant (hereinafter the 5% agreement). Second, defendants allege that plaintiff engaged in fraud by understating their production costs, thereby inducing defendant IMDS to make lower bids. Defendants also contend that sometime around 2005, plaintiff made a commitment to increase the amount of business it gave to IMDS and that the subject was again discussed between 2008 and 2011. Defendants allege that in 2013, plaintiff told defendants that it would "dramatically increase the volume of IMDS's kit production to approximately twice its then-present volume" in the month following the execution of the amended and restated promissory note.

¶ 8 Plaintiff moved to dismiss defendants' counterclaims and defenses in accordance with section 2-615 of the Code of Civil Procedure (735 ILCS 5/1-615 (West 2014)). The trial court granted that motion on March 18, 2015, and allowed defendants to replead their complaint. On September 10, 2015, the trial court dismissed an amended complaint, also ruling that defendants' claims were barred by a release contained in the amended and restated note. Plaintiff then

voluntarily dismissed the second two counts of its complaint and moved for summary judgment on the first count (the note). The trial court granted plaintiff's motion. Particular facts will be discussed as they relate to the issues discussed below.

¶ 9 The trial court, in dismissing defendants' amended complaint, first addressed a release contained in the promissory note. The release states as follows:

> "As additional consideration for the December 2013 Advance and the December 2013 Forgiveness, each individual and corporation that comprises the Borrower, on the one hand, and the Lender, on the other hand, hereby releases, forever discharges and promises not to sue [each] other *** for any and all claims *** whatsoever which are based on acts or omissions occurring on or prior to the date of this Note and which the undersigned releasing person or corporation may now have or hereafter acquire ***, known and unknown, *** which in whole or in part, arise out of or in any manner relate to, without limitation, the principal sums evidenced herein and/or any other relationship, transaction or occurrence between or involving the Lender and Borrower."

The trial court noted that defendants argued that they were not bound by the terms of this release for three reasons: (1) that they were fraudulently induced to sign it; (2) that a general release is ineffective regarding unknown claims; and (3) that they were under economic duress when they signed the agreement.

¶ 10 The first argument—fraudulent inducement—was based on two allegations: that plaintiff understated its production costs and that plaintiff promised to double the volume of kits purchased from IMDS. The trial court noted that these claims were represented by the first two counts of defendants' counterclaim and subject to a motion to dismiss pursuant to section 2-615 of the Civil Practice law (735 ILCS 5/1-615 (West 2014)). Noting that fraud must be pleaded

with specificity (see *Wolford v. Household Finance Corp.*, 105 Ill. App. 3d 1102, 1104 (1982)), the trial court found that defendants failed to set forth facts sufficient to meet this burden. In particular, the trial court found that defendants' allegations concerning the 5% agreement were conclusory and did not establish an enforceable agreement. The trial court further observed that the 5% agreement purportedly dated back to as early as 2002, and defendants were basing their claim on "an unspecified number of transactions over a period of 11 or 12 years." Defendants' reference to various emails was insufficient in that only one mentioned plaintiff's costs. Other facts cited by defendants were similarly nebulous. Absent an enforceable contract, plaintiffs were free to accept or reject any bid for any reason. Moreover, defendants' allegations about plaintiff's production costs were simply generalizations about the relative cost of labor in Illinois and Florida (where IMDS is based). The trial court concluded that the facts alleged failed to substantiate defendants' claim that plaintiff misrepresented its production costs.

¶ 11 The trial court further rejected defendants' claim that plaintiff promised to double the business it did with IMDS as the basis of a fraud claim. It noted that statements of future intent are insufficient to support a claim of fraud in this state. See *Abazari v. Rosalind Franklin University of Medicine & Science*, 2015 IL App (2d) 140952, ¶ 15. The trial court further rejected defendants' argument that an exception applied where the statements made were part of a larger scheme to defraud because the evidence of the scheme cited by defendants was plaintiff's alleged understatement of its costs, which the trial court had already rejected as explained above. Moreover, the statement regarding plaintiff doubling its business with IMDS was merely aspirational. Regarding an alleged promise to refrain from collecting on the note until IMDS was on better financial footing, the trial court observed that this was outside the four corners of the document itself and that the note contained an integration clause.

¶ 12 The trial court then stated that generally, where the language of a release is plain, it must be given effect as written. *Rakowski v. Lucente*, 104 Ill. 2d 317, 323 (1990). It then explained:

> "The release in the 2013 note is specific, and releases all claims that 'arise out of *** the principal sums [evinced] herein and/or the relationship between [plaintiff and defendants] relating to the IMDS Business.' It is clear that the purpose of the release was to consolidate into one document the sums owed. As consideration for the note, including the release, [plaintiff] forgave $200,000 of the debt."

The trial court found the release sufficient to bar the claims asserted in defendants' affirmative defenses and counterclaims

¶ 13 The trial court also rejected defendants' claim that they were induced to sign the note by economic duress. To succeed, defendants would have to show that a wrongful act by plaintiff deprived them of the free will to make a contract. *De Fontaine v. Passalino*, 222 Ill. App. 3d 1018, 1029 (1991). Noting that there was no adequate allegation of fraud or other wrongful conduct on plaintiff's behalf, the trial court found that defendants had alleged nothing more than that they were in a difficult bargaining position.

¶ 14 Accordingly, the trial court determined that the claims and defenses based on conduct occurring before the execution of the note were barred by the release contained therein. It noted that one defense—failure to mitigate—was based on conduct occurring after the execution of the note. Here, defendants allege that had plaintiff given IMDS more business, it would have been able to pay back the note. The trial court rejected this argument, noting that defendants had cited nothing to establish an ongoing duty to engage in business dealing to avoid further loss. The trial court therefore dismissed this defense as well. Subsequently, the trial court granted plaintiff's motion for summary judgment on the note, and this appeal followed.

¶ 15 III. ANALYSIS

¶ 16 On appeal, defendants advance four arguments. First, they contend that a question of fact exists regarding whether IMDS had an enforceable right to supply medical kits to plaintiff where its bid to produce the kit was 5% less than plaintiff's costs. Second, they argue that questions of fact exist regarding whether they were fraudulently induced to take loans from plaintiff and whether the statement about plaintiff doubling its business with IMDS was merely aspirational. Third, they assert that a genuine issue of material fact exists as to whether plaintiff had a duty to mitigate by continuing its business relationship with IMDS. Finally, they claim that the trial court erred in finding that there was no issue of fact concerning whether plaintiff misrepresented its production costs. We review a trial court's ruling on motions to dismiss and motions for summary judgment *de novo*. *Patel v. Home Depot USA, Inc.*, 2012 IL App (1st) 103217, ¶ 8 (motion to dismiss); *Giannetti v. Angiuli*, 263 Ill. App. 3d 305, 306-07 (1994) (motion for summary judgment). Under this standard of review, we owe no deference to the trial court. *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001).

¶ 17 However, defendants do not directly address the terms of the release, though they do renew their argument that they were fraudulently induced to sign the note. This, they argue, renders the release invalid. Thus, we will first examine defendants' second argument. If defendants fail to persuade us that they stated a case that they were fraudulently induced to execute the note, defendants' first and fourth arguments are moot in light of the valid release. In any event, we will consider defendants' argument regarding plaintiff's alleged failure to mitigate.

¶ 18 A. Fraudulent Inducement

¶ 19 To make out a claim for fraudulent inducement, defendants would have to establish the following elements: "a false representation of material fact, made with knowledge or belief of

that representation's falsity, and made with the purpose of inducing another party to act or to refrain from acting, where the other party reasonably relies upon the representation to its detriment." *Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 72 (2010). As noted above, defendants would have to show that a wrongful act by plaintiff deprived them of the free will to make a contract. *De Fontaine*, 222 Ill. App. 3d at 1029. Generally, unless they are part of some greater scheme "misrepresentations of intention to perform future conduct, even if made without a present intention to perform, do not generally constitute fraud." *HPI Healthcare Services, Inc. v. Mount Vernon Hospital, Inc.*, 131 Ill. 2d 145, 168 (1989). Furthermore, it is axiomatic that a heightened pleading standard applies to claims of fraud and that it must be pleaded with specificity. *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 29. That is, a party claiming fraud must plead "specific allegations of facts from which fraud is the necessary or probable inference, including what representations were made, when they were made, who made the misrepresentations and to whom they were made." *Chatham Surgicore v. Health Care Services Corp.*, 356 Ill. App. 3d 795, 803-04 (2005). The trial court found that defendants failed to meet this standard.

¶ 20 Defendants first point to a statement by one of plaintiff's employees that plaintiff would double its business with IMDS as the basis for the claim of fraudulent inducement. The trial court found that this claim was "aspirational." Without additional explanation, defendants assert, "The statement from [plaintiff's employee] could hardly be aspirational since [the employee] had intricate detailed knowledge of [plaintiff's] kit business and the authority to assign kits to IMDS to produce." Defendants' point is not apparent to us. The mere fact that the employee possessed such knowledge and authority does not render it impossible, or even unlikely, that the statement was an aspiration rather than a firm commitment. Defendants cite nothing to the contrary. They

do cite *Glazewski v. Coronet Insurance Co.*, 108 Ill. 2d 248 (1985) (defendants do not provide pinpoint citations to their legal authority, leaving us to ascertain what they believe is the relevant portion of the cases they cite and hampering somewhat our ability to follow their arguments); however, that case is easily distinguishable. The statement relied on to prove fraud in *Glazewski*, 108 Ill. 2d at 249-50, concerned the value of an insurance policy—a material fact to the transaction at issue instead of, as here, a representation about future conduct.

¶ 21 Defendants attempt to invoke the exception that allows a statement of future intent to form the basis of a fraud action where "it is part of a scheme or device to defraud another." *Mitchell v. Norman James Construction Co.*, 291 Ill. App. 3d 927, 940 (1997). However, as the trial court noted, defendant had not pleaded the existence of such a scheme with the specificity required in a fraud case. For example, defendants allege plaintiff "transferred only a fraction of the kit production volume to IMDS on contracts where IMDS was the designated Minority subcontractor to produce kits" and "doing so suppressed IMDS' growth and caused cash flow problems and financial harm to IMDS." Such broad generalizations are not sufficient to plead fraud, and defendants do not cite the record here or call our attention to anything more specific. Similarly, defendants state that plaintiff "opted to give IMDS loans while purposely not increasing the kit business but deceiving IMDS through continued fall commitments." Again, nothing specific is set forth. Parenthetically, it strikes us as illogical to suppose that all the while plaintiff was providing loans to IMDS it was simultaneously seeking to undermine IMDS given that it would adversely affect the likelihood of IMDS being able to pay the loans back.

¶ 22 Defendants point out that IMDS is a MBE and, as a result, plaintiff was able to secure favorable contracts when it used IMDS as a supplier. We fail to see the relevance of this

assertion. While it is true that this created an *incentive* for plaintiff to do business with IMDS, defendants do not explain how it created an *obligation* for plaintiff to do so.

¶ 23 In short, plaintiff's statement regarding doubling its business with IMDS was a statement of future intent which typically cannot support a claim of fraud. Furthermore, defendants have not adequately pleaded the existence of a scheme to defraud such that that exception would allow a statement of future intent to serve as the basis for a fraud claim. The trial court properly found that the release was valid and barred defendants' claims that predated it.

¶ 24 B. Failure to Mitigate

¶ 25 The only defense that did not predate the execution of the note and release was defendants' assertion that plaintiff failed to mitigate its damages. The law is well-settled that there is "a duty upon [an] injured party to exercise reasonable diligence and ordinary care in attempting to minimize his damages *after* injury has been inflicted." *Brady v. McNamara*, 311 Ill. App. 3d 542, 547 (1999). Defendants posit that had plaintiff continued to do business with IMDS, they would have been able to pay back the note. Thus, defendants reason, plaintiff's failure to continue to do business with them constitutes a failure to mitigate their damages. Defendants cite no authority where the duty to mitigate damages has been construe to encompass a duty to continue a business relationship.

¶ 26 We, however, have found a case that provides some guidance on this issue. It does not favor defendants' position. In *InsureOne Independent Insurance Agency v. Hallberg*, 2012 IL App (1st) 092385, the plaintiffs, a group of insurance companies that purchased several other insurance companies, prevailed in a lawsuit alleging breaches of various noncompetition and nonsolicitation agreements. The plaintiffs were awarded money damages. The defendants (the sellers) counterclaimed for amounts due on the original sale and prevailed as well. Both sides

appealed. The parties originally contemplated one of the defendants—Hallberg—running the company after the sale, and the plaintiffs initially hired the defendant. However, they were ultimately unable to work together. The defendant left the company and formed his own company. The plaintiffs filed suit. One issue was whether the plaintiffs "had a duty to mitigate their damages by doing business with defendants, *i.e.*, allowing defendants to write plaintiffs' policies." *Id.* ¶ 87. The reviewing court fund no such duty existed where the business relationship between the parties had deteriorated. *Id.* Similarly, here, we cannot impose upon plaintiff a duty to continue to do business with an entity that was breaching the terms of the note. *C.f.*, also, *Curt Bullock Builders, Inc. v. H.S.S. Development, Inc.*, 261 Ill. App. 3d 178, 185 (1994) (finding no duty for a lessee to accept a lessor's offer to move to different, albeit more desirable, location in a shopping center which would have mitigated lessee's damages). In short, particularly in the absence of dispositive authority establishing such a duty, we do not find defendants' argument persuasive.

¶ 27 We also note that, citing a case applying Colorado law (see *Duffield v. First Interstate Bank of Denver*, 13 F. 3d 1403 (10th Cir. 1994)), defendants assert that plaintiff violated the duty of good faith and fair dealing. Such a duty does exist under Illinois law. See *Citicorp Savings of Illinois v. Rucker*, 295 Ill. App. 3d 801, 807 (1998). However, under Illinois law, this duty does not prevent a party from enforcing the express terms of a contract. *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1060 (1999). Here, plaintiff has simply enforced the express terms of the note. As such, no breach of this duty has occurred.

¶ 28 In sum, we do not find any of these arguments well-founded.

¶ 29 IV. CONCLUSION

¶ 30 In light of the foregoing, the judgment of the circuit court of Lake County is affirmed.

¶ 31 Affirmed.