2018 IL App (5th) 170267-U

NO. 5-17-0267

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

INTERNET WINE & SPIRITS CO., d/b/a Randall's Wine & Spirits, Plaintiff-Appellant, v. JAIMIE HILEMAN, Defendant-Appellee.	)	Appeal from the Circuit Court of St. Clair County. No. 16-L-75 Honorable Heinz M. Rudolf, and Honorable Robert P. LeChien, Judges, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the order of the circuit court of St. Clair County that granted the defendant's motion for a partial summary judgment, because no disputed issues of material fact exist in this case and the defendant was entitled to judgment as a matter of law.

¶ 2 The plaintiff, Internet Wine & Spirits Co., doing business as Randall's Wine & Spirits, appeals the order of the circuit court of St. Clair County that granted the motion for a partial summary judgment of the defendant, Jaimie Hileman. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On April 3, 2017, the plaintiff filed a second amended complaint (the complaint) in which the plaintiff alleged one count of breach of contract, arising from a settlement agreement (the agreement) entered into

between the plaintiff and the defendant to settle an action brought in federal court by the defendant against the plaintiff. In the complaint, in which the plaintiff referred to itself as "IWS," the plaintiff alleged, *inter alia*, that the defendant "materially breached the terms of the [agreement] by falsely reporting to Mandy Murphey that she was 'fired' from IWS." The plaintiff further alleged that the defendant "appeared in a television interview with [Murphey] on Fox 2 News," and that "[d]uring the Fox 2 News report, Murphey reported that [the defendant] was 'fired' from her job as an executive in 'wine and spirits industry,' IWS, as a result of alleged transgender discrimination." The plaintiff alleged that "[t]he untrue assertion that [the defendant] was 'fired' due to being transgender directly criticizes, denigrates, and disparages IWS because it discredits and damages IWS' reputation in the community," in direct contravention of the requirement of the agreement that the defendant "not 'criticize, denigrate, or disparage IWS' and that she would not make statements that would 'damage [IWS's] reputation.' " With regard to damages and the cause thereof, the plaintiff alleged that the defendant's "material breach of the [agreement] proximately caused [the plaintiff] to suffer actual damages including lost profits," and that the plaintiff earned $120,000 "less in profits between December 2015 and January 2016, the time period after the Fox 2 News report aired *** than it made between December 2014 and January 2015, the same time period one year before [the defendant] appeared on the Fox 2 News report." The plaintiff further alleged that it "continued to experience less profits in 2016 than in 2015." Attached to the complaint as exhibits were, *inter alia*, copies of the agreement and of the defendant's federal court complaint against the plaintiff.

¶ 5 On May 2, 2017, the defendant filed a motion for a partial summary judgment and an accompanying memorandum of law. Therein, the defendant contended, *inter alia*, that there were no material issues of fact in the case, because in the news report in question, Murphey never stated that the plaintiff fired the defendant, and in fact never mentioned the plaintiff at all. The

defendant contended that although Murphey stated that the defendant was fired from her job, "[i]t is undisputed that neither Murphey, [the defendant], nor Fox 2 stated or communicated that IWS was [the defendant's] employer." Attached to the motion, as part of Exhibit 1, was a DVD recording of the Fox 2 News segment at issue in this case. The DVD is also included in the record on appeal presented to this court and has been considered by the court in rendering this decision.

¶ 6 On June 21, 2017, a hearing was held on the motion before the Honorable Robert P. LeChien. At the hearing, the defendant reiterated the position taken in the motion for a partial summary judgment. The plaintiff, on the other hand, argued that the defendant had breached the agreement and that, under the terms of the agreement, the plaintiff was therefore entitled to the return of the money paid to the defendant under the agreement. The defendant noted, for purposes of clarity, that the motion was for a partial summary judgment, rather than a full summary judgment, because it was the defendant's theory that the agreement provided for attorney fees for the prevailing party in any dispute over the agreement, and the defendant believed the question of attorney fees under the agreement would not be ripe until it was known if the defendant prevailed on the partial summary judgment motion. Counsel for the defendant stated that she "assumed that once the [c]ourt decided who prevailed, that one party or the other would do a request for attorney[ ] fees." At the conclusion of the hearing, Judge LeChien granted, from the bench, the defendant's motion for a partial summary judgment and granted the defendant leave to file a request for attorney fees. Judge LeChien also entered a written order doing the same.

¶ 7 On July 20, 2017, the plaintiff, noting that the defendant had subsequently filed a motion for attorney fees, filed what it styled as a motion "for judicial finding that there is no just reason for delaying appeal." Therein, the plaintiff contended that the sole remaining issue in the trial

court was the question of attorney fees and therefore requested that the trial court "issue a judicial finding that there is no just reason for delaying an appeal of" Judge LeChien's order granting the defendant's motion for a partial summary judgment. Also on July 20, 2017, the plaintiff filed a notice of appeal from Judge LeChien's order granting the motion for a partial summary judgment. Thereafter, this court docketed the plaintiff's appeal.

¶ 8 ANALYSIS

¶ 9 Before we consider the plaintiff's substantive argument on appeal, we must first determine whether we have subject matter jurisdiction to do so. See, *e.g.*, *Steel City Bank v. Village of Orland Hills*, 224 Ill. App. 3d 412, 416 (1991). Illinois courts have an independent duty to consider subject matter jurisdiction, which cannot be waived, stipulated to, or consented to by the parties. *Bradley v. City of Marion*, 2015 IL App (5th) 140267, ¶ 13. We note that the record on appeal presented to this court by the plaintiff originally did not contain a copy of any order granting the plaintiff's motion for a finding of no just reason for delaying appeal. However, at oral argument in this case, which was held on March 28, 2018, we gave the plaintiff 10 days to supplement the record on appeal with said order, as well as any other order relevant to this court's jurisdiction. On April 3, 2018, the plaintiff supplemented the record on appeal with an order that was file stamped by the circuit court, dated September 20, 2017, and signed by the Honorable Heinz M. Rudolf, that granted the plaintiff's motion for a finding of no just reason for delaying appeal. The plaintiff also supplemented the record on appeal with an order that was file stamped by the circuit court, dated November 13, 2017, and signed by the Honorable Stephen P. McGlynn, that denied the defendant's motion for attorney fees and therefore disposed of the sole remaining issue in the circuit court in this case.[1] Accordingly, we conclude there are no

[1]The defendant does not challenge Judge McGlynn's ruling in this appeal.

jurisdictional issues that bar our consideration of this case, and we therefore turn to the merits of the plaintiff's appeal.

¶ 10 On appeal, the plaintiff contends, as it did in the trial court, that this case should have survived the motion for a partial summary judgment because there exist disputed issues of material fact, including whether the defendant "stated she was fired from her position as an executive in the wine and spirit industry to Mandy Murphey," and whether the defendant "stated to Mandy Murphey that [the plaintiff] fired [the defendant]." Contrary to the plain language of the allegations in the complaint, which of course was drafted by the plaintiff, the plaintiff concedes on appeal "that Mandy Murphey never expressly stated that [the plaintiff] fired [the defendant] from her position as an executive in the wine and spirit industry."

¶ 11 The defendant, on the other hand, maintains that Judge LeChien ruled correctly because the defendant is entitled to judgment as a matter of law. We agree with the defendant. A motion for summary judgment should be granted if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2015 IL App (1st) 142804, ¶ 24 (citing 735 ILCS 5/2-1005(c) (West 2010)). Although summary judgment can play an important role in promoting the prompt administration of justice, it is nevertheless a drastic measure and should be granted only where the moving party's right is so clear as to be free from doubt. *Id.* Summary judgment is not appropriate in situations where a reasonable person could draw different inferences from the undisputed facts contained within the record. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "Although a plaintiff is not required to prove his case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a

judgment." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). If a plaintiff fails to establish any element of the plaintiff's claim, summary judgment is appropriate. See, *e.g.*, *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). We review *de novo* a trial court order granting summary judgment. *Id*. We may affirm the ruling of a trial judge on any basis supported by the record. See, *e.g.*, *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 418 (2007); see also, *e.g.*, *People v. Johnson*, 208 Ill. 2d 118, 134 (2003). We may do so because the question before us on appeal is the correctness of the result reached by the trial judge, rather than the correctness of the reasoning upon which that result was reached. See, *e.g.*, *Johnson*, 208 Ill. 2d at 128.

¶ 12 To prevail on a claim of breach of contract, a plaintiff must establish: (1) a valid, enforceable contract, (2) performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resultant injury—or damages—to the plaintiff. See, *e.g.*, *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813, 823 (2005). With regard to damages and the causes thereof in a breach of contract action, a plaintiff may assert a claim for lost profits as the measure of damages. *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 315 (1987). To recover such damages, "it is not necessary that the amount of loss be proven with absolute certainty." *Id*. That said, "recovery of lost profits cannot be based upon conjecture or sheer speculation." *Id*. at 316. To the contrary, the plaintiff's evidence must "afford a reasonable basis for the computation of damages," and "the defendant's breach must be plainly traceable to specific damages." *Id*. Moreover, "it must be shown with a reasonable degree of certainty that the defendant's breach caused a specific portion of the lost profits." *Id*.

¶ 13 Also of relevance for purposes of summary judgment is the fact that it is the plaintiff in an action who "fixes the issues in controversy and the theories upon which recovery is sought by the allegations" found in the plaintiff's complaint. *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911 (1994). Thus, when ruling on a party's subsequent motion for a summary

judgment, the circuit court "looks to the pleadings to determine the issues in controversy." *Id*. When so doing, "[i]f the defendant is entitled to judgment as a matter of law on the claims as pled by the plaintiff, the motion will be granted without regard to the presence of evidentiary material which might create a right of recovery against the moving defendant on some unpled claim or theory." *Id*. If a plaintiff has not attempted to file an amended complaint before summary judgment is granted, "the plaintiff will not be heard to complain that summary judgment was inappropriately granted because of the existence of evidence supporting a theory of recovery that [the plaintiff] never pled in [the plaintiff's] complaint." *Id*.

¶ 14 In this case, it is undisputed that Murphey never stated in her on-the-air report that the plaintiff fired the defendant. In fact, it is undisputed that the plaintiff was not mentioned in the report at all. On appeal, the plaintiff abandons the contention made in the complaint that "[d]uring the Fox 2 News report, Murphey reported that [the defendant] was 'fired' from her job as an executive in 'wine and spirits industry,' IWS, as a result of alleged transgender discrimination," and instead now claims that it is immaterial that Murphey never stated that the plaintiff fired the defendant and never mentioned the plaintiff during the broadcast at all. However, the plaintiff continues to claim it suffered damages, alleging that the defendant's "material breach of the [agreement] proximately caused [the plaintiff] to suffer actual damages including lost profits," because, the plaintiff alleges, the plaintiff earned $120,000 "less in profits between December 2015 and January 2016, the time period after the Fox 2 News report aired *** than it made between December 2014 and January 2015, the same time period one year before [the defendant] appeared on the Fox 2 News report," and "continued to experience less profits in 2016 than in 2015." In other words, the plaintiff persists in its contention that the damages it purports to have suffered resulted from Murphey's *broadcast*, not from what would have been the actual breach of the contract: the defendant's purported off-the-air statement to

Murphey that the plaintiff fired the defendant. In the absence of any mention of the plaintiff in the broadcast, we conclude the plaintiff's theory, as pled in the complaint, that it lost profits because of the broadcast amounts to nothing more than the conjecture and sheer speculation rejected by the Illinois Supreme Court in *Midland Hotel*. See 118 Ill. 2d at 315. Accordingly, even were we to assume, *arguendo*, that the defendant breached the agreement in this case by telling Murphey that the plaintiff fired the defendant, and were we to further assume, *arguendo*, that the plaintiff made less profit after the broadcast, we could not conclude that the assumed breach was "plainly traceable" (see *id*. at 316) to the assumed lost profits that the plaintiff has tied explicitly, in the complaint, to Murphey's broadcast, because it is undisputed that in the broadcast, Murphey never stated that the plaintiff fired the defendant, and in fact never mentioned the plaintiff at all. In this case, as pled by the plaintiff in the complaint (see *Pagano*, 257 Ill. App. 3d at 911 (plaintiff fixes issues in controversy and theories upon which recovery is sought by allegations found in plaintiff's complaint)), there is nothing but conjecture and sheer speculation to connect a breach of the agreement by the defendant to the alleged lost profits of the plaintiff. Accordingly, the circuit court did not err in this case, because, as explained above, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment (see, *e.g.*, *Robidoux*, 201 Ill. 2d at 335), and if a plaintiff fails to establish any element of the plaintiff's claim, summary judgment is appropriate. See, *e.g.*, *Morris*, 197 Ill. 2d at 35.

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, we affirm the order of the circuit court of St. Clair County that granted the defendant's motion for a partial summary judgment.

¶ 17 Affirmed.