2010 IL App (2d) 101048-U
No. 2—10—1048
Order filed August 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FTI INTERNATIONAL, INC.,	)	Appeal from the Circuit Court
	)	of De Kalb County.
Plaintiff and Counterdefendant-Appellant,	)	
	)	
v.	)	No. 08—LM—72
	)	
WHITESELL INTERNATIONAL CORPORATION, d/b/a FABRISTEEL, a/k/a Fabristeel Products, a/k/a Fabristeel Manufacturing,	)	
	)	Honorable
Defendant and Counterplaintiff-Appellee.	)	Kurt P. Klein,
	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

Held: The trial court properly granted defendant a directed finding, as plaintiff failed to make a *prima facie* case of breach of an oral contract; although plaintiff alleged that defendant agreed to pay for "service calls," it provided no evidence to that effect and thus failed to show a meeting of the minds on the essential terms of the alleged contract.

¶ 1 In this breach-of-contract action, the plaintiff, FTI International, Inc., appeals the trial court's order granting defendant, Whitesell International Corporation d/b/a Fabristeel (Fabristeel) a directed

finding under section 2—1110 of the Code of Civil Procedure (735 ILCS 5/2—1110 (West 2010)). We affirm.

¶ 2 II. BACKGROUND

¶ 3 This appeal arises out of a complaint filed by FTI for breach of an oral contract, in regard to a machine that it manufactured for Fabristeel. After the machine was manufactured, FTI performed various services on it that FTI alleged were "changes" to the machine that were subject to billing for $49,014.22. FTI alleged that, due to various reasons, the original written contract for the purchase of the machine was missing. Fabristeel filed an answer, denying that there was a contract requiring it to pay for the services. Fabristeel also raised a statute-of-limitations defense and a counterclaim, alleging that the machine never worked.

¶ 4 On May 17, 2010, a bench trial was held. James Schanstra, the vice president of FTI, was the only witness called to testify for FTI. Schanstra stated that there was a written contract for FTI to build and assemble the machine for Fabristeel, which would then add its own equipment to the machine in order for it to work for a third party, a vehicle manufacturer. No actual written contract was presented to the court because the documents were missing due to vandalism, foreclosure, and loss of property at FTI. Schanstra testified that FTI closed in 2003. Schanstra said that there was an oral contract for service calls on the machine.

¶ 5 Schanstra testified that he set up a system to simulate how the machine would work, using drawings submitted by Fabristeel, but he could not know if it would work once in place at the vehicle manufacturing plant. Schanstra stated that the machine worked on the FTI factory floor, but it then never worked as the end product. FTI did not get further access to the machine until after it was shipped to the vehicle manufacturer.

¶ 6 According to Schanstra, the machine was accepted by Fabristeel before it left FTI, and it became the property of Fabristeel at that time. He said that FTI had no responsibility beyond that. He said that FTI was willing to help Fabristeel marry its equipment with the machine, but FTI did not give any guarantees. He further testified that there had been some damages in shipping that FTI was not responsible for. He said that, after the machine was accepted and paid for, FTI made service calls in regard to the machine that were not paid for.

¶ 7 Exhibit 1 was admitted into evidence. That exhibit was a document dated January 30, 2003, stating that FTI had successfully completed work on the machine and further stating "This unit performs in compliance with the specifications on the above purchase order. Any changes required after approval will be made on a time and material basis. Our billing rate for time is $135.00 per hour for Electrical Engineer and $95.00 per hour for Builder." It was signed by representatives of both parties.

¶ 8 Other exhibits included a summary of FTI's projected cash flow, which included "service calls" to Fabristeel, and invoices issued to Fabristeel for "service calls." Schanstra did not know the specifics about time or materials billed in the invoices. One of the documents showed service calls made on January 9 and 30, 2003, which were for staging at the vehicle manufacturer's plant and installation of the machine there. The January 9 call was valued at $3,678.08 and the January 30 call was valued at $40,434.72.

¶ 9 At the conclusion of Schanstra's testimony, Fabristeel moved for a directed finding, and FTI's motion to reopen the proofs was granted. Schanstra then testified that there was an oral agreement made between a vice president of Fabristeel and FTI for FTI to help service the machine at the rates in Exhibit 1. He said this type of agreement was common and was consistent with

Exhibit 1. He said that the company would not have made service calls unless requested by Fabristeel. When asked if Exhibit 1 referred to any agreement to pay for installation charges, Schanstra said that it "implied that." Schanstra also said that a "change" under the document was any touching of the machine by FTI.

¶ 10 Fabristeel again moved for a directed finding and judgment, arguing that there was a failure of proof that there was an oral contract related to the service calls. The trial court granted the motion, finding that the testimony about billing rates for change orders did not equate to a contact for payment for service calls. The court also stated that Schanstra's definition of a change order was not the court's understanding of the use of the term in any industry. FTI moved for reconsideration, arguing that it sufficiently showed the existence of an oral contact and that its evidence was not impeached. The court denied the motion, stating that FTI failed to establish a *prima facie* case that there was an oral contract. The court also denied Fabristeel's counterclaim. FTI appeals.

¶ 11 II. ANALYSIS

¶ 12 In a poorly written brief, lacking any on-point authority, FTI contends that the trial court wrongly entered a directed finding and judgment under section 2—1110. FTI argues that, when Schanstra's testimony was not impeached and he explained the common terms between the parties and in the industry, there was a logical inference that a contract arose.

¶ 13 A. Standard of Review

¶ 14 FTI contends that the standard of review is *de novo*, while Fabristeel contends that we review whether the trial court's decision is against the manifest weight of the evidence.

¶ 15 Section 2—1110 provides that, in all cases tried without a jury, a defendant may, at the close of the plaintiff's case, move for a finding or judgment in his or her favor. *In re Foxfield Subdivision*,

396 Ill. App. 3d 989, 992 (2009). "In ruling on such a motion, a court must engage in a two-prong analysis." *Id.* "First, the trial court must determine, as a matter of law, whether the plaintiff has presented a *prima facie* case. A plaintiff establishes a *prima facie* case by proffering at least 'some evidence on every element essential to [the plaintiff's underlying] cause of action.' " *Id.* (quoting *Kokinis v. Kotrich*, 81 Ill. 2d 151, 154 (1980)). "If the plaintiff has failed to meet this burden, the court then should grant the motion and enter judgment in the defendant's favor." *Id.* "Because whether a plaintiff has failed to present a *prima facie* case is a question of law, the trial court's ruling is reviewed *de novo* on appeal." *Id.*

¶ 16 If the plaintiff has presented a *prima facie* case, the court then must weigh all the evidence offered by the plaintiff, including evidence favorable to the defendant, to determine whether the *prima facie* case survives. *Minch v. George*, 395 Ill. App. 3d 390, 398 (2009). The weighing process may result in the negation of some of the evidence necessary to the plaintiff's *prima facie* case, in which case the court should grant the defendant's motion. *Id.* If the court moves on to consider the weight of the evidence and finds that no *prima facie* case remains, we will not overturn that decision unless it is against the manifest weight of the evidence. *Id.*

¶ 17 Here, although the court spoke briefly about its understanding of what a change order might be, its overall determination was that FTI failed to establish a *prima facie* case without any further weighing of the evidence. Accordingly, a *de novo* standard of review applies. In any event, we would affirm under either standard.

¶ 18 B. Existence of an Oral Contract

¶ 19 FTI contends that it established the existence of an oral contract. Fabristeel argues that there was no evidence of acceptance or of a meeting of the minds as to the essential terms of any contract.

¶ 20 To state a claim for breach of contract, a plaintiff must allege (1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages. *Village of South Elgin v. Waste Management of Illinois, Inc.*, 348 Ill. App. 3d 929, 940 (2004).

¶ 21 "Overall, a party seeking to enforce an agreement has the burden of establishing the existence of the agreement." *Reese v. Forsythe Mergers Group, Inc.,* 288 Ill. App. 3d 972, 979 (1997). "To form a valid contract between two parties, there must be mutual assent by the contracting parties on the essential terms and conditions of the subject about which they are contracting." *Id*.

¶ 22 It is well settled that "[a]lthough the parties may have had and manifested the intent to make a contract, if the content of their agreement is unduly uncertain and indefinite no contract is formed." *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 29 (1991) (citing 1 Williston, Contracts §§38-48 (3d ed. 1957) and 1 Corbin, Contracts §§95-100 (1963)). In other words, the purported contract must be sufficiently definite so that a court, applying proper rules of construction and applicable principles of equity, can ascertain what the parties have agreed to do. *Id.*

¶ 23 Here, FTI failed to present sufficient evidence of any agreement. FTI claims that Exhibit 1, signed on January 30, 2003, "infers" an agreement that Fabristeel would pay for all "service calls" on the machine, including ones that occurred prior to that date. But Exhibit 1 makes no mention of "service calls" and refers only to future "changes." Although Schanstra testified to his personal view that the meaning of a change would include a service call, there was no evidence that anyone at Fabristeel agreed to that definition and agreed to pay for service calls, especially when the bulk of

those calls were on or before the date the machine was accepted and were for staging and installation, without any "change" in its specifications. Thus, FTI failed to establish that there was any specific offer and acceptance of the contract terms that FTI asks this court to "infer" from Exhibit 1, and it presented no evidence of mutual assent on the essential terms and conditions of the alleged contract. Accordingly, the trial court correctly granted the section 2—1110 motion.

¶ 24 FTI also discusses reformation of a contract in its brief. However, reformation was never mentioned before the trial court and, because the trial court properly determined that FTI failed to make a *prima facie* case that an oral contract ever existed, arguments concerning reformation of an existing contract are irrelevant.

¶ 25 III. CONCLUSION

¶ 26 FTI failed to present a *prima facie* case that an oral contract was formed. Accordingly, the judgment of the circuit court of De Kalb County is affirmed.

¶ 27 Affirmed.