2012 IL App (3d) 110439-U

Order filed March 12, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

DR. MICHELLE UNGURAIT,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellant,	)	Peoria County, Illinois,
	)	
	)	Appeal No. 3-11-0439
v.	)	Circuit No. 11-MR-144
	)	
PEORIA SCHOOL DISTRICT NO. 150,	)	
An Illinois local governmental entity,	)	Honorable
	)	Michael E. Brandt
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant's motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure where: (1) plaintiff received consideration for section 17 of her employment contract; (2) section 17 was an enforceable early termination clause; and (3) plaintiff could not make a claim for promissory estoppel because an enforceable contract existed between the parties.

¶ 2 Plaintiff, Dr. Michelle Ungurait, filed a three-count complaint against her former employer, the Board of Education for the Peoria School District No. 150 (defendant), seeking: (1)

a declaratory judgment that section 17 of her employment contract was unenforceable; (2) a preliminary injunction; and (3) damages under the doctrine of promissory estoppel. On defendant's motion, the trial court dismissed plaintiff's complaint with prejudice pursuant to section 2-615 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615 (West 2010). We affirm.

¶ 3 FACTS

¶ 4 Plaintiff's amended complaint alleged that, on July 2, 2010, plaintiff and Dr. Grenita Lathan, superintendent of Peoria School District No. 150, met in Asheville, North Carolina, to discuss an employment opportunity. During that conversation, plaintiff told Lathan that she would not move to Peoria with her family unless she had a three-year written contract. During the week of July 21, 2010, defendant orally offered plaintiff the position of associate superintendent for a term of three years at an annual salary of $135,000, health benefits for plaintiff and her family, and contributions to her retirement fund. Based upon the oral offer of employment, plaintiff quit her job, moved to Peoria, and undertook the position.

¶ 5 Plaintiff and defendant later entered into a written employment contract. The written contract described additional benefits plaintiff would receive, including vacation time and sick leave. Although the contract had a written execution date of August 9, 2010, plaintiff alleged that she did not see the contract until September 1, 2010. On September 3, 2010, Lathan called plaintiff into her office and stated that the office was gossiping about the fact that plaintiff had not signed the contract. Plaintiff admitted, in her complaint, that she saw section 17 of the contract, but decided to sign it anyway because she had already moved her family to Peoria and begun her

position as associate superintendent.[1]

¶ 6 On March 28, 2011, plaintiff received notice that she was being placed on administrative leave pursuant to section 17 of the contract. Section 17 provides:

> "17. EARLY TERMINATION. If the Administrator terminates employment prior to the end of this Contract, the Administrator shall pay liquidated damages to the Board of Education. The amount of the liquidated damages shall be equal to five (5%) percent of the Administrator's annual salary computed from the effective date of the Contract termination to June 30 of the Contract year, but in no event less than $2,500.00. In the event the Administrator terminates employment during the term of this Contract, but effective at the end of a school year and has given the Board at least thirty (30) days' notice of such termination as herein provided, then no amount of liquidated damages shall be assessed. The Board of Education shall not release any employee from their employment contract pursuant to 105 ILCS 5/24-14 unless and until the provisions of this Contract have been complied.
>
> If the Board desires to terminate this Contract, without cause, effective prior to the end of the Contract, then the Board shall give the Administrator thirty (30) days' notice and pay to the Administrator's annual salary computed from the effective date of the Contract termination to June 30 of the Contract year, but in no event less than $5,000.00. If a contract termination occurs pursuant to this paragraph, then

[1]The written contract contained a clause that stated that this contract constituted all of the terms agreed upon by the parties and superseded all prior agreements, arrangements or communications between the parties regarding the subject matter of the agreement whether written or oral.

paragraphs 12 and 13 of the Agreement shall not apply."

¶ 7 Plaintiff filed her amended complaint on May 3, 2011. On May 24, 2011, defendant filed a motion to dismiss pursuant to section 2-615 of the Code. The trial court granted defendant's motion to dismiss with prejudice on June 14, 2011, and plaintiff appealed.

¶ 8 ANALYSIS

¶ 9 A motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) objects to the legal sufficiency of the complaint. *Loman v. Freeman*, 229 Ill. 2d 104 (2008). When ruling on a section 2-615 motion, a court must decide whether the allegations in the complaint, when considered in the light most favorable to plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Id.* We review a trial court's grant of a section 2-615 motion *de novo*. *Addison v. Distinctive Homes, Ltd.*, 359 Ill. App. 3d 997 (2005).

¶ 10 Enforceability of Section 17

¶ 11 Count I of plaintiff's complaint sought a declaratory judgment that section 17 of the employment contract was unenforceable. As an initial matter, we note that the parties spent some time arguing about whether plaintiff may use declaratory judgment as a vehicle to declare section 17 unenforceable. We need not decide the issue because, even assuming that the declaratory judgment is a proper vehicle for challenging the enforceability of section 17, plaintiff's claims would still fail.

¶ 12 Plaintiff's first argument is that she did not receive adequate consideration for section 17. Plaintiff alleged she received the same benefits in the written contract in September 2010, that she had been orally promised in July 2010, therefore, she did not receive additional consideration for the addition of section 17. In essence, plaintiff's argument is that section 17 constituted an

unenforceable modification to the contract due to the lack of consideration. See *Ross v. May Company*, 377 Ill. App. 3d 387, 391 (2007) (citing *Nebel, Inc. v. Mid-City National Bank of Chicago*, 329 Ill. App. 3d 957 (2002)) (a modification of a contract "is a change in one or more respects that introduces new elements into the details of the contract and cancels others, but leaves the general purpose and effect undisturbed").

¶ 13 In order for a modification to be enforceable, there must be consideration for the modification. *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461 (2004). However, in order for us to be able to evaluate the enforceability of the alleged modification, we must find that there was an original binding agreement. *Id.* In this case, there was no agreement between the parties until plaintiff entered into the written employment contract in September 2010. Plaintiff alleges only that defendant orally promised her certain benefits and, based upon those promises, she moved her family to Peoria. Plaintiff does not contend in her complaint that this constitutes a valid prior agreement, and we decline to find that it does. See *Ebert v. Dr. Scholl's Foot Comfort Shops, Inc.*, 137 Ill. App. 3d 550 (1985) (for a valid contract there must be offer and acceptance). We further note that the final contract included a clause that provided that the written contract constituted all of the terms agreed upon by the parties and superseded all prior agreements, arrangements, or communications between the parties regarding the subject matter of the agreement whether written or oral.

¶ 14 Moreover, even assuming that the oral offer and plaintiff's response constituted an agreement, plaintiff's argument regarding the lack of consideration is contradicted by the employment contract. Specifically, plaintiff claimed that the oral offer promised: (1) a three-year term at an annual salary of $135,000; (2) health benefits paid for herself and her family; and

(3) contributions to her retirement fund. However, the written contract itself provided those benefits as well as additional benefits such as vacation leave and sick time. Therefore, it is simply not true that plaintiff failed to receive additional benefits that could be deemed consideration for the inclusion of section 17.

¶ 15 II. Liquidated Damages

¶ 16 Plaintiff's second argument regarding section 17 is that it is an unenforceable liquidated damages clause. Plaintiff alleged that the clause constituted a penalty, and that it had no reasonable correlation between the damages defendant would pay ($5,000) and plaintiff's actual loss under the terms of the contract ($11,250 monthly).

¶ 17 A liquidated damages clause is defined as "an amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches." *Penske Truck Leasing Co., L.P. v. Chemetco, Inc.*, 311 Ill. App. 3d 447, 456 (2000) (citing Black's Law Dictionary 395 (7th ed. 1999)). The test for determining whether the liquidated damages clause is void as a penalty is stated in section 356 of the Restatement (Second) of Contracts:

> "Damages for breach of either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty." Restatement (Second) of Contracts sec. 356 (1979).

¶ 18 A review of section 17 establishes that it is not a liquidated damages clause. As defined, a liquidated damages clause provides the amount of damages to be recovered *in the event of a*

breach. Section 17 does not establish damages in the event of a breach, but instead describes the rights of the parties in the event that one of them chooses to terminate the contract early. This is different than a breach of contract, which occurs when one of the parties actually violates a contractual obligation. *Chapman v. Engel*, 372 Ill. App. 3d 84 (2007). There is no indication that defendant actually violated its obligations under the contract and, instead, the record indicates that the employment contract was terminated according to its own terms. Therefore, section 17 does not operate as a liquidated damages clause.

¶ 19 We acknowledge that section 17 refers to the amount to be paid as "liquidated damages." Nonetheless, section 17 is titled as an early termination clause. In addition, as described above, the clause describes the consequences in the event that either party elected to terminate the contract early. Interpreting section 17 as a whole, it clearly functions as an early termination clause, and not a liquidated damages clause. See *Salce v. Saracco*, 409 Ill. App. 3d 977 (2011). Accordingly, we find that Count I of the plaintiff's complaint must fail as a matter of law.

¶ 20 III. Promissory Estoppel

¶ 21 Count III of plaintiff's complaint requested damages under the doctrine of promissory estoppel. The complaint alleged that defendant made plaintiff an express promise that, if she left North Carolina, she would be employed for at least 3 years. The complaint further stated that plaintiff relied upon this promise, and she gave up her compensation and benefit packages in North Carolina, to work for defendant.

¶ 22 Our supreme court clarified, in *Newton Tractor Sales, Inc. v. Kubota Tractor Corporation*, that promissory estoppel can be pled as an affirmative cause of action. *Newton Tractor Sales, Inc. v. Kubota Tractor Corporation*, 233 Ill. 2d 46 (2009). The doctrine operates

as "a 'sword' in any situation where a promise has been made which was relied upon the promisee to his detriment in such a manner as to make it a fraud or injustice not to enforce the promise." *Id.* at 55 (citing R. Brazener, Annotation, *Promissory Estoppel as Basis for Avoidance of Statute of Frauds*, 56 A.L.R. 3d 1037, 1042 (1974)). Promissory estoppel is an equitable doctrine under which the plaintiff "may recover *without the presence of a contract.*" (Emphasis added.) *Id.* at 53 (citing *Illinois Valley Asphalt, Inc. v. J.F. Edwards Construction Co.*, 90 Ill. App. 3d 768 (1980)).

¶ 23 In the instant case, plaintiff has not stated a cause of action for promissory estoppel because an actual contract existed between the parties. As stated, in *Prentice v. UDC Advisory Services, Inc.*:

> "[O]nce it is established, either by an admission of a party or by a judicial finding, that there is an enforceable contract between the parties and therefore consideration exists, then a party may no longer recover under the theory of promissory estoppel. *** It is not intended 'to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract.' " *Prentice v. UDC Advisory Services, Inc.*, 271 Ill. App. 3d 505, 512 (1995), (citing *Wagner Excello Foods, Inc. v. Fearn Int'l, Inc.*, 235 Ill. App. 3d 224, 237 (1992)).

¶ 24 In other words, promissory estoppel is barred when there is an express contract between the parties. *Prodromos v. Poulos*, 202 Ill. App. 3d 1024, 1032 (1990) (stating "as a rule, plaintiffs cannot pursue quasi-contractual claims when there is a contract between the parties"). Plaintiff admits that the parties entered into a written employment contract, and she did not otherwise plead that the contract was unenforceable. Although plaintiff claims that she only

signed the contract because she had already moved her family to Peoria, the law in Illinois is clear that inequality in bargaining power is insufficient to hold that a contract is unenforceable. *Zobrist v. Verizon Wireless*, 354 Ill. App. 3d 1139 (2004). Consequently, plaintiff's promissory estoppel claim must also fail.

¶ 25 IV. Injunctive Relief

¶ 26 Finally, the plaintiff argues that the trial court improperly dismissed her prayer for injunctive relief. In order to be entitled to preliminary injunctive relief, one of the elements that the plaintiff has to prove is a likelihood of success on the merits. *Armstrong v. Crystal Lake Park District*, 139 Ill. App. 3d 991 (1985). As we have established that plaintiff cannot succeed on either her declaratory judgment or promissory estoppel claim, she is not entitled to injunctive relief.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 29 Affirmed.