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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-239

	Opinion Delivered June 20, 2012
WAYNE WELSHER, M.D. APPELLANT	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT
V.	[NO. CV-2008-2030-2]
	HONORABLE DAVID CLINGER, JUDGE
MERCY HEALTH SYSTEM OF NORTHWEST ARKANSAS, INC. APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from an order granting summary judgment to appellee, Mercy Health System. Mercy Health System's CEO recruited appellant, Dr. Welsher, to relocate from North Carolina to Northwest Arkansas to establish a cardiovascular surgery service at Mercy Health System. The parties entered into a written "Physician's Agreement," pursuant to which either party could terminate the agreement with or without cause after giving ninety days' notice of intent to terminate. The parties simultaneously entered into a loan agreement whereby Mercy loaned Welsher $200,000, Welsher executed a promissory note in that amount providing for semi-monthly payments to Mercy, and Mercy agreed to forgive each payment due on the note so long as Welsher remained employed at Mercy. Almost two years later, Mercy gave Welsher notice that his employment would be terminated in ninety days pursuant to the terms of the Physician's Agreement. Welsher sued Mercy, alleging that he

suffered damage because he was fraudulently induced to enter into the Physician's Agreement and asserting that he was not obligated to pay the remaining $91,574 principal outstanding on the promissory note. The trial court granted summary judgment in favor of Mercy, and this appeal followed.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, responses to requests for admission, and affidavits show that there is no genuine issue of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Walls v. Humphries*, 2012 Ark. App. 4. The burden of proving that there is no genuine issue of material fact is upon the moving party. *Id.* The question on appeal is whether the evidence presented by the moving party left a material question of fact unanswered. *Id.* In conducting our appellate review, we view the proof in the light most favorable to the party resisting the motion, resolving any doubts and inferences against the moving party. *Id.*

Dr. Welsher asserts that he made a prima facie case that he had been fraudulently induced to enter into the contract. The law of fraudulent inducement is premised on the notion that a contract obtained by fraud cannot be used to relieve the party obtaining the contract of liability for that fraud. *See Allen v. Overturf*, 234 Ark. 612, 353 S.W.2d 343 (1962). When a party is induced by false representations to enter into a contract, the contract is utterly invalid. *Id.* This is so even if the contract is a written one containing a merger clause. *Id.* In order to prove fraud, a plaintiff must prove five elements under Arkansas law: (1) that the

defendant made a false representation of material fact; (2) that the defendant knew that the representation was false or that there was insufficient evidence upon which to make the representation; (3) that the defendant intended to induce action or inaction by the plaintiff in reliance upon the representation; (4) that the plaintiff justifiably relied on the representation; and (5) that the plaintiff suffered damage as a result of the false representation. *Wal-Mart Stores, Inc. v. Coughlin*, 369 Ark. 365, 255 S.W.3d 424 (2007).

The statements by Mercy's CEO that are alleged to have fraudulently induced Dr. Welsher to enter into the Physician's Agreement are that (1) Mercy would ensure Welsher had adequate facilities, equipment, and staff; (2) Mercy would transition from a community hospital to a regional medical center; (3) Mercy would engage in a comprehensive marketing program; (4) Mercy's administration would insist on cooperation from the cardiology group; and (5) Mercy would allow Welsher to do complex medical cases. Dr. Welsher's arguments focus on whether these were statements of fact, as opposed to expressions of hopes and aspirations. However, we think that the key issue is whether Dr. Welsher could reasonably have relied on these statements as concrete facts in light of his testimony that Mercy's CEO also informed him that the resources available for establishment of the cardiovascular department goals were limited and needed to be balanced against Mercy's investments in other programs; that the efforts to expand the cardiology department had a troubled history; that the person who had previously held that position was discharged after one year of employment because he had difficulties working with others; and that "if this program did not

work out with" Welsher, Mercy would have lost its final opportunity to have a cardiac surgery service.

Taking all of these additional statements into consideration, we do not think that Dr. Welsher could have reasonably believed that the five enumerated statements were anything more than goals and aspirations. Reliance must be reasonable under the circumstances, *i.e.*, where the parties deal at arm's length, a party will not be heard to say that he relied upon a representation when it was contradicted by other facts of which he had knowledge. *See* Richard A. Lord, *Williston on Contracts* § 69:33 (2012). Here, the possibility that the efforts to establish a cardiovascular surgery service might fail was frankly discussed, as was the need for Dr. Welsher to establish a good working relationship with others. Likewise, Dr. Welsher was informed that the resources available to the program were limited by other considerations, including return on investment. We think that a reasonable person therefore could not view the enumerated statements as statements of fact, but that they were instead expressions of aspirations and goals that could be obtained only if Mercy and Welsher worked well together.

In the absence of any basis for finding reasonable reliance, we hold that the trial court did not err in granting summary judgment to Mercy on Dr. Welsher's fraudulent-inducement claim. Furthermore, because fraudulent inducement is the basis for appellant's argument regarding repayment of the promissory note, our holding that reasonable reliance was lacking makes it unnecessary to address appellant's point regarding repayment of the promissory note.

Affirmed.

GRUBER and HOOFMAN, JJ., agree.

Shemin Law Firm PLLC, by: *Kenneth R. Shemin*; and *Cullen & Co., PLLC*, by: *Tim Cullen*, for appellant.

Wright, Lindsey & Jennings LLP, by: *Edwin L. Lowther, Jr.* and *Michelle M. Kaemmerling*, for appellee.