

FIRST DIVISION
December 12, 2011

No. 1-11-0604

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BETH HILLMAN, D.O.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 10 CH 37532
)	
SWEDISH EMERGENCY ASSOCIATES, P.C.,)	Honorable
)	William O. Maki,
Defendant-Appellee.)	Judge Presiding.

O R D E R

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Karnezis concurred with the judgment.

HELD: Trial court properly dismissed the complaint with prejudice as plaintiff failed to allege a cause of action for declaratory judgment and forfeited any error as to dismissal of accounting claim.

¶ 1 Plaintiff, Beth Hillman, D.O., appeals from the dismissal with prejudice of her complaint seeking a declaratory judgment and an accounting against defendant, Swedish Emergency Associates, P.C. (SEA). The complaint arises out of a purported letter agreement relating to achieving partnership. We affirm.

¶ 2

BACKGROUND

¶ 3 Plaintiff, a physician licensed to practice medicine in Illinois, was employed by SEA. On July 1, 2007, James H. Vasilakis of the SEA human resources department sent plaintiff a letter which was attached to the complaint as an exhibit.

¶ 4 The letter stated:

"On behalf of the Board of Directors of Swedish Emergency Associates I would at this time formally extend to you an offer of entry into the SEA Partnership Track. As you recall partnership requires 3 years of service to the group- one year probation and a 2 year waiting period. As a result of your exceptional performance and work ethic we feel you have earned this privilege. Full partnership therefore would be offered 3 years from your original hire date."

The letter further stated: "Partnership would be contingent upon maintenance of all SEA employee contractual obligations," including but not limited to "full time employee status, board certification in emergency medicine, unencumbered physician licensure, as well as continued high quality performance in the Emergency Department and hospital activities."

¶ 5 The letter further provided "benefits" of partnership included: "Equal corporate shareholder status, attendance at corporate meetings, involvement in the group's decision making processes, voting privileges as well as several financial incentives." The letter asked plaintiff to indicate her acceptance or denial of "this partnership track offer" by checking the appropriate response on the letter and returning a copy to the SEA corporate president, Dr. McNulty. The letter provided a line for plaintiff's signature. The exhibit does not include plaintiff's signature nor a notation as to

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whether plaintiff accepted or rejected the offer. Plaintiff does not allege she returned the letter to Dr. McNulty.

¶ 6 However, plaintiff alleges she accepted the offer shortly after it was made, diligently completed the required three years of service, and "otherwise fulfilled all other conditions precedent imposed upon her by the agreement." Plaintiff alleges that, instead of offering her equal corporate shareholder status, SEA offered her a shareholder status subordinate to the persons designated in the current shareholder agreement as "Founding Shareholders" (hereinafter Founding Shareholders). Plaintiff alleges that Founding Shareholders are the only shareholders who can amend articles or bylaws, issue additional shares, or take other specified actions by a majority vote. After SEA offered her a subordinate shareholder status, plaintiff unsuccessfully attempted to reach an agreement with SEA to secure the shareholder status which she believed was offered in the letter. According to the complaint, "the parties were unable to reach an agreement on the meaning of the terms of the employment agreement or the sufficiency of the shareholder status offered."

¶ 7 In count I of her complaint, plaintiff sought a declaration that she was entitled to shareholder status equal to that of the Founding Shareholders. In count II, she sought an accounting as to the value of her interest in SEA as a Founding Shareholder.

¶ 8 On September 30, 2010, SEA filed a combined motion to dismiss the complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 5/2-619 (West 2010)). Pursuant to section 2-615, SEA argued that dismissal of the complaint was required because plaintiff had failed to allege the existence of an enforceable contract. Pursuant to section 2-619, SEA argued that, on June 13, 2006, the parties had entered into a fully integrated employment

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contract, signed by both parties, which precluded enforcement of the alleged offer set forth in the June 1, 2007, letter. Plaintiff's employment contract and affidavit as to its foundation and authenticity was attached to the motion. The trial court entered and continued the section 2-619 portion of the motion, stayed discovery, and ordered briefing solely on the section 2-615 portion of the motion. After briefing, the trial court dismissed the complaint with prejudice. Plaintiff timely appealed that dismissal order.

¶ 9 On appeal, plaintiff argues her complaint sufficiently alleged the existence of an enforceable promise contained in the July 1, 2007, letter, which she accepted by her full performance. She asserts SEA breached the letter agreement by offering her a shareholder status subordinate to that of the Founding Shareholders, which was contrary to the letter's promise of an "[e]qual corporate shareholder status." Plaintiff seeks reversal of the dismissal of her complaint.

¶ 10

ANALYSIS

¶ 11 A motion to dismiss under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), raises an issue as to the legal sufficiency of the complaint based on deficiencies on the face of the complaint. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 382 (2004). A court must determine "whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Id.* All well-pleaded facts must be taken as true. *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 68-69 (2004). However, conclusions of law or fact which are not supported by specific facts are not admitted. *Id.* at 69. Exhibits attached to the complaint are considered part of the pleadings. *Bajwa v. Metro Life Insurance Co.*, 208 Ill. 2d 414, 431 (2004). An exhibit upon which a claim is based controls over

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conflicting allegations in the complaint. *Id.* at 431-32. We review a dismissal under section 2-615 *de novo*. *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 54 (2011). The decision to dismiss a case may be affirmed on any basis contained in the record. *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 196 (1999).

¶ 12 Declaratory Action (Count I)

¶ 13 Plaintiff argues she has stated a cause of action supporting her request for a declaration that SEA offered her shareholder status which was not in compliance with the letter agreement.

¶ 14 *Karimi v. 401 North Wabash Venture, LLC*, 2011 Ill. App. (1st) 102670, is dispositive. In *Karimi*, plaintiffs, Farid Karimi and Mahmobah Kashani, entered into an agreement with defendants, 401 North Wabash Venture, LLC, Trump Chicago Managing Member, LLC, and Deutsch Bank Trust Company Americas, to purchase a condominium unit and three parking spaces at the Trump International Hotel and Tower. *Id.* at ¶5. The total purchase price was in excess of \$2 million, and the plaintiffs deposited 15% of the purchase price as earnest money. *Id.* The agreement provided an anticipated closing date of late 2008, which was extended to May 15, 2009, due to the plaintiffs' inability to obtain financing. *Id.* at ¶5-6. The plaintiffs failed to close on May 15, 2009, and the defendants sent the plaintiffs a letter dated July 6, 2009, stating the defendants were terminating the purchase agreement due to the plaintiffs' breach thereof. *Id.* at ¶6. The defendants retained the earnest money and earned interest as liquidated damages, and later sold the condominium unit and two parking spaces to a third party. *Id.*

¶ 15 The plaintiffs filed an amended complaint alleging, in pertinent part, that the purchase agreement was still in effect and seeking a declaration of the parties' rights under the agreement.

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Id. at ¶7. The trial court dismissed the complaint with prejudice pursuant to section 2-615 of the Code. *Id.* The plaintiffs appealed. We affirmed, holding:

"A claim for declaratory judgment *** is not the proper vehicle for presenting what are, in essence, plaintiffs' breach of contract allegations. The declaratory judgment process allows a court to address a controversy after a dispute arises but before steps are taken that give rise to a claim for damages or other relief. [Citation.] Although a declaratory judgment action is proper to determine the parties' existing rights, a court may dismiss such an action if 'a party, seeks to enforce his rights after the fact.' [Citation.] Here, defendants have already terminated the purchase agreement and sold the unit to a third party. Plaintiffs are seeking 'to enforce [their] rights after the fact' and these allegations are properly breach of contract allegations. The dismissal of the declaratory judgment counts was proper on that basis." *Id.* at ¶10.

¶ 16 Similarly, in the present case, plaintiff may not bring a declaratory judgment action because she is seeking to enforce her contractual rights *after* steps had been taken giving rise to her claim for damages. Specifically, plaintiff alleges that, in the July 1, 2007, letter, SEA offered her "[f]ull partnership" and "[e]qual corporate shareholder status" in three years as long as she performed certain contractual obligations. Plaintiff alleges she accepted the offer, satisfactorily completed the three-year waiting period, and "fulfilled all other conditions precedent imposed upon her by the agreement." Plaintiff alleges that, following the three-year waiting period, SEA offered her shareholder status subordinate to the Founding Shareholders. Plaintiff alleges that, after she "was advised of the subordinate shareholder status being offered to her, she made an effort to secure status

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consistent with that offered and accepted in the employment agreement, but the parties were unable to reach an agreement on the meaning of the terms of the employment agreement or the sufficiency of the shareholder status offered." As in *Karimi*, plaintiff here is seeking to enforce her contractual rights "after the fact," and her allegations are properly breach of contract allegations. Accordingly, we affirm the dismissal of plaintiff's declaratory judgment action.

¶ 17 Even on the merits, plaintiff's request for a declaratory judgment, that she is entitled to shareholder status equal to that of the Founding Shareholders, fails because she did not adequately allege the letter agreement constitutes a valid and enforceable contract. "The case law provides that an enforceable contract must be premised on language that is definite and certain as to all essential terms." *Peterson v. Residential Alternatives of Illinois, Inc.*, 402 Ill. App. 3d 240, 247 (2010). The letter agreement states defendant is extending "an offer of entry into the SEA Partnership Track" contingent on a 3-year wait period and "maintenance of all SEA employee contractual obligations," and that one of the "benefits" of the partnership is plaintiff will be entitled to "[e]qual corporate shareholder status." However, the letter agreement does not state what "partnership" entails; as noted by SEA, the term "partnership" here is "an imprecise term in this context because SEA is undisputedly not a partnership, it's a corporation." The letter agreement does not specify all the contractual obligations which she is required to maintain under the SEA employment contract in order to be eligible for partnership, nor is the SEA employment contract to which the letter agreement refers attached to the complaint. Further, the letter agreement does not state how many shares plaintiff is entitled to, what she will have to pay for them, what kind of shares they are, what she will be paid as a shareholder, whether she will be entitled to an officer or director position, and

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whether she will have a vote as a shareholder. The letter agreement does not use the term Founding Shareholder or indicate whether the shares to which plaintiff is entitled gives her the same rights and responsibilities as a Founding Shareholder. Given the lack of definite language as to all essential terms, the letter agreement here is not an enforceable contract.

¶ 18 Further, plaintiff's request for a declaratory judgment in her favor is without merit because she failed to adequately plead her acceptance of the letter agreement. The letter agreement specifically provides plaintiff is to accept the agreement by checking the appropriate response ("I accept the Partnership Track offer") and returning it to the SEA corporate president. The letter agreement also provides a line for plaintiff's signature. The letter agreement attached as an exhibit to plaintiff's complaint does not include plaintiff's signature nor a notation as to whether she accepted or rejected the offer; further, plaintiff does not allege in her complaint that she returned the agreement to the SEA corporate president. Plaintiff alleges, in a conclusory manner, that she accepted the letter agreement and "satisfactorily completed the three-year waiting period, and otherwise fulfilled all other conditions precedent imposed upon her by the agreement." There are no allegations of specific facts to support this conclusion.

¶ 19 Plaintiff argues *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill. 2d 482 (1987), is controlling. Our supreme court in *Duldulao*, addressing for the first time whether an employee handbook was contractually binding, held that an employee handbook or other policy statement would be binding where: (1) the policy or handbook language clearly states a promise which would allow an employee to reasonably believe an offer has been made; (2) the statement is disseminated to the employee in such a way that the employee is aware of its contents and reasonably believes it

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is an offer; and (3) the employee accepts the offer by commencing or continuing to work after learning of the statement. *Id.* at 490. The employee's work is the consideration for the promises. *Id.* Thus, under *Duldulao*, as to "a claim for breach of contract based upon employment-related policy statements and handbooks, the traditional requirements of offer, acceptance, and consideration were still required, albeit in a somewhat modified form." *Unterschuetz*, 346 Ill. App. 3d at 71.

¶ 20 First, we note the promise raised by plaintiff in her complaint was not part of an employee handbook or policy statement generally disseminated by SEA. Plaintiff's complaint is based on a purported promise which was contained in a letter addressed solely and specifically to plaintiff. The *Duldulao* analysis is not squarely on point. Nonetheless, plaintiff fails, as discussed above, to allege the elements of an enforceable contract action.

¶ 21 Accounting (Count II)

¶ 22 In her second count, plaintiff sought an accounting to determine the value of her interest in SEA as a Founding Shareholder. Plaintiff has failed to address the dismissal of her claim for an accounting and, therefore, has forfeited any error as to its dismissal. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Furthermore, as discussed, plaintiff failed to allege a basis for a declaration that she is entitled to Founding Shareholder status.

¶ 23 Dismissal with Prejudice

¶ 24 The trial court dismissed plaintiff's complaint with prejudice. Generally, "an initial pleading should be dismissed with prejudice under section 2-615 only if it is clearly apparent that no set of facts can be proven that will entitle the plaintiff to recover." *Blazyk v. Daman Express, Inc.*, 406 Ill.

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App. 3d 203, 209 (2010). Plaintiff has not presented any arguments on appeal as to the trial court's decision to grant defendant's motion to dismiss with prejudice and, therefore, has forfeited any challenge to this issue. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Because the complaint did not state a cause of action, and plaintiff never proposed amendments to her complaint in the trial court, we affirm the dismissal with prejudice. *Bellik v. Bank of America*, 373 Ill. App. 3d 1059, 1065-66 (2007).

¶ 25 Affirmed.