

THIRD DIVISION
August 10, 2011

2011 IL App (1st) 102652-U
No. 1-10-2652

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HAVOCO OF AMERICA, LTD.,)	APPEAL FROM THE
Plaintiff-Appellant,)	CIRCUIT COURT OF
)	COOK COUNTY
v.)	
)	
HORIZON NATURAL RESOURCES COMPANY,)	No. 07 L 2325
Defendant)	
)	
(International Coal Group, Inc., Defendant-Appellee;)	
Horizon Natural Resources Sales Company; AEI Holding)	
Company, Inc.; AEI Resources, Inc., doing business)	HONORABLE
as Ziegler Coal Holding Company; International Coal)	RONALD F.
Group, Inc.; Massey Energy; Anker Coal Group, Inc.;)	BARTKOWICZ,
and CoalQuest, Defendants).)	JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

ORDER

HELD: The circuit court of Cook County did not err in dismissing Havoco's breach of contract claim against International Coal Group, Inc. (ICG), based on Havoco's lack of legal capacity to sue, the lack of a contractual relationship between Havoco and ICG, and the order of a federal bankruptcy court. The judgment of the circuit court is affirmed.

¶ 1 Plaintiff, Havoco of America, Ltd. (Havoco), appeals orders of the circuit court of Cook County dismissing its complaint against defendant, International Coal Group, Inc. (ICG).¹ The circuit court ruled Havoco lacked capacity to sue and lacked a contractual relationship with ICG. Additionally, the court ruled Havoco's breach of contract claim against ICG was barred by an order entered by the United States Bankruptcy Court for the Eastern District of Kentucky in September 2004. For the following reasons, we agree and affirm.

¶ 2 **BACKGROUND**

¶ 3 The record discloses that on March 2007, Havoco filed a complaint containing the following allegations. In 1977, R&F Coal Company (R&F) entered into contract number 77P-42-T7 to sell and deliver a significant tonnage of coal to the Tennessee Valley Authority (TVA). R&F entered into an agency agreement with Hilco, Inc. (Hilco) in connection with contract number 77P-42-T7, under which Hilco would be paid 40 cents per ton of coal shipped to the TVA.

¶ 4 On January 28, 1991, R&F assigned its rights under contract number 77P-42-T7 to Marrowbone Development Company (Marrowbone). The contract was subsequently amended and restated with Supplement 270, which provided in part:

¹ Defendants Horizon Natural Resources Company; Horizon Natural Resources Sales Company; AEI Holding Company, Inc.; AEI Resources, Inc., doing business as Ziegler Coal Holding Company; International Coal Group, Inc.; Massey Energy; Anker Coal Group, Inc.; and CoalQuest are not parties to this appeal.

1-10-2652

"As of December 31, 1990, approximately 13,300,000 tons remain available for shipment under this contract. If at expiration of the term of the contract less than the maximum tonnage has been scheduled for delivery, the parties may by agreement extend the term of this contract for a period sufficient to permit delivery of tonnage in an amount up to the difference between the maximum tonnage and the total scheduled; however, neither party shall be obligated to agree to such an extension. If deliveries under the contract continue beyond January 27, 1992, Contractor may furnish coal from any mine owned or controlled by it or its parent or affiliate companies to such [of] TVA's fossil plants and at such qualities as the parties may agree."

Shell Mining Company (Shell) subsequently acquired R&F and R&F's rights under contract number 77P-42-T7. On November 23, 1992, Ziegler Coal Holding Company (Ziegler) acquired the stock of Shell, as well as contract number 77P-42-T7.

¶ 5 Havovo further alleged that coal shipments continued under contract number 77P-42-T7 through at least February 23, 1993. As of that date, at least 12,632,856 tons remained to be shipped under contract number 77P-42-T7. Moreover, Havoco alleged substantially all of that coal has been delivered to the TVA under the contract. Havoco believed Hilco performed all of its obligations under the agency agreement and was paid 40 cents per ton shipped, but was not permitted to perform as an agent after February 23, 1993. In August 1999, the TVA took the position that contract number 77P-42-T7 expired on February 23, 1993.

1-10-2652

¶ 6 On December 4, 1996, the United States Bankruptcy Court for the Eastern District of Tennessee ordered Hilco to assign its rights under the agency agreement and contract number 77P-42-T7 to Havoco.

¶ 7 Before August 1999, AEI Holding Company, Inc., and AEI Resources, Inc. (collectively AEI) acquired the stock of Ziegler. Horizon Natural Resources Company and Horizon Natural Resources Sales Company (collectively Horizon) are the successors in interest to AEI. Havoco alleged that ICG acquired some of Horizon's assets, including coal covered by contract number 77P-42-T7. Havoco also alleged that Massey Energy, Anker Coal and CoalQuest are successors in interest to Horizon's assets, including coal covered by contract number 77P-42-T7. Havoco further believed coal covered by contract number 77P-42-T7 was delivered by Ziegler, AEI, Horizon, ICG, Massey Energy, Anker Coal, and CoalQuest.

¶ 8 Havoco's complaint, seeking over \$5 million dollars in damages, contains five counts. Counts I and III alleged breach of the agency agreement. Count II alleged unjust enrichment. Count IV alleged fraudulent transfer of Horizon's assets. Count V alleged a conspiracy to defraud Havoco.

¶ 9 On February 28, 2008, ICG filed a combined motion to dismiss Havoco's complaint pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2006)). ICG first argued that Havoco's complaint is enjoined by an order entered by the United States Bankruptcy Court for the Eastern District of Kentucky on September 16, 2004 (September 2004 order), a copy of which was attached to ICG's motion. ICG stated that in 2002, Horizon, Marrowbone and Ziegler (Horizon Debtors) filed for protection under chapter 11 of the

United States Bankruptcy Code in the Bankruptcy Court for the Eastern District of Kentucky. In connection with the liquidation of the Horizon Debtors, substantially all of their assets were sold to various purchasers pursuant to the September 2004 order. In particular, the September 2004 order approved an "Amended and Restated Asset Purchase Agreement" (Asset Purchase Agreement) dated June 2, 2004, between certain Horizon Debtors and Newcoal, LLC (subsequently renamed ICG), a copy of which was attached to ICG's motion. The Asset Purchase Agreement specified the assets being sold, assigned or otherwise transferred to ICG. Neither contract number 77P-42-T7 nor the agency agreement Hilco assigned to Havoco is listed in the schedules of the Asset Purchase Agreement. The September 2004 order also provided in part:

"[A]ll persons and entities are forever prohibited and enjoined from commencing or continuing in any manner any action or other proceeding, whether in law or equity, in any judicial, administrative, arbitral or other proceeding against the relevant Purchaser, its successors and assigns, or the relevant Purchased Assets, with respect to any (a) Encumbrance arising under, out of, in connection with or in any way relating to the Debtors, the applicable Purchased Assets *** or (b) Successor Liability ***."

ICG also argued Havoco's claims were barred by various statutes of limitations. ICG further argued that Havoco failed to state any claim for which relief may be granted. In particular, ICG argued Havoco's breach of contract claims were deficient because they failed to establish the existence of a contract with ICG.

¶ 10 On April 18, 2008, Havoco filed its response to ICG's motion to dismiss. Havoco argued its claims were not barred by the September 2004 order because Havoco only sought to impose

1-10-2652

liability for events arising after the entry of that order. Havoco noted that under section 2.3(a)(I) of the Asset Purchase Agreement, ICG assumed:

"[A]ll Liabilities and obligations relating to the Purchased Assets arising from or related to the Buyer's ownership, possession or operation of the Purchased assets after the Closing Date, including all Liabilities and obligations arising in connection with the Executory and the Non-Executory Contracts."

Havoco further argued its claims were timely and stated that it would amend its complaint to adequately plead fraud and conspiracy.

¶ 11 On May 21, 2008, ICG filed a reply to Havoco's response. In the course of its argument, ICG highlighted that, according to Havoco's complaint and exhibits, both Ziegler and the TVA had informed Havoco that the last shipment under contract number 77P-42-T7 occurred in February 1993, and there had been no further shipments pursuant to that contract. Ziegler told Havoco it continued to ship coal to the TVA as a result of ongoing business relationships Ziegler formed with the TVA separate from and predating Ziegler's acquisition of contract number 77P-42-T7.

¶ 12 On October 30, 2008, ICG filed a motion to dismiss Havoco's complaint on the ground that Havoco lacked legal standing to sue. ICG asserted that an examination of the records of the Secretary of the State of Delaware revealed that Havoco was incorporated in 1974, but had not filed an annual report since 1991 and the Secretary of State had declared Havoco's corporate charter void in 1994 for failure to pay corporate taxes. ICG noted under Delaware law, Havoco

1-10-2652

had three years to wind up its affairs – a period which expired well before Havoco filed its complaint in 2007.

¶ 13 The same day, ICG supplemented to its combined motion to dismiss by filing a copy of an August 2004 notice filed in the bankruptcy proceedings of the Horizon Debtors. The notice listed two sales commission contracts with the TVA (neither of which was contract number 77P-42-T7 or the agency agreement with Hilco) as expressly rejected by ICG as part of the Asset Purchase Agreement.

¶ 14 On November 7, 2008, Havoco filed a reply to ICG's supplemental motion to dismiss. Havoco again relied on the language of the Asset Purchase Agreement. Havoco also asserted a genuine issue of material fact existed about whether ICG's business with the TVA related to contract number 77P-42-T7. Havoco contended contract number 77P-42-T7 covered any coal sold to the TVA by Marrowbone or its affiliates to any TVA plants.

¶ 15 On November 10, 2008, following a hearing on the matter, the circuit court granted ICG's motions to dismiss. The circuit court directed the parties to submit a final judgment order on December 1, 2008.

¶ 16 On November 19, 2008, ICG filed opposition to Havoco's reply to the supplemental motion to dismiss, which ICG asserted it had not seen prior to the November 10, 2008 hearing. ICG attached an affidavit from its general counsel, who was familiar with the Horizon Debtors' bankruptcy proceeding. ICG's general counsel stated that ICG did not acquire Marrowbone's assets, including any coal reserves. ICG's general counsel also stated that the schedules on which Havoco relied in its reply related to asset purchases by Oldcoal, LLC, now known as Lexington

1-10-2652

Coal Company, LLC, rather than the purchases by Newcoal, LLC, now known as ICG. ICG's general counsel further stated that he was familiar with the company's dealings with the TVA and asserted no aspect of its relationship with the TVA is based on contract number 77P-42-T7 or any supplements or continuations thereof.

¶ 17 On November 26, 2008, Havoco responded to ICG's motion to dismiss based on a lack of legal standing. Havoco attached an affidavit from Barry VanDerMullen stating that he had been president of Havoco. VanDerMullen also stated that Havoco was declared a void corporation for non-payment of taxes in 1994. VanDerMullen further stated that 100% of Havoco's shares were owned by a trust, for which VanDerMullen was trustee. Havoco also attached a copy of the trust document, dated January 1, 1991, transferring Havoco's legal rights and authorizing VanDerMullen, his heirs and assigns:

"to take all measures, which may be proper or necessary for the complete recovery of the assigned property and in their name or otherwise to prosecute or withdraw any suits or proceedings in law or equity therefor."

¶ 18 On December 1, 2008, the case was continued for status.

¶ 19 On December 11, 2008, ICG filed a reply on the issue of legal standing, arguing that the trust lacked authority to sue because it was not formed under Delaware law for the purpose of winding up Havoco's affairs. ICG also argued Havoco had provided no legal authority for joining or substituting the trust as a party to the case.

¶ 20 On December 16, 2008, the circuit court entered two orders. The circuit court's first order dismissed the complaint for lack of standing. The circuit court's second order dismissed the

complaint for the reasons previously stated by the circuit court on August 11 and November 10, 2008. The transcript of proceedings for November 10, 2008, show the circuit court dismissed the claim based on standing and based on the documents from the Horizon debtors' bankruptcy proceeding.

¶ 21 On January 14, 2009, Havoco filed a notice of appeal to this court. On February 23, 2009, this court dismissed the appeal due to the lack of a final judgment against all defendants. On August 9, 2010, the circuit court entered an order administratively closing the case. On September 7, 2010, Havoco filed a notice of appeal to this court.

¶ 22 DISCUSSION

¶ 23 I. The Standard of Review

¶ 24 On appeal, Havoco argues the circuit court erred in dismissing its complaint for lack of standing. Havoco also argues the circuit court erred in dismissing count I of its complaint, which alleged a breach of the agency agreement. In this case, ICG proceeded by way of a combined motion to dismiss. Section 2-619.1 of the Code allows a party to combine in one motion a section 2-615 motion to dismiss for substantially insufficient pleadings with a section 2-619 motion for involuntary dismissal based upon defects or defenses. 735 ILCS 5/2-619.1 (West 2010). A motion to dismiss under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) tests the legal sufficiency of a plaintiff's claim; a motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)) admits the legal sufficiency of a plaintiff's claim but asserts certain defects or defenses outside the pleading that defeat the claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). "The purpose of a section 2-619

motion to dismiss is to dispose of a case on the basis of issues of law or easily proved issues of fact." *Hertel v. Sullivan*, 261 Ill. App. 3d 156, 160 (1994). Nonetheless, a court may not decide a disputed question of fact if, as here, a jury demand is filed. *Hertel*, 261 Ill. App. 3d at 160.

¶ 25 In this case, the circuit court did not specify the statutory bases for the dismissal orders. Nevertheless, this court can affirm a judgment for any reason the record supports, even if the trial court never relied on that reason. *Holtkamp Trucking Co. v. David J. Fletcher, M.D., LLC*, 402 Ill. App. 3d 1109, 1115 (2010). Accordingly, this court may review whether count I should have been dismissed under any of the bases advanced by ICG. Our standard of review for rulings under either section is *de novo*. *Solaia*, 221 Ill. 2d at 579.

¶ 26 II. Standing

¶ 27 Havoco argues that the circuit court erred in dismissing its complaint for lack of legal standing on the ground that it is a dissolved corporation. At the outset, it is necessary to distinguish between capacity and standing. Section 2-619(a)(2) of the Code provides that a complaint may be dismissed where the plaintiff does not have the legal capacity to sue. 735 ILCS 5/2-619(a)(2) (West 2006). The "legal capacity to sue or be sued" generally refers to the status of the party, *e.g.*, incompetent, infant (*Patterson Heating & Air Conditioning Corp. v. Durable Const. Co.*, 3 Ill. App. 3d 444, 446 (1972)), or unincorporated association (*American Federation of Technical Engineers, Local 144 v. La Jeunesse*, 63 Ill. 2d 263, 266 (1976)). In contrast, "[t]he doctrine of standing requires that a party, either in an individual or representative capacity, have a real interest in the action brought and in its outcome." *In re Estate of Wellman*, 174 Ill. 2d 335, 344 (1996). Lack of legal standing is generally treated as "other affirmative

matter avoiding the legal effect of or defeating the claim" under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2006)). See, e.g., *P & S Grain, LLC v. County of Williamson*, 399 Ill. App. 3d 836, 843 (2010). In this case, ICG used the term standing in the title of one of its motions to dismiss, but the text of the motion argued that Havoco lacked the legal capacity to sue.

¶ 28 A corporation can exist only under the express laws of the state by which it was created. *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Building Corp.*, 302 U.S. 120, 124-25 (1937). The record shows Havoco was a Delaware corporation. Where a corporation fails to pay franchise taxes assessed against it, Delaware law provides "the charter of the corporation shall be void, and all powers conferred by law upon the corporation are declared inoperative***." Del. Code Ann. Tit. 8, §510 (1994). The legal existence of all Delaware corporations, "whether they expire by their own limitations or are otherwise dissolved," is continued for three years "from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct***." *Id.* at §278. Thereafter, a dissolved corporation has no capacity to sue. See *In re Citadel Industries, Inc.*, 423 A.2d 500, 503 (Del.Ch. 1980).

¶ 29 In this case, Havoco does not deny that it is a dissolved corporation. Rather, Havoco notes that its assets and the right to sue for recovery thereof were transferred to a trust years prior to the dissolution. Havoco also notes that Hilco assigned its rights under the agency agreement and contract number 77P-42-T7 to Havoco in 1996. Havoco thus concludes that the trust had an interest in contract number 77P-42-T7 and the commission rights under the agency agreement.

¶ 30 ICG correctly notes that none of Havoco's points establish that Havoco had the legal capacity to sue. Havoco remains a dissolved corporation. Moreover, by showing that its assets and rights were transferred to the trust, Havoco establishes that it also lacked standing, as the trust has any real interest in the outcome of the lawsuit.

¶ 31 Havoco further maintains that the trust had the ability to pursue claims in the name of the trust or the name of Havoco. ICG correctly notes that there is no indication in this appeal that the trust did so. Moreover, Havoco cites no authority in support of its assertion that the trust document supercedes established Illinois law regarding the issues of legal capacity and legal standing. "This court is not a repository where the burden of argument and research may be dumped and we will not scour the record to develop argument for a party." *New v. Pace Suburban Bus Service*, 398 Ill. App. 3d 371, 384 (2010).

¶ 32 Lastly, Havoco asserts that the circuit court erred by refusing to follow its "suggestion" that the trust be made the plaintiff in this lawsuit. However, a party cannot avoid the dismissal which results from its lack of standing and capacity to sue simply by moving for leave to amend the complaint to bring in the proper plaintiff. See *Beagley v. Andel*, 58 Ill. App. 3d 588, 590 (1978). Even assuming *arguendo* as Havoco does that section 2-407 of the Code (735 ILCS 5/2-407 (West 2006)) permits the substitution of the trust as the proper plaintiff, Havoco did not move to amend the complaint, although it had months to do so after ICG first raised the issue. The circuit court did not abuse its discretion in declining to substitute a proper plaintiff *sua sponte*. See *Beagley*, 58 Ill. App. 3d at 590.

¶ 33 In short, we conclude the circuit court did not err in dismissing Havoco's complaint on the

ground that Havoco, as a dissolved corporation, lacked legal capacity to sue.

¶ 34 III. Breach of Contract

¶ 35 Although unnecessary to the disposition of this appeal, we further note that the circuit court did not err in dismissing the breach of contract claim against ICG, even had it substituted the trust as a proper plaintiff. A breach of contract claim requires a contractual relationship between the plaintiff and defendant. *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 199 (1999). Havoco's complaint does not allege a contractual relationship between it and ICG. Rather, Havoco alleged, upon information and belief, that ICG delivered coal covered by contract number 77P-42-T7. Havoco also relies on section 2.3(a)(I) of the Asset Purchase Agreement, under which ICG assumed:

"[A]ll Liabilities and obligations relating to the Purchased Assets arising from or related to the Buyer's ownership, possession or operation of the Purchased Assets after the Closing Date, including all Liabilities and obligations arising in connection with the Executory and the Non-Executory Contracts."

However, Havoco fails to note sections 2.1(a)(vi) and (vii) of the Asset Purchase Agreement, with exceptions not relevant here, define the executory and nonexecutory contracts as those listed or identified on Schedules 2.1(a)(vi), (vii) and 2.1(b).

¶ 36 In this case, it is undisputed that neither contract number 77P-42-T7 nor the agency agreement appears in the schedules to the Asset Purchase Agreement. Havoco argues that ICG has liability arising simply out of its ownership of the purchased assets. Yet Havoco fails to show how any such liability constitutes a breach of contract number 77P-42-T7 or the agency

agreement, where ICG assumed no such contractual liability or obligation under the asset purchase agreement. Instead, Havoco argues at length about its rights under these contracts, without showing ICG had any liability or obligation under them. Moreover, the September 2004 order, approving the asset sales under the terms stated in the agreement, effectively bars Havoco from suing ICG based on contracts for which it assumed no liability or obligation.

¶ 37 Havoco asserts a question of fact remains about whether ICG's current dealings with the TVA are related to contract number 77P-42-T7. However, the record shows ICG assumed no liability or obligation under that contract. Indeed, the record shows that two unrelated contracts involving the TVA were expressly rejected by ICG. When ruling on a motion to dismiss under section 2-619 of the Code, if a defendant presents adequate evidence supporting his defense, the burden then shifts to the plaintiff. See *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). If the facts established by the defendant's evidence are not refuted by evidence from the plaintiff, the court will take those facts as true notwithstanding any contrary unsupported allegations in the plaintiff's pleadings. See *Safeco Insurance Co. v. Jelen*, 381 Ill. App. 3d 576, 583 (2008). Havoco's speculation, absent the existence of a question of fact, is insufficient to survive the motion to dismiss. Accordingly, the circuit court did not err in dismissing Havoco's breach of contract claim against ICG.

¶ 38 CONCLUSION

¶ 39 In sum, the circuit court did not err in dismissing Havoco's complaint based on Havoco's lack of legal capacity to sue. Also, the circuit court did not err in dismissing Havoco's breach of contract claim against ICG, based on the asset purchase agreement approved by the September

1-10-2652

2004 order. For all of the aforementioned reasons, the orders of the circuit court of Cook County are affirmed.

¶ 40 Affirmed.