

No. 1-10-1868

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

R & J CONSTRUCTION SUPPLY COMPANY, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 09 L 012850
)	
WILLIAM JAVARAS, individually and d/b/a West)	The Honorable
Suburban Concrete,)	Ronald Bartkowicz,
)	Judge Presiding.
Defendant-Appellee.)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

HELD: The circuit court did not err in striking a defendant from a complaint where a limited liability company engaged in business under an assumed name with plaintiff and the named defendant did not agree to be personally liable for the debts and obligations of the limited liability company. The circuit court properly took judicial notice of a Secretary of State's Office's report detailing an assumed name for a limited liability company. The circuit court also did not err in finding that plaintiff's complaint was deficient because it failed to attach existing contracts to the complaint as an exhibit supporting a breach of contract count.

Plaintiff R & J Construction Supply Company, Inc. (Supply) appeals the circuit court's dismissal of William Javaras as a defendant from its two count complaint, which included a count for breach of contract and a count for account stated. Supply named Javaras as a

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defendant individually and doing business as West Suburban Concrete. Supply claims that the circuit court should not have granted Javaras's motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)) because the circuit court erred in taking judicial notice of a Illinois Secretary of State's Office report listing West Suburban Concrete as an assumed name for W S Concrete LLC. Supply also claims that it properly named Javaras as a defendant because he was personally liable on the breached contract since he failed to disclose that he was an agent working on behalf of an undisclosed or partially disclosed principal. Supply further claims that the circuit court erred in granting Javaras's motion to dismiss pursuant to section 2-606 of the Illinois Code of Civil Procedure (735 ILCS 5/2-606 (West 2008)) based on Supply's failure to attach the contract underlying its breach of contract count to the complaint. For the reasons stated below, we affirm.

The following facts are relevant to the instant appeal and are obtained from the pleadings. Supply's business consists of "selling and renting tools, supplies, equipment, and materials to customers in the business of construction, building, and remodeling." Supply claims that Javaras "is a merchant who performs construction work, including pouring concrete foundations and providing concrete structural services for construction projects." Beginning on approximately June 29, 2008 and continuing through approximately July 22, 2009, Supply rented and/or sold and delivered tools, equipment and/or supplies to Javaras, his agent, or his employees. Supply billed and rendered invoices to Javaras relating to the purchases and rentals of Supply's goods and services. The unpaid balance owed to Supply after previous payments and credits is \$66,605.54.

On October 29, 2009, Supply filed a two count complaint naming "William Javaras,

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individually and d/b/a West Suburban Concrete" as defendant. Breach of contract was one of the counts in the complaint and account stated was the other count. Supply alleged in the complaint that Javaras breached the contract by failing to pay the outstanding balance of \$66,605.54, plus interest accrued at a monthly rate of 1½% for unpaid balances exceeding 30 days. Supply also alleged that the invoices and purchase orders provided to Javaras state that Supply is entitled to recover its reasonable attorney's fees and costs in prosecuting any lawsuit to enforce its right to payment. As support for Supply's unpaid balance, it attached as "Exhibit A" a summary of purchases and/or rentals of tools, equipment and/or supplies from Supply. In its account stated count, Supply alleged that "Exhibit A" represents a summary of the invoices provided to Javaras and reflects an account Supply maintains to record the monetary transactions between Supply and Javaras. Supply also alleged that it contacted Javaras for payment of the outstanding balance. Javaras failed to render payment, but he has not denied liability for or objected to the amount reflected in "Exhibit A."

On February 8, 2010, Javaras, individually and doing business as West Suburban Concrete, and W S Concrete LLC, doing business as West Suburban Concrete, filed a motion to dismiss pursuant to sections 2-619 and 2-606 of the Illinois Code of Civil Procedure and Illinois Supreme Court Rule 282. Javaras claimed in the motion to dismiss that the complaint was deficient because Supply failed to attached a copy of the purported contract to the complaint. Javaras alleged that since no contract was attached to the complaint, the breach of contract count must be dismissed. Javaras also claimed that absent a contract supporting the claimed debt amount, the elements supporting an "account stated" claim could not be established. The motion to dismiss further claimed that Javaras never did business individually or as West Suburban

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Concrete, and thus, he was improperly named in the complaint. The motion to dismiss also stated that West Suburban Concrete was an assumed name for W S Concrete LLC, an Illinois limited liability company. Javaras stated that he was a member of the limited liability company, W S Concrete LLC. Attached to the motion to dismiss as "Exhibit A" was a printout from the Illinois Secretary of State's Office's website displaying West Suburban Concrete as the assumed name of W S Concrete LLC. According to the motion to dismiss, the alleged transactions were entered into between Supply and the limited liability company, W S Concrete LLC. Javaras asserted that he must be dismissed from the complaint because the complaint improperly seeks to impose liability upon a member of a limited liability company.

Supply filed a response to the motion to dismiss on February 23, 2010. In the response, Supply stated that Javaras received copies of the documents listed in "Exhibit A" to the complaint. Supply attached to its response representative sample documents that were referred to in the summary of transactions labeled as "Exhibit A" to the complaint. Supply also alleged that Javaras failed to provide actual admissible evidence to support his contention that he did not do business under the assumed name of West Suburban Concrete, and that the transactions were between Supply and W S Concrete LLC.

On March 19, 2010, the circuit court entered an order striking Javaras from the complaint. The circuit court granted Supply leave to amend the complaint to correct the misnomer and add the correct party to the complaint, which was W S Concrete, LLC. The circuit court noted that W S Concrete was a limited liability company, which was involuntarily dissolved. The circuit court stated that a member of a limited liability company cannot be held personally liable for the debts of a limited liability company. Absent an affidavit stating that

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Javaras agreed to be personally liable for the debt, the circuit court ruled that Javaras could not be held personally liable for the debt and struck him from the complaint. The circuit court also ruled that the complaint was insufficient because Supply failed to attach a copy of the contract to the complaint.

On April 9, 2010, Supply filed a motion to reconsider. Supply asserted that the circuit court's findings were not based on facts, as was the order releasing Javaras from liability. Supply also stated that over 100 invoices and even more purchase orders comprise the outstanding balance, and attaching those documents to the complaint would result in a cumbersome pleading. Supply, however, stated that if ordered to attach the documents, it would have to comply with section 2-606. Supply asserted that the circuit court's ruling was not supported by affirmative matter as required by section 2-619. Supply also stated that the dismissal of Javaras was legally unwarranted because the complaint pled a cause of action under the legal theory that Javaras was an agent of an undisclosed or partially disclosed principal. Supply further alleged that Javaras failed to establish that he did not do business as West Suburban Concrete with affirmative matter.

On June 3, 2010, the circuit court entered an order denying Supply's motion to reconsider. The circuit court granted Supply leave to amend its complaint. The circuit court elaborated that section 2-606 requires the instrument on which a claim is founded upon to be attached to the complaint, but Supply failed to attach any document that indicates Supply contracted with Javaras personally and not as a representative of the limited liability company.

Supply filed a "motion for finding of dismissal with prejudice" on June 11, 2010. Supply stated that it had no factual or legal basis to file an amended complaint because it lacked

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documents and records supporting the circuit court's finding that it transacted business with W S Concrete LLC. Supply asserted that its purchase orders did not name W S Concrete LLC. Since the circuit court denied its motion to reconsider, Supply requested the circuit court to modify its order by dismissing the complaint with prejudice to allow for review by this court. The circuit court granted Supply's request, and on June 18, 2010 entered an order dismissing Supply's complaint with prejudice. Supply timely appealed. This appeal is taken on Supply's brief only because Javaras did not file a brief on appeal.

On appeal, Supply contends that the circuit court erred in granting Javaras's section 2-619 motion to dismiss when it struck Javaras from the complaint. Supply maintains that the unsworn and uncertified copy of the Secretary of State's Office's Detail Report (Detail Report) listing West Suburban Concrete as the assumed name of W S Concrete LLC was a hearsay document that was not admissible into evidence. Supply claims that Javaras did not support his allegations in the motion to dismiss with affirmative matter and the Detail Report attached to Javaras's motion to dismiss does not negate Supply's well pled facts in its complaint. Supply also claims that the circuit court erred when it accepted Javaras's allegation that he was a member of a limited liability company despite the absence of any affidavit or other affirmative matter as support for that contention. Since a disputed question of fact exists regarding whether Supply contracted with Javaras, Supply claims that the circuit court erred in granting Javaras's section 2-619 motion to dismiss. Supply contends that the circuit court's ruling that a misnomer existed and ordering Supply to amend its complaint was erroneous because an opposing party may require correction of a misnomer, but the party may not require dismissal of the action. Supply further contends that Javaras was also liable under an agency theory as pled in the

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complaint.

Supply also claims that the circuit court erred in dismissing its complaint based upon section 2-606 because the deficiency in failing to attach the deemed required documents could have been remedied by Supply through an amendment to the complaint. Supply contends that due to the volume of documents representing the underlying transactions it would have been cumbersome to attach the documents to the complaint. Supply, however, attached sample representative documents to its response to Javaras's motion to dismiss. Since the alleged pleading deficiency could have been rectified, Supply contends that the circuit court erred in dismissing its complaint based on section 2-606.

A section 2-619 motion to dismiss "admits the legal sufficiency of the plaintiff's claim, but asserts certain defects or defenses outside the pleading that defeat the claim." *Solaia Technology, LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 579 (2006). A circuit court should grant a section 2-619 a motion to dismiss "if, after construing the pleadings and supporting documents in the light most favorable to the nonmoving party, the trial court finds that no set of facts can be proved upon which relief could be granted." *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (2000). In reviewing a circuit court's ruling on section 2-619 motion to dismiss, this court adopts a *de novo* standard of review. *Solaia Technology, LLC*, 221 Ill. 2d at 579.

Under section 2-606, "if a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleadings an affidavit stating facts showing that the instrument is not accessible to him or her." 735 ILCS 5/2-606 (West 2008).

The instruments referred to in section 2-606 consists of contracts and similar agreements. *Bajwa*

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v. Metropolitan Life Insurance Co., 208 Ill. 2d 414, 431 (2004).

Supply's issue on appeal requires a determination of whether Supply named a proper defendant in its complaint. In Supply's complaint, it named Javaras individually and doing business as West Suburban Concrete as defendant. In Javaras's motion to dismiss, he alleged that he was not individually liable for the purchases or rentals of material from Supply because he never transacted business individually with Supply. Javaras alleged that any transactions entered into with Supply were through W S Concrete LLC doing business as West Suburban Company and not through himself individually. To support his allegation, Javaras attached the "LLC File Detail Report" (Detail Report) obtained from the Illinois Secretary of State's Office to his motion to dismiss. The Detail Report listed West Suburban Concrete Company as the assumed name of W S Concrete LLC.

As an initial matter, Supply's complaint was deficient because it failed to comply with section 2-606 by not attaching supporting contractual documents to the complaint. Supply included a breach of contract count in its complaint. To memorialize the transactions comprising the outstanding balance pled in the breach of contract count, Supply attached a summary of transactions as "Exhibit A" to the complaint. The summary document, however, was not the actual contract giving rise to the breach of contract count. Exhibit A contained information in four columns consisting of: "Date;" "Invoice #;" "Amount;" and "Purchase Order #." Absent from Supply's exhibit was identification of the contracting party to whom Supply sold or rented the materials giving rise to the alleged outstanding balance. Supply is correct in its contention that in ruling on a section 2-619 motion to dismiss, "a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor."

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Morr-Fitz, Inc. v. Blagojevich, 231 Ill. 2d 474, 488 (2008). Supply's allegations in the breach of contract count, however, are unsupported by the underlying documentation that Supply alleges was breached. In its complaint, Supply does not state that the alleged breached contract was oral. Instead, Supply pled that the underlying transactions summarized in Exhibit A constituted the contracts between Supply and Javaras. Thus, based on the face of the complaint, a written contract giving rise to the breach of contract count existed. As such, Supply was required to attach the contract to the complaint to comply with section 2-606's requirements. Absent the contract, this court cannot conclude that Supply's allegation that Javaras entered into the transactions with Supply constituted a well pled fact from the face of the complaint.

Here, the circuit court took judicial notice of the Detail Report attached to Javaras's motion to dismiss, and held that West Suburban Concrete was the assumed name for W S Concrete LLC. The circuit court did not err in taking judicial notice of the Detail Report because records from the Illinois Secretary of State's Office are public records and a court may take judicial notice of such records. *Maldonado v. Creative Woodworking Concepts*, 296 Ill. App. 3d 935, 938 (1998). In *Maldonado*, this court took judicial notice of the Secretary of State's Office's record identifying a corporate name previously used by a corporation. *Id.* Similarly, the Secretary of State's Office's record here states that West Suburban Concrete was the assumed name for W S Concrete LLC. In both cases, the information taken judicial notice of related to a corporation's name.

Based on the information stated in the Detail Report, the circuit court ruled that the complaint contained a misnomer. A "misnomer is a mistake in name or the provision of an incorrect name to the person in accusation or pleading." *Todd W. Musburger, Ltd. v. Meier*, 394

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Ill. App. 3d 781, 806 (2009). Mistakenly naming a party in a complaint other than by his own name results in a misnomer. *Id.*

Supply contends that the circuit court erred when it concluded that the proper defendant was W S Concrete LLC doing business as West Suburban Concrete and struck Javaras from the complaint, especially since Supply did not request such relief. Supply claims that the circuit court erred when it unilaterally inserted another legal entity into the case under the pretext of a misnomer. This court disagrees with Supply. The circuit court did not rule that West Suburban Concrete was a misnomer for Javaras. Rather, the circuit court ruled that West Suburban Concrete was a misnomer for W S Concrete LLC. Based on the Detail Report, the circuit court did not err in ruling that a misnomer existed because W S Concrete LLC was doing business as West Suburban Concrete and documentation supporting an allegation that Javaras was doing business as West Suburban Concrete fails to exist. This information reveals that a misnomer existed in Supply's complaint.

Having ruled that W S Concrete LLC should be named as defendant, the circuit court did not err in striking Javaras from the complaint. As previously mentioned, Supply failed to attach the contract underlying the breach of contract count to the complaint. Supply's "Exhibit A" that it attached to the complaint fails to identify the contracting party. No documentation attached to Supply's complaint supports Supply's pleading that it entered into transactions with Javaras individually. The sample invoices and purchase orders that Supply attached to its response to Javaras's motion to dismiss do not reflect that it sold or rented the materials to Javaras. On Supply's documentation, West Suburban Concrete was listed as the sold to and bill to entity, and not Javaras. The record is also devoid of documentation evidencing that Javaras voluntarily

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agreed to be individually liable for the purchases or rentals. Absent such documentation, no basis exists to hold Javaras personally liable for the debts of W S Concrete LLC.

Regardless of the interest that Javaras may have had in W S Concrete LLC, owners or members of W S Concrete LLC were not liable for its debts upon its dissolution based on the nature of limited liability companies in Illinois. Section 10-10 of the Illinois Limited Liability Company Act (Act) provides that “the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company” unless the articles of organization provide otherwise and a member consented in writing to be liable for the entity’s debts, obligations and liabilities. 805 ILCS 180/10-10 (West 2008). No documentation exists demonstrating that Javaras agreed to be personally liable for the debts and obligations of the limited liability company. Absent such evidence, Javaras cannot be held personally liable for the limited liability company’s debts and obligations according to established Illinois statutory law. *Puleo v. Topel*, 368 Ill. App. 3d 63, 68 (2006).

Moreover, Supply contends on appeal that it pled Javaras should not have been dismissed as defendant under an agency theory. Supply fails to make such a pleading in its complaint. Supply’s 17 paragraph complaint identifies Javaras as defendant and asserts that Javaras entered into the transactions with Supply and agreed to pay for the purchases or rentals of Supply’s materials. Nowhere in the 17 paragraphs does Supply state that Javaras should be held liable for the purchases or rentals under an undisclosed or partially disclose agency theory. Supply first raises an agency theory of liability in its motion for reconsideration. The purpose underlying a motion to reconsider “is to bring to the court’s attention newly discovered evidence that was not

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available at the time of the first hearing, changes in the law, or errors in the court's previous application of existing law." *Woolums v. Huss, M.D.*, 323 Ill. App. 3d 628, 639-40 (2001).

Admission of new matter raised in a motion to reconsider "lies in the discretion of the trial court and should not be allowed absent a reasonable explanation of why it was not available at the time of the original hearing." *Id.* at 640. This court adopts an abuse of discretion standard to review a circuit court's denial of a motion to reconsider that raises new arguments or legal theories that were not presented during the course of proceedings. *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 415 (2006).

Supply claims that its contracts were entered into with Javaras on behalf of an undisclosed or partially disclosed principal. Supply contends that an agent acting on behalf of an undisclosed or partially disclosed principal who enters into a contractual relationship with a third party is personally liable on the contract. *Kimco Corp. v. Murdoch, Coll & Lillibridge, Inc.*, 313 Ill. App. 3d 768, 772 (2000). An agent who executes a contract by signing his own name and includes his own personal contact information, such as telephone number and social security number, without disclosing he is acting on behalf of a principal would be personally liable on the contract. *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 430 (2004). Here, Supply failed to present a contract demonstrating that Javaras executed the contract in his own name or on his own behalf. Also, the sample representative documents that Supply attached to its response to the motion to dismiss reveal West Suburban Concrete as the "Sold To", "Ship To" or "Bill To" contact. Javaras was not listed individually on any of the sample documents. Since Supply failed to plead facts and attach supporting documentation demonstrating that it entered into transactions with Javaras individually or as an agent on behalf of another entity, the circuit

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court not err in dismissing Supply's complaint.

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.