

THIRD DIVISION
May 25, 2011

No. 1-10-2969

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

ROBERT WELSH, doing business as BIG TEN DEVELOPMENT, INC., Plaintiff-Appellant,)	APPEAL FROM THE
)	CIRCUIT COURT OF
)	COOK COUNTY
)	
v.)	No. 08 L 13973
)	
THE BIG TEN CONFERENCE, INC., Defendant-Appellee.)	HONORABLE
)	BRIGID McGRATH,
)	JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

ORDER

HELD: Plaintiff's complaint, alleging that defendant breached a confidentiality agreement in creating a cable television channel, failed to state a claim for which relief can be granted; the circuit court's order is affirmed.

Plaintiff Robert Welsh, doing business as Big Ten Development, Inc. (Welsh), appeals an order of the circuit court of Cook County dismissing his second amended complaint against defendant, the Big Ten Conference, Inc. (Big Ten). Welsh argues the circuit court erred in dismissing his claim that the Big Ten breached a confidentiality agreement on the ground that it

violated the Frauds Act (740 ILCS 80/1 (West 2008)). The Big Ten argues the circuit court correctly dismissed the claim as violating the Frauds Act, but erred in denying the Big Ten's motion to dismiss the second amended complaint for failing to state a claim upon which relief can be granted. We conclude the second amended complaint fails to state a claim and affirm the judgment of the circuit court on that basis.

BACKGROUND

The record on appeal discloses the following facts. On March 5, 2008, Welsh filed a lawsuit against the Big Ten and Big Ten Network Services, LLC, in the United States District Court for the Northern District of Illinois. The federal complaint alleged a federal trademark claim and four state law claims, including breach of an implied-in-fact confidentiality agreement. On April 14, 2008, Welsh amended the federal complaint to allege the federal trademark claim, breach of an express contract and misappropriation of trade secrets. The Big Ten moved to dismiss the complaint. On November 21, 2008, the district court entered an order dismissing the federal claim on the merits and dismissing the pendent state law claims for lack of subject matter jurisdiction. *Welsh v. The Big Ten Conference, Inc.*, No. 08-3142 (N.D. Ill. Nov. 21, 2008).

On December 19, 2008, Welsh filed his initial complaint in the circuit court of Cook County, alleging misappropriation of trade secrets in violation of the Trade Secrets Act (765 ILCS 1065/1 *et seq.* (West 2008)) and breach of contract. The Big Ten moved to dismiss the complaint for failure to state a claim pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2008)). On May 18, 2009, following a hearing, the circuit court granted the motion to dismiss. The circuit court expressed doubt about the merits of

1-10-2969

the trade secrets claim and ruled Welsh failed to properly allege both the existence and terms of any contract. However, the circuit court granted Welsh leave to replead both counts.

On June 12, 2009, Welsh filed his amended complaint, repleading the claims of misappropriation of trade secrets and breach of contract. On July 23, 2009, the Big Ten filed a combined motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2008)), based on both section 2-615 of the Code and, as applied to the breach of contract claim, section 2-619(a)(7) of the Code, which provides a claim may be dismissed as "unenforceable under the Statute of Frauds." 735 ILCS 5/2-619(a)(7) (West 2008). On October 28, 2009, the circuit court granted the motion to dismiss under section 2-615 of the Code, for the same reasons the initial complaint was dismissed.

On November 6, 2009, Welsh filed a second amended complaint. Count I repeated the allegations of the previously dismissed misappropriation of trade secrets verbatim. Welsh repleaded the breach of contract claim, which alleged that in the spring of 1997, Welsh began developing a business plan to enhance the profitability of Big Ten athletics. One component of Welsh's plan was the creation of the Big Ten Network, a cable/satellite station providing in-depth coverage of the Big Ten. The details were set forth in a confidential business plan, dated May 1998, which was attached as an exhibit to the second amended complaint.

Welsh generally alleged he gave a preliminary presentation of the confidential business plan to the Big Ten in "early 1998." The Big Ten acknowledged the confidential nature of the plan in a letter Welsh attached as an exhibit. The April 23, 1998 letter to Welsh from Big Ten Commissioner James E. Delany states in relevant part:

1-10-2969

"We would like to confirm that the Conference acknowledges the confidential nature of the Business Plan, dated May 1998, for Big Ten Development. However, in that regard, we wish to notify you that many of the concepts set forth in the Business Plan have been considered from time to time by the Conference and other entities that have contacted the Conference. Accordingly, we cannot agree that such concepts are your proprietary property."

Big Ten officials allegedly invited Welsh to attend a meeting of conference officials, including athletic directors of Big Ten schools, on May 18, 1998. As an alleged inducement to make his business plan available under terms of confidentiality, Welsh was told of the Big Ten's interest in another letter from Commissioner Delany. The second letter, dated April 23, 1998, which was also attached as an exhibit to the second amended complaint, states:

"We have enjoyed the opportunity to discuss with you the potential development of an enterprise referred to in your business plan as Big Ten Development. This letter confirms The Big Ten Conference's continued interest in exploring the development of the relationship between the Conference and Big Ten Development and further implementation of the business plan for Big Ten Development.

The Conference shares your view that certain Conference properties (*e.g.*, championship events, related marketing and media rights, etc.) could be better developed. We also agree that the coordination of championship events and the marketing of related rights provide exciting synergistic opportunities.

1-10-2969

The Conference is interested in the potential opportunities and synergies that can be created by Big Ten Development and is prepared to continue to move forward with the development of the relationship. It is understood, however, that this is a letter of interest only and is subject to the Conference's satisfaction with the development of the proposed venture, the approvals of the board, various committees and groups of the Conference, and the negotiation and execution of definitive agreements. Consequently, this letter does not constitute a binding obligation for either of us."

Welsh alleged that, as a consequence of these promises and inducements, he distributed his business plan on a confidential basis and gave a detailed presentation on the proposed Big Ten Network to Big Ten officials at their May 18, 1998 meeting.

After weeks passed, Welsh was advised that, despite the merits and creativity of the business plan, the Big Ten was unwilling to cede control over such matters to an independent entity. Several years later, the Big Ten announced it was partnering with other entities to introduce a Big Ten Network.

Count II of the second amended complaint alleged Welsh agreed to disclose and discuss the details of his business plan on the condition the plan remain confidential. Welsh alleged that by expressing its interest, having Welsh appear at the May 18, 1998 meeting and repeatedly acknowledging the confidentiality of his plan, the Big Ten accepted Welsh's offer and induced Welsh to submit and elaborate upon the details of the plan. Welsh also alleged that before distributing copies of the plan at the May 18, 1998 meeting, he stated his willingness to distribute and discuss his business plan was conditioned on the Big Ten and its agents treating the plan as

1-10-2969

confidential. Welsh further alleged the Big Ten breached this confidentiality agreement by retaining and distributing copies of the plan to others, using concepts contained in the plan and converting the plan's concepts for its own profit in creating the Big Ten Network.

On December 14, 2009, the Big Ten again filed a combined motion to dismiss under section 2-619.1 of the Code, based on both sections 2-615 and 2-619(a)(7) of the Code. On April 7, 2010, the circuit court denied the section 2-615 motion regarding count II, but directed Welsh to respond to the section 2-619 motion. On September 16, 2010, the circuit court granted the Big Ten's motion to dismiss under section 2-619(a)(7) of the Code, ruling the contract claim was unenforceable under the Statute of Frauds. On October 7, 2010, Welsh filed a timely notice of appeal to this court.

DISCUSSION

I. The Standard of Review

On appeal, Welsh argues the circuit court erred in dismissing count II of his second amended complaint, which alleged a violation of a confidentiality agreement. In this case, the Big Ten 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. Although the circuit court dismissed count II under section 2-619 of the Code, 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 II should have been dismissed under section 2-615 of the Code for failure to state a claim. Our standard of review for rulings under either section is *de novo*. *Solaia*, 221 Ill. 2d at 579.

II. Failure to State a Claim

To properly plead a cause of action in breach of contract, a plaintiff must allege: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) resulting injury to the plaintiff. *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 199 (1999). A plaintiff should allege the factual circumstances surrounding the formation of the agreement, specifically, the offer, acceptance and existence of valuable consideration. *Id.* Furthermore, a plaintiff must establish definite and certain terms of the contract. *Brown & Kerr, Inc. v. American Stores Properties, Inc.*, 306 Ill. App. 3d 1023, 1030 (1999).

The Big Ten argues Welsh failed to properly allege the nature of the alleged contract. The Big Ten relies on cases like *Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d

1-10-2969

15, 20-22 (2009), where this court upheld the dismissal of a fifth amended complaint which was unclear whether it sought recovery for noncompliance with an agreed order, breach of an oral contract, breach of a written contract, or breach of a contract implied-in-fact. Welsh responds that the failure to allege whether an agreement is oral or written is not necessarily a ground for dismissal (*O.K. Electric Co. v. Fernandes*, 111 Ill. App. 3d 466, 470 (1982)). He asserts what matters is that the opposing party is reasonably informed of the nature of the claim. See 735 ILCS 5/2-612(b) (West 2010).

Although neither Welsh nor the Big Ten directly addresses the point, this court cannot avoid noting Welsh's allegations are essentially those of an "idea submission" case of the sort more common in jurisdictions like New York and California. In such cases, disclosure of an idea may be the necessary consideration for an express contract. 4 Melville B. Nimmer, David Nimmer & Lionel S. Sobel, *Nimmer on Copyright*, §19D.05(A)(1) at 19D-45 (2007) (and cases cited therein). Also, a legal obligation to pay for an idea may arise from an implied-in-fact agreement depending on the circumstances of the case, including whether the idea was solicited or voluntarily received. See 4 Melville B. Nimmer, David Nimmer & Lionel S. Sobel, *Nimmer on Copyright*, §19D.05(A)(2)(a) at 19D-48-57 (2007). Thus, the facts necessary to state an idea submission claim depend in part on whether Welsh alleges a breach of express or implied-in-fact contract.

In this case, the general allegations of Welsh's complaint appear to assert an express contract. However, the specific allegations in count II appear to allege an implied-in-fact contract. Furthermore, Welsh failed to specify whether the alleged contract was written or oral,

1-10-2969

despite the prior directive of the circuit court to do so. As the type of contract alleged affects the Big Ten's ability to respond to and defend against the claim, the complaint's vague and contradictory allegations on this point fail to reasonably inform the Big Ten of the nature of Welsh's claim.

The Big Ten next argues Welsh failed to allege a definite offer and acceptance. The Big Ten correctly notes that count II alleges Welsh's offer was expressly accepted and agreed to on or about April 23, 1998, but later alleges the Big Ten accepted his offer on May 18, 1998. Yet, in both count II and the complaint's general allegations, Welsh alleges the Big Ten solicited him to present his plan and Welsh accepted on the condition his plan be held confidential. After more than one opportunity to replead, Welsh's second amended complaint fails to clarify which party offered, which party accepted, or which date the offer was accepted on.

Moreover, the Big Ten notes that, although the initial April 23, 1998 letter from Commissioner Delany "confirmed" the confidential nature of the plan after the fact, Welsh does not allege he attached conditions of confidentiality to the preliminary presentation of his plan in early 1998 or that the disclosure to Commissioner Delany prior to April 23, 1998, was conditioned on confidentiality. In idea submission cases based on implied-in-fact contract, "[t]he idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power." *Desny v. Wilder*, 299 P.2d 257, 270 (1956). In cases involving disclosures allegedly made in confidence, an idea seller cannot impose a duty of confidence on a prospective buyer without actual notice and consent. See 4 Melville B. Nimmer, David Nimmer & Lionel S. Sobel, *Nimmer on Copyright*, §19D.05(B)(1) at

1-10-2969

19D-64 (2007) (and cases cited therein). Accordingly, the absence of allegations on this point is significant.

The Big Ten also argues Welsh did not sufficiently plead consideration, because Welsh's plan did not contain confidential or novel information. This court has recognized novelty is generally a requirement in idea submission cases. *Szczesny v. W.G N. Continental Broadcasting Corp.*, 54 Ill. App. 3d 619, 626 (1977) (*dicta*). Moreover, Welsh's complaint alleges the proposals in the plan were novel, suggesting Welsh recognized from the outset this is an idea submission case, as opposed to a simple breach of confidentiality case. Commissioner Delany's letters suggest Welsh's proposals may not have been novel, but that is an issue of fact that cannot be resolved under section 2-615 of the Code.

The Big Ten further argues Welsh failed to plead definite and certain terms of the contract. In particular, the Big Ten notes Welsh failed to allege the duration of the confidentiality pledge. Welsh responds this court upheld a confidentiality agreement that was unlimited in duration and geography in *Coady v. Harpo, Inc.*, 308 Ill. App. 3d 153, 161-62 (1999), where the agreement was in writing and did not otherwise restrain trade. Moreover, as Welsh notes, the Trade Secrets Act does not affect:

"contractual remedies, whether or not based upon misappropriation of a trade secret, provided however, that a contractual or other duty to maintain secrecy or limit use of a trade secret shall not be deemed to be void or unenforceable solely for lack of durational or geographical limitation on the duty." 765 ILCS 1065/8(b)(1) (West 2010).

However, the question of whether a confidentiality agreement may be of unlimited duration in certain cases is separate from the question of whether Welsh sufficiently alleged such an agreement existed in this case. Welsh's complaint is devoid of allegations that the Big Ten or its officials agreed to keep Welsh's plan confidential in perpetuity.

Similar failures have been fatal to idea submission claims in other jurisdictions. For example, in *Baer v. Chase*, 392 F.3d 609, 620-21 (3d Cir. 2004), the court ruled the lack of definition regarding the plaintiff's compensation and the duration of an alleged contract related to the creation of *The Sopranos* television series rendered it unenforceable under New Jersey law. Similarly, in *Auto Channel, Inc. v. Speedvision Network, LLC*, 144 F. Supp. 2d 784, 791 (W.D. Ky. 2001), the district court ruled the price, ownership, governance, form, and timing of a future relationship to create a cable channel, in addition to the duration, scope, and geographic limitation of any noncompetition agreement, would be essential terms of any contract. In *Marraccini v. Bertelsmann Music Group, Inc.*, 644 N.Y.S.2d 875, 877 (N.Y.A.D. 1996), the New York Supreme Court, Appellate Division, held an oral contract between plaintiff and defendants whereby she agreed to disclose the details of her proposal for a music video cable channel in return for an indefinite payment, confidentiality, an undefined job and an undefined equity stake in the new, undefined venture, was "far too indefinite to constitute an enforceable contract."

Finally, the Big Ten argues Welsh failed to adequately plead a breach of contract. The Big Ten relies on a different portion of *Auto Channel*, where the district court rejected a claim of promissory estoppel in part because any promise not to compete with Auto Channel was not sufficiently clear and definite. *Auto Channel*, 144 F. Supp. 2d at 792. Welsh responds that *Auto*

1-10-2969

Channel is distinguishable from the instant case, because it did not involve a confidentiality agreement. For the reasons previously stated, we conclude that confidentiality agreements, like other agreements, must be alleged in sufficiently clear and definite terms to state a claim upon which relief may be granted.

In short, Welsh's second amended complaint fails to allege the facts necessary to state a claim for breach of contract. The complaint fails to adequately allege whether the contract is express or implied-in-fact. The complaint also fails to allege whether the contract is written or oral. Further, the complaint contains vague and internally inconsistent allegations on the elements of offer and acceptance. The complaint fails to allege Welsh's preliminary presentation was expressly conditioned on a promise of confidentiality, even if Commissioner Delany "confirmed" the confidential nature of the plan afterward. The complaint fails to allege an agreement on essential terms, including the scope and duration of the purported confidentiality agreement. These failures are fatal to Welsh's claim, even if it is viewed as a simple breach of a purported confidentiality agreement.

Accordingly, we conclude the circuit court should have granted the Big Ten's motion to dismiss under section 2-615 of the Code. Consequently, we need not consider the issue of whether the circuit court properly dismissed the contract claim under section 2-619(a)(7) of the Code.

1-10-2969

CONCLUSION

In sum, Welsh's second amended complaint fails to state a claim upon which relief may be granted. The order of the circuit court of Cook County dismissing the complaint is affirmed on that basis.

Affirmed.