2012 IL App (1st) 112074-U

FIRST DIVISION
June 29, 2012

No. 1-11-2074

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

DR. ROBERT S. ROSENSON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 M1 161107
	)	
NORTHWESTERN MEDICAL FACULTY	)	
FOUNDATION, an Illinois not-for-profit	)	Honorable
corporation,	)	Patrick W. O'Brien and
	)	Mary R. Minella,
Defendant-Appellee.	)	Judges Presiding.

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

ORDER

¶ 1 *HELD*: Dismissal of action with prejudice was affirmed where: (1) plaintiff's second-amended complaint failed to comply with the pleading requirements of section 2-603 of the Code of Civil Procedure; (2) second-amended complaint failed to allege either a common-law or statutory cause of action for either unpaid incentive compensation or attorney fees against plaintiff's former employer; and (3) plaintiff failed to present any other set of facts which would support any further attempt to amend his complaint.

¶ 2 Plaintiff, Dr. Robert S. Rosenson, a licensed physician, filed the instant suit against his former employer, defendant, Northwestern Medical Faculty Foundation (the Foundation), an Illinois

not-for-profit corporation. Plaintiff's second-amended complaint sought damages for the nonpayment of incentive compensation in 2006, the year plaintiff terminated his employment. After that complaint was dismissed with prejudice, plaintiff appealed. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reflects that plaintiff worked for the Foundation as a member physician in the department of medicine, division of cardiology, from December 1, 2000, until his resignation became effective on November 30, 2006. On November 27, 2000, plaintiff had entered into a member employment agreement with the Foundation (employment agreement) for an initial term, beginning December 1, 2000, and ending August 21, 2001. The employment agreement renewed automatically for yearly terms, unless either party notified the other of an intent not to renew within 90 days of the relevant termination date. The employment agreement also provided that the agreement and attached schedules and exhibits constituted "the entire agreement between the parties."

¶ 5 Plaintiff's compensation was set forth in section 3 of the employment agreement. Section 3.1 provided that the "Foundation shall initially compensate" plaintiff with a salary in accordance with schedule 2, which was attached to the employment agreement. The Foundation had the right to review plaintiff's salary annually and make changes based on that review or, otherwise, modify the salary pursuant to the Foundation's policy and procedures. Plaintiff's fringe benefits were detailed in both section 3.2 and an attached schedule 3, and could similarly be modified or eliminated by the Foundation. Additionally, section 3.3 and schedule 2 of the employment

agreement both dealt with incentive compensation. Section 3.3 stated:

> "Payment of incentive compensation, *if any*, shall be subject to Foundation policies and procedures. The Foundation reserves the right to change, amend and/or eliminate the incentive compensation program with or without notice; any such change, amendment, or elimination would apply to all program participants." (Emphasis added.)

Schedule 2 included similar language, stating again that the Foundation had the right to change or eliminate the incentive compensation program, and that payment, "*if any*, shall be subject to Foundation policies and procedures and then-current legal standards applicable to the Foundation." (Emphasis added.)

¶ 6 Other relevant compensation provisions were set forth in the Foundation's "Member Base and Incentive Compensation Plan, Policy and Procedure Manual" (manual). The purpose of the Foundation's base and incentive compensation plan, as set forth in the manual, was "to provide a basis for rewarding members for their academic, clinical and administrative achievements." Any incentive compensation plan of a department or division, was to be consistent with the Foundation's guidelines and approved by the compensation and finance committees of the board of directors. The finance committee of the board had the duty to recommend, to the board or the executive committee, financial targets and base and incentive compensation targets for the Foundation and its departments.

¶ 7 The manual, in the introductory paragraph of a section entitled "Incentive Compensation Plan," stated that members "shall be given the opportunity" to receive incentive compensation, but such pay "is not guaranteed." The actual payout of incentive compensation depended, in part, on "the amount of operating income generated by the department," the attainment of Foundation,

department, division, and individual members' goals, and the appropriate review and approval by the compensation and finance committees and the board. According to the manual's general descriptions of incentive compensation, the chair of each department was to establish the department's and individual member's incentive compensation goals, evaluate whether a member had met those goals, and recommend an individual award for approval by the compensation committee.

¶ 8 In a subsection entitled "Eligibility for Individual Awards," the manual provided more details as to the procedures for consideration of an incentive compensation award. This section stated:

> "All regular full-time Members and part-time Members regularly scheduled to work at least 20 hours per week with at least one year of service as of the end of the fiscal year or other measuring period, shall be eligible for consideration to receive a payout from the relevant incentive compensation pool, but only to the extent recommended by the Department Chair or Foundation President and approved by the Compensation Committee. *** Because a primary purpose of the Plan is to assist the Foundation in retaining physicians who will further the Foundation's tax exempt purposes, to be eligible to receive any payout of incentive compensation (including a payout already approved by the Compensation Committee) a Member must continue to be employed and on the payroll at the time the incentive compensation is paid."

The manual further explained that payout of such an individual incentive compensation award was to be based on the member attaining the clinical, teaching and research goals set by the department. The manual further provided that incentive compensation would "be made to eligible Members only upon recommendation by the Department Chair or the Foundation President and approval by the

Compensation Committee of the Board." The amount of payout for incentive compensation to any individual member was to "be determined by the Compensation Committee, at its sole discretion, taking into account the recommendation of the Department Chair or the Foundation President and all other factors the Compensation Committee deems relevant." Additionally, as to an incentive payout at the end of the fiscal year, the compensation committee was to "review the Department Chair or Foundation President recommendations and determine the payout of incentive compensation (if any) that will be made to an individual member for the fiscal year then ending." The manual stated that the Foundation had "the right to change, amend, and/or eliminate the Incentive Compensation Program with or without notice" as to all participants.

¶ 9 The department of medicine set forth the process for determining incentive compensation for its members in a "Department of Medicine Activity-Based Compensation and Incentive Compensation Plan" (department plan), which became effective in fiscal year 2002. The department plan contained detailed methodologies for determining a member's contributions in the clinical, research, and educational areas. The department used these methodologies to assess each member of the department "for clinical, research and educational productivity," and to make a "recommendation" as to an incentive compensation award. A division chief reviewed any recommended incentive compensation award and "recommend[ed] changes based on individual citizenship." Thereafter, the "Executive Leadership of the Department review[ed] the requests of the Division Chiefs and finalize[d] the incentive compensation recommendation for each faculty member."

¶ 10 On September 26, 2006, plaintiff met with Dean James Young and Dr. Robert O. Bonow,

the chief of cardiology. The details of the discussion which took place at the meeting were memorialized in a letter to plaintiff from Dr. Bonow, dated October 4, 2006. Plaintiff was to reduce his clinical activities beginning in October 2006, and resign both his full-time faculty appointment with Northwestern University and his membership in the Foundation, effective November 30, 2006. The letter further provided that plaintiff was to "transition to an adjunct faculty appointment from December 1 through December 31 to allow [plaintiff] to complete [his] research at Northwestern," then resign his staff appointment at Northwestern Memorial Hospital on December 31, 2006. The letter indicated that plaintiff previously had raised "allegations of physical threats and retaliatory actions," which were not addressed at the meeting, as "these have been investigated outside the Department."

¶ 11 The instant litigation arose after plaintiff, in a July 30, 2007, letter from his counsel to Danae K. Prouis, the Foundation's general counsel, demanded incentive compensation for 2006. The letter gave notice that if the Foundation did not comply with this request, plaintiff would "pursue his remedies in court including those remedies set forth in 705 ILCS 225/1." Plaintiff did not state the specific amount of incentive compensation which he was owed, but offered to "compromise" his claim for a payment of $17,500. The Foundation did not make the requested payment.

¶ 12 On July 23, 2010, plaintiff filed an initial, single-count complaint alleging the Foundation breached the terms of his employment and violated the Illinois Wage Payment and Collection Act (the Act). 820 ILCS 115/1, *et. seq*. (West 2006). After the Foundation filed a motion to dismiss, plaintiff was granted leave to file an amended complaint, which he did on October 28, 2010. However, after the Foundation filed a motion to dismiss this pleading, plaintiff, again with leave,

filed a corrected-amended complaint on January 7, 2011. The corrected-amended complaint contained two counts. In count I, plaintiff claimed the Foundation, by failing to pay him incentive compensation in 2006, breached the terms of his employment and violated the Act. In count II, pled in the alternative, plaintiff claimed the Foundation had not exercised its discretion in good faith as to its decision not to pay him incentive compensation, and had also violated the Act. The trial court granted the Foundation's motion to dismiss the corrected-amended complaint in its entirety, but granted plaintiff leave to replead. Defendant's motions to dismiss the initial complaint and amended complaint were brought pursuant to both sections 2-615 and 2-619 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615; 5/2-619 (West 2010).

¶ 13 The second-amended complaint, which is at issue on appeal, also contained two counts. Attached to the second-amended complaint were the employment agreement, manual, department plan, and Dr. Bonow's September 26, 2006, letter. Plaintiff pled that in 2006, the Foundation had paid incentive compensation to unnamed "various physicians." He further pled that he was "eligible for incentive compensation for 2006." Paragraphs 14 through 16 of the second-amended complaint further alleged:

> "14. The plaintiff satisfied the criteria for incentive compensation for 2006. Specifically, plaintiff's clinical, research and educational productivity, as described in the Revised Policy [department plan] was equal to or better than other physicians who received Incentive Compensation. Plaintiff's productivity in the aforesaid areas were equal to or better than the prior year wherein plaintiff received incentive compensation.
>
> 15. Specifically, plaintiff's outpatient sessions were full and there was a four month

wait list. The plaintiff started earlier and worked later and longer than most other cardiologists. The dollars generated from indirect grants procured by the plaintiff rated him at the maximum. The plaintiff had publications as well.

16. Prior to 2006, plaintiff's 'citizenship,' as described in the [department plan] was excellent. Plaintiff's citizenship in 2006 remained the same as in the prior years."

In count I, plaintiff claimed that the Foundation's failure to pay him incentive compensation in 2006 was a "breach of the terms of employment as set forth in Exhibits 1 through 3 [the employment agreement, manual, and department plan]" and a violation of the Act. He claimed he had been "damaged in an amount not yet determined, but in excess of $18,000."

¶ 14 In count II, plaintiff contended, "[t]o the extent that the defendant had discretion in awarding" incentive compensation, the Foundation was to exercise that discretion in good faith. Plaintiff alleged that in 2006, he complained to the Foundation that it "was engaged in improper conduct," specifically with respect to the allocation of grants, gifts, and educational funds. He alleged that the misuse of funds was "confirmed" by an audit done by the Foundation's "legal department." Plaintiff contended, based on "information and belief," the Foundation "may have negated his 'citizenship rating' " in 2006 because of his complaints. Plaintiff asserted Dr. Bonow said to him that "it was 'all over for you at Northwestern now that you complained to the Dean's Office.' " In count II, plaintiff alleged the Foundation breached "the terms of the employment agreement as set forth in Exhibits 1 through 3" (the employment agreement, manual and plan) and violated the Act.

¶ 15 The Foundation moved to dismiss the second-amended complaint pursuant to sections 2-615 and 2-619. The motion to dismiss, however, attached only the second-amended complaint, the

complaint's exhibits, and a trial court memorandum opinion granting a motion to dismiss in *Nunes v. Northwestern Medical Faculty Foundation*, No. 09 CH 16841. The Foundation argued the employment agreement and manual established that it had no obligation to pay plaintiff an incentive compensation award and, therefore, the second-amended complaint should be dismissed pursuant to section 2-615. The Foundation further argued an action based on a violation of the Act must be based on an enforceable agreement for compensation and, for that reason, plaintiff's claims for violating the Act should be dismissed under either section 2-615 or section 2-619. Finally, the Foundation argued an independent cause of action for breach of an implied duty of good faith did not exist and, therefore, plaintiff's good-faith claim should be dismissed pursuant to section 2-615.

¶ 16 Defendant's motion to dismiss was granted, with prejudice, on June 20, 2011. The form order entered on that day had preprinted and handwritten language which stated: "<u>IT IS HEREBY Ordered that the Motion: to Dismiss as to Defendant's</u> Motion to Dismiss Plaintiff's Second Amended complaint pursuant to section 2-619 <u>is Granted</u> with prejudice." (Underlining not in original; the underlined words were preprinted.) The order stayed entry of the judgment in favor of the Foundation until July 7, 2011. The court's half-sheet or docket sheet for June 20, 2011, had the handwritten entry: "D MTD 2-615/619-Granted." On July 7, 2011, a date set for status, the trial court entered a form order stating: "<u>Judgment for Defendant's</u> Motion to Dismiss Plaintiff's Second Amended Complaint is hereby granted with prejudice and judgment is entered as of today's date." (Underlining not in original; the underlined words were preprinted.) The record on appeal does not include a transcript as to the June 20 and July 7 proceedings. This timely appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, plaintiff asserts that the trial court improperly dismissed his second-amended complaint with prejudice pursuant to either section 2-615 or 2-619 of the Code. We affirm the trial court's decision.

¶ 19 A. Standard of Review

¶ 20 "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint, and alleges only defects on the face of the complaint." *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 61. "The critical inquiry in deciding a section 2-615 motion to dismiss is whether the allegations of the complaint, considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Id*. A complaint may be dismissed when "it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Seip v. Rogers Raw Material Fund, L.P.*, 408 Ill. App. 3d 434, 438 (2011).

¶ 21 "A motion to dismiss under section 2-619, on the other hand, admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim." *Id*. When reviewing an order dismissing a complaint, pursuant to a 2-619 motion, we will interpret the pleadings and supporting documents in the light most favorable to the plaintiff. *Id*. An order granting a motion to dismiss, pursuant to either section 2-615 or section 2-619, will be reviewed *de novo* by this court. *Id* at 439. We may affirm a dismissal order for any reason which appears in the record. *Doe v. PSI Upsilon International*, 2011 IL App (1st) 110306, ¶ 11.

¶ 22 B. Application of Section 2-603

¶ 23 Although not addressed by either party, before addressing the propriety of the trial court's dismissal orders under either section 2-615 or 2-619, we find that we must first consider the application of section 2-603 of the Code. 735 ILCS 5/2-603 (West 2010).

¶ 24 Specifically, in order to determine whether plaintiff properly asserted causes of action in his second-amended complaint, we must first understand what claims are being made. Pursuant to section 2-603, plaintiff was required to set forth his claims in a "plain and concise" manner. 735 ILCS 5/2-603(a) (West 2010). Furthermore, he was required to state "[e]ach separate cause of action" in separate counts. 755 ILCS 5/2-603(b) (West 2010). The purpose behind section 2-603 " 'is to give notice to the court and to the parties of the claims being presented.' " *Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 19 (2009) (quoting *Smith v. Heissinger*, 319 Ill. App. 3d 150, 154 (2001)). A complaint may be dismissed for failure to comply with this section of the Code. *Id*.

¶ 25 Plaintiff's second-amended complaint contained two unlabeled counts. In the first count, plaintiff alleged the Foundation's failure to pay him incentive compensation in 2006 breached the terms of his employment as set forth in the employment agreement, manual, and department plan. However, the first count also alleged this failure violated the Act. In the second count, plaintiff pled, in the alternative, that the Foundation had failed to exercise its discretion as to his incentive compensation in good faith. On that basis, plaintiff alleged that the Foundation had, therefore, breached the terms of his employment as set forth in the employment agreement, manual, and department plan. In count II, however, plaintiff again alleged that the Foundation's conduct also

violated the Act. As to damages, in both counts plaintiff alleged that he was damaged "[a]s a direct and proximate consequence of defendant's wrongful conduct."

¶ 26 Additionally, in each count plaintiff also sought attorney fees under the Attorney Fees in Wage Actions Act (Fees Act) (705 ILCS 225/1 (West 2010)), which allows for the recovery of reasonable attorney fees in certain actions for "wages earned and due and owing." The Fees Act applies to limited groups of employees and requires that a plaintiff make a written demand for the specific amount due plaintiff. *Id.*; *Landers-Scelfo v. Corporate Office Systems, Inc.*, 356 Ill. App. 3d 1060, 1071 (2005).

¶ 27 Thus, in both counts of his second-amended complaint, plaintiff improperly blended elements of a breach-of-contract claim and a cause of action for violation of the Act. See *Catania v. Local 4250/5050 of Communications Workers of America*, 359 Ill. App. 3d 718, 725 (2005) (which found that an action under the Act is "distinct" from a common-law breach-of-contract suit). Furthermore, the second-amended complaint did not refer to any specific section of the Act, and did not clearly allege how the Act was violated. Moreover, count II certainly may be read and, indeed, was so construed by the Foundation as an attempt to state an independent claim for breach of the duty of good faith and fair dealing. The prayers for damages in both counts also sound in tort, with each count seeking damages allegedly proximately caused by the Foundation's wrongful conduct. Finally, each count seeks attorney fees under the Fees Act, without including any supporting allegations.

¶ 28 By improperly commingling these various claims and causes of action and, by not clearly and concisely setting forth his causes of action, plaintiff did not comply with section 2-603. These pleading defects and deficiencies would amply serve to support a decision to affirm the dismissal

of plaintiff's second-amended complaint. Nevertheless, while we may affirm the dismissal of a complaint on any grounds which appear of record (*Doe*, 2011 IL App (1st) 110306, ¶ 11), we will proceed to consider plaintiff's arguments for reversing the trial court's dismissal.

¶ 29 C. Dismissal Under Section 2-615 or 2-619

¶ 30 In addressing plaintiff's arguments, we initially address the contention that the trial court erred by dismissing the entire second-amended complaint pursuant to section 2-619, when defendant had only moved to dismiss count II under section 2-615.

¶ 31 As an initial matter, the record is not entirely clear as to whether the trial court granted the Foundation's motion to dismiss pursuant to section 2-619 alone. While the written June 20 order granting the dismissal does describe defendant's motion as one brought under section 2-619, the half-sheet indicates defendant's "2-615/2-619" motion was granted on that date. Furthermore, the trial court's reasoning and its bases for granting the dismissal, are not set forth in either the written order, or in the half-sheet entry. The July 7 order entering judgment for defendant made no reference to either section 2-615 or 2-619. Lastly, we do not have a report of the proceedings for either date, or an appropriate substitute under Supreme Court Rule 323 (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)). Thus, there is some confusion as to which section or sections of the Code the trial court ultimately relied upon in making its decision.

¶ 32 Additionally, we again note that our review is *de novo* under either section 2-615 or 2-619, and we may affirm the dismissal of plaintiff's complaint based upon any grounds in the record. Thus, the argument that dismissal of count II under section 2-619 was improper would have little ultimate relevance if we were only to consider the propriety of the dismissal of plaintiff's second-amended

complaint under section 2-615.

¶ 33 Specifically, although the Foundation brought its motion to dismiss pursuant to both sections 2-615 and 2-619, it did not rely on any affirmative matter to defeat plaintiff's claim, nor did it cite to a specific subsection of section 2-619. Instead, the Foundation's motion and supporting memorandum presented arguments that plaintiff–on the face of the second-amended complaint and attached exhibits–had not sufficiently stated claims upon which relief could be granted. These arguments are properly made under section 2-615. Therefore, we will review the dismissal of the second-amended complaint under the standards applicable to section 2-615 and, as such, any concerns regarding the trial court's allegedly improper dismissal of count II pursuant to section 2-619 are alleviated.

¶ 34 Finally, we also briefly address plaintiff's contention that the Foundation's motion to dismiss improperly combined arguments under both sections 2-615 and 2-619. We note that the "failure to properly designate a motion as being brought pursuant to section 2-615 or section 2-619 will not require reversal unless prejudice results to the non-movant." *Downers Grove Assoc. v. Red Robin International, Inc.*, 151 Ill. App. 3d 310, 314 (1986). "A hybrid motion normally will only cause prejudice when the plaintiff is induced to forego the submission of counter-affidavits or other material to contest a defendant's affirmative defense and to rely solely on his complaint." *Id.* During the proceedings in the trial court, plaintiff was fully aware of defendant's argument that the second-amended complaint failed to allege causes of action, and plaintiff responded to those arguments. His previously-filed complaints had also been the subject of similar attacks. Plaintiff's briefs on appeal argue that counts I and II sufficiently allege causes of action and should not have been dismissed.

We conclude that plaintiff will not be prejudiced by our review of the dismissal order under section 2-615 alone, and any alleged prejudice arising from the application of section 2-619 to count II or from the defendant's motion practice will, thus, be completely avoided.

¶ 35 D. Dismissal Pursuant to Section 2-615

¶ 36 In determining whether plaintiff's second-amended complaint was sufficient under section 2-615, we will accept as true only well-pled facts and reasonable inferences which may be drawn from those facts. *McCready v. Illinois Secretary of State, White*, 382 Ill. App. 3d 789, 794 (2008). We may consider all exhibits attached to the complaint and, where there is a conflict between the allegations and the exhibits, the exhibits control. *Id*.

¶ 37 1. Count I

¶ 38 On appeal, plaintiff asserts that he has pled "the necessary elements to establish a claim under [the Act] and it was error for the trial court to grant [the Foundation's] Motion as to Count I." The Act provides "redress for an employer's wrongful withholding of employee benefits." *Kim v. Citigroup, Inc.*, 368 Ill. App. 3d 298, 306 (2006). The elements of a cause of action under the Act are: "(1) the defendant was an 'employer' as defined in the Wage Payment Act; (2) the parties entered into an 'employment contract or agreement'; and (3) the plaintiff was due 'final compensation.' " *Catania*, 359 Ill. App. 3d at 724. As to the element of the existence of a contract or agreement, a plaintiff must "plead facts showing mutual assent to terms that support the recovery." *Id*. (quoting *Landers-Scelfo*, 356 Ill. App. 3d at 1068). See also *Stark v. PPM America, Inc.*, 354 F. 3d 666, 672 (2004). (The Act "requires a right to compensation.").

¶ 39 Plaintiff argues that a claim is stated under the Act when a plaintiff pleads that wages or final

compensation are alleged to be due plaintiff under an employment contract or agreement. He then contends that the dismissal of count I was erroneous because the employment agreement, manual, and department plan are subject to "more than one reasonable interpretation" and, thus, there is an ambiguity as to whether an award of incentive compensation was discretionary. Specifically, plaintiff argues that the "if any" language in section 3.3 of the employment agreement could be construed to mean that incentive compensation was: (1) "purely discretionary;" (2) contingent upon funds being available; or (3) subject only to the requirement that the member satisfied the requisite criteria. Because of this ambiguity, plaintiff believes his action under the Act–as pled in count I–should not have been dismissed on the ground that he had not alleged a right to incentive compensation.

¶ 40 However, in his brief before this court, plaintiff has not cited or discussed just what specific section of the Act the Foundation has allegedly violated by not paying him incentive compensation in 2006. He has not set forth or referred to any language of the Act, nor has he cited any case law or regulations interpreting the Act in support of the argument that he has stated a cause of action. The only case law cited by plaintiff in his initial brief as to count I's sufficiency deals with the general interpretation or construction of contract terms in determining whether a contract is ambiguous.

¶ 41 As appellant, plaintiff is required to make cogent arguments with citations to relevant authority to support his argument that count I stated a valid claim that defendant's failure to pay him an incentive compensation award in 2006 was indeed a violation of the Act. Ill. S. Ct. R. 341 (eff. July 1, 2008); See *Lozman v. Putnam*, 379 Ill. App. 3d 807, 824 (2008) (setting forth authority

holding that an argument may be waived by failing to argue it, provide citation to relevant authority, or provide case citations or other legal authority in support of the argument). Thus, plaintiff has failed to demonstrate that the trial court erred in dismissing count I, at least as to any claim under the Act.

¶ 42 In contrast, the Foundation cites to section 2 of the Act in its brief, which provides:

> "For all employees, other than separated employees, 'wages' shall be defined as any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties, whether the amount is determined on a time, task, piece, or any other basis of the calculation. Payments to separated employees shall be termed 'final compensation' and shall be defined as wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the employee by the employer pursuant to an employment contract or agreement between the 2 parties." 820 ILCS 115/2 (West 2006).

¶ 43 The Foundation treats plaintiff's claim for an incentive compensation award as a claim for an "earned bonus" under section 2 . The Foundation, thus, argues that the holding in *McLaughlin v. Sternberg Lanterns*, 395 Ill. App. 3d 536 (2009), supports the dismissal of plaintiff's complaint because an award of incentive compensation is not guaranteed and is entirely discretionary under the employment agreement and manual.

¶ 44 The plaintiff in *McLaughlin* filed an action under the Act against his former employer seeking, in part, a *pro rata* share of a performance bonus for the year of his termination. *Id*. at 540-41. At the time of his termination, plaintiff was vice president of sales for the defendant, a

manufacturer and seller of lighting products. *Id*. at 537. Plaintiff's written employment terms stated that a sales performance bonus would be based on the percentage of increases in sales per year. *Id*. at 538. In determining the meaning of "earned bonus" under section 2 of the Act, the appellate court carefully examined the language of the Act, state and federal case law interpreting section 2, regulations of the Illinois Department of Labor construing section 2 of the Act and, the term "earned bonus." *Id*. at 541-44. The court in *McLaughlin* concluded that a separated employee may not subsequently sue and recover an "earned bonus" under section 2, where the bonus plan in question does not unequivocally guarantee that an employee would receive the bonus as compensation. *Id*. at 544.

¶ 45 In his reply brief, plaintiff does not refute defendant's treatment of plaintiff's incentive compensation claim as one for an "earned bonus" or dispute the applicability of section 2. Plaintiff fails to discuss section 2 of the Act, the holding of *McLaughlin* or, the authority cited therein interpreting the meaning of an "earned bonus" under the Act. In his reply brief, plaintiff simply continued to assert–in the face of the court's holding in *McLaughlin*–that the terms in the employment agreement, manual, and department plans are ambiguous as to whether an award of incentive compensation is entirely discretionary. In making this argument, plaintiff fails to recognize that if there is, in fact, an ambiguity as to whether an award of incentive compensation is discretionary, any guaranty of payment would similarly be ambiguous at best. Indeed, any of plaintiff's proposed interpretations of the "if any" language of section 3.3 of the employment agreement leads to a conclusion that an incentive compensation award was not guaranteed. Therefore, plaintiff's argument in support of a reversal of the dismissal of count I tends to support,

rather than defeat, the Foundation's position that a violation of the Act has not been pled where no unequivocal right to incentive compensation has been alleged.

¶ 46 Additionally, plaintiff has not argued on appeal that the allegations of count I state a common-law cause of action for breach of his employment contract. See *Catania*, 359 Ill. App. 3d at 725 (an action under the Act is distinct from a common-law contract action). Therefore, to the extent count I may be viewed as a contract action, plaintiff has waived any argument that he has properly alleged such a claim. *Lozman*, 379 Ill. App. 3d at 824 ("a party waives a point by failing to argue it.").

¶ 47 Similarly, plaintiff has not argued on appeal that he has sufficiently pled his right to attorney fees under the Fees Act. Indeed, he has not addressed whether this action even falls within the purview of the Fees Act or, whether he satisfied the statutory requirement that he must make a demand for a specific sum owed. *Catania*, 359 Ill. App. 3d at 727. Plaintiff has, therefore, also waived any argument as to whether he stated a claim under the Fees Act. *Lozman*, 379 Ill. App. 3d at 823.

¶ 48 In light of the foregoing discussion, we affirm the dismissal of count I pursuant to section 2-615 of the Code.

¶ 49 2. Count II

¶ 50 Plaintiff next argues that count II should not have been dismissed because the Foundation's failure to pay him incentive compensation "[ran] counter to the reasonable expectations of the parties and this constitutes a breach of the implied covenant of good faith." This argument is based on plaintiff's contentions that: (1) "where an employer has repeatedly paid an employee a bonus as if

it were nondiscretionary, that bonus will become a term of the employment agreement;" and (2) the reasonable expectations of the parties–as set forth in the employment agreement, manual, and department plan–were that plaintiff would be entitled to receive incentive compensation if he met certain criteria in a given year.

¶ 51 "The duty of good faith and fair dealing is implied in every contract and requires a party vested with contractual discretion to exercise it reasonably, and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of parties." *Seip*, 408 Ill. App. 3d at 443. "The duty, however, is not an independent source of duties for the parties to a contract, and is 'used as a construction aid in determining the intent of the parties where an instrument is susceptible of two conflicting constructions.' " *Id*. (quoting *Fox v. Heimann*, 375 Ill. App. 3d 35, 42 (2007)). "Notwithstanding this implied covenant, parties to a contract are entitled to enforce its terms to the letter, and an implied covenant of good faith and fair dealing cannot overrule or modify the express terms of a contract." *Suburban Insurance Services, Inc. v. Virginia Surety Co., Inc.*, 322 Ill. App. 3d 688, 693 (2001).

¶ 52 There are no allegations in the complaint to support a conclusion that the Foundation paid incentive compensation to plaintiff "as if it was nondiscretionary." We must, therefore, reject this argument in support of count II.

¶ 53 As to plaintiff's reasonable-expectations contention, we note that plaintiff's brief does not refer to the specific provisions of the employment agreement, manual, or department plan, which would support his contention that the reasonable expectations of the parties included the notion that there would be an entitlement to incentive compensation if plaintiff met certain criteria. To the

contrary, the employment agreement, manual, and department plan establish that any award of incentive compensation was discretionary, subject to specific review and approval procedures, and predicated upon the attainment of financial targets. An award, if any, was to be based on a process beginning with the recommendation by the department of medicine. Such a recommendation would be made only after a detailed and systematic review was completed, one based upon an examination and application of certain criteria and methodology. Furthermore, there was no indication that incentive compensation was an entitlement if a member "met certain criteria." We reiterate that plaintiff cannot, under the guise of the duty of good faith, "read an obligation into a contract that does not exist." *Id*.

¶ 54 Even if we were to accept plaintiff's position as to the parties' reasonable expectations, plaintiff has not sufficiently alleged that he met the criteria or requirements for an award of incentive compensation as to be entitled to such an award. Plaintiff has alleged, in a conclusory manner, that in 2006 he "satisfied the criteria" and was "eligible for incentive compensation." He set forth, again only in a general manner, that his "clinical, research and educational productivity *** was equal to or better than other physicians who received incentive compensation," and made other general statements as to his work. These allegations do not, in any way, refer to the specific methodologies to be used by the department of medicine in reviewing his work for purposes of recommending an incentive award, or the fact that any such recommendation would still have to be approved by the compensation committee and the full board. The complaint is devoid of any allegation that all applicable financial targets had been met in 2006. The complaint is also silent as to whether the department of medicine recommended an award and, if the department did recommend an award,

what action, if any, was taken by the compensation committee or the board.

¶ 55 We note that plaintiff's complaint did raise allegations that defendant did not make an award of incentive compensation in 2006 due to the fact that plaintiff had reported irregularities in how the Foundation handled certain funds. However, plaintiff makes no arguments in his brief before this court as to these allegations. Therefore, plaintiff has waived this point as well. *Lozman*, 379 Ill. App. 3d at 824.

¶ 56 Furthermore, having failed to raise any argument that count II stated a claim that the Foundation breached any express contractual provision or violated the Act, or that he stated a claim under the Fee Act in count II, plaintiff has forfeited any argument as to the dismissal of count II on these grounds as well.

¶ 57 E. Other-Contract Language

¶ 58 We also briefly consider a portion of the Foundation's manual that has, thus far, gone unaddressed by the parties. Specifically, a subsection of the manual entitled "Eligibility for Individual Awards" specifically stated: "[b]ecause a primary purpose of the Plan is to assist the Foundation in retaining physicians who will further the Foundation's tax exempt purposes, to be eligible to receive any payout of incentive compensation (including a payout already approved by the Compensation Committee) *a Member must continue to be employed and on the payroll at the time the incentive compensation is paid*." (Emphasis added.) Plaintiff has never addressed this provision, nor has he demonstrated how his claim satisfies its requirement that he be employed by the Foundation at the time any incentive compensation was to be paid. Indeed, the first claim for incentive compensation contained in the record did not occur until July of 2007, nearly eight months

after plaintiff resigned his position with the Foundation. It is difficult to understand how this provision is not completely fatal to any possible claim that the Foundation owes plainitff incentive compensation.

¶ 59 F. Dismissal with Prejudice

¶ 60 Finally, plaintiff argues that his second-amended complaint should not have been dismissed with prejudice. Without elaboration or specification, plaintiff states: "[t]here are sets of facts which entitle [him] to recovery and he should have been granted leave to replead." Although "Illinois has a liberal policy of allowing the amendment of pleadings, this right is not unlimited." *RBS Citizens, National Ass'n v. RIG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 192 (2011). There is nothing in the record that shows plaintiff requested leave to replead his second-amended complaint in the trial court below, presented any set of facts which would support a further amendment to his complaint or, submitted an amended complaint to the trial court. Plaintiff had filed four complaints before the dismissal was finally entered with prejudice. The basis of plaintiff's claims against the Foundation remains his belief that he was entitled to incentive compensation in 2006. However, the employment agreement, manual, and department plan demonstrate that incentive compensation was not guaranteed, but was actually within the discretion of the Foundation. In light of these circumstances, and in light of our determination that the second-amended complaint was properly dismissed for failure to state claims pursuant to section 2-615, the dismissal with prejudice was proper. See *Bellik v. Bank of America*, 373 Ill. App. 3d 1059, 1066 (2007); *Teter v. Clemons*, 112 Ill. 2d 252, 261 (1986).

¶ 61 III. CONCLUSION

¶ 62 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 63 Affirmed.