

No. 1-11-2246

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN BUCKLEY and MAMA GRAMM'S BAKERY,) Appeal from the
INC., an Illinois Corporation,) Circuit Court of
) Cook County
Plaintiffs-Appellants,)
v.) No. 10 CH 27736
)
HAITHAM ABUZIR a/k/a MIKE ABUZIR,)
) Honorable
Defendant-Appellee.) LeRoy Martin
) Judge Presiding.
)

JUSTICE MURPHY delivered the judgment of the court.
Steele, P.J., and Salone, J., concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant incorrectly brought his motion under section 2-619(a)(9) of the Illinois Code of Civil Procedure instead of section 2-615, and the record does not demonstrate that plaintiffs have not been prejudiced by the incorrect designation.

¶ 2 Plaintiffs, John Buckley and Mama Gramm's Bakery, Inc. (Mama Gramm's), appeal from an order of the circuit court of Cook County dismissing their complaint with prejudice. On appeal, plaintiffs contend that dismissal of their complaint was improper because many disputed

1-11-2246

issues of material fact exist regarding the elements of their claim. For the reasons that follow, we reverse and remand.

¶ 3

BACKGROUND

¶ 4 On April 13, 2011, plaintiffs filed a first amended complaint in equity against defendant, Haitham Abuzir, requesting that the circuit court pierce the corporate veil of Silver Fox Pastries, Inc. (Silver Fox), as to defendant in regard to a judgment entered in their favor and against Silver Fox on October 9, 2007, in the amount of \$421,582.50, plus costs. Plaintiffs asserted that Silver Fox had violated the Illinois Trade Secrets Act (765 ILCS 1065/1 *et seq.* (West 2006)) by hiring Mama Gramm's head baker and obtaining its recipes, methods, processes, techniques, formulas, and customer list from her, then producing baked goods that were identical to those of Mama Gramm's and selling them to its customers. Silver Fox, which had been incorporated on May 8, 2006, was involuntarily dissolved on October 12, 2007.

¶ 5 Plaintiffs also asserted that while Suna Abuzir, defendant's sister, was in charge of the day-to-day operations of Silver Fox and held herself out as its owner, defendant took care of all other aspects of running the business and made all business decisions. Defendant provided Silver Fox with all its start-up funds, prepared and filed its incorporation documents, and regularly provided it with money for supplies, equipment, payroll, and rent. Defendant was also directly involved in the sale of equipment owned by Silver Fox where he signed the agreement on its behalf and retained \$15,000 from the sale. Plaintiffs maintained that all funds provided to Silver Fox were capital contributions and that defendant was not a creditor of Silver Fox. In addition, plaintiffs asserted that Silver Fox did not have any directors; keep any corporate records

1-11-2246

or documents; observe any corporate formalities; hold any meetings of shareholders, officers, or directors; issue stock; pay dividends; maintain adequate capitalization; or make a payment on any loan allegedly made to it.

¶ 6 Plaintiffs alleged that defendant created Silver Fox and hired Mama Gramm's head baker for the express purpose of taking and using its trade secrets, recipes, and customer lists to obtain business from its clients. Plaintiffs also alleged that defendant exercised ownership control over Silver Fox to such a degree that they shared a unity of interest and ownership and that adherence to the fiction of Silver Fox as a separate corporate entity would promote injustice or subject them to inequitable consequences. Plaintiffs further alleged that defendant had perpetrated an injustice against them and either intended to do so or had knowledge with substantial certainty that he was doing so. Plaintiffs requested the court pierce the corporate veil of Silver Fox as to defendant and enter judgment in their favor in the sum of \$421,582.20, plus costs and interest from October 9, 2007.

¶ 7 On May 2, 2011, defendant filed a motion to dismiss plaintiffs' complaint pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2010)) and attached signed affidavits from himself and Ali Ashali, Suna's husband, in support. Defendant asserted that Ashali was the president, registered agent, and owner of Silver Fox and that Suna was the general manager and in charge of its day-to-day operations. In May 2006, defendant loaned money to Silver Fox, which executed a promissory note in the amount of \$45,000 for a portion of those loans. In May 2007, Silver Fox authorized defendant to sell its assets and retain \$15,000 of the proceeds of that sale in partial satisfaction of the debt owed

1-11-2246

under the promissory note, then closed its operations. In 2008, plaintiffs initiated supplementary proceedings against defendant and moved for the entry of a turnover order against him with respect to the \$15,000 he had received from the sale of Silver Fox's assets. Following an evidentiary hearing, the circuit court denied plaintiffs' motion, ruling that defendant was a creditor of Silver Fox and that the payment was proper.

¶ 8 Defendant contended that the corporate veil of Silver Fox could not be pierced because plaintiffs could not establish a unity of interest and ownership between him and Silver Fox or show that adherence to the fiction of a separate corporate existence would promote injustice or inequitable circumstances. Defendant maintained that plaintiffs had not alleged sufficient facts to establish a unity of interest and ownership between him and Silver Fox where he was never a director, officer, or shareholder of Silver Fox. Defendant further maintained that plaintiffs had not alleged sufficient facts to establish that he was "involved in" the tort allegedly committed by Silver Fox where he denied engaging in such activity in his affidavit and plaintiffs had no basis in fact to dispute those denials.

¶ 9 On May 23, 2011, plaintiffs filed a response to defendant's motion to dismiss in which they asserted that defendant had admitted the legal sufficiency of their complaint by bringing his motion under section 2-619(a)(9) of the Code. Plaintiffs also asserted that defendant did not set forth any affirmative matter defeating their action in his motion, but instead disputed issues of material fact where many of the denials set forth in his affidavit were contradicted by allegations in the complaint and prior statements made by him, Suna, and Ashali. In his reply, defendant asserted that plaintiffs' complaint should be dismissed where there were no facts in the record

1-11-2246

showing that he was "involved in" the tort allegedly committed by Silver Fox and plaintiffs had failed to contradict the denials in his affidavit with a counteraffidavit.

¶ 10 On July 1, 2011, the circuit court conducted a hearing on defendant's motion to dismiss, and although the record does not contain a report of proceedings of that hearing, the parties have stipulated to an agreed statement of facts in lieu of such a report. The agreed statement of facts shows that the court granted defendant's motion to dismiss plaintiffs' complaint with prejudice. The court based its decision on its determination that plaintiffs were required to plead sufficient facts to show that defendant was directly involved in and had knowledge of the torts committed by Silver Fox because he was not an owner, director, or employee of the corporation, but had failed to do so. Plaintiffs then requested leave to amend their complaint, and the court granted them until August 1, 2011, to file a second amended complaint on an alternative theory other than piercing the corporate veil. The court also entered a written order granting defendant's motion, dismissing plaintiffs' complaint with prejudice and allowing them until August 1, 2011, to file a second amended complaint alleging an alternative legal theory. Plaintiffs now appeal from this order.

¶ 11

ANALYSIS

¶ 12 On appeal, plaintiffs contend that the circuit court erred by dismissing their complaint with prejudice where multiple disputed issues of material fact exist regarding the elements of their claim. Defendant responds that we should affirm the circuit court's dismissal of plaintiffs' complaint because they failed to allege sufficient facts to show a unity of ownership between him and Silver Fox and adherence to the fiction of Silver Fox's separate corporate existence would

1-11-2246

not sanction a fraud or promote an injustice.

¶ 13 Initially, we must determine whether defendant's motion to dismiss was properly brought under section 2-619(a)(9) of the Code. A motion for involuntary dismissal brought under section 2-619(a)(9) admits the legal sufficiency of the plaintiff's complaint and asserts an affirmative matter outside the pleading that avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9) (West 2010); *Czarowski v. Lata*, 227 Ill. 2d 364, 369 (2008). The phrase "affirmative matter" encompasses defenses other than a negation of the essential allegations of a cause of action. *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993).

¶ 14 In his motion to dismiss, defendant claimed to have been bringing his motion pursuant to section 2-619(a)(9) and asserted that the court should dismiss plaintiffs' complaint because they had failed to allege sufficient facts to show a unity of interest and ownership between him and Silver Fox where they did not allege that he was a director, officer, or shareholder of Silver Fox. Defendant also asserted that plaintiffs had failed to allege sufficient facts to show that he was involved in the torts allegedly committed by Silver Fox where he denied engaging in such conduct in his affidavit and plaintiffs had no basis in fact to dispute his denials. Thus, defendant did not admit the legal sufficiency of plaintiffs' complaint in his motion where he alleged that plaintiffs had failed to plead sufficient facts to state their cause of action. In addition, defendant did not assert a matter outside the pleading that avoided the legal effect of or defeated plaintiffs' claim where the denials in his affidavit constituted a mere negation of the essential allegations of plaintiffs' cause of action. We therefore determine that defendant's motion to dismiss was not properly brought under section 2-619(a)(9).

1-11-2246

¶ 15 Although defendant asserts that we may consider his motion as having been filed as a motion for summary judgment (735 ILCS 5/2-1005(b) (West 2010)), his motion more closely resembles a motion to dismiss brought under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)). Unlike a motion brought pursuant to section 2-619(a)(9), a section 2-615 motion attacks the legal sufficiency of the plaintiff's complaint. *Abbasi ex rel. Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386, 391 (1999). In this case, defendant requested the court dismiss plaintiffs' complaint with prejudice and attacked its legal sufficiency by asserting that plaintiffs had failed to allege sufficient facts to show that there was a unity of interest and ownership between him and Silver Fox or that he was involved in the torts allegedly committed by Silver Fox. As such, defendant's motion to dismiss should have been brought pursuant to section 2-615.

¶ 16 A defendant's failure to properly designate a motion to dismiss as being brought under section 2-615 is not always fatal, but will require reversal if the plaintiff has been prejudiced by the incorrect designation. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994); *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 278 (2004). However, where the interests of judicial economy would be served and the plaintiff is not prejudiced thereby, the motion may be deemed as having been filed in the proper manner. *Kovilic v. City of Chicago*, 351 Ill. App. 3d 139, 143 (2004). For the reasons that follow, we cannot determine that plaintiffs were not prejudiced by the incorrect designation of defendant's motion to dismiss.

¶ 17 A motion to dismiss brought under section 2-615 attacks the legal sufficiency of the complaint and is solely based on defects appearing from the face of the complaint. *Aboufariss v. City of De Kalb*, 305 Ill. App. 3d 1054, 1066 (1999). Thus, in ruling on such a motion a court

1-11-2246

may only consider those facts apparent from the face of the pleadings, matters of judicial notice, and judicial admissions in the record. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). The relevant inquiry is whether the allegations of the complaint, considered in the light most favorable to the plaintiff, are sufficient to state a cause of action, and the complaint will only be dismissed if it is clearly apparent that the plaintiff cannot prove any set of facts that will entitle it to relief. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 61.

¶ 18 In his motion to dismiss, defendant asserted that plaintiffs had failed to plead sufficient facts to show that there was a unity of interest and ownership between him and Silver Fox or that he was involved in the torts allegedly committed by Silver Fox and relied in part on the denials set forth in his affidavit in doing so. In their response, plaintiffs asserted that defendant had admitted the legal sufficiency of their complaint by bringing his motion under section 2-619(a)(9) and maintained that their complaint should not be dismissed because much of his affidavit was contradicted by the allegations in the complaint and the prior statements made by him, Suna, and Ashali. In his reply, defendant asserted that the court should dismiss plaintiffs' claim because they had not alleged sufficient facts to support their cause of action or filed a counteraffidavit to rebut the denials set forth in his affidavit.

¶ 19 The agreed statement of facts reflects that a hearing was conducted on the motion and that the circuit court heard arguments from both parties at that time, but does not disclose the content of the parties' arguments before the court. The statement of facts also indicates that the court granted defendant's motion based on its determination that plaintiffs had "failed to plead facts sufficient to show that Defendant was directly 'involved in' and had knowledge of the wrongful

1-11-2246

acts upon which the underlying judgment was based." The statement of facts then relates that plaintiffs requested leave to amend their complaint and that the court granted them one month to do so under an alternative legal theory. In its written order, the court stated that it was granting defendant's section 2-619 motion to dismiss plaintiffs' complaint and providing plaintiffs with one month to file a second amended complaint under an alternative legal theory.

¶ 20 The record thus shows that plaintiffs did not address the issue of the sufficiency of their factual allegations in their response to defendant's motion in reliance on the assumption that he had admitted the legal sufficiency of their complaint by bringing his motion under section 2-619(a)(9). In addition, plaintiffs have not addressed this issue in their appellate brief or reply except to assert that they should have been given the opportunity to amend their complaint if the court had determined that they had failed to plead sufficient facts to state a cause of action, and there is no indication that plaintiffs addressed the issue at the hearing on the motion. The record also shows that the primary issue disputed by the parties prior to the hearing was the legal effect of defendant's affidavit, which cannot be used to support a section 2-615 motion. See *Pooh-Bah Enterprises*, 232 Ill. 2d at 473 (in ruling on a motion brought under section 2-615, consideration is limited to facts apparent from the face of the pleadings). Further, the record does not reveal whether the court considered defendant's motion as having been brought under section 2-615 or 2-619(a)(9) where it referred to the motion as a section 2-619 motion in its written order and the agreed statement of facts indicates that it granted the motion because plaintiffs had failed to plead sufficient facts to state a cause of action.

¶ 21 Based on this record, we cannot say that plaintiffs were not prejudiced by the incorrect

1-11-2246

designation of defendant's motion to dismiss. While it appears from the agreed statement of facts that the court correctly based its decision on the factual allegations in plaintiffs' complaint, that inference is somewhat contradicted by the court's reference to defendant's motion as a section 2-619 motion in its written order and is not corroborated by a record of the matters argued before and considered by the court at the hearing. Thus, we cannot be certain that defendant's affidavit, which was the primary subject of the parties' prehearing filings and plaintiffs' claim on appeal, was not improperly considered in ruling on defendant's motion. In addition, if the motion had been correctly designated as being brought under section 2-615, plaintiffs would have had the opportunity to fully develop and present an argument that their pleadings were sufficient to state a cause of action. Further, where plaintiffs requested an opportunity to amend their complaint following the court's ruling, it is possible they would have been able to amend their complaint with more specific factual allegations prior to the hearing had defendant correctly designated his motion as being brought under section 2-615. See *OnTap Premium Quality Waters, Inc. v. Bank of Northern Illinois, N.A.*, 262 Ill. App. 3d 254, 264 (1994) (a case should not be dismissed with prejudice on the pleadings if the plaintiff can state a cause of action by amending its complaint).

¶ 22 As such, we determine that the record does not demonstrate that plaintiffs were not prejudiced by the incorrect designation of defendant's motion to dismiss and therefore conclude that the circuit court's order granting defendant's motion and dismissing plaintiffs' complaint with prejudice must be reversed. In doing so, we note that we pass no judgment on the sufficiency of the factual allegations in plaintiffs' complaint or the merits of a section 2-615 motion to dismiss, but are reversing due to the threat of prejudice to plaintiffs arising from the incorrect designation

1-11-2246

of defendant's motion.

¶ 23

CONCLUSION

¶ 24 Accordingly, we reverse the judgment of the circuit court of Cook County and remand the matter for further proceedings.

¶ 25 Reversed and remanded.