2013 IL App (1st) 120272

SECOND DIVISION
February 5, 2013

No. 1-12-0272

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAVID M. KERT and VERNON J. WELSH, Individually and d/b/a KERT & WELSH, a partnership,	)	Appeal from the Circuit Court of Cook County, Illinois
Plaintiffs-Appellants,	)	
v.	)	No. 07 L 10844
OASIS LEGAL FINANCE, LLC, a Delaware limited liability company,	)	The Honorable Kathleen M. Pantle,
Defendant-Appellee.	)	Judge Presiding

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

ORDER

Held: Plaintiffs failed to sufficiently plead a cause of action for declaratory judgment because they have not shown that an actual controversy exists. Specifically, plaintiffs seek to enforce their rights after the fact and a judgment of nonliability for past conduct.

¶ 1 Plaintiffs, David M. Kert and Vernon J. Welsh, individually, and doing business as Kert & Welsh[1], a New York general partnership, filed a second amended complaint against defendant, Oasis Legal Finance, LLC (Oasis).[2] The parties entered into an agreement whereby Oasis loaned the firm $200,000, with a 40 % interest rate compounded annually, to finance the firm's class action lawsuits. Prior to the filing of their second amended complaint, the firm paid Oasis the full amount of the loan, plus interest. Despite paying Oasis the full amount of the loan, the firm sought declaratory relief pursuant to section 2-701 of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-701 (West 2010). Oasis filed a combined motion to dismiss plaintiffs' complaint pursuant to section 2-619.1 of the Code. 735 ILCS 5/2-619.1 (West 2010). The circuit court granted Oasis' combined motion to dismiss with prejudice, finding that the firm did not sufficiently plead a cause of action for declaratory judgment. At issue is whether the firm sufficiently plead a cause of action for declaratory judgment. We hold that the firm has failed to sufficiently plead a cause of action for declaratory judgment because it has not shown that an actual controversy exists. Specifically, the firm seeks to enforce its rights after the fact and for a judgment of nonliability for past conduct.

¶ 2 JURISDICTION

¶ 3 On August 1, 2011, the circuit court granted Oasis' motion to dismiss counts one through

[1] We will refer to the law firm of Kert & Welsh as "the firm." We will refer to the individual partners, David M. Kert and Vernon J. Welsh, as "Kert" or as "Welsh" where appropriate.

[2] The firm's second amended complaint contained eight counts. However, as discussed *infra*, the firm only raised arguments in its briefs before this court addressing subsections (A), (B), (C), and (F) of Count I of its second amended complaint.

six of the firm's second amended complaint. On that same day, the circuit court also struck count seven of the firm's second amended complaint, but allowed leave to amend. On November 30, 2011, the circuit court denied the firm's motion to reconsider the August 1, 2011, order. On January 6, 2012, the circuit court both allowed the firm leave to file counts seven and eight and dismissed those counts with prejudice. In addition, the circuit court entered a finding that there was no just cause to delay enforcement or appeal pursuant to Illinois Supreme Court Rule 304(a). Ill. S. Ct. R. 304 (a) (eff. Feb. 26, 2010). On January 30, 2012, the firm timely appealed. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 304(a). Ill. S. Ct. R. 304 (a) (eff. Feb. 26, 2010).

¶ 4 BACKGROUND

¶ 5 On March 30, 2011, the firm filed a seven count second amended complaint against Oasis. According to the complaint, the parties entered into a credit agreement whereby Oasis loaned the firm $200,000, with an interest rate of 40% compounded annually, to finance the firm's class action lawsuit practice. During negotiations on the agreement, "the near-exclusive topic" was whether the firm would be successful in several class actions suits, which the agreement referred to as "select cases." Around November of 2006, prior to entering into the agreement, the firm told Oasis that they operated as a New York general partnership. According to the firm, a New York partnership "has no independent existence" such that it is a separate legal entity. The agreement provided that upon realization of sufficient compensation on any of the select cases, the firm would pay the loan principle plus interest. In April of 2008, the firm informed Oasis that a settlement in one of the select cases was sufficient to pay off the loan. The

firm also informed Oasis that they believed that the 40 % interest rate was usurious under the Illinois Interest Act. According to the firm, Oasis informed them that the terms of the agreement would not be changed. Oasis also stated that they were able to charge a 40% interest rate under the Illinois Consumer Installment Loan Act. Eventually, according to the firm, Oasis claimed they were owed $788,149 under the agreement. The firm paid Oasis, "under protest," the amount owed in December of 2010 to avoid "potential hazards" and to mitigate damages. The firm alleged that "[t]he total amount claimed by and paid to [Oasis] on December 29, 2010, was unlawfully claimed by [Oasis]," and that they "were forced and compelled to involuntarily pay said amount in error."

¶ 6 Relevant to this appeal, and contained in count one of their complaint, plaintiffs requested the following declaratory relief: "a declaration that the [the firm's] general partnership is a New York general partnership;" (Count 1(A)) "a declaration that said general partnership is not a separate entity and has no independent legal status from its individual partners;"(Count I (B) "a declaration that per the plain and express language of the Credit Agreement, [Kert] and [Welsh] both assigned their personal wages and income as collateral for this loan under the agreement;" (Count I (C)) and "a declaration that Defendant Oasis falls within the exception under the Illinois Interest Act, 815 ILCS 205/4(1)(c)" (Count I (F)).

¶ 7 The firm attached the agreement to their complaint, as well as two letters, and an affidavit, from its former attorney. The agreement was titled "Credit Agreement," and listed Oasis as the lender and the firm, "a New York general partnership" as the borrower. The agreement defines "Collateral" as "all of the rights, assets, and personal property (tangible and

intangible), wherever located, of [the firm] with respect to the Select Cases, including, without limitation, [the firm's] interest in and rights in, to and under the Fee Agreements and those Accounts that derive from Fee Agreements with respect to the Select Cases." "Client" is defined as "any client of [the firm] that is a plaintiff with respect to a Select Case." It defines "Fee Agreement" as "a written agreement between [the firm] and Client with respect to a Select Case *** executed by [the firm] and Client pursuant to which Client has retained [the firm] to represent Client in such Select Case." The signature page lists the firm as the "Borrower" and Oasis as the "Lender." Under "Schedule 1" of the agreement, the agreement lists a $6,000 commitment fee and the net loan proceeds as $194,000. The guarantors are listed as Kert and Welsh individually. The interest rate was listed as 40% per annum. The agreement lists three "select cases."

¶ 8 In the first letter sent from the firm's former attorney to Oasis, dated July 29, 2010, the firm's attorney stated that he believed that the agreement violated section 6 of the Illinois Interest Act (815 ILCS 205/6 (West 2010)) and that the agreement fell within the exception of section 4(c)(1) of the Illinois Interest Act (815 ILCS 205/4 (c)(1) (West 2010)). In his second letter, the firm's former attorney stated that he disagreed with Oasis' contention that it was authorized to loan money according to the Consumer Installment Loan Act and reiterated his belief that the agreement fell within section 4(c)(1) of the Illinois Interest Act (815 ILCS 205/4 (c)(1) (West 2010)). In his affidavit, the firm's former attorney attested that Oasis filed a counterclaim on October of 2010, and that he did not believe that the agreement was legal under the Consumer Installment Loan Act.

¶ 9 Oasis filed a combined motion to dismiss the firm's second amended complaint pursuant to section 2-619.1 of the Code. 735 ILCS 5/2-619.1 (West 2010). In its motion, Oasis asserted that it was a "legal funding company" which loans attorneys money to cover business needs and expenses. It was licensed by the Illinois Department of Financial and Professional Regulation to make loans under the Illinois Consumer Installment Loan Act. Oasis stated it had "two 'other business' authorizations" which allowed it to loan over $40,000 at any interest rate. According to Oasis, the firm approached it "for a business loan to finance the firm's working capital, case development, case servicing, marketing, and general business needs," and to finance litigation in certain "select cases." After extensive due diligence, Oasis agreed to lend the firm $200,000 on December 22, 2006. The firm was required to pay Oasis the principal, plus any accrued interest, within 15 days of the firm's receipt of proceeds from any of the select cases. Repayment of the loan was guaranteed individually by the partners Kert and Welsh.

¶ 10 Under the section 2-619 component of Oasis' combined motion to dismiss, it argued that the agreement did not violate the Interest Act because business loans may be made at any interest rate agreed to by the parties. Oasis pointed out that the fee agreements from the select cases were the property of the firm, not Kert and Welsh as individual partners. Oasis also argued that Kert and Welsh did not individually assign their own wages, rather the firm's fee agreements from the select cases were pledged as collateral by the firm as security for the loan. Oasis maintained that it was licensed under the Consumer Installment Loan Act, and that it possessed two "business authorizations" that allowed it to make loans at any agreed upon rate.

¶ 11 Under the section 2-615 component of its combined motion to dismiss, Oasis argued that

the firm failed to state a cause of action for declaratory judgment pursuant to section 2-701(a) of the Code because no actual controversy existed between the parties. 735 ILCS 5/2-701 (West 2010). Specifically, that the firm simply sought whether the agreement between the parties was legally binding. Oasis, however, asserted that the firm failed to indicate whether or not Oasis was attempting to enforce the agreement or that the firm had failed to pay Oasis pursuant to the agreement. Accordingly, Oasis argued that the firm failed to plead sufficient facts to sustain a cause of action for declaratory judgment.

¶ 12 Oasis attached to its motion to dismiss, as exhibits, the following documents: the agreement between the parties; a license from the Illinois Department of Financial Institutions showing it was licensed to make business loans; a license from the Illinois Department of Financial and Professional Regulation, Division of Financial Institutions, authorizing it to make loans over $40,000; a copy of the firm's partnership agreement; copies of the retainer agreements for the select cases; and guarantees for the loan signed personally by Kert and Welsh, as individuals.

¶ 13 The partnership agreement, stated in relevant part that Kert and Welsh formed a limited liability partnership under the laws of the State of New York to practice law. The partnership agreement states,

> "Whenever this agreement refers to a matter or case being 'signed,' it means when the firm agrees to accept the matter or case and is retained to do so in the name of the partnership."

An amendment to the partnership agreement stated that "all matters and cases accepted by any of the partners in the past or in the future shall belong to the firm."

¶ 14 In response, the firm argued that they formed a general partnership under New York law that has no independent legal status, that Kert and Welsh individually assigned their own compensation as collateral, and that in their second amended complaint they plead that an actual controversy existed.

¶ 15 The circuit court found that the firm did not sufficiently plead a cause of action for declaratory relief.[3] The circuit court reasoned:

> "Here, the [firm] seek[s] the Court's legal interpretation as to the validity of it loan Agreement with Oasis. [The firm] allege[s] no facts in support of an actual controversy, e.g. that Oasis is attempting to enforce the Agreement or that [the firm] have collected money and refuse to pay the same to Oasis pursuant to the Agreement. As such, [the firm's] claims for declaratory judgment cannot stand."

Accordingly, the circuit court granted Oasis' motion to dismiss with prejudice. The circuit court denied plaintiffs' subsequent motion to reconsider.

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[3] The circuit court also found that dismissal of the firm's complaint was proper according to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)) because the agreement qualified as a business loan under section 4(1)(c) of the Illinois Interest Act (815 ILCS 205/4 (c)(1) (West 2010)); because the firm was a partnership, both under New York law and under its own partnership agreement; that the select cases were a security interest under the Uniform Commercial Code; and that, in any event, Oasis had the authority, under the Illinois Consumer Installment Loan Act, to contract for the agreed upon interest rate.

¶ 16 On January 6, 2012, the circuit court entered an order finding no just reason to delay appeal pursuant to Illinois Supreme Court Rule 304(a). Ill. S. Ct. R. 304 (a) (eff. Feb. 26, 2010). Plaintiffs timely appealed on January 30, 2012.

¶ 17 ANALYSIS

¶ 18 Initially, we note, the firm did not raise any arguments in its briefs before this court addressing much of its second amended complaint. The rules on waiver are well established. "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); see also *Wilson v. County of Cook*, 2012 Ill. 112026, ¶25 (noting that the plaintiffs "provided little or no argument" to support their contention before holding that "we look exclusively to those allegations highlighted by plaintiffs in their brief, and to the extent that they have failed to address other allegations raised in the complaint, those arguments have been forfeited.") Additionally, we will not consider matters outside the record. *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009) ("we cannot review the circuit court's finding *** because there is no record to review the basis of the circuit court's finding."); *Sapp v. The Industrial Comm'n*, 222 Ill. App. 3d 1068, 1070 (1991). It is the appellant's burden to support a claim of error, "and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 19 In this case, in its notice of appeal, the firm stated they were appealing three orders of the circuit court. The first order, entered August 1, 2011, and the second order which denied the

firm's motion to reconsider the August 1, 2011, order, dismissed counts one through six of the firm's second amended complaint. The circuit court struck count seven, but allowed the firm leave to amend. Count one alone asked the circuit court to enter 12 different declaratory judgments, two of which were argued in the alternative, in addition to asking for fees, costs, and "such other and further equitable and legal relief as [the circuit court] shall find just and proper." In addition to requesting declaratory judgment for the four reasons stated in the background section of this order,[4] the firm also asked for the following: "a declaration that [Oasis] usuriously and fraudulently entered into the Credit Agreement with the [firm] on December 22, 2006"(Count I (D)); "a declaration that [Oasis] violated the Illinois Consumer Fraud and Deceptive Business Practices Act, both before and after entering into said Agreement" (Count I(E)); a declaration that Oasis violated section 5 of the Illinois Interest Act (815 ILCS 205/5 (West 2010) (Count I (G)); a declaration that Oasis violated section 6 of the Illinois Interest Act (815 ILCS 205/6 (West 2010) (Count I (H)); "a declaration that there was no meeting of the minds between the parties" (Count I (I)); alternatively "a declaration that mutual mistake of material fact occurred between the parties" (Count I (J)); also in the alternative, that Oasis breached the agreement; and "a declaration that the [firm] ha[s] overcome and negated the voluntary payment doctrine" (Count I (K)). Under count two of their complaint, the firm alleged

[4] The firm requested the following: "a declaration that the [its] general partnership is a New York general partnership" (Count I (A)); "a declaration that said general partnership is not a separate entity and has no independent legal status from its individual partners" (Count I(B)); "a declaration that per the plain and express language of the Credit Agreement, [Kert] and [Welsh] both assigned their personal wages and income as collateral for this loan under the agreement"(Count I (C)); and "a declaration that Defendant Oasis falls within the exception under the Illinois Interest Act, 815 ILCS 205/4(1)(c)" (Count I (F)).

Oasis violated sections 5 and 6 of the Illinois Interest Act. 815 ILCS 205/5, 6 (West 2010). Count three of their complaint alleged violations of the Illinois Consumer Fraud and Deceptive Practices Act. Count four alleged common law fraud. Count five alleged that there was no meeting of the minds, and that the contract was *void ab initio*. Count six asked for rescission, based on mutual mistake. Count seven asked for breach of contract. Notably absent from plaintiffs' briefs before this court is any argument addressing any of these counts. Accordingly, they are waived. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 20 In the third order the firm appealed, entered by the circuit court on January 6, 2012, the circuit court entered an order with the following three findings: "Leave is granted to file counts VII and VIII;" "Counts VII and VIII are dismissed with prejudice;" and that "No just reason exists to delay either enforcement or appeal or both for this and previous rulings." However, absent from the record is an amended count seven or a count eight. The firm did not include any transcripts from proceedings before the circuit court, adding further confusion. We must presume the circuit court properly dismissed those counts. *Foutch*, 99 Ill. 2d at 391-92. The firm did include what is presumably an amended count seven in the appendix to its opening brief, but it is not in the record. *See Sapp* 222 Ill. App. 3d at 1070. Even if it was in the record, the count makes a claim for breach of contract, an argument the firm did not raise in their opening brief. Ill. S. Ct. R. 341(h)(7) (July 1, 2008). Accordingly, we hold that the firm has waived any argument concerning an amended count seven or count eight to its second amended complaint. We also hold that the firm has waived any argument in relation to their catch-all statement that they are appealing "each of the Circuit Court's orders and rulings that were a step in the

procedural progression to the foregoing specified orders," for failing to raise any argument regarding this "procedural progression" in its briefs before this court. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 21 To clarify, the only issue properly preserved for our review is whether the circuit court properly dismissed Count I (A), (B), (C), and (F) of the firm's second amended complaint. Under those subsections of Count I, the firm asked for declaratory judgment to be entered stating the following: that its "general partnership is a New York partnership" (Count I(A)); "that said general partnership is not a separate entity and has no independent legal status from its individual partners" (Count I (B)); "that per the plain and express language of the Credit Agreement, [Kert] and [Welsh] both assigned their personal wages and income as collateral for this loan under the agreement" (Count I (C)); and "that Defendant Oasis falls within the exception under the Illinois Interest Act, 815 ILCS 205/4(1)(c)" (Count I (F)).

¶ 22 Section 2-619.1 of the Code allows for combined motions to dismiss. 735 ILCS 5/2-619.1 (West 2010). In this case, Oasis sought to dismiss the firm's complaint under both section 2-619 of the Code and section 2-615 of the Code. The circuit court made findings that dismissal of the firm's complaint was proper under both sections. Due to our ultimate conclusion in this case, we need only address the circuit court's dismissal of plaintiffs' complaint brought pursuant to section 2-615 of the Code. In the section 2-615 component of its combined motion to dismiss, Oasis argued that the firm failed to state a cause of action for declaratory judgment pursuant to section 2-701(a) of the Code. 735 ILCS 5/2-701 (West 2010). We agree.

¶ 23 Only the legal sufficiency of the complaint is challenged in a section 2-615 motion to dismiss. *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). "The proper inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Id.* "All well-pleaded facts in the complaint must be taken as true, but conclusions of law will not be taken as true, unless supported by specific factual allegations." *Jarvis v. South Oak Dodge*, 201 Ill. 2d 81, 86 (2002). Our review is *de novo*. *Id.*

¶ 24 Section 2-701 of the Code allows the circuit court to, "in cases of actual controversy, make binding declarations of rights, having the force of final judgments." 735 ILCS 5/2-701(a) (West 2010). In order to bring a complaint for declaratory relief, there must be an actual controversy. *Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371, 375 (1977). This "does not mean that a wrong must have been committed and injury inflicted. Rather, it requires a showing that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events." *Id.*; *Senese v. Climatemp, Inc.*, 222 Ill. App. 3d 302, 313 (1991) ("The actual controversy requirement is intended to distinguish present justiciable issues from abstract or hypothetical disputes where no present dispute is pending and requires resolution."). The purpose of section 2-701 of the Code "is to allow the court to address a controversy one step sooner than normal, after a dispute has arisen but prior to any action which gives rise to a claim for damages or other relief." *Delano Law Offices v. Choi*, 154 Ill. App. 3d 172, 173 (1987). Accordingly, "a concrete dispute admitting of an immediate and

definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof" must be presented. *Underground Contractors Ass'n* , 66 Ill. 2d at 375. Typically, it is not the function of section 2-701 of the Code to make a declaration of nonliability for past conduct. *Howlett v. Scott*, 69 Ill. 2d 135, 143 (1977). Declaratory relief appropriately determines existing rights, "but such an action may be dismissed where a party seeks to enforce his rights after the fact." *Senese*, 222 Ill. App. 3d at 314.

¶ 25 In this case, we hold that declaratory judgment is not appropriate because the firm has not shown that an actual controversy exists. Absent from their complaint are any allegations that Oasis is seeking to further enforce the agreement by collecting more money or that the firm is withholding funds due to Oasis pursuant to the agreement. The firm alleges in their complaint that they have already paid Oasis the full loan amount, plus interest. The firm is looking to enforce their "rights after the fact." *Senese*, 222 Ill. App. 3d at 314. The purpose of declaratory judgments is to "to allow the court to address a controversy one step sooner than normal, after a dispute has arisen but prior to any action which gives rise to a claim for damages or other relief." *Delano Law Offices*, 154 Ill. App. 3d at 173. This purpose would not be served by allowing declaratory relief in this case because the firm has already satisfied its obligations under the agreement.

¶ 26 Additionally, declaratory relief is not appropriate where a party seeks nonliability for past conduct. *Id.* In *Delano Law Offices, P.C. v. Choi*, an attorney sought a declaratory judgment that the fee charged by a medical office for the production of a client's medical records was unreasonable. *Delano Law Offices, P.C.*, 154 Ill .App. 3d at 173. The Fourth District of this

court granted the defendant's motion to dismiss, holding:

> "In the instant case, the plaintiffs requested medical records and received them. Defendant is entitled to reasonable fees for providing those records and billed the plaintiffs. Plaintiffs asked the court to declare that the charge was not reasonable. In essence, they seek a judgment of nonliability for past conduct. Such relief is not appropriate under the declaratory judgment statute." *Id.* at 174.

As in *Delano Law Offices*, the firm here seeks a judgment of nonliability for past conduct. They have already paid Oasis, and do not indicate in their complaint that Oasis is taking any further action against them under the agreement. Accordingly, the circuit court properly dismissed Count I, subsections (A), (B), (C), and (F) of plaintiffs' complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2010). As the firm has waived any contentions as to the rest of its second amended complaint, the circuit court did not err when it dismissed the firms' second amended complaint.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court affirmed.

¶ 29 Affirmed.