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FIRST DIVISION
October 21, 2013

No. 1-12-2686
2013 IL App (1st) 122686-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|------------------|
| UMF CORPORATION, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Cook County |
| |) | |
| v. |) | No. 12 L 00243 |
| |) | |
| JOHN A. DORE, MICHAEL J. O’ROURKE, |) | Honorable |
| MICHAEL C. MOODY, and A.G. CHENELLE, |) | John C. Griffin, |
| |) | Judge Presiding. |
| Defendants-Appellees. |) | |

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

Held: Circuit court did not abuse its discretion by dismissing complaint pursuant to 735 ILCS 5/2-619(a)(3) where parties and issues in instant case were substantially similar to those in prior filed case pending in same circuit.

¶ 1 This appeal is the second time that this court has been asked to consider the legal fallout of a complex corporate governance and financing deal that unraveled between 2005 and 2007. The circuit court dismissed the instant case because, among other things, it was duplicative of another previously filed lawsuit. We affirm.

¶ 2 Most of the relevant allegations underlying this case are recounted at length in *Essex Insurance Co. v. Sweports, Ltd.*, 2011 IL App (1st) 103386-U, so we will keep our recitation of the facts brief. Plaintiff UMF is majority owned by another corporation, Sweports, Ltd. The business and governance of both companies is deeply intertwined. Sweports owns a number of patents and licenses for antimicrobial technology, and UMF manufactures and sells products based on those patents and licenses. Moreover, Sweports is majority owned by George Clarke, who is not a party to this particular suit but is an officer and board member of both companies.

¶ 3 In 2005, UMF needed to raise a large amount of cash in order to pay off debt and expand its business. It attempted to do this through a series of deals with a third party called Sandbox Industries, LLC. During negotiations with Sandbox, UMF and Sweports were represented by two law firms, one of which was O'Rourke Katten & Moody (OKM). Defendants O'Rourke and Moody were partners at the firm. At some point during the Sandbox deals, OKM agreed to accept Sweports stock as payment for its legal bills. Later, in 2006, O'Rourke and Moody joined with defendants A.G. Chenelle and John A. Dore (who was a corporate director on Sweports' board) to invest an additional \$100,000 each in Sweports in exchange for additional stock in the company. In 2007, however, Clarke unilaterally executed a document (referred to as the "Informal Action" in the record) that purportedly rescinded all outstanding stock interests in Sweports and removed Dore and another director from their positions on Sweports' board. Clarke's action led to quite a few lawsuits by various affected parties against Clarke, UMF, and Sweports, but only one of them is relevant to this particular case.¹

¹ The bases of the other lawsuits are summarized in *Essex*, which was a declaratory judgment action filed by an insurance company against Sweports, UMF, and Clarke. See generally *Essex*, 2011 IL App (1st) 103386, ¶¶ 8-10. The question in that case was whether the insurance company had a duty to defend Clarke or his companies in any of the lawsuits against them that resulted from the 2007 Informal Action.

¶ 4 After Clarke issued the Informal Action, the defendants in this case filed a pair of lawsuits (which were later consolidated) against Sweports and Clarke that challenged the validity of the Informal Action. Sweports counterclaimed, raising various claims of fraud, breach of fiduciary duty, and negligence regarding the Sandbox financing deals against Dore, Moody, O'Rourke, and Chenelle. The counterclaims were all eventually dismissed by the circuit court. The claims against Sweports proceeded to summary judgment, at which the circuit court found the Informal Action to be invalid. After a trial on damages only in October 2011, a jury awarded Dore, Moody, and O'Rourke \$345,000 each and Chenelle received \$230,000.

¶ 5 And so matters stood as of January 6, 2012, when UMF filed its complaint in the instant case. In its complaint, UMF raised substantially the same claims against defendants as Sweports had in its counterclaims to the shareholder lawsuit. Once again, UMF recited the facts surrounding the Sandbox financing deals and alleged that Dore, Moody, O'Rourke, and Chenelle had committed fraud and negligence and breached their fiduciary duties to UMF. Defendants moved to dismiss the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), arguing that UMF's claims were barred by the statute of limitations, *res judicata*, or the existence of a another case pending between the same parties for the same cause of action. The circuit court agreed and dismissed the case, finding that although the complaint was not barred by *res judicata*, the statute of limitations precluded several of the counts in the complaint. Additionally, the circuit court found in the alternative that the complaint should be dismissed because of its similarity to the previously filed case involving Sweports and defendants.² See 735 ILCS 5/2-619(a)(3) (West 2010). UMF now appeals.

² Technically, the circuit court first dismissed two counts of the complaint on statute of limitations grounds, and then dismissed the remaining counts against O'Rourke, Moody, and Dore under section 2-619(a)(3). Chenelle later joined the motion and the circuit court dismissed the counts against him on the same bases. The circuit court made clear, however, that it believed the entire complaint was subject to dismissal under section 2-619(a)(3),

¶ 6 Although the circuit court had several bases to support its decision, we need only reach one because it is dispositive. We generally review orders dismissing a case under section 2-619 (735 ILCS 5/2-619 (West 2010)) *de novo*. See *Zahl v. Krupa*, 365 Ill. App. 3d 653, 658 (2006). The standard of review is different, however, when we review dismissal under section 2-619(a)(3) (735 ILCS 2-619(a)(3) (West 2010)). A complaint may be dismissed under this subsection of the statute when “there is another action pending between the same parties for the same cause.” 735 ILCS 2-619(a)(3) (West 2010). Unlike the other subsections of section 2-619, subsection 2-619(a)(3) is administrative in nature and is designed merely to “avoid duplicative litigation.” *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447 (1986). Because “the decision to grant or deny defendant's section 2-619(a)(3) motion is discretionary with the trial court,” (*id.*) we review an order to dismiss under this section only for abuse of that discretion rather than *de novo*. The standard of review in this situation is therefore very deferential, given that we will find an abuse of discretion only when “the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view.” *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 815 (2008).

¶ 7 When considering a motion to dismiss under section 2-619(a)(3), the burden is on the “movant to demonstrate through clear and convincing evidence that the two actions involve (1) the same parties; and (2) the same cause.” *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, 2012 IL App (1st) 110137, ¶ 29. In this case, there is no real question that the current lawsuit by UMF against defendants involves the “same cause” as the previously filed case between defendants and Sweports. “Lawsuits present the same cause when the relief requested is based on substantially the same set of facts.” (Internal quotation marks omitted.) *Id.* ¶ 31.

including the those counts that were also subject to dismissal on statute of limitations grounds. As we may affirm on any basis appearing in the record (*Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 734 (2009)), we address only section 2-619(a)(3) because it is dispositive for all causes of action raised in the complaint.

Importantly, “[w]hile different issues may have been raised in the two lawsuits or different relief may have been sought, the crucial inquiry is whether both arise out of the same transaction or occurrence, not whether the legal theory, issues, burden of proof, or relief sought materially differs between the two actions.” *Id.* Both the current lawsuit and the previous one involved the chain of events surrounding the failed Sandbox financing deals and the Informal Action by Clarke, and the pleadings in both lawsuits alleged very similar facts. Indeed, the facts and causes of action that UMF alleges against defendants in this case are nearly identical to the facts and causes of action that Sweports raised in its counterclaim against defendants in the previous case. Although UMF’s basis for damages and the relief that it now seeks differs somewhat from that claimed by Sweports in the previous case, that distinction is irrelevant under section 2-619(a)(3). See *id.* Under these circumstances, the cases involve the same cause for the purpose of section 2-619(a)(3).

¶ 8 The question is somewhat closer regarding the “same parties” requirement but the result is the same. As UMF is quick to point out, it is a distinct legal entity from Sweports and was not involved in the previously filed lawsuit as a party. Section 2-619(a)(3), however, does not require the parties to be actually identical in order to justify dismissal. Instead, the “same parties” requirement of section 2-619(a)(3) is satisfied “where the litigants’ interests are sufficiently similar, even though the litigants differ in name or number.” (Internal quotation marks omitted.) *Id.* ¶ 30. As the circuit court noted in its decision, the interests of Sweports and UMF in this matter are functionally the same. It cannot escape our notice that this case was filed by UMF shortly after judgment was entered against Sweports in the previously filed case, and that UMF’s claims against defendants in this case are nearly identical to Sweports’ counterclaims in the previous case. Moreover, as the circuit court noted in its memorandum opinion and order,

Sweports and UMF are intimately related corporate entities. UMF's business model is dependent on access to Sweports' intellectual property holdings, and Sweports depends on UMF to market products based on that intellectual property. Moreover, the companies share at least one crucial corporate officer: George Clarke, who is president, CEO, and a board member of both companies and who was also personally involved in the Sandbox venture on behalf of both companies. In fact, the Sandbox deal itself, which is the underlying basis for both of the lawsuits at issue here, was expressly designed to benefit both companies and involved agreements that affected the finances and corporate governance of both companies. Finally, in various pleadings for both this case and the previously filed one, Sweports and UMF refer to each other collectively as "the companies" multiple times.

¶ 9 As the circuit court mentioned in its memorandum opinion, this situation is quite similar to *Skipper Marine Electric, Inc. v. Cybernet Marine Products*, 200 Ill. App. 3d 692 (1990). In that case, a critical indicator that two entities were the same for the purpose of section 2-619(a)(3) was that they admitted in their pleadings that they were not only affiliated but had an interlocking business relationship. Similarly, the fact that both companies had common officers and directors supported the finding that their interests were substantially the same. See *id.* at 696. We found that this was sufficient to support a finding that the two companies were the same for the purpose of section 2-619(a)(3).

¶ 10 Under the circumstances here, there was ample reason for the circuit court to find that both this case and the previously filed one involve the same parties and the same cause. The circuit court therefore did not abuse its discretion by dismissing the case under section 2-619(a)(3). Given our finding on this point, we need not reach defendants' alternate contentions that dismissal was justified under either the statute of limitations or *res judicata*.

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¶ 11 Affirmed.