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¶ 2 Plaintiff, Healy & Schulte, Inc., appeals from an order of the circuit court of Cook County dismissing its claims against defendant, Lakeshore Centre Holdings, LLC.¹ On appeal, plaintiff contends that it was not required to submit its claims to an arbitrator and that defendant waived any right it had to compel arbitration. For the reasons that follow, we affirm in part and reverse and remand in part.

¶ 3 BACKGROUND

¶ 4 On November 24, 2009, plaintiff filed a two-count complaint against defendant. In count one, plaintiff alleged that it had performed public relations services for defendant pursuant to a written contract between the parties and that defendant did not make the required payments for those services. In count two, plaintiff alleged that defendant obligated itself in a written guaranty of payment to pay all funds due to plaintiff under the contract and that defendant failed to make any payments pursuant to the guaranty.

¶ 5 Plaintiff attached a copy of the contract dated August 6, 2007, to the complaint, in which defendant agreed to retain plaintiff as outside public relations counsel and which provides that "any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration." Plaintiff also attached a copy of the guaranty of payment, which provides that the guaranty will ensure that plaintiff is paid in full by defendant for any and all

¹ Although the circuit court stated that it was dismissing the case without prejudice, defendant's motion to dismiss was brought pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), which provides for the dismissal of an action based on an affirmative defense or other matter that avoids or defeats the claim (*Carr v. Koch*, 2012 IL 113414, ¶ 27), and not section 2-615 (735 ILCS 5/2-615 (West 2010)), which only leads to a dismissal with prejudice if the plaintiff can prove no set of facts that would entitle it to recovery (*Bellik v. Bank of America*, 373 Ill. App. 3d 1059, 1065 (2007)). As such, we will regard the court's order as a dismissal of plaintiff's claims pursuant to section 2-619.

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services provided under the contract and that defendant agrees to pay plaintiff "for all outstanding invoices issued in 2008 no later than June 30, 2009," other funds owed to plaintiff under the contract, and any expenses incurred by plaintiff in enforcing the guaranty. The guaranty provides that defendant consents to the jurisdiction of the courts of Cook County "in connection with any action or proceeding arising out of or relating to" the guaranty and that defendant waives any right to notice of default or service by summons to enforce the guaranty in court "recognizing but without regard to the fact that [defendant has] already agreed to arbitration." In addition, plaintiff attached a statement of account between plaintiff and defendant, which indicated that defendant failed to make a number of payments in 2008 and the first half of 2009 totaling \$137,583.48.

¶ 6 The court granted a default judgment in favor of plaintiff on December 8, 2009, but then granted defendant's motion to vacate that judgment on January 11, 2010. On February 21, 2012, defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), asserting that the court lacked subject matter jurisdiction over this action because the contract provided that any controversy must be settled by arbitration. Plaintiff responded that the arbitration clause in the contract did not divest the court of subject matter jurisdiction, the guaranty did not contain an arbitration provision, and defendant waived any claim regarding arbitration by litigating the case for over two years before raising the issue. On April 27, 2012, the court entered an order dismissing plaintiff's action "due to the existence of an arbitration clause."

¶ 7

ANALYSIS

¶ 8 We begin by noting that we will decide the merits of this appeal on plaintiff's brief alone,

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as defendant has not filed an appellee's brief, the record is not complex, and the claimed errors can be decided without the aid of an appellee's brief. *State Farm Mutual Insurance Co. v. Ellison*, 354 Ill. App. 3d 387, 388 (2004). A motion to dismiss brought under section 2-619 of the Code 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. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). In ruling on such a motion, the court will construe the pleadings and supporting documents in the light most favorable to the plaintiff and accept as true all well-pleaded facts in the complaint and draw all reasonable inferences therefrom in favor of the plaintiff. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. The issue on appeal is whether a genuine issue of material fact exists to preclude dismissal of the plaintiff's claims, and we review the circuit court's ruling on the motion *de novo*. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993).

¶ 9

I. Guaranty of Payment

¶ 10 Plaintiff first contends that the court erred by dismissing its claim regarding defendant's alleged failure to make required payments under the guaranty of payment. In the guaranty, defendant agreed to pay plaintiff "for all outstanding invoices issued in 2008 no later than June 30, 2009," any other funds owed to plaintiff under the contract, and any expenses incurred by plaintiff in enforcing the guaranty. Defendant also consented to the jurisdiction of the courts of Cook County in connection with any action related to the guaranty without regard to the parties' prior agreement regarding arbitration. In its complaint, plaintiff alleged that defendant failed to make payments pursuant to the guaranty for unpaid invoices from 2008 and 2009 and attached a

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statement of account which indicated that defendant had not made payments on a number of invoices issued during that period of time. Thus, plaintiff's claim is entirely based on defendant's obligations under the guaranty, which does not contain an arbitration clause and provides that defendant consents to the jurisdiction of the circuit court. As such, plaintiff was not required to submit its claim regarding the guaranty to arbitration, and we determine that the court erred by dismissing that claim on that basis.

¶ 11 While paragraph 2 of the guaranty provides that "the undersigned covenants and agrees to be bound and abide by all of the terms, provisions and conditions" of the public relations services contract, that provision does not apply to plaintiff, as "the undersigned" refers to Walter Kaiser, who signed the guaranty as the manager of defendant. Moreover, the arbitration clause does not require that plaintiff's claim regarding defendant's failure to make payments under the guaranty be settled by arbitration, as that clause only provides that a claim arising from the contract must be settled by arbitration and plaintiff's claim arises from the guaranty, not the contract.

¶ 12 II. Waiver

¶ 13 Plaintiff also contends that the court erred by dismissing its claim regarding defendant's alleged failure to make required payments under the public relations services contract because defendant waived its right to compel arbitration by participating in the litigation for over two years before raising the issue. While Illinois courts disfavor a finding of waiver, a party will be found to have waived its contractual right to compel arbitration when its conduct is inconsistent with the arbitration clause and indicates an abandonment of the right to arbitration. *Woods v. Patterson Law Firm, P.C.*, 381 Ill. App. 3d 989, 994 (2008).

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¶ 14 In its reply in support of its motion to dismiss, defendant asserted that it did not waive its right to arbitration by litigating the case because it denied the existence of a valid and enforceable contract in its answer to plaintiff's complaint and the court had not yet determined whether a valid and binding contract existed. In doing so, defendant cited to *Epstein v. Yoder*, 72 Ill. App. 3d 966, 972 (1979), for the proposition that "waiver of the contractual right to arbitration cannot occur until such time as the trial court has found such contract to exist." Although defendant necessarily admitted the existence of a valid contract for the purpose of its section 2-619 motion to dismiss, nothing in the record shows that defendant has abandoned its denial of the existence of a valid and enforceable contract set forth in its answer to plaintiff's complaint. As such, the court did not err by dismissing plaintiff's claim regarding defendant's failure to make payments under the public relations services contract.

¶ 15 CONCLUSION

¶ 16 Accordingly, we affirm that portion of the order of the circuit court of Cook County dismissing count one of plaintiff's complaint, reverse that portion of the order dismissing count two, and remand the matter to the circuit court for further proceedings.

¶ 17 Affirmed in part; reversed and remanded in part.