

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).

2013 IL App (4th) 121079-U
NO. 4-12-1079
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
August 13, 2013
Carla Bender
4th District Appellate
Court, IL

TOPFLIGHT GRAIN COOPERATIVE, INC.,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Piatt County
RJW WILLIAMS FARMS, INC., JAMES WILLIAMS,)	No. 11MR31
and J&A FARMS, a General Partnership,)	
Defendants-Appellees.)	Honorable
)	Chris E. Freese,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting the seller's motion to dismiss the purchaser's application to compel arbitration where the purchaser sufficiently alleged it sent a timely written confirmation of the revised oral contract and a question of fact remained regarding whether it was received by the seller.

¶ 2 This case arises from a dispute concerning an alleged contract for the sale of corn between plaintiff, Topflight Grain Cooperative, Inc. (grain purchaser) (Topflight), and defendants, RJW Williams Farms, Inc. (grain seller), James Williams (grain delivery), and J&A Farms (grain delivery) (collectively RJW). In March 2012, Topflight filed an amended application to compel arbitration, arguing the parties agreed to arbitrate any disputes arising under the contract. In April 2012, RJW filed a motion to dismiss, arguing the unsigned contract was unenforceable where no written confirmation sufficient to satisfy the statute of frauds was ever received by RJW. In July 2012, the trial court granted RJW's motion to dismiss.

¶ 3 Topflight appeals, arguing the trial court erred in granting RJW's motion to dismiss where (1) Topflight did not have to identify the specific person who sent the confirmation, (2) the issue of whether RJW received the confirmation is a question of fact sufficient to preclude dismissal, (3) RJW failed to support its motion to dismiss with an affidavit, (4) Topflight should have been allowed to amend its pleading, and (5) the matter should proceed to arbitration. We reverse and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 The following facts are taken from the pleadings. On June 10, 2010, Topflight entered into an oral agreement to purchase 200,000 bushels of #2 Yellow Corn from RJW (contract No. 16877). The agreement provided for a December 2010 delivery date. The agreement also contained an arbitration clause, which provided any disputes would be arbitrated by the National Grain and Feed Association.

¶ 6 According to affidavits from Topflight employees Derrick Bruhn and Scott Docherty, it is Topflight's customary practice to send a purchase confirmation to grain sellers on the same day a purchase agreement is made. Where, as is alleged in this case, the agreement is reached late in the day, the confirmation is sent the following day. Neither Bruhn's nor Docherty's affidavit stated they personally mailed the confirmation for contract No. 16877 (confirmation No. 16877) to RJW. Instead, both affidavits stated "[o]n or about June 11, 2010, Topflight issued Futures Only Grain Purchase Confirmation #16877 dated June 10, 2010," which was labeled as Exhibit A. The written confirmation contains the contract number, contract date, delivery date, commodity type, quantity, price, delivery location, and an arbitration clause. Topflight maintains it never received written notice of any objection to the contents of the

confirmation.

¶ 7 According to Topflight, on September 3, 2010, a customer acknowledgment was sent to RJW identifying contract No. 16877 as one of 14 "open purchase contracts." (Exhibit G.) Another customer acknowledgment identifying contract No. 16877 was sent to RJW in November 2010. (Exhibit I.) The November customer acknowledgment showed contract No. 16877 was one of 18 "open purchase contracts." Both customer acknowledgments showed the commodity, delivery date, due date, and remaining quantity for contract No. 16877. Topflight also sent a calendar year-end summary to RJW on January 17, 2011, which does not appear in the record on appeal.

¶ 8 On March 3, 2011, Bruhn and Docherty met personally with representatives from RJW to discuss approaching grain deliveries. Bruhn and Docherty hand-delivered RJW a customer acknowledgment, dated March 3, 2011, for contract No. 16877, which showed a remaining quantity of 200,000 bushels of corn. (Exhibit B.)

¶ 9 On March 4, 2011, RJW requested permission to deliver one-half of contract No. 16877 directly to Archer-Daniels-Midland (ADM) instead of Topflight's Monticello location. Topflight agreed to the modification and Bruhn split the order for 200,000 bushels from the original order into two different orders. In his affidavit, Bruhn stated "I split the 200,000 bushels by putting the 100,000 bushels which were being delivered directly to ADM on Direct Grain Purchase Confirmation #36280 [(confirmation No. 36280)] and left the remaining 100,000 bushels on a revised #16877 to be delivered [directly to Topflight] as originally agreed." Bruhn's affidavit stated he sent both confirmation No. 36280 and revised confirmation No. 16877 to RJW on March 4, 2011. (Exhibits C and D.)

¶ 10 On March 7, 2011, Bruhn and Docherty again met personally with RJW and hand-delivered a revised customer acknowledgment for revised contract No. 16877, dated March 4, 2011, which showed a quantity of 100,000 bushels. (Exhibit E.) Bruhn's affidavit stated he "faxed a customer acknowledgment to RJW showing the split of #16877 and #36280." (Exhibit F.)

¶ 11 In a letter dated April 29, 2011, RJW stated it was their intention to honor the pending contracts and requested an extension until the close of business on May 6, 2011. (Exhibit M.) Topflight granted the extension on "contracts 36280, 16877, and 16738." (Exhibit N.) According to Docherty's affidavit, RJW delivered 83,338.94 bushels to ADM per contract No. 36280. However, RJW did not deliver any of the 100,000 bushels due under revised contract No. 16877 nor the remaining 16,661.06 bushels due under contract No. 36280.

¶ 12 In May 2011, Topflight cancelled the contracts for the remaining bushels and sent a demand letter to RJW for \$629,615.85, which represented the amounts due for nondelivery of contract Nos. 16877 and 16738 as well as the shortage on contract No. 36280. (Exhibit K.) We note only contract No. 16877 is at issue in this appeal. According to Topflight, RJW did not pay the amount demanded and refused to arbitrate contract No. 16877. (It appears from the record RJW did consent to arbitration of contract Nos. 16738 and 36280.)

¶ 13 On July 25, 2011, Topflight filed a motion to compel arbitration against RJW Williams Farms, Inc., for its failure to perform its obligations under contract No. 16877.

¶ 14 On August 30, 2011, RJW Williams Farms, Inc., filed a motion to dismiss, arguing James Williams and J&A Farms were necessary parties to the action.

¶ 15 On February 10, 2012, the trial court granted the motion to dismiss but gave

Topflight leave to filed an amended pleading.

¶ 16 On March 9, 2012, Topflight filed an amended application to compel arbitration. Topflight alleged RJW (1) failed to deliver on contract No. 16877, (2) failed to pay Topflight for the deficient amount due to its failure to deliver on contract No. 16877, and (3) refused to arbitrate the dispute as provided for by the contract.

¶ 17 On April 13, 2012, RJW filed a motion to dismiss Topflight's application pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)). RJW argued contract No. 16877 was unenforceable under the statute of frauds because (1) it was unsigned, (2) no written confirmation was received by RJW, and (3) customer acknowledgments and the crop-year summary received by RJW were insufficient to qualify as written confirmations.

¶ 18 During the July 13, 2012, hearing on RJW's motion to dismiss, RJW argued the trial court should dismiss Topflight's application because the affidavits from Docherty and Bruhn attached to its application did not state they personally mailed RJW the (original) confirmation for contract No. 16877. Topflight responded by arguing Docherty's and Bruhn's affidavits showed the confirmation for contract No. 16877 "was issued." In response, the court stated the following:

"No, it doesn't. It says Topflight, Inc. By whom? Who? Who at Topflight? A magician? A ghost? These affidavits don't say [']I did it.['] Not one of them. Show me where somebody says [']I sent this.['] That's what I want to see. Otherwise you lose. You just can't say Topflight sent it. Nobody says they did it."

Topflight's counsel replied by stating the following:

"Those may be defenses that raise factual, you know, issues with allegations made in that amended application, but they're not sufficient under Section 2-619 to dismiss. [RJW] hasn't completely negated the cause of action that's been filed. And in fact, Topflight has alleged and provided evidence that a written confirmation was sent, that [RJW] had reasons to know. [Topflight has] established [the statute of frauds] has been satisfied there has been no affirmative matter presented by [RJW] that completely negates the well pled amended application."

In making its ruling, however, the court found as follows:

"I don't think counsel understands the motion. I don't think counsel understands the argument. The motion is granted. This cause is dismissed. There is absolutely nothing in your filings that refute [RJW's] allegations that you have not sent the notice. It's simply a bold statement that somebody at Topflight sent it with no one coming forward and saying they did it."

¶ 19 On August 13, 2012, Topflight filed a motion to reconsider, arguing dismissal was improper where (1) RJW did not provide an affidavit to challenge Topflight's affidavits, (2) Topflight should have been allowed to amend its pleadings to include alternative legal theories, and (3) the matter should proceed to arbitration because RJW's motion to dismiss challenged the contract as a whole and not just the arbitration clause.

¶ 20 Following an October 26, 2012, hearing, the trial court denied Topflight's motion to reconsider.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, Topflight argues the trial court erred in granting RJW's motion to dismiss where (1) it did not have to identify the specific person who sent confirmation No. 16877, (2) the issue of whether RJW received the confirmation is a question of fact sufficient to preclude dismissal, (3) RJW failed to properly support its motion to dismiss with an affidavit where it raised an affirmative matter, (4) the court should have allowed Topflight leave to amend its pleading because alternative theories were available, and (5) the matter should proceed to arbitration because RJW challenged the contract as a whole and not just the arbitration clause.

¶ 24 RJW responds, arguing the unsigned agreement was not a valid contract because (1) Topflight did not send a written confirmation sufficient to comply with the statute of frauds, (2) RJW was not required to file an affidavit in support of its motion to dismiss, (3) Topflight did not ask to file an amended pleading after the trial court granted the motion to dismiss, and (4) arbitration is not appropriate because there is no valid contract providing an arbitration clause.

¶ 25 A. Standard of Review

¶ 26 "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367, 799 N.E.2d 273, 278 (2003). "A section 2-619 motion admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned from those facts." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352, 882 N.E.2d 583, 588 (2008).

"Essentially, the defendant is saying in such a motion, 'Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim.' [Citations.]" *Winters v. Wangler*, 386 Ill. App. 3d 788, 792, 898 N.E.2d 776, 779 (2008) (characterizing a section 2-619 motion as a "Yes, but" motion). On appeal from a section 2-619 motion, the reviewing court must determine "whether there is a genuine issue of material fact and whether defendant is entitled to judgment as a matter of law." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 494, 639 N.E.2d 1282, 1293-94 (1994). The court must construe the pleadings and supporting documents in favor of the nonmoving party. *Czarobski v. Lata*, 227 Ill. 2d 364, 369, 882 N.E.2d 536, 539 (2008). The standard of review for a section 2-619 motion is *de novo*. *Czarobski*, 227 Ill. 2d at 369, 882 N.E.2d at 539.

¶ 27

B. Statute of Frauds

¶ 28 The parties agree the provisions of the Uniform Commercial Code (UCC) (810 ILCS 5/1-101 to 13-103 (West 2010)) govern the issues raised in this case. Under the UCC, both grain producers and grain licensees are considered merchants. *Sierens v. Clausen*, 60 Ill. 2d 585, 588-89, 328 N.E.2d 559, 561 (1975). The statute of frauds provision of the UCC requires contracts for the sale of goods in excess of \$500 be in writing. 810 ILCS 5/2-201(1) (West 2010). However, an unsigned contract will be enforceable if "within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents." 810 ILCS 5/2-201(2) (West 2010). Under section 201(2) this written confirmation will be sufficient to bind the parties to the unsigned contract "unless written notice of objection to [the confirmation's] contents is given within 10 days after it is received." 810 ILCS 5/2-201(2) (West 2010).

¶ 29

C. Topflight's Application To Compel Arbitration

¶ 30

In this case, the underlying issue is whether Topflight and RJW agreed to arbitrate their disputes. See *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 444, 530 N.E.2d 439, 443 (1988). However, any obligation to arbitrate in this case would be derived from their contract. Thus, the question of whether a valid contract existed between the parties must first be resolved. See *Salsitz v. Kreiss*, 198 Ill. 2d 1, 13, 761 N.E.2d 724, 731 (2001) ("an agreement to arbitrate is a matter of contract").

¶ 31

In this case, when looking at the well-pleaded facts in Topflight's complaint as true, it was error to allow the section 2-619 motion to dismiss. Topflight alleged the order confirmation (Exhibit A) was sent shortly after the order was placed. Exhibit A shows the order confirmation contains the contract number, contract date, delivery date, commodity type, quantity, price, delivery location, and an arbitration clause. Whether written confirmation of an oral contract is received is a question of fact to be resolved by the trier of fact. See *Byington v. Department of Agriculture*, 327 Ill. App. 3d 726, 732, 764 N.E.2d 576, 581 (2002) (citing *Tabor & Co. v. Gorenz*, 43 Ill. App. 3d 124, 129, 356 N.E.2d 1150, 1153-54 (1976); *Pillsbury Co. v. Buchanan*, 37 Ill. App. 3d 876, 878, 346 N.E.2d 386, 388 (1976)). The existence of an unresolved question of fact precludes the granting of a section 2-619 motion to dismiss. *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 18, 960 N.E.2d 18; *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115, 619 N.E.2d 732, 735 (1993) (the existence of an issue of material fact precludes dismissal). Accordingly, we find the trial court erred in granting RJW's motion to dismiss.

¶ 32

In addition, although the parties appeared reluctant during oral argument to address

the modification of original contract No. 16877, *i.e.*, the alleged June 10, 2010, contract governing the sale and purchase of 200,000 bushels of corn, we note Topflight's application is seeking payment under revised contract No. 16877 in the amount of \$100,000 and not \$200,000. (As stated, the record indicates RJW agreed to arbitrate the dispute regarding the remaining 16,661.06 bushels due under contract No. 36280.) While the parties focus their arguments on whether Topflight sent a confirmation for the original contract, the parties appear to have modified their agreement when Topflight accepted RJW's offer to split the original order for 200,000 bushels into two separate orders. According to Bruhn's affidavit, at RJW's request, on March 4, 2011, he "split the 200,000 bushels by putting the 100,000 bushels which were being delivered directly to ADM on [confirmation No. 36280] and left the remaining 100,000 bushels on a *revised* #16877 to be delivered [directly to Topflight] as originally agreed." (Emphasis added). Thus, any obligation on RJW's behalf to deliver 200,000 bushels of corn under original contract No. 16877 ceased and was thereafter replaced by its obligations under revised contract Nos. 16877 and 36280. In other words, the parties entered into new contracts. At that point, the issue of whether the original contract was valid became irrelevant. Indeed, Topflight's application only argued RJW's failure to deliver 100,000 bushels under revised contract No. 16877 should be arbitrated.

¶ 33 Bruhn's affidavit stated he sent revised confirmation No. 16877 to RJW on March 4, 2011. This confirmation, contained in the record as Exhibit D, shows all the essential terms of revised contract No. 16877 sufficient to alert RJW to its contents, *i.e.*, the contract number, contract date, delivery date, commodity type, quantity, price, and delivery location. The revised confirmation also contains the same arbitration clause as the original confirmation.

¶ 34 In addition, both Bruhn and Docherty stated in their affidavits they met with RJW personally on March 7, 2011, and hand-delivered the customer acknowledgment for revised contract No. 16877 to RJW at that time. Exhibit E, the customer acknowledgment for revised contract No. 16877 is dated March 4, 2011, and shows the contract number, due date, delivery date, commodity type, quantity, and price for revised contract No. 16877. Thus, even if Bruhn's affidavit had not stated he sent RJW the confirmation for revised contract No. 16877, a reasonable argument could be made the customer acknowledgment for revised contract No. 16877 was a sufficient written confirmation under the statute of frauds. Further, Bruhn stated he sent the revised confirmation on March 4, 2011, the same day RJW requested to split the order. Section 2-201(2) requires the delivery of a written confirmation within a reasonable time. 810 ILCS 5/2-201(2) (West 2010); 810 ILCS 5/1-205 (West 2010) (defining "reasonable time"). The question of whether a written confirmation was delivered within a reasonable time is a question of fact. *Irvington Elevator Co. v. Hesper*, 2012 IL App (5th) 110184, ¶ 23, 982 N.E.2d 824.

¶ 35 Moreover, we know from the record RJW partially performed contract No. 36280 by delivering 83,338.94 of the required 100,000 bushels. However, RJW did not deliver any of the 100,000 bushels required under revised contract No. 16877. The confirmation for contract No. 36280 shows signatures by both parties, whereas the confirmation for revised contract No. 16877 was not signed by RJW. (Compare Exhibit C with Exhibit D.) As stated, an unsigned contract will still be enforceable if "within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents ***." 810 ILCS 5/2-201(2) (West 2010). The question necessarily becomes whether RJW received revised confirmation No. 16877 from Topflight and, if it did, whether RJW

objected to it. See 810 ILCS 5/2-201(2) (West 2010). As stated, whether written confirmation of an oral contract was received is a question of fact to be resolved by the trier of fact. See *Byington*, 327 Ill. App. 3d at 732, 764 N.E.2d at 581 (citing *Tabor & Co.*, 43 Ill. App. 3d at 129, 356 N.E.2d at 1154; *Pillsbury Co.*, 37 Ill. App. 3d at 878, 346 N.E.2d at 388).

¶ 36 In closing, we note it appears the parties have a history of doing business together. Indeed, the record shows a number of contracts between them. RJW consented to arbitrate disputes regarding some of those contracts, presumably due to the arbitration clauses contained therein. While not apparent on the facts before this court, evidence of the prior course of dealings between the parties and their usage of trade practices would likely prove helpful to the trier of fact in reaching an ultimate resolution to this cause. See 810 ILCS 5/1-303 (West 2010).

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, we reverse the trial court's dismissal and remand for further proceedings.

¶ 39 Reversed and remanded.