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FIRST DIVISION
April 28, 2014

Nos. 1-12-1980 & 1-13-2418
2014 IL App (1st) 121980-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN A. DORE, MICHAEL C. MOODY, MICHAEL J. O'ROURKE, and A.G. CHENELLE,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees,	)	
v.	)	Nos. 07 L 012136 07 L 013237
SWEPORTS LTD. and LEE ABRAMS,	)	
Defendants-Appellants.	)	Honorable Allen S. Goldberg Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concured with the judgment.

ORDER

Held: Summary judgment in favor of plaintiff was proper on claim for breach of a promissory note, but retrial on separate claim for breach of contract was required because plaintiff was not entitled to summary judgment on that claim.

¶ 1 The parties in this case were involved in a complex corporate financing deal that went awry and spawned multiple lawsuits. This appeal is the third time that we have dealt with the legal fallout of that deal, and this particular case concerns the liability of defendants for breach of contract and failure to pay back a loan. The circuit court granted summary judgment to plaintiffs on the issue of liability and the case proceeded to a jury trial on damages. We affirm in part the circuit court's ruling on summary judgment and the jury award, but we must reverse and remand for a retrial on one count of the complaint.

¶ 2 We have considered issues related to this case twice before. *Essex Insurance Co. v. Sweports, Ltd.*, 2011 IL App (1st) 103386-U, was a declaratory judgment action regarding an insurance company's duty to defend and indemnify the defendants in, among other cases, this lawsuit. *UMF Corporation v. Dore*, 2013 IL App (1st) 122686-U, involved a somewhat complicated attempt by a subsidiary of Sweports to sue the plaintiffs in this case after Sweports' counterclaims against plaintiffs failed. Both cases were closely related to this one, but the issues raised were collateral. This case concerns the heart of the dispute between the parties.

¶ 3 We have already explained the underlying facts of the dispute between the parties in *Essex* and *UMF*, so we will only briefly summarize the relevant history here. In 2005, Sweports needed to raise money in order to pay off debt and expand its business. As one component of a larger financing deal (referred to as the *Sandbox* deals), the plaintiffs in this case agreed to provide Sweports with a $500,000 loan in exchange for stock and stock options. The parties memorialized their agreement in a written contract, referred to as the "Loan Guarantee and Stock Purchase Agreement" (LGSPA). Under the LGSPA, Sweports had three obligations.

First, each plaintiff would receive a 2% ownership interest in Sweports. Second, each plaintiff had a three-month option to purchase an additional 1% stake in Sweports for $100,000. Third, each plaintiff had a two-year option to acquire additional shares "on the same terms offered to any other person or entity." The parties executed the LGSPA on November 1, 2006, and plaintiffs took out a $500,000 loan from a third-party bank in order to finance their own loan to Sweports. The parties executed a written promissory note on November 13, 2006, under which Sweports agreed to repay the principal on the note by November 13, 2007, at a 9% interest rate. The note also included provisions for late-payment penalties, as well as a nonpayment provision allowing for collection costs and attorney fees. Notably, both the promissory note and the LGSPA contained integration clauses.

¶ 4 After concluding the deal, things proceeded smoothly for a short time. Plaintiffs transferred the $500,000 to Sweports, and Sweports issued the stock certificates for the 2% interest to plaintiffs. In December, three of the four plaintiffs (Dore, Moody, and O'Rourke) exercised their option to purchase an additional 1% interest in the company, and Dore and O'Rourke were named to the board of directors.

¶ 5 Things then fell apart. A dispute arose between plaintiffs and George Clarke, the president of Sweports, which eventually culminated in Clarke unilaterally issuing a corporate resolution that the record refers to as the Informal Action (IA). The IA recited a long list of grievances against plaintiffs and other parties, and it culminated with a number of declarations that purported to cancel all of Sweports' obligations related to the *Sandbox* deals. As relevant to this case, the IA claimed that Sweports "determines and declares that it owes no monies whatsoever to any of these entities or individuals [*i.e.*, plaintiffs] other than any amount found due and owing by a Court sitting in equity," and that plaintiffs "have no interest whatsoever including any ownership interest in Sweports, and Sweports has no agreement, relationship, and/or obligation to [plaintiffs, among others]."

¶ 6 Plaintiffs objected to the IA, but the issue could not be resolved. Clarke removed Dore and O'Rourke from Sweports' board, and Sweports refused to make dividend payments to plaintiffs or to otherwise recognize their ownership interests in the company. Plaintiffs eventually filed several lawsuits against Sweports and Clarke, and two of those suits were consolidated into this case in April 2008. (For a list of the other known cases, see *Essex*, 2011 IL App (1st) 103386-U, ¶¶ 8-10. There is at least one other case of which we are aware (see *In re Sweports, Ltd.*, No. 12-14254 (N.D. Ill.) (involuntary bankruptcy petition)), and it is possible that there are others.) As consolidated, the suit contained two counts. In count I, plaintiffs contended that Sweports had breached the LGSPA by unilaterally stripping plaintiffs of their ownership interest in the company via the IA. In count II, plaintiffs claimed that Sweports had breached the promissory note by failing to repay the loan. Plaintiffs moved for summary judgment on both counts, which was granted by the circuit court. The case proceeded to a jury trial on damages only, and the jury awarded $345,000 each to Dore, Moody, and O'Rourke, and $230,000 to

Chenelle. (Chenelle apparently did not exercise his option to purchase an additional 1% interest in the company within three months of the LGSPA, which explains the difference in amounts between plaintiffs.)

¶ 7 Sweports has now appealed (Abrams is only a nominal defendant), and it raises a number of issues related to (1) the summary-judgment order, (2) the damages trial, and (3) the dismissal of Sweports' counterclaims and affirmative defenses. The issues are interrelated, but we will begin with the summary-judgment order because it significantly impacts the remaining issues. We review issues related to summary judgment *de novo*. See *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "Summary judgment should be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [Citation.] In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. [Citation.]" (Internal quotation marks omitted.) *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 368 (2006).

¶ 8 Interestingly, although Sweports states repeatedly in its brief that summary judgment should not have been granted as to both counts I and II, its actual argument is only directed toward the circuit court's findings on count I regarding breach of the LGSPA. Sweports' argument as to why plaintiffs were not entitled to judgment on count II, which dealt with the breach of the promissory note, is contained in a single perfunctory paragraph at the end of its brief. Under such circumstances we would be entitled to deem the issue forfeit (see Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 1, 2013)), but the issue is simple enough that we will address the issue on the merits. The promissory note required repayment of the $500,000 principal plus 9% interest no later than November 13, 2007. The note does not contain any other conditions to repayment, and it is undisputed that Sweports did not repay the debt. Plaintiffs were therefore entitled to summary judgment on count II.

¶ 9 Count I is more complicated. Sweports offers several arguments for why it did not breach the LGSPA, most of which either depend on the dismissed counterclaims and affirmative defenses (an issue which we address below) or are simply specious and therefore do not warrant discussion. One argument, however, has merit. Sweports notes that, even given the IA's apparent repudiation of any agreement with plaintiffs and its express statement that plaintiffs have no ownership interest in the company, Sweports could not have breached the LGSPA because it had already performed all of its obligations under the agreement when it issued the IA. Plaintiffs brushed off this argument in their response brief, but Sweports is largely correct. The LGSPA called for Sweports to do three things in exchange for receiving the $500,000 from plaintiffs: issue each plaintiff stock equivalent to a 2% interest in the company, allow each plaintiff a three-month option to purchase an additional 1% ownership stake, and allow each plaintiff a two-year option to purchase additional stock on the same terms given to anyone else. Sweports issued the stock certificates for the initial 2% stake to all four plaintiffs in December 2006, and it then issued stock certificates to Dore, O'Rourke, and Moody that same month when they exercised their 1% option. Chenelle's option expired at the end of January 2007. Thus, by the time Sweports issued the IA in June 2006, it had already performed most of its obligations under the LGSPA.

¶ 10 Those undisputed facts matter because plaintiffs have framed their claim as a breach of contract action. Plaintiff's theory is that the IA constituted a breach of contract because it purported to rescind the ownership interest in Sweports that plaintiffs had been promised. The theory might have been viable had the IA been executed prior to Sweports' issuance of the stock certificates, but that is not what happened. Regardless of the actual effect the IA may have had on plaintiffs' ownership interests when it was issued in June 2007, the LGSPA only required Sweports to issue the stock certificates and allow plaintiffs to exercise options to purchase more stock in the company. By the time the IA was executed, Sweports had already issued the stock for the original 2% stake and the three-month option had either already been exercised or was expired. All that remained of Sweports' obligations under the LGSPA in June 2007 was plaintiffs' two-year option. Even though the IA disclaimed plaintiffs' ownership stake in the company, that does not constitute a breach of the LGSPA. At most, the IA may have constituted an anticipatory repudiation of the two-year option clause of the LGSPA, which was Sweports' only remaining obligation under the terms of the agreement.

¶ 11 Under the circumstances, we are compelled to agree with Sweports that the circuit court was incorrect to find that the IA breached the LGSPA as a whole. The question now is how that error affects this case. At most, Sweports breached only the two-year option clause, and so plaintiffs were not entitled to summary judgment based on any alleged breach of the 2% stock clause or the three-month option clause. The only remaining issue in the case is whether the IA constituted an anticipatory repudiation of the two-year option clause, but anticipatory repudiation is a question of fact (see *Timmerman v. Grain Exchange, LLC*, 394 Ill. App. 3d 189, 201 (2009)). The parties do not agree about either the intent behind the IA or its practical effect, so summary judgment was not appropriate here. Summary judgment on count I was therefore improper, and we must remand this case for a new trial on the LGSPA count. Even so, the undisputed facts show that Sweports did not breach its obligations under the LGSPA regarding the initial issuance of stock and the three-month option, so retrial will be limited to only whether Sweports breached the two-year option clause and, if so, the value of that option.

¶ 12 As a side note, we think it important to emphasize that what compels this result is plaintiffs' own choice of remedies. The record is clear that Sweports attempted to unilaterally divest plaintiffs of their ownership interest in the company, initially via the IA and then in practice by barring them from receiving dividends or participating in corporate governance. Given the terms of the LGSPA and the note, Sweports' action was not a breach of contract. That does not mean, however, that plaintiffs did not have a remedy. Based on the record, it appears that plaintiffs may have had a claim for conversion or some similar tort. Shares of corporate stock, though intangible, are chattel that is subject to tortious conversion (see Restatement (Second) of Torts § 242 cmt. b (1965)), and, though we have not had the opportunity to consider the issue in many years, we have recognized that a corporation may be liable for conversion of its shareholders' stock in a situation analogous to this one. See *Lewis v. Bidwell Electric Co.*, 141 Ill. App. 33, 34 (1908) (noting that one situation in which a corporation can be liable for conversion is "[i]f it sells or declares a forfeiture of stock, wrongfully"); see also *The Film and Tape Works, Inc. v. Junetwenty Films, Inc.*, 368 Ill. App. 3d 462, 474-76 (2006) (discussing the application of a conversion claim to a commercial dispute involving a contract). Whether such a claim could have been viable is a question we do not address, given that plaintiffs chose to pursue their claim as a matter of contract rather than tort.

¶ 13 Given that we must remand this case for a retrial on count I, we do not address Sweports' additional contention that the circuit court erred by limiting trial to the fair-market value of plaintiffs' stock. The retrial will be limited to the issue of anticipatory repudiation and the value of the two-year option, so the issue is moot. We will, however, consider two other points.

¶ 14 First, Sweports contends that the circuit court erred by not ruling on its counterclaims and affirmative defenses. Some procedural history is necessary here. Sweports first filed several counterclaims and affirmative defenses when it answered the complaint in January 2009. Among other things, Sweports contended that the LGSPA and note had been procured by fraud. The circuit court dismissed the counterclaims and defenses on March 13, 2009. Sweeports tried to file amended counterclaims and defenses three more times, but the circuit court dismissed them each time for various reasons. Finally, after the circuit court dismissed Sweeports' third amended counterclaims, the court ordered Sweeports to file a new set of counterclaims no later than August 23, 2010. On July 6, 2010, Sweeports filed a motion seeking leave to file its fourth amended counterclaims, which contained an unsigned version of the proposed counterclaims as an exhibit. The circuit court granted the motion and ordered Sweeports to file the amended counterclaims within seven days. Sweeports did not, however, file the new counterclaims. Instead, on December 1, 2010, Sweeports filed a second motion seeking leave to file the counterclaims. This motion was eventually denied on March 16, 2012, the same date that the circuit court resolved Sweeports' postjudgment motion on the jury award.

¶ 15 Sweeports does not challenge the circuit court's dismissal of its third amended counterclaims, but contends only that the circuit court should have considered its fourth amended counterclaims before entering final judgment in this case. This argument implicates our own jurisdiction, so we review the issue *de novo*. See *Stasko v. City of Chicago*, 2013 IL App (1st) 120265, ¶ 27. Sweeports argues that it actually filed the fourth amended counterclaims on July 6, 2010, when it filed its original motion for leave to file the counterclaims. Thus, Sweeports contends that the counterclaims were properly before the court and should have been considered. The circuit court, however, rejected this same argument in its March 16, 2012 ruling, noting that the July 6 order expressly stated that Sweports was to file the counterclaims within 7 days. Based on the wording of the order, the circuit court determined that Sweports July 6 motion did not constitute an actual filing of the counterclaims.

¶ 16 We have reviewed the record on this point and we agree with the circuit court. Although Sweports' July 6, 2010 motion attached the counterclaims as an exhibit to the motion, the motion itself merely sought leave to file the counterclaims. The counterclaims themselves were unsigned and, more importantly, were not date stamped or otherwise marked as filed by the clerk's office. See *In re Marriage of Nunn*, 260 Ill. App. 3d 698, 699-701 (1994) (noting that mere delivery of documents to the clerk's office is insufficient to consider a document filed). Moreover, Sweports' position is at odds with its own motion of December 1, 2010, which acknowledged that it had failed to file the counterclaims and again sought leave to do so. Under the circumstances, Sweports' counterclaims were therefore not before the court, and the court did not err by not resolving them.

¶ 17 The last issue involves the award of attorney fees to O'Rourke and Moody as part of the judgment on count II. Sweports raises this issue in a single conclusory sentence at the end of its brief and does not develop its argument with any citations to the record or discussion of authority. We therefore consider the issue to be forfeit. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 1, 2013) (argument "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on").

¶ 18 To recap: summary judgment and the jury award on count II are affirmed, including the award of attorney fees, but summary judgment on count I is reversed and remanded for trial on whether Sweports breached the two-year option clause of the LGSPA by anticipatory repudiation and, if so, the value of the option. The circuit court's decision not to consider Sweports' fourth amended counterclaims and affirmative defenses is affirmed.

¶ 19 Affirmed in part and reversed in part; cause remanded.