FIRST DIVISION
October 20, 2014

No. 1-13-3992
2014 IL App (1st) 133992-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| MAX SANDERS, | ) | |
| | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County. |
| | ) | |
| v. | ) | |
| | ) | No. 13 CH 1359 |
| OHMITE HOLDING, LLC, HAWTHORNE PARTNERS, LLC, HAWTHORNE PARTNERS II, LLC, and BANC OF AMERICA COMMERCIAL FINANCE CORP., | ) | Honorable |
| | ) | Rodolfo Garcia, |
| | ) | Judge Presiding. |
| Defendants-Appellees. | ) | |

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

**ORDER**

*Held:* The circuit court properly granted defendants' section 2-619.1 motion to dismiss because plaintiff failed to state a claim upon which relief could be granted, and because certain claims were barred by the statute of limitations.

¶ 1 This appeal stems from the circuit court's dismissal of plaintiff Max Sanders' first amended complaint with prejudice. Plaintiff filed this action claiming that the 7.75 units of defendant Ohmite Holdings, LLC (Ohmite) that he had acquired entitled him to 7.75% of the

profits, losses and distributions of the company. Ohmite moved to dismiss the complaint on the grounds that plaintiff failed to state a cause of action that entitled him to relief, and that several counts of the complaint were barred by the statute of limitations. The circuit court agreed and plaintiff now appeals alleging that each count of his complaint stated a cause of action and that none of the counts in the complaint were barred by the statute of limitations. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Plaintiff filed a complaint "for declaratory and other relief" on January 16, 2013, against defendants Ohmite, Hawthorne Partners, LLC, Hawthorne Partners II, LLC, and Bank of America Commercial Finance Corporation. Plaintiff alleged in his complaint that James Horne had been allocated 7.75% of all profits and losses of Ohmite in May 2000, that Horne assigned his membership interest to plaintiff on February 28, 2007, and that plaintiff should therefore have been allocated 7.75% of all profits and losses made by Ohmite. Plaintiff further alleged that while a member's share of profits, losses, and distributions cannot be modified in a manner adverse to a member without the consent of all members, Ohmite reduced Horne's allocable share from 7.75% to .000775% in 2003 without Horne’s consent. Plaintiff requested that judgment be entered against all defendants declaring that he was entitled to 7.75% of all profits, losses, and distributions of and from Ohmite.

¶ 4 On February 19, 2013, defendants filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), stating that plaintiff was not seeking a declaration of any existing rights. A hearing was held on the motion on July 8, 2013. The trial court stated that a declaratory judgment "might not be" the right vehicle to use to arrive at the relief plaintiff was seeking. The trial court indicated that “some sort of affirmative

injunctive relief or some sort of rescission action to undo the issuance of [the 1,000,000] additional units, which is the only way that [Horne's] ownership could have been reduced," would be the appropriate claim. The trial court further stated that it was granting the motion to dismiss because the cause of action should be "consistent with the state of ownership in 2003 when [plaintiff] only came into this business in 2007." The trial court noted that while plaintiff was arguing that he did not know what happened in 2003, there would be no need for a suit to have been filed if nothing had happened in 2003. The trial court stated, "I can't undo what's already happened," and noted that if there was a cause of action, Horne should be the one bringing it, since his shares were reduced before he assigned them to plaintiff. The trial court agreed with Ohmite that there were no allegations in the complaint that showed that plaintiff ever owned 7.75% of the company. The trial court granted defendants' motion to dismiss with leave to replead.

¶ 5 On August 1, 2013, plaintiff filed a seven-count first amended complaint. In count one of his first amended complaint, plaintiff alleged that in March of 1999, the members of Ohmite were Hawthorne Partners, LLC, Hawthorne Partners II LLC, NationsCredit Management Corporation, and James Horne. He further alleged that on March 5, 1999, all the members of Ohmite entered into a written agreement whereby Horne was allocated 15.5% of all profits and losses of Ohmite, and 15.5% of all distributions made by Ohmite. Plaintiff alleged that pursuant to the terms of the Equity Purchase Agreement dated May 24, 2000, Horne transferred half of his membership interest to Hawthorne Partners II, entitling Horne to 7.75% interest in Ohmite. Plaintiff alleged that on February 28, 2007, Horne transferred his membership interest to plaintiff, and that plaintiff should therefore be allocated 7.75% of all distributions made by Ohmite. Plaintiff stated that since he received the membership interest, he has only been

allocated .00075% of Ohmite's profits and losses. Plaintiff argued that judgment should be entered against defendants declaring that plaintiff was entitled to 7.75% of all profits, losses, and distributions from Ohmite.

¶ 6 In count two of the complaint, plaintiff alleged that he had previously commenced an action against Ohmite in the Court of Chancery of Delaware because Ohmite refused to let him inspect certain books and records of the company. On February 21, 2011, the Court of Chancery entered judgment in favor of plaintiff. Plaintiff alleged that in compliance with that judgment, Ohmite produced a document dated June 3, 2003, entitled "Action By Written Consent of the Manager and Members Owning a Majority of the Voting Units of Ohmite Holding, L.L.C." (the 2003 Action). Plaintiff attached a copy of the document labeled “Exhibit 5” to his first amended complaint. Plaintiff alleged that as a result of this action, "Ohmite purported to reduce Horne's allocable share of profits, losses, and distributions of and from Ohmite from 7.75% to .00075%." Plaintiff argued that Horne never consented to the reduction in shares, and that plaintiff should therefore still be entitled to 7.75% of the profits, losses, and distributions of Ohmite.

¶ 7 In count three of the complaint, plaintiff alleged that prior to Horne assigning his membership interest to plaintiff, plaintiff had a security interest in Horne's membership, and that Ohmite was aware of that interest. Plaintiff contended that despite knowing about plaintiff’s interest, Ohmite failed to notify plaintiff of any purported issuance of additional units. Plaintiff again contended that he should be entitled to 7.75% of the profits, losses, and distributions of Ohmite.

¶ 8 In count four of plaintiff's first amended complaint, he alleged that upon information and belief, in 2003 Ohmite issued 1,000,000 units for a total of $1,000,000 to Hawthorne Partners II. Plaintiff further alleged that at the time the units were issued, a single individual, Michael

Heisley, controlled Hawthorne Partners, Hawthorne Partners II, and Ohmite. Plaintiff argued that the acquisition of 1,000,000 units by Hawthorne Partners II, was presumptively fraudulent and that a constructive trust should be imposed on those units. He further argued that he should be entitled to 7.75% of all profits, losses, and distributions of Ohmite.

¶ 9 Count five of the first amended complaint alleged that the price by which Hawthorne Partners II acquired 1,000,000 units was substantially less than the value of such units, and that he should be entitled to 7.75% of all profits, losses, and distributions of Ohmite.

¶ 10 Count six alleged that Ohmite breached the LLC agreement by failing to allocate 7.75% of Ohmite's profits, losses, and distributions to plaintiff.

¶ 11 And finally, count seven alleged that to the best of plaintiff's knowledge, Ohmite did not actually issue additional units, and Hawthorne II, did not actually contribute $1,000,000 to Ohmite. Plaintiff again argued that he was entitled to 7.75% of all profits, losses, and distributions of Ohmite.

¶ 12 Several exhibits were attached to the first amended complaint. “Exhibit 1” was the "Amended and Restated Limited Liability Company Agreement of Ohmite Holding, L.L.C.," dated March 5, 1999, which reflected Horne's ownership interest as 15.5%. “Exhibit 2” was the "Equity Purchase Agreement" dated May 24, 2000, which stated that Horne was in default under the original note for failure to pay interest. The agreement further stated that plaintiff had originally loaned Horne the money to acquire the units, and under this new agreement plaintiff agreed to accept a prepayment of $1,000,000.

¶ 13 “Exhibit 3” was an "Assignment of Membership Interest" which stated that Horne transferred all of his right, title, and membership interest in 7.75% of the voting units of Ohmite

to plaintiff. "Exhibit 4" was the Court of Chancery of the State of Delaware's opinion granting plaintiff's request to inspect certain records and books of Ohmite.

¶ 14 "Exhibit 5" was a document titled "Action by Written Consent of the Manager and Members Owning a Majority of the Voting Units of Ohmite Holding, L.L.C." The document stated that Ohmite had determined to obtain $1,000,000 of additional equity financing to satisfy requirements of Ohmite's lenders. The document stated that Hawthorne Partners II, agreed to provide $1,000,000 in requested equity financing. The document further stated that the manager resolved that the fair market value of the units was not more than $1.00 per unit. The document noted that each member shall have the opportunity to purchase its *pro rata* share of the offered units based on unit ownership. The document further stated that in consideration for the commitment, Hawthorne Partners II shall be entitled to purchase the units offered to any member that does not elect to participate.

¶ 15 Ohmite responded to plaintiff's first amended complaint with a motion to dismiss pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2012)) of the Code. In its motion, Ohmite argued that plaintiff again failed to state a cause of action in any of the seven counts of his first amended complaint, and that the claims for breach of fiduciary duty were barred by the statute of limitations. Specifically, Ohmite argued that plaintiff was not entitled to the remedy sought — namely, the reversal of the 2003 Action which reduced Horne's ownership interest. Ohmite attached Schedule I of the Amended and Restated Limited Liability Company Agreement which noted that it was based as of July 31, 2013, "to reflect the issuance of 1,000,000 Voting Units to Hawthorne Partners, LLC." The schedule indicated that Horne held 7.75 voting units, which amounted to .001% ownership interest.

¶ 16 The trial court granted Ohmite's combined motion to dismiss, with prejudice, "for the reasons set forth in Defendants' Motion and Supporting Memoranda." Plaintiff now appeals.

¶ 17 II. ANALYSIS

¶ 18 On appeal, plaintiff contends that his first amended complaint should not have been dismissed because each count of his complaint stated a cause of action, and that none of the counts of the complaint were barred by the statute of limitations. Ohmite maintains that the trial court properly granted its section 2-619.1 motion to dismiss because plaintiff failed to state a cause of action, and two of his causes of actions were barred by the statute of limitations. For the following reasons, we affirm.

¶ 19 Section 2-619.1 of the Code is a procedural statute which allows a litigant to combine a section 2-615 motion to dismiss and a section 2-619 motion for involuntary dismissal in one pleading. 735 ILCS 5/2-619.1 (West 2012). Section 2-619.1 provides that a combined motion shall be divided into parts and each part shall be limited to and specify a single section of the Code under which relief is sought. 735 ILCS 5/2-619.1 (West 2012). A section 2-615 motion attacks the sufficiency of a complaint and raises the question of whether it states a cause of action upon which relief can be granted. *Burdinie v. Village of Glendale Heights*, 139 Ill. 2d 501, 505 (1990). When ruling on a section 2-615 motion, the court may only consider the facts apparent from the face of the complaint, matters of which the court may take judicial notice, and judicial admissions in the record. *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 115 (1995). A section 2-619 motion raises certain defects or defenses and poses the question of whether the defendant is entitled to judgment as a matter of law. *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1046 (1998).

¶ 20 In ruling on a motion to dismiss under either section 2-615 or section 2-619 of the Code, the court must accept all well-pled facts in the complaint as true and draw all reasonable inferences from those facts in favor of the plaintiff. *Miner v. Gillette Co*., 87 Ill. 2d 7, 19 (1981). Because the resolution of either motion involves only a question of law, our review is *de novo*. *Storm & Associates*, 298 Ill. App. 3d at 1047.

¶ 21 Plaintiff's first contention is that all seven counts of his first amended complaint stated a cause of action. Ohmite maintains that none of the counts stated a cause of action because they are all premised on plaintiff's contention that there exists a question of fact regarding whether Ohmite actually issued 1,000,000 units in 2003. Ohmite maintains that the additional units were in fact issued, as evidenced not only by the bare allegations on the face of plaintiff's first amended complaint, but also by Exhibit 5 that was attached to plaintiff's first amended complaint, and also as evidenced by Exhibit A attached to Ohmite's motion to dismiss. We agree with Ohmite.

¶ 22 Plaintiff alleged in count four of his first amended complaint that upon information and belief Ohmite issued 1,000,000 units for a total of $1,000,000 to Hawthorne Partners II in 2003. Plaintiff further alleged that in connection with a suit in the Court of Chancery of Delaware, Ohmite produced a document dated June 3, 2003, entitled "Action By Written Consent of the Manager and Members Owning a Majority of the Voting Units of Ohmite Holding, L.L.C." Plaintiff attached a copy of that document as Exhibit 5, which stated in pertinent part that the company had determined to obtain $1,000,000 of additional equity financing, and that Hawthorne Partners II had agreed to commit the entire amount in requested equity financing. The document further stated that the 1,000,000 units were being issued at the price of $1.00 per unit, which constituted fair and reasonable consideration. The document noted that each member

would have the opportunity to purchase its *pro rata* share of the offered units based on unit ownership, and that Hawthorne Partners II would be entitled to purchase the units offered to any member that did not elect to participate. Finally, the document stated that "Schedule I to the Company's Amended and Restated Limited Liability Company Agreement shall be amended to reflect the issuance of the Offered Units." Schedule I was not attached to plaintiff's first amended complaint. Plaintiff further alleged in his first amended complaint that in reliance on the 2003 Action, "Ohmite purported to reduce Horne's allocable share of profits, losses, and distributions of and from Ohmite from 7.75% to .000775%."

¶ 23 Plaintiff's contentions on appeal, however, seem to hinge on the theory that the 1,000,000 additional units were never actually issued, and thus Horne's ownership interest was still 7.75% when he transferred it to plaintiff. However, as the trial court noted, if that were the case, then there would have been no reason to bring this lawsuit. From the face of plaintiff's complaint, it is apparent that in 2003, 1,000,000 additional units were sold, and that Horne's ownership interest was reduced, all of which took place four years before Horne transferred his ownership interest to plaintiff. To the extent plaintiff is arguing that those additional units were never actually issued, we note that pursuant to section 2-606 of the Code, an instrument that is attached to the pleading as an exhibit constitutes part of the pleading for purposes of ruling on motions relating to the pleadings. 735 ILCS 5/2-606 (West 2012). In the case of a conflict between such written exhibits and the allegations of a pleading, the exhibits control. *Garrison v. Choh*, 308 Ill. App. 3d 48, 53 (1999). Here, Exhibit 5, attached to plaintiff's complaint, is the written agreement to sell 1,000,000 additional units. Thus, to the extent plaintiff's complaint alleges that those additional units were not sold, the exhibit controls.

¶ 24 Accordingly, because it is clear from the allegations of plaintiff's complaint, and from the exhibits attached to his complaint, that 1,000,000 units of ownership interest were sold in 2003, and that Horne's ownership interest was reduced to .000775% in 2003, and because each count of the complaint requests that judgment be entered against all defendants "declaring that plaintiff is entitled to 7.75% of all profits, losses, and distributions of and from Ohmite," plaintiff failed to state a claim upon which relief could be granted. Thus, a dismissal pursuant to section 2-615 of the Code was proper. 735 ILCS 5/2-615 (West 2012).

¶ 25 Moreover, Exhibit 5 to plaintiff's complaint specifically stated that "upon closing of the purchase of the Offered Units, Schedule I to the Company's Amended and Restated Limited Liability Company Agreement shall be amended to reflect the issuance of the Offered Units." Schedule I states that it was adjusted to "reflect the issuance of 1,000,000 Voting Units to Hawthorne Partners, L.L.C." It further noted that Horne owned 7.75 voting units, which amounted to .001% ownership interest. While Schedule I to Ohmite's Amended and Restated Limited Liability Company Agreement was not attached to plaintiff's complaint (*Mt. Zion State Bank & Trust*, 169 Ill. 2d at 115 (when ruling on a section 2-615 motion, the court may only consider facts apparent from the face of the complaint)), but rather was attached to Ohmite's combined section 2-619.1 motion to dismiss, "will consider that part of the motion as having been filed and decided under section 2-619" (735 ILCS 5/2-619(a)(9) (West 2012)), which allows defendant to file a motion for dismissal on the grounds that the claim asserted against defendant is barred by other affirmative matter defeating the claim. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 92 (1996); *Perkaus v. Chicago Catholic High School Athletic League*, 140 Ill. App. 3d 127, 134 (where plaintiff failed to attach league bylaws as an exhibit to

his complaint, defendants properly submitted the documents in support of a section 2-619(a)(9) motion to dismiss).

¶ 26 Finally, to the extent that any of the counts of plaintiff's complaint purport to state a cause of action for breach of fiduciary duty, such cause of action is barred by the statute of limitations. In Illinois, the statute of limitations for breach of fiduciary duty is five years. 735 ILCS 5/13-205 (West 2012). Because the 2003 Action occurred in 2003, and plaintiff brought his original complaint ten years later in 2013, we find that the trial court properly granted Ohmite's section 2-619 motion. On appeal, plaintiff contends that there is no statute of limitations for breach of fiduciary duty claims alleging self-dealing. However, as Ohmite notes, "fraudulent concealment will toll the statute of limitations if the plaintiff pleads and proves that fraud prevented the discovery of the cause of action." *Clay v. Kuhl*, 189 Ill. 2d 603, 613 (2000) (citing 735 ILCS 5/13-215 (West 2012)). Here, plaintiff did not plead in his first amended complaint that Ohmite fraudulently concealed any information from him. Accordingly, the five-year statute of limitations applies in this case, and bars plaintiff's claim for breach of fiduciary duty.

¶ 27 For the foregoing reasons, we affirm the judgment of the Circuit Court of Cook County.

¶ 28 Affirmed.