2015 IL App (1st) 13-1132-U

THIRD DIVISION
March 4, 2015

No. 1-13-1132

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STRATEGIES FOR DYNAMIC GROWTH, LLC AND, INTERIOR DIMENSION, INC., individually and on behalf of a class of all creditors similarly situated,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	06 L 7653
MENWITT CORPORATION (formerly known as Pond Sweep Manufacturing Co.), WITTMEN CORPORATION (formerly known as Pond Supplies of America, Inc.), AQUASCAPE DESIGN, INC., GARY G. WITTSTOCK, JOHN MENHART, AND GREGORY G. WITTSTOCK,	)	The Honorable Raymond W. Mitchell, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: This court affirmed the dismissal of plaintiffs' complaint because the contract on which plaintiffs' complaint was based was unenforceable, thus defeating their claims. Plaintiffs also failed to allege sufficient facts to withstand a motion to dismiss, and the trial court did not abuse its discretion in denying plaintiffs' motion to file a sixth-amended complaint. Affirmed.

¶ 2 Plaintiffs-appellants Strategies for Dynamic Growth, LLC, and Interior Dimension, Inc., now appeal the trial court's order dismissing with prejudice counts 1-7 of their proposed class action complaint against Menwitt Corporation, Wittmen Corporation, Aquascape Design, Inc., Gary G. Wittstock, John Menhart, and Gregory G. Wittstock (defendants). Plaintiffs, who are unpaid creditors and purport to represent all other unpaid creditors in the action, challenge the dismissal of their complaint. They argue defendants were liable for actions amounting to fraudulent concealment and breach of fiduciary duty, from a failure to disclose a certain asset purchase agreement for the insolvent company, that plaintiffs claim would have permitted them to garner unpaid dues. Plaintiffs also argue disputed issues of fact precluded the dismissal of their complaint. Finally, they contend the trial court abused its discretion in denying their motion to file their second-amended class action complaint, which was in reality their sixth-amended complaint. We affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiffs filed their initial complaint on July 21, 2006. At issue in this case, however, is plaintiffs' fifth-amended complaint, filed on September 10, 2009. Plaintiffs brought that complaint on behalf of unsecured creditors of Menwitt Corporation (formerly known as Pond Sweep Manufacturing Company) and creditors of Wittmen Corporation (formerly known as Pond Supplies of America, Inc.). They sought recovery for unpaid business consulting services and credit lines provided to the predecessor companies, Pond Sweep Manufacturing Company and Pond Supplies of America, Inc. (hereinafter, the "Pond Companies"). Plaintiffs alleged the Pond Companies sold their assets to the company, Aquascape Design, Inc., through an asset purchase agreement signed and executed on February 1, 2006. Pursuant to this agreement, Aquascape allegedly agreed to assume all of the Pond Companies liabilities, not to exceed

$2,200,000. The agreement specified that "[t]he total purchase price for all of the assets *** shall be the assumption at closing of the specific liabilities of the Seller set forth on Exhibit B," and further stated, in relevant part:

> "Purchaser is only assuming the Liabilities specifically set forth on Exhibit B and the 2 existing leases to the Premises and in no way is expressly or implied [*sic*] assuming any other liabilities, obligations, or taxes of the Seller, whether fixed, contingent, or otherwise. Except for the Liabilities on Exhibit B and the 2 existing leases for the [p]remises, Seller and Wittstock shall remain completely liable for all of the Seller's other liabilities, and shall hold the Purchaser harmless with respect to same."

The February 1 document, which referenced "Exhibit B" numerous times throughout, did not identify a closing date.

¶ 5 About a month later, the Pond Companies and Aquascape entered into an asset purchase agreement, dated March 17, 2006. This agreement superseded any earlier agreements and showed Aquascape ultimately purchased the Pond Companies for some $750,780. Following the March agreement, apparently there was not enough money remaining to pay the debts owed to unsecured creditors, which included Plaintiffs. Plaintiffs argued this violated the February agreement, which they claimed to have discovered after the Pond Companies' assets had been exhausted. Plaintiffs thereafter asserted various counts of fraudulent concealment, breach of fiduciary duty, civil conspiracy, unjust enrichment, and breach of contract. At the heart of their complaint, plaintiffs asserted the Pond Companies owed creditors a fiduciary duty to disclose the February 1 agreement, and the Pond Companies' failure to do so, amounted to a form of fraud. Noting the familial relationship between the two companies – with the Pond Companies being

owned by father Gary Wittstock and Aquascape being owned by son Gregory Wittstock – plaintiffs implied misdealing occurred as a result.

¶ 6 Defendants filed a motion to dismiss under sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2010)), wherein they argued the February agreement was unenforceable because there was never any "Exhibit B" prepared, approved, or appended to the agreement and thus no identifiable purchase price. Defendants argued the absence of an enforceable contract was an "affirmative matter avoiding the legal effect of or defeating the claim" under section 2-619 and thus warranted dismissing the complaint. Defendants further relied on the March 17, 2006, agreement as enforceable and argued that, under the March agreement, Aquascape did not agree to assume all of the Pond Companies' liabilities. In essence, they argued the unsecured creditors were not entitled to any payoff and their claims thus had no merit.

¶ 7 The parties offered testimony from depositions and affidavits in support of their positions regarding whether the February agreement was enforceable. The enforceability, according to the parties, revolved around the existence or non-existence of "Exhibit B," referenced in the February 1 agreement. Plaintiffs pointed to the deposition of Jeffrey Corso (defendant Gary Wittstock's former attorney), who stated that he "prepared what would start to look like an Exhibit B," but he admitted there was no draft of Exhibit B. Corso pointed to a summary of accounts payable from the Pond Companies, suggesting this could serve as Exhibit B. He stated the intended Exhibit B was merely meant to identify the amounts owed to each creditor, so as to prevent any one creditor from filing a claim larger than that provided in Exhibit B. Plaintiffs argued Exhibit B was not vital to the February agreement because the total liabilities were less than the $2,200,000.

¶ 8 Defendants pointed to the affidavits of individuals involved in various aspects of the sale of the Pond Companies to support their position that Exhibit B was never prepared for the February agreement, nor was an account payable list approved by the parties, and therefore the agreement remained unenforceable. Ira Leavitt, counsel for Aquascape, attested that he prepared the February asset purchase agreement, yet never prepared Exhibit B. Jack Luedtke, the Aquascape employee who oversaw acquiring the assets of the Pond Companies, attested that no draft of Exhibit B was even proposed in relation to the February agreement. He attested Aquascape had not even negotiated a price for the Pond Companies' assets at the time the February agreement was signed. Gregory Wittstock, owner of Aquascape, attested that neither he nor his company ever authorized a $2.2-million sale price for the Pond Companies. He also stated that he never agreed that the summary of payables report, attached to plaintiffs' complaint, would serve as Exhibit B. He in fact never requested an Exhibit B and further stated the binding agreement was that executed on March 17, 2006.

¶ 9 After considering this evidence and the parties' arguments, on June 9, 2011, the trial court granted defendants' motion to dismiss in a written order. The court noted the February agreement specifically limited "the liabilities Aquascape agreed to assume to those listed in Exhibit B." The court determined that Exhibit B was an essential part of the February agreement between Aquascape and the Pond Companies, and absent the document, the agreement failed to identify a purchase price. As a result, the court held the February agreement was not enforceable and granted the defendants' motion to dismiss counts 1-7 with prejudice.

¶ 10 Litigation continued for several more years on count 8, for breach of an oral agreement between plaintiff, Strategies for Dynamic Growth, and defendant, Gary Wittstock. Plaintiffs

subsequently filed a motion for leave to file another amended complaint, which the trial court denied.

¶ 11 On March 5, 2013, plaintiffs' motion to voluntarily dismiss count 8 (on the oral agreement) was granted, thereby concluding the case. This timely appeal followed.

¶ 12 ANALYSIS

¶ 13 Plaintiffs now challenge the dismissal of counts 1-7. A section 2-615 motion poses the question of whether the complaint states a cause of action upon which relief can be granted. *Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 307 (2002). A section 2-619 motion, on the other hand, raises certain defects or defenses and questions whether defendant is entitled to judgment as a matter of law. *Id*.; see also *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (2008) (a section 2-619 motion admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matters, appearing on the face of the complaint, or established by external submissions, which defeats plaintiff's claim). Because the resolution of either motion involves a question of law, the standard of review is *de novo*. *Prime Leasing, Inc*, 332 Ill. App. 3d at 307. On a motion to dismiss, this court must accept all well-pleaded facts as true. *Id*.

¶ 14 Plaintiffs now argue, as they did below, that the February agreement was a viable contract and Acquascape therefore assumed the Pond Companies' liabilities identified therein. They argue Exhibit B therefore was not a necessary component of the contract.

¶ 15 Defendants respond that the plain language of the February 1 agreement specifically limited the liabilities that Aquascape agreed to assume to those listed in Exhibit B, and absent evidence of that Exhibit, there was no enforceable agreement and no valid complaint in this case. We agree.

¶ 16 In general, a party seeking to enforce an agreement has the burden of establishing the existence of the agreement. *Reese v. Forsythe Mergers Group, Inc.*, 288 Ill. App. 3d 972, 979 (1997). To form a valid contract between two parties, there must be mutual assent by the contracting parties on the essential terms and conditions of the subject about which they are contracting. *Id*.; see also *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1091 (2003) (failure to agree on an essential term indicates the required mutual assent is lacking). Accordingly, when determining whether an enforceable contract exists, we must look at the intent of the parties, as evidenced by the language in the document. *Id*. While a contract may be enforced even though some contract terms may be missing or left to be agreed upon, if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract. *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 30 (1991). *Id*. at 30; see also *Jannusch v. Naffziger*, 379 Ill. App. 3d 381, 386 (2008) (same); see also *Shults v. Griffin-Rahn Insurance Agency, Inc.*, 193 Ill. App. 3d 453, 457 (1990) (for a contract to be binding and enforceable, its terms must be definite and certain). In short, a contract is sufficiently definite and certain to be enforceable if the court is enabled from the terms and provisions thereof, under proper rules of construction and applicable principles of equity, to ascertain what the parties have agreed to do. *Cheever*, 144 Ill. 2d at 29. Regarding the February 1 agreement, that is not something we can divine.

¶ 17 Here, it is unclear what the Pond Companies and Aquascape intended the February 1, 2006, document to represent. However, even if they intended at some point for the document to represent an agreement, it clearly never reached fruition. In no uncertain terms, this document required that the parties identify the liabilities Aquascape was to assume in Exhibit B, yet by plaintiffs' own admission, the document itself was never prepared. *Cf. Chicago Investment*

Corporation v. Dolins, 107 Ill. 2d 120, 127 (1985) (if the parties construe the execution of a formal agreement as a condition precedent, then no contract arises unless and until that formal agreement is executed). Aquascape never reviewed the Exhibit B or ultimately finalized a purchase price for the February document. In addition, the document failed to provide for a specified closing date.

¶ 18 We therefore reject plaintiffs' argument that because the February 1 document states Aquascape would assume liabilities not to exceed $2.2-million dollars, there was an enforceable contract. That clause and also the repeated reference throughout the document to the liabilities listed in Exhibit B destroy any claim that the "ceiling number" could be construed as the purchase price. See *Universal Scrap Metals, Inc. v. J. Sandman and Sons, Inc.*, 337 Ill. App. 3d 501, 506-07 (2003) (contract price term was not inherent in phrase, "right of first refusal," especially where it was to be "under mutually agreed upon conditions," and contract indicated parties contemplated further negotiations regarding price beyond initial agreement). Thus, there was no enforceable agreement on February 1, and the mere informal draft agreement cannot be the basis of a fraud or deceit claim. See *Zaborowski v. Hoffman Rosner Corporation*, 43 Ill. App. 3d 21, 23 (1976) (a promise to perform an act is an insufficient false representation to constitute fraud; in order to constitute fraud the representation must be an affirmance of fact and not a mere promise or expression of opinion or intention); see also *Hirsch v Feuer*, 299 Ill. App. 3d 1076, 1086 (1998) (mere silence in a transaction does not amount to fraud). Nor could the two companies' conduct following the February 1 agreement be construed as a fill-in for an essential term that was missing. Moreover, if anything, the March 17 agreement confirms that the February 1 agreement was not enforceable. As plaintiffs' contentions below and on appeal

are inexorably tied to the "fact" that the Pond Companies fraudulently concealed a document that never actually existed are nonsensical and thus rejected.

¶ 19 It merits mention that plaintiffs also alleged the Pond Companies had a fiduciary duty to disclose this same February "agreement." It is true that once a corporation becomes insolvent, an officer's fiduciary duty extends to the creditors of the corporation because, from the moment insolvency arises, the corporation's assets are deemed to be held in trust for the benefit of its creditors. *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶ 83. To set forth a breach of fiduciary cause of action, plaintiffs had to allege a fiduciary duty existed, this duty was breached, and the breach proximately caused the injury of which the plaintiffs complain. *Neade v. Portes,* 193 Ill. 2d 433, 444 (2000). Assuming plaintiffs had the capacity to raise the breach of fiduciary claim on their own behalf and that of other creditors, plaintiffs have not set forth sufficient facts to establish the Pond Companies either breached their fiduciary duty or that the apparent breach proximately caused plaintiffs' injuries. See *Visvardis v. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (2007). Again, plaintiffs in error contend the Pond Companies committed a breach by not disclosing an agreement that never formally existed. There is no "Exhibit B" attached to plaintiffs' complaint, as required. Moreover, plaintiffs have failed to allege, outside of this so-called February 1 agreement, that Aquascape was even capable of assuming $2.2 million in another company's debt or that a viable alternative for the Pond Companies' insolvency existed to the March 17 agreement. See *Ranjha v. BJBP Properties, Inc.*, 2013 IL App (1st) 122155, ¶ 9 (mere conclusions of law or facts unsupported by specific factual allegations in a complaint are insufficient to withstand a section 2-615 motion to dismiss). Nor have plaintiffs alleged in their complaint, or cited legal authority, for the proposition that the Pond Companies owed a fiduciary duty to involve creditors in all their business negotiations to

address insolvency. Based on the foregoing, we cannot say the trial court erred in dismissing plaintiffs' complaint.

¶ 20 In reaching this conclusion, we reject plaintiffs' contention in their reply brief that defendants had a "conspiratorial scheme" to leave Exhibit B incomplete. Not only did plaintiffs fail to raise this argument in their initial brief, it is nowhere alleged in the complaint at issue. See ILCS S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief."). Plaintiffs' contention must fail.

¶ 21 Plaintiffs next contend the trial court erred in denying them leave to file their second-amended class action complaint, which was in reality their sixth-amended complaint in this litigation. A trial court has discretion to allow the amendment of pleadings or to finally terminate litigation, and the refusal to allow amendment is reversible error only if there is an abuse of discretion. *Plocar v. Dunkin' Donuts of America, Inc.*, 103 Ill. App. 3d 740, 749 (1981). To determine whether this has occurred, we consider whether the proposed amendment would cure the defective pleading; whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; whether the proposed amendment is timely; and whether previous opportunities existed to amend the pleading. *Loyola Academy v. S & S Roof Maintenance*, 146 Ill. 2d 263, 273 (1992).

¶ 22 In the trial court's order denying plaintiffs leave to file their sixth-amended complaint, the court stated that the plaintiffs' theories of recovery were premised on the same set of facts and bases as in their previous complaint, which had been dismissed already. Having reviewed plaintiffs' final complaint, we cannot disagree. Moreover, plaintiffs had almost six years and six chances to state viable causes of action but were ultimately unable to do so. See *Plocar*, 103 Ill. App. 3d at 750. We believe that plaintiffs were given ample opportunity to plead their case and

the circuit court did not abuse its discretion in refusing to allow them an opportunity to replead after this final dismissal. See *Hirsch*, 299 Ill. App. 3d at 1087. Allowing plaintiffs to now amend their pleading yet again would not further the ends of justice or be reasonable. See *Plocar*, 103 Ill. App. 3d at 749. Given the amount of time this litigation has been pending, repleading could in fact be prejudicial.

¶ 23 CONCLUSION

¶ 24 Based on the foregoing, we affirm the circuit court's dismissal of counts 1-7 of plaintiffs' fifth-amended complaint. We also affirm the denial of leave to file the subsequent second-amended class action complaint, which was in reality the sixth-amended complaint.

¶ 25 Affirmed.