2015 IL App (1st) 131344-U

FOURTH DIVISION
February 26, 2015

No. 1-13-1344

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WE'RE CLEANING, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	
LIVE NATION CHICAGO, INC. and CHICAGO PARK DISTRICT,	)	No. 10 CH 35004
	)	
	)	
Defendants-Appellees.	)	Honorable
	)	Mary Anne Mason,
	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.[1]
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Unsigned amended complaint filed in federal court that added a party, destroyed diversity jurisdiction, and formed basis for court's remand to state court, was not a nullity under federal or state law. Circuit court had authority to rule on defendants' motions to dismiss amended complaint. Duty of good faith and fair dealing did not require defendant to extend plaintiff's contract beyond the agreed termination date. Circuit court did not abuse its discretion in denying plaintiff leave to replead, where proposed amended complaint was not presented to trial court and is not in record on appeal. Circuit court's order dismissing amended complaint with prejudice affirmed.

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[1] This case was recently reassigned to Justice Ellis.

¶ 2 Plaintiff is a janitorial services company that performed subcontract work on a publicly-bid contract at Northerly Island for the Chicago Park District. After its contract was not renewed for an additional year, and another company won a new round of competitive bidding for the subcontract, plaintiff sued in the circuit court of Cook County for damages and injunctive relief. When defendant removed the case to federal court based on diversity jurisdiction, plaintiff sought leave to file an amended complaint that would add a second defendant and destroy diversity jurisdiction in the process. The federal judge granted plaintiff leave to join the new defendant and, finding itself without diversity jurisdiction, remanded the matter to the circuit court of Cook County. But when both defendants filed motions to dismiss back in state court, plaintiff argued that it had never filed a signed copy of the amended complaint in federal court, and thus the amended complaint was a nullity under state and federal law—the circuit court could not dismiss it because it did not legally exist.

¶ 3 The circuit court dismissed the amended complaint with prejudice. The principal issue on appeal is whether the circuit court had the authority to rule on the amended complaint, given that it was not technically signed by plaintiff's counsel when filed in federal court and was never signed during the state court proceedings, either. We hold that the circuit court did possess that authority. We affirm the circuit court's dismissal with prejudice in all respects.

¶ 4 I. BACKGROUND

¶ 5 A. The Live Nation / Park District Contract

¶ 6 In June of 2005, Defendant Live Nation Chicago, Inc. (Live Nation) entered into a contract with the Chicago Park District (CPD) whereby Live Nation would manage the entertainment venue on Northerly Island for the CPD (the CPD Contract).

¶ 7 Under the CPD Contract, Live Nation was required to use a specified percentage of minority-owned business enterprises (MBEs) and women-owned business enterprises (WBEs) as subcontractors. The CPD contract provided that, if Live Nation found it necessary to substitute a MBE or WBE subcontractor for whatever reason, it must seek the CPD's permission and, if that substitution resulted in a lowering of the MBE or WBE goal, Live Nation would be required to raise the participation of another WBE or MBE to achieve the stated goals.

¶ 8 The CPD Contract also contained a provision regarding third party beneficiaries stating that the agreement was "not intended to confer upon any person or entity any rights or remedies under or by reason of this Agreement."

¶ 9 The CPD Contract's term was a three-year initial term with two one-year extensions. The last available extension option on the CPD Contract expired on December 31, 2009.

¶ 10 B. The Live Nation / We're Cleaning Subcontract

¶ 11 Plaintiff We're Cleaning, Inc. is an Illinois corporation in the business of providing cleaning and janitorial services. Plaintiff is certified by the City of Chicago as a WBE and MBE.

¶ 12 On February 1, 2006, plaintiff entered into a written subcontract with Live Nation to perform janitorial services at Northerly Island (the Subcontract). The Subcontract terminated, by its terms, "on the conclusion of the last Event of the 2009 Event Season at the Amphitheater or December 31, 2009, whichever is earlier." The Subcontract in fact ended on December 31, 2009.

¶ 13 C. Modification of Live Nation / CPD Contract and New Bids for Janitorial Services

¶ 14 On January 1, 2010, Live Nation and CPD executed a modification to the CPD contract which changed the "End Date" from December 31, 2009 to December 31, 2010 (the Modified CPD Contract). Because the Modified CPD contract extended Live Nation's work for an

additional year, Live Nation invited plaintiff and other vendors to bid on a new janitorial services contract for that additional year.

¶ 15 Plaintiff timely submitted its bid, but Live Nation awarded the contract to another bidder.

¶ 16 D. Litigation

¶ 17 In August, 2010, plaintiff filed suit in the circuit court of Cook County to prevent Live Nation from using another subcontractor, for a declaration of its rights, and for breach of contract. Live Nation then removed the action to the United States District Court for the Northern District of Illinois on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332 (2006), which requires complete diversity of citizenship between the parties and an amount in controversy in excess of $75,000.00, exclusive of interest and costs.

¶ 18 The case pended in federal court for almost two years before Live Nation moved for summary judgment in April, 2012. Two days later, plaintiff sought leave to file an amended complaint to add new claims and a new defendant, the CPD. Plaintiff also sought a remand to state court, arguing that the amount in controversy was less than $75,000.

¶ 19 The district court granted plaintiff's motion, ordering plaintiff to file the amended complaint no later than May 4, 2012. The district judge noted in his order that he would *sua sponte* remand the case to state court once the amended complaint was filed, because the joinder of the CPD as a defendant defeated diversity of citizenship between the parties.

¶ 20 Plaintiff missed that deadline but requested leave to file the amended complaint *instanter* on May 7. In an order dated May 10, 2012, the district court granted plaintiff leave to file the amended complaint *instanter* and, as promised, *sua sponte* remanded the case to state court. On May 16, 2012, a certified copy of the federal court's remand order in this case was mailed to the circuit court of Cook County.

¶ 21 Unbeknownst to the district court and presumably the lawyers as well, plaintiff never filed a signed copy of the amended complaint in federal court. The closest plaintiff came to doing so was attaching an unsigned copy of the amended complaint as an exhibit to its motion for leave to file that amended complaint—a motion that was, itself, properly signed by counsel.

¶ 22 After remand to the circuit court, in August, 2012, both defendants filed motions to dismiss, which are the subject of this appeal. After several delays brought about, in part, by plaintiff's substitution of new counsel, the circuit court set a "final date" in January, 2013 for plaintiff to file a response to the two motions to dismiss.

¶ 23 On that date, January 11, 2013, plaintiff still did not file a written substantive response to the motion to dismiss. Instead, plaintiff filed a motion for leave to file a second amended complaint. Insofar as it addressed the motions to dismiss at all, plaintiff claimed that it had discovered that the first amended complaint filed in federal court was never signed, and thus "the Motions to Dismiss [were] moot."

¶ 24 At the status hearing in February, 2013, for which no record is available, the court denied plaintiff leave to file a second amended complaint. Though we do not know what, if anything, was said regarding plaintiff's position that the unsigned first amended complaint was a nullity, the trial court set a hearing date for oral argument on the motions to dismiss the first amended complaint.

¶ 25 On March 22, 2013, after hearing argument, the circuit court dismissed the first amended complaint in its entirety with prejudice. Plaintiff now appeals.

¶ 26 II. ANALYSIS

¶ 27 Initially, we note that the facts we have recited above were taken from one of two sources—defendants' brief or own review of the record. Plaintiff's opening brief did not comply

with Illinois Supreme Court Rule 341(h)(6), which requires that an appellant's brief contain a "Statement of Facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). Plaintiff's two-page Statement of Facts is a mere summary of a portion of the procedural history of this case, and contains not a single word of the factual background of this case. Plaintiff's opening brief seems to presuppose that this court is somehow intimately familiar with the facts of this case.

¶ 28 The Illinois Supreme Court has criticized appellants who submit a statement of facts that merely summarizes the procedural history of the case, and fails to contain the facts necessary to an understanding of the case. *In re Levin*, 118 Ill. 2d 77, 86 (1987). This court has stricken an appellant's brief where, among other things, the statement of facts "[did] not convey a complete picture of the proceedings." See *Board of Managers of Eleventh Street Loftominium Ass'n v. Wabash Loftominium, L.L.C.*, 376 Ill. App. 3d 185, 187 (2007). As we have explained, this court "is not a depository in which [a party] may dump [its] arguments without factual foundation in hopes that [the court] will sift through the entire record to find support for a determination favorable to [its] position." (Internal quotation marks omitted.) *Engle v. Foley & Lardner, LLP*, 393 Ill. App. 3d 838, 854 729 (2009) (quoting *Mikrut v. First Bank of Oak Park*, 359 Ill. App. 3d 37, 51-52 (2005), in turn quoting *Coffey v. Hancock*, 122 Ill. App. 3d 442, 444 (1984)).

¶ 29 Compliance with Rule 341 is mandatory, and we have the discretion to strike an appellant's brief and dismiss an appeal for failure to comply with Rule 341. *Fryzel v. Miller*, 2014 IL App (1st) 120597, ¶ 25. Recognizing the harshness of this sanction, we have often chosen to address the merits of an appeal so long as the procedural violations were not so flagrant as to preclude our meaningful review. See, *e.g.*, *In re Marriage of Iqbal & Khan*, 2014

IL App (2d) 131306, ¶ 14; *Carter v. Carter*, 2012 IL App (1st) 110855, ¶ 12. Although we would be well within our power to strike plaintiff's brief, we choose to exercise our discretion here and address the issues on the merits.

¶ 30 A motion to dismiss under section 2-615(a) of the Code (735 ILCS 5/2–615(a) (West 2006)) tests the legal sufficiency of the complaint, whereas a motion to dismiss under section 2-619(a) (735 ILCS 5/2–619(a) (West 2006)) admits the legal sufficiency of the complaint, but asserts affirmative matter outside the complaint that defeats the cause of action. *Kean v. Wal–Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). We apply *de novo* review to the trial court's order granting a motion to dismiss under either section. *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 29.

¶ 31 Plaintiff raises two issues regarding the trial court's dismissal of the amended complaint. First, plaintiff claims that, because it did not file a signed copy of the amended complaint in federal court, that unsigned pleading is a nullity under federal and state law and, thus, should not have been dismissed with prejudice because it did not legally exist. Second, plaintiff claims that defendant Live Nation breached its contract with the CPD when it hired a different subcontractor for the additional year of janitorial services, and that plaintiff may sue for a breach of that contract because it was a direct third-party beneficiary of that contract. We address each argument in turn.

¶ 32 A. Whether the Amended Complaint was a Nullity

¶ 33 There is no debate among the parties that plaintiff never filed a signed amended complaint in federal court; plaintiff only filed an unsigned copy, attached to a signed motion for leave to file it *instanter*. It is equally undisputed that at no time during the pendency of the case in state court did plaintiff sign that amended complaint. We are thus left only with questions of

law—whether the lack of a signature rendered the amended complaint a nullity under state or federal rules—which we consider *de novo*. *Downtown Disposal Services, Inc. v. City of Chicago*, 407 Ill. App. 3d 822, 901 (2011).

¶ 34 1. *Supreme Court Rule 137*

¶ 35 Plaintiff first argues that, because the amended complaint violated the signature requirement of Supreme Court Rule 137 (Il. S. Ct. R. 137 (eff. July 1, 2013)), we should consider that pleading a nullity. A pleading is a nullity if it contains a defect that "is deemed incurable," *Downtown Disposal Services, Inc. v. City of Chicago*, 2012 IL 112040 ¶ 22 (collecting cases), thus rendering the pleading "void *ab initio*." *Downtown Disposal Services*, 407 Ill. App. 3d at 832.

¶ 36 We disagree that the amended complaint was rendered a nullity under Rule 137. First, the plain language of Rule 137 does not require that result. That rule provides, in pertinent part, that "[e]very pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record in his individual name." *Id.* But Rule 137 also provides a cure for that violation: "[i]f a pleading, motion, or other document is not signed, it shall be stricken *unless it is signed promptly after the omission is called to the attention of the pleader or movant*." (Emphasis added.) *Id*. Thus, by its express terms, Rule 137 does not characterize the lack of a signature on a filed pleading as an incurable flaw rendering the pleading void *ab initio* but, rather, as a defect capable of cure.

¶ 37 We find support in the case law for this conclusion. In *Brown & Kerr, Inc. v. American Stores Properties, Inc.*, 306 Ill. App. 3d 1023 (1999), a motion for reconsideration, which extended the period of time for filing a notice of appeal, was not signed by an attorney as required by Rule 137. *Id.* at 1029. The circuit court granted the defendants leave to have their

attorney sign the motion several months later. *Id.* The plaintiff claimed that the unsigned motion to reconsider was a nullity and, as such, did not extend the time for appeal, leaving the defendant's later appeal untimely. We rejected the plaintiff's argument, finding that the later signature cured the error and rendered the appeal timely. *Id.*; see also *Gershak v. Feign*, 317 Ill. App. 3d 14, 24 (2000) ("it was error for the trial court to refuse to allow the attorneys to cure the defective pleadings by signing the notices of rejection when the error was brought to their attention. Rule 137 clearly provides for such a cure.").

¶ 38 We find further support in case law from the federal courts on the related issue of compliance with Rule 11 of the Federal Rules of Civil Procedure (FRCP 11). That federal rule contains substantively identical language to Rule 137, mandating that "[e]very pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name," and likewise providing that the court "must strike an unsigned paper *unless the omission is promptly corrected after being called to the attorney's or party's attention*." (Emphasis added.) Fed. R. Civ. P. Rule 11. Because of the substantial similarity between FRCP 11 and Supreme Court Rule 137, "cases construing the Federal rule are appropriate guidance in the interpretation of Rule 137." *Edward Yavitz Eye Center, Ltd. v. Allen*, 241 Ill. App. 3d 562, 569 (1993). Accordingly, though at the moment we are confining our analysis to Supreme Court Rule 137, we will consider case law construing FRCP 11 for guidance.

¶ 39 Federal courts have treated a failure to sign a document, as required by FRCP 11, as a mere technical defect capable of cure, not a nullity. In *Becker v. Montgomery*, 532 U.S. 757 (2001), the United States Supreme Court considered the signature requirement of FRCP 11(a) in the context of whether a *pro se* appellant's failure to sign an otherwise perfected notice of appeal, which he later signed, caused the appeal to be untimely. The Court explained that, in reading

FRCP 11(a) as a whole, "the signature requirement and the cure for an initial failure to meet the requirement go hand in hand." *Id*. at 765. "The remedy for a signature omission, in other words, is part and parcel of the requirement itself." *Id*. The Supreme Court thus reversed the lower court's dismissal of the appeal and reinstated it. *Id*. at 768. See also *Holley Coal Co. v. Globe Indemnity Co*., 186 F.2d 291, 294 (4th Cir. 1951) (unsigned pleading not invalid, and district court did not abuse its discretion in accepting unsigned pleading, which was apparent oversight); *Burak v. Commonwealth of Pennsylvania*, 339 F. Supp. 534, 535 (E.D. Pa. 1972) (failure to sign amended complaint was "a mere technical defect" under FRCP 11(a), and pleading could be deemed properly amended "especially since none of the defendants [had] previously pointed to this violation of Rule 11 and alleged prejudice"); *Hadlock v. Baechler*, 136 F.R.D. 157, 159 (W.D. Ark. 1991) (“failure to sign is considered, generally, a mere technical defect").

¶ 40 These federal cases thus further support our interpretation of Rule 137. We hold that the lack of a signature on the amended complaint did not render that pleading a nullity under Supreme Court Rule 137 and did not deprive the circuit court of the authority to dismiss that amended complaint with prejudice.

¶ 41 Without question, this is an unusual case, where it could be fairly said that plaintiff is attempting to turn Rule 137 on its head. The purpose of Rule 137 is to discourage frivolous pleadings and punish those who file baseless lawsuits. *Cult Awareness Network v. Church of Scientology International*, 177 Ill.2d 267, 279 (1997); *Gershak v. Feign*, 317 Ill. App. 3d 14, 23 (2000). The rule is penal in nature, and the moving party—the party seeking sanctions against the non-compliant pleading or party—bears the burden or establishing a violation of the rule. *Gershak*, 317 Ill. App. 3d at 23; *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill.2d 458, 467 (1990) (construing predecessor to Rule 137).

¶ 42 In this case, however, the position of the parties is backwards. Plaintiff attempted to invalidate its own pleading, while defendants wanted no part of any such sanction—they wanted their day in court on their motions to dismiss. By word and deed, defendants waived any technical defect in the amended complaint. See *People v. Phipps*, 238 Ill. 2d 54, 62 (2010) (waiver is "intentional relinquishment or abandonment of a known right"). Thus, though we reject plaintiff's reliance on Rule 137 on the merits, we would additionally affirm the circuit court based on defendants' waiver of any Rule 137 violation. In the end, to rule in favor of plaintiff on this issue would be to punish *defendants*, as well as the court, by delaying the case still further—the complete opposite of Rule 137's purpose.

¶ 43 We do not know what transpired in the hearing in which plaintiff raised this nullity issue, because there is no transcript of proceedings. We fail to understand why plaintiff did not simply sign the amended complaint upon calling the defect to defendants' and the court's attention. Surely defendants would not have objected to that cure, because they clearly wanted to proceed with their motions to dismiss, even after the defect was brought to their attention. It seems clear that the trial court would not have objected, either, because like defendants, the trial judge was determined to move forward with the dispositive motions, frustrated by the delay in the case caused by plaintiff. When plaintiff seeks to disavow its own pleading on the basis of a technical defect, and passes up an easy opportunity to cure it, the suspicion that these actions are anything but a delay tactic, or some attempt to get out from under a dispositive motion, is hard to ignore. Suffice it to say that, in the future, we would strongly encourage litigants in this situation to attempt to cure the defect, rather than profit from it.

¶ 44 2. *Federal Rule of Civil Procedure 11*

¶ 45 We next address plaintiff's claim that the unsigned amended complaint violated FRCP 11(a) and thus rendered that pleading a nullity. We have just examined federal decisions that support the opposite conclusion, and we could affirm on that basis alone. But as a more fundamental and preliminary matter, we do not believe that this question is one that we may properly consider in the first instance, and we reject plaintiff's argument for that reason as well.

¶ 46 The federal district judge clearly deemed the amended complaint to have been properly filed, because he conditioned his remand order on the filing of that pleading, which joined a non-diverse party and defeated diversity jurisdiction. In fact, the joinder of the non-diverse party, via the amended complaint, was the *only* possible legal basis on which the court could have remanded the case. Otherwise, as long as diversity of citizenship existed between the parties and the monetary threshold was met, the district court would have been compelled to retain jurisdiction (absent a few circumstances not relevant here). *See First State Ins. Co. v. Callan Associates, Inc.*, 113 F.3d 161, 163 (9th Cir. 1997) (plaintiff "had a statutory right under the diversity statute to pursue its claim in the federal district court and the district court had a 'virtually unflagging' obligation to exercise jurisdiction.") (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). But once the district court allowed plaintiff leave to amend the complaint and join a non-diverse party, it was equally compelled to *remand* the case. *See* 28 U.S.C.A. § 1447(e) (West 2010) ("If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."); 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

¶ 47 Simply put, the federal court's remand order revolved entirely around the filing of the amended complaint. Without it, a remand would have been impermissible, but with it, a remand was mandatory. It is simply impossible, at this juncture, to disentangle the filing of the amended complaint from the remand order on which it was premised. Thus, if this court were to opine on the legal effect of the unsigned amended complaint's filing in federal court, we would necessarily be opining on the propriety of the remand order, as well.

¶ 48 Plaintiff has provided us with no legal basis for a state appellate court to review a remand order for error. In fact, with limited exceptions not relevant here, a district court's remand order is not even reviewable by *federal* appellate courts. *See* 28 U.S.C. § 1447(d) (West 2010) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise …"). Where a remand order is based, as in this case, on a lack of subject matter jurisdiction, federal appellate review "'is unavailable no matter how plain the legal error in ordering the remand.'" *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 642 (2006) (quoting *Briscoe v. Bell*, 432 U.S. 404, 413-414, n. 13 (1977)).

¶ 49 To the contrary, federal law provides the conditions under which jurisdiction will re-vest in state court following a remand, none of which include reviewing the propriety of the remand:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. *The State court may thereupon proceed with such case.* (Emphasis added.)
>
> 28 U.S.C. § 1447(c) (West 2011).

¶ 50 At most, under that federal statute, a state court's review of its jurisdiction to hear a remanded case is limited to determining whether (1) the remand order was entered in federal court and (2) the federal court clerk's office mailed a certified copy of that remand order to the applicable state court clerk. *Id*.; *see also Limehouse v. Hulsey*, 744 S.E.2d 566, 574-75 (S.C. 2013). Indeed, some courts have held that only the remand order itself is necessary, and not the ministerial act of mailing the certified copy of the order to the state court. See, e.g., *Health for Life Brands, Inc. v. Powley*, 57 P.3d 726, 730 (Ariz. 2002). Regardless, each of those events occurred in this case, and plaintiff does not argue otherwise.

¶ 51 Accordingly, once jurisdiction re-vested in the circuit court of Cook County in May of 2012, whatever did or did not transpire in federal court prior to the entry of the remand order became moot or, at least, beyond the review of a state court. The amended complaint had been conclusively deemed filed by the district court's act of remanding the case; the CPD had been deemed by the federal judge, the parties to the litigation, and the circuit judge to be a party defendant; and each defendant filed motions to dismiss based on those assumptions. At most, at this stage, an Illinois court could review the compliance of the amended complaint, and the legal effect of non-compliance, under Supreme Court Rule 137—which we have done above. But any argument under federal civil procedural law, as a matter of law, was unavailable to plaintiff. We therefore reject plaintiff's reliance on FRCP 11 in this case.

¶ 52 3. *Whether Plaintiff's Nullity Argument is Barred by Judicial Estoppel*

¶ 53 Defendants object to plaintiff's attempt to disavow its own pleading under the doctrine of judicial estoppel, an equitable doctrine whose purpose is to protect the integrity of the judicial system from abuse by litigants. *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1996); see also *Berge*

v. Mader, 2011 IL App (1st) 103778, ¶ 12. Because of our ruling on the merits of plaintiff's nullity argument, we find it unnecessary to address this issue and express no opinion on it.[2]

¶ 54 B. Claims Against Live Nation

¶ 55 Finally, plaintiff argues that its breach-of-contract action against Live Nation should not have been dismissed. As with other portions of plaintiff's briefing, however, plaintiff's argument on this point is muddy at best. Plaintiff appears to be arguing that, by virtue of a contractual provision *not* in its contract with Live Nation, but in the *Live Nation / CPD contract*, it had a "contractual expectation" that its contract with Live Nation would be renewed for an additional year. Plaintiff bases this argument on the fact that the Live Nation / CPD contract had MBE and WBE goals, and that the contract required certain conditions be met before Live Nation "substituted" a WBE or MBE subcontractor at Northerly Island. Plaintiff thus claims that, by not extending its contract with plaintiff at the same time it was re-upping for another year with the CPD, Live Nation improperly "substituted" another janitorial subcontractor for plaintiff, in violation of the covenant of good faith and fair dealing in the Live Nation / CPD contract.

¶ 56 We reject that argument. When Live Nation renewed its contract with the CPD for another year, it did not "substitute" another janitorial subcontractor for plaintiff—it simply allowed the contract with plaintiff to end by its express terms and chose to re-let that janitorial subcontract for competitive bidding. As defendants correctly note, the substitution procedures

[2] Plaintiff pursues no other claims against the CPD. In fact, plaintiff now concedes that its sole count against the CDP, a tort claim, would be barred by the *Moorman* doctrine. See *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982). That leaves this court, and the CPD, to wonder why the CPD was joined in the lawsuit in the first place—other than the fact that it spoiled diversity jurisdiction and allowed plaintiff to return to its preferred forum, state court. Regardless, for our purposes, plaintiff is clearly not raising any further error with regard to the CPD.

for MBEs and WBEs in the Live Nation / CPD contract concerned scenarios where Live Nation would fire or underutilize a minority subcontractor. It was intended to prevent Live Nation from merely hiring a WBE or MBE subcontractor as window dressing to meet its minority goals, only to turn around and fire that subcontractor or fail to use it. If either of those events occurred, procedures were put in place to be sure that Live Nation continued to adhere to minority participation goals. But there is no allegation in the amended complaint, nor could there be, that Live Nation either fired plaintiff or underutilized its services—Live Nation merely let its contract with plaintiff end at its agreed-upon termination date of December 31, 2009. Under a common-sense, plain reading of the Live Nation / CPD contract, allowing a subcontract to end by its express terms, re-letting that subcontract for competitive bidding, and ultimately choosing a different subcontractor, is not "substituting" one subcontractor for another.

¶ 57 That leaves with plaintiff with nothing more to argue than Live Nation breached its contract with the CPD simply because it allowed its contract with plaintiff to end. But plaintiff has cited no authority in the case law, or in any contract before us, for the proposition that the duty of good faith and fair dealing requires one party to modify or extend the expiration date of a contract. There is case law that stands for the opposite principle. In *Continental Bank N.A. v. Modansky*, 997 F. 2d 309 (7th Cir. 1993), the lender, Continental Bank sued guarantors for breach of contract after they failed to compensate the lender for loans they had guaranteed on behalf of four lumber companies that filed for bankruptcy. The Seventh Circuit, interpreting Illinois law, held that the lender did not breach the duty of good faith and fair dealing where the lender honored the expiration date that was clearly set forth in a credit agreement between the lender and the lumber companies. *Id*. at 312. As the court in *Modansky* explained, "[t]he expiration date was a contract term, and the execution of the contract signified the lumber

companies' acceptance of that term." *Id*. The court also noted that, if the lumber companies intended that the credit would extend for one year, *they should have negotiated a later expiration date*." (Emphasis added.) *Id*.; see also *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 173 (2010) (despite parties' ongoing oral discussions and negotiations regarding possible restructuring of loan agreement, loan agreement did not require plaintiff to modify loan); *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1060 (1999) (covenant of good faith and fair dealing, which applies to every contract, does not enable guarantor to read non-existent obligation into contract). Here, the contract between Live Nation and plaintiff contained an express termination date. That agreement did not require Live Nation to modify the termination date. The covenant of good faith and fair dealing did not require Live Nation to extend its agreement with plaintiff.

¶ 58 Because there was no breach of the Live Nation / CPD contract as a matter of law, we need not consider whether plaintiff would have the right to assert such a breach in the first instance as a direct third-party beneficiary of that contract. See *Paukovitz v. Imperial Homes, Inc.*, 271 Ill. App. 3d 1037, 1039 (1995). Even if plaintiff could somehow overcome the language in the Live Nation / CPD contract that expressly disavows third-party beneficiaries—stating that it "is not intended to confer upon any person or entity any rights or remedies under or by reason of this Agreement other than the Parties hereto and their successors and assigns"—plaintiff has not pleaded and cannot plead a cognizable breach of that contract in any event, as we have just demonstrated. Plaintiff's claim for breach of contract fails as a matter of law and was properly dismissed.

¶ 59 C. Whether Dismissal With Prejudice Was Proper

¶ 60 We agree with defendants that "it is not clear whether [plaintiff] is arguing that the dismissal should not have been final without leave to replead." In its reply brief, plaintiff fails to clarify its argument. To the extent plaintiff is arguing that the dismissal of the amended complaint should have been without prejudice, its argument fails.

¶ 61 "Whether to allow an amendment of a complaint is a matter within the sound discretion of the trial court, and, absent an abuse of that discretion, the court's determination will not be overturned on review. [Citation.]" (Internal quotation marks omitted.) *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 331 (2008); accord *Loyola Academy v. S & S Roof Maintenance*, 146 Ill. 2d 263, 273-74 (1992). A reviewing court will find an abuse of discretion only where no reasonable person would take the view adopted by the trial court. *Compton*, 382 Ill. App. 3d at 331. "Given the broad discretion a trial court exercises in ruling on motions to amend pleadings prior to judgment, a court should not find that the denial of a motion to amend is prejudicial unless there has been a manifest abuse of such discretion." *Keefe-Shea Joint Venture v. City of Evanston*, 364 Ill. App. 3d 48, 61 (2005); see also *Loyola Academy*, 146 Ill. 2d at 273-74.

¶ 62 Here, plaintiff's proposed amendment is not a part of the record; plaintiff did not tender a proposed amended complaint to the trial court. As this court has explained:

> "There is no presumption that a proposed amendment will be a proper one and it is not error to refuse to allow an amendment that has not been presented when there are no means of determining whether or not it will be proper and sufficient. [Citation.] It has been held that a trial court cannot be said to have abused its discretion where a proposed amendment has not been submitted to the trial court or made a part of the record. [Citations.] Under such circumstances the reviewing

court is powerless to review the trial court's exercise of discretion. [Citation.]"

Loftus v. Mingo, 158 Ill. App. 3d 733, 746 (1987).

Applying these principles, we cannot say the trial court abused its discretion in denying plaintiff leave to file an amended complaint. Therefore, we must affirm its decision.

¶ 63 III. CONCLUSION

¶ 64 For the reasons stated, we affirm the decision of the circuit court of Cook County dismissing the amended complaint with prejudice.

¶ 65 Affirmed.