2015 IL App (1st) 132116-U

No. 1-13-2116

FIFTH DIVISION
December 23, 2015

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CONRAD BLACK CAPITAL CORPORATION, Plaintiff-Appellant, v. HORIZON PUBLICATIONS, INC., NORTH AMERICAN NEWSPAPERS LTD., F. DAVID RADLER, MELANIE WALSH, ROLAND L. MCBRIDE, W. GERALD STRONGMAN, BRUCE AUNGER, SHERBROOKE LEASING LTD., 1261860 ALBERTA LTD., 0714179 B.C. LTD., 0655730 B.C. LTD., 0749009 B.C. LTD., 1455354 ALBERTA LTD., JOHN DAVID DODD, LINDA SUE SCHAFFER-DODD, THOMAS A. ROSE, TERRY SALMAN, JOHN H. SATTERWHITE, JERRY STRADER, and TIMMUS COMPANY, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 31356 The Honorable Neil H. Cohen, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Gordon and Palmer concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court properly dismissed the majority of plaintiff's eight-count complaint as it related to a shareholders' agreement for which a condition precedent had

not yet been satisfied, thereby negating the majority of plaintiff's claims, *i.e.*, breach of contract, breach of fiduciary duty, and declaratory judgment. The circuit court properly considered the portions of the two remaining counts of the complaint as a declaratory judgment where plaintiff failed to establish a claim for damages related to the alleged improper sale and transfer of stock shares. The circuit court also did not have jurisdiction to consider plaintiff's request for the inspection of records under Delaware General Corporation Law.

¶ 2 Plaintiff, Conrad Black Capital Corporation (Conrad Capital), appeals the circuit court's dismissal of the majority of its eight-count amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2008)) in favor of defendants, Horizon Publications, Inc. (Horizon), North American Newspapers Ltd. (North American), F. David Radler, Melanie Walsh, Roland L. McBride, W. Gerald Strongman, Bruce Aunger, Sherbrooke Leasing Ltd., 1261860 Alberta Ltd., 0714179 B.C. Ltd., 0655730 B.C. Ltd., 0749009 B.C. Ltd., John David Dodd, Linda Sue Schaffer-Dodd, Thomas A. Rose, Terry Salman, John H. Satterwhite, Jerry Strader, and Timmus Company. Plaintiff's main contention on appeal is that the circuit court erred in dismissing its breach of contract claim in the amended complaint where defendants' failed to honor the parties' shareholders agreement by refusing to purchase plaintiff's shares of Horizon. Based on the following, we affirm the judgment of the circuit court.

¶ 3 FACTS

¶ 4 Horizon is a Delaware corporation formed in 1999 in order to acquire and operate community newspapers in the United States. Conrad Capital is a Canadian corporation that holds 27% of Horizon's shares. Conrad Black is the chairman and director of Conrad

Capital. According to plaintiff's amended complaint, North American is a Canadian corporation that held over 50% of Horizon's shares as of March 2009. Plaintiff's amended complaint alleged that F. Donal Radler is the president and owner of North American. Black and Radler were former business colleagues whose relationship turned sour in 2007 following the exposition of their criminal involvement in Hollinger International, Inc. The parties agree on the mutual disdain between Black and Radler.

¶ 5 On December 19, 2008, Conrad Capital delivered to Horizon a "Notice of Exercise," notifying Horizon of its intent to sell all of its Horizon shares. Section 3 of the shareholders' agreement provided:

> "Except as provided in Section 2 [Transfer by Gift or Devise] and Section 5 [Options to Sell Shares and Operations Shares Upon Permanent Disability or Death] , a Shareholder shall transfer all or any part of the Shares or Operations Shares he now owns or hereafter acquires only in accordance with the procedures set forth in this Section 3.
>
> (A) Option to Publications and/or Operations. In the event a Shareholder ('Selling Shareholder') desires to sell all or any part of his Shares and/or Operations Shares, as the case may be, said Selling Shareholder shall notify Publications and/or Operations, as the case may be, and all other Shareholders ('Non-Selling Shareholders') in writing. Publications and/or Operations shall each then have the respective right of first refusal, for a period of thirty (30) days from the date of the notice from the Selling Shareholder, to purchase all or a portion of said Shares and Operations Shares, at its respective sole option, as the case may be, for the purchase price and upon the terms and conditions set forth in Section 4

herein. Within said thirty (30) day period, the Shareholders of Publications and/or Operations, as the case may be, shall be required to call and hold a meeting of Shareholders. At such meeting, Publications and/or Operations, as the case may be, shall determine whether it shall exercise all or any part of its respective right of first refusal with respect to the Shares or Operations Shares of the Selling Shareholder and shall notify the Selling Shareholder of its respective election. A vote by a majority of the Shares or Operations Shares, as the case may be, held by the Non-Selling Shareholders shall be sufficient to determine the action of Publications and/or Operations, as the case may be. Notwithstanding anything hereinabove to the contrary, Publications' or Operations' respective right to purchase less than all of said Shares and/or the Operations Shares, as the case may be, is expressly conditioned upon the balance of such Shares or the Operations Shares, as the case may be, being purchased pursuant to the provisions of Section 3(B).

(B) Obligations of all Non-Selling Shareholders. If, following the procedures set forth in Section 3(A), Publications or Operations shall have exercised its respective right of first refusal with respect to less than all the Shares or Operations Shares, as the case may be, offered by the Selling Shareholder, or Publications and/or Operations, as the case may be, shall have declined to exercise its respective right at all, then the Shares or the Operations Shares, as the case may be, to which Publications and/or Operations, as the case may be, has not exercised its right to purchase shall be bought by all the Non-Selling Shareholders, each purchasing his respective 'proportionate share' of said

> remaining Shares or remaining Operations Shares, as the case may be. Such obligation shall be consummated upon the terms and conditions set forth in Section 3(A)."

¶ 6 Pursuant to section 4 of the shareholders' agreement, the purchase price when a shareholder tendered its shares was the fair market value of the shares at the end of the calendar year immediately preceding receipt of the offer to sell, less any distributions made between the valuation and closing date. The fair market value, according to section 4, was calculated according to a formula multiplying 7.8 times Horizon's earnings before interest, taxes, depreciation, and amortization (known as EBITDA) for the prior calendar year, less long-term debt, divided by the number of outstanding shares.

¶ 7 Section 8 of the shareholders' agreement further provided:

> "The parties agree that the Shares and Operations Shares cannot readily be purchased or sold in the open market, and for that reason, among others, the parties will be irreparably damaged in the event that this Agreement is not specifically enforced. Should any dispute arise concerning the sale or disposition of Shares and/or Operation Shares or any other matter contemplated by this Agreement, an injunction may be issued restraining any sale or disposition of Shares and/or Operation Shares or any matter contemplated by this Agreement pending the determination of such controversy. In the event of any controversy concerning the right or obligation to purchase or sell any of the Shares and/or Operations Shares or any other matter contemplated by this Agreement, such right or obligation shall be enforceable in the court of equity by a decree of specific performance. Such remedy shall, however, be cumulative and not exclusive, and

shall be in addition to any other remedy which the parties may have, including, but not limited to, an action for declaratory judgment."

¶ 8 On December 29, 2008, ten days after providing notice of its intent to sell its shares, Conrad Capital learned that the remaining fourteen Horizon shareholders also submitted notices of intent to sell their Horizon shares.[1] In response, Horizon's board of directors called a special meeting of the shareholders for January 20, 2009. However, according to plaintiff's amended complaint, on January 13 and 15, 2009, counsel for Horizon advised counsel for Conrad Capital that the subsequent tender offers of the remaining shareholders had created a "stalemate" and, therefore, neither Horizon nor Horizon's shareholders would purchase Conrad Capital's tendered shares.

¶ 9 Thereafter, Conrad Capital requested to postpone the shareholders' meeting until February 10, 2009. A notice was sent to the shareholders informing them that the meeting had been postponed and informing them that:

"It is the intention of the Board and holders of a majority of the Company's stock, including Conrad Black Capital Corporation, that the deferral of the meeting would be without prejudice to any party's rights (under the Shareholder's Agreement and otherwise), and that the proposed meeting would be considered timely under such Agreement, assuming it occurs on or prior to February 10, 2009 (or such later date as the holders of a majority of the corporation's stock may agree upon), even if such meeting occurs more than 30 days after a stockholder gave his or her notice."

[1] Relevant to this case was the economic tumult of 2008, including the stockmarket crash and its effect on the newspaper market.

According to defendants, during the postponement period, Conrad Capital "shopped" its shares to a third party.

¶ 10 The shareholders' meeting was again postponed from February 10, 2009, until February 20, 2009, and then postponed indefinitely. The second postponement notice contained an identical disclaimer as the first, albeit with a different target date. The third notice postponing the meeting indefinitely provided that "[e]ither the management of the Company or Conrad Black Capital Corporation may reschedule the meeting on not less than ten (10) days advance notice" and further noted that "this further deferral of the meeting would continue to be without prejudice to any party's rights *** and that the proposed meeting would be considered timely under the Agreement even if such meeting occurs more than 30 days after a stockholder gave his or her notice." The parties dispute whether Conrad Capital agreed to the latter two postponements. No meeting has ever taken place.

¶ 11 Meanwhile, according to plaintiff's amended complaint, on February 13, 2008, Ronald McBride, one of the named defendants, issued a notice to the shareholders that Peter Atkinson, an original shareholder, had given notice of his desire to sell his 10.15 shares of Horizon pursuant to the terms of the shareholders' agreement (Atkinson notice). The notice indicated that the majority of Horizon shareholders executed written consents waiving a shareholders' meeting pursuant to the terms of the Horizon by-laws and determining that Horizon was declining its right to purchase the shares. The notice provided that "[b]ecause Horizon has decided not to purchase any of the shares, each of the shareholders (other than Mr. Atkinson) now has the obligation to acquire their *pro rata* portion of his shares" with the shareholders as a group being obligated to purchase

all of the shares. Moreover, the notice informed the non-selling shareholders that if they did not wish to purchase all of Atkinson's shares, Horizon would look for additional purchasers "to avoid breaching the terms of the [shareholders'] agreement." Based on a value of $17,324,513 for the preceding year, the total purchase price for Atkinson's 2.154% stake was $373,170.

¶ 12 Then, on March 7, 2008, McBride issued a second notice on behalf of Horizon notifying shareholders that the Kipnis trust had given notice of its desire to sell its 5.07 shares of Horizon pursuant to the shareholders' agreement (Kipnis notice). The Kipnis notice indicated that Horizon had called a shareholders' meeting for March 17, 2008, to consider whether Horizon would exercise its right of first refusal for the Kipnis shares. The notice additionally provided that if the existing shareholders did not wish to purchase all of the Kipnis shares then Horizon would look for other purchasers to "avoid breaching the terms of the [shareholders'] agreement." The valuation of the Kipnis shares, based on the preceding year, was $186,412.

¶ 13 According to plaintiff's amended complaint, six entities ultimately purchased the Atkinson and Kipnis trust shares, only one of which was an existing Horizon shareholder, namely, North American. The other five entities allegedly were affiliated with Radler.

¶ 14 Nearly one year after tendering its shares, on January 28, 2010, Conrad Capital sent a registered letter to Horizon requesting permission to examine and copy Horizon's books and records pursuant to section 220 of the Delaware General Corporation Law. Conrad Capital alleged its purpose for the request was to investigate possible management improprieties, to receive a current list of stockholders and directors, and to determine an accurate valuation of Horizon's shares. Horizon denied the request. Conrad

Capital sent a second inspection request, which again was denied by Horizon. Horizon, however, provided Conrad Capital with an April 23, 2010, shareholder list, Horizon's by-laws, minutes from the board and shareholder meetings since 2006, and audited financial statements. Notwithstanding, Conrad Capital sent a third inspection request to Horizon. The request was denied.

¶ 15 On September 6, 2011, plaintiff filed its initial five-count complaint against defendants. Defendants filed a motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2008)). In a written order, on April 19, 2012, the circuit court dismissed plaintiff's breach of contract (count I) and breach of fiduciary duty (count II) claims without prejudice and dismissed plaintiff's derivative claim for breach of fiduciary duty (count III) with prejudice. The circuit court denied defendants' motion to dismiss plaintiff's claim for declaratory judgment (count IV) and for access to Horizon's books and records (count V).

¶ 16 On November 29, 2012, plaintiff filed an eight-count amended complaint against defendants. In count I, plaintiff alleged defendants' failure to purchase its Horizon shares breached the shareholders' agreement. In count II, plaintiff alleged defendants breached the implied covenant of good faith and fair dealing inherent in the shareholders' agreement. In count III, plaintiff alleged the transfer of the Atkinson and Kipnis trust shares to third parties breached the shareholders' agreement. In count IV, plaintiff alleged breach of fiduciary duty against the Horizon directors. In count V, plaintiff alleged the Horizon shareholders aided and abetted the breaches of fiduciary duties in connection with its share tender. In count VI, plaintiff alleged the derivative breach of fiduciary duty claim that was dismissed with prejudice by the circuit court in its April 19,

2012, order for purposes of appeal. In count VII, plaintiff requested a declaratory judgment. In count VIII, plaintiff requested an order to compel inspection of Horizon's books and records under section 220 of the Delaware General Corporation Law. In response, defendants filed a section 2-619 motion to dismiss plaintiff's entire amended complaint. Plaintiff then filed a motion for partial summary judgment.

¶ 17 On May 13, 2013, the circuit court entered a written order dismissing counts I (breach of contract), II (breach of implied covenant of good faith and fair dealing), V (aiding and abetting the breach of fiduciary duties against the shareholders), VII (declaratory judgment), and VIII (order to compel inspection of Horizon's books and records pursuant to section 220 of the Delaware General Corporation Law). The circuit court additionally dismissed portions of counts III (breach of contract related to the sale of the Atkinson and Kipnis trust shares to a third party) and IV (breach of fiduciary duty against the Horizon directors). With regard to count III, the circuit court held that plaintiff was not entitled to the requested constructive trust over the Atkinson and Kipnis trust shares, even assuming the transfer restriction was enforceable. The court further held that plaintiff was not entitled to attorney fees or costs pursuant to the American rule. The circuit court, however, found that, since plaintiff did not seek money damages for the alleged breach, it essentially sought a declaration that the transfers were null and void. Count III survived dismissal with regard to the declaratory judgment of the Atkinson and Kipnis trust transfers. Count IV was based on a breach of fiduciary duty related to the Atkinson and Kipnis trust transfers and, therefore, survived dismissal as well.

¶ 18 On June 10, 2013, the circuit court entered a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010**)** finding there was no just reason to delay the appeal of its May 13, 2013, order.

¶ 19 ANALYSIS

¶ 20 Plaintiff appeals the dismissal of its amended complaint pursuant to section 2-619 of the Code. A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts an affirmative matter to otherwise defeat the claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. In considering a section 2-619 motion to dismiss, a court reviews all pleadings and supporting documents in a light most favorable to the nonmoving party. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367-68 (2003). However, conclusions of fact or law unsupported by allegations of specific facts are not taken as true and are not considered by the court in ruling on the motion. *Mayfield v. ACME Barrel Co.*, 258 Ill. App. 3d 32, 34 (1994). The court must determine whether the existence of a genuine issue of material fact precludes dismissal or, absent such an issue of fact, whether the asserted affirmative matter makes dismissal proper as a matter of law. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). We review the dismissal of a complaint pursuant to section 2-619 *de novo*. *Id*. at 116.

¶ 21 I. Breach of Shareholders' Agreement

¶ 22 Plaintiff contends that its amended complaint set forth a valid claim for breach of contract against defendants. More specifically, plaintiff argues that its written tender notice triggered defendants' obligation to purchase plaintiff's shares and defendants' refusal to do so violated the shareholders' agreement. Plaintiff further argues the circuit

court erred in finding that a Horizon shareholders' meeting was a condition precedent to the sale of its shares. However, even if the shareholders' meeting was required, plaintiff maintains that a meeting effectively took place when North American, the majority shareholder, communicated on behalf of Horizon that neither North American nor Horizon would purchase plaintiff's shares. In the alternative, plaintiff argues that Horizon anticipatorily breached the shareholders' agreement before the shareholders' meeting had been postponed by communicating that neither Horizon nor the shareholders would purchase plaintiff's shares, thereby nullifying the need for the meeting. Moreover, plaintiff contends it set forth an enforceable claim for declaratory judgment (count VI) in its amended complaint where section 8 of the shareholders' agreement contemplated declaratory judgment in addition to the equitable remedy of specific performance.

¶ 23 Defendants respond that Horizon had an exclusive right of first refusal to purchase Conrad Capital's shares. However, in order to execute that right, the shareholders were required to conduct a shareholders' meeting to determine whether Horizon would repurchase the shares in question. Defendants maintain that, because the shareholders' meeting was postponed indefinitely and has never taken place, Horizon continues to have its right of first refusal. Defendants argue that they were not required to take any action in the interim. In fact, defendants contend that Conrad Capital had the ability to satisfy the precondition of the requisite meeting, but postponed the originally scheduled meeting. Then, Conrad Capital was notified of the two subsequent postponements without ever attempting to exercise its right to reconvene the shareholders' meeting. Defendants further argue that the doctrine of anticipatory repudiation does not apply to the facts of this case because the alleged statements by

Horizon lawyers regarding the company's willingness to purchase Conrad Capital's shares occurred before any duty on Horizon's part arose where the requisite shareholders' meeting had never occurred. In other words, the meeting was a condition precedent that had to be, but was never, satisfied before any duty arose on Horizon to exercise its right of first refusal. Moreover, defendants maintain that the affidavit upon which Conrad Capital supports its anticipatory repudiation argument is deficient where it fails to provide a definite and unequivocal manifestation of the company's intent not to render the promised performance.

¶ 24 In order to resolve plaintiff's breach of contract claim, we must rely on the language of the shareholders' agreement. A court must attempt to give effect to the parties' intentions when interpreting a contract. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). The best indication of the parties' intent is the plain meaning of the contract's language, looking at the contract as a whole. *Id*. at 233.

¶ 25 As stated, section 3(A) of the shareholders' agreement provided:

> "In the event a Shareholder ('Selling Shareholder') desires to sell all or any part of his Shares and/or Operations Shares, as the case may be, said Selling Shareholder shall notify Publications and/or Operations, as the case may be, and all other Shareholders ('Non-Selling Shareholders') in writing. Publications and/or Operations shall each then have the respective right of first refusal, for a period of thirty (30) days from the date of the notice from the Selling Shareholder, to purchase all or a portion of said Shares and Operations Shares, at its respective sole option, as the case may be, for the purchase price and upon the terms and conditions set forth in Section 4 herein. Within said thirty (30) day period, the

> Shareholders of Publications and/or Operations, as the case may be, shall be required to call and hold a meeting of Shareholders. At such meeting, Publications and/or Operations, as the case may be, shall determine whether it shall exercise all or any part of its respective right of first refusal with respect to the Shares or Operations Shares of the Selling Shareholder and shall notify the Selling Shareholder of its respective election. A vote by a majority of the Shares or Operations Shares, as the case may be, held by the Non-Selling Shareholders shall be sufficient to determine the action of Publications and/or Operations, as the case may be. Notwithstanding anything hereinabove to the contrary, Publications' or Operations' respective right to purchase less than all of said Shares and/or the Operations Shares, as the case may be, is expressly conditioned upon the balance of such Shares or the Operations Shares, as the case may be, being purchased pursuant to the provisions of Section 3(B)."

¶ 26 There is no question that Conrad Capital satisfied the notification requirement by expressing its desire to sell its shares on December 19 and 22, 2008. Moreover, there is no question that the shareholders failed to hold a meeting within 30 days of that notice. The language of the shareholders' agreement expressly required that the shareholders "call and hold" a meeting within the 30 day time period after the selling shareholder provided notice of its intent to sell. Assuming the Horizon board did not have the authority to postpone the shareholders' meeting without penalty, and defendants point to nothing in the record providing such authority, Horizon breached the shareholders' agreement in failing to hold a meeting within 30 days of December 22, 2008, or at least by February 10, 2009, the date Conrad Capital requested to postpone the initial meeting.

¶ 27 Conrad Capital, however, does not seek specific performance of the shareholders' meeting. Instead, Conrad Capital insists that a "meeting" took place because the majority shareholder, North American, informed Conrad Capital *vis a vis* its attorneys that neither Horizon nor the shareholders planned to purchase plaintiff's shares. In support of its argument, Conrad Capital relies on an affidavit filed by its counsel, Stan Freedman. In the affidavit, Freedman attests that on January 13, 2009, he had a telephone conversation with Robert Rose, who represented North American, Radler, and maybe Horizon as well. The affidavit provided that "in this conversation, Rose told [Freedman] that his clients and/or Horizon were of the view that the tenders of shares by various shareholders in December 2008 following [Conrad Capital's] tender had created 'a wash,' *i.e.*, a stalemate, and that a court would not enforce [Conrad Capital's] rights under the Shareholders Agreement. Rose also stated that none of the Horizon shareholders would buy [Conrad Capital's] tendered shares." Freedman's affidavit continued by stating that, on January 15, 2009, he had a conversation with Rose and Douglas Newirk, attorney for Horizon and maybe Radler, North American, and other Horizon shareholders. Freedman attested that "[i]n this conversation, Rose and/or Newirk told [him] that Horizon would not buy [Conrad Capital's] tendered shares. Taken together, these January 13 and January 15, 2009, conversations demonstrated to [him] the futility of holding any meeting of shareholders." Defendants have not provided counter-affidavits challenging this information; therefore, the facts stated therein are deemed admitted. See *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). Notwithstanding, we conclude that the two conversations between the parties' attorneys discussing defendants' intended actions does

not satisfy the requirement of the shareholders' agreement that a meeting be called and held.

¶ 28 The Horizon by-laws did provide a method for taking "action" without a shareholders' meeting, but the requirements for such action also were not satisfied by Freedman's affidavit. Pursuant to section 1.6 of the by-laws:

> "[a]ny action required to be taken at any annual or special meeting of stockholders of the Company, or any action which may be taken at any annual or special meeting of the stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted."

Freedman's affidavit failed to demonstrate that consent in writing was obtained by any of defendants, let alone the requisite minimum number necessary to authorize an "action." Accordingly, Freedman's conversations with Rose and Newirk did not satisfy the requirements of holding and calling a meeting pursuant to the shareholders' agreement or the requirements for an action without a meeting. Because no meeting ever took place, Horizon has not been forced to formally exercise its right of first refusal. Based on the language of the parties' shareholders' agreement, at this time, Conrad Capital is entitled only to specific performance of a shareholders' meeting, or the equivalent pursuant to the by-laws.

¶ 29 We also note that, contrary to its argument, Conrad Capital had the authority to insist on the shareholders' meeting. Pursuant to section 1.3 of the Horizon by-laws, "[s]pecial meetings may be called at any time by the President or the Board of Directors, or the holders of not less than one-fifth (1/5) of all of the outstanding stock entitled to vote at such meeting." Conrad Capital holds 27% of the Horizon shares, and, therefore, had the capability to call a meeting at any time. Therefore, contrary to its argument, Conrad Capital was not at the mercy of defendants. Plaintiff could have triggered the condition precedent at any time prior to suffering the dramatic consequences that it complains of.

¶ 30 In sum, we conclude that the circuit court properly dismissed plaintiff's claim for breach of the shareholders' agreement. Because we find plaintiff was not entitled to the specific performance requested, namely, forcing Horizon to purchase plaintiff's shares, plaintiff additionally was not entitled to a declaratory judgment stating as much. We, therefore, find the circuit court properly dismissed plaintiff's claim for a declaratory judgment. In light of our finding, we need not consider plaintiff's anticipatory repudiation argument.

¶ 31 II. Breach of the Implied Covenant of Good Faith and Fair Dealing

¶ 32 Plaintiff additionally contends the shareholders separately breached an implied covenant of good faith and fair dealing where they *en masse* tendered their Horizon shares after plaintiff tendered its shares, thereby causing a "wash" and a "stalemate."

¶ 33 The supreme court has advised that an independent cause of action for breach of an implied duty of good faith and fair dealing does not exist, except in the narrow context of cases involving an insurer's obligation to settle with a third party that sued the policy

holder. *Voyles v. Sandia Mortgage Corp*. 196 Ill. 2d 288, 295-96. The facts of this case do not fall within that narrow exception. Moreover, plaintiff concedes that the covenant of good faith and fair dealing acts as a construction aid in determining the intent of the contracting parties.

¶ 34 Section 3(B) of the shareholders' agreement, which was directed at the shareholders and is relevant to this contention, provided:

> "If, following the procedures set forth in Section 3(A), Publications or Operations shall have exercised its respective right of first refusal with respect to less than all the Shares or Operations Shares, as the case may be, offered by the Selling Shareholder, or Publications and/or Operations, as the case may be, shall have declined to exercise its respective right at all, then the Shares or the Operations Shares, as the case may be, to which Publications and/or Operations, as the case may be, has not exercised its right to purchase shall be bought by all the Non-Selling Shareholders, each purchasing his respective 'proportionate share' of said remaining Shares or remaining Operations Shares, as the case may be. Such obligation shall be consummated upon the terms and conditions set forth in Section 3(A)."

The language of section 3(B) of the shareholders' agreement makes clear that the parties' intent was that the shareholders' obligation to purchase any tendered shares is only triggered upon Horizon's exercise of its right of first refusal. Because we have determined that the condition precedent triggering Horizon's obligation, namely, the shareholders' meeting, was not satisfied, Horizon has not exercised its right of first refusal and, therefore, the shareholders' obligations with regard to Conrad Capital's share

tender has not yet been triggered. There is no need to rely on the implied duty of good faith and fair dealing to assist in clarifying the terms of the agreement. We conclude that the circuit court properly dismissed plaintiff's claim for breach of the duty of good faith and fair dealing.

¶ 35 III. Breach of Fiduciary Duty of Horizon Directors and Shareholders

¶ 36 Plaintiff does not present any substantive argument to support this claim, instead relying on its arguments related to the breach of the shareholders' agreement claim. We, therefore, need not address plaintiff's contention related to the Horizon directors' alleged breach of fiduciary duty to it and the shareholders' actions aiding and abetting that breach of fiduciary duty where we have concluded that defendants did not breach the shareholders' agreement by not purchasing plaintiff's Horizon shares.

¶ 37 IV. Improper Sale/Transfer of the Atkinson and Kipnis Trust Shares

¶ 38 Plaintiff next contends the circuit court erred in converting its claims regarding the improper sale of the Atkinson and Kipnis trust shares to third parties and subsequent share transfers to North American into a declaratory judgment because it failed to request contract damages. Plaintiff argues that it was unable to request specified damages because defendants consistently prevented it from learning the details of the share transfer. Plaintiff maintains that, pursuant to the language of the shareholders' agreement, it was "irreparably damaged" because the share transfers violated the terms of the agreement. Moreover, plaintiff argues that it was damaged by the improper share transfer because, if Atkinson and the Kipnis trust were precluded from selling their shares to third parties, they would have remained shareholders and could have supported the timely sale of Conrad Capital's shares.

¶ 39 Defendants respond that plaintiff's amended complaint failed to allege a basis for damages. Instead, plaintiff's amended complaint sought relief in the form of declaring the Atkinson and Kipnis trust sales and transfers null and void, imposing a constructive trust, and awarding attorney fees and costs. On appeal, plaintiff only contests the circuit court's finding with regard to declaring the sales and transfers null and void, but attempts to assert bases for damages for the first time on appeal. Defendants argue that the new bases for damages are forfeited.

¶ 40 In order to present a claim for breach of contract, a plaintiff must allege sufficient facts to demonstrate the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and damages resulting from the breach. *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813, 823 (2005). The allegations of plaintiff's amended complaint do not present any facts demonstrating it suffered quantifiable damages resulting from the alleged improper sale and transfer of the Atkinson and Kipnis trust shares. The only damages alleged are the dilution of its ownership rights *vis a vis* Radler, based on the presumption that Radler orchestrated the sales and transfers of the shares to people or entities under his control. If, in fact, the sales and transfers were improper, a declaratory judgment making the sales and transfers null and void would restore plaintiff's presumptive power based on his proportionate ownership. Plaintiff, therefore, cannot support its breach of contract claim.

¶ 41 To the extent plaintiff presented damages-related arguments for the first time on appeal, those arguments are forfeited. *Mabry v. Boler*, 2012 IL App (1) 111464, ¶ 15. Despite forfeiture, however, plaintiff's attempt to explain its inability to establish damages and its speculative argument regarding what may have happened had the

Atkinson and Kipnis trust sales been precluded fail to sustain the burden of establishing damages. Basic contract law requires that a plaintiff establish damages with reasonable certainty and prohibits damages based on conjecture and speculation. *Valenti v. Mitsubishi Motor Sales of American, Inc.*, 332 Ill. App. 3d 969, 973 (2002). Plaintiff has not sustained its burden. We, therefore, conclude that the circuit court did not err in treating plaintiff's allegation that the Atkinson and Kipnis trust share sales and transfers violated the terms of the shareholders' agreement as a declaratory judgment.

¶ 42 V. Inspection of Horizon's Books and Records

¶ 43 Plaintiff finally contends the circuit court erred in finding it lacked jurisdiction to enforce its request to inspect Horizon's books and records to support its claims. According to plaintiff, because Horizon is a foreign corporation doing business in Illinois, Horizon must comply with Illinois law governing the inspection of books and records.

¶ 44 The fundamental problem with plaintiff's request was that it was filed under *Delaware* law, not Illinois law, namely, section 220 of the Delaware General Corporation Law. Section 220(d) of the Delaware General Corporation Law, however, explicitly states that "[t]he Court of Chancery is hereby vested with *exclusive* jurisdiction to determine whether a director is entitled to the inspection sought." (Emphasis added.) 77 Del. Laws § 220(d). The Court of Chancery is a specific court created by the Delaware Constitution. In contrast, the case cited by plaintiff in support of its position is an Illinois case interpreting Illinois law. See, *e.g.*, *McCormick v. Statler Hotels Delaware Corp.*, 55 Ill. App. 2d 21, 33-34 (1964). Unlike the plaintiff in *McCormick*, plaintiff here has not filed an inspection request of Horizon's books and records under Illinois law. Plaintiff

has not cited any law establishing the circuit court's jurisdiction to impose Delaware law, specifically the Delaware Court of Chancery. We, therefore, conclude the claim was properly dismissed.

¶ 45 CONCLUSION

¶ 46 We affirm the judgment of the circuit court in dismissing the claims presented on appeal pursuant to section 2-619.

¶ 47 Affirmed.