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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

J&L JEWELRY, INC.,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 13 L 2908
)	
EPK MANAGEMENT, LP,)	
d/b/a CHICAGO SUPER MALL,)	The Honorable
)	Sanjay Tailor,
Defendant-Appellee.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Complaint for breach of an implied-in-law bailment was properly dismissed with prejudice where retail space license agreement, entered into by the parties and attached as an exhibit, expressly limited their relationship to that of licensor and licensee.

¶ 2 Plaintiff J&L Jewelry, Inc. (J&L), a jewelry vendor, appeals from an order of the circuit court of Cook County granting the motion of defendant EPK Management, LP (EPK), doing business as Chicago Super Mall, to dismiss J&L's complaint for breach of an implied bailment, for failure to state a claim pursuant to section 2-615 of the Illinois Code of Civil Procedure

(Code) (735 ILCS 5/2-615 (West 2010)). J&L contends that its complaint sufficiently stated a cause of action for breach of an implied bailment and should not have been dismissed with prejudice. We affirm for the reasons that follow.

¶ 3 On March 21, 2013, J&L filed a complaint for breach of an implied bailment against EPK, a limited partnership that licenses retail space at its commercial building located at 5220 South Pulaski Road, Chicago, Illinois. J&L alleged the following facts in its complaint.

¶ 4 J&L entered into a retail space license agreement with EPK on November 17, 2005, and has operated a jewelry booth at EPK's "Super Discount Mall" since then. On June 11, 2010, J&L renewed its license agreement with EPK on the same terms as before. There are more than 100 vendors at the mall and about 11 vendors sold jewelry. Due to the high value and risk of loss or theft, jewelry vendors take additional precautions. Each jewelry vendor has a commercial vault in their booth to store inventory during the evening. J&L spends about half an hour every night storing its inventory in its commercial vault and about an hour each morning removing its inventory from the commercial vault for display.

¶ 5 The mall is open for business Monday through Saturday, from 10 a.m. to 8 p.m., and Sunday, from 10 a.m. to 7 p.m. Upon the close of business each evening, vendors leave the building and are not allowed back inside until the doors open for business the next day.

¶ 6 Quoting its license agreement attached as an exhibit to its complaint, which requires that vendors "must have their locations open, operating and fully stocked in order to do the maximum amount of business during the mall operating hours," J&L alleged that vendors generally leave their entire inventory overnight at the mall due to the volume of their goods and the little time to get ready for business in the morning. J&L further alleged that it is unsafe for jewelry vendors like J&L to remove their entire inventory from the mall at the close of business each evening.

¶ 7 On the evening of November 7, 2012, intruders entered the mall by blasting a hole through the brick wall at the rear of the building. The intruders then blasted a hole into the back of J&L's commercial vault and took J&L's entire inventory of jewelry. J&L's commercial vault was located at the rear of its booth, against a wall that J&L shared with a vacant booth. Motion sensors inside the mall were not triggered.

¶ 8 Under the heading "BREACH OF BAILMENT," J&L alleged that a bailor-bailee relationship, "by virtue of a constructive bailment and/or bailment implied in law," was created between EPK and J&L when EPK assumed care, custody, and exclusive control of J&L's inventory every night. J&L alleged that EPK, "as bailee of J&L's inventory, had a duty to keep it safe between the hours of 8:00 p.m. until 10:00 a.m. the following day on Mondays through Saturdays, and between the hours of 7:00 p.m. on Sundays until 10:00 a.m. on Monday mornings," and that EPK had a duty "to deliver the inventory back to J&L every morning the store opened for business." J&L alleged that EPK failed to keep the inventory safe and deliver it to J&L on November 7 and 8, 2012, due to EPK's failure to properly secure the mall. J&L further alleged that EPK was negligent in failing to properly operate its motion sensors and meet retail industry security standards of having adequate security measures.

¶ 9 Ultimately, J&L alleged that it sustained over \$600,000 in damages as a result of EPK's negligence in securing the mall and breach of bailment obligations. Notwithstanding "language in paragraph 3 of the License Agreement that [EPK] assumes no liability for theft," J&L maintained that common law bailment principles do not permit EPK to avoid liability "when its actions lulled [its] vendors, including J&L, into a false sense of security that their valuable goods and inventory would [be] protected during evening hours, and when only [EPK] was in a position to safeguard the goods and inventory during the evening hours."

¶ 10 On May 20, 2013, EPK filed a section 2-615 motion to dismiss J&L's complaint for failure to state a cause of action, *i.e.*, "J&L did not and will never be able to plead and prove the essential elements for a bailment, as there was not a bailee/bailor relationship between J&L and EPK." EPK argued that J&L's complaint failed to allege any actual transfer or delivery of any goods from J&L to EPK, nor any actual acceptance of exclusive possession of J&L's goods by EPK. According to EPK, J&L's complaint simply alleged a "constructive bailment" between EPK and J&L, the breach of EPK's various duties, and conclusory statements that EPK was negligent. EPK contended that J&L's complaint should be dismissed with prejudice because of J&L's failure to properly plead the existence of and the right to recovery under a bailment theory. EPK added that it never exercised any possession, control, or dominion over the property inside J&L's commercial vault because EPK was never given keys to the vault, nor did EPK have any knowledge of the specific articles inside.

¶ 11 On June 27, 2013, J&L filed a response to EPK's motion to dismiss, arguing that it had alleged sufficient facts for a breach of bailment claim because constructive transfer of possession and implied acceptance are sufficient to satisfy the elements of actual delivery and actual acceptance. J&L contended that there was a transfer of goods and that EPK took constructive possession of the goods in the mall. As support, J&L cited the specific allegations in its underlying complaint that upon the close of business each evening, vendors leave the building and are not allowed back inside until the doors open for business the next day, and that J&L reasonably believed that its inventory would be safe during the evening when the building was closed to the public. Without citation to its underlying complaint, J&L contended that it had "satisfied the act of delivering the property to [EPK] by relinquishing control and transferring the possession of its property to [EPK]. J&L added that it constructively transferred possession of

its property to EPK, again citing the allegation in its complaint that it reasonably believed that its inventory would be safe in the evening when the building was closed to the public. J&L also maintained that EPK had exclusive possession of J&L's commercial vault and the jewelry inside "since J&L relinquished possession of those properties when [EPK's] policies required J&L to leave the building after the mall's closing that day." As support, J&L cited the specific allegations in its complaint that the mall is open for business Monday through Saturday, from 10 a.m. to 8 p.m., and Sunday, from 10 a.m. to 7 p.m., and that intruders broke into the mall on the evening of November 7, 2012, and took J&L's entire jewelry inventory without triggering any motion sensors. J&L further maintained that it had alleged "implied acceptance by reason of EPK's exclusive possession and knowledge of the same."

¶ 12 On July 30, 2013, EPK filed a reply in support of its section 2-615 motion to dismiss J&L's complaint for failure to state a cause of action. EPK explained that J&L cannot establish the element of delivery, actual or implied, for three reasons: (1) J&L conceded in its response that it cannot allege actual delivery of the contents of its commercial vault; (2) J&L misstates Illinois law by implying that transfer of possession, as opposed to transfer of *exclusive* possession, is all that is required to establish the delivery element; and (3) notwithstanding, J&L cannot establish the transfer of *exclusive* possession because EPK was never given keys to J&L's commercial vault, and "exclusive control," as alleged in J&L's complaint, is insufficient to establish the elements of both delivery and acceptance, which are separate, distinct elements of a bailment.

¶ 13 Moreover, EPK explained that J&L cannot establish the element of acceptance, actual or implied, for three reasons: (1) J&L conceded in its response that it cannot allege actual acceptance of the contents of its commercial vault; (2) J&L cannot establish "implied acceptance

by reason of EPK's exclusive possession and knowledge of the same" because J&L maintained possession of the keys to the safe at all times, preventing EPK from having either exclusive possession or knowledge of its contents and thus, acceptance of J&L's goods; and (3) J&L's complaint did not allege that EPK had knowledge or notice of the contents of J&L's commercial vault.

¶ 14 Following a hearing, the trial court granted EPK's motion to dismiss with prejudice but allowed J&L leave to replead a claim other than breach of bailment by October 4, 2013. J&L, instead, filed the instant appeal.

¶ 15 ANALYSIS

¶ 16 In this court, the issue that J&L presents for review is whether J&L's complaint properly pled the existence of and the right to recover under a bailment theory where the factual allegations in the complaint show that both parties benefitted when J&L left its inventory on the mall premises each night in the exclusive possession and control of EPK. J&L contends that its complaint properly alleged the existence of and the right to recover under a bailment theory because the factual allegations in its complaint show an implied agreement for bailment, the delivery and acceptance of the jewelry, and the non-return of the jewelry.

¶ 17 EPK maintains that J&L's complaint failed to allege the necessary elements of a bailment. EPK contends that J&L's complaint failed to establish the existence of a bailor-bailee relationship and therefore failed to establish a breach of bailment, noting in a footnote that J&L addressed the elements to establish a breach of bailment, in its opening brief, without first addressing the threshold question of whether a bailment relationship existed.

¶ 18 A motion to dismiss pursuant to section 2-615 of the Code challenges the legal sufficiency of the complaint. *In re Estate of Powell*, 2014 IL 115997, ¶ 12. When ruling on a

section 2-615 motion to dismiss, the court must accept as true all well-pleaded facts in the complaint, including any reasonable inferences therefrom. *Tucker v. Soy Capital Bank and Trust Co.*, 2012 IL App (1st) 103303, ¶ 17. The specific inquiry is whether the allegations of the complaint, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted (*Tucker*, 2012 IL App (1st) 103303, ¶ 17), yet pleadings must still be construed liberally with the aim of doing substantial justice between the parties (735 ILCS 5/2-603 (West 2010); *Bea v. Bethany Home, Inc.*, 333 Ill. App. 3d 410, 413 (2002)). As relevant here, an exhibit attached to a complaint is " 'considered to be part of the pleading, and facts stated in the exhibit are considered as having been alleged in the complaint.' " *Tucker*, 2012 IL App (1st) 103303, ¶ 22 (quoting *International Insurance Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 622 (1993)). "Where an exhibit contradicts the allegations in a complaint, the exhibit controls," even in the context of a motion to dismiss. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18.

¶ 19 A complaint should be dismissed with prejudice pursuant to a section 2-615 motion only when it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recover. *Tucker*, 2012 IL App (1st) 103303, ¶ 17. We review *de novo*, an order granting a section 2-615 motion to dismiss. *In re Estate of Powell*, 2014 IL 115997, ¶ 12. In so doing, we are not bound by the trial court's reasoning and " 'may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground.' " *Rabin v. Karlin and Fleisher, LLC*, 409 Ill. App. 3d 182, 186 (2011) (quoting *In re Marriage of Gary*, 384 Ill. App. 3d 979, 987 (2008)). Because we affirm the dismissal of J&L's complaint on the ground that J&L's complaint did not and cannot plead and prove the existence of an implied

agreement to create a bailment, we need not address the other arguments raised by J&L in this appeal. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 155 (2002).

¶ 20 A bailment is defined as the rightful possession of goods by one who is not an owner. *Berglund v. Roosevelt University*, 18 Ill. App. 3d 842, 844 (1974). Common characteristics of every bailment are the intent to create a bailment, delivery of possession of the bailed items, and the acceptance of the items by the bailee. *Berglund*, 18 Ill. App. 3d at 844. A bailment can be established by express contract or by implication, either as an implied-in-fact bailment or an implied-in-law bailment. *Interlake, Inc. v. Kansas Power and Light Co.*, 79 Ill. App. 3d 679, 683 (1979).

¶ 21 An implied-in-law bailment, or a constructive bailment, may be found where the property of one is voluntarily received by another for some purpose other than that of obtaining ownership. *American Ambassador Casualty Co. v. City of Chicago*, 205 Ill. App. 3d 879, 882 (1990). Under these circumstances, the law implies a contract for the keeping of the property until it is restored to the owner, and the contract implied is that of a depositary, whose duty is imposed without an actual contract for that purpose. *American Ambassador Casualty Co.*, 205 Ill. App. 3d at 882. "The holder is bound to take care of, keep, and preserve the property, not for the sake of any benefit to himself or upon any expectation of compensation for his services, but solely for the convenience and accommodation of the owner." 8 AM. JUR. 2D *Bailments* § 53, quoted in *Chesterfield Sewer & Water, Inc. v. Citizens Insurance Co. of New Jersey*, 57 Ill. App. 2d 90, 93 (1965).

¶ 22 Here, J&L alleged in its complaint that a bailor-bailee relationship, "by virtue of a constructive bailment and/or bailment implied in law," was created between EPK and J&L when EPK assumed care, custody, and exclusive control of J&L's inventory every night. However, the

retail space license agreement attached to J&L's complaint as an exhibit refutes J&L's allegation that a bailment was created by an implied agreement. See *Gagnon*, 2012 IL App (1st) 120645, ¶ 20. J&L acknowledged in its complaint the language in paragraph three of the retail space license agreement, entitled "Business Insurance," which states in its entirety, "Each operator must obtain fire and other required insurance at its own expense. [EPK] assumes no responsibility or liability for fire, theft or damage to an operator's location or property at any time." We further observe that paragraph 17, entitled "License Rights," states, "The operator understands that it is a license [*sic*], not a tenant of [EPK], and its use of its location creates no tenancy or other rights in its location. The operator consents to its status as a licensee of [EPK] for the use of its location and understands that these rules and regulations shall not be construed as creating any legal right to occupancy on behalf of the licensee." The signatory portion of the retail space license agreement reflects the same language as that in paragraph 17 and the relevant signatures. Despite J&L's allegation in its complaint that a bailor-bailee relationship, "by virtue of a constructive bailment and/or bailment implied in law," was created between EPK and J&L when EPK assumed care, custody, and exclusive control of J&L's inventory every night, the attached retail space license agreement establishes that J&L was merely a licensee of EPK for the use of a booth in its mall with no tenancy or other rights. *Tucker*, 2012 IL App (1st) 103303, ¶ 23. " 'Where a release is clear and explicit, the court must enforce it as written.' " *Tucker*, 2012 IL App (1st) 103303, ¶ 24 (quoting *International Insurance Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 623 (1993)). Because an exhibit to the complaint contradicts an essential term of the alleged implied-in-law contract for the keeping of the property until it is restored to the owner, J&L has failed to sufficiently allege a constructive bailment. *Gagnon*, 2012 IL App (1st) 120645, ¶ 22. Under these circumstances, J&L's complaint was properly dismissed with

