2015 IL App (1st) 133590-U

FOURTH DIVISION
August 27, 2015

Nos. 1-13-3590 & 1-13-3951 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MATTHEW R. HICKS, Plaintiff-Appellant, v. THE CITY OF DES PLAINES, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County, Illinois No. 12 L 13102 Honorable John C. Griffin, Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 ***Held:*** Trial court's dismissal of complaint and award of attorney's fees affirmed. Fraud claims were insufficiently pleaded and barred by statutory tort immunity. Uncontradicted evidence showed defendant paid the appropriate amount of compensation for sick leave and vacation and personal time to plaintiff. Award of attorney's fees was not abuse of discretion.

¶ 2 Plaintiff Matthew Hicks brought the underlying action against defendant City of Des Plaines (Des Plaines) for breach of a settlement agreement. He alleged a breach of contract, fraudulent misrepresentation, fraud in the inducement, and a declaration that the agreement was null and void. The trial court ultimately dismissed each of these claims. Plaintiff appeals, arguing

that the fraud claims were sufficiently pleaded, and that the trial court erred in relying on affirmative matter in dismissing the contract claim. Finding no error in the trial court's judgment, we affirm.

¶ 3 I. BACKGROUND

¶ 4 We draw the facts from the allegations of the complaint and the first amended complaint, which we accept as true at this stage. *In re Estate of Powell*, 2014 IL 115997, ¶ 12. Matthew Hicks was formerly employed as a police officer with the city of Des Plaines. In 2011, charges of misconduct were filed against him seeking his dismissal from the police department. Hicks responded by filing a claim with the Equal Employment Opportunity Commission (EEOC). To resolve their dispute, Hicks and Des Plaines entered into a Settlement Agreement (the Agreement) later that same year.

¶ 5 Under the Agreement, Hicks was required to sign a retirement letter effective on his fiftieth birthday and "withdraw, with prejudice, any and all complaints currently pending, or alleged or intended, against the CITY," including the EEOC charge. For its part, Des Plaines was required to "withdraw, with prejudice, any and all charges currently pending, or alleged or intended against SERGEANT HICKS." Going forward, the only litigation allowed between the parties would concern any breach or enforcement of the terms of the Agreement.

¶ 6 In the Agreement, plaintiff stipulated that he "read and understands the Agreement" and that he "has been advised to, and has consulted with, legal counsel."

¶ 7 Among other things, the Agreement required Des Plaines to pay Hicks the following compensation:

> Any sick leave accumulated by SERGEANT HICKS as of August 4, 2010, shall be paid into HICKS's RHS (Retirement Health Savings) account according to CITY

> policy; that is, the first 45 days shall be paid at 25% of SERGEANT HICKS's current pay rate ($52.990 per hour) and those in excess of 45 days will be paid into the RHS account at 100% of SERGEANT HICKS's rate of pay. All vacation and/or personal days shall be paid in the RHS account at 100% of SERGEANT HICKS's rate of pay. *The CITY shall pay approximately $30,372.02 into SERGEANT HICKS's RHS account as directed by applicable regulations including but not limited to, the collective bargaining agreement and the specific benefit plan document*. (Emphasis added.)

¶ 8 In payment of the sick leave and vacation/personal time owed to plaintiff under the Agreement, Des Plaines deposited the amount of $16,188.13 into plaintiff's Retirement Health Savings (RHS) account.

¶ 9 II. PROCEDURAL BACKGROUND

¶ 10 A. Complaint

¶ 11 On November 19, 2012, Plaintiff filed his complaint seeking relief in four counts. Count I sounded in breach of contract. For the purposes of this appeal, the only relevant claim in Count I was that Des Plaines breached the Agreement by depositing only $16,188.13 into plaintiff's RHS account when, according to plaintiff, it should have deposited "approximately $30,372.02" into that account under the terms of the Agreement.[1]

¶ 12 Counts II and III pleaded fraud and fraud in the inducement, respectively, alleging that Des Plaines made material misrepresentations regarding the Agreement on which plaintiff relied to his detriment. Count IV sought a declaratory judgment that the Agreement was void *ab initio* as a result of the fraudulent inducement.

[1] Plaintiff originally alleged other breaches of the Agreement, relating to such things as breach of an alleged confidentiality provision and failure to protect plaintiff from taxation on his compensation. But plaintiff filed a First Amended Complaint that pleaded over these allegations, and plaintiff does not press any of these claims on appeal, limiting his argument to the proper RHS deposit amount. We will confine our review accordingly.

¶ 13 The trial court dismissed the fraud counts with prejudice, ruling that they were inadequately pleaded and that, in any event, they were barred by statutory tort immunity that Des Plaines enjoyed under Section 2-106 of the Local Governmental and Governmental Employees Tort Immunity Act (the Tort Immunity Act), 745 ILCS 10/2-106 (West 2010).

¶ 14 As we previously noted, the breach-of-contract claim in Count I consisted of many asserted breaches of the Agreement, only one of which is now relevant. The trial court dismissed the other, now-irrelevant claims without prejudice, as they were insufficiently pleaded. With regard to the portion of Count I that is currently before this court—the claim that Des Plaines shorted plaintiff's RHS deposit by approximately half—defendant sought dismissal under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)), attaching an affidavit from Vicky Kalogris, a compensation specialist for Des Plaines.

¶ 15 In her affidavit, Ms. Kalogris swore that the proper calculation of the amount owed to plaintiff's RHS account for sick leave and vacation/personal time was the amount of $16,188.13, and that the amount of $30,372.02 (the amount that plaintiff claims should have been deposited) had previously been deposited into plaintiff's RHS account and was the approximate balance of the RHS account at the time the additional $16,188.13 was deposited. Based on this affidavit, Des Plaines argued that the "approximately $30,372.02" figure that plaintiff cited from the Agreement did *not* refer to the payment for sick leave and vacation/personal time, but rather referred to a different amount of benefits that Des Plaines already owed to plaintiff independent of that deposit; Des Plaines, in other words, was merely reciting in the Agreement that it was not paying this additional sick leave and vacation/personal time in *lieu* of the $30,372.02, but rather in *addition* to it.

¶ 16 The trial court refused to dismiss that portion of Count I with prejudice because the Kalogris affidavit lacked sufficient documentation to back up her calculations.

¶ 17 Plaintiff filed an amended complaint, in which he limited count I to the RHS-deposit issue. Des Plaines again moved to dismiss count I pursuant to 2-619, once again attaching an affidavit from Ms. Kalogris, and this time providing the documentation to back up her calculations. This affidavit did not otherwise differ in any material respect from her initial affidavit.

¶ 18 Plaintiff was granted leave to depose Ms. Kalogris. It is not clear from the record if that deposition took place. In plaintiff's response, plaintiff did not challenge the accuracy of Ms. Kalogris's calculations of plaintiff's due and owing sick leave and vacation/personal time, but rather fell back on the language of the Agreement, which he insisted called for the deposit of approximately $30,372, not the $16,188.13 that was actually deposited.

¶ 19 The trial court dismissed count I with prejudice. The court first ruled that the plain language of the contract demonstrated that the $30,372 figure was not the figure associated with sick leave and vacation/personal time, but rather was a separate figure. The court also noted that plaintiff did not contest the sworn facts in Ms. Kalogris's affidavit that this approximate $30,372 had previously been deposited into plaintiff's RHS account, independent of and prior to the deposit of the $16,188.13 deposit for sick leave and vacation/personal time. Nor did plaintiff contest that Ms. Kalogris had properly calculated the $16,188.13 amount.

¶ 20 Invoking a provision of the Agreement, the trial court also granted Des Plaines leave to file a petition for reasonable attorney's fees and costs. The trial court ultimately awarded Des Plaines attorneys' fees and costs in the amount of $29,915.50.

¶ 21 This appeal followed.

¶ 22 III. ANALYSIS

¶ 23 A. The Contract Claim

¶ 24 The trial court dismissed count I, the contract claim, pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)), based on the affidavit attached to Des Plaines's motion to dismiss. We review *de novo* the trial court's dismissal of a complaint under section 2-619. *Cooney v. Rossiter*, 2012 IL 113227, ¶ 17. A motion to dismiss under section 2-619 admits the legal sufficiency of the complaint but asserts a defense that defeats it. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. When considering a section 2-619 motion, a court must accept as true all well-pleaded facts in the complaint, as well as any inferences that may reasonably be drawn in plaintiff's favor. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55; *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). Dismissal of a complaint under section 2-619 is appropriate only if the plaintiff can prove no set of facts that would support a cause of action. *In re Estate of Boyar*, 2013 IL 113655, ¶ 27.

¶ 25 The defendant bears the initial burden to establish that the affirmative matter on which it relies prevails over the complaint. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). Affirmative matter, as explained by our Supreme Court, acts as a "type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained or inferred from the complaint ***." *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 121 (2008) (quotation omitted). Once established, the burden shifts to the plaintiff to demonstrate that the affirmative matter is unsubstantiated or requires material facts to be developed further. *Epstein*, 178 Ill. 2d at 383. If the plaintiff cannot meet this burden, the complaint will be dismissed. *Id.*

¶ 26 Count I revolves around the interpretation of this language in the Agreement:

> Any sick leave accumulated by SERGEANT HICKS as of August 4, 2010, shall be paid into HICKS's RHS (Retirement Health Savings) account according to CITY policy; that is, the first 45 days shall be paid at 25% of SERGEANT HICKS's current pay rate ($52.990 per hour) and those in excess of 45 days will be paid into the RHS account at 100% of SERGEANT HICKS's rate of pay. All vacation and/or personal days shall be paid in the RHS account at 100% of SERGEANT HICKS's rate of pay. *The CITY shall pay approximately $30,372.02 into SERGEANT HICKS's RHS account as directed by applicable regulations including but not limited to, the collective bargaining agreement and the specific benefit plan document*. (Emphasis added.)

¶ 27 The interpretation of a contract is a question of law. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005). Our primary goal is to reflect the intent of the parties. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). The parties' intent is not derived from detached portions of the contract or from clauses standing in isolation, but rather is construed as a whole, viewing each part in relation to the others. *Id*. We will not interpret a contract in a way that will render any provision meaningless. *Wolfensberger v. Eastwood*, 382 Ill. App. 3d 924, 934 (2008). Where possible, we must construe a contract so that different provisions are in harmony, not conflict, with one another. *Id*.

¶ 28 Plaintiff claims that his sick leave and vacation/personal time was supposed to be "approximately $30,372.02" as described in the final sentence of the passage above. But we agree with the trial court, and defendant, that reading this provision in such a manner would render the first two sentences utterly meaningless. The first two sentences establish a very clear formula by which plaintiff is to be compensated for his sick leave and vacation/personal time. If the parties already had agreed that this amount would be "approximately $30,372.02," then there

would be no need to lay out the formula in the first instance; the parties could have just agreed that Des Plaines would pay that sum to plaintiff to settle the matter. Even without resorting to the Kalogris affidavit, the plain language of the Agreement alone defeats plaintiff's argument.

¶ 29 Still, the Kalogris affidavit clearly supports Des Plaines's position and our interpretation. That affidavit demonstrates that a proper calculation of plaintiff's due and owing sick leave and vacation/personal time is $16,188.13—the amount the plaintiff admits was paid to him. Plaintiff does not challenge the accuracy of that calculation on appeal, nor did he contest it at trial. Neither did plaintiff challenge the affidavit's assertion that, at the time the $16,188.13 was deposited into plaintiff's RHS account, the account had an existing balance of "approximate[ly] $30,372.02." As the trial court properly noted, plaintiff did not effectively challenge this affidavit in any way at all, and thus the affidavit is deemed admitted in all respects. *Epstein*, 178 Ill. 2d at 383; *Kedzie v. 103rd Currency Exchange v. Hodge*, 156 Ill. 2d 112, 116 (1993).

¶ 30 From all of this, the trial court concluded that the purpose of the final sentence in the passage above was to memorialize the fact that Des Plaines had a pre-existing obligation toward plaintiff in the amount of "approximately $30,372.02," and that sentence was intended to clarify that it was still due and owing—that the payment for sick leave and vacation/personal time would be over and above, and not in lieu of, the $30,372.02 already owed. We find this interpretation entirely reasonable. We do not know, from this record, precisely why this pre-existing sum of $30,372.02 was owed, other than the fact that it derived from "the collective bargaining agreement and the specific benefit plan document"—but it is not necessary that we know that information. It is abundantly clear that this last sentence was *not* intended to be the sum owed for sick leave or vacation/personal time.

¶ 31 Thus, as a matter of law, Des Plaines did not breach the Agreement by depositing the sum of $16,188.13 into plaintiff's RHS account for payment of sick leave and vacation/personal time. The record is uncontradicted that this amount reflected the appropriate calculation for sick leave and vacation/personal time and that the reference to "approximately $30,372.02" referred to something else altogether. The trial court's dismissal of count I was proper.

¶ 32 B. The Fraud Claims

¶ 33 The trial court dismissed the fraud claims pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2014)) as insufficiently pleaded. But as we previously noted, the court also agreed with Des Plaines that the fraud claims, even if properly pleaded, would be barred under the Tort Immunity Act, 745 ILCS 10/2-106 (West 2010), which is why the trial court dismissed these counts with prejudice instead of allowing leave to amend. Tort immunity is more properly invoked under section 2-619(a)(9). See *Smith*, 231 Ill. 2d at 115 (defense of tort immunity properly raised in section 2-619(a)(9) motion). But the fact that Des Plaines sought dismissal based on tort immunity pursuant to section 2-615, and not section 2-619(a)(9), does not alter our analysis, as it is the substance of the motion, and not its form, that controls. *Winters v. Wangler*, 386 Ill. App. 3d 788, 793 (2008).

¶ 34 First, we agree with the trial court that the fraud counts were insufficiently pleaded. The elements of common-law fraud are: 1) a false statement of material fact; 2) defendant's knowledge that the statement was false; 3) defendant's intent that the statement induce the plaintiff to act; 4) plaintiff's reliance upon the truth of the statement; and 5) plaintiff's damages resulting from reliance on the statement. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496 (1996). To plead common-law fraud, a heightened standard of specificity is required, such that the party state with specificity, particularity, and certainty the circumstances constituting that

fraud to apprise the opposing party of the charges it must answer. *Green v. Rogers*, 234 Ill. 2d 478, 494 (2009). Thus, a plaintiff, at a minimum, must plead facts with sufficient particularity establishing not only the elements of fraud, but also what representations were made, when they were made, who made them, and to whom they were made. *Board of Education of the City of Chicago v. A, C and S, Inc.*, 131 Ill. 2d 428, 457 (1989).

¶ 35 Count II, sounding in fraudulent misrepresentation, described Des Plaines's allegedly fraudulent misrepresentation as follows:

> Defendant, through their agent, represented to Plaintiff that the Settlement would be entered into in good faith, be mutually beneficial, would be a completed and fair settlement of claims between the parties, and would be maintained in confidence to protect potentially sensitive information about Plaintiff from entering the public eye.

¶ 36 We agree with the trial court that these allegations fall far short of the required pleading for a fraud claim. First, the complaint does not specify who made these statements, much less does it provide any factual allegation supporting the claim that this unknown individual was an agent of Des Plaines. See *Connick*, 174 Ill. 2d at 497-98 (claim for fraudulent misrepresentation properly dismissed where complaint did nothing more than plead legal conclusion of agency without providing factual allegations supporting conclusion).

¶ 37 Second, it is difficult to even locate a false statement of material fact, or any fact at all, within this allegation—and certainly nothing to indicate a promise that the payment of sick leave and vacation/personal time would be the $30,372.02 figure. A statement that a settlement will be "fair" or "mutually beneficial" falls more comfortably in the category of a non-actionable opinion—known in the sales context as "puffing"—as opposed to a statement of fact. See *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 73 (2007) (noting that "puffing," or mere

expressions of opinion or superlatives not considered factual misrepresentations actionable as fraudulent, typically include words such as "best," "high-quality," "perfect," and "magnificent"); *Avery*, 216 Ill. 2d at 173-74 (" 'A general statement that one's products are best is not actionable as a misrepresentation of fact.' ") (quotation omitted); see also *Abazari v. Rosalind Franklin University of Medicine & Science*, 2015 IL App (2d) 140952, ¶ 25 ("statements about 'unprecedented' and 'limitless' opportunity in the field of podiatric medicine cannot form the basis" for claim of factual misrepresentation by university in its advertising but, rather, were " 'puffing'—a seller's rosy descriptions of possible outcomes from using a product.").

¶ 38 And even if plaintiff could have overcome this hurdle, he could not have alleged that he reasonably relied on any alleged fraudulent promise that he would be paid "approximately $30,372.02" for his sick leave and vacation/personal time given that, as we have held above, the language of the Agreement plainly showed that this sum of money was *not* related to sick leave or vacation/personal time. A plaintiff may not assert fraud in the defendant's description as to what is contained in a written agreement when, as here, the plaintiff had the opportunity to read the document himself and when, as here, plaintiff admittedly sought the advice of counsel before signing it. A plaintiff "is not justified in relying on representations outside of or contrary to the contract he or she signs where the signer is aware of the nature of the contract and had a full opportunity to read the contract." *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 365 (1995). "A party cannot close his eyes to the content of a document and then claim that the other party committed fraud merely because it followed the contract." *Id*. at 365-66. See also *Hurley v. Frontier Ford Motors, Inc.*, 12 Ill. App. 3d 905, 911 (1973) ("One is ordinarily not justified in relying on a misrepresentation as to the terms of a contract he signs when he has been afforded the opportunity to read it ***."); *Belleville National Bank v. Rose*,

119 Ill. App. 3d 56, 59 (1983) (noting that "fraud is, in most situations, unavailable to avoid the effect of the written agreement where the complaining party could have discovered the fraud by reading the instrument, and was in fact afforded a full opportunity to do so.").

¶ 39 Thus, even if plaintiff had more specifically alleged that an agent of Des Plaines promised him "approximately $30,372.02" for his sick leave and vacation/personal time, plaintiff could not recover for fraudulent misrepresentation because the contract he read and signed, on advice of counsel, plainly told him otherwise. Plaintiff could not, as a matter of law, have alleged reasonable reliance on any such misrepresentation, and thus dismissal of count II with prejudice was proper.

¶ 40 Count III, alleging fraud in the inducement, described Des Plaines's allegedly fraudulent statements thusly:

> Plaintiff reasonably relied on Defendant's representation that the payments stemming from the Settlement would fairly and accurately represent the written agreement between the parties.

¶ 41 Count III suffers from the same defects we have described above. The complaint supplies no information as to who made the allegedly false representations or when they did so. But more to the point, as we have already held that Des Plaines did, in fact, make payments that "fairly and accurately represent[ed]" the Agreement, we see no way in which plaintiff could possibly allege that these statements were false. As a matter of law, they were not.

¶ 42 Finally, we agree with the trial court that plaintiff's fraud claims would be barred by section 2-106 of the Tort Immunity Act, which provides that "a local public entity is not liable for an injury caused by an oral promise or misrepresentation of its employee, whether or not such promise or misrepresentation is negligent or intentional." 745 ILCS 10/2-106 (West 2010). The

fraud counts fall squarely within this immunity, as plaintiff alleges oral promises or misrepresentations by an agent of Des Plaines. See *Kuch & Watson, Inc. v. Woodman*, 29 Ill. App. 3d 638, 639-40 (1975).

¶ 43 Indeed, plaintiff did not so much as mention the tort immunity argument in his opening brief and, though promising at the outset of his reply brief to do so, made no substantive counter-argument other than to note that it was Des Plaines's duty to raise and establish its right to immunity. But Des Plaines did so at the trial level, and it does so before this court. As we have already noted, the fact that Des Plaines raised it below pursuant to section 2-615 instead of section 2-619(a)(9) does not prevent us from considering the substance of the motion over the form (see *Winters*, 386 Ill. App. 3d at 793), and in any event we may affirm the trial court's judgment on any basis in the record. *Riverdale Indus., Inc. v. Malloy*, 307 Ill. App. 3d 183, 185 (1999).

¶ 44 For all of these reasons, the trial court properly dismissed the fraud counts with prejudice.

¶ 45 Finally, we turn to the trial court's award of attorney's fees. The Agreement provided for attorney's fees to the prevailing party in the event of litigation arising from the Agreement's enforcement. Des Plaines was clearly the prevailing party below and before this court, as well.

¶ 46 We review the trial court's award of attorney fees for an abuse of discretion. *Wendy and William Spatz Charitable Foundation v. 2263 North Lincoln Corp.*, 2013 IL App (1st) 122076, ¶ 40. An abuse of discretion occurs only when no reasonable person could adopt the view of the trial court. *Peraica v. Riverside-Brookfield High School District No. 208*, 2013 IL App (1st) 122351, ¶ 34.

¶ 47 Defense counsel submitted its petition for fees in the amount of $29,915.50. Plaintiff responded with no substantive objection other than the fact that plaintiff had filed a notice of

appeal. Plaintiff later sought leave to file additional argument, which the trial court denied. The trial court then awarded Des Plaines the full sum of the fees sought.

¶ 48 On appeal, plaintiff raises no substantive objection to the fee award. He does not claim that the fees were excessive or duplicative or in any way inappropriate. Instead, he merely argues that the fee award, and the Agreement's provision for such fees, were "unconscionable." We do not consider this to be a serious, much less a well-developed, argument. The taxpayers paid for the defense of this case, and the taxpayers have been reimbursed for defending a lawsuit that, in our view, borders on the frivolous. In any event, plaintiff has provided no substantive basis whatsoever for this court to find an abuse of discretion. Upon our independent review of the fee petition, we likewise find no error. The fee award is affirmed.

¶ 49 In conclusion, we commend the trial court for drafting two thoughtful and well-reasoned opinions on the two dismissal orders. Such detailed rulings greatly assist this court in considering the issues.

¶ 50 We affirm the judgment of the circuit court of Cook County in all respects.

¶ 51 Affirmed.