2015 IL App (1st) 141230-U

FIRST DISTRICT
DECEMBER 28, 2015

No. 1-14-1230 & 1-14-2371, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RAND ROAD PROPERTY, INC. and SAM CASTAGNA,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 12 M1 730566
	)	
LD HOLDINGS, LLC and CBS OUTDOOR, INC.,	)	Honorable
	)	Leonard Murray,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed certain claims (counts III, IV, V and VI) and erred in dismissing other claims (counts I, II, VII and VIII) in an 8-count complaint filed by landowner and former landowner against the lessor and lessee of a billboard lease for a billboard located on the property.

¶ 2 This appeal arises from the March 25, 2014 order of the circuit court of Cook County, which dismissed with prejudice all counts of a second amended complaint filed by plaintiffs Rand Road Property, Inc. (Rand Road) and Sam Castagna (Castagna), against defendants LD Holdings, LLC (LD) and CBS Outdoor, Inc. (CBS). On appeal, Rand Road and Castagna argue

that: (1) the circuit court erred in dismissing counts I, IV, V, VII and VIII of the second amended complaint by converting, *sua sponte*, LD and CBS' motions to dismiss into motions for summary judgment and entering summary judgment in LD and CBS' favor; (2) the circuit court erred in entering summary judgment in favor of LD and CBS where material facts were in dispute and the court made errors of law; (3) the circuit court erred in dismissing counts III and VI pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)); and (4) the circuit court erred in dismissing count II and counts III pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). For the following reasons, we affirm in part and reverse in part the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 This case involves a parcel of real property located at 2325 N. Rand Road in Palatine, Illinois, which is the site of an advertising billboard owned and operated by CBS. In February 2008, Castagna[1] purchased the property from its previous owner, Robert Kendzie (Kendzie), who had entered into a lease agreement with Viacom Outdoor, Inc. (Viacom) for the placement of the billboard on the property in October 2005 (the billboard lease). The terms of the billboard lease commenced in 2006 for a period of 15 years until 2021. In January 2006, Viacom changed its name to CBS, which was certified by the Delaware Secretary of State. Upon acquiring the property from Kendzie in 2008, Castagna succeeded Kendzie's interest as lessor of the billboard lease, while CBS, as lessee, continued to own and operate the billboard.

[1] Castagna purchased the property jointly with his wife, Lilibeth Holub, who is not a party to the case at bar.

¶ 5 In January 2012, LD[2] approached Castagna about purchasing an easement interest in the property and an assignment of his interest in the billboard lease. On January 5, 2012, in an "option agreement" letter, LD tendered an offer to Castagna to purchase an easement on the property and an assignment of his interest in the billboard lease in exchange for $125,799.26. On January 25, 2012, in a letter regarding "option agreement – non-recourse loan agreement," LD offered Castagna a 49-year "non-recourse" loan in the amount of $142,500, in exchange for Castagna's interest in the billboard lease and a grant of easement on the property. On April 23, 2012, Castagna signed an agreement entitled "option agreement – non-recourse loan agreement" (the option agreement), which required LD to provide Castagna with a 49-year "non-recourse" loan in the amount of $110,000. The loan was collateralized by a grant of easement and assignment of Castagna's interest in the billboard lease to LD for the period of the loan term. Under the non-recourse loan structure, LD would issue Castagna a lump sum payment of $110,000 at closing; the loan would be repaid through monthly rental payments that LD would receive from CBS as Castagna's assignee under the billboard lease; and Castagna would not be liable for repayment of any portion of the lease income that is terminated, lapsed, or reduced. The option agreement specifies that by signing the agreement, Castagna granted LD "an option to complete the contemplated transaction." On May 23, 2012, Castagna executed a document entitled "disbursement instructions," presumably directing LD to deposit the loan amount into his account at PNC Bank.

¶ 6 On June 4, 2012, Rand Road entered into a purchase agreement with Castagna to buy the property for $560,000. Section 11(e) of the purchase agreement provides that "[e]xcept for the

[2] LD appears to be a subsidiary or affiliate of Landmark Dividend LLC.

[b]illboard [l]ease *** with a stated term expiring April 30, 2021, title to the [p]roperty is subject to no tenancy or other right of use or occupancy which will remain in effect at or after [c]losing. [Castagna] is the fee simple owner of and is lawfully seized and possessed of the [p]roperty."

¶ 7 On June 26, 2012, LD and Castagna closed on their transaction by executing two documents: (1) an "easement, assignment and assumption of lease agreement" (the easement agreement), by which Castagna granted LD a 49-year easement on the property to "construct, install, repair, replace, operate, utilize, lease, and maintain" a billboard sign structure, and also assigned all of Castagna's rights, title and interest under the billboard lease to LD; and (2) a "loan and security agreement" (the loan agreement), by which LD agreed to give Castagna a loan of $110,000, with a maturity date of "_____, 2061." The easement agreement, as well as the rent received from lessee CBS under the billboard lease, served as collateral for the loan.

¶ 8 On June 29, 2012, LD, as the new lessor under the billboard lease, and CBS, as lessee, entered into a lease amendment which extended the term of the billboard lease by 38 years until February 28, 2059. On that same day, CBS (as lessee), Castagna (as assignor), and LD (as assignee), executed a "consent to assignment of lease" (the consent) by which CBS consented to Castagna assigning his rights and interest, including rent payments, under the billboard lease to LD, and LD assuming all of Castagna's obligations under the billboard lease. The consent was "expressly predicated" on LD's execution of the lease amendment, which was included as an exhibit to the consent.

¶ 9 On July 2, 2012, the easement agreement was recorded with the Cook County Recorder of Deeds.

¶ 10 On August 20, 2012, the Village of Palatine (Village) passed an ordinance (ordinance No. 0-127-12) authorizing the Village mayor to execute a "redevelopment agreement" with developer Rand Road and car dealer Patrick Hyundai of Palatine (Hyundai), for the properties at the southeast corner of Rand and Lake Cook Roads. On September 10, 2012, the Village, Rand Road and Hyundai executed the redevelopment agreement, whereby the Village agreed to provide $5 million in Tax-Increment Financing (TIF) to Rand Road to develop the area, including opening and maintaining an automobile dealership on the site. The purpose of the redevelopment project was to "serve a public purpose by reducing or eliminating conditions that, in part, qualify the Rand/Lake Cook Redevelopment Project Area as a blighted area and which are necessary to foster the development within the [area]." Under Article 8.18 of the redevelopment agreement, Rand Road and Hyundai shall have "complete control and discretion in regard to buying out or continuing 'as is' *** the [billboard] tenancy [at 2325 N. Rand Road] until *** August 31, 2028." However, the redevelopment agreement shall become null and void if Rand Road did not close on the purchase of the property by December 27, 2012.

¶ 11 On October 8, 2012, the Village enacted another ordinance (ordinance No. 0-139-12), approving a final planned development for "the construction and operation of a new automobile dealership (Hyundai) including auxiliary services and repairs."

¶ 12 On October 10, 2012, closing was held for the purchase of the property by Rand Road, which accepted a warranty deed from Castagna. The warranty deed specifically identifies the June 26, 2012 easement agreement as an existing encumbrance on the property. On November 2, 2012, the warranty deed was recorded with the Cook County Recorder of Deeds.

¶ 13 On December 7, 2012, Rand Road filed the instant action against LD and CBS for possession (count I) and declaratory judgment (count II), seeking to invalidate the easement agreement, billboard lease, and lease amendment as unenforceable on the basis that the billboard was being maintained illegally on the property. On January 30, 2013 and February 4, 2013, respectively, LD and CBS filed separate motions to dismiss the complaint. CBS' motion to dismiss alleged, *inter alia*, that there had been no "change in ownership" of the billboard and thus, the billboard was not being maintained illegally on the property because CBS was the same legal entity to which a billboard permit had originally been granted by the Illinois Department of Transportation (IDOT). LD's motion to dismiss primarily argued that, pursuant to the easement agreement, Rand Road had no legitimate claim to invalidate LD's superior right, title and interest in its easement.

¶ 14 On February 14, 2013, Rand Road filed a motion for substitution of judge without cause as a matter of right (motion to substitute), which was granted on February 27, 2013. On that same day, Rand Road filed a motion for extension of time and for leave to conduct discovery (motion to conduct discovery) and to stay LD and CBS' pending motions to dismiss. Rand Road argued that it was entitled to conduct discovery as to certain purported facts and documents raised in the motions to dismiss, including whether there had been any "changes in ownership" of the billboard and whether the easement agreement was valid and enforceable, before responding to the motions to dismiss. Thereafter,[3] the circuit court granted in part Rand Road's motion to conduct discovery, allowing Rand Road to "request information from [CBS] regarding corporate continuity."

[3] Although unclear, it appears that the circuit court's ruling on the motion to conduct discovery was in March or April 2013.

¶ 15 On April 15, 2013, instead of responding to the motions to dismiss the complaint, Rand Road obtained leave from the circuit court to file a first amended complaint. On April 19, 2013, Rand Road, along with Castagna for the first time in the action, filed a first amended complaint against LD and CBS for possession (count I), declaratory judgment (counts II and III), rescission (count IV), fraud (count V), violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (count VI), and tortious interference with contract (count VII).

¶ 16 On May 30, 2013, Rand Road and Castagna filed a second amended complaint against LD and CBS for possession (count I), declaratory judgment (counts II and III), rescission (count IV), fraud (count V), violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (count VI), and tortious interference with contract (counts VII and VIII). The second amended complaint alleged that ownership of the billboard was transferred from National Advertising Company (NAC), which had obtained a permit for the billboard from IDOT in 1992, to Viacom in 2005 and to CBS in 2006; that the IDOT permit was never renewed despite these changes in ownership in the billboard; that IDOT was not notified of these changes in ownership or of the changes in lessees or lessors under the billboard lease; that while Castagna was in serious discussions to sell the property to Rand Road, Castagna was in discussions with LD about LD possibly obtaining an easement of the property and assignment of the billboard lease; that Castagna gave LD's representative a draft of the purchase agreement in April or May 2012; that LD's representative assured Castagna that the purchase agreement would not be affected by the signing of either the easement agreement or the loan agreement; that Rand Road purchased the property from Castagna "free and clear of all leases and tenancies, rights of occupancy, personal property, and debris"; that at the time LD signed the easement agreement, LD was

aware that Castagna was selling the property to Rand Road, was aware of the terms of the purchase agreement, and was aware that Castagna was selling the property to Rand Road free and clear of all leases and tenancies other than the billboard lease ending in 2021; that despite LD's knowledge, pursuant to the easement agreement, it obtained a 49-year easement with respect to the property to operate and maintain the billboard and obtained assignment of the billboard lease as lessor; that LD subsequently entered into the lease amendment with CBS and extended the term of the billboard lease for 38 years until February 2059; and that the Village ordinance 0-139-12 vested Rand Road with complete control and discretion in regard to buying out or continuing the billboard tenancy.

¶ 17 On August 26, 2013, CBS filed a motion to dismiss the second amended complaint pursuant to sections 2-615, 2-619, and 2-619.1 of the Code. On October 8, 2013, LD filed an amended motion to dismiss the second amended complaint pursuant to section 2-619.1 of the Code.[4] On February 4, 2014, a hearing on the motions to dismiss was held. On March 25, 2014, the circuit court entered an order dismissing with prejudice all eight counts of the second amended complaint.

¶ 18 On April 18, 2014, Rand Road and Castagna filed a timely notice of appeal (appeal No. 1-14-1230). Thereafter, on April 24, 2014, CBS filed a Supreme Court Rule 137 motion for sanctions against Rand Road and Castagna, which the circuit court denied on June 30, 2014. On July 30, 2014, Rand Road and Castagna filed a second notice of appeal (appeal No. 1-14-2371).[5]

[4] It is unclear when LD filed its original motion to dismiss the second amended complaint.

[5] Although Rand Road and Castagna filed a second notice of appeal on July 30, 2014, jurisdiction was conferred on this court by the filing of the April 18, 2014, which appealed from the circuit court's March 25, 2014 ruling dismissing the second amended complaint. See *In re*

On August 26, 2014, this court consolidated the two appeals (appeal Nos. 1-14-1230 and 1-14-2371).[6]

¶ 19 ANALYSIS

¶ 20 On appeal, we determine whether the circuit court erred in dismissing with prejudice all counts of the second amended complaint, which we review *de novo*. See *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 14.

¶ 21 As a preliminary matter, Rand Road and Castagna argue on appeal that in examining LD and CBS' motions to dismiss, the circuit court erred when it converted, *sua sponte*, the motions to dismiss into motions for summary judgment and entered judgment in favor of LD and CBS on certain counts (counts I, IV, V, VII and VIII), thereby, depriving Rand Road and Castagna of the opportunity to conduct discovery and to respond to the motions for summary judgment. They argue that reversal is required because not only did the circuit court err in converting the motions to dismiss into motions for summary judgment, the court compounded that error by entering summary judgment in favor of LD and CBS on those claims where material facts were in dispute and the court made other errors of law. LD argues, and CBS agrees and incorporates as its own arguments, that this court can affirm a dismissal order on any basis supported by the record, regardless of whether the reasons given by the circuit court are correct or sound. LD and CBS also argue that to the extent that the circuit court treated their motions to dismiss certain counts

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Estate of Hanley, 2013 IL App (3d) 110264, ¶ 43 ("[p]ursuant to Supreme Court Rule 303(a)(2) (eff. June 4, 2008), when the court renders a decision on a timely filed postjudgment motion, such as a motion for sanctions, a premature notice of appeal takes effect when the court enters the order disposing of the posttrial matter"). Thus, this court has proper jurisdiction over the appeal.

[6] CBS does not appeal from the circuit court's June 30, 2014 denial of its Rule 137 motion for sanctions; thus, that issue is not on appeal before us.

as motions for summary judgment, it was not reversible error where Rand Road and Castagna did not suffer any prejudice because the record before the court precluded all of their claims. The transcript of the hearing on the motions to dismiss reveals that the circuit court's stated basis for converting the motions to dismiss certain counts (counts I, IV, V, VII and VIII) into motions for summary judgment was that there were no factual issues in dispute.

¶ 22 A motion for involuntary dismissal under section 2-619 of the Code and a motion for summary judgment share similarities and may, in certain circumstances, be functionally equivalent. *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 42. With each motion, if the movant puts forth sufficient evidence to entitle it to judgment as a matter of law, the burden shifts to the nonmovant to counter that evidence, and if the nonmovant is unable to do so, judgment as a matter of law in favor of the movant is warranted. *Id.* In each motion, the existence of a question of material fact will preclude judgment as a matter of law. *Id.* However, there are also critical differences between a section 2-619 motion and a motion for summary judgment. *Id.* ¶ 43. For instance, a party may not rely solely on her complaint to oppose a properly-supported motion for summary judgment. *Id.*

¶ 23 Further, this court has described the difference between proper section 2-619 motions and improper ones as the difference between "yes but" motions and "not true" motions. *Id.* ¶ 40. A proper section 2-619 motion is a "yes but" motion that admits both that the complaint's allegations are true and that the complaint states a cause of action, but argues that some other defense exists that defeats the claim nevertheless. *Id.* That defense may be one of the enumerated bases contained within section 2-619—such as the running of a limitations period or the existence of a prior pending action—or it may fall within the catch-all of "other affirmative

matter," such as immunity from suit or plaintiff's lack of standing, under subsection (a)(9). *Id.* On the other hand, a motion that attempts to merely refute a well-pleaded allegation in the complaint is a "not true" motion that is inappropriate for section 2-619. *Id.* ¶ 41. A "not true" motion at the pleading stage, in essence, serves as nothing more than an answer that denies a factual allegation and is not a basis for dismissal. *Id.* Such a fact-based motion is appropriate for a summary judgment motion or for resolution at trial. *Id.*

¶ 24 We find that, regardless of whether the circuit court disposed of the claims by motions to dismiss or motions for summary judgment, our standard of review on appeal is *de novo*. *Id.* ¶ 42. Regardless of whether we agree with the manner in which the circuit court disposed of this case, or whether we agree with the court's reasoning, we will review the arguments to determine if the circuit court ultimately reached the correct result in dismissing the complaint and we may affirm the court's ruling on any basis supported by the record. *Id.* ¶ 50; *In re Huron Consulting Group, Inc.*, 2012 IL App (1st) 103519, ¶ 33.

¶ 25 Turning to the merits of the appeal, we determine whether the circuit court erred in dismissing all counts of the second amended complaint. In their motions to dismiss, LD and CBS sought dismissal of the claims against them under both sections 2-615 and 2-619 of the Code. We examine each count in turn.

¶ 26 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint based on defects apparent on its face. 735 ILCS 5/2-615 (West 2012). "In reviewing a section 2-615 dismissal motion, the relevant question is whether, taking all well-pleaded facts as true, the allegations in the complaint, construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Duffy*, 2012 IL App (1st) 113577, ¶

14. A section 2-615 motion to dismiss is granted where "no set of facts can be proved entitling the plaintiff to recovery." *Id.* However, a plaintiff "may not rely on factual or legal conclusions that are not supported by factual allegations." *Id.* Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009).

¶ 27 On the other hand, a section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011). A section 2-619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise from those facts. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. Further, in ruling on a section 2-619 motion, a court must interpret all pleadings and supporting documents in favor of the nonmoving party. *Id.* Because the allegations of the complaint are taken as true, the "affirmative matter" presented by the movant must do more than refute a well-pleaded fact in the complaint. *Bucci v. Rustin*, 227 Ill. App. 3d 779, 782 (1992). An "affirmative matter" must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). The defendant has the initial burden of establishing that the affirmative matter defeats the plaintiff's claim. *Id.* Once the defendant satisfies the burden of putting forward this "affirmative matter," the burden shifts to the plaintiff to demonstrate that the proffered defense is unfounded or requires the resolution of a material fact. *Id.* If the plaintiff fails to carry the shifted burden of going forward, the complaint will be dismissed. *Id.*

¶ 28 Count I of the second amended complaint was brought by Rand Road against LD and CBS for possession of the billboard located on the property and all purported easements thereon. Count I alleged that LD and CBS unlawfully withheld possession of the property from Rand Road on the bases that CBS had no right to lease or possess any portion of the premises; the billboard is illegal for failure to notify IDOT of "changes in ownership" and "changes in permittee" of the billboard under the Highway Advertising Control Act of 1971 (225 ILCS 440/1 *et. seq.* (West 2012)), thus, rendering the IDOT billboard permit void; and that Village ordinance (No. 0-139-12) vested Rand Road with complete control and discretion with regard to continuing or buying out the billboard. Count I further alleged that LD and CBS had no right to lease or possess any portion of the property, nor did they have a right to lease or maintain the billboard on any portion of the property. Attached to the second amended complaint were multiple exhibits, including a copy of the October 2005 billboard lease between the original owner of the property, Kendzie, and Viacom; the June 4, 2012 purchase agreement; the June 26, 2012 easement agreement; the June 29, 2012 lease amendment extending the term of the billboard lease by 38 years; Village ordinances Nos. 0-127-12 and 0-139-12; the September 10, 2012 redevelopment agreement; and the June 26, 2012 loan agreement between LD and Castagna.

¶ 29 CBS sought to dismiss count I of the second amended complaint under section 2-619 of the Code. It argued that there had been no "changes in ownership" of the billboard and thus, neither the billboard nor the billboard lease was "illegal"; that Rand Road lacked standing to challenge the legality of the billboard; that any purported "illegality" of the billboard did not render the billboard lease or the easement agreement unenforceable; and that the Village ordinances did not affect CBS' rights under the billboard lease, the easement agreement, or the

lease amendment. Attached to CBS' motion to dismiss were exhibits, including documents relating to various company stock purchases, name changes, and mergers purporting to show that there was no "change in ownership" of the billboard.

¶ 30 LD's amended motion to dismiss sought to dismiss count I under section 2-619, arguing that because the easement agreement was recorded prior to the warranty deed, Rand Road had no legitimate claim to invalidate LD's superior right and interest in its easement. Attached to the motion to dismiss were various exhibits, including the affidavit of LD's Vice President of Acquisitions, David Maltzman (Maltzman); the option agreement; a non-recourse loan amortization schedule; the May 23, 2012 disbursement instructions signed by Castagna; the warranty deed; and the June 29, 2012 consent between CBS, Castagna and LD. In their response to LD's motion to dismiss, Rand Road and Castagna submitted an affidavit of Castagna in which he averred that prior to signing the easement agreement and the loan agreement, Maltzman repeatedly assured him that they would not adversely affect Castagna's obligations to Rand Road under the purchase agreement.

¶ 31 On appeal, Rand Road argues that the billboard on the property is illegal under sections 8 and 10 of the Highway Advertising Control Act of 1971 (225 ILCS 440/8, 440/10 (West 2012)), arguing that ownership of the billboard was transferred from NAC, the original entity which acquired a billboard permit from IDOT, to Viacom and then to CBS. Rand Road argues that because CBS and its predecessors failed to notify IDOT of the change in ownership or to renew the billboard permit as required by statute, the billboard was illegal at the time the three billboard agreements were executed: (1) the billboard lease; (2) the easement agreement; and (3) the lease amendment. Thus, Rand Road argues, these three agreements regarding the ownership, control

and maintenance of the billboard are void. Rand Road further argues that, at a minimum, a question of material fact exists regarding whether there was a change in ownership of the billboard. Further, Rand Road contends that the easement agreement and the lease amendment are also void because the billboard was prohibited by a Village ordinance that was enacted before these agreements were executed.

¶ 32 Section 8 of the Highway Advertising Control Act of 1971 (Act), states in relevant part the following:

> "Upon change of sign ownership the new owner of the sign shall notify [IDOT] and supply the necessary information to renew the permit for such sign at no cost within 60 days after the change of ownership. Any permit not so renewed shall become void." 225 ILCS 440/8 (West 2012).

¶ 33 Section 10 of the Act states that signs without valid permits are "unlawful" and that "[e]ach sign declared by this Section to be unlawful and a public nuisance shall be removed or brought into compliance with this Act by the owner *** within 30 days after receipt of notice by certified mail from [IDOT] ***." Section 10 also states that "[a]ny sign not so removed by the owners or any such signs which are removed and reerected illegally by the owners shall become the property of the State and shall be removed and disposed of by [IDOT] or may be painted over by [IDOT]." 225 ILCS 440/10 (West 2012).

¶ 34 Illinois Administrative Code 522.90 states that "[u]pon a change in permittee or sign ownership, the new permittee or owner of the sign shall notify [IDOT], in writing, of the sign permit or registration number and the old and new permittee or sign owners' names within 60

days after the change in permittee or sign ownership. *** Any permit or registration not so renewed shall become revocable ***." 92 Ill. Adm. Code 522.90 (2011).

¶ 35 CBS counters with various arguments in support of the court's dismissal of count I, which LD adopts and incorporates by reference. First, CBS, pointing to section 10 of the Act, argues that Rand Road had no private right of action to enforce IDOT's responsibilities under the Act. However, this argument ignores the fact that Rand Road does not seek to enforce the Act, but rather, seeks to demonstrate why the three billboard agreements, as referenced above, are void. Second, CBS argues that any purported "illegality" of the billboard did not render the three aforementioned billboard agreements void because they were not made for an illegal purpose. However, despite CBS' attempt to distinguish *Bond Kildeer Marketplace, LLC v. CBS Outdoor, Inc.*, 2012 IL App (2d) 111292, we find it to be instructive. *Bond Kildeer* concerned a landowner lessor who brought action against a billboard lessee, seeking an order of possession and declaratory judgment that the lease was terminated and that the billboard was to be removed. *Id.* ¶ 6. The *Bond Kildeer* court held that because the billboard was illegal under the Act, the billboard lease was rendered unenforceable on the basis that its purpose had been rendered illegal. *Id.* ¶ 25. Thus, under *Bond Kildeer*, CBS' argument in support of its position cannot stand.

¶ 36 CBS next argues that the billboard is not illegal because there had been no "changes in ownership" under the Act and that the exhibits attached to its motion to dismiss constituted an "affirmative matter" that defeated count I. We must take as true the allegations in the second amended complaint that NAC obtained a permit for the billboard in 1992, but that IDOT was never notified when Viacom became the owner of the billboard in 2005 or when CBS became

the owner of the billboard in 2006. CBS argues that because stock purchases, company name changes and mergers did not amount to "changes in ownership" of the billboard under the Act, and that the entity that originally obtained the IDOT permit (NAC) was the same entity that eventually became known as CBS, no duty to notify IDOT was triggered under the Act. In support, CBS specifically points to a stock certificate (Exhibit C) by which the Minnesota Mining and Manufacturing Company sold 40,000 shares of NAC stocks to Outdoor Systems, Inc. However, nothing on the stock certificate established that *all* of NAC's stocks were purchased by Outdoor Systems, Inc. Also, Exhibit D, an uncertified Illinois Secretary of State "Corporation File Detail Report," shows that, at an unknown time, NAC assumed the name of "Outdoor Systems Advertising," not Outdoor Systems, Inc. Exhibit E is a certificate of amendment by the Delaware Secretary of State showing that Outdoor Systems, Inc. was changing its name to Infinity Outdoor, Inc. Exhibits F and G are two Delaware Secretary of State certificates of amendment showing Infinity Outdoor, Inc. changing its name to Viacom in 2005, and Viacom changing its name to CBS in 2006. Exhibit H is a certification by the Delaware Secretary of State by which NAC merged with CBS in December 2006. Because we must interpret all pleadings and supporting documents in favor of Rand Road at this stage of the proceedings, we find that the evidence in CBS' exhibits to its motion to dismiss, did not constitute an "affirmative matter" within section 2-619(a)(9) and, thus, the burden never shifted to Rand Road to counter that evidence. Rather, that evidence merely refuted Rand Road's well-pled allegations of the second amended complaint that the named entities—NAC, Viacom, CBS—were separate entities and that there were changes in billboard ownership requiring notification to IDOT under the Act. See *Doe*, 2015 IL App (1st) 133735, ¶ 41 (a motion that

attempts to merely refute a well-pleaded allegation in the complaint is a "not true" motion and is inappropriate for section 2-619. A "not true" motion serves as nothing more than an answer that denies a factual allegation and is not a basis for dismissal). Further, discrepancies between the names Outdoor Systems Advertising, and Outdoor Systems, Inc., as well as the act of merger between two entities (NAC and CBS), imply broken links in the chain of ownership on which CBS relies. Thus, a question of material fact exists as to whether there was a change in ownership of the billboard. See *id.* ¶ 42 (a motion to dismiss and a motion for summary judgment share similarities such as that in each motion, the existence of a question of material fact will preclude judgment as a matter of law). Therefore, we hold that the circuit court erred in dismissing count I of the second amended complaint. In light of our ruling, we need not address Rand Road's additional argument that the easement agreement and the lease amendment are also void because the billboard was prohibited by a 2006 Village ordinance (ordinance No. 0-127-06), where this argument was never raised before the circuit court and is forfeited for review on appeal. See *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 24 (arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal).

¶ 37 Count II of the second amended complaint was a claim for declaratory judgment filed by Rand Road against LD and CBS. Count II alleged that Rand Road was the current owner of the property; that it had complete control and discretion regarding the billboard; that it had a tangible legal interest in the billboard and property; that CBS and LD claimed an adverse interest in the billboard and alleged easement; that the failure to notify IDOT of changes in ownership and permittee rendered the IDOT permit void; that the billboard was illegal under the Act; that consequently, the billboard lease, the easement agreement, and the lease amendment were

rendered unenforceable. Count II requested that this court declare those three billboard agreements to be unenforceable.

¶ 38 On appeal, Rand Road argues that the circuit court erred in dismissing count II by finding that Rand Road lacked standing to challenge "a claimed violation of IDOT's rules for a permit" and that CBS established the chain of ownership of the billboard by the evidence appended to its motion to dismiss. Rand Road argues that, as owner of the property, it had standing to seek a binding declaration of rights with respect to ownership and control of the billboard; that it had a real interest in whether the contracts by which LD and CBS claimed ownership and control are void; and that Rand Road's interest in the property was adversely affected by LD and CBS' acts in claiming ownership and control over a portion of the property pursuant to void contracts. Rand Road further argues that the circuit court erred in finding that CBS provided evidence of an affirmative matter sufficient to establish the chain of ownership of the billboard and that there was no permit violation because there was no change in ownership to trigger a duty to notify IDOT under the Act. CBS reiterates some of the same arguments it made with regard to count I and counters that the circuit court's dismissal of count II was proper. Specifically, CBS argues that Rand Road had no private right of action under the Act, and that the billboard is not illegal because there had been no "changes in ownership" under the Act. LD adopts and incorporates by reference CBS' arguments with respect to count II. Because we have already addressed these arguments in our discussion of count I, and have determined that there exists a question of material fact as to whether there was a change in ownership of the billboard, we likewise hold that the circuit court erred in dismissing count II of the second amended complaint.

¶ 39 Count III of the second amended complaint, which was brought by Rand Road against LD and CBS, alleged that Village ordinances (Nos. 0-127-12 and 0-139-12) gave Rand Road "complete control and discretion [over] whether to maintain the [b]illboard"; that LD and CBS claimed an adverse interest in the billboard and alleged easement; that there was an "actual and justiciable dispute" as to which party had the right to control the billboard; and that, in accordance with the Village ordinances, the billboard must be removed by April 30, 2024 or Rand Road has the "legal option to buy out the remaining legal term of the [b]illboard." Count III requested a declaration that Rand Road had the right to the immediate removal of the billboard; that the lease amendment and the easement agreement were null and void; and that Rand Road had the right to buy out the property's "[b]illboard [t]enancy." In response, LD and CBS sought to dismiss count III under sections 2-615 and 2-619 of the Code.

¶ 40 Rand Road argues on appeal that the circuit court erred in dismissing count III under section 2-615 of the Code, where it had stated a claim against LD and CBS for declaratory judgment of the ownership and control of the billboard based on Village ordinances Nos. 0-127-12 and 0-139-12. Rand Road further argues that, to the extent that the court dismissed count III for lack of ripeness, the circuit court also erred.

¶ 41 CBS argues that count III was properly dismissed because Rand Road sought an improper declaratory judgment where, despite Rand Road's assertions, the specific terms of the Village ordinances were not actually at issue in the second amended complaint. Rather, CBS argues, at issue are the terms of the redevelopment agreement, to which CBS and LD were not parties and therefore had no rights or obligations arising from that agreement for the circuit court to fix. Thus, CBS argues, a declaratory judgment was not a proper remedy under count III. CBS

further points out that the Village ordinances were passed *after* LD had entered into and recorded the easement agreement, and *after* CBS and LD had executed the lease amendment. CBS contends that, to agree with Rand Road's contention that the ordinances gave it an absolute right to remove the billboard from the property would require a finding that the ordinances retroactively extinguished the contractual rights of CBS and LD, which would be unconstitutional. Further, CBS argues that the terms of the redevelopment agreement gave Rand Road the contractual right with the Village to buyout the billboard lease or to continue it until August 31, 2028, but that those terms did not mean that CBS and LD have somehow agreed not to extend the billboard lease beyond 2028 because they were not parties to and cannot be bound by the redevelopment agreement. CBS further argues that the issue of ripeness is a red herring because a determination of which parties were necessary and proper to the declaratory judgment claim, not ripeness, was the true issue before the circuit court.

¶ 42 LD argues that the circuit court properly dismissed count III, noting that the redevelopment agreement gave Rand Road control over the buyout of LD's and CBS' rights to the billboard lease, but did not give Rand Road the power of eminent domain or to declare existing contracts null and void. LD adopts and incorporates CBS' argument regarding the issue of ripeness.

¶ 43 Taking as true the allegations in count III, we find that Rand Road failed to state a claim against LD and CBS for declaratory judgment of the ownership and control of the billboard based on Village ordinances Nos. 0-127-12 and 0-139-12. The express terms of Village ordinance No. 0-127-12 authorized the Village mayor to execute a "redevelopment agreement" with Rand Road and Hyundai, for the development of properties at the southeast corner of Rand

and Lake Cook Roads. Village ordinance No. 0-139-12 approved the final planned development for "the construction and operation of a new automobile dealership (Hyundai) including auxiliary services and repairs," and granted permission for the relocation of "one of the existing billboards" in accordance with the engineering plans and the redevelopment agreement. Nothing in either ordinance provides Rand Road with the right to the immediate removal of the billboard, nor requires the relocation of the billboard at issue. Thus, the plain language of the Village ordinances fails to offer the relief sought by Rand Road in count III. Rand Road further argues that it has rights and duties with respect to the property and the billboard pursuant to the redevelopment agreement, which it claims was attached to and thus incorporated into Village ordinance No. 0-127-12. However, the redevelopment agreement was executed on September 10, 2012, 21 days *after* the Village passed ordinance No. 0-127-12 on August 20, 2012 and, thus, the executed copy of the redevelopment agreement could not have been attached thereto as it was not yet in existence. Even if the executed copy had been attached to the ordinance, Article 8.18 of the redevelopment agreement, which Rand Road references, does not entitle Rand Road to a declaratory judgment against CBS and LD under this claim. Article 8.18 of the redevelopment agreement provides Rand Road with "complete control and discretion in regard to buying out or continuing 'as is' *** the [billboard] tenancy [at the property] until *** August 30, 2028." However, neither CBS nor LD was a party to the redevelopment agreement, which was executed by Rand Road, Hyundai, and the Village *after* LD and Castagna had already entered into the easement agreement and *after* CBS and LD had already entered into the lease amendment extending the billboard lease term by 38 years to February 28, 2059. See *Wall v. Chicago Park District*, 378 Ill. 81, 94 (1941) ("[t]he tenth section of article 1 of the Federal constitution

prohibiting the States from passing any law impairing the obligation of contracts applies to governmental action by municipalities"). Thus, Rand Road is not entitled to have the easement agreement and the lease amendment declared null and void pursuant to the redevelopment agreement, and is not entitled to any other relief, on this basis. Therefore, taking as true all allegations in count III, we conclude that Rand Road has failed to state a claim under count III, where no set of facts can be proved entitling it to recovery on this basis. See *Duffy*, 2012 IL App (1st) 113577, ¶ 14 (a section 2-615 motion to dismiss is granted where "no set of facts can be provided entitling the plaintiff to recovery"). Accordingly, we need not address Rand Road's arguments against dismissal of count III for lack of ripeness under section 2-619.

¶ 44 Counts IV (rescission) and V (fraud) of the second amended complaint were filed by Castagna against LD. Both counts were based on several statements that LD's Vice President of Acquisitions, Maltzman, allegedly made to Castagna: (1) that the execution of the easement agreement between Castagna and LD would not affect the purchase agreement between Castagna and Rand Road; (2) the billboard lease would not be extended past 2021, but the billboard would likely be removed by CBS in 2021; and (3) Castagna would not be required to repay the money that LD gave him in exchange for the easement under the June 26, 2012 loan agreement. In count IV, Castagna alleged that he reasonably believed and relied on Maltzman's statements to his own detriment; that Maltzman had a duty to disclose to Castagna, LD and CBS' intention to extend the billboard lease for an additional 38 years; that Maltzman failed to disclose this information, which was material to Castagna's negotiations and understanding in entering the easement agreement with LD; that Maltzman falsely told him that he would not be required to repay any money under the loan agreement, which he reasonably relied upon to his detriment;

that the easement agreement and the loan agreement should be rescinded to put the parties in their prior status quo. In count V, Castagna alleged that LD and Maltzman knew the alleged statements to be false; that they knew Castagna had signed the purchase agreement with Rand Road; that they knew CBS was not planning to remove the billboard in 2021; that they knew and had already planned to extend the billboard lease with CBS beyond 2021; that they knew that money loaned to Castagna would have to be repaid under the loan agreement; that, despite knowing these representations were untrue, they willfully and wantonly made these statements to induce Castagna to enter into the loan agreement and easement agreement with LD; and that he suffered damages of several hundred thousand dollars due to LD's fraudulent conduct, including, all amounts owed by Castagna to Rand Road for breaching the purchase agreement.

¶ 45 Castagna argues on appeal that counts IV and V should not have been dismissed, arguing that the circuit court erroneously held that the existence of written agreements precluded these claims. He further argues that the circuit court erred in disposing of these counts by summary judgment, where the fraudulent statements, LD's intent, and his reasonable reliance were in dispute. He contends that the complexity of the loan agreement, which was authored by LD, created a question of material fact as to whether Castagna could have discovered LD's fraud even after a close reading of the agreement. Moreover, he argues that he could not have discovered LD's fraud with respect to the extension of the billboard lease because the extension was not described in the agreements that he entered into with LD, nor did LD show him a copy of the lease amendment.

¶ 46 LD counters that counts IV and V were properly dismissed because, at the time Castagna entered into the purchase agreement with Rand Road, he was already contractually obligated to

grant LD an easement on the property under the April 2012 option agreement. Thus, LD concludes, as a matter of law, any subsequent representations made by LD could not have been material to Castagna's decision to grant LD an easement. LD further argues that the alleged misrepresentations could not form the basis of a fraud or rescission claim because they were statements of opinion, not fact, as to the effect of a written instrument.

¶ 47 To state a cause of action for fraud, a plaintiff must plead: (1) a false statement of material fact; (2) knowledge or belief by the defendant that the statement was false; (3) an intention to induce the plaintiff to act; (4) reasonable reliance upon the truth of the statement by the plaintiff; and (5) damage to the plaintiff resulting from this reliance. *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15. The basis of a fraud claim must be a statement of fact, not an expression of opinion. *Id.* ¶ 17. Fraud claims must be pleaded with sufficient specificity, particularity, and certainty to apprise the opposing party of what he is called upon to answer. *Id.* ¶ 15. Therefore, a plaintiff must at least plead with sufficient particularity facts which establish the elements of fraud, including what misrepresentations were made, when they were made, who made them, and to whom they were made. *Id.*

¶ 48 We agree with LD that Castagna's allegations as to Maltzman's statement regarding the impact of the June 26, 2012 easement agreement between Castagna and LD upon the June 4, 2012 purchase agreement between Castagna and Rand Road, is not a statement of fact but an expression of opinion. See *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 17 (1995) ("[a] representation is one of opinion rather than fact if it only expresses the speaker's belief, without certainty, as to the existence of a fact"). Thus, Castagna did not sufficiently plead the first

element—a false statement of material fact—of a claim for fraud with respect to this alleged statement.

¶ 49 Likewise, Castagna's allegations as to Maltzman's statements that the billboard lease would not be extended past 2021, but that the billboard would very likely be removed by CBS in 2021, did not sufficiently plead the first element of a fraud claim where they were expressions of opinion rather than fact. Further, these statements constituted future action or inaction which could not be a basis for fraud. Generally, a promise to perform an act, though accompanied at the time with an intention not to perform it, is not such a false representation as will constitute fraud. *Bank of Lincolnwood v. Comdisco, Inc.*, 111 Ill. App. 3d 822, 828 (1982). The exception to this general rule is "where the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud." (Internal quotation marks omitted.) *Barille v. Sears Roebuck & Co.*, 289 Ill. App. 3d 171, 179 (1997) (quoting *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 334 (1977)). To fall within the exception, a party must allege sufficient facts from which a scheme can be inferred. *Commonwealth Eastern Mortgage Co. v. Williams*, 163 Ill. App. 3d 103, 114 (1987). Additionally, to support an action in fraud, the statement must be certain and definite. *Id.* at 113-14. Here, Castagna has not alleged sufficient facts from which a scheme can be inferred, where he fails to even specify *when* these statements were made. See *Avon Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15 (a plaintiff must plead with sufficient particularity facts which establish the elements of fraud, including what misrepresentations were made, when they were made, who made them, and to whom they were made). Nor could Maltzman's alleged statement that the billboard "would very likely" be removed in 2021 by a third-party, CBS, constitute a certain and definite representation sufficient to support an action in

fraud. Therefore, we find that Castagna did not sufficiently plead the first element of fraud with respect to these alleged statements.

¶ 50 We also find that Castagna did not sufficiently plead the first element of a fraud claim with respect to Maltzman's alleged statement that Castagna would not be required to repay the $110,000 that LD gave him in exchange for the easement under the June 26, 2012 loan agreement. We note that LD asserts in its brief before this court that "no one has ever asked [Castagna] to repay the money and no one ever will." Based on the plain language of the loan agreement, which was attached as an exhibit to the second amended complaint, we find Maltzman's alleged statement that Castagna was not required to repay the $110,000 loan to be a true, rather than *false,* statement of fact. See *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 25 (it is well established that exhibits attached to a complaint become a part of a complaint, and if there is any conflict between the factual matters in the exhibits and those alleged in the complaint, the factual matters in the exhibit control). Section 1 of the loan agreement expressly states that, "[e]xcept as otherwise set forth in [s]ection 9.2(b), [Castagna] shall not be personally liable for the repayment of the [l]oan [a]mount or for the payment of [i]nterest." Further, the amortization schedule, which was attached as Exhibit C to the loan agreement, expressly states that LD will issue Castagna a lump sum payment of $110,000, for which LD will solely look to the rent from CBS under the billboard lease for repayment; and that, if any portion of the expected lease income is terminated, lapsed, or reduced, Castagna "will not be held liable for repayment for such portion of the [l]ease income." Section 9.2(b) states certain caveats under which Castagna would be personally liable under the loan agreement: (1) for covenants, representations, and warranties Castagna made to LD under the agreement; (2) for causing or

contributing to a decrease in the rent payment paid to LD by CBS; and (3) for any rent payments that he receives from CBS but did not pay LD. Likewise, subsection 9.2(a)(i) states that in the event of default under four specific circumstances, LD may declare the whole loan amount immediately due and payable and hold Castagna liable. While Maltzman's statement omitted the specific caveats under which Castagna could hypothetically be held liable for the loan amount, we find that Castagna has not alleged with particularity any facts that show the omission to be a material one. See *White v. DaimlerChrystler Corp.*, 368 Ill. App. 3d 278, 287 (2006) (in a common law fraud case, plaintiff must allege with sufficient particularity the facts that make the defendant's omission or concealment material); see also *Kleinwort Benson North America v. Quantum Financial Services, Inc.*, 285 Ill. App. 3d 201, 209 (1996); *Chapman v. Hosek*, 131 Ill. App. 3d 180, 186 (1985) (a misrepresentation or concealed fact is material if the plaintiff would have acted differently had he been aware of it). In fact, despite the fact that the caveats were clearly listed in the written loan agreement, Castagna set forth no allegations regarding what he would have done differently. Nor did he allege anywhere in count V that the terms in the loan agreement were wrong or confusing. Thus, we find that Castagna did not sufficiently plead the first element of fraud with respect to these alleged statements. Therefore, because Castagna failed to sufficiently plead the first element of fraud, he has failed to state a claim for fraud. Accordingly, we hold that the circuit court properly dismissed count V of the second amended complaint.

¶ 51 Because we hold that Castagna has failed to sufficiently plead a claim for fraud, where the first element was legally insufficient, we likewise hold that count IV (rescission based on fraud or misrepresentation), which requires the same first element to be satisfied and hinges on

the same alleged misrepresentations made by Maltzman, cannot stand.[7] Accordingly, we hold that the circuit court properly dismissed count IV of the second amended complaint.

¶ 52 Nor did the circuit court err in dismissing count VI of the second amended complaint, which alleged a claim for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) arising out of the same alleged misrepresentations used to support the claims for common law fraud (count V) and rescission (count IV). To state a claim under the Consumer Fraud Act, a plaintiff must show: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the deception occurred in the course of trade or commerce; and (4) the consumer fraud proximately caused the plaintiff's injury. *Avon Hardware Co.*, 2013 IL App (1st) 130750, ¶ 23. Because we have concluded in our analysis of Castagna's common law fraud claim that the alleged statements made by Maltzman were either expressions of opinion, future action not proper as a basis for fraud, or true statements of fact, we find that Castagna cannot sufficiently plead a deceptive act under the Consumer Fraud Act. Moreover, like common law fraud claims, Consumer Fraud Act claims are subject to a heightened pleading standard requiring particularity and specificity. See *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 419 (2002) (plaintiff "must state with particularity and specificity the deceptive manner of defendant's acts or practices, and the failure to make such averments requires the dismissal of the complaint"); *Pantoja-Cahue v. Ford Motor Credit Co.*, 375 Ill. App. 3d 49, 61 (2007). Taking all well-pleaded facts as true and construing

[7] The elements of an equitable claim for rescission based on fraud or misrepresentation are: (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) intended to induce the other party to act; (4) acted on by the other party in reliance on the truth of the representation; and (5) resulting damage. *23-25 Building Partnership v. Testa Produce, Inc.*, 381 Ill. App. 3d 751, 758 (2008).

all allegations in count VI in a light most favorable to Castagna, we find that Castagna only alleged in a cursory manner, without any specific facts, that LD knew these statements were false; that they were made in the course of its business in acquiring billboard leases; that they were made in order to induce Castagna to sign the easement agreement and the loan agreement; and LD's deceptive and fraudulent conduct proximately caused Castagna damages in the amount of "several hundred thousand dollars" for all amounts owed by Castagna to Rand Road for breaching the purchase agreement. Thus, we find that Castagna failed to state a claim for violation of the Consumer Fraud Act.[8] Therefore, we hold that the circuit court properly dismissed count VI under section 2-615 of the Code.

¶ 53 Counts VII and VIII alleged claims for tortious interference with contract by Rand Road against LD and CBS, respectively. The elements of an action for tortious interference with contract are: (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of the contractual relationship; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other caused by the defendant's wrongful conduct; and (5) damages. *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1038 (1998).

¶ 54 In count VII, Rand Road alleged that the purchase agreement between it and Castagna was in place as of June 4, 2012; that LD was aware of the signed purchase agreement; that on June 21, 2012, LD's General Counsel, Don Ervin (Ervin), wrote an e-mail to Castagna about

[8] Castagna argues on appeal that the circuit court erred in determining that he was not a "consumer" for the purposes of the Consumer Fraud Act, in considering Castagna's diligence in ascertaining the accuracy of LD's misrepresentations and omissions, and in finding that Castagna was a sophisticated businessman. Because we resolve this claim on other grounds, we need not address these arguments.

discussing the details of the underlying sale of the property as contemplated in the purchase agreement; that LD was aware that Castagna's entry into the easement agreement would cause him to breach the purchase agreement; that LD maliciously, intentionally and unjustifiably induced Castagna to breach the purchase agreement by entering into the easement agreement with Castagna so as to cause an easement to be placed on the property and the billboard lease to be extended beyond 2021; that Castagna breached the purchase agreement as a result of LD's wrongful conduct; and that Rand Road had been significantly damaged.

¶ 55 Rand Road argues on appeal that count VII was improperly resolved in favor of LD, where questions of material fact existed as to element 1. Rand Road contends that LD never established that the April 23, 2012 option agreement between LD and Castagna, which tends to show that LD's contractual relationship with Castagna predated the purchase agreement, ever vested.

¶ 56 LD counters that count VII was properly resolved in its favor because its contractual relationship with Castagna predated the purchase agreement, as evidenced by the April 23, 2012 option agreement and, thus, LD could not have interfered with the purchase agreement that did not exist until June 4, 2012 (element 1). LD further argues that this claim cannot stand because Castagna did not breach the purchase agreement with Rand Road (element 4).

¶ 57 In order to establish element 1, Rand Road must show that the purchase agreement between Rand Road and Castagna existed at the time LD allegedly interfered with the contract. Because Castagna and LD entered into the easement agreement and the loan agreement on June 26, 2012, *after* the June 4, 2012 purchase agreement had been executed, the only way that element 1 could be defeated is if LD and Castagna's contractual relationship for the easement of

the property and assignment of the billboard lease began *before* the June 4, 2012 purchase agreement was executed. In arguing that the purchase agreement was not in existence at the time LD entered into a contractual relationship with Castagna, LD directs our attention to LD and Castagna's April 23, 2012 option agreement and the May 23, 2012 disbursement instructions executed by Catasgna, which were attached as exhibits to LD's motion to dismiss, as evidence that they predated the June 4, 2012 purchase agreement. However, the April 23, 2012 option agreement, which was an offer by which LD proposed to provide Castagna with a 49-year "non-recourse" loan in the amount of $110,000 in exchange for an easement in the property and an assignment of the billboard lease to LD, specified that by signing the option agreement, Castagna granted LD "an option to complete the contemplated transaction" and that LD may "exercise the option granted herein at any time within 30 days after clear title and receipt of the items referenced in Exhibit B." Although on May 23, 2012, Castagna executed a document entitled "disbursement instructions" presumably directing LD to deposit the loan amount into his PNC Bank account, it is unclear whether the option agreement ever vested, whether LD ever received clear title or any of the enumerated items in Exhibit B of the option agreement, or whether LD ever exercised its option within 30 days of receiving those items. Thus, there is a question of material fact as to whether the option agreement was first in time so as to defeat element 1 of the tortious interference with contract claim. See *Doe*, 2015 IL App (1st) 133735, ¶ 41 (a motion that attempts to merely refute a well-pleaded allegation in the complaint is a "not true" motion that is inappropriate for section 2-619; a "not true" motion serves as nothing more than an answer that denies a factual allegation and is not a basis for dismissal).

¶ 58 Likewise, we find that there is a question of material fact as to whether Castagna consequently breached the purchase agreement (element 4). Section 11(e) of the purchase agreement provides that, except for the billboard lease with a term expiring on April 30, 2021, the title of the property was subject to no tenancy or other right of use or occupancy which will survive closing. Section 11(i) states that Castagna, as the seller, represents that he has not entered into any other contracts for the sale or transfer of any portion of the property which had not been previously terminated, and that, between the date of agreement and closing, no part of the property will be alienated or encumbered excepted as contemplated by the purchase agreement. Section 12, however, states that Rand Road, as the purchaser, shall be deemed to have relied upon every representation and warranty made by Castagna, "except with respect to matters of which [Rand Road] had *actual* knowledge prior to such closing." As discussed, the purchase agreement was executed by Rand Road and Castagna on June 4, 2012. Although the June 26, 2012 easement agreement was recorded with the Cook County Recorder of Deeds on July 2, 2012, *prior* to the closing of the purchase of the property on October 10, 2012, it is unclear whether Rand Road had *actual* knowledge of the encumbrance on the property created by the easement agreement *prior* to closing. Therefore, we find that there was a question of material fact as to whether Castagna breached the purchase agreement. Accordingly, count VII should not have been dismissed or resolved in favor of LD.

¶ 59 In count VIII, Rand Road alleged that CBS, prior to signing the lease amendment to extend the billboard lease by 38 years, was aware of and possessed a copy of the purchase agreement; that on June 25, 2012, CBS' Vice President of Real Estate, Mitch Matson (Matson), e-mailed a representative of Rand Road acknowledging receipt of the purchase agreement 11

days earlier; that CBS was aware of the purchase agreement and was aware that the purported lease amendment would extend the billboard lease by 38 years longer than was permitted or anticipated in the purchase agreement; that at the time CBS executed the lease amendment, it was aware of the terms and provisions of the purchase agreement; that CBS was aware entering into the lease amendment would cause Castagna to breach the purchase agreement; that CBS malicious, intentionally and unjustifiably entered into the lease amendment, thereby inducing a breach of the purchase agreement; and that Rand Road had been significantly damaged as a result of CBS' wrongful conduct. CBS sought to dismiss count VIII in its motion to dismiss pursuant to section 2-615 of the Code.

¶ 60 On appeal, Rand Road argues that count VIII was improperly dismissed because it is undisputed that CBS was an "actor with knowledge" that entered into the lease amendment, contravening the terms of the purchase agreement and causing its breach by Castagna. Rand Road also argues that the circuit court's error in resolving this claim by summary judgment in favor of CBS, deprived Rand Road of the opportunity to obtain additional evidence of CBS' tortious interference or possible collusion with LD.

¶ 61 CBS counters that count VIII was properly dismissed, arguing that Rand Road failed to plead facts to show that CBS' conduct was somehow malicious or unjustified because CBS had a "privilege" to enter into the lease amendment to protect its preexisting interest, and that there was no breach of the purchase agreement by Castagna.[9]

¶ 62 Taking as true the allegations in count VIII, we find that, for the same reasons stated in our discussion of count VII, a question of material fact exists as to whether Castagna breached

[9] CBS cites no legal authority in arguing that Castagna did not breach the purchase agreement.

the purchase agreement. We also reject CBS' argument that Rand Road failed to allege sufficient facts to show that CBS' conduct in entering the lease amendment was somehow malicious or unjustified. Given count VIII's allegations that CBS' representative, Matson, had received a copy of the purchase agreement prior to entering into the lease amendment, as well as the close proximity in time in the execution of the purchase agreement, the execution of the lease amendment, and the closing of the sale of the property, we find that that these factual allegations were sufficient to plead that CBS' conduct was intentional or unjustified. Therefore, we hold that the circuit court erred in resolving this claim in favor of CBS. Accordingly, we affirm the circuit court's dismissal of counts III, IV, V, and VI, but reverse dismissal of counts I, II, VII, and VIII.

¶ 63 For the foregoing reasons, we affirm in part and reverse in part the judgment of the circuit court of Cook County.

¶ 64 Affirmed in part; reversed in part and remanded for further proceedings consistent with this order.