2015 IL App (2d) 140876-U
No. 2-14-0876
Order filed June 8, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

REVOLUTION MADISON, LLC,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-CH-2088
	)	
MARILYN L. ECCLES, COMMUNITY	)	
COLLEGE DISTRICT NO. 532, and	)	
BOARD OF TRUSTEES OF COMMUNITY	)	
COLLEGE DISTRICT NO. 532,	)	Honorable
	)	Luis A. Berrones,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied Revolution's motion to consolidate its section 2-1401 petition with its amended complaint because the section 2-1401 petition was rendered moot by a subsequent agreed order. The trial court properly dismissed count II of Revolution's amended complaint because that claim was also rendered moot by the subsequent agreed order, and it did not err in dismissing counts I and III of Revolution's amended complaint because they failed to state a cause of action. Finally, Revolution forfeited the issue that the trial court improperly dismissed count I of its original complaint. Accordingly, we affirmed.

¶ 2 Plaintiff, Revolution Madison, LLC (Revolution), and defendant, Marilyn Eccles, entered

into an installment agreement (the Purchase Contract) on April 18, 2007, whereby Revolution would purchase the real property owned by Eccles at 34 N. Sheridan Road, Waukegan, Illinois 60085 (the Premises). In 2011, after having amended the Purchase Contract in 2010 for past failures to pay, Revolution again owed late payment on the Purchase Contract. In response, Eccles posted a demand and notice for payment on the Premises, requesting payment within 30 days or she would take legal action. Over 30 days later, Eccles filed a forcible entry and detainer action against Revolution. Revolution defaulted, Eccles regained possession of the Premises, and she subsequently sold the Premises to a third party, defendant Community College District No. 532, a/k/a College of Lake County (CLC).[1]

¶ 3 Revolution filed this current action, a separate proceeding from the forcible entry and detainer action, alleging fraud and seeking declaratory relief and, in the alternative, rescission of the Purchase Contract. The gist of Revolution's claims was that defendants did not provide proper notice to it in the forcible entry and detainer action, which violated the Purchase Contract and deprived the trial court of jurisdiction. After its original complaint was dismissed, Revolution filed an amended complaint and also filed a section 2-1401 (735 ILCS 5/2-1401 (West 2012)) petition to vacate. It later moved to consolidate its section 2-1401 petition with its amended complaint. On June 24, 2014, the trial court denied Revolution's motion to consolidate and dismissed all counts of its amended complaint.

¶ 4 We affirm.

¶ 5 I. BACKGROUND

[1] A hand-written correction to the instrument conveying the Premises to CLC specified that the conveyance was to the board of trustees of Community College District No. 532, not to Community College District No. 532.

¶ 6 Before entering into the Purchase Contract, Eccles owned the Premises and operated it as Madison Avenue Restaurant. Revolution purchased the Premises from Eccles, through the Purchase Contract for $1,200,000 plus interest. Notice to Revolution under the Purchase Contract was to be sent to its legal counsel, Kelley Drye & Warren, LLP, at 333 W. Wacker Drive, Chicago, Illinois 60606. After Revolution failed to make timely payments and pay real estate taxes for 2007 through 2009, the Purchase Contract was amended and extended on September 8, 2010. The amendments to the Purchase Contract required that Revolution do several things, including pay past due interest, pay past due real estate taxes, and comply with the city of Waukegan's notice to remediate the Premises. The amendments also changed where Revolution would receive notice to 114 S. Genesee Street, Suite 504, Waukegan, Illinois 60085. On October 9, 2009, the Illinois Secretary of State administratively dissolved Revolution. Revolution applied for reinstatement several years later, and on October 3, 2013, it was reinstated as an LLC.

¶ 7 On May 10, 2011, Eccles, through Chester Macrowksi, posted a demand and notice pursuant to section 9-104.1 of the Code of Civil Procedure (Code) (735 ILCS 5/9-104.1 (West 2010)) at the Premises. The demand and notice was later filed with the court on July 13, 2011, and Macrowski signed an "affidavit of posting service." The demand and notice notified Revolution that $60,720 was past due under the Purchase Contract, plus attorney fees. Unless past due payments were made within 30 days, Eccles would take legal action for forcible entry and detainer pursuant to section 9-101 of the Code (735 ILCS 5/9-101 (West 2010)).

¶ 8 On June 21, 2011, Eccles filed a complaint for forcible entry and detainer against Revolution, in case no. 11 LM 1388. Eccles attempted service via Chester Macrowski, and on July 13, 2011, he filed an affidavit averring that he attempted service of the summons and

complaint at various locations, including at the Premises and at 114 S. Genesee Street, Waukegan, Illinois, which was the address provided for in the amended Purchase Contract. However, he was unable to complete service because no one was at any of the locations where he attempted service.

¶ 9 On August 3, 2011, the circuit court entered a "forcible entry / detainer order" (detainer order) in case no. 11 LM 1388. The detainer order granted Eccles possession of the Premises. Neither Revolution nor its counsel was present at any of the proceedings leading to the detainer order. After repossessing the Premises, Eccles sold it to CLC.

¶ 10 Revolution filed its initial complaint (the original complaint) in this matter on July 15, 2013, for declaratory judgment, breach of contract, fraud, and other relief. We summarize the content of the original complaint as follows.

¶ 11 Count I sought declaratory relief. Revolution alleged that Eccles had no standing to pursue the detainer order and further alleged that the circuit court did not have subject matter jurisdiction of Eccles's claim because she never sent Revolution, nor did Revolution ever receive, a notice of breach or default as required by both the Purchase Contract and the Illinois Limited Liability Company Act (LLC Act), 805 ILCS 180/1-50 *et seq.* (West 2012). Specifically, Revolution alleged that the detainer order was void *ab initio* because the circuit court lacked subject matter jurisdiction and personal jurisdiction.

¶ 12 Count II sought, in the alternative, rescission for a breach of contract against Eccles. Therein, Revolution alleged that it paid Eccles over $635,000 in performance of the purchase contract for the Premises. Moreover, it paid third parties over $25,000 and funded over $100,000 in operating losses in reliance upon Eccles's promises to convey title of the Premises pursuant to the Purchase Contract. Eccles breached the Purchase Contract by failing to serve

notice of default and provide a 30-day cure period to Revolution, as required by the Purchase Contract and by the LLC Act.

¶ 13 Count III sought, again in the alternative, that the circuit court find that Eccles committed fraud. Revolution alleged as follows. In October 2009, Governor Quinn announced that Illinois would provide $36 million to fund CLC's planned expansion of its existing Lakeshore Campus in Waukegan, near the Premises. CLC then announced a "Master Plan" to expand the Lakeshore Campus, which included acquiring various properties near its existing campus, one being the Premises. Thereafter, Waukegan served a "Notice to Remediate" the Premises on Revolution, intending to obtain title to the Premises. The notice to remediate caused Revolution and Eccles to amend and extend their Purchase Contract and Revolution to renew efforts to sell the Premises to CLC. Thereafter, Waukegan dismissed the notice to remediate.

¶ 14 However, Revolution was unable to sell the Premises by March 2011, and Waukegan notified Revolution of certain needed repairs on the Premises, particularly certain "loose tiles." Revolution timely made the repairs. After making the repairs, Revolution heard nothing further from the city of Waukegan, CLC, or Eccles.

¶ 15 No later than May 2011, Eccles decided that she would seek to declare a forfeiture of the Purchase Contract and regain possession of the Premises, misappropriate the $635,000 she received from Revolution, and sell the Premises to CLC. Her decision to defraud Revolution was evidenced by her "singular silence" after March 2011. Furthermore, Eccles never sent Revolution or its attorneys any notice of default as required by the Purchase Contract. Instead, she filed a complaint for forcible entry and detainer regarding the Premises and failed to serve notice on Revolution or any of its agents, as well as failed to serve the complaint on the Illinois Secretary of State. She provided an affidavit to the court that Revolution's place of residence

was "unknown," even though she had long known the contact information for Revolution and its agents. She "intentionally secreted" the lawsuit to avoid providing Revolution with actual notice of her fraudulent scheme, and after securing a default judgment against Revolution, she again failed to serve Revolution with a copy of the order. The fraudulent misrepresentations and concealments led to the detrimental detainer order against Revolution.

¶ 16 On September 6, 2013, both Eccles and CLC filed section 2-619.1 combined motions, specifically motions under sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 619 (West 2012)) to dismiss Revolution's complaint. In Eccles's section 2-619 motion to dismiss, she argued that Revolution lacked both standing and capacity to sue. In particular, Eccles argued that Revolution was a limited liability company dissolved in 2009, and the alleged cause of action was based on events that occurred in 2011, two years after its dissolution. Therefore, Revolution lacked standing and capacity to sue. Additionally, Eccles argued that Revolution did not seek relief pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)) within two years of the detainer order and therefore was time-barred from pursuing relief under that section.

¶ 17 In Eccles's section 2-615 motion to dismiss, she argued that the complaint failed to state a cause of action. Regarding count I (declaratory relief), Eccles argued that Revolution's claim was based on a breach of contract, and therefore a declaratory judgment was no longer a proper avenue for relief as the purpose of a declaratory judgment is to address a controversy "one step sooner than normal after a dispute has arisen." Moreover, Revolution had a remedy available through section 2-1401, and an action for declaratory relief may be dismissed when another remedy is available. Addressing count II (rescission), Eccles argued that Revolution failed to plead sufficient facts to successfully plead a cause of action. In particular, Revolution failed to

plead facts demonstrating the performance of a condition precedent to the contract. Finally, as to count III (fraud), Eccles argued that Revolution failed to allege sufficient facts to support that she was vicariously liable for any alleged fraud.

¶ 18 In CLC's section 2-619 motion, it argued that it was not a proper party to the suit because CLC was separate and distinct from its board of trustees, was not a legal entity, and could not be sued. In its section 2-615 motion, it argued that no actual controversy existed between it and Revolution with respect to count I because CLC could not act; only its board of trustees could act. Thus, any claim or controversy should be directed at the board of trustees, not CLC. As to count III, CLC argued that the fraud claim was not supported by sufficient facts nor directed at CLC.

¶ 19 After responses, replies, supplemental briefing, and a hearing on the motions to dismiss, the trial court entered an order on February 14, 2014, granting the section 619.1 combined motions to dismiss count I of Revolution's complaint with prejudice and to dismiss counts II and III without prejudice. The order gave Revolution 21 days to file an amended complaint as to counts II and III.

¶ 20 On March 7, 2014, Revolution filed its first amended complaint (the amended complaint), and its factual allegations remained substantially the same. The first amended complaint again contained three counts: count I alleged common law fraud; count II sought a declaration that Eccles did not possess title to the Premises after August 2, 2011, and that the November 18, 2011, warranty deed to the Premises was void *ab initio* and did not convey title to the Premises to CLC or its board; and in the alternative, count III sought rescission of the Purchase Contract for the Premises.

¶ 21 Also on March 7, 2014, Revolution filed a section 2-1401(a) petition (735 ILCS 5/2-1401(a) (West 2012)) to vacate the detainer order. The substance of Revolution's 2-1401 petition mirrored that of count I of its original complaint. The 2-1401 petition alleged that the detainer order was void *ab initio* because the court never had personal jurisdiction over Revolution (but unlike in count I of its original complaint, it did not allege a lack of subject matter jurisdiction); and it further alleged that Eccles's fraud, as detailed in count III of the original complaint, deprived Revolution of due process of law in that it never received proper notice of the suit leading to the detainer order.

¶ 22 CLC filed a section 2-619 motion to dismiss the first amended complaint on April 3, 2014. In its motion, CLC argued that count II of Revolution's amended complaint should be dismissed because Revolution could not assert an amended claim for declaratory relief when the trial court already dismissed its claim for declaratory relief with prejudice in its original complaint; Revolution's claim for declaratory relief was duplicative with the pending section 2-1401 motion; and no controversy existed between Revolution and CLC but rather any controversy would be between it and CLC's board.

¶ 23 Eccles also filed sections 2-615 and 2-619 motions to dismiss all three counts of Revolution's amended complaint and to dismiss its section 2-1401 petition on April 4, 2014. In Eccles's section 2-615 motion, she argued that count I of Revolution's amended complaint should be dismissed because Revolution did not allege facts with the necessary specificity to plead fraud, and even if its allegations were not conclusory, it failed to allege all necessary elements of fraud. Eccles argued that count II should be dismissed because Revolution failed to allege sufficient facts for a declaratory judgment, a declaratory judgment was an unavailable remedy, and the law-of-the-case doctrine precluded seeking declaratory relief again after the

court dismissed, with prejudice, Revolution's count for declaratory relief in its original complaint. And she argued that count III should be dismissed because Revolution failed to allege sufficiently specific facts to support a claim for rescission, and even had it alleged sufficient facts, rescission was an equitable remedy and therefore inappropriate because the parties had agreed to a damage provision in the Purchase Contract.

¶ 24 In Eccles's section 2-619 motion, she argued that Revolution's section 2-1401 petition was time-barred because it was brought more than two years after the detainer order was entered on August 23, 2011 (Revolution filed its petition on March 7, 2014). Therefore, even if Revolution had had the capacity to file a section 2-1401 petition, which she maintained they did not, the trial court did not have jurisdiction to entertain it.

¶ 25 In response, Revolution moved on April 30, 2014, to consolidate the claims made in its section 2-1401 petition with those made in its amended complaint. CLC and Eccles both objected to the motion to consolidate.

¶ 26 On June 24, 2014, the trial court entered an order addressing Revolution's motion to consolidate and Eccles and CLC's respective motions to dismiss.[2] First, it denied Revolution's motion to consolidate. Turning to the motions to dismiss, it granted dismissal as follows:

> "a) Count II of Plaintiff's First Amended Complaint is dismissed with prejudice as to all Defendants;
>
> b) Community College District No. 532 is dismissed with prejudice. The District cannot hold title to property;

[2] The trial court did not indicate whether it was ruling on sections 2-615 or 2-619 motions to dismiss, but rather only that it was ruling on motions to dismiss.

c) Community College District No. 532 and The Board of Trustees of Community College District No. 532 are dismissed with prejudice. Plaintiff does not have a claim to title against the District or the Board;

d) Count I (Fraud) against Eccles is dismissed with prejudice; and

e) Count III (Rescission) against Eccles is dismissed without prejudice."

The court allowed Revolution 21 days to file an amended count for rescission against Eccles.

¶ 27 Revolution thereafter filed a motion to stand on its amended complaint and to "make this court's June 24, 2014 dismissal of count III thereof 'with prejudice.' " On August 1, 2014, the trial court granted its motion to stand on its amended complaint and dismissed count III with prejudice.

¶ 28 Revolution timely appealed on August 28, 2014.

¶ 29 On September 10, 2014, in case no. 11 LM 1388, the court entered an agreed order between Eccles and Revolution stipulating that the court never had jurisdiction over Revolution during 2011, and therefore the detainer order was void upon entry. The detainer order was vacated and the matter dismissed.

¶ 30 II. ANALYSIS

¶ 31 Before addressing Revolution's arguments as to why the court erred in dismissing its complaint, it is prudent to address Eccles's section 2-619 argument, made in her response to the original complaint and reiterated in her response to the amended complaint, that Revolution lacked standing and/or capacity to sue in this case. See *People v. Greco,* 204 Ill. 2d 400, 409 (2003) (standing is an element of justiciability and is intended to insure that issues are raised only by parties with a real interest in the outcome of the controversy).

¶ 32 Eccles's argument is summarized as follows. Revolution dissolved its legal entity status on October 9, 2009. The original complaint was filed on July 15, 2013, and was based on events that occurred beginning in 2011, in particular, Eccles providing notice in May 2011 to the Premises that if past due payments were not made within 30 days, she would file an action for forcible entry and detainer. Revolution did not exist as a legal entity at the time these events occurred. Once an LLC dissolves, it must take certain steps to regain legal entity status through reestablishment, and Revolution did not reestablish itself until October 3, 2013, after the filing of its original complaint. The reinstatement provisions of the LLC Act (805 ILCS 180/35-40 (West 2012)) are silent concerning claims that arise while an LLC is dissolved. However, the treatment of such claims was answered in *A Plus Janitorial Company, Inc. v. Group Fox, Inc.*, 2013 IL App (1st) 120245. There, the court held that a dissolved corporation did not have the capacity to sue for claims that arose post its dissolution.

¶ 33 Revolution responds that it "has always been an Illinois LLC [citation omitted] and this case surely does not involve a 'dissolved corporation.' " Revolution distinguishes *A Plus* because there, the corporation was permanently dissolved, whereas Revolution's corporate status was later reinstated. Revolution points to section 35-40(d) of the LLC Act (805 ILCS 180/35-40(d) (West 2010)), in particular:

> "Upon the filing of the application for reinstatement, the limited liability company existence shall be deemed to have continued without interruption from the date of the issuance of the notice of dissolution, and the limited liability company shall stand revived with the powers, duties, and obligations as if it had not been dissolved." *Id.*

Revolution argues that this language must be construed and applied as written, and that the language authorizes it to pursue claims filed after its dissolution once it is restored as an LLC. In

support, it cites *Henderson-Smith & Associates v. Nahamani Family Service Center, Inc.*, 323 Ill. App. 3d 15 (2001), which involved the dissolution of a corporation under the Business Corporation Act of 1983 (Corporation Act) (805 ILCS 5/12.40 (West 2000)). There, the plaintiff-corporation was ultimately allowed to sue for breach of contract even though its cause of action accrued after it had been administratively dissolved for failure to pay its franchise taxes but before it was reinstated after paying said taxes approximately 1½ years later. *Id.* at 17-18, 23.

¶ 34 We disagree with Eccles that Revolution lacked capacity based on its October 2009 dissolution. First, *A Plus* is distinguishable, as Revolution suggests, because the plaintiff-corporation in *A Plus* was a dissolved corporation that was never reinstated. *A Plus Janitorial Company, Inc.*, 2013 IL App (1st) 120245, ¶¶ 1, 7, 21. The *A Plus* court did not have to examine the effects of any statutory reinstatement language, as we must do here with section 35-40 of the LLC Act (805 ILCS 180/35-40 (West 2012)). *A Plus*, therefore, does not aid our disposition.

¶ 35 On the other hand, *Henderson-Smith & Associates*, 323 Ill. App. 3d at 15, supports Revolution's position that it had standing and capacity to sue. There, the plaintiff-corporation had entered into a contract with the defendant-corporation to provide accounting services. *Id.* at 16. The secretary of state dissolved the plaintiff on June 1, 1998, after it failed to pay its franchise taxes. *Id.* at 17. Following its dissolution, the plaintiff continued to provide services to the defendant pursuant to their contract. The plaintiff alleged that it never received the fee it was owed for the 1998 year-end audit, and it sued the defendant for damages. *Id.* at 18.

¶ 36 Prior to a bench trial, the defendant moved to dismiss based on the plaintiff's administrative dissolution. *Id.* The trial court denied the motion. The court ultimately found in favor of the plaintiff, and the defendant appealed.

¶ 37 The appellate court began by noting that under common law, a dissolved corporation could not sue or be sued. *Id.* at 19-20. However, exceptions existed under the Corporation Act (805 ILCS 5/1.01 *et seq.* (West 1998)). *Id.* at 20. In particular, the Corporation Act contained a "relation back" provision for administratively dissolved corporations that were reinstated, as the plaintiff was in this case. *Id.* Section 12.45(d) of the Corporation Act provided that:

> " 'Upon reissuance of the certificate of reinstatement, the corporate existence shall be deemed to have continued without interruption from the date of the issuance of the certificate of dissolution, and the corporation shall stand revived with such powers, duties and obligations as if it had not been dissolved; and all acts and proceedings of its officers, directors and shareholders, acting or purporting to act as such, which would have been legal and valid but for such dissolution, shall stand ratified and confirmed.' " *Id.* (quoting 805 ILCS 5/12.45(d) (West 1998)).

¶ 38 In interpreting this relation back provision, the appellate court began by explaining that the portions of the Corporation Act involving administrative dissolution were intended to "ensure payment of taxes and fees by corporations." *Id.* at 23. Accordingly, "a delinquent corporation should not be able to obtain—or at any rate collect on—a judgment until it pays its taxes and fees." *Id.* The flip side of this logic is that once a delinquent corporation makes good on its deficiency, it should be allowed to carry on its business and conduct its legal affairs. *Id.* The statute was "intended to be coercive rather than punitive," which is "especially clear in light of the broad language of the relation back provision." *Id.* The fiction of uninterrupted corporate existence promotes stability, certainty, and predictability in commercial transactions. *Id.* Moreover, the fiction prevents a corporation from employing administrative dissolution, followed by a later reinstatement, to evade otherwise legitimate debts. *Id.*

¶ 39 Finding that the relevant facts were that the defendant contracted with the plaintiff for accounting services, received those accounting services, and did not pay for them, the appellate court held that the relation back provision allowed the plaintiff to file suit even though the cause of action accrued after the plaintiff administratively dissolved its corporate form. *Id.* at 24. However, the appellate court continued that although the plaintiff had a cause of action, the trial court should not have entered judgment in its favor while it was still a delinquent corporation. *Id.* Nonetheless, it held that the plaintiff's reinstatement "retroactively validated the judgment in its favor." *Id.* at 26.

¶ 40 The principle difference between *Henderson-Smith* and our case is that *Henderson-Smith* involved the Corporation Act, whereas this case involves the LLC Act. Here, Revolution was administratively dissolved under section 35-30 of the LLC Act for failure to file an annual report. Failure to file an annual report is one ground for administrative dissolution under section 35-25 of the LLC Act. Section 35-40 of the LLC Act provides for reinstatement as follows:

> "(d) Upon the filing of the application for reinstatement, the limited liability company existence shall be deemed to have continued without interruption from the date of the issuance of the notice of dissolution, and the limited liability company shall stand revived with the powers, duties, and obligations as if it had not been dissolved; and all acts and proceedings of its members, managers, officers, employees, and agents, acting or purporting to act in that capacity, and which would have been legal and valid but for the dissolution, shall stand ratified and confirmed." 805 ILCS 180/35-40(d) (West 2012).

¶ 41 No Illinois case directly interprets section 35-40(d), but the language of section 35-40(d) is similar to the language used in section 12.45(d) of the Corporation Act (805 ILCS 5/12.45(d) (West 2012)) ("Upon reissuance of the certificate of reinstatement, the corporate existence shall

be deemed to have continued without interruption from the date of the issuance of the certificate of dissolution.") and section 113.60(d) of the General Not For Profit Corporation Act of 1986 (Not For Profit Act) (805 ILCS 105/113.60(d) (West 2010)) ("Upon the filing of the application for reinstatement, the authority of the corporation to conduct affairs shall be deemed to have continued without interruption from the date of the issuance of the certificate of revocation."). As discussed in *Henderson-Smith supra*, the relation-back provision in the Corporation Act generally permits a plaintiff to file a complaint that accrued while it was dissolved but before it was reinstated, so long as that suit does not defy the reasonable expectations of the parties. See *Henderson-Smith*, 323 Ill. App. 3d at 24 (the legal fiction of reinstatement under the Corporation Act did not extend to fictions that would "belie the intentions of the parties and those that would frustrate their reasonable expectations").

¶ 42 In *Young America's Foundation v. Doris A. Pistole Revocable Living Trust*, 2013 IL App (2d) 121122, this court borrowed the interpretation of reinstatement under the Corporation Act in deciding the meaning of "maintain" under the Not For Profit Act (*id.* ¶ 59), citing *Henderson-Smith* approvingly (*id.* ¶ 63). We stated that "[l]ike the Corporation Act, the Not for Profit Act provides that a noncomplying corporation whose authority to conduct affairs has been revoked may seek reinstatement, and upon reinstatement that authority must be deemed to have continued without interruption." *Id* ¶ 59. We held that the plaintiff, a foreign (to Illinois) not-for-profit corporation, which lacked authority to conduct business in Illinois at the time of filing and within the applicable limitations period, could maintain suit against the defendants where it subsequently complied with the statute to obtain authority to conduct business in Illinois.[3] *Id.* ¶¶ 58-62.

[3] We note that *Young America's Foundation* concerned section 113.70 of the Not For

¶ 43 Following these cases, and applying the plain language of the statute, we hold that section 35-40(d) of the LLC Act permitted Revolution to prosecute its complaint against defendants. The language for reinstatement under the LLC Act mirrors that of the Corporation Act, and the fiction of uninterrupted corporate existence promotes stability, certainty, and predictability in business transactions, as well as assuring that corporations cannot abuse administrative dissolution and subsequent reinstatement to avoid legitimate debts. Accordingly, Revolution could file suit despite its administrative dissolution at the time its cause of action accrued, because its subsequent reinstatement cured any defect in its capacity to maintain suit.

¶ 44 We now turn to Revolution's substantive arguments involving the trial court's dismissal of its original and amended complaints, as well as its denial of its motion to consolidate. We review motions to dismiss under section 2-615 and 2-619 *de novo* and in reviewing dismissal under these motions, we take all well-pleaded facts as true. *Brock v Andersen Road Ass'n*, 287 Ill. App. 3d 16, 21 (1997). Revolution makes various arguments as to why the trial court erred in dismissing count I of its original complaint, all counts of its amended complaint, and denying its motion to consolidate. We address the original complaint, the amended complaint, and the motion to consolidate in turn.

¶ 45 1. Revolution's Original Complaint

¶ 46 Revolution argues that the trial court erred in dismissing count I of its original complaint, which alleged that the court in case no. 11 LM 1388 lacked subject matter jurisdiction to enter the detainer order. It advances various arguments to this effect based on Eccles's alleged failure to provide proper notice.

Profit Act, not directly addressing reinstatement under section 113.60(d). Nonetheless, both sections implicated the capacity of a corporation to maintain suit under the Not For Profit Act.

¶ 47 However, all of the arguments advanced overlook the fact that the law in Illinois is that " 'a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints.' " *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17 (quoting *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153-54 (1983)). If an amended pleading does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, and it is forfeited. *Id.*; *Jacobson v. Gimbel*, 2013 IL App (2d) 120478, ¶ 19. In order to preserve claims for appeal, a party can stand on the dismissed counts and voluntarily dismiss the remaining counts, file an amended pleading that reallege or incorporates by references the dismissed count, or perfect an appeal from the dismissal order prior to filing an amended pleading. *Jacobson*, 2013 IL App (2d) 120478, ¶ 19.

¶ 48 Here, Revolution did not stand on its original pleading, did not reallege or incorporate count I of the original complaint in its amended complaint, and did not perfect an appeal for the original complaint before filing its amended complaint. Rather, Revolution filed a new count for declaratory relief in its amended complaint (count II).[4] Having failed to preserve count I of the original complaint for appeal, we find that it is forfeited and need not address it further. [5]

[4] Eccles argues, in fact, that the law of the case barred count II of the amended complaint because Revolution was essentially realleging count I of the original complaint, which had been dismissed with prejudice. Count II of the amended complaint seeks different relief than count I of the original complaint—asking that we declare the warranty deed void *ab initio*, not merely the detainer order—and we therefore resolve the issue through forfeiture.

[5] Nevertheless, we quickly note that the trial court had subject matter jurisdiction of the forcible entry and detainer action because the circuit courts are courts of general jurisdiction. Ill. Const. 1970, art. VI, § 9; *People v. Byrnes*, 34 Ill. App. 3d 983, 96 (1975). Subject matter

¶ 49 2. Revolution's Amended Complaint

¶ 50 Next, Revolution argues that the trial court erred in dismissing all three counts of its amended complaint.

¶ 51 Revolution argues that Eccles's section 2-615 motion was meritless. It argues as follows. Regarding count I for fraud, Eccles ignored multiple allegations of fraudulent conduct, including that she made a false statement that Revolution could not be found for service in the forcible entry and detainer suit after due diligence and inquiry. She also claimed that Revolution's fraud allegations lacked specificity but ignored the contents of its pleadings and failed to identify any conclusory allegations. Regarding count II for declaratory relief, count II did not contain conclusory allegations but rather was based on facts that demonstrated that Eccles's fraud deprived the trial court of jurisdiction to enter the detainer order. Count II was not, as Eccles contended, rooted in an alleged breach of contract. Regarding count III for rescission, Eccles did not point out the defects it complains of in count III with specificity; ignored that the Purchase Contract required notice to Revolution before she could seek forfeiture of the Purchase Contract;

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jurisdiction is a separate issue from whether Eccles provided proper notice in the particular forcible entry and detainer action. See *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 340-41 (2002) (a defective complaint does not deprive a circuit court of subject matter jurisdiction; subject matter jurisdiction does not depend upon the legal sufficiency of the complaint or the outcome of the suit, and a limitations period is not a jurisdictional prerequisite to a suit); *Health Cost Controls v. Sevilla*, 307 Ill. App. 3d 582, 587 (1999) (subject matter jurisdiction refers to the power of a court to hear and determine cases of the general class to which the proceeding in question belongs).

and misunderstood what Revolution sought in asking for rescission when it argued that Revolution failed to satisfy a condition precedent in the Purchase Contract.

¶ 52 Eccles responds as follows. Count I of Revolution's amended complaint, which alleged fraud, did not state a cause of action. First, Revolution did not allege specific facts to show fraud, but instead relied on conclusory allegations. Assuming *arguendo* that Revolution did plead more than mere conclusions, count I still did not state a cause of action for fraud because the allegations of count I boil down to a breach of the Purchase Contract. However, the allegation that a party allegedly breached a contract does not on its own show fraud.

¶ 53 Eccles continues that count II for declaratory relief likewise did not state a cause of action. Count II was rooted in an alleged breach of contract, which is an action at law and not the proper subject for a declaratory judgment. The remedy of a declaratory judgment does not create substantive rights or duties but rather is a procedural vehicle for judicial determination of the rights and obligations of the parties. Because it is procedural, not substantive, an action for declaratory relief must state a claim based on particular substantive legal theories. Merely stating that a judgment is void *ab initio* is insufficient for declaratory relief absent some independent substantive basis. Additionally, Revolution's claims of a lack of service are contradicted by her affidavits of attempted service and of posting. Finally, the law of the case doctrine precluded count II because the trial court already dismissed with prejudice Revolution's declaratory judgment count in the original complaint.

¶ 54 Finally, Eccles argues that count III for rescission failed to allege specific facts to avoid dismissal. Importantly, Revolution failed to satisfy a condition precedent to the Purchase Contract. The articles of agreement, which were merely an executory agreement that would result in a sale once performance of a contract was completed, provided that in the case of failure

by Revolution to make any of the payments, Eccles would have the option to forfeit the agreement. However, Revolution never made any allegation that it satisfied the condition precedent to the agreement. Moreover, Revolution breached any valid Purchase Contract by failing to make timely payments. Finally, rescission is an equitable remedy and is inappropriate where the parties agreed to damages in the contract. For all these reasons, it was right for the trial court to dismiss count III.

¶ 55 We hold that the trial court properly dismissed each of the three counts of the amended complaint pursuant to section 2-615. Our review of a section 2-615 motion to dismiss is *de novo*. *Village of Roselle v. Commonwealth Edison Co.*, 368 Ill. App. 3d 1097, 1112 (2006). The relevant inquiry is whether the plaintiff alleged sufficient facts that, if proved, would entitle it to relief. *Id.* Our reasoning is as follows.

¶ 56 Count I of the amended complaint alleged fraud. "The facts which comprise an alleged fraud must be pleaded with specificity, particularity, and certainty to apprise the other party of how he is to defend himself." *Heider v. Leewards Creative Crafts, Inc.*, 245 Ill. App. 3d 258, 264 (1993). Common law fraud requires that a plaintiff allege that: (1) the defendant made a statement; (2) of a material nature; (3) which was untrue; and (4) was known by the defendant to be untrue, or was made in culpable ignorance of its truth or falsity; (5) was made for the purpose of inducing reliance by the plaintiff; (6) was actually relied on by the plaintiff; and (7) resulted in plaintiff's injury. *Bank of Northern Illinois v. Nugent*, 223 Ill. App. 3d 1, 9 (1991). A false representation of intent to act, without amounting to actual fraudulent conduct, is not fraud in the eyes of the law, with the rationale being that allegations of fraud must be based on affirmative acts and not mere promises or expressions of intent to perform. *Id.* at 9-10. However, an exception to the general rule exists where a false promise of future conduct is alleged to be part

of an existing fraudulent scheme with no intent of performing the promised acts. *Id.* at 10. In such an instance, we look to the totality of the circumstances to determine whether a fraudulent scheme has been pled with sufficient specificity. *Id.*

¶ 57 Revolution's allegations of fraud in count I of the amended complaint were as follows. Eccles "induced Revolution's failures to cure any alleged default and to appear and respond to Eccles' Complaint in Forcible Entry and Detainer by her various acts, omissions, concealments, and misrepresentations throughout 2011." Specifically, Revolution alleges the following constituted fraudulent acts or omissions: Eccles's failure to provide Revolution notice that it had breached its obligations under the Purchase Contract; Eccles's failure to provide Revolution or any of its agents at any time with notice that it was in default of the Purchase Contract; Eccles's decision to post a demand and notice at the Premises on May 10, 2011, which violated the terms of the Purchase Contract and the LLC Act (805 ILCS 180/1-50(c) (West 2010)); Eccles's filing of her complaint before serving proper notice; Eccles's misrepresentations in her forcible entry and detainer complaint, including that she was entitled to possession of the premises and Revolution had unlawfully withheld possession; Eccles's failure to serve a copy of the complaint or summons on Revolution or any of its agents; Eccles's misrepresentations in her affidavit of posting, which stated that Revolution could not be found for service after due inquiry and that upon diligent inquiry Revolution's place of residence was unknown, and her failure to provide the "last known" residence or address for Revolution or its agents; Eccles's misrepresentation that its May 10, 2011, posting satisfied the notice requirements of the Purchase contract and the LLC Act; Eccles's misrepresentations in her affidavit of attempt to serve that the contacts listed were complete and that the process server actually tried to contact Revolution's agents; Eccles's failure to provide Revolution or its agents with a copy of the court's July 13, 2011, order

granting her leave to serve Revolution with process by posting, and her failure to provide the sheriff with the address most likely to result in actual notice; Eccles's failure to provide Revolution or its agents with notice of the August 3, 2011, order granting Eccles a default judgment and sole possession of the Premises; and Eccles's failure to provide Revolution or any of its agents with a copy of the warranty deed dated November 2011.

¶ 58 Revolution alleged that all these misrepresentations were intentionally false and designed to wrongfully induce its failure to cure any breach of the Purchase Contract and lead to its loss of the Premises. It claims this was a fraudulent scheme perpetuated by Eccles, whereby she did not share her plans to sell the Premises to CLC during any discussions with Revolution concerning repairs to the Premises, misappropriated Revolution's installment payments, and eventually sold the Premises after prosecution of the forcible entry and detainer action. At all times Revolution alleges that it reasonably relied on Eccles's acts and representations to its detriment, that is, loss of the Premises.

¶ 59 These allegations do not sufficiently allege a cause of action for fraud. The situation presented is not one where affirmative acts of fraud are alleged. Rather, Revolution argues inaction and the failure to live up to prior promises. This type of fraud via inaction is often referred to as "promissory fraud," that is, a form of fraud based upon a false representation of intent concerning future conduct, such as a promise to perform a contract when there is actually no intent to perform the contract. See *General Electric Credit Auto Lease, Inc. v. Jankuski*, 177 Ill. 3d 380, 384 (1988). However, Illinois recognizes promissory fraud only if it is part of a scheme to defraud. *Id.*; see *BPI Energy Holding, Inc. v. IEC (Montgomery), LLC*, 664 F.3d 131, 136 (7th Cir. 2011) (interpreting Illinois law). "The concern is that otherwise it would be difficult for a judge or jury to distinguish between a fraudulent promise and a mere breach of

promise, that is, a breach of contract." *BPI Energy Holding*, 664 F.3d at 136. Thus, without sufficient allegations of a scheme to defraud, Revolution cannot state a cause of action for fraud. See *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 334 (1977) (exception for fraud where false promise or representation of future conduct is alleged to be part of scheme employed to accomplish fraud).

¶ 60 "The distinguishing features of a 'scheme,' however, are not clear in Illinois case law." *Jankuski*, 177 Ill. App. 3d at 384. In cases where the court found a fraudulent scheme, the defendant made some promise contrary to her contemporaneous intent to follow through on the promise in the future. See, *e.g.*, *Stamatakis Industries, Inc. v. King*, 165 Ill. App. 3d 879, 882-83 (1987) (protracted negotiations between parties showed that a scheme was alleged); *Vance Pearson, Inc. v. Alexander*, 86 Ill. App. 3d 1105, 1112-13 (1980) (defendant agreed to install a scale for plaintiff by a certain date but evidence showed promise was made without intent to keep it); *Carter v. Mueller*, 120 Ill. App. 3d 314, 320 (1983) (landlord's assurance to tenant that everything would be taken care of prior to tenant taking possession, along with later statement that everything was taken care of, constituted a fraudulent scheme). Nonetheless, despite any lingering opacity in deciphering what constitutes a fraudulent scheme in Illinois, we can logically infer that a fraudulent scheme requires something more than a breach of a future promise. At the very least, the cases finding a fraudulent scheme indicate that a plaintiff has to show that a fraudulent intent existed at or before the time that the promise was made. Practically speaking, Revolution had to allege specific facts, not conclusions, that showed that Eccles said or did something more than fail to adhere to the Purchase Contract. More simply, Revolution had to allege more than a breach of contract with conclusory allegations of fraudulent intent.

¶ 61 Here, the allegations boil down to that Eccles perpetuated fraud by not providing proper notice to Revolution or its agents that led to the detrimental detainer order. The lynchpin of Revolution's fraud count is its allegation that "[u]pon information and belief, by at least early May 2011, Defendant Eccles decided that without notice to Revolution she would seek to declare a forfeiture of the Purchase Contract, misappropriate the $635,000.00 plus previously paid to her by Revolution, regain possession of the Premises, and then sell the Premises to the College ("Eccles' Scheme")." This is conclusory. Yet, Revolution does not address or dispute that it failed to make timely payments under the Purchase Contract leading up to Eccles's posting of a demand and notice pursuant to section 9-104.1 of the Code (735 ILCS 5/9-104.1 (West 2010)) at the Premises on May 10, 2011. Revolution does not even dispute that Eccles posted a demand and notice on May 20, 2011, but rather that such a demand and notice violated the terms of the Purchase Contract and the LLC Act. The facts supporting Revolution's conclusions of fraud are, simply, that Eccles sought the detainer order to repossess the Premises, Revolution did not receive notice pursuant to the Purchase Contract, Eccles secured the detainer order because Revolution did not receive any notice, and Eccles sold the Premises to CLC to Revolution's detriment. In other words, Revolution has only alleged that Eccles breached her promise with conclusory allegations of fraudulent intent.

¶ 62 We will not find fraud where the allegations of fraud amount to no more than a failure to fulfill explicit contractual obligations. See *Sklodowski v. Countrywide Home Loans, Inc.*, 358 Ill. App. 3d 696, 704 (2005). Without a fraudulent scheme, Revolution cannot allege fraud in this case, and therefore the trial court properly granted Eccles's section 2-615 motion to dismiss count I of the amended complaint.

¶ 63 Turning to count II for declaratory relief, we hold that whether it was proper to dismiss count II is a moot issue. All of the arguments advanced with respect to count II overlook the fact that the detainer order was subsequently voided by the September 10, 2014, agreed order in case no. 11 LM 1388. Therefore, the issue of whether the trial court erred in dismissing count II for declaratory relief is moot because the detainer order has already been vacated and thus no controversy over the validity of the detainer order exists. See *Young v. Mory*, 294 Ill. App. 3d 839, 844 (1998) ("[C]ourts should not adjudicate declaratory judgment actions involving moot or hypothetical issues."); *Clyde Savings & Loan Ass'n v. May Department Stores*, 100 Ill. App. 3d 189, 192 (1981) (if the question involved is moot, a complaint for declaratory judgment should be dismissed).

¶ 64 Turning to count III for rescission, rescission is an equitable remedy, and equitable remedies are not available where there is an adequate remedy at law. *Newton v. Aitken*, 260 Ill. App. 3d 717, 720 (1994). Rescission, generally speaking, means the cancelling of a contract in order to restore the parties to the status quo ante (*Horwitz v. Sonnenschein Nath & Rosenthal LLP*, 399 Ill. App. 3d 965, 973 (2010)), and it is an extraordinary remedy (*CC Disposal, Inc. v. Veolia ES Valley View Landfill, Inc.*, 406 Ill. App. 3d 783, 790 (2010)).

¶ 65 Revolution's alleged bases for rescission are Eccles's breach of contract and fraud. Rescission may be an appropriate remedy where there was fraud in the making of the contract (*Peddinghaus v. Peddinghaus*, 314 Ill. App. 3d 900, 908 (2000)), or where there is substantial non-performance or breach by another party (*Famer v. Koen*, 187 Ill. App. 3d 47, 50 (1989)). Here, Revolution did not allege fraud in the making of the contract but rather that Eccles intended to defraud Revolution by May 2011, years after the parties agreed to the Purchase Contract and a year after they agreed to amend and extend it. We have already held that

Revolution cannot state a cause of action for fraud based on these facts in affirming the dismissal of count II of the amended complaint. Our reasoning from count I applies here too, and we decline to find that fraud was a basis for rescission.

¶ 66 As for Eccles's alleged breach of contract for failing to provide proper notice under the Purchase Contract, we find this alleged breach does not support rescission. Rescission "contemplates voiding the contract as if it had never existed." *Newton*, 260 Ill. App. 3d at 719. Yet, Eccles's alleged breach came about only after Revolution breached the Purchase Contract by failing to make timely payments under its terms. Revolution does not need an extraordinary remedy to void the detainer order (and, in fact, the detainer order was already vacated by the September 10, 2014, agreed order in case no. 11 LM 1388). Rather, legal remedies existed to challenge improper notice, such as a section 2-1401 petition to vacate the detainer order, which Revolution failed to timely file. The remedy of rescission would allow Revolution to walk from a contract that the record shows it was in material breach of through its failure to make installment payments (again, Revolution did not dispute or address its failure to make payments in its pleadings), all while any wrong against Revolution due to ineffective notice had alternative legal remedies. This would be a windfall for Revolution, not merely a return to the status quo ante, as rescission would not only remedy Eccles's alleged breach in favor of Revolution but also relieve Revolution of any potential liability for its own, earlier breach. Accordingly, we hold that the trial court properly dismissed count III for failure to state a claim for rescission.

¶ 67 Thus, because all three counts of the amended complaint failed to state a cause of action, the trial court properly dismissed all counts.

¶ 68 3. Revolution's Motion to Consolidate

¶ 69 Finally, Revolution argues that the trial court erred in denying its motion to consolidate its section 2-1401 petition with its amended complaint. Eccles argues that Revolution's section 2-1401 petition was time-barred, which deprived the trial court of anything to consolidate. Revolution disagrees. It argues that its original complaint in this case was filed on July 15, 2013, which was less than two years after the August 3, 2011, detainer order. Although its section 2-1401 petition was filed on March 7, 2014, more than two years after the detainer order, its original complaint was not a section 2-1401 petition, was not governed by section 2-1401's time limitations, and was timely filed. Moreover, Eccles argues that the question of consolidation was rendered moot by the September 10, 2014, agreed order in case no. 11 LM 1388.

¶ 70 We disagree with Eccles that Revolution's section 2-1401 petition was time-barred. Section 2-1401 of the Code provides an avenue for relief from judgments more than 30 days from the entry thereof. 735 ILCS 4/2-1401(a) (West 2012). A section 2-1401 petition must be filed in the same proceeding in which the order or judgment was entered (735 ILCS 4/2-1401(b) (West 2012)), and the petition must be filed not later than two years after the entry of the order or judgment, with limited exceptions[6] (735 ILCS 4/2-1401(c) (West 2012)); *In re Marriage of Morreale*, 351 Ill. App. 3d 238, 241 (2004) ("A section 2-1401 petition may not be brought more than two years after the judgment's entry.")). However, a party may seek relief "beyond the two-year limitation of section 2-1401 where the judgment being challenged is void." *People v.*

[6] The exceptions are those petitions involving section 20b of the Adoption Act, section 2-32 of the Juvenile Court Act of 1987, or in a petition based on section 116-3 of the Code of Criminal Procedure of 1963. 735 ILCS 4/2-1401(c) (West 2012). None of these exceptions apply here.

Gosier, 205 Ill. 2d 198, 206 (2001). Here, that is precisely what Revolution did and thus its 2-1401 petition was not time-barred.

¶ 71 Nonetheless, we agree with Eccles that the issue of Revolution's section 2-1401 petition is moot because the detainer order that the 2-1401 petition attacked was vacated by an agreed order entered on September 10, 2014, in case no. 11 LM 1388. Accordingly, we do not address the issue of consolidation further because there would be nothing to consolidate.

¶ 72 III. CONCLUSION

¶ 73 The trial court was correct to deny Revolution's motion to consolidate its section 2-1401 petition with its amended complaint because its section 2-1401 petition was subsequently rendered moot by the September 20, 2014, agreed order vacating the detainer order. The trial court properly dismissed count II of the amended complaint because it was likewise rendered moot by the agreed order vacating the detainer order. The trial court did not err in dismissing counts I and III of the amended complaint because Revolution failed to state a cause of action for fraud and rescission, respectively. Finally, Revolution forfeited the issue of whether the trial court erred in dismissing of count I of the original complaint, and we therefore did not address it. Accordingly, the judgment of the circuit court of Lake County is affirmed.

¶ 74 Affirmed.