2015 IL App (2d) 150017-U
No. 2-15-0017
Order filed September 29, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WESTLAKE FINANCIAL GROUP, INC.,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-L-746
	)	
GUARANTEED RATE, INC.,	)	Honorable
	)	Margaret J. Mullen,
Defendant-Appellee.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court erred in granting Guaranteed Rate's section 2-615 motion to dismiss, because Westlake's amended complaint sufficiently alleged a claim of breach of contract, and because a limitation-of-liability clause did not bar all damages sought. Therefore, we reversed and remanded.

¶ 2 Plaintiff, Westlake Financial Group, Inc. (Westlake), appeals from the trial court's dismissal of its amended breach-of-contract complaint against defendant, Guaranteed Rate, Inc. (Guaranteed Rate). Westlake argues that the trial court erred in ruling that: (1) the amended complaint failed to state of a cause of action, and (2) Westlake's damages were barred under a limitation-of-liability clause. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Westlake filed its initial complaint on October 2, 2013. The trial court granted Guaranteed Rate's motion to dismiss the complaint, and Westlake was given leave to amend its complaint. Westlake filed an amended complaint on March 18, 2014, alleging as follows in relevant part. On January 1, 2010,[1] Westlake and Guaranteed Rate entered into a General Service Agreement (GSA or agreement) whereby Guaranteed Rate hired Westlake to, *inter alia*, act as its insurance broker and procure benefits for its employees, including but not limited to medical, dental, vision, life, and disability insurance. Westlake also agreed to create and/or provide the following: a confidential and secure website branded and coded for Guaranteed Rate's employees to manage their healthcare and benefits; confidential and secure access to and use of Westlake's issue tracking system software through the website; confidential and secure access to and use of Westlake's "Online Enrollment System" software through which Guaranteed Rate employees could make annual selections of the various benefits options provided by Guaranteed Rate through Westlake; confidential and secure administration of benefits; and a confidential and secure benefit call center. In consideration for creating and/or providing the web portal, support center, and brokerage services, Westlake would be paid certain fees and receive certain commissions. Guaranteed Rate also guaranteed that Westlake would be administering benefits to about 500 employees. The terms of the agreement were to begin on January 1, 2010, and terminate on December 31, 2014.

¶ 5 Westlake further alleged as follows. It performed all of its duties under the agreement, excepting only performance prevented by Guaranteed Rate's actions. However, on or before

[1] The document states that the agreement was entered into on January 1, 2010, but the date "6/21/2010" appears on the bottom right corner of each page. This discrepancy does not affect the issues on appeal.

August 3, 2012, Guaranteed Rate breached the agreement by, *inter alia*, instructing its health insurance company, Blue Cross Blue Shield, and other benefits providers that Westlake was no longer providing its brokerage services and to remove Westlake as the producer of record for Guaranteed Rate's insurance; by unilaterally replacing Westlake with another brokerage service; and by denying Westlake any further commissions under the agreement. As a direct result of the breach, Westlake had suffered the loss of at least 24 months of commissions on benefits, which were direct damages exceeding $200,000. The costs saved by Westlake in not having to perform the remainder of the agreement were nominal because it had already completed the website and because Westlake's support center was already staffed as a fixed cost of Westlake's operations. Alternatively, Westlake lost "the value of creating and providing" the custom website, which Westlake believed exceeded $100,000.

¶ 6 On March 18, 2014, Guaranteed Rate filed a motion to dismiss the amended complaint under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). It argued that: (1) Westlake failed to allege facts establishing that Guaranteed Rate breached the GSA, and (2) all of the damages Westlake sought were expressly barred by the GSA's terms. For the first argument, Guaranteed Rate argued as follows. Westlake had not alleged any facts establishing or even inferring that Guaranteed Rate breached the contract. Instead, Westlake simply alleged that Guaranteed Rate discontinued its relationship with Westlake, which was a right provided to Guaranteed Rate under the provision stating:

> "Termination by Guaranteed Rate. Guaranteed Rate may terminate this Agreement at any time upon sixty (60) days prior written notice if (i) WestLake[2] is

[2] The contract refers to Westlake as "WestLake," but we use the spelling Westlake applies to itself in its briefs.

> unable to fulfill its responsibilities under this Agreement, or WestLake is otherwise in material breach of any provision of this Agreement, and (ii) Guaranteed Rate has given WestLake written notice of such failure or breach and WestLake has not cured such deficiency during such sixty (60) day period."

Guaranteed Rate argued that Westlake had not alleged any facts establishing that Guaranteed Rate improperly terminated the relationship, nor had it pointed to a single term in the agreement that it contended Guaranteed Rate breached.

¶ 7 Guaranteed Rate argued that even if, *arguendo*, Westlake properly alleged a breach and a breach had in fact occurred, two distinct contract provisions completely barred the damages that Westlake sought. It cited the following "exculpatory" provision:

> "Limitation of Liability. Except with respect to the indemnification and confidentiality obligations contained in this Agreement or any Exhibit hereunder, without limitation to the foregoing, under no circumstances shall either party be liable to the other party for any *indirect, incidental, consequential, special, punitive or exemplary damages*, even if either party has been advised of the possibility of such damages, arising from this Agreement, *such as, but not limited to, loss of revenue or anticipated profits or lost business*." (Emphases added.)

Guaranteed Rate argued that this language barred Westlake from seeking commissions it may have otherwise received in the future, as those commissions could be described only as lost revenue or anticipated profits. Guaranteed Rate next cited the following provision: "Effect of Termination. Termination of this Agreement shall have no effect on any and all amounts due for services rendered prior to such termination." Guaranteed Rate argued that the inclusion of this provision revealed the express intention to limit liability to fees incurred for services already

rendered, and nothing more.

¶ 8 Guaranteed Rate further argued that Westlake was required to include the limitation of liability provision to maintain its compliance with the Employee Retirement Income Security Act (ERISA) (29 U.S.C. § 1001 *et seq.* (2006)) and to ensure that Guaranteed Rate would not be subjected to a penalty for terminating the agreement. Guaranteed Rate cited federal law stating that an ERISA-related contract must be reasonable, including that it allow the termination of the plan without penalty on reasonably short notice.

¶ 9 Addressing Westlake's alternative argument that it was entitled to the value of creating and providing a web portal, Guaranteed Rate argued that Westlake had expressly waived such fees in the agreement's fee schedule.

¶ 10 The trial court dismissed the amended complaint on April 22, 2014. It ruled that: (1) Westlake had not properly alleged a claim of breach of contract, and (2) the limitation of liability clause barred all of Westlake's damages.

¶ 11 Westlake appealed. On October 22, 2014, we granted Guaranteed Rate's motion to dismiss the appeal for lack of jurisdiction.

¶ 12 On November 12, 2014, Westlake filed a motion in the trial court for entry of a final judgment. On December 4, 2014, the trial court entered an order stating that Westlake elected to stand on its amended complaint and not re-plead. It dismissed the amended complaint, with prejudice, for the reasons stated in the April 2014 order. Westlake timely appealed.

¶ 13 II. ANALYSIS

¶ 14 Westlake appeals from the trial court's grant of Guaranteed Rate's section 2-615 motion to dismiss. A section 2-615 motion to dismiss challenges a complaint's legal sufficiency. *State ex rel. Pusateri v. Peoples Gas Light & Coke Co.*, 2014 IL 116844, ¶ 8. In ruling on a section 2-

615 motion, a court must accept as true the complaint's well-pleaded facts and all reasonable inferences. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. A court should dismiss a cause of action under section 2-615 only where it is apparent that no set of facts can be proven entitling the plaintiff to recover. *Pusateri*, 2014 IL 116844, ¶ 8. The main inquiry is whether the allegations, when construed in the light most favorable to the plaintiff, sufficiently state a cause of action upon which relief can be granted. *DeHart*, 2013 IL 114137, ¶ 18. "The complaint must be liberally construed with a view to doing substantial justice between the parties." *Giammanco v. Giammanco*, 253 Ill. App. 3d 750, 757 (1993). We review *de novo* an order granting a section 2-615 motion to dismiss. *Pusateri*, 2014 IL 116844, ¶ 8.

¶ 15 A. Cause of Action

¶ 16 We first address whether Westlake's amended complaint sufficiently stated a cause of action of breach of contract to survive the section 2-615 motion to dismiss. Westlake points out that the elements of a cause of action for breach of contract are: (1) the existence of a contract; (2) the plaintiff's performance of all contractual conditions; (3) a breach by the defendant; and (4) resulting damages. See *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 69 (2004).

¶ 17 Westlake argues that as to the first element, it alleged that it and Guaranteed Rate entered into the GSA whereby Guaranteed Rate hired Westlake to, among other things, act as its insurance broker and procure benefits for its employees, in exchange for certain fees and commissions. Regarding the second element, Westlake points to its allegation that it performed all of its duties under the GSA, such as providing a web portal, support center, and brokerage services. On the element of breach, Westlaw references its allegations that Guaranteed Rate breached the GSA on or about August 3, 2012, by one or more of the following acts: instructing its health insurance company, Blue Cross Blue Shield, and its other benefits providers that

Westlake was no longer providing its brokerage services and to remove Westlake as the producer of record for Guaranteed Rate's insurance; unilaterally replacing Westlake with another brokerage service; and denying Westlake any further commissions. Westlake argues that it sufficiently plead the fourth element, damages, by alleging that as a result of Guaranteed Rate's breach, it lost at least 24 months' of commissions on brokerage services to about 500 employees, equaling about $200,000. Westlake alternatively pleaded that it lost "the value of creating and providing" the custom website, which Westlake believed exceeded $100,000.

¶ 18 Guaranteed Rate argues that Westlake failed to sufficiently allege a breach of the GSA. According to Guaranteed Rate, Westlake does not explain how or why the actions of removing it as the producer of record for Guaranteed Rate's insurance, replacing it with another brokerage service, and denying it further commissions under the GSA constituted a breach. Guaranteed Rate argues that none of the amended complaint's allegations specify which GSA provision or provisions it supposedly breached through these actions. Guaranteed Rate cites *Talbert v. Home Savings of America, F.A.*, 265 Ill. App. 3d 376, 380 (1994), for the proposition that Westlake had to allege facts showing that Guaranteed Rate "fail[ed] to carry out a term, promise, or condition of a contract."

¶ 19 Westlake responds that it attached the GSA to the amended complaint. Westlake refers to the GSA's termination clause and argues that Guaranteed Rate's action of changing its producer of record was a breach of the contract unless Guaranteed Rate could show that it gave Westlake notice and a 60-day opportunity to cure. Westlake argues that in this case, Guaranteed Rate did not give it any notice of problems with its performance or an opportunity to cure, so the change in producers before the term expired was a breach of the GSA.

¶ 20 Given the liberal construction to be afforded to a complaint when determining whether it should be dismissed under section 2-615 (*Giammanco*, 253 Ill. App. 3d at 757), we conclude that Westlake sufficiently pleaded a breach of the contract. Westlake alleged that it had been hired as a brokerage servicer for Guaranteed Rate's employees' benefits and that it would receive certain fees and commissions for this work. Westlake alleged that the agreement's terms were to run from January 1, 2010, to December 31, 2014. Westlake alleged that Guaranteed Rate breached the agreement in August 2012 by removing it as producer of record for Guaranteed Rate's insurance, replacing it with another brokerage service, and denying it further commissions. Clearly, replacing Westlake with another brokerage service and denying Westlake commissions sufficiently alleges a breach of the contract's terms. While Westlake did not directly point out the paragraph numbers of the GSA that Guaranteed Rate allegedly violated, Westlake did attach the GSA to the complaint and referred to it throughout the complaint. Westlake also attached a letter from Blue Cross Blue Shield dated August 3, 2012, stating that Guaranteed Rate had removed Westlake as its producer of record effective August 1, 2012. This is not a situation where, under the allegations set forth, no set of facts can be proven entitling Westlake to recover. See *Pusateri*, 2014 IL 116844, ¶ 8. Therefore, we conclude that Westlake's allegations regarding the breach of the GSA were sufficient to withstand a section 2-615 motion to dismiss.

¶ 21 Guaranteed Rate argues that, aside from the requirements to plead a breach of contract, Westlake's claim was not sufficiently pled in light of the ERISA requirements that benefits contracts such as the GSA must allow for termination without penalty and on reasonably short notice once the fiduciary makes a good-faith determination that the contract is no longer in the plan beneficiaries' best interests. Guarantee Rate points out that the GSA itself states that "Westlake will Administer said plan in conjunction with and abiding by all applicable state and

federal laws." Guaranteed Rate argues that the crux of Westlake's claim is that Guaranteed Rate did not have the right to terminate the GSA, or at least did not properly terminate in the manner prescribed by the termination provision. Guaranteed Rate argues that under Westlake's interpretation of the provision, Guaranteed Rate could terminate only if Westlake was unable to fulfill its responsibilities under the GSA, or Westlake was otherwise in material breach of any contract provision, and Westlake had failed to cure within 60 days of being provided written notice. Guaranteed Rate argues that this interpretation provides it with only an illusory veneer of a termination right, while Westlake actually retained control over termination, contrary to ERISA requirements.

¶ 22 Guaranteed Rate argues that under ERISA, it is the plan administrator and has a fiduciary obligation to administer the plan for the benefit of the plan's beneficiaries. See 29 U.S.C. § 1102(a)(1), (2) (2006). Guaranteed Rate argues that Westlake qualifies as a "party in interest" under the regulations because it was a service provider for the Guaranteed Rate benefits plan. See 29 U.S.C. § 1002(14)(B) (2006) (defining "party in interest" to mean "a person providing services to such plan"); 29 C.F.R. § 2550.408b-2(c)(1)(iii)(C) (2010) (defining "covered service provider" as an entity providing "services for indirect compensation," including third party administration and consulting, the latter of which includes "the selection or monitoring of service providers").

¶ 23 Guaranteed Rate cites section 1108(b)(2) of ERISA (29 U.S.C. § 1108(b)(2) (2006)), which allows "[e]xemptions from prohibited transactions" for "[c]ontracting or making *reasonable* arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan ***." (Emphasis added.) Guaranteed Rate argues that in order for such contractual arrangements to be reasonable, ERISA

explicitly requires that a contract allow for "termination by the plan *without penalty* to the plan *on reasonably short notice* under the circumstances to prevent the plan from becoming locked into an arrangement that has become disadvantageous." (Emphases added.) 29 C.F.R. § 2550.408b-2(c)(3) (2010). That section further states that a "provision in the contract *** which reasonably compensates the service provider *** for loss upon early termination of the contract *** is not a penalty." *Id.* Guaranteed Rate cites *International Union of Bricklayers & Allied Craftsmen v. Gallante*, 915 F. Supp. 695, 704 (S.D.N.Y. 1996), where the court stated that a contract with a 3½-year term violated the above-cited regulation because there was no provision allowing the fund to terminate the contract before the end of the period. The court therefore granted summary judgment "rescinding the contract and declaring it null and void." *Id.* Guaranteed Rate also cites *Gilliam v. Edwards*, 492 F. Supp. 1255, 1264-65 (D.N.J. 1980), where the court ruled that a contract giving the plan administrator the sole termination option was not reasonable under section 2550.408b-2(c) of the Code of Federal Regulations (29 C.F.R. § 2550.408b-2(c) (1974)).

¶ 24 Westlake responds that Guaranteed Rate's ERISA argument is "tortured" and a misrepresentation of the law. Westlake notes that under section 2550.408b-2(c)(3), the contract or arrangement must allow "termination by the *plan* without penalty to the *plan* on reasonably short notice ***." (Emphases added.) 29 C.F.R. § 2550.408b-2(c)(3) (2010). Westlake argues, that, therefore, the issue becomes the meaning of "plan" under the regulations and whether that meaning includes Guaranteed Rate.

¶ 25 Westlake points out that this court has stated that there are four principal ERISA entities: the employer, the plan, the plan fiduciaries, and the beneficiaries. *Central Laborers' Pension Fund v. Nicholas & Associates, Inc.*, 2011 IL App (2d) 100125, ¶ 38; see also *Pearson v. Voith*

Paper Rolls, Inc., 656 F.3d 504, 510 (7th Cir. 2011) ("[A]n ERISA plan is an entity legally separate from the employer"). ERISA defines "employee benefit plan" or "plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3) (2006). Westlake notes that ERISA in turn defines "employee welfare benefit plan" and "welfare plan" as "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, *** for the purpose of providing for its participants or their beneficiaries," various types of insurance and benefits. 29 U.S.C. § 1002(1) (2006). Westlake cites *Larson v. United Healthcare Insurance Co.*, 723 F.3d 905, 912 (7th Cir. 2013), where the Seventh Circuit stated:

> "With insurance-based plans, however, 'confusion is all too common in ERISA land; often the terms of an ERISA plan must be inferred from a series of documents[,] none clearly labeled as "the plan." ' [Citations.] We sometimes equate the ERISA 'plan' with the insurance policy. [Citation.] More commonly, however, we refer to an insurance policy as a 'plan document' that *implements* the plan." (Emphasis in original.)

Westlake argues that although Guaranteed Rate has not produced the "plan" as established by a written instrument, it can reasonably be inferred that the individual insurance contracts are the plan documents, if not the plan itself. Westlake argues the right to terminate without penalty flows to the plan, not the employer, so Guaranteed Rate's ERISA argument fails. Westlake also argues that Guaranteed Rate could have terminated any of its insurance policies at will, and Westlake would have then replaced the policy with another insurance contract.

¶ 26 Westlake argues that, even otherwise, the GSA was actually terminable on reasonably short notice and without penalty. Westlake maintains that Guaranteed Rate has failed to cite a

single case indicating that a 60-day termination provision on a 4-year contract was unreasonable. Westlake argues that the cases Guaranteed Rate does cite are distinguishable because they addressed contracts where the underlying breaches related to fiduciary duties, not a notice and opportunity to cure clause in an arms-length vendor contract, and they did not have provisions allowing the defendant to terminate the contract upon 60 days' notice. See *Gallante*, 915 F. Supp. at 704; *Gilliam*, 492 F. Supp. at 1264.

¶ 27 Westlake argues that *In re Iron Workers Local 25 Pension Fund*, 811 F. Supp. 2d 1295, 1320 (E.D. Mich. 2011), is more on point. There, the court stated that for a transaction between a plan and service provider to be permitted, the contract or arrangement must be reasonable; the service must be necessary for the plan's operation; and no more than reasonable compensation may be paid for the services. *Id.* at 1320. The court stated that to be reasonable, the contract must allow for termination on reasonably short notice without penalty so that the plan does not become locked into an arrangement that has become disadvantageous. *Id.* at 1321. The court stated that while the contract at issue did not explicitly indicate that it could be terminated at any time, such a provision was part of the contract by operation of federal law. *Id.*

¶ 28 While the parties' arguments create the risk of falling down the rabbit hole of ERISA law, we tread carefully and examine only the provisions necessary to resolve the 2-615 dismissal at issue here. ERISA requires that every employee benefit plan be established and maintained pursuant to a written instrument. 29 U.S.C. § 1102(a)(1) (2006). The instrument is to state one or more "named fiduciaries" who have authority to control and manage the plan's administration and operation. *Id.* "Named fiduciary" is defined as "a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary ***." 29 U.S.C. § 1002(a)(2) (2006). The fiduciary has defined duties under section 1104 of

ERISA (29 U.S.C. § 1104 (2006)), and section 1106 contains a list of prohibited transactions for fiduciaries, including transfer of any of the plan's assets to a party in interest (29 U.S.C. § 1106(a)(1)(D) (2006)). However, section 1108 of ERISA contains exemptions from the prohibited transactions listed in section 1106. 29 U.S.C. § 1108(b) (2006). These exemptions include, as Guaranteed Rate points out, "[c]ontracting or making *reasonable* arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan ***." (Emphasis added.) 29 U.S.C. § 1108(b)(2) (2006). The Department of Labor has stated, through regulations, that a contract or arrangement is not reasonable under section 1108(b)(2)[3] if "*it does not permit termination by the plan without penalty to the plan on reasonably short notice under the circumstances* to prevent the plan from becoming locked into an arrangement that has become disadvantageous." (Emphasis added.) 29 C.F.R. § 2550.408b-2(c)(3) (2010).

¶ 29 Although Westlake focuses on the meaning of the word "plan" in the above regulation, it is clear from the statutory scheme that the termination requirement relates to contracts between fiduciaries and service providers. That is, section 1106 contains a list of prohibited transactions for fiduciaries; section 1108 lists exemptions from those prohibited transactions for fiduciaries; and section 2550.408b-2(c)(3) elaborates on the reasonableness requirement of section 1108 for transactions by fiduciaries. See also *National Health Plan Corp. v. Road Carriers Local 707,*

[3] The regulation actually cites "section 408(b)(2)" which corresponds to the original numbering of section 1108. See also Lawrence A. Frolik & Kathryn L. Moore, Law of Employee Pension & Welfare Benefits iii (3d ed. 2012) (Although ERISA is codified in the U.S. Code in Title 29, § 1001 *et seq.*, "[m]any of those who work with ERISA [still] refer to its sections *** by the section numbers by which it was enacted.").

Welfare & Pension Fund, No. 90 CIV. 4415, at *5 (S.D.N.Y. Apr. 15, 1991) (section 2550.408b-2 covers contracts between a fiduciary and another party).

¶ 30 As stated, a fiduciary must be named or identified in a plan instrument (29 U.S.C. § 1002(a)(2) (2006)). We recognize that Guaranteed Rate did include the plan document, which names it as a fiduciary, in support of its motion to dismiss the original complaint, though it did not do so in its motion to dismiss the amended complaint. Regardless, in reviewing a 2-615 motion, we ordinarily do not consider documents outside of the complaint. *Phillips v. De Paul University*, 2014 IL App (1st) 122817, ¶ 26; see also *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 14 (when deciding a motion to dismiss, a court may not consider documentary evidence not incorporated into the pleadings as exhibits). In other words, in looking just at Westlake's amended complaint and the complaint's exhibits, it is not apparent that 2550.408b-2 and its reasonable termination requirement would even apply, as the complaint does not indicate who is the fiduciary of Guaranteed Rate's plan.

¶ 31 Even if we were to recognize Guaranteed Rate as the named fiduciary, which would make section 2550.408b-2 applicable, that section requires only termination on "reasonably short notice under the circumstances." 29 C.F.R. § 2550.408b-2(c)(3) (2010). We agree with Westlake that the cases Guaranteed Rate cites in support of its position that the GSA did not satisfy this requirement are distinguishable. Specifically, *Gallante* involved a 3½-year term (*Gallante*, 915 F. Supp. at 704) and *Gilliam* involved a 5-year term (*Gilliam*, 492 F. Supp. at 1259), and neither had an early termination option for the plan. Here, in contrast, there was a 60-day termination option for Guaranteed Rate, albeit one that gave Westlake the opportunity to cure and continue with the contract. Guaranteed argues that this is not a true termination opportunity as required under section 2550.408b-2(c)(3). However, as Westlake points out, the

court in *In re Iron Workers Local 25 Pension Fund*, 811 F. Supp. 2d at 1321, held that even though the contract at issue did not explicitly indicate that it could be terminated at any time, such a provision was part of the contract by operation of federal law. See also *Resolution Trust Corp. v. Diamond*, 45 F.3d 665 (1995) ("When parties entered into a contract, they are presumed to accept all the rights and obligations imposed on their relationship by state (or federal) law."). Illinois precedent also supports this proposition. See, *e.g.*, *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 397 Ill. App. 3d 512, 531 (2010) (parties are presumed to know the existing law, and the laws in existence at the time the contract is executed are considered part of the contract). Moreover, as Guaranteed Rate itself points out, here the contract explicitly stated that Westlake would administer the benefits "in conjunction with and abiding by all applicable state and federal laws." The incorporation of federal requirements was not an argument advanced by the defendants in *Gallante* or *Gilliam*, so those courts did not consider it. See *Bona v. Barasch*, No. 01 CIV. 2289, at *7 (S.D.N.Y. May 23, 2003) (similarly distinguishing *Gallante*). Thus, to the extent that a different type of termination provision was required under section 2550.408b-2(c)(3), it would be automatically considered part of the contract, and the lack of such an express provision would not be a basis to grant the dismissal. Although such a termination provision would still require only "reasonably short notice under the circumstances" (29 C.F.R. § 2550.408b-2(c)(3) (2010)), we cannot determine, as a matter of law, what would constitute reasonably short notice here. See *id.* at *5 (ERISA and its regulations do not state a maximum duration for service provider contracts; an agreement's duration must be reasonable based on the particular case's facts and circumstances).

¶ 32 Guaranteed Rate also highlights the requirement that the termination be "without penalty." 29 C.F.R. § 2550.408b-2(c)(3) (2010). However, the regulation goes on to state:

> "A provision in a contract or other arrangement which reasonably compensates the service provider or lessor for loss upon early termination of the contract, arrangement, or lease is not a penalty. For example, a minimal fee in a service contract which is charged to allow recoupment of reasonable start-up costs is not a penalty. *** Such a provision does not reasonably compensate for loss if it provides for payment in excess of actual loss or if it fails to require mitigation of damages." *Id.*

It cannot be said, as a matter of law, that Westlake's request for lost commissions or the cost of establishing the website is not "reasonabl[e] compensat[ion]." *Id.* Westlake also requested in its amended complaint "such other and further relief as is just," thus opening the door to a lesser amount of damages. Therefore, the damage request would not serve as a basis to justify the section 2-615 dismissal.

¶ 33 B. Limitation-of-Liability Clause

¶ 34 Westlake argues that the trial court also erred is dismissing the amended complaint based on the limitation-of-liability clause, which the trial court ruled barred all of Westlake's damages. Again, this clause stated:

> "Limitation of Liability. Except with respect to the indemnification and confidentiality obligations contained in this Agreement or any Exhibit hereunder, without limitation to the foregoing, under no circumstances shall either party be liable to the other party for any *indirect, incidental, consequential, special, punitive or exemplary damages*, even if either party has been advised of the possibility of such damages, arising from this Agreement, *such as, but not limited to, loss of revenue or anticipated profits or lost business*." (Emphases added.)

Guaranteed Rate had argued that the clause barred Westlake from seeking commissions it may have otherwise received in the future, as those commissions could be described only as lost revenue or anticipated profits that are prohibited by the clause.

¶ 35 Westlake points out that this court issued our decision in *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589 (*Westlake I*), shortly after the trial court made its ruling. That case also involved Westlake and an identical limitation-of-liability clause, in very similar circumstances of a defendant terminating the agreement before its terms had ended. *Id.* ¶ 1. The trial court there held that lost profits were not recoverable under the limitation-of-liability clause. *Id.* ¶ 6. We first determined that "lost profits can be categorized as either direct or indirect damages, depending on the situation. *Id.* ¶ 34. We stated that the next issue was whether the GSA's limitation-of-liability clause excluded any damages from lost profits. *Id.* After reviewing caselaw from Illinois and other jurisdictions, we determined that the clause prohibited damages for consequential or indirect lost profits but not direct lost profits. *Id.* ¶ 43. We concluded:

> "Therefore, the limitation-of-liability clause does not bar direct damages from lost profits, which are, at a minimum, arguably present here, so the trial court erred in relying on the clause as an alternative basis to grant the section 2-615 motion to dismiss." *Id.* ¶ 46.

The type of damages Westlake alleged in *Westlake I* are identical to the type of damages alleged here, so the clause would similarly not support a section 2-615 dismissal.

¶ 36 Guaranteed Rate argues that *Westlake I* is distinguishable because the parties there did not bring the aforementioned ERISA issues to our attention. We agree that ERISA law was not raised in *Westlake I*, and therefore we did not consider it. However, we have examined

Guaranteed Rate's ERISA arguments above and determined that they do not justify a dismissal of the amended complaint. We recognize that the limitation-of-liability clause will have to be read in conjunction with the requirement that damages may not be "in excess of actual loss" (29 C.F.R. § 2550.408b-2(c)(3) (2010)), but it is not clear what the "actual loss" is here. We note that this is especially true given that Westlake has sought alternative damages of creating and providing a "Web Portal specifically coded and tailored for" Guaranteed Rate.

¶ 37 Guaranteed Rate maintains that Westlake waived damages related to its website in the GSA. Westlake responds that Guaranteed Rate has in turned forfeited this argument by failing to cite authority in its brief. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (argument in brief shall contain citation to authorities relied upon); *Adler v. Greenfield*, 2013 IL App (1st) 121066, ¶ 59 (failure to support argument with citation to legal authority results in forfeiture of the argument on appeal). Potential forfeiture aside, we note that the fee schedule states, in the "Assumptions" section: "Assumes Services for approximately 500 benefit eligible employees." Accordingly, it is at least arguable that because Guaranteed Rate allegedly terminated the contract early, thus ending services to the 500 employees, the fee waivers, including that allegedly for the website, do not apply.

¶ 38 Having addressed both bases on which the trial court granted the section 2-615 motion to dismiss and determined that both were in error, we reverse the trial court's dismissal and remand the cause for further proceedings.

¶ 39 Last, Guaranteed Rate notes that Westlake requests in its brief that we reverse the trial court's dismissal: (1) on the basis of the GSA's limitation-of-liability clause; and (2) on the basis of failure to state a cause of action. Westlake's brief requests, as an alternative to the second option, that we reverse the dismissal on the basis of failure to state a cause of action with

the instruction that the trial court allow Westlake to file a second amended complaint. Guaranteed Rate argues that the alternate request is not valid because Westlake waived its right to file a second amended complaint when it chose to stand on its amended complaint in the trial court and not re-plead. Westlake argues that this waiver argument must be rejected because Guaranteed Rate failed to cite any supporting authority in its brief. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). We have already concluded that the trial court erred in dismissing the amended complaint as pled. Therefore, we do not address this issue further.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we reverse the trial court's dismissal of Westlake's amended complaint and remand for further proceedings.

¶ 42 Reversed and remanded.