

No. 1-14-1229

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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TIMOTHY MCARDLE, SHARON MCDERMOTT, GREEN SQUARE, INC., an Illinois Corporation,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiffs-Appellants,	)	
	)	
v.	)	10 L 8699
	)	
PAUL E. WOJCICKI; MARK S. KOCOL,	)	Honorable
	)	Margaret Ann Brennan,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

**ORDER**

*Held:* The circuit court properly dismissed plaintiffs' claim for breach of fiduciary duty with prejudice pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)), where the claim failed to sufficiently allege any breach of duty owed to the plaintiffs.

¶ 1 In this appeal, we consider whether the circuit court erred in finding that defendant Paul E. Wojcicki as chief executive officer and defendant Mark S. Kocol as chief operating officer of two failed Illinois limited liability companies, did not breach their fiduciary duties to plaintiffs Timothy McArdle, Sharon McDermott, and Green Square, Inc., in their capacities as investors of the companies. For the reasons that follow, we find the circuit court did not err in this regard and therefore affirm the court's decision.

¶ 2 BACKGROUND

¶ 3 In 2004, defendants Wojcicki and Kocol announced plans to build and operate a brewpub restaurant and craft brewery in the Beverly neighborhood of Chicago, Illinois. To fund the project, defendants formed two Illinois limited liability companies (LLCs). The first LLC, PaulMark Land Acquisition Company (PMLA), would purchase commercial real estate and then construct the building housing the brewpub. The second LLC, Beverly Brewing Company (BBC), would operate the brewpub. Wojcicki took the position of chief executive officer (CEO) of both companies and Kocol took the position of chief operating officer (COO).

¶ 4 In the course of soliciting investors to invest in the project, the defendants met with potential investors and made certain representations about the financial conditions of the companies and how investment funds would be utilized. In early 2005, before becoming members of the companies, plaintiffs received business plans for both companies. Under the terms of the business plans, investors were required to invest in and become members of both LLCs.

¶ 5 Plaintiffs McArdle and McDermott became Class B members of both LLCs in May 2005. Plaintiff Green Square, Inc. became a Class B member of both LLCs in November 2005. The project also attracted thirteen other investors.

¶ 6 The project, however, never got off the ground, and eventually both companies were involuntarily dissolved and company accounts closed. All of the members, including defendants, lost their investments.

¶ 7 Thereafter, plaintiffs brought this action against defendants, alleging they breached their fiduciary duties. Defendants moved to dismiss plaintiffs' original, first, and second amended complaints pursuant to sections 2–615 and 2–619 of the Code of Civil Procedure (Code) (735 ILCS 5/2–615, 2–619(a)(2), (9) (West 2010)). The circuit court granted the motions to dismiss with leave to amend.

¶ 8 In conjunction with the third dismissal, the circuit court ordered defendants to produce the LLCs' books and records for plaintiffs to review in drafting their third amended complaint. Defendants produced the books and records as directed. Plaintiffs filed their third amended complaint alleging claims for breach of fiduciary duty, fraud, and conversion. Defendants moved to dismiss under section 2-615 of the Code.

¶ 9 The circuit court granted the motion to dismiss and dismissed the third amended complaint with prejudice. The court subsequently denied plaintiffs' motion to reconsider.

¶ 10 In the instant appeal, plaintiffs do not challenge the dismissals of their fraud or conversion claims, but instead limit their appeal to challenging the dismissal of their breach of fiduciary duty claim.

¶ 11 ANALYSIS

¶ 12 The circuit court dismissed plaintiffs' claim for breach of fiduciary duty with prejudice pursuant to section 2-615 of the Code. A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint and should be granted if, after viewing the allegations in the light most favorable to the plaintiff, the complaint fails to state a cause of action on which relief can

be granted. *McCready v. Secretary of State*, 382 Ill. App. 3d 789, 794 (2008); *McHenry County Defenders, Inc. v. City of Harvard*, 384 Ill. App. 3d 265, 280 (2008). The grant of a section 2-615 motion to dismiss presents a question of law which we review *de novo*. *McHenry County Defenders, Inc.*, 384 Ill. App. 3d at 280. In the instant case, we find the circuit court properly granted defendants' section 2-615 motion dismissing plaintiffs' breach of fiduciary claim because the claim failed to sufficiently allege any breach of duty owed to plaintiffs.

¶ 13 Plaintiffs claims against defendants for breach of fiduciary duty for alleged misuse of the LLCs' investment funds arise under the Illinois Limited Liability Company Act (Act) (805 ILCS 180/1-1 *et seq.* (West 2010)). Section 15-3(b) of the Act provides that member-managers of LLCs such as defendants owe fiduciary duties of loyalty and care to the LLC and its members. 805 ILCS 180/15-3(b) (West 2010); *Anest v. Audino*, 332 Ill. App. 3d 468, 475-76 (2002).

¶ 14 However, section 15-5 of the Act further provides that members of an LLC may enter into an operating agreement identifying specific types or categories of activities that do not violate these fiduciary duties, provided the activities are not manifestly unreasonable. 805 ILCS 180/15-5(a)(6)(A) (West 2010). "[A]n LLC operating agreement is to be enforced according to general contract principles, unless it conflicts with a statute." *In re Marriage of Schlichting*, 2014 IL App (2d) 140158, ¶ 63. "Limited liability companies are creatures of contract, and the parties have broad discretion to use an LLC agreement to define the character of the company and the rights and obligations of its members." *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 880 (Del. Ch. 2009).

¶ 15 Here, the circuit court correctly looked to, and relied upon, the terms of the LLCs' operating agreements in determining whether plaintiffs sufficiently pled a breach of fiduciary

duty claim against defendants. And our review of the circuit court's ruling must also be guided by the terms of the operating agreements.

¶ 16 The LLC operating agreements in this case gave Wojcicki, as CEO, and Kocol, as COO, "full and complete discretion in the management and control of the day-to-day business and affairs of the Compan[ies] and the authority to make all decisions affecting the Compa[nies]' business and affairs." The operating agreements also provided that "[t]he Officers \*\*\* shall not be liable, responsible or accountable in damages or otherwise to the Compa[nies] or any of the Members \*\*\* for any acts performed or omitted within the scope of their authority as Officers \*\*\* or otherwise conferred on the Officers \*\*\*, provided that such Officer \*\*\* shall act in good faith and shall not be guilty of willful misconduct or gross negligence." Thus, in order to plead a breach of fiduciary duty claim, plaintiffs must allege sufficient facts establishing that the defendants engaged in willful misconduct or gross negligence, or violated their duty to act in good faith.

¶ 17 Plaintiffs argue the defendants willfully engaged in a series of activities resulting in a breach of their fiduciary obligations. We must disagree. We find plaintiffs have failed to plead sufficient facts to establish that the defendants engaged in any improper acts or that they acted outside the scope of authority conferred by the operating agreements.

¶ 18 Plaintiffs claim defendants failed to disclose financial records. However, the record shows the circuit court ordered defendants to produce the companies' books and financial records for plaintiffs to review in drafting their third amended complaint. Defendants produced the requested books and records as directed.

¶ 19 Plaintiffs contend the defendants spent plaintiffs' investment money on general contractors and/or architect firms before having raised and/or received the necessary and proper

amounts to pay for said expenditures and before applying for or securing bank financing. Plaintiffs, however, ceded decision-making authority for both companies to the defendants when they signed the operating agreements. The defendants' decisions to expend company funds on contractors and architects in an effort to complete the project fell squarely within the discretion and authority vested in defendants under the operating agreements to manage and control the companies' business affairs. Moreover, defendants did not require plaintiffs' prior approval before transacting business on behalf of the companies and therefore did not breach a fiduciary duty by doing so without plaintiffs' approval.

¶ 20 Plaintiffs maintain the defendants used BBC funds to pay PMLA capital expenditures and debts, and vice-versa, without plaintiffs' prior approval. Plaintiffs however site no specific examples of such expenditures. And as we have already determined, defendants did not require plaintiffs' prior approval before transacting business on behalf of the companies.

¶ 21 Plaintiffs assert the defendants improperly commingled their personal money with investor money. Plaintiffs however do not specify or give an approximate amount of the funds purportedly commingled or even identify when the commingling allegedly occurred. Plaintiffs offer only legal conclusions as opposed to required well-pleaded facts. "Illinois is a fact-pleading state; conclusions of law and conclusory allegations unsupported by specific facts are not sufficient to survive dismissal." *Wells Fargo Bank, N.A. v. Mundie*, 2016 IL App (1st) 152931, ¶ 8.

¶ 22 Plaintiffs finally claim the defendants failed to hold invested funds in a constructive trust until the project was fully financed. We note, however, that the operating agreements did not require defendants to hold the companies' funds in a constructive trust. In sum, plaintiffs alleged

no facts supporting their characterization of defendants' decision-making as displaying willful misconduct, gross negligence, or a violation of the duty to act in good faith.

¶ 23 For the foregoing reasons, we affirm the order of the circuit court of Cook County dismissing plaintiffs' claim for breach of fiduciary duty with prejudice pursuant to section 2-615 of the Code.

¶ 24 Affirmed.