2016 IL App (1st) 143744-U

SECOND DIVISION
March 22, 2016

No. 14-3744

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CHICAGO ATHLETIC CLUBS, LLC, Plaintiff-Appellant, v. 3440 N. SOUTHPORT, LLC, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County. No. 13 L 7423 Honorable Ronald F. Bartkowitz and Honorable James E. Snyder Judges Presiding

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it dismissed plaintiff's complaint because all of the claims were defeated by an affirmative matter. The trial court did not err when it declined to give plaintiff leave to replead because any amendment would have been futile.

¶ 2 Plaintiff Chicago Athletic Clubs, LLC entered into a lease agreement with Defendant 3440 N. Southport, LLC. The agreement required defendant to undertake certain duties to make the premises suitable for plaintiff's use. When defendant missed a deadline and its work did not conform to the specifications the parties originally agreed upon, the parties executed amendments to the agreement. The amendments refute the allegations plaintiff attempts to use to support its

claims. Therefore, plaintiff cannot state a cause of action and, accordingly, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff Chicago Athletic Clubs, LLC is an Illinois company that operates several fitness clubs. Defendant 3440 N. Southport, LLC is an Illinois company that agreed to develop a commercial property, lease it to plaintiff, and act as the landlord. The parties understood that plaintiff intended to use the property primarily as a fitness club.

¶ 5 The original lease between the parties required defendant to build a commercial storefront and to build commercial spaces on the second and third floors by certain deadlines. Plaintiff alleges that it spent $400,000 in anticipation of occupying the space. Plaintiff further alleges that defendant did not complete the project to the agreed-upon specifications by the agreed-upon deadlines. The parties proceeded to execute what they now refer to as the first amendment to the lease.

¶ 6 Under the first amendment, the parties agreed that plaintiff would no longer lease the second and third floors as originally anticipated. The parties also modified the design requirements for the first floor so that defendant was no longer required to deliver the premises in the manner set forth in an exhibit to the original lease. Instead, defendant proposed new plans for the first floor under the first amendment and those plans were approved by plaintiff. The parties agreed upon a new deadline by which defendant was required to deliver the premises.

¶ 7 The premises were delivered in substantially-completed form by the date agreed upon in the first amendment. However, plaintiff alleges that the premises were not built according to the plans. Plaintiff contends that the premises were not delivered in the size and shape agreed upon, had an insufficient entryway for a commercial building, and had a residential rather than a

commercial aesthetic. The parties executed a second amendment to their agreement.

¶ 8 In the second amendment, plaintiff agreed that defendant delivered the premises with all of defendant's work substantially completed. Plaintiff accepted the delivery of possession from defendant. The second amendment also sets forth a new rent payment schedule and expressly states that plaintiff agreed to pay rent for the period beginning September 1, 2012.

¶ 9 About six months after the rent commencement date that plaintiff agreed upon, it filed a six count complaint with claims for breach of contract, two types of fraud, and estoppel. Defendant filed a motion to dismiss arguing principally that the claims were barred by the first and second amendments to the lease agreement. The trial court agreed and dismissed the complaint with prejudice. Plaintiff filed a motion to reconsider which, after a hearing, was denied. Plaintiff filed a notice of appeal.

¶ 10 ANALYSIS

¶ 11 We review the dismissal of a complaint *de novo*. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. Defendant's motion to dismiss was brought pursuant to the section of the Code of Civil Procedure that allows a defendant to file a combined motion directed at a pleading. 735 ILCS 5/2-619.1 (West 2012). Defendant interposed arguments for involuntary dismissal under both section 2-615 and section 2-619.

¶ 12 A section 2-615 motion attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008). All well-pleaded facts must be taken as true and any inferences should be drawn in favor of the non-movant. 735 ILCS 5/2-615 (West 2012); *Hammond v. S.I. Boo, LLC* (In re County Treasurer & Ex-Officio County Collector), 386 Ill. App. 3d 906, 908

(2008). Plaintiffs are not required to prove their case at the pleading stage; they are merely required to allege sufficient facts to state all elements that are necessary to constitute each cause of action in their complaint. *Visvardis v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (2007). A section 2-615 motion to dismiss should not be granted unless no set of facts could be proved that would entitle the plaintiff to relief. *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008).

¶ 13 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint. 735 ILCS 5/2-619 (West 2012). The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of the litigation. *Henry v. Gallagher* (In re Estate of Gallagher), 383 Ill. App. 3d 901, 903 (2008). Although a section 2-619 motion to dismiss admits the legal sufficiency of a complaint, it raises defects, defenses, or some other affirmative matter appearing on the face of the complaint or established by external submissions, which defeat the plaintiff's claim. *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (2008).

¶ 14 Count I of plaintiff's complaint is for breach of the original, unamended form of the parties agreement. In it, plaintiff alleges that defendant is liable for things like failing to complete the storefront on time, failing to deliver the second and third floors of the building on time, and failing to secure the proper permits as required by the agreement. But the suggestion that any of those supposed failings could subject defendant to liability is flatly refuted by the first amendment to the lease. Plaintiff does not dispute that it executed the first amendment to the lease and, in fact, attached the amendment to its complaint.

¶ 15 When a written instrument upon which a claim or defense is founded is attached to the pleading as an exhibit, it constitutes part of the pleading for purposes of ruling on motions relating to the pleadings. 735 ILCS 5/2-606 (West 2012). In the case of a conflict between such

written exhibits and the allegations of a pleading, the exhibits control. *Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.*, 114 Ill. 2d 278, 287 (1986).

¶ 16 Here, the first amendment to the lease is an affirmative matter—a subsequent covenant—that defeats the allegations made in count I. For example, defendant cannot be liable for failing to complete the storefront by the date set forth in the original agreement because the parties agreed in the first amendment that the storefront would be completed by a different, later date. Defendant cannot be liable for anything related to the second and third floors because, in the first amendment, the parties agreed that the lease would no longer concern the second and third floors.

¶ 17 The language in the first amendment is unequivocal. It completely defeats the claim plaintiff tries to make out under the terms of the original agreement. As to completing the storefront by the date set forth in the original agreement, the parties stated in the amendment that "any and all reference to [defendant] delivering to [plaintiff] the 1st Floor Commercial Storefront" by the date in the original agreement "shall hereby be deleted from the lease agreement entirely and forever." As for completing the second and third floors as originally anticipated, the parties agreed in the amendment that "[a]ny and all references to the leasing of the 2nd and 3rd floor of the Lease Premises shall be deleted entirely from the Lease Agreement and [defendant] shall have no lease obligations whatsoever (concerning those floors)." "Any existing or future 2nd and 3rd floor covenants, conditions or other duties *** contained in the [original agreement] *** shall be hereby deleted forever and of no further obligation from [defendant] to [plaintiff]." The parties also agreed in the amendment that it would thereafter be plaintiff's responsibility to obtain the required permits. Count I was properly dismissed.

¶ 18 In count II, plaintiff seeks to hold defendant liable for a breach of the first amendment to

the lease. However, just like above, plaintiff fails to recognize the legal effect of executing the second amendment to the lease which defeats its allegations for a breach of the first amendment. Plaintiff's main allegation in count II is that defendant failed to build the first floor in accordance with the plans submitted to it by defendant that it approved. But after possession was delivered, plaintiff executed the second amendment confirming it had possession and agreeing that all of defendant's work was substantially completed. It agreed to begin paying rent with the first rent period beginning September 1, 2012.

¶ 19 Plaintiff argues that its acceptance of defendant's work does not discharge its breach of contract claim (citing *Kangas v. Anthony Trust*, 110 Ill. App. 3d 876 (1982)). But even in that case we acknowledged that a voluntary acceptance of defective performance results in a complete discharge where the acceptance is absolute and unconditional. *Kangas*, 110 Ill. App. 3d at 881. Here, plaintiff accepted possession and then signed another amendment indicating that all of defendant's work was substantially completed and that it assented to the commencement of its rent obligations. Its actions of signing the amendment are totally inconsistent with any right it had to claim that the work was not substantially completed in compliance with the first amendment. Such an interpretation would render the entire second amendment meaningless.

¶ 20 Plaintiff contends that it should have at least been granted leave to replead its breach of contract claims. But re-pleading would have been an exercise in futility because plaintiff's claims are contradicted point by point by the evidence. Defendant established that plaintiff could not prevail on its claims as a matter of law and, thus, the trial court was entitled to dismiss the claims with prejudice and without leave to replead.

¶ 21 Counts III and IV of plaintiff's complaint are for common law fraud and consumer fraud

respectively. To state a claim for common law fraud, the plaintiff must allege facts in support of the following elements: (1) a false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induce the plaintiff to act; (4) plaintiff's reliance upon the truth of the statement; and (5) plaintiff's damages resulting from reliance of the statement. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 495 (1996). The elements of a claim under the Consumer Fraud and Deceptive Business Practice Act (815 ILCS 505/1 *et seq*.) are: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during a course of conduct involving trade or commerce. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 62.

¶ 22 The way that plaintiff pled these claims is really just a repackaging of its breach of contract claims. Something akin to "defendant promised to do certain things but never did." The claims' pivotal allegations are conclusory and clearly fail to meet the pleading standard. But more important is the fact that the alleged misrepresentation and the alleged deceptive act cannot be a misrepresentation or a deceptive act because the amendments to the agreement expressly repudiate the allegations. The claims are entirely defeated by an affirmative matter—the covenants in the amendments—and cannot stand. In addition, whether brought under the common law or the Consumer Fraud Act, fraud claims require reliance. *Connick*, 174 Ill. 2d at 495; *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149 (2002). When it executed the amendments, plaintiff expressly agreed not to rely on the things it now claims to rely. The trial court did not err by dismissing these counts with prejudice.

¶ 23 Counts V and VI of the complaint are for estoppel and promissory estoppel and are pled in the alternative. It appears that plaintiff's estoppel claim is based on its idea that because defendant

breached the contract and committed fraud, plaintiff should recover. Creating particular confusion is paragraph 142 of the complaint which states that "[defendant] is estoppel (sic) from any claims against [plaintiff] given that any claims asserted by defendant are a result of its own default." It is more of a defense than a claim. In any event, it is premised on proving that defendant breached the contract or committed fraud, two things plaintiff simply cannot prove. As for its promissory estoppel claim, it is barred where the plaintiff alleges (and in this case does so by incorporation in the very same count) that there is a valid and binding written agreement covering the subject matter. Like with all of the other counts above, plaintiff cannot prove that the alleged promises were unfulfilled or that it was justified in relying on the pre-amendment covenants. The trial court did not err by dismissing these counts with prejudice.

¶ 24 Finally, and as addressed briefly above, plaintiff argues that the trial court committed error by not giving it leave to amend. But as explained count by count above, the allegations plaintiff uses to support its claims are flatly refuted by the evidence. There is no set of facts that would entitle plaintiff to any relief. Leave to amend may be freely denied where, as here, the amendment would be futile. *Nelson v. Quarles & Brady, LLP*, 2013 IL App (1st) 123122, ¶ 69.

¶ 25 CONCLUSION

¶ 26 Accordingly, we affirm.

¶ 27 Affirmed.