2016 IL App (1st) 152192-U
No. 1-15-2192
July 12, 2016

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

RELCO FINANCE, INC. and RELCO LOCOMOTIVES, INC.,	)	Appeal from the Circuit Court Of Cook County.
Plaintiffs-Appellants,	)	No. 14 L 6896
v.	)	The Honorable Eileen O'Neill Burke, Judge Presiding.
SEVERSTAL DEARBORN, LLC, f/k/a SEVERSTAL DEARBORN, INC.,	)	
Defendant-Appellee.	)	

JUSTICE NEVILLE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: A contract that provides a party "may" send notice declaring that the other party has defaulted means that if a party seeks default remedies listed in the contract, that party must provide notice of default to the other party, but the non-defaulting party has no obligation to declare a default. When a contract requires the parties to send notices by registered mail, and the parties present no evidence to show that the use of registered mail formed an essential term of the contract, an allegation that a party mailed notice suffices as an allegation that the party provided actual notice and met the requirements of the contract's notice provision.

¶ 2 This case involves the sufficiency of the notices of default the plaintiffs, Relco Finance and Relco Locomotives, sent to the defendant, Severstal Dearborn. The circuit court dismissed the complaint on the pleadings, finding that the documents incorporated into the complaint showed that the plaintiffs had not sent sufficient notice. We hold that the contracts require notice of default as a precondition for pursuing the remedies for default listed in the contracts, and the complaint shows that the plaintiffs did not send the requisite notice in precisely the forms indicated in the contracts. However, we find that the plaintiffs adequately alleged that Severstal received actual notice of the alleged default. Accordingly, we reverse the circuit court's judgment and remand for further proceedings on the complaint.

¶ 3 BACKGROUND

¶ 4 On June 30, 2014, Relco Finance and Relco Locomotives jointly filed a complaint against Severstal, charging Severstal with breaching two separate but related contracts. According to the complaint, on December 14, 2009, Severstal signed a lease in which it agreed to pay rent to Relco Finance for use of several locomotives, and it signed a maintenance agreement in which it agreed to pay Relco Locomotives specified fees for maintaining the locomotives it leased from Relco Finance. Relco Finance and Relco Locomotives attached both contracts to the complaint.

¶ 5 Both contracts included default clauses. The lease provided:

> "[Relco Finance], at its option, may, by written notice to [Severstal], declare this Lease in default on the occurrence of *** Failure by [Severstal] to pay Lease

Charges or any other monetary amounts due to [Relco Finance] by [Severstal] under this Lease ***.

Upon the occurrence of any default by [Severstal], [Relco Finance] shall have each of the following remedies: *** recover[] all payments of Lease Charges, whether or not accrued, and all other Lease Charges payable hereunder; or *** exercise any other right or remedy which may be available under the Uniform Commercial Code or any other applicable law and proceed by appropriate court action *** either to enforce performance *** of the applicable covenants of this Lease or to recover damages for the breach thereof."

¶ 6 The maintenance contract provided:

"RELCO [Locomotives], at its option, may, by written notice to [Severstal], declare this Maintenance Agreement in default on the occurrence of *** Failure by [Severstal] to pay Maintenance Charges or any other monetary amounts due to RELCO by [Severstal] under this Lease [*sic*] ***.

Upon the occurrence of any default by [Severstal], RELCO shall have each of the following remedies: *** recover[] all payments of Maintenance Charges, whether or not accrued, and all other Charges payable hereunder; or *** exercise any other right or remedy which may be available under the Uniform Commercial Code or any other applicable law and proceed by appropriate court action *** either to enforce performance *** of the applicable covenants of this Lease or to recover damages for the breach thereof."

¶ 7 The lease provided: "All notices shall be made in writing and delivered to the party to which such notice is being given by registered mail (return receipt requested) to such party at the address written below, or to such other address as may be hereafter specified by like notice by either party to the other." The maintenance contract similarly required the parties to send notices in writing by registered mail to specified addresses.

¶ 8 Severstal gave its address as "14661 Rotunda Dr. P.O. Box 1699 Dearborn, MI 48120." Neither party alleged or presented any evidence that Severstal gave either Relco Finance or Relco Locomotives notice of a change of address.

¶ 9 To show compliance with the notice provision, the plaintiffs attached to the complaint three letters, and they incorporated the letters into the complaint by reference. Relco Locomotives alleged that on March 3, 2014, it sent by registered mail a letter in which Mark Lindskoog, manufacturing support manager for "RELCO" (with no further specification), demanded that Severstal pay invoices dated July and August 2013, for a total amount owed of $20,234.31, to pay Relco Locomotives "for the maintenance" of a specified locomotive. The letter did not suggest that Severstal had breached the lease with Relco Finance. Lindskoog wrote that if Severstal failed to pay within 15 days, Relco would pursue legal remedies. Relco Locomotives also attached to the complaint an affidavit in which Lindskoog stated that he sent the letter via registered mail. However, the letter shows on its face that he mailed it to "4001 Miller Road Dearborn, MI."

¶ 10 Both plaintiffs alleged that on May 20, 2014, an attorney who represented both plaintiffs sent to Severstal's attorney a letter again stating that Severstal owed $20,234.31, and

threatening to sue if Severstal failed to pay within a week. The plaintiffs alleged that their attorney sent the May 20 letter by regular mail and by fax. The plaintiffs filed the initial complaint a month later, on June 30, 2014.

¶ 11 In the second amended complaint, the plaintiffs further alleged that on October 28, 2014, their attorney sent to Severstal's attorney, by registered mail, a letter in which plaintiffs "declare Severstal to be in default under the Lease Agreement and Maintenance Agreement." The plaintiffs attached to the complaint a copy of a receipt for registered mail, showing an indecipherable signature on the line labeled, "Received by," and indicating that the post office delivered the letter to "203 N. LaSalle St. #2500, Chicago IL."

¶ 12 Severstal filed a motion to dismiss the complaint under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2014)), arguing that the exhibits showed that the plaintiffs never complied with the notice requirements they wrote into the lease and the maintenance contract. The circuit court granted Severstal's motion to dismiss by order dated July 2, 2015. The court said:

> "The lease agreement requires all notices to be made in writing and delivered via registered mail. ***. Thereafter, Severstal's address is listed as 14461 Rotunda Drive, P.O. Box 1699, Dearborn, MI 48120. *** Both the March 3, 2014 and October 28, 2014 letters bear different addresses, but provide no factual context permitting a change of address as envisioned under the agreement. Therefore, both the March 3, 2014 and October 28, 2014 letters appear as facially deficient. *** Relco fails to provide the Court with any

> concrete proof of the letters actually being sent via registered mail, and delivered upon Severstal. Thus, it is impossible for Relco to contend that it has fully complied with its contractual obligations. ***
>
> In light of Relco's continual failure to provide evidence of its having complied with the terms of the underlying agreement[s], *** it is apparent that Relco cannot and will not be able to sufficiently plead a cause of action against Severstal for breach of contract."

¶ 13 Plaintiffs filed this appeal.

¶ 14 ANALYSIS

¶ 15 Plaintiffs argue on appeal (1) they had no obligation to send notice of the default prior to seeking remedies for the default, and (2) if they had an obligation to send notice of default, they adequately alleged that they did so.

¶ 16 Did the Contracts Require Notice of the Defaults?

¶ 17 Plaintiffs argue that both contracts say only that they "may" send Severstal notice of default in the event of a default. They claim that they have a right to sue for default remedies even if they choose not to send the optional notice. We review *de novo* the issue of the correct interpretation of the contract. *Paluch v. United Parcel Service, Inc.*, 2014 IL App (1st) 130621, ¶ 13.

¶ 18 When a court construes a contract,

> "the primary objective is to give effect to the intention of the parties. [Citation.] A court will first look to the language of the contract itself to determine the

> parties' intent. [Citation.] A contract must be construed as a whole, viewing each provision in light of the other provisions.
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> * * *
>
> *** A court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used." *Thompson v. Gordon*, 241 Ill. 2d 428, 441-42 (2011).

¶ 19 Plaintiffs' proposed interpretation of the contracts makes meaningless the provisions that give them the option of declaring and sending notice of a default. According to plaintiffs, no consequences of any kind follow from the decision to declare or not to declare a default. The contracts would have exactly the same effects if, instead of notices of default, the contracts provided that plaintiffs could, at their option, send the owners of Severstal birthday cards.

¶ 20 Plaintiffs cite in support of their interpretation *Professional Executive Center v. LaSalle National Bank*, 211 Ill. App. 3d 368 (1991). The *Professional Executive* court noted only that the term "may" in a contract indicates permission, so that the contract did not require the plaintiff to send the defendant a notice of default. *Professional Executive*, 211 Ill. App. 3d at 379-80. The *Professional Executive* court did not explain what the provision permitting the plaintiff to send such notice meant, and how the decision to send notice could ever make any difference to the rights of the parties under the contract. The *Professional Executive* court did not consider any cases interpreting similar notice provisions in other contracts.

¶ 21 We find that the Vermont Supreme Court correctly interpreted a similar contract provision in *Simpson Development Corp. v. Herrmann*, 583 A.2d 90 (Vt. 1990). The contract in *Simpson* provided that if Simpson failed to meet its contractual obligation, Herrmann "may declare a default," and then the contract specified that in case of default, Herrmann had a right to the return of her deposit. *Simpson*, 583 A.2d at 91. The *Simpson* court said:

> "Relying on the use of the word 'may' (i.e., 'PURCHASER may declare a default'), she argues that the provision is permissive and binds her only if she elects to declare Simpson in default.
>
> We agree that the provision entitles Herrmann to an election if Simpson breaches the contract: she may declare a default and seek a return of her deposit or she may proceed to perform despite the breach." *Simpson*, 583 A.2d at 92.

¶ 22 The contract in *Jones v. Burr*, 389 N.W.2d 289, 292 (Neb. 1986), similarly provided that the seller "may declare a default by delivering written notice" if the buyer failed to fulfill its contractual obligations. If the seller declared a default, he could seek the specified default remedies, and the "failure of the Owners to give any such notice in the event of such default [would] not operate as a waiver of the right of the Owners to exercise such option or remedy for any subsequent default at any time thereafter." *Jones*, 389 N.W.2d at 292; see also *Moeller v. Chun-yen Lien*, 25 Cal. App. 4th 822, 830 (1994).

¶ 23 We find that the contracts here similarly give plaintiffs the option of declaring a default by sending notice of the default to Severstal. If they declare a default, they may seek the

remedies for default specified in the contract; if they choose not to declare a default, they do not waive the option of later declaring a default for a later breach. We agree with the circuit court here that the contracts made the provision of written notice a precondition for suing for the default remedies listed in the contract.

¶ 24 Did Plaintiffs Sufficiently Allege Compliance with the Notice Provision?

¶ 25 Next, the plaintiffs contend that they sufficiently alleged compliance with the notice provisions in the two contracts. We review *de novo* the dismissal of a complaint under section 2-615 of the Code of Civil Procedure. *Majca v. Beekil*, 183 Ill. 2d 407, 416 (1998). The circuit court should not dismiss a complaint under section 2-615 unless the complaint shows that the plaintiff cannot prove any set of facts under the pleadings that would entitle the plaintiff to relief. *Allen v. Berger*, 336 Ill. App. 3d 675, 677 (2002). "[W]hen a written instrument is attached to a complaint as an exhibit either because the claim is founded on the instrument or the instrument is pled, the exhibit constitutes a part of the pleading for all purposes. A motion to strike a complaint does not admit as true those allegations in the complaint which conflict with facts disclosed in the exhibits." *McCormick v. McCormick*, 118 Ill. App. 3d 455, 460 (1983).

¶ 26 The exhibits incorporated into the complaint to support the allegations of notice show that Relco Finance sent no notice of default by registered mail before October 28, 2014, well after it filed the complaint. The exhibits show that Relco Finance sent a notice of default on May 20, 2014, but by fax and by regular mail, not by registered mail. While Relco Locomotives alleged that it sent default notice by registered mail on March 3, 2014, the

exhibit shows that Relco Locomotives sent the notice to an address other than the address for Severstal specified in the contracts. Thus, the exhibits show that the plaintiffs did not comply with the notice provisions they wrote into the lease and maintenance contract.

¶ 27 Plaintiffs contend that they adequately alleged actual notice, which suffices for the contracts. For this argument, plaintiffs primarily rely on *Vole, Inc. v. Georgacopoulos*, 181 Ill. App. 3d 1012 (1989). The contract at issue in *Vole* included a notice provision very similar to the notice provision in the contracts here. The *Vole* contract provided that any notices pursuant to the contract "shall be served by registered mail" to a specified address. *Vole*, 181 Ill. App. 3d at 1019. The plaintiff sent notices of contract violations to the defendant, but not by registered mail. The *Vole* court said:

> "In general, the object of notice is to inform the party notified, and if the information is obtained in any way other than formal notice, the object of notice is attained. *** Defendants' only contention is that plaintiff's failure to send the written notice by registered mail as required by the lease agreement defeats any right of plaintiff to enforce the provision concerning a default by defendants. A provision requiring sending of notice by registered mail is merely intended to insure delivery. *** We find no injustice or prejudice to have resulted by the trial court ruling that defendants received sufficient notice of default, where defendant McGrogan admitted actual receipt of written notice, although such notice was not sent by registered mail as required by the lease agreement." *Vole*,

181 Ill. App. 3d at 1019; see also *Bultman v. Bishop*, 120 Ill. App. 3d 138, 143-44 (1983).

¶ 28 Here, the exhibits support the allegation that plaintiffs sent the notices of default in March and May 2014, and the May notice it addressed to Severstal's attorney at the address given in the contracts. Severstal attempts to distinguish *Vole* on grounds that the defendant in *Vole* admitted that it received notice and Severstal has never answered the complaint, so it has not admitted that it received any of the letters the plaintiffs sent. The lack of an answer does not affect the sufficiency of the allegations in the complaint. We find the allegations sufficient to raise an inference of actual notice. See *Liquorama, Inc. v. American National Bank & Trust Co.*, 86 Ill. App. 3d 974, 978 (1980). Severstal has not argued that the parties intended to make use of registered mail and contact at the listed addresses essential terms of the contract, when similar terms of the contract at issue in *Vole* did not form essential terms of that contract. With discovery, plaintiffs may be able to prove a set of facts under the complaint that entitle them to relief. Accordingly, we must reverse the trial court's judgment and remand for further proceedings.

¶ 29 CONCLUSION

¶ 30 The contracts require notice of default before plaintiffs seek the default remedies listed in the contract. The exhibits plaintiffs incorporated into the complaint show that plaintiffs did not give Severstal notice of the default by registered mail to the address given in the contract, but plaintiffs' complaint adequately alleged actual notice. Accordingly, we reverse the trial court's judgment and remand for further proceedings on the second amended complaint.

¶ 31 Reversed and remanded.