2016 IL App (1st) 160591-U

FIRST DIVISION
October 31, 2016

No. 1-16-0591

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TAMMI P. BOWDEN and NANCY J. GAGEN, Plaintiffs-Appellants, v. ILLINOIS BELL TELEPHONE COMPANY, d/b/a AT&T ILLINOIS, an Illinois Corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County, No. 15 L 9601 Honorable James E. Snyder, Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Where plaintiffs' claims were based on allegedly deficient records provided by defendant in response to a subpoena issued in prior federal litigation, the circuit court properly dismissed plaintiffs' complaint as failing to state a claim pursuant to the Illinois Uniform Commercial Code as a matter of law.

¶ 2 In this case the *pro se* plaintiffs, Tammi Bowden and Nancy Gagen, attempt to cast what they allege was a failure by the defendant, Illinois Bell Telephone Company (Illinois Bell), to fully comply with a subpoena in their federal lawsuits as a violation of the Illinois Uniform Commercial Code (UCC) (810 ILCS 5/1-101 *et seq*. (West 2014)). The circuit court dismissed

this complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). On appeal, plaintiffs contend that (1) the court erroneously considered an affirmative matter when it dismissed their complaint and (2) the dismissal was wrong because their complaint properly alleged claims under the UCC. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 A. Plaintiffs' Federal Litigation

¶ 5 The present case was preceded by and is intertwined with four prior cases filed by plaintiffs in federal court. Plaintiffs each brought a lawsuit against their former employer, Kirkland & Ellis LLP (Kirkland), in the United States District Court for the Northern District of Illinois (Northern District), filed as *Bowden v. Kirkland & Ellis LLP*, No. 07 C 975 (N.D. Ill.) and *Gagen v. Kirkland & Ellis LLP*, No. 07 C 979 (N.D. Ill.). In these consolidated lawsuits, plaintiffs alleged claims for interception of telephone calls in violation of the Electronic Communications Privacy Act (Privacy Act) (18 U.S.C. § 2520 (2010)) and retaliation in violation of Title VII of the Civil Rights Act (42 U.S.C. § 1981a(b)(3)(D) (2010)). In September 2010, the Northern District granted Kirkland's motion for summary judgment with respect to the Privacy Act claims. *Grey v. Kirkland & Ellis LLP*, Nos. 07 C 975, 07 C 978, 07 C 979 (N.D. Ill. Sept. 2, 2010). The Northern District's grant of summary judgment was affirmed by the Seventh Circuit. *Bowden v. Kirkland & Ellis LLP*, Nos. 10-3290, 10-3304 (7th Cir. Mar. 23, 2011).

¶ 6 Ms. Gagen filed a *pro se* motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (see Fed. R. Civ. P. 60(b)) for relief from the entry of summary judgment. In it, she claimed that, as a Rule 45 subpoena respondent, AT&T Midwest—of which Illinois Bell is an affiliate—had committed fraud by withholding certain Automated Message Accounting (AMA) records. The Northern District denied Ms. Gagen's motion because the evidence Ms. Gagen

relied on "could have been discovered prior to entry of judgment." *Gagen*, No. 07 C 979 (N.D. Ill. Apr. 21, 2011). The denial of Ms. Gagen's motion was affirmed by the Seventh Circuit. *Gagen v. Kirkland & Ellis LLP*, No. 11-2135 (7th Cir. Sept. 1, 2011).

¶ 7 In December 2010, Ms. Bowden filed a *pro se* complaint against Illinois Bell in the Northern District. See *Bowden v. Illinois Bell Telephone Co.*, No. 10 C 7761 (N.D. Ill.). Ms. Bowden alleged that "[s]ubpoenas for [AMA] records for several phone numbers were issued to Illinois Bell" in her lawsuit against Kirkland, and claimed that Illinois Bell had unlawfully intercepted her electronic communications "for monetary gains or other valuable consideration." Ms. Bowden's case against Illinois Bell was dismissed by the Northern District as untimely. *Bowden*, No. 10 C 7761 (N.D. Ill. Apr. 7, 2011).

¶ 8 In March 2011, Ms. Gagen filed a *pro se* complaint against Illinois Bell in the Northern District alleging that she had obtained AMA records for her Illinois Bell telephone number "pursuant to a subpoena issued to AT&T Midwest, c/o Mark W. Lewis, Esq." and claiming that Illinois Bell had unlawfully intercepted her wire and electronic communications. See *Gagen v. Illinois Bell Telephone Co.*, No. 11 C 2024 (N.D. Ill.). The Northern District dismissed Ms. Gagen's lawsuit based on issue preclusion, noting that the suit was "premised upon the same allegations of phone call interception that was the basis of her prior suit." *Gagen*, No. 11 C 2024 (N.D. Ill. Apr. 11, 2011).

¶ 9 B. The Instant Litigation

¶ 10 Plaintiffs filed the *pro se* verified complaint that is the subject of the present appeal against Illinois Bell on September 21, 2015. Plaintiffs alleged that Illinois Bell was the carrier that provided services for a landline telephone number that belonged to Ms. Gagen. Plaintiffs further alleged that, on December 23, 2008, they obtained a subpoena for various AMA records

for Ms. Gagen's landline and other numbers. The subpoena was issued with respect to plaintiffs' federal litigation which, plaintiffs alleged in the instant complaint, they lost as a result of a deficiency in the AMA records produced by Illinois Bell.

¶ 11 According to plaintiffs' complaint in this case, "AMA Records contain detail about phone calls that is not provided in typical consumer phone bills and records. For example, they indicate the particular telephone switch or switches that route phone calls." Plaintiffs stated that Illinois Bell "requires persons or entities requesting its AMA Records to obtain a subpoena for those records" and that customers must pay for the AMA records they request. Between January and March 2009, plaintiffs stated that an Illinois Bell agent, Mark Lewis, "negotiated with [plaintiffs] the terms and conditions of Illinois Bell's production and sale of AMA Records to [plaintiffs], including the timing, cost, and delivery of the AMA Records." On March 24, 2009, Illinois Bell delivered to plaintiffs the AMA records they had agreed to provide pursuant to the negotiations and delivered a "replacement subset of those AMA Records on April 9, 2009."

¶ 12 In their complaint, plaintiffs brought a total of four claims against Illinois Bell: one count by each plaintiff for "Fraudulent Express Warranty—By Affirmation (810 ILCS 5/2-313) and Buyer's Incidental and Consequential Damages (810 ILCS 5/2-715)," and one count by each plaintiff for "Violation of Implied Warranty—Fitness for Particular Purpose (810 ILCS 5/2-315) and Buyer's Incidental and Consequential Damages (810 ILCS 5/2-715))."

¶ 13 In support of their claims, plaintiffs alleged that they met with Mr. Lewis on January 14, 2009, "to discuss their requests for AMA Records. The discussions at that meeting were focused on the scope and reason for [plaintiffs'] requests." Plaintiffs stated that, after the meeting, Mr. Lewis "agreed that Illinois Bell would provide [them with] all of the AMA Records they

requested." On February 13, 2009, Mr. Lewis called Ms. Bowden. Plaintiffs alleged that, during that phone call:

> "Lewis affirmed that in addition to the AMA Records Bowden requested and Illinois Bell agreed to deliver to her, Illinois Bell would produce extra AMA Records for certain phone numbers. Lewis reasoned that it was easier for Illinois Bell to produce AMA Records for a range of dates rather than for specific dates within the range. Bowden expressed her agreement with Illinois Bell's production of the additional AMA Records for the date range September 2005 through July 2006."

¶ 14 Plaintiffs further alleged that they negotiated a price for the AMA records, which Ms. Bowden agreed to pay on behalf of herself and Ms. Gagen. According to plaintiffs:

> "Lewis's affirmation on February 13, 2009, that Illinois Bell would deliver all of the AMA Records [plaintiffs] requested, plus the additional AMA Records Illinois Bell offered to produce and Bowden agreed to accept, was an express warranty that the AMA Records Illinois Bell would deliver to [plaintiffs] would be complete in accordance with [plaintiffs'] understanding and agreement."

¶ 15 Plaintiffs alleged that Ms. Bowden delivered a check in the amount of $2000 to Mr. Lewis on March 23, 2009. The following day, Illinois Bell delivered AMA records to plaintiffs and, on April 9, 2009, delivered a "replacement subset" of the AMA records, which included records for Ms. Gagen's landline. Plaintiffs further alleged that, on June 12, 2009, Mr. Lewis "again confirmed Illinois Bell's February 13, 2009 express warranty" via email, which showed that the search query used by Illinois Bell in its AMA database to produce the AMA records was

"for calls originating from and terminating at [Ms. Gagen's landline]." Plaintiffs stated that the email was in response to a request from Ms. Bowden "that Illinois Bell affirm the AMA database search criteria that it used to produce the AMA Records delivered to [plaintiffs] in March and April of 2009." According to plaintiffs, they wanted to ensure that all of the AMA records had, in fact, been delivered.

¶ 16 The crux of plaintiffs' claims are based on their allegations that Illinois Bell had either excluded or altered the AMA records to omit "more than 400 phone calls or attempted phone calls terminating at [Ms. Gagen's landline]." As a result, plaintiffs claimed, Illinois Bell breached its express warranty and did so intentionally "because the search query Lewis affirmed that Illinois Bell ran on its AMA database should have produced the excluded" phone calls. Plaintiffs further stated that, "[o]n information and belief," an Illinois Bell network engineer or other employee or agent "intentionally altered the electronic AMA Records for [Ms. Gagen's landline]" because Illinois Bell's employee or agent knew the excluded phone calls "supported [plaintiffs'] allegations that phone calls between them had been intercepted."

¶ 17 With respect to their claim for breach of an implied warranty, plaintiffs alleged that, because Mr. Lewis knew the purpose for their AMA records request, "there was an implied warranty from Illinois Bell to [plaintiffs] that the AMA Records Illinois [Bell] would produce and that it delivered to [plaintiffs] were fit for the purpose that Lewis knew [plaintiffs] would use them." Plaintiffs claimed that Illinois Bell breached this implied warranty by excluding from the AMA records or altering them to omit the "more than 400 phone calls or attempted phone calls terminating at [Ms. Gagen's landline]."

¶ 18 Plaintiffs claimed that, as a "direct and proximate consequence" of Illinois Bell's breach of its express and implied warranties, they were unable to prove and obtain judgment on their

federal claims against Kirkland for interception of phone calls in violation of the Privacy Act (18 U.S.C. § 2520 (2010)) and retaliation in violation of Title VII of the Civil Rights Act (42 U.S.C. § 1981a(b)(3)(D) (2010)). As relief in this case, plaintiffs requested reimbursement of the sum paid for the deficient AMA records, the damages they would have received had they prevailed on their Privacy Act and Title VII claims, an order directing Illinois Bell to deliver the AMA records it withheld, and attorney fees and costs incurred both in the federal cases and in this case.

¶ 19 Attached to the complaint in this case was a November 16, 2012, "Notice of Intent to Sue" addressed to Illinois Bell and signed by both plaintiffs. In it, plaintiffs stated that they intended to sue Illinois Bell because it "fraudulently omitted certain AMA Records" for Ms. Gagen's landline. Plaintiffs asserted that the "AMA Records were specially assembled and produced for [Ms. Gagen's landline] pursuant to contract negotiations conducted by Mark Lewis." In the notice, plaintiffs asked Illinois Bell to cure its "deficient AMA Records."

¶ 20 On November 17, 2015, Illinois Bell filed a combined section 2-615 and 2-619 motion to dismiss plaintiffs' verified complaint. Illinois Bell asserted that plaintiffs' claims should be dismissed because (1) the Federal Rules of Civil Procedure "govern discovery production in response to federal court subpoenas," so plaintiffs could not state a claim under the UCC; and (2) plaintiffs' claims were barred by *res judicata* because the same subject matter had been raised by the same parties in the Rule 60 motion in their case against Kirkland and in the other federal cases that each plaintiff had filed.

¶ 21 Plaintiffs filed their response to Illinois Bell's motion to dismiss on December 17, 2015, arguing that (1) Illinois Bell's section 2-615 motion should have been brought under section 2-619 because it raised the subpoena as an affirmative matter outside of plaintiffs' complaint; (2) even when analyzed under section 2-619, Illinois Bell's arguments were meritless; and

(3) *res judicata* did not bar their claims or prayers for relief. In their response to the motion to dismiss, plaintiffs stated that their claims were based only on the AMA records that were produced in addition to those identified in the subpoena, which they claimed Illinois Bell had "voluntarily offered to provide."

¶ 22 On February 9, 2016, the circuit court issued a seven-page order granting Illinois Bell's motion to dismiss plaintiffs' complaint pursuant to section 2-615. The court explained why the subpoena was not an affirmative matter and agreed with Illinois Bell that plaintiffs could not state a claim under the UCC because there was no bargain or contract between the parties. The court also held that *res judicata* did not bar plaintiffs' claims.

¶ 23 JURISDICTION

¶ 24 Plaintiffs timely filed their notice of appeal in this matter on March 4, 2016. This court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 25 ANALYSIS

¶ 26 A. The Subpoena Was Not an Affirmative Matter

¶ 27 Plaintiffs first contend that Illinois Bell relied on an affirmative matter outside of the complaint—the federal court subpoena—in support of the section 2-615 portion of its motion to dismiss. Plaintiffs claim that the motion therefore should have been considered under section 2-619(a)(9), rather than section 2-615. However, the circuit court properly relied only on the allegations of the complaint in dismissing this lawsuit under section 2-615.

¶ 28 " 'A section 2-615 motion to dismiss tests the legal sufficiency of a complaint,' whereas a 'section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts a defense

outside the complaint that defeats it.' " *Fayezi v. Illinois Casualty Co.*, 2016 IL App (1st) 150873, ¶ 32 (quoting *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31). Section 2-619(a)(9) provides that a motion to dismiss may be filed because "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014).

¶ 29 With respect to Illinois Bell's motion to dismiss, it is clear that the subpoena does not constitute "affirmative matter." As our supreme court has observed, "affirmative matter" is:

> " '[A] type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusion of material fact unsupported by allegations of specific fact contained or inferred from the complaint *** [not] merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint.' " *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 121 (2008) (quoting 4 R. Michael, Illinois Practice § 41.7 at 332 (1989)).

¶ 30 Illinois Bell's argument that plaintiffs could not state a claim under the UCC as a matter of law was based on plaintiffs' *allegations* that they utilized a subpoena to request AMA records from Illinois Bell. This is a claim properly considered under section 2-615. Notably, Illinois Bell did not rely on any particular statement or provision of the subpoena, but instead relied on the existence of the subpoena—an existence which plaintiffs alleged in their complaint.

¶ 31 Plaintiffs argue that the subpoena was attached to Illinois Bell's motion to dismiss. However, Illinois Bell's argument exclusively relied on the allegations made in plaintiffs' complaint, including the fact that they obtained a subpoena for the AMA records. Illinois Bell's reliance on the subpoena's existence is thus not reliance on "affirmative matter" within the

meaning of section 2-619(a)(9) and the fact that Illinois Bell attached the subpoena to its motion is irrelevant.

¶ 32 The case plaintiffs rely on is completely distinguishable. In *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77 (1996), the circuit court granted the defendants' section 2-615 motion to dismiss the plaintiff's defamation claim, which was based on the contents of a magazine article. *Id.* at 83-84. On appeal, our supreme court noted that the motion to dismiss was more properly considered pursuant to section 2-619. *Id.* at 91-92. The court reasoned that the defendants' motion to dismiss "was not limited to an analysis of the allegations in the plaintiff's complaint. Instead, the motion examined portions of the allegedly defamatory article which were not part of the plaintiff's complaint." *Id.* at 91. In addition, the court noted that "[b]ecause th[o]se portions of the article did not appear in the complaint, the defendants attached a copy of the article as an exhibit to their motion to dismiss." *Id.* at 91-92. As the trial and appellate courts both relied on the attached article in granting and affirming the dismissal, the supreme court concluded that the motion should not have been considered under section 2-615. *Id.* at 91.

¶ 33 Here, in contrast, Illinois Bell's argument for dismissal did not involve the contents of the subpoena, nor did the circuit court rely on its contents in dismissing plaintiffs' complaint. Plaintiffs acknowledge in their argument that, while the circuit court made a "litany of references *** to the allegations of plaintiffs' complaint referring to the subpoena," it made no references "to the content of the *** subpoena." This brings the court's ruling in this case squarely within the scope of section 2-615. *Bryson* is inapplicable.

¶ 34 B. Plaintiffs' Complaint Fails to State a Claim

¶ 35 Having determined that the circuit court properly considered this as a 2-615 motion, we turn to plaintiffs' claim that the circuit court erred in granting the motion. "A section 2-615(a)

motion presents the question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiffs, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief can be granted." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25 (citing *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 15). "In ruling on a section 2-615 motion, the court only considers (1) those facts apparent from the face of the pleadings, (2) matters subject to judicial notice, and (3) judicial admissions in the record." *Reynolds*, 2013 IL App (4th) 120139, ¶ 25. We review the circuit court's ruling on the 2-615 motion *de novo*. *Patrick Engineering*, 2012 IL 113148, ¶ 31.

¶ 36 Plaintiffs contend that the circuit court erred in dismissing their complaint because they sufficiently alleged facts supporting their UCC claims. Illinois Bell, on the other hand, argues that plaintiffs' claims fail as a matter of law because records obtained pursuant to a federal subpoena are governed by the Federal Rules of Civil Procedure, not the UCC.

¶ 37 The purpose of the UCC is to "simplify, clarify, and modernize the law governing commercial transactions;" to "permit the continued expansion of commercial practices through custom, usage, and agreement of the parties;" and to "make uniform the law among the various jurisdictions." 810 ILCS 5/1-103(a) (West 2014). Article 2 of the UCC, under which plaintiffs brought their claims, applies to "transactions in goods." 810 ILCS 5/2-102 (West 2014). The specific claims that plaintiffs attempt to allege here are for violation of an express warranty by affirmation and violation of an implied warranty of fitness for a particular purpose.

¶ 38 Section 2-313 of the UCC governs express warranties by affirmation, and provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall

conform to the affirmation or promise." 810 ILCS 5/2-315(1)(a) (West 2014). "In a breach of express warranty action under the [Illinois UCC], plaintiff must show a breach of an affirmation of fact or promise that was made a part of the basis of the bargain." (Internal quotation marks omitted.) *Oggi Trattoria & Caffe, Ltd. v. Isuzu Motors America, Inc.*, 372 Ill. App. 3d 354, 360 (2007).

¶ 39 Implied warranties of fitness for a particular purpose are governed by section 2-315 of the UCC, which states that "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is *** an implied warranty that the goods shall be fit for such purpose." 810 ILCS 5/2-315 (West 2014). To succeed on such a claim, the plaintiff must show (1) that there was "a sale of goods, (2) that the seller had reason to know of any particular purpose for which goods are required, (3) that plaintiff, as buyer of the goods, was relying upon seller's skills or judgment to select suitable goods, and (4) that the goods were not fit for the particular purpose for which they were used." *Maldonado v. Creative Woodworking Concepts, Inc.*, 342 Ill. App. 3d 1028, 1034 (2003).

¶ 40 A subpoena is not a contract. Instead, "[a] 'subpoena' is a mandate lawfully issued in the name of the court." 9A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2451 (3d ed.). Enforcement of a subpoena is the responsibility of the issuing court. See *Gordon v. Borgini*, 297 F.R.D. 1, 2 (2013) ("[s]ubpoenas are process of the issuing court, [citation], and [t]he language of Rule 45 clearly contemplates that the court enforcing a subpoena will be the court that issued the subpoena" (internal quotation marks omitted)); see also Fed. R. Civ. P. 45(g) (eff. Dec. 1, 2007) ("The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena

or an order related to it"); 9A Wright, Miller, & Kane, Federal Practice and Procedure § 2463.1 ("It is the issuing court that has the necessary jurisdiction over the party issuing the subpoena and the person served with it to enforce the subpoena.")

¶ 41 Rule 45 of the Federal Rules of Civil Procedure, which governs the procedure for federal subpoenas, contemplates compensation of a nonparty who must respond to a subpoena. Subsection (c) of the rule, titled "Protecting a Person Subject to a Subpoena," provides that "[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(c)(1) (eff. Dec. 1, 2007)). In line with this provision, Rule 45 permits a nonparty to object to the burden of responding to a subpoena (Fed. R. Civ. P. 45(c)(2)(B) (eff. Dec. 1, 2007)) and, in certain circumstances, permits the issuing court itself to "ensure[ ] that the subpoenaed person will be reasonably compensated" (Fed. R. Civ. P. 45(c)(3)(C) (eff. Dec. 1, 2007)).

¶ 42 While there are often negotiations to determine what documents will be produced in response to a subpoena and what costs will be paid by the party that issued the subpoena, these are not contract negotiations or a transaction in goods and they do not involve any kind of commercial interaction between parties. These discussions are conducted, subject to supervision of the court that issued the subpoena, to ensure compliance with a court order and they are in no sense a voluntary commercial exchange. The UCC is simply not implicated.

¶ 43 Even if failure to fully comply with a subpoena could somehow be viewed as falling within the UCC, this claim for inadequate compliance with a subpoena in unrelated federal litigation would not be actionable. This court has said, repeatedly: " '[t]here is no civil cause of action for misconduct which occurred in prior litigation.' [Citation.] 'Petitions to redress injuries resulting from misconduct in judicial proceedings should be brought in the same litigation.' "

Johnson v. Johnson & Bell, Ltd., 2014 IL App (1st) 122677, ¶ 19 (quoting *Harris Trust & Savings Bank v. Phillips*, 154 Ill. App. 3d 574, 585 (1987)). As the court noted in *Harris Trust*, "public policy" precludes a second lawsuit and it would be improper for a court to review litigation that has gone on before a different judge.

¶ 44 In their reply brief, plaintiffs state that they "do not disagree *** that Rule 45 of the Federal Rules of Civil Procedure govern[s] federal subpoenas [or] that [e]nforcing a subpoena is the issuing court's responsibility." (Internal quotation marks omitted.) Instead, plaintiffs contend that two separate transactions occurred with respect to the AMA records: one transaction through which they obtained the specific AMA records identified in the subpoena which they would concede is outside of the UCC, and a second transaction with respect to the AMA records Illinois Bell agreed to supply *in addition* to those that were identified in the subpoena, pursuant to the parties' "contractual" agreement. However, we think it is clear from the complaint that this was one transaction, pursuant to subpoena, and that the agreement by Illinois Bell to provide additional records and by plaintiffs to pay necessary copying costs was inextricably bound with subpoena compliance.

¶ 45 Even construing all of the allegations in the light most favorable to plaintiffs, it is clear that the entire process during which plaintiffs discussed their AMA records requests with Mr. Lewis was part of subpoena negotiations, and that Illinois Bell provided the additional records because it was more convenient for Illinois Bell to provide AMA records for a range of dates rather than the specific dates required by the subpoena. By tying the loss of their federal claims to the insufficient AMA records provided by Illinois Bell, plaintiffs only underscore the inextricable connection between the subpoena issued in connection with that lawsuit and the anticipated records.

¶ 46 In support of their argument that these were two separate transactions, one pursuant to subpoena and one pursuant to contract, plaintiffs rely on their notice of intent to sue attached to the complaint and Ms. Gagen's affidavit, which was attached as an exhibit to plaintiffs' response to the motion to dismiss. However, as discussed below, neither of these documents can be used to contradict the allegations of the complaint and, more importantly, the additional facts contained in those documents do not overcome the inextricable link between the subpoena and all of the documents that Illinois Bell supplied or said it would supply to the plaintiffs.

¶ 47 With respect to the notice of intent to sue, generally, "[w]here an exhibit [attached to a complaint] contradicts the allegations in a complaint, the exhibit controls." *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. However, " '[w]hen the exhibit is not an instrument upon which the claim or defense is founded but, rather, is merely evidence supporting the pleader's allegations, the rule that the exhibit controls over conflicting averments in the pleading is inapplicable.' " *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 432 (2004) (quoting *Garrison v. Choh*, 308 Ill. App. 3d 48, 53 (1999)). The notice of intent to sue was not an instrument upon which plaintiffs' claims were founded. Rather, it was a document created after the claim arose in an effort to lend support to the claim. Therefore, any statements in the notice that conflict with the complaint do not control.

¶ 48 In reference to Ms. Gagen's affidavit, in ruling on a section 2-615 motion, the court "may not consider affidavits, products of discovery, documentary evidence not incorporated into the pleadings as exhibits, or other evidentiary materials." *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 29 (2003). Ms. Gagen's affidavit was not attached to plaintiffs' complaint and, in fact, is dated December 17, 2015, almost three months after plaintiffs filed their complaint. Thus, it clearly cannot even be considered in connection with Illinois Bell's motion to dismiss.

¶ 49 Moreover, neither of these documents undermines the inextricable connection between the entire document production, the negotiations surrounding that production, and the subpoena. In the notice of intent to sue, plaintiffs stated that the AMA records were "specially assembled and produced" for Ms. Gagen's landline "pursuant to contract negotiations conducted by Mark Lewis" with plaintiffs in 2009. Plaintiffs argue that, whereas the subpoena required Illinois Bell to produce AMA records from Ms. Gagen's landline for 57 discrete dates, the notice of intent to sue instead described AMA phone records for Ms. Gagen's landline "for every day in an 11-month period." Similarly, in her affidavit, Ms. Gagen averred that the subpoena required Illinois Bell to provide AMA records to plaintiffs for 57 days, and Illinois Bell provided AMA records for an additional 330 days that were not covered by the subpoena. Thus, these two documents support plaintiffs' contention that Illinois Bell provided documents for 330 days in addition to the 57 specific days requested. However, as the circuit court aptly noted, these "additional records were not a separate transaction for goods, but the manner in which Defendant effectuated a legally mandated release of records." The parties negotiated, as parties often do, how best to comply with a legally required production of information. Such discussions do not transform compliance with production into a bargain for the sale of goods under the UCC.

¶ 50 Because we have found the circuit court properly dismissed plaintiffs' complaint pursuant to section 2-615, we need not consider whether plaintiffs' claims would also be barred by *res judicata*.

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 53 Affirmed.