2017 IL App (1st) 153582-U

FIRST DIVISION
March 27, 2017

No. 1-15-3582

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HALLIE CHEN, STEVEN SAMUELS, JOSHUA HERZ, MARIE O'DONNELL, and JONG JUNG, Individually and on Behalf of a Class of Other Persons Similarly Situated,	)	Appeal from the Circuit Court of Cook County,
Plaintiffs,	)	
v.	)	No. 06 CH 10237
CITY OF CHICAGO, a Municipal Corporation, and PARKEON, INC.,	)	Honorable Martin S. Agran,
Defendants,	)	Lee Preston, and David B. Atkins,
(Steven Samuels, Plaintiff-Appellee; City of Chicago, Defendant-Appellant).	)	Judges Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Plaintiff's claim for violation of the Credit Card Act, if not abandoned, was properly dismissed because plaintiff failed to allege a transaction involving a retail seller. Plaintiff's subsequent claims were mooted by defendant's offer of settlement and properly dismissed for a lack of subject matter jurisdiction.

¶ 2 The plaintiffs in this case sued the City of Chicago for overcharging them for street parking paid for at the City's Pay & Display kiosks. The plaintiffs alleged that, when less than two hours of lawful parking time remained and they selected the "add maximum" choice from the kiosks, they believed they would be charged the posted rate of 25 cents per five minutes of parking for the remaining available parking time. They were instead charged $6.00 for two hours of parking, the maximum amount of time a car could park on the street at any time of day.

¶ 3 Although this case involved numerous complaints filed by various combinations of named plaintiffs against both the City and its vendor, at issue in this appeal are the claims of a single plaintiff, Steven Samuels, against the City, and two orders of the circuit court dismissing those claims. Specifically, Mr. Samuels challenges (1) the portion of the court's May 25, 2007, order dismissing Count VII of the amended complaint, which alleged a violation of the Illinois Credit Card and Debit Card Act (Credit Card Act or Act) (720 ILCS 250/1 *et seq*. (West 2006)), and (2) the court's October 4, 2011, order dismissing all claims brought by Mr. Samuels in the second amended complaint, on the basis that an offer of settlement by the City mooted the claims and deprived the court of subject matter jurisdiction.

¶ 4 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 5 BACKGROUND

¶ 6 This class action lawsuit was initially filed by three plaintiffs against the City of Chicago and Parkeon, Inc. The claims against Parkeon were subsequently dismissed, leaving the City as the sole defendant, and two of the plaintiffs were later dismissed from the action at their own request, leaving Mr. Samuels as the sole plaintiff. Although subsequent plaintiffs were added who continued the litigation against the City, those plaintiffs are not parties to this appeal.

¶ 7 The complaint in this action has been amended multiple times. The versions at issue on

appeal are the amended complaint and the second amended complaint. In both, plaintiffs alleged that the Pay & Display parking kiosks the City began to install sometime in or around 2002 identified the cost of parking in Chicago's central business district as "25 cents for five minutes." Through the kiosks, credit card users select the amount of time they wish to pay for in either five-minute increments or by choosing "maximum time." Identified on the kiosks are restrictions set out in the City of Chicago Municipal Code for parking in the central business district, which provide that the maximum time a person may park on the street is two hours and prohibit parking from 4 p.m. until 6 p.m.

¶ 8 Plaintiffs alleged that, on a day in May 2006, at approximately 2:25 p.m., Mr. Samuels elected to park on Madison Avenue between Franklin and Wells Streets and used his credit card to pay at a nearby Pay & Display kiosk. Mr. Samuels selected "maximum time" and, in light of the fact that parking was not permitted after 4 p.m., believed that he would be charged $4.75 for 95 minutes of parking. He was instead charged $6.00 for two hours of parking, although his receipt confirmed that it expired at 4 p.m. Although plaintiffs acknowledged in their amended complaints that, following the filing of this litigation, the City instructed Parkeon to recalibrate the kiosks to charge "the correct amount," they alleged that, prior to taking this action, the City had "engaged in a systematic scheme of fraud and conversion" and had "wrongfully receive[d] millions of dollars" from individuals who used the Pay & Display parking system.

¶ 9 Count VII of the amended complaint in this matter asserted a claim for a violation of section 17.03 of the Credit Card Act (720 ILCS 250/17.03 (West 2006)) which, according to plaintiffs, "prohibits a person, and a retail seller, from obtaining payment from a credit card charge where the retail seller does not furnish the services that are the subject of the charge." In connection with that claim, Mr. Samuels alleged that he and other plaintiffs and members of the

proposed class were "persons and retail sellers within the meaning of the Act" and that the City, "in the course of its business dealings with the public," violated the Act "by obtaining payment from a credit card charge where it did not furnish the services that were the subject of the charge and charged more than the advertised and stated sum of $0.25 per five minutes."

¶ 10 The City moved to dismiss the amended complaint on various grounds and, on April 25, 2008, the circuit court entered an order granting the motion in part. The court dismissed the Credit Card Act claim pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2008)), explaining that, in its view, the conduct alleged in the amended complaint did not fall within the purview of the Act:

> "Section 17.03 of the [Credit Card Act] is not implicated in this case because Plaintiffs acknowledge that they received the services that are the subject of the credit card charge. They received the right to park in the Central Business District until 4:00 p.m. in exchange for their credit card payments. [Citation.] Moreover, Plaintiffs never argue that they did not receive the right to park in exchange for their credit card payments. Rather, the Plaintiffs state that they were overcharged for the benefits that they did receive. [Citation.] The acknowledgement that the Plaintiffs did receive the right to park until 4:00 p.m., the benefit that is the subject of the credit card charge, places this case outside the ambit of the [Credit Card Act]."

¶ 11 On July 21, 2008, Mr. Samuels filed a second amended complaint asserting claims—based on the same facts—for breach of contract, common law fraud, unjust enrichment and

constructive trust, conversion, consumer fraud, and deceptive business practices. This complaint included no reference to the previously dismissed claim for violation of the Credit Card Act.

¶ 12 On January 30, 2009, the City tendered a check to Mr. Samuels in the amount of $1.45, representing the damages claimed by him in the lawsuit, plus interest. The check stated that it would become void if not cashed within 60 days. Mr. Samuels never cashed the check and the parties proceeded to engage in discovery.

¶ 13 On July 5, 2011, nearly three years after the second amended complaint was filed and two-and-a-half years after tendering its offer of settlement to Mr. Samuels, the City filed a motion to dismiss Mr. Samuels's claims for lack of jurisdiction pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)). The City contended that, pursuant to controlling precedent in Illinois, Mr. Samuels's claims were mooted by the City's tender of complete economic relief.

¶ 14 The circuit court agreed. On October 4, 2011, it issued an order dismissing with prejudice all claims asserted by Mr. Samuels. The court rejected Mr. Samuels's arguments that the City's offer was not unconditional because the check it tendered to him expired after sixty days; that the offer was not complete because it failed to include punitive damages, attorneys' fees, and costs; and that comments made by defense counsel about the likelihood that a class action for breach of contract could be maintained constituted a judicial admission regarding the continued viability of Mr. Samuels's claims.

¶ 15 The lawsuit against the City continued on behalf of other plaintiffs, who are not parties to this appeal, and, on November 16, 2015, the circuit court entered a final order disposing of the last of those plaintiffs' remaining claims. This appeal followed.

¶ 16 JURISDICTION

¶ 17 Mr. Samuels timely filed his notice of appeal on December 16, 2015. We therefore have jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered in the circuit court. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 18 ANALYSIS

¶ 19 Mr. Samuels makes two arguments on appeal. He first argues that, in its order of May 25, 2007, the circuit court erroneously dismissed his claim against the City based on its alleged violation of the Credit Card Act for failing to state a claim upon which relief could be granted. Mr. Samuels additionally argues that, in its order of October 4, 2011, the court erroneously concluded that the City's unaccepted offer of settlement in the full amount of Mr. Samuels's alleged damages deprived it of subject matter jurisdiction over his remaining claims against the City and thus should not have dismissed them pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (2008)). We consider each argument in turn.

¶ 20 A. Credit Card Act Violation

¶ 21 Mr. Samuels first argues that it was error for the circuit court to dismiss count VII of the amended complaint for failure to state a violation of section 17.03(a) of the Credit Card Act (720 ILCS 250/17.03(a) (West 2006)). Mr. Samuels insists that his allegation that he did not receive the full benefit of the service he paid for—*i.e.*, that he paid for two hours of parking and received a receipt stating he was only allowed to park for 95 minutes—was sufficient to state a claim under the Act. In response, the City contends that the circuit court correctly concluded that the Act is violated only where there is an outright refusal to provide a service that has been paid for, not where there has been an overcharge in connection with a service that was provided.

Alternatively, the City argues that Mr. Samuels failed to allege a transaction involving a "retail seller," as required by the Act.

¶ 22 As an initial matter, it is unclear whether the circuit court's dismissal of the Credit Card Act claim is properly before us on appeal. The record reveals that, after this claim was dismissed, Mr. Samuels failed to incorporate by reference or otherwise include this claim in his second amended complaint. Our supreme court has long held that "[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn." *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963). Under these circumstances, " 'a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints.' " *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17 (quoting *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153 (1983)). The City does not make this argument but, instead, simply states in a footnote that the Credit Card Act claim was not included in the second amended complaint. Mr. Samuels does not address the issue at all. We need not resolve this question, however, because even if its dismissal was adequately preserved for our review, the Credit Card Act claim was properly dismissed.

¶ 23 A motion to dismiss brought pursuant to section 2-615 of the Code is a facial challenge asserting that the complaint fails to state a cause of action upon which relief can be granted. 735 ILCS 5/2-615 (West 2008); *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 147 (2002). "The proper inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). We review an order granting a motion to dismiss pursuant to section 2-615 of the Code *de novo*. *Freeman v. Williamson*, 383 Ill. App.

3d 933, 936 (2008).

¶ 24 Section 17.03(a) of the Credit Card Act provides that:

> "No person shall process, deposit, negotiate, or obtain payment of a credit charge through a retail seller's account with a financial institution or through a retail seller's agreement with a financial institution, card issuer, or organization of financial institutions or card issuers if that retail seller did not furnish or agree to furnish the money, goods, services, or anything of value that is the subject of the credit card charge." 720 ILCS 250/17.03(a) (West 2006).

¶ 25 Although it did not form the basis of the circuit court's dismissal order, in our view the most obvious deficiency with the Credit Card Act claim is the absence of any allegation that the credit card charge in question involved a "retail seller." Section 17.03 incorporates the definition of "retail seller" found in section 2.4 of the Retail Installment Sales Act: any "person regularly engaged in, and whose business consists to a substantial extent of, selling, and who in the ordinary course of business regularly sells or offers to sell goods or services to retail buyers." 720 ILCS 250/17.03(g)(1) (West 2006); 815 ILCS 405/2.4 (West 2006).

¶ 26 In this regard, the allegations of the amended complaint are clearly deficient on their face. They state, in a conclusory manner, that *plaintiffs* and members of the class "are persons and retail sellers within the meaning of the Act" but fail to allege any facts regarding what plaintiffs are in the business of selling or how *their* status as sellers could facilitate a claim against the City. Nowhere in the amended complaint is there an allegation that the City or its vendor is a retail seller, or that the payment Mr. Samuels made at the City's Pay & Display kiosk was otherwise processed through a retail seller's account.

¶ 27 Moreover, even if the amended complaint clearly alleged that the City or its vendor was a retail seller, we agree with the City that this would be incorrect as a matter of law because motorists paying for street parking are simply not "retail buyers." Our supreme court has explained that municipalities merely regulate street parking and do not sell it to motorists at retail. See *City of Bloomington v. Wirrick*, 381 Ill. 347, 359 (1942) (holding that, although municipalities have the authority to monitor the length of time that vehicles are parked and recoup the costs associated with that regulation, they "cannot rent space in the public streets for a private purpose" because "[t]he right to park in the street is a right already vested in the public"). In light of this authority, the allegations of the amended complaint that the City "is the owner and operator of thousands of parking spaces" and that Parkeon "is the owner and operator of thousands of parking payment machines *** and the installer, manager, operator and collector of the Pay & Display Parking System" simply do not set forth the activities of entities regularly engaged in sales to retail buyers.

¶ 28 The issue the circuit court did base its dismissal on—whether the conduct complained of by the plaintiffs in this case is more properly characterized as an overcharge or the failure to provide goods that were purchased—we find to be a closer question. The plain language of section 17.03 of the Act prohibits, not overcharging for goods or services, but failing to furnish them at all. The parties do not cite and our research has likewise revealed no authority interpreting this section or the substantially similar section that has now replaced it (720 ILCS 5/17-45 (West 2012)). The circuit court viewed the service at issue simply as the right to park on the street, which Mr. Samuels clearly received. Although Mr. Samuels argues that he purchased 120 minutes of parking and only received 95, he has not consistently adhered to this position; in both the amended complaint and his appellate brief he repeatedly characterizes his legal theory

as one of overcharge.

¶ 29 Mr. Samuels argues, for example, that "[t]here is no part of the [Credit Card Act] which allows for a retailer to overcharge a consumer's credit card." That may be, but where a plaintiff asserts a *violation* of a particular statute, we are concerned with what conduct that statute requires or proscribes, not with conduct that it fails to adddress. Equally unavailing is Mr. Samuels's reliance on cases applying the Consumer Fraud and Deceptive Practices Act (815 ILCS 505/1 et seq. (West 2006)) for the general proposition that "[c]harging for services that were not rendered and charging for something a consumer does not need offends public policy." In count VII of the amended complaint, Mr. Samuels did not seek to state a claim for consumer fraud, but for violation section 17.03.

¶ 30 Given the dearth of authority and Mr. Samuels's somewhat inconsistent arguments, we decline to decide this issue. We may affirm the circuit court's ruling on any basis supported by the record (*Nesby v. Country Mutual Insurance Co.*, 346 Ill. App. 3d 564, 566 (2004)) and we conclude, as stated above, that even if dismissal of the Credit Card Act claim was preserved for appellate review, dismissal of that claim pursuant to section 2-615 of the Code was proper where the amended complaint clearly failed to allege a transaction involving a retail seller.

¶ 31 B. Lack of Subject Matter Jurisdiction

¶ 32 Mr. Samuels also argues that, in its order of October 4, 2011, the circuit court erroneously dismissed his remaining claims on the basis that the City's settlement offer mooted the claims and deprived the court of subject matter jurisdiction. Mr. Samuels does not argue, as he did in the circuit court, that the City's proffered payment to him of $1.45 did not constitute a full and unconditional satisfaction of his damages in this case. He instead argues that dismissal was improper because, by continuing to litigate the case over a two-and-a-half year period

following the proffered payment, the City "waived and was estopped from asserting that the parties had reached an accord and settlement." The City disagrees, insisting that a lack of subject matter jurisdiction is not something that a party can waive or forfeit.

¶ 33 A motion to dismiss pursuant to section 2-619 of the Code "admits the legal sufficiency of a plaintiff's complaint but raises defects, defenses, or other affirmative matters that appear on the complaint's face or that are established by external submissions acting to defeat the complaint's allegations." *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1029 (2006). Subsection (a)(1) of section 2-619 specifically contemplates dismissal for a lack of subject matter jurisdiction. 735 ILCS 5/2-619(a)(1) (West 2010)). A motion made pursuant to section 2-619 should be granted where "a plaintiff's claim can be defeated as a matter of law or on the basis of easily proven issues of fact." *Gadson v. Among Friends Adult Day Care, Inc.*, 2015 IL App (1st) 141967, ¶ 14. Our review of an order granting a motion to dismiss pursuant to section 2-619 of the Code is *de novo*. *Freeman*, 383 Ill. App. 3d at 936.

¶ 34 The City initially takes issue with Mr. Samuels's characterization of its check as a "settlement offer" that he "did not accept." The City insists that the check was not a "settlement," *i.e.*, an offer of compromise, but payment in full for the damages Mr. Samuels claimed in this lawsuit. We view this as a matter of semantics and not as a true dispute between the parties. On appeal, Mr. Samuels makes no argument that he suffered damages in excess of the $1.45 tendered by the City. And, although he notes that because he never cashed the City's check it "became stale and void at the direction of the City," he cites no authority for the proposition that whether a claim is mooted turns on whether the proffered payment is accepted or rejected by the plaintiff.

¶ 35 Indeed, our supreme court has made clear that no such distinction exists. Compare

Wheatley v. Board of Education of Township High School District 205, 99 Ill. 2d 481, 485 (1984) (holding, in a case where a class of teachers sued the school board that had dismissed them, that the named plaintiffs' claims were mooted when they *accepted* the school board's offer of reemployment) and *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 453, 457 (2011) (holding that a defendant airline's offer to refund the $40 checked baggage fee that comprised a consumer plaintiff's only alleged damages mooted the plaintiff's claims, *even where the offer was rejected by the plaintiff's counsel*).

¶ 36 In *Barber*, relied on by the circuit court in this case, our supreme court held that "the important consideration in determining whether a named representative's claim is moot is whether that representative filed a motion for class certification prior to the time when the defendant made its tender." *Barber*, 241 Ill. 2d at 456. "Where the named representative has done so, and the motion is thus pending at the time the tender is made, the case is not moot, and the circuit court should hear and decide the motion for class certification before deciding whether the case is mooted by the tender." *Id.* at 456-57. However, where, as here, the offer was made before a motion for class certification was filed, "the interests of the other class members are not before the court [citation] and the case may properly be dismissed." *Id.* at 457.

¶ 37 Although not raised by the parties, we note that, in reaching this holding, our supreme court has repeatedly relied on the analysis contained in certain decisions of the Seventh Circuit Court of Appeals, which made no distinction, for purposes of mootness, between accepted and rejected offers of settlement. See, *e.g.*, *Barber*, 241 Ill. 2d at 457 (citing *Susman v. Lincoln American Corp.*, 587 F.2d 866, 870 (7th Cir. 1978)). However, the United States Supreme Court recently held that only accepted offers of settlement can moot a plaintiff's claims. *Campbell-Ewald Co. v. Gomez*, __ U.S. __, __, 136 S. Ct. 663, __ (2016) (adopting the reasoning of Justice

Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, __, 133 S. Ct. 1523, 1533 (2013), that an unaccepted settlement offer is a legal nullity and " '[w]hen a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before' ").

¶ 38 Our supreme court most recently applied the rule stated in *Barber* and its predecessors in *Ballard RN Center, Inc. v. Kohll's Pharmacy & HomeCare, Inc.*, 2015 IL 118644, which predated the United States Supreme Court's decision in *Campbell-Ewald* by several months. Our supreme court has thus not yet been asked to consider whether, in light of the reasoning set forth in *Campbell-Ewald*, Illinois courts should continue to draw no distinction between accepted and rejected offers of settlement when considering the continued viability of a named plaintiff's claims. Accordingly, *Barber* remains controlling authority in Illinois and the circuit court did not err in dismissing Mr. Samuels's claims for lack of subject matter jurisdiction.

¶ 39 Mr. Samuels's primary argument on appeal is that the circumstances of this case justify a deviation from the general rule that a complete offer of settlement moots a plaintiff's claims. He insists that, because the City continued to actively litigate the case for two-and-a-half years before filing its motion to dismiss—during which time plaintiff contends defense counsel indicated to the court that a class action could be maintained on the breach of contract claim, the parties appeared in court on dozens of occasions, and the parties engaged in extensive discovery—the City "waived and was estopped from asserting that the parties had reached an accord and settlement." In support of this argument, Mr. Samuels cites *Klancir v. BNSF R.R. Co.*, 2015 IL App (1st) 143437, a case involving the equitable tolling of a statutory limitations period. However, the court in *Klancir* began its analysis with the premise that "[t]he right to invoke a statute-of-limitations defense can be expressly waived or waived by conduct

inconsistent with an intent to enforce that right." (Internal quotation marks omitted.) *Id.* ¶ 26. By contrast, our supreme court has made clear, not only that a court lacks subject matter jurisdiction over a mooted claim, but that "[t]he issue of subject matter jurisdiction *cannot* be waived." (Emphasis added.) *Belleville Toyota, Inc. v. Toyota Motor Sales, USA, Inc.*, 199 Ill. 2d 325, 333 (2002). Mr. Samuels's reliance on *Klancir* is misplaced because, although a party may be estopped from asserting certain arguments or defenses by virtue of its conduct during litigation, such conduct will not vest the circuit court with jurisdiction over a mooted claim.

¶ 40 Because we affirm the circuit court's October 4, 2011, order dismissing Mr. Samuels's remaining claims for a lack of subject matter jurisdiction, we need not address the City's alternative argument that dismissal of those claims would also have been proper pursuant to section 2-615 of the Code.

¶ 41 CONCLUSION

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

¶ 43 Affirmed.