FOURTH DIVISION
December 29, 2017

No. 1-16-0079

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAW OFFICES OF ARNOLD LANDIS, P.C.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
	)	
v.	)	No. 14 L 11074
	)	
ONEBEACON MIDWEST INSURANCE	)	
COMPANY,	)	Honorable
	)	Brigid Mary McGrath
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's judgment affirmed. Claim that trial court incorrectly dismissed counts for account stated was forfeited by complete absence of legal argument. Trial court properly dismissed counts alleging fraudulent misrepresentation, as plaintiff failed to sufficiently allege elements of fraud. No abuse of discretion found in trial court's decision denying plaintiff leave to file second amended complaint; plaintiff forfeited review by failing to tender proposed amendment to trial court and by failing to provide transcript of hearing, and record does not support abuse of discretion, in any event.

¶ 2 Plaintiff, Law Offices of Arnold Landis, P.C., appeals from the circuit court's orders dismissing its amended complaint against defendant OneBeacon Midwest Insurance Company (OneBeacon), and denying plaintiff leave to file a second amended complaint.

¶ 3 Plaintiff brought this case against OneBeacon to recover compensation for legal services that plaintiff had provided to defend two officers of a bank in a lawsuit. Those officers were insured, through the bank, under an insurance policy issued by OneBeacon. When OneBeacon stopped paying plaintiff for legal fees, plaintiff sued OneBeacon for breach of contract. The trial court dismissed that complaint, finding no contract between plaintiff and OneBeacon. Plaintiff amended its complaint to sue for account stated and misrepresentation. The trial court dismissed the amended complaint with prejudice, denying plaintiff's request to file a second amended complaint. We find no error and affirm.

¶ 4 I. BACKGROUND

¶ 5 The amended complaint alleges that FDIC filed a complaint in 2010 against various officers and directors of Wheatland Bank, including the bank's president, Michael Sykes, and its chief lending officer, Leonard Eichas.

¶ 6 Those two officers were additional insureds under a policy OneBeacon provided to the bank, covering "management and professional liability." The policy was an advancement policy that provided that "*[i]t shall be the duty of the* ***Insured*** *and not the duty of the Insurer to defend Claims*." (Emphasis in original.) The policy provided for the advancement of defense costs, including attorney fees, at the insured's request, but with the caveat that "***Defense Costs*** *shall be part of, and not in addition to, the applicable Limit of Liability *** and* ***Defense Costs*** *shall reduce and may exhaust such Limit(s) of Liability*." (Emphases in original.)

¶ 7 The amended complaint alleges that Sykes and Eichas retained Plaintiff to defend them in the FDIC lawsuit. Plaintiff submitted invoices to OneBeacon for its legal services. Initially, OneBeacon paid them as appropriate "defense costs." But then it stopped paying.[1]

¶ 8 Plaintiff continued to represent these officers and accrue attorney fees. Plaintiff alleges that he is owed fees in the amount of $90,100.07 for Sykes's representation and $33,528 for Eichas's representation.

¶ 9 The original lawsuit sounded in breach of contract. OneBeacon moved to dismiss, arguing that it had no contractual relationship with plaintiff, that plaintiff, in essence, was suing the wrong party—it should sue its clients if they did not pay the fees. OneBeacon argued that it only had a contractual relationship with the bank officers, not the lawyer they selected to represent them in the lawsuit. The trial court agreed and dismissed the complaint.

¶ 10 Plaintiff amended the complaint, alleging two counts of account stated (one each for the representation of Sykes and Eichas) and two counts for misrepresentation (likewise broken down by client). OneBeacon moved to dismiss in a combined motion under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2014)), attaching the insurance policy at issue, as plaintiff had failed to do so, and raising several arguments. The trial court dismissed the

[1] OneBeacon told the trial court, and tells us, that it stopped paying because, between the attorney fees it had already paid plaintiff and the money it paid toward a settlement and release of claims for Sykes and Eichas, the policy limit was exhausted. Plaintiff admits in the amended complaint that it received payment for some period of time before the payments ceased, and the insurance policy is attached to the pleadings, but the *reason* why OneBeacon stopped paying plaintiff is not contained in the pleadings or in an affidavit and thus cannot be accepted as true at this stage. We note OneBeacon's stated reason only for the fact that it has raised that justification at each stage of the proceeding; it will play no part in our decision.

amended complaint with prejudice. It denied the motion to vacate that ruling and denied plaintiff leave to further amend its complaint. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 We review *de novo* a trial court's dismissal under either section 2-615 or section 2-619. *Construction Systems, Inc. v. FagelHaber, LLC*, 2015 IL App (1st) 141700, ¶ 49. A section 2-615 motion to dismiss tests the legal sufficiency of the complaint, while a section 2-619 motion to dismiss admits the sufficiency of the complaint but asserts affirmative matter that defeats the claim. *Id*. Section 2-619.1 of the Code allows a party to combine a section 2-615 motion to dismiss with a section 2-619 motion to dismiss. *Id.* This court may affirm the circuit court's dismissal on any basis appearing in the record. *Lutkauskas v. Ricker*, 2013 IL App (1st) 121112, ¶ 18.

¶ 13 "An appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill.2d 389, 391-92 (1984). In *Foutch*, the court held that there was no basis for holding that the trial court abused its discretion in denying a motion to vacate because there was no transcript of the hearing on the motion. *Id*. at 392.

¶ 14 Although plaintiff included a copy of the transcript in the appendix attached to its brief, we have explained that this is not the proper method of supplementing the record. See, *e.g*., *Marzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, ¶ 20; *Pikovsky v. 8440–8460 North Skokie Boulevard Condominium Ass'n, Inc.,* 2011 IL App (1st) 103742, ¶ 16, ("a reviewing court will not supplement the record on appeal with the documents attached to the appellant's brief on appeal as an appendix, where there is no stipulation between the parties to supplement the record

and there was no motion in the reviewing court to supplement the record with the material"); see also *Kazubowski v. Kazubowski*, 45 Ill. 2d 405, 416 (1970) ("The record of proceedings in the trial court properly authenticated imports verity and is the sole conclusive and unimpeachable evidence of proceedings in the lower court.").

¶ 15 Plaintiff filed a motion in this court to supplement the record with the transcript, and we granted the motion. But plaintiff did not file a certified supplemental record. Apparently, when this court granted the motion, plaintiff reasonably believed that he had sufficiently filed the transcript because it was attached to plaintiff's motion, and defendant did not file any response or objection to the motion. Thus, we will consider the transcript as included in the record.

¶ 16 Also, "[b]ecause we are not required to defer to the trial court's reasoning on *de novo* review, the transcripts of the hearings on the motion to dismiss are unnecessary." *Gonnella Baking Co. v. Clara's Pasta di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003). That is, the failure of an appellant to include a transcript of proceedings is not fatal, *if* the record contains sufficient information to allow meaningful review of the merits of the appeal. *Id.*; see also *Whitmer v. Munson*, 335 Ill. App. 3d 501, 511-12 (2002) (and cases cited therein). Because the record contains a copy of defendant's motion to dismiss, as well as plaintiff's response, we conclude that the record is sufficient to conduct a *de novo* review of whether the trial court properly granted defendant's motion to dismiss.

¶ 17 Plaintiff first claims that the trial court erred in dismissing its claim for an account stated. An account stated is an agreement between the parties, who have had previous transactions, that the account representing those transactions is true, and the balance stated is correct, together with a promise, express or implied, for the payment of such balance. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 56. An account stated is "merely a final determination of the

amount of an existing debt," and thus an action for an account stated is founded upon a promise to pay that existing debt, not the original promise to pay that created the debt. *Id*.But plaintiff's "argument" as to how the trial court erred consists only of a reiteration of certain allegations in the amended complaint and the bare assertion that the allegations were sufficient to set forth and sustain a cause of action for an account stated. In its opening brief, plaintiff did not cite a single court decision in its argument of less than one page.

¶ 18 Supreme Court Rule 341(h), which sets out the requirements for appellants' briefs, requires that an appellant's brief contain:

> "Argument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal or abstract, if any, where evidence may be found. Citation of numerous authorities in support of the same point is not favored. Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Il. S. Ct. R. 341(h) (eff. Jan. 1, 2016).

¶ 19 As a reviewing court, we are "entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented." (Internal quotation marks omitted.) *Bartlow v. Costigan*, 2014 IL 115152, ¶ 52. "[T]he appellate court is not a depository in which the appellant may dump the burden of argument and research." *First Mercury Insurance Co. v. Nationwide Security Services, Inc.*, 2016 IL App (1st) 143924, ¶ 21. And it is not our job "to scour the record and make arguments for the appellants, as our docket is full and noncompliance with the supreme court rules does not help us resolve appeals expeditiously." *Id*. Our supreme court has repeatedly held that the failure to argue a point in the appellant's opening brief results

in forfeiture of the issue. See *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010) (and cases cited therein). We agree with defendant that plaintiff has forfeited the issue because its brief "fails to articulate an organized and cohesive legal argument for the court's consideration." *Bank of Ravenswood v. Maiorella*, 104 Ill. App. 3d 1072, 1074 (1982).

¶ 20 In its reply brief, plaintiff asserts that it should be "credited, not criticized for making a brief argument." Plaintiff does not dispute that the "argument" in its opening brief consists only of a reiteration of certain allegations in the amended complaint and the bare assertion that the allegations were sufficient to set forth and sustain a cause of action for an account stated. Instead, plaintiff notes that it cited to the record when listing the allegations, and states that it "articulate[d] a reason why the court's dismissal should be reversed: [Plaintiff] states a cause of action for account stated." We reiterate that plaintiff failed to articulate an organized and cohesive legal argument and has forfeited the issue.

¶ 21 But, citing *Toth v. Mansell*, 207 Ill. App. 3d 665 (1990), plaintiff attempted to raise an argument in the reply brief that it had alleged sufficient facts regarding defendant's assent to the amount due. Once again, plaintiff's "argument" consists of a reference to allegations in its complaint and plaintiff's mere assertion that these allegations were sufficient "to allege that [defendant] assented to the amount claimed due by [plaintiff.]" For the reasons stated earlier, plaintiff has forfeited the issue. Moreover, "[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Il. S. Ct. R. 341(h) (eff. Jan. 1, 2016).

¶ 22 Nonetheless, we shall briefly address this argument. In *Toth*, 207 Ill. App. 3d at 671-672, the court stated as follows:

> "An account stated must demonstrate the mutual assent of both creditor and debtor. [Citation.] The meeting of the minds as to the accuracy of an account usually results from one party rendering a statement of account to which the other party acquiesces. [Citation.] The manner of acquiescence is not critical, and the meeting of the minds may be inferred from the parties' conduct and the circumstances of the case. When one party renders a statement of account to another, who retains it without objection for longer than is reasonable, an account stated is established. [Citations.] " *Id.* at 671-72.

As it did in the trial court, plaintiff claims that defendant "acquiesced" to the amount due based on the allegations in the amended complaint that plaintiff forwarded statements to defendant, more than two years had passed, and defendant had not objected to the amount claimed due. Plaintiff claimed that this purported acquiescence on the part of defendant created an account stated.

¶ 23 First, plaintiff has failed to allege any facts from which any "acquiescence" can be inferred. Instead, the amended complaint alleges that defendant "refused" to pay those statements. See *Patrick Engineering,* 2012 IL 113148, ¶ 57 (holding that party "never acquiesced to the invoices; there was simply no meeting of the minds," where allegations in complaint were contradictory and stated that party never objected to invoices, but also stated party failed to approve them and refused to pay for services.)

¶ 24 But more importantly, "the rule that an account rendered and not objected to within a reasonable time is to be regarded as correct assumes that there was an original indebtedness, but there can be no liability on an account stated *if no liability in fact exists*, and the mere presentation of a claim, although not objected to, cannot of itself create liability." (Emphasis

added.) *Motive Parts Co. of America, Inc. v. Robinson*, 53 Ill. App. 3d 935, 941 (1977). "In other words, an account stated cannot create original liability where none exists; it is merely a final determination of the amount of an existing debt." *Id.*; accord *Dreyer Medical Clinic, S.C. v. Corral*, 227 Ill. App. 3d 221, 226 (1992); *Sexton v. Brach*, 124 Ill. App. 3d 202, 205 (1984). "[A]n account stated is merely a form of proving damages for the breach of a promise to pay on a contract." *Dreyer*, 227 Ill. App. 3d at 226. Plaintiff has failed to adequately allege facts showing *any* original liability or *any* agreement (written or oral) between *plaintiff and defendant* (as opposed to the agreements between plaintiff and its clients or the agreement between defendant and its insured).

¶ 25 Plaintiff next argues that the trial court erred in dismissing Counts II and IV of the amended complaint, alleging the tort of intentional misrepresentation. Although the amended complaint did not specify which category of "misrepresentation" plaintiff was alleging, in response to defendant's motion to dismiss below, plaintiff asserted that its "claim is not for negligent misrepresentation; it is for intentional misrepresentation." Intentional misrepresentation is just another name for fraud. *Abazari v. Rosalind Franklin University of Medicine and Science*, 2015 IL App (2d) 140952, ¶ 14.

¶ 26 To prevail on a claim of fraudulent misrepresentation, a plaintiff must establish the following elements: (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the plaintiff to act; (4) action by the plaintiff in justifiable reliance on the truth of the statement; and (5) damage to the plaintiff resulting from such reliance. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 35; *Doe v. Dilling*, 228 Ill. 2d 324, 342-43 (2008). Plaintiff argues that the amended complaint alleged sufficient facts to sustain an action for fraudulent misrepresentation.

¶ 27 Because Illinois is a fact-pleading state, in evaluating the sufficiency of pleadings for purposes of a section 2-615 motion to dismiss, "conclusions of law and conclusory factual allegations unsupported by specific facts are not deemed admitted." *Time Savers, Inc. v. LaSalle Bank, N.A.*, 371 Ill. App. 3d 759, 767 (2007). And a higher standard of specificity is imposed on pleadings claiming fraud. *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 419 (2003). "The facts which constitute an alleged fraud must be pleaded with sufficient specificity, particularity and certainty to apprise the opposing party of what he is called upon to answer." *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 457 (1989); accord *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15. "The pleadings must contain specific allegations of facts from which fraud is the necessary or probable inference." *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d at 457. "Thus, a plaintiff must at least plead with sufficient particularity facts which establish the elements of fraud, including what misrepresentations were made, when they were made, who made the misrepresentations, and to whom they were made." *Id.*; accord *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496-97 (1996).

¶ 28 The amended complaint failed to satisfy the heightened pleading requirements that apply to fraud claims. For the first element, that defendant made a false statement of material fact, plaintiff points to the following allegations in paragraphs 8 and 18: (1) "Consistent with its obligation to provide a defense to [Sykes and Eichas] for the FDIC Complaint, Defendant agreed to the retention of Plaintiff and for payment of the fair, reasonable and necessary fees and related costs in defense of the FDIC Complaint," and (2) "Defendant's representation to Plaintiff that it would pay the reasonable attorney fees and related costs and expenses for [Sykes's and Eichas's] defense was false." Plaintiff's allegations do not state who, specifically, agreed with whom,

much less when or where this communication took place or how it did. See *A, C & S, Inc.*, 131 Ill. 2d at 457. The requirement of a heightened standard would mean nothing if these naked conclusions were sufficient.

¶ 29 In support of its argument that the amended complaint adequately alleged the second element that defendant "knew" its statement was false, plaintiff points to its allegation in paragraph 17 that "Defendant has refused to pay certain amounts billed for the period of June 2012 through February 2013 and all amounts billed after February 2013." That is not even close to a specific allegation that OneBeacon knew that its promise to pay legal fees to plaintiff was false at the time the promise was made. Indeed, the amended complaint concedes that OneBeacon *did* pay plaintiff's fees for a time, but then stopped. We certainly cannot take, from the pleaded fact that OneBeacon initially paid plaintiff and then stopped doing so, that "the necessary or probable inference" is that OneBeacon had known that its alleged promise to pay plaintiff was false at the time it was made. *Id*. This allegation falls well short of the specificity required for a claim of fraudulent misrepresentation.

¶ 30 We agree with the trial court that the amended complaint failed to adequately plead a claim for fraudulent misrepresentation.

¶ 31 Plaintiff next argues that the trial court erred when it considered, on a section 2-615 motion, documentary evidence—the insurance policy between defendant and Sykes and Eichas—because it was not incorporated into the amended complaint as an exhibit, nor was it attached as an exhibit to the original complaint. Plaintiff entirely ignores the fact that OneBeacon filed a combined section 2-619.1 motion, allowing it to argue both that the amended complaint failed to state a claim on which relief could be granted (under section 2-615) *and* that other

affirmative matter—namely the insurance policy—barred the claims (under section 2-619). See 735 ILCS 5/2-619.1 (West 2014).

¶ 32 Our review of the transcript shows that both sections were referenced during the hearing. Although the trial court had ordered the parties to brief the section 2-615 portion of the motion, at the outset of the hearing, defendant told the court: "This is our 2-619.1 motion to dismiss." And the trial court's order states:

"This matter coming to be heard *on Defendant One Beacon's § 2-619.1 Motion to Dismiss the Amended Complaint*, all parties being present and this Court being advised on the premises,

IT IS HEREBY ORDERED:

*** For the reasons stated on the record, this matter is dismissed with prejudice." (Emphasis added.)

¶ 33 When a plaintiff fails to attach to its complaint copies of documents on which underlying liability is based, it is "entirely appropriate" for a defendant to submit these documents in support of its motion to dismiss under section 2-619 of the Code of Civil Procedure. *Perkaus v. Chicago Catholic High School Athletic League*, 140 Ill. App. 3d 127, 134 (1986). There was nothing improper in OneBeacon's attachment of the insurance policy to its motion to dismiss.

¶ 34 Plaintiff's final argument is that the trial court erred in denying plaintiff's motion for leave to file a second amended complaint.

¶ 35 Under section 2-616(a) of the Code of Civil Procedure, at any time before final judgment, the trial court may allow amendments to pleadings on just and reasonable terms. 735 ILCS 5/2-616(a) (West 2014). But "plaintiffs do not have an absolute and unlimited right to amend." *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 6 (2004).

¶ 36 The decision to grant leave to amend a complaint is within the sound discretion of the circuit court, and the court's decision will not be reversed absent an abuse of that discretion. *Id.* at 7; *Weidner v. Midcon Corp.*, 328 Ill. App. 3d 1056, 1059 (2002). To determine whether an abuse of discretion occurred, courts look at four factors, including: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 37 Plaintiff requested leave to file a second amended complaint immediately after defendant's motion to dismiss was granted on October 26, 2015, but its request was denied. On November 25, 2015, plaintiff filed a "Motion to Vacate Dismissal and for Leave to File Amended Complaint." On December 8, 2015, the trial court denied the motion. It is unclear if there was a hearing; the record contains no transcript.

¶ 38 That, once again, is the first problem with plaintiff's argument. This court has held that the lack of a transcript effectively precluded us from reviewing the denial of a motion for leave to amend, as it was impossible to know which factors the court emphasized and what reasoning guided it. See *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 56. Our supreme court declined to review the denial of a motion to vacate without a transcript from the hearing on that motion. *Foutch*, 99 Ill.2d at 392. More generally, this court has repeatedly recognized the difficulty of reviewing a discretionary decision in the absence of a record of the trial court's reasoning. See, *e.g., Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶¶ 14–15 (absent record of hearing on motion to vacate judgment, appellate court could not determine if trial court abused discretion because appellate court did "not know whether the trial

court heard evidence on the motion, what the parties argued, or—most importantly—the basis for the court's decision"); *In re Marriage of Golden*, 358 Ill. App. 3d 464, 473 (2005) (affirming discretionary decision on review of maintenance payments because record lacked "a report of proceedings or a sufficient substitute," and thus court was "unable to determine what evidence was presented to the trial court or how the trial court weighed the various relevant factors").

¶ 39 Plaintiff argues that it could have easily corrected the alleged deficiencies in its amended complaint. To find an abuse of discretion in denying leave to amend, it must be clear from the record that reasons or facts were presented to the trial court as a basis for requesting the favorable exercise of the court's discretion. *Hayes*, 351 Ill. App. 3d at 7; *Bernstein v. Lind-Waldock & Co*., 153 Ill. App. 3d 108, 112-13 (1987). Since we have no record, it is obviously not clear from the record that plaintiff made a sufficient presentation to the trial court.

¶ 40 In fact, if anything, the record shows the opposite to be true. As defendant notes, plaintiff did not even attempt to articulate specific facts to be included in any second amended complaint—because it never proffered a second amended complaint. See *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 532-33 (1995) (finding no abuse of discretion in denying leave to amend, when plaintiff failed to submit proposed amendment after oral motion for leave was denied). A plaintiff's failure to tender a proposed amended complaint with supporting facts to the trial court significantly diminishes the appellate court's ability to determine whether the proposed amendment would have provided a viable cause of action. *Illinois Non-Profit Risk Management Ass'n v. Human Service Center of Southern Metro-East*, 378 Ill. App. 3d 713, 726 (2008); *Beahringer v. Roberts*, 334 Ill. App. 3d 622, 630 (2002). This failure to tender the proposed amendment forfeits the right to review of the trial court's decision denying a request for leave to amend. *Id*.; see also *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 521

(1987) (plaintiff's failure to include proposed amended complaint in record forfeited plaintiff's right to review of trial court's denial of motion to amend complaint).

¶ 41 We cannot find that the trial court's denial of leave to amend the complaint was an abuse of discretion.

¶ 42 We affirm the judgment of the circuit court granting defendant's motion to dismiss the amended complaint and denying plaintiff leave to file a second amended complaint.

¶ 43 Affirmed.