

No. 1-16-2958

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

PENGBO FU,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 16 L 5111
)	
YONGXIAO FU,)	
)	Honorable
Defendant-Appellee.)	Patrick J. Sherlock,
)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

- ¶ 1 *Held:* The judgment of the circuit court is affirmed; plaintiff failed to state a claim for which he could receive relief because plaintiff cannot revoke an unconditional gift under Illinois law; plaintiff’s stretched interpretation of foreign law is unenforceable because it is inconsistent with public policy.
- ¶ 2 Plaintiff, Pengbo Fu, brought suit for breach of a gift agreement against his son,

defendant Yongxiao Fu. Both parties are citizens of the People’s Republic of China (PRC), though defendant is currently a resident of Massachusetts. The parties entered into the gift agreement in the PRC, and the agreement specifies PRC law governs its terms. Plaintiff brought suit in Cook County because the money at issue in the litigation was being held by the International Bank of Chicago. The trial court found plaintiff’s complaint deficient on its face for failure to establish the fact of the foreign law supporting the basis of plaintiff’s claim, and found that plaintiff’s interpretation of PRC law was immoral and against public policy. For the reasons that follow we affirm the judgment of the trial court.

¶ 3

BACKGROUND

¶ 4 On February 27, 2012, in China, the parties entered into a gift agreement where plaintiff agreed to “make a free and unconditional gift” of \$590,000 to defendant so that defendant could pursue an EB-5 Visa to immigrate to the United States. The gift agreement is written in Chinese and an English translation is provided in the record. The Immigration and Nationality Act provides for the allocation of visas granting immigrant status to foreign nationals entering the United States for the purpose of engaging in a commercial enterprise through capital investment in a U.S. business. 8 U.S.C. § 1153 (2006). Title 8 of the Code of Federal Regulations governs the procedure for employment creation aliens to apply for an EB-5 Visa. 8 C.F.R. § 204.6 (2016). Under the Code, an alien must invest at least \$500,000 “in a targeted employment area within the United States” to be considered for an EB-5 Visa. *Id.* Additionally, the alien must “show that he has invested his own capital obtained through lawful means.” *Matter of Ho*, 22 I&N Dec. 206, 210 (AAO 1998)¹. In May 2012, defendant attempted to obtain an EB-5 visa by investing \$500,000 in a project to finance construction of a hotel and conference center near

¹ Available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3362.pdf>

O'Hare Airport. In May 2013, the SEC found the project was fraudulent and defendant was able to recover his money. Defendant then informed plaintiff of his failure to obtain an EB-5 visa and that defendant would find another project to invest in. Plaintiff did not seek the return of his gift at that time.

¶ 5 In July 2013, defendant invested \$500,000 in an entity known as Lake 1 LLC for the construction of a garment manufacturing and retail facility in Melrose Park, Illinois. Defendant transferred the funds to the Lake 1 LLC EB-5 Escrow Account at the International Bank of Chicago. On February 3, 2016, the United States denied EB-5 approval for the Lake 1 LLC project. Lake 1 LLC made no claim on defendant's investment held in the escrow account.

¶ 6 On March 10, 2016, defendant signed an agreement to invest \$500,000 in an EB-5 project for development of an apartment complex in New York. On March 21, 2016, and again on March 23, plaintiff's attorneys wrote to the International Bank of Chicago to inform them of a dispute over the funds being held in the Lake 1 LLC EB5 Escrow Account and claimed that the funds belonged to plaintiff. Defendant sought to withdraw the money from the escrow account to invest in the New York project, but the International Bank of Chicago refused to release the funds to defendant because of the dispute with plaintiff.

¶ 7 On May 17, 2016, plaintiff filed a petition in a Shanghai court in the PRC to revoke the gift agreement. On May 20, 2016, plaintiff filed the current suit to revoke the gift agreement and recover \$500,000 from the escrow account. On May 31, 2016 the PRC court entered an order freezing the funds in the escrow account.

¶ 8 Plaintiff's complaint in the Cook County circuit court claimed that "plaintiff has never relinquished rights over the EB-5 Money pursuant to the laws of the [PRC]." Plaintiff argued defendant breached the "contract" of the gift agreement where defendant was to use the gift to

obtain an EB-5 visa, but defendant failed to do so. Plaintiff attached to the complaint a translation of the gift agreement as well as translations of his claim in the Shanghai court. Plaintiff's litigation in the Shanghai court claimed two grounds for his revocation of the gift agreement under Article 192 of the Contract Law of the PRC: (1) under paragraph 2 of Article 192, a donee "has the obligation to support the donor but does not fulfill it"; and, (2) under paragraph 3 of Article 192, a donee "does not fulfill the obligations as stipulated in the gift agreement." Plaintiff claimed defendant did not fulfill his obligations because defendant is not supporting his parents and refused to talk with them. Plaintiff also claimed defendant was not fulfilling his obligations under the gift agreement because plaintiff did not obtain an EB-5 visa, and his current pursuits of an EB-5 visa include his spouse, arguing that the third party beneficiary violates the gift agreement.

¶ 9 On August 4, 2016, defendant filed a motion to dismiss plaintiff's complaint pursuant to 2-615 and 2-619. 735 ILCS 5/2-615, 2-619 (West 2016). Defendant argued plaintiff's complaint failed to adequately plead applicable PRC law, failed to state a claim under Illinois law, and that defendant was complying with the terms of the gift agreement. Plaintiff replied to the motion by arguing PRC law governed the terms of the gift agreement and PRC law allowed for the revocation of gifts. Plaintiff argued that under the Contract Law of the PRC, a gift agreement is a contract that may be revoked under Article 192 if "(1) the donee seriously harms or infringes the rights or interests of the donor or the donor's close relatives; (2) the donee has an obligation to provide for the donor but fails to fulfill this obligation; or (3) the donee does not perform obligations agreed upon in the gift contract." Plaintiff did not provide citation to how "a free and unconditional gift" could be revoked. Plaintiff claimed defendant violated the Contract Law of the PRC by harming plaintiff through defendant's perceived "inconsiderate behavior

towards plaintiff” because defendant had become estranged from plaintiff. Plaintiff also claimed that whether defendant was in pursuit of another EB-5 visa was immaterial due to plaintiff’s other claim and possible political exigencies. Plaintiff further argued defendant violated the Marriage Law of the PRC by not fulfilling his duty to support plaintiff. Plaintiff included an affidavit from his attorney in the PRC. The attorney wrote that she filed plaintiff’s claim in a Shanghai court and included references to two PRC cases with only a sparse description of both. The trial court noted for one case, “[n]o factual details were given,” and that the other dealt with a failed marriage agreement. Plaintiff also attached English translations of the Contract Law of the PRC and the Marriage Law of the PRC.

¶ 10 On October 11, 2016, the trial court dismissed plaintiff’s complaint with prejudice, finding “[p]laintiff has not provided any evidence” for his interpretation of PRC law. The trial court noted it “cannot take judicial notice of a foreign country’s law,” that “[p]laintiff is required to plead and prove the law like any other fact,” and that “[p]laintiff has not provided an iota of evidence to support his interpretation of Article 192 of the Contract Law and Article 21 of the Marriage Law.” The trial court then decided plaintiff’s “complaint must therefore be dismissed under Section 2-619.” The court noted it “would have no problem enforcing the express language contained in Article 192 of the Contract Law and Article 21 of the Marriage Law, even though the language differs considerably from Illinois law on the subject. The strained interpretation of that language urged by plaintiff is another matter.” The trial court went on to explain plaintiff’s improperly pled interpretation of PRC law was “oppressive, immoral, and impolitic” and dismissed plaintiff’s claims with prejudice as unenforceable under Illinois law. This appeal followed.

¶ 11

ANALYSIS

¶ 12 The trial court dismissed plaintiff’s complaint pursuant to section 2-619. 735 ILCS 5/2-619 (West 2016). We review *de novo* motions to dismiss pursuant to section 2-619 because such motions raise issues of law. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367-68 (2003) (“The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. [Citation.] *** Our review of a section 2-619 dismissal is *de novo*.”). A 2-619 motion to dismiss asserts an affirmative matter that defeats the claim or avoids the legal effect of plaintiff’s claim. “The basis of the motion must go to an entire claim or demand. [Citation.] Section 2–619(a) additionally provides that if the grounds for the motion do not appear on the face of the pleading attacked, the motion shall be supported by affidavit. [Citation.]” *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). Defendant contends that plaintiff agreed dismissal was warranted, and that plaintiff simply argued that dismissal should have been without prejudice. Defendant’s position is that because of this we should review the trial court’s entire order to grant dismissal with prejudice for an abuse of discretion. Because we affirm the trial court’s ruling under either standard of review, resolving the dispute over the standard of review is unnecessary to our disposition.

¶ 13 A 2-615 motion to dismiss only challenges the legal sufficiency of the complaint by alleging defects on the face of the complaint. *Id.* at 484-85. A “court should dismiss a cause of action on the pleadings only if it is clearly apparent that no set of facts can be proven which will entitle a plaintiff to recover.” *Id.* at 488.

¶ 14 Plaintiff Failed to State a Claim for Which He Could Receive Relief

¶ 15 Plaintiff argues that he should be able to revoke his unconditional gift to his son because his son has become estranged from him. The trial court dismissed under 2-619 plaintiff’s complaint for failure to state a claim for which he could obtain relief because plaintiff failed to

adequately plead PRC law. However, on appeal, we review the judgement of the court, not its reasoning, so we may affirm for any reason found in the record. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 16 The gift was delivered and accepted, so plaintiff made a valid gift to defendant. A valid *inter vivos* gift requires “delivery of the property by the donor to the donee, with the intent to pass the title to the donee absolutely and irrevocably, and the donor must relinquish all present and future dominion and power over the subject matter of the gift.” *Pocius v. Fleck*, 13 Ill. 2d 420, 427 (1958). Here, plaintiff transferred ownership of the money to defendant. Plaintiff clearly wrote that he wanted to “make a free and unconditional gift” of \$590,000 to defendant so that defendant could pursue an EB-5 Visa to immigrate to the United States. Based on the language of the gift agreement, plaintiff intended to, and did, transfer ownership of \$590,000 to defendant. Strictly enforcing the terms of the gift agreement, based on the agreed upon translation of the gift agreement, still results in dismissal of plaintiff’s case because plaintiff made the gift free of any conditions. He cannot promise that he will give a gift unconditionally and only after he is unhappy with his son apply a condition on the gift so that he can revoke it. The gift was made with intent to permanently transfer the property, plaintiff delivered the property to defendant, and defendant accepted.

¶ 17 Plaintiff argues PRC law controls the gift agreement, and that under PRC law gifts may be revocable. However, plaintiff never established this interpretation of PRC law in any of the pleadings. “The general rule is that a foreign law must be pleaded.” *Christiansen v. William Graver Tank Works*, 223 Ill. 142, 151 (1906). In plaintiff’s reply to defendant’s motion to dismiss, plaintiff attached exhibits but didn’t explain how they supported his argument that he has a claim against defendant under PRC law simply for defendant’s allegedly “inconsiderate

behavior towards plaintiff.” “When an exhibit is attached to a complaint it becomes part of the complaint [citation], and when the allegations in the complaint differ from those shown in the exhibit attached to the complaint, the exhibit controls. [Citation.]” *Bianchi v. Savino Del Bene International Freight Forwarders, Inc.*, 329 Ill. App. 3d 908, 921 (2002). However, in this case plaintiff only attached translations of PRC law without explaining why defendant’s conduct constituted an actionable claim under that law. Plaintiff simply asserted PRC law governed the gift agreement, that gift agreements are contracts under PRC law, and that PRC law allows for revocation of gifts when the donee seriously harms the donor. This fails to explain how defendant’s conduct could be characterized as seriously harming plaintiff under PRC law.

¶ 18 We find *Bianchi* instructive as to why plaintiff’s complaint fails under 2-615 scrutiny. In *Bianchi*, the plaintiff filed a claim in an Italian court against the defendant, claiming wrongful termination. The Italian court ruled in the plaintiff’s favor, but “[t]he court did not specify a wage or salary figure, and it did not order [the defendant] to reinstate [the plaintiff], leaving the amount of [the plaintiff’s] award undetermined.” *Id.* at 912. The plaintiff attached as exhibits a copy of the Italian court’s judgment as well as an authenticated English translation of the judgment. *Id.* at 913. The trial court dismissed the plaintiff’s claim because it found the Italian judgment was unenforceable because of its failure to state the amount of judgment. *Id.* The plaintiff then filed an amended complaint to recognize the foreign judgment, and included an intimation of payment with an English translation of the Italian original. *Id.* at 914. The defendant again moved for dismissal, arguing that the intimation added nothing because it was simply the plaintiff’s opinion as to what damages could be proven. The trial court agreed and again dismissed the plaintiff’s complaint. *Id.* at 915. The plaintiff filed a motion for reconsideration, which included letters from Italian attorneys stating their interpretation of the

Italian court's order and interpretations of statutes. However, they failed to include the text of the statutes or their English translations. *Id.* at 916. The trial court denied the plaintiff's motion for reconsideration, and we affirmed. We found that the plaintiff's pleadings failed to "allege sufficient facts to state a cause of action." *Id.* at 918. In the present case, plaintiff's complaint is also deficient on its face. While plaintiff included English translations of PRC statutes, he failed to provide the court with relevant analysis concerning his interpretation. "In opposing a motion to dismiss under section 2-615, a plaintiff cannot rely on mere conclusions of law or fact unsupported by specific factual allegations." *Id.* at 918. Here, plaintiff only provides us with conclusory allegations that he can revoke the gift agreement under PRC law. While plaintiff may have included translations of the foreign law, unlike the plaintiff in *Bianchi*, here plaintiff failed to provide analysis supporting his interpretation of PRC law. While plaintiff included an affidavit from his attorney in the PRC, that affidavit did not explain the factual background of one case cited and did not explain the relevance of the factual details of the other case the attorney referenced. "[I]n Illinois, the laws of foreign countries must be pled and proven as any other fact. [Citation.]" *Id.* at 922. Plaintiff failed to do so here.

¶ 19 Plaintiff cannot revoke a "free and unconditional gift" under Illinois law and plaintiff failed to plead PRC law. Therefore, the complaint may be properly dismissed under section 2-615 because it failed to state a claim for which plaintiff could receive relief. 735 ILCS 5/2-615 (West 2016).

¶ 20 Plaintiff's Interpretation of PRC Law is Contrary to Public Policy

¶ 21 On appeal plaintiff argues that under his interpretation of PRC law an unconditional gift is revocable and he should be granted leave to amend his complaint to properly plead PRC law. The trial court found allowing plaintiff to amend his complaint would be futile because even if

plaintiff properly pled PRC law, plaintiff's proposed interpretation of PRC law was "oppressive, immoral, and impolitic" and therefore unenforceable in Illinois courts. We agree.

¶ 22 Plaintiff gave defendant a free and unconditional gift of \$590,000 because EB-5 visas require the foreign investor seeking United States residency to invest a minimum of \$500,000 of funds he legally owns. The foreign investor must prove ownership of those funds to be eligible for an EB-5 visa. *Matter of Ho*, 22 I&N Dec. at 210-11. Here, plaintiff signed the agreement giving defendant \$590,000 freely and unconditionally to help defendant acquire an EB-5 visa. With the signed gift agreement, defendant was able to prove he legally owned enough assets in his own name to meet United States government requirements for EB-5 visas. Plaintiff contends PRC law allows him to make written representations that a gift is unconditional to help defendant comply with the requirements of the U.S. Government to obtain an EB-5 visa and then revoke that gift after delivery and acceptance. Such an interpretation would facilitate a deception upon the U.S. government. Therefore, we affirm the trial court's finding that enforcement of this claim is "oppressive, immoral, and impolitic" and therefore unenforceable.

¶ 23 Illinois courts may enforce foreign law, but "if entertaining a foreign cause *** is contrary to the public policy of the forum, its courts may bar enforcement of the foreign remedy." *Marchlik v. Coronet Insurance Co.*, 40 Ill. 2d 327, 330 (1968). Here, plaintiff made a "free and unconditional gift" to defendant because defendant was required to own the money he invested in the United States to be eligible for an EB-5 visa. "[T]he immigrant investor must establish that he or she is the legal owner of the capital invested." Immigration and Naturalization Service memo PM-602-0083 (May 20, 2014)² (citing *Matter of Ho*, 22 I&N Dec. 206). If plaintiff is allowed to claim he can revoke his unconditional gift to defendant, plaintiff's

² Available at: [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20\(Approved%20as%20final%205-30-13\).pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Approved%20as%20final%205-30-13).pdf)

interpretation of PRC law would work a deception on the U.S. Government because plaintiff gave the gift for defendant to qualify for an EB-5 visa. We will not participate in this deception by ordering revocation of the gift. Therefore, we affirm dismissal of the complaint with prejudice.

¶ 24 Under Illinois law, plaintiff delivered the gift to defendant with intent to pass title to defendant irrevocably, and defendant accepted the gift. Plaintiff has not pled a claim for which he can obtain relief and his case is dismissed. We reject plaintiff's request to plead his interpretation of PRC law that the "unconditional" gift is revocable under PRC law because it is against public policy.

¶ 25 **CONCLUSION**

¶ 26 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 27 Affirmed.