2017 IL App (1st) 170402-U

No. 1-17-0402

Fourth Division
December 29, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ORIGINAL PIZZA, LLC, a Limited Liability Company, Plaintiff-Appellant, v. RS RETAIL, LLC, a Limited Liability Company, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 16 L 005975 The Honorable Margaret Ann Brennan, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed plaintiff's promissory estoppel complaint where plaintiff failed to establish the existence of a promise made by defendant or that plaintiff relied on such a promise.

¶ 2 The instant appeal arises from aborted lease negotiations between plaintiff Original Pizza, LLC, and defendant RS Retail, LLC. The parties had begun negotiations for plaintiff to lease space for its restaurant from defendant and had exchanged several draft letters of intent, but the negotiations ultimately ceased and the parties never signed a lease or even finalized a letter of intent. Plaintiff filed a complaint against defendant for promissory estoppel, alleging

that plaintiff had vacated its former restaurant space in reliance on defendant's promise to lease plaintiff a space. Defendant filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)), and the trial court granted the motion, finding that there was no question of fact that there had been no promise made, no reliance, no justifiable reliance, and no foreseeability of reliance. Plaintiff appeals and we affirm.

¶ 3 BACKGROUND

¶ 4 On June 16, 2016, plaintiff filed a complaint against defendant, alleging that plaintiff operated a pizza restaurant on Taylor Street in Chicago and that defendant owned a different property on Taylor Street. The complaint alleges that "[p]rior to May 12, 2016, Defendant, through its agents Nick Millot and Phillip Golding, advised Plaintiff's agent, Ted Mavrakis, that Defendant approved the lease of [defendant's] Property to Plaintiff and that all terms were agreed upon." However, the complaint alleges that these statements were false "in that Defendant apparently had not approved the lease of the Property to Plaintiff." The complaint alleges that these statements were made to induce plaintiff to terminate its lease at its existing location and, in reliance on defendant's statements, plaintiff terminated the lease. Subsequently, "[o]n or about May 27, 2016, Plaintiff was informed by Defendant's agents that Defendant would not lease the Property to Plaintiff." As a result, plaintiff terminated its existing lease, had no location in which to operate its restaurant, and "has suffered ongoing monetary damages."

¶ 5 On August 12, 2016, defendant filed a combined motion to dismiss the complaint pursuant to section 2-619.1 of the Code, as well as a request for sanctions. Defendant argued that at no time did defendant promise to lease the property to plaintiff, and that the furthest

negotiations went was the exchange of draft letters of intent, each of which contained language expressly providing that they did not represent binding commitments. Furthermore, defendant argued that plaintiff could not claim that it terminated its existing lease in reliance on any promise made by defendant because plaintiff was in fact being evicted from its former location and an order of possession had been entered against it. Defendant argued that, "[w]ith no promise and no reliance, Plaintiff has no damages and has no claim." Defendant further argued that plaintiff and its counsel were well aware of the deficiencies in the complaint and should be sanctioned.

¶ 6 Attached to defendant's motion to dismiss were a number of documents. First, the affidavit of Anthony Porcelli provided that Porcelli was a shareholder in the law firm representing defendant in this action, and Porcelli averred that the exhibits attached to the affidavit were true and correct copies of, *inter alia*, documents from the eviction case against plaintiff with respect to the properly formerly occupied by plaintiff. One of these documents was a verified complaint filed by the landlord of that property seeking a judgment for possession of the property; the complaint itself is not file-stamped, but the motion to dismiss claims the complaint was filed on November 10, 2015, and there is a stamp from the circuit court certifying the copy. The other document was an agreed order, entered May 12, 2016, which provided that judgment for possession of the property was entered in favor of the landlord but that judgment would be stayed until June 13, 2016. The agreed order also stated that it incorporated a release and settlement agreement that was dated April 26, 2016, which was not attached to the affidavit.

¶ 7 Also attached to the motion to dismiss was the affidavit of Phillip Golding, a real estate broker with CBRE, Inc., the commercial real estate services firm which had been retained by

defendant to locate tenants for its property. Golding averred that he was involved with negotiating the terms of a draft letter of intent for a potential lease with plaintiff for space in defendant's building, and that in early May 2016, Golding and Ted Mavrakis, plaintiff's president, exchanged several iterations of a draft letter of intent in the process of negotiations. However, Golding averred that, to his knowledge, no letter of intent was ever signed by defendant and no lease was ever drafted. Golding averred that several documents attached to his affidavit were true and correct copies of the draft letters of intent exchanged by the parties. There were a total of five draft letters of intent attached to Golding's affidavit, beginning with one dated May 3, 2016, that was drafted on behalf of defendant. The other four draft letters made corrections and revisions from that base document. The fourth draft letter of intent was signed by Mavrakis on May 5, 2016, and the fifth draft letter of intent was signed by Mavrakis on May 6, 2016. All of the draft letters contained the same language stating that "[t]his letter is not intended to be a binding contract, except as expressly stated herein, a lease or offer to lease, but is intended only to provide the basis for negotiations for a lease document (the 'Lease') between the parties." All of the draft letters also contained the following statement:

> "This letter is intended merely as an expression of intent, and by signing below, each party agrees that (i) this letter does not create any binding obligation on either party, (ii) either party may terminate Lease negotiations at any time for any reason without liability to the other party, and (iii) any party proceeding on the basis of this letter (whether with or without the knowledge of the other party) is doing so at its sole risk. Without limiting the foregoing, Landlord acknowledges that Tenant's execution of this letter does not signify that the lease transaction has received Tenant's necessary

corporate and municipality approvals, and that there is no assurance given by Tenant that such approvals will be obtained."

¶ 8 Finally, attached to the motion to dismiss was the affidavit of Nick Millot, who averred that he was the development analyst for Related Midwest, defendant's sole owner, and was responsible for evaluating and negotiating commercial leases with potential tenants on behalf of defendant. Millot averred that he was involved with the preliminary discussions regarding a potential letter of intent for plaintiff's lease of space at defendant's building and reviewed the draft letters of intent exchanged on behalf of the parties. Millot averred that "[a]t no time, did [defendant] execute a Letter of Intent with Plaintiff pertaining to the lease of space at the Property." Millot further averred that "[a]t no time did [defendant] enter into a lease with Plaintiff for space at the Property."

¶ 9 On September 16, 2016, plaintiff requested an extension of time to respond to the motion to dismiss, claiming that plaintiff required the depositions of Golding, Millott, and another broker from CBRE in order to be able to respond to the motion. On September 26, 2016, the trial court granted the motion for extension of time and gave leave for plaintiff to take the depositions. However, plaintiff did not depose these individuals prior to filing its response.

¶ 10 On November 22, 2016, plaintiff filed a response to defendant's motion to dismiss. First, plaintiff argued that defendant could not rely on the draft letters of intent to show there was no promise because "the draft Letters of Intent were never executed by both Plaintiff and Defendant." Plaintiff further argued that "prior to May 12, 2016, Defendant, through its agents Nick Millot and Phillip Golding, advised Plaintiff's agent, Ted Mavrakis, that Defendant approved the lease of [defendant's premises] to Plaintiff and that all terms were agreed upon. This is evidence of a promise." Second, plaintiff argued that the fact that there

was an eviction proceeding did not mean that plaintiff could not have relied on any statements made by defendant. Plaintiff argued that "[a]lthough Plaintiff's landlord at [the old property] was suing to evict Plaintiff, Plaintiff had strong and viable defenses to the eviction." Plaintiff claimed that "[i]t was not until Defendant told Plaintiff that its lease for [defendant's property] was approved that Plaintiff signed off on the agreement to vacate [the old property]." There were no documents attached to the response to the motion to dismiss, but the response appears to contain a verification under section 1-109 of the Code (735 ILCS 5/1-109 (West 2014)) by Mavrakis.[1]

¶ 11 There is no report of proceedings from the hearing on the motion to dismiss but, on January 10, 2017, the trial court entered an order granting defendant's motion to dismiss with prejudice, "for the reasons set forth in open court including, but not limited to that there was no issue of material fact that there was no promise, no reliance, no justifiable reliance, and no foreseeability of reliance and as a result the complaint is dismissed with prejudice." The trial court also denied defendant's motion for sanctions.[2]

¶ 12 Plaintiff filed a notice of appeal, and this appeal follows.

¶ 13 ANALYSIS

¶ 14 On appeal, plaintiff argues the trial court erred in granting defendant's motion to dismiss because there were genuine issues of material fact that precluded dismissal of the action. In the case at bar, defendant filed a combined motion to dismiss pursuant to section 2-619.1 of the Code, which permits a party to file a motion to dismiss based on both section 2-615 and section 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2014)). 735 ILCS 5/2-619.1

[1] The signature does not include a printed name anywhere on the page to identify the signer. However, the signature is similar to Mavrakis' signature that appears on the draft letters of intent.

[2] Defendant does not appeal the denial of sanctions.

(West 2014). A section 2-615 motion to dismiss "tests the legal sufficiency of a complaint," while a section 2-619 motion to dismiss "admits the sufficiency of the complaint, but asserts affirmative matter that defeats the claim." *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. "In ruling on motions to dismiss pursuant to either section 2-615 or 2-619 of the Code, the trial court must interpret all pleadings in the light most favorable to the nonmoving party" (*Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 23-24 (2004)), and a cause of action should not be dismissed under either section unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief (*Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009) (section 2-615 motion); *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277-78 (2003) (section 2-619 motion)). Our review of a motion to dismiss under either section is *de novo* (*Carr v. Koch*, 2012 IL 113414, ¶ 27), and we may affirm the dismissal of a complaint on any ground that is apparent from the record (*Golf v. Henderson*, 376 Ill. App. 3d 271, 275 (2007)). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 15 While the trial court's order does not specify whether its dismissal was based on section 2-615 or 2-619, the supporting documents attached to the motion would be considered only under a 2-619 motion. "On a motion to dismiss pursuant to section 2-619(a)(9) of the Code, the defendant, as the movant, 'has the burden of proof on the motion, and the concomitant burden of going forward.' " *Philadelphia Indemnity Insurance Co. v. Pace Suburban Bus Service*, 2016 IL App (1st) 151659, ¶ 22 (quoting 4 Richard A. Michael, Illinois Practice § 41:8, at 481 (2d ed. 2011)). "The 'affirmative matter' asserted by the defendant must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials." *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997); 735 ILCS

5/2-619 (West 2014). "Once a defendant satisfies this initial burden of going forward on the section 2-619(a)(9) motion to dismiss, the burden then shifts to the plaintiff, who must establish that the affirmative defense asserted either is 'unfounded or requires the resolution of an essential element of material fact before it is proven.' " *Epstein*, 178 Ill. 2d at 383 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993)). The plaintiff may establish this by presenting "affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect." 735 ILCS 5/2-619 (West 2014). "The plaintiff's failure to properly contest the defendant's affidavit by submitting a counteraffidavit may be fatal to his cause of action, as the failure to challenge or contradict supporting affidavits filed with a section 2-619 motion results in an admission of the fact stated therein." *Philadelphia Indemnity Insurance*, 2016 IL App (1st) 151659, ¶ 22 (citing *Fayezi v. Illinois Casualty Co.*, 2016 IL App (1st) 150873, ¶ 44).

¶ 16 In the case at bar, plaintiff argues that there were genuine issues of material fact concerning each element of its promissory estoppel claim. "Promissory estoppel is employed to form a contract when the promisee has detrimentally relied on the promissor's gratuitous promise to do or refrain from doing something in the future. [Citation.]" *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 91. "The doctrine operates to impute contractual stature based upon a promise that is not supported by consideration and to provide a remedy to the party who detrimentally relies on that promise." *Matthews*, 2016 IL 117638, ¶ 93. "To establish a claim based on promissory estoppel, the plaintiff must allege and prove that (1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendant, and (4) plaintiff relied on the promise to its detriment." *Matthews*, 2016 IL 117638, ¶ 95. The trial

court found that plaintiff had failed to establish any of these elements. Since a plaintiff is required to allege each element of its cause of action, if we agree with the trial court as to even one element, we must affirm the dismissal of plaintiff's complaint.

¶ 17 With respect to the existence of "an unambiguous promise to plaintiff" (*Matthews*, 2016 IL 117638, ¶ 95), we agree with the trial court that there is no issue of fact as to the existence of such a promise. There is no dispute that the parties never entered into a lease agreement or signed a letter of intent. The furthest negotiations went was the exchange of draft letters of intent, which defendant attached to its motion to dismiss. Each of these draft letter of intent contained the same language stating that "[t]his letter is not intended to be a binding contract, except as expressly stated herein, a lease or offer to lease, but is intended only to provide the basis for negotiations for a lease document (the 'Lease') between the parties." All of the draft letters also contained the following statement:

> "This letter is intended merely as an expression of intent, and by signing below, each party agrees that (i) this letter does not create any binding obligation on either party, (ii) either party may terminate Lease negotiations at any time for any reason without liability to the other party, and (iii) any party proceeding on the basis of this letter (whether with or without the knowledge of the other party) is doing so at its sole risk. Without limiting the foregoing, Landlord acknowledges that Tenant's execution of this letter does not signify that the lease transaction has received Tenant's necessary corporate and municipality approvals, and that there is no assurance given by Tenant that such approvals will be obtained."

Thus, it is clear that the draft letters of intent did not constitute a promise for the purposes of plaintiff's promissory estoppel claim.

¶ 18 Plaintiff argues that we should not consider the draft letters of intent because "the draft Letters of Intent were never executed by both Appellant and Appellee. Appellee cannot rely upon the unexecuted Letter of Intent to establish that no promise was made." However, plaintiff overlooks the fact that, although the draft letters were never executed by *both* plaintiff and defendant, two of the draft letters were, in fact, signed by Mavrakis on behalf of plaintiff. The draft letters of intent expressly provide that "by signing below, each party agrees" that the letter did not create any binding obligation on either party, that either party could terminate negotiations at any time, and that "any party proceeding on the basis of this letter *** is doing so at its sole risk." Thus, by signing two of the draft letters containing this language, plaintiff acknowledged that the letter of intent, even in its final form, did not constitute a binding obligation. Furthermore, the fact that the draft letters of intent were never executed by both parties only serves to highlight the fact that no promise had been made.

¶ 19 Plaintiff argues that the evidence of a promise was the allegation that "prior to May 12, 2016, Defendant, through its agents Nick Millot and Phillip Golding, advised Plaintiff's agent, Ted Mavrakis, that Defendant approved the lease of [defendant's premises] to Plaintiff and that all terms were agreed upon." This allegation appears both in plaintiff's complaint and in its response to the motion to dismiss. The response contained a verification pursuant to section 1-109 of the Code, and such a verification has been held to be the equivalent of an affidavit for purposes of section 2-619. *Griffin v. Universal Casualty Co.*, 274 Ill. App. 3d 1056, 1063 (1995); *In re Estate of Mosquera*, 2013 IL App (1st) 120130, ¶ 24. Thus, we take this allegation as true for purposes of reviewing plaintiff's motion to dismiss.

¶ 20 However, vague assertions are not sufficient to demonstrate the existence of a material fact in opposing a motion to dismiss. See *Roberts v. Dow Chemical Co.*, 244 Ill. App. 3d 253,

257 (1993). Plaintiff's allegation does not provide any details as to the alleged promise, including the date or the form in which this promise was made. We note that the affidavits attached to defendant's motion to dismiss aver that negotiations began in early May 2016, and "prior to May 12, 2016," encompasses the period of time in which the draft letters of intent were exchanged—the first was sent May 3, while the last was dated May 6. There is no written communication between the parties between May 6 and May 12 that was attached to either the complaint or the briefing on the motion to dismiss, and plaintiff does not allege that there was any oral communication subsequent to the exchange of the draft letters of intent. Thus, it appears that the communication referred to by plaintiff would have been in the course of exchanging draft letters of intent which, as explained above, clearly set forth that they did not constitute binding obligations and that either party could terminate lease negotiations at any time. Accordingly, we cannot find that this provides evidence of a promise and therefore agree with the trial court that plaintiff failed to establish that there was a promise.

¶ 21 Additionally, we agree with the trial court that plaintiff failed to establish that there was reliance on the promise by plaintiff. Defendant's motion to dismiss included copies of a forcible entry and detainer complaint against plaintiff and an agreed judgment of possession against plaintiff with respect to the property that plaintiff allegedly vacated in reliance on defendant's promise. The motion to dismiss claims the complaint was filed on November 10, 2015, and the agreed order granting the landlord possession is dated May 12, 2016. In its response to the motion to dismiss, and again on appeal, plaintiff argued that the fact that there was an eviction proceeding did not mean that plaintiff could not have relied on any statements made by defendant, because "[a]lthough Plaintiff's landlord at [the old property]

was suing to evict Plaintiff, Plaintiff had strong and viable defenses to the eviction." Plaintiff further claimed that "[i]t was not until Defendant told Plaintiff that its lease for [defendant's property] was approved that Plaintiff signed off on the agreement to vacate [the old property]." We do not find these arguments persuasive.

¶ 22 Plaintiff's argument overlooks the fact that the agreed order incorporated a release and settlement agreement that was dated April 26, 2016. Thus, as of April 26, 2016, plaintiff had reached an agreement with its former landlord, which presumably covered the subject matter of possession of the property.[3] This was approximately one week before the first draft letter of intent was exchanged between the parties in the instant case and prior to any alleged promise to lease the property to plaintiff. Plaintiff does not explain the apparent contradiction between the existence of the settlement agreement and plaintiff's claim that it did not "sign off on the agreement to vacate" its former premises until after the alleged promise to lease defendant's property. In fact, plaintiff makes no mention of this settlement agreement in its argument. However, we find its existence to be dispositive, as it makes clear that plaintiff could not have relied on any promises made on behalf of defendant in early May. Accordingly, we agree with the trial court that plaintiff failed to establish that it relied on a promise made by defendant and therefore affirm the dismissal of plaintiff's complaint.

¶ 23 CONCLUSION

¶ 24 For the reasons set forth above, we find that the trial court properly dismissed plaintiff's complaint because plaintiff failed to establish that defendant made a promise or that plaintiff relied on such a promise.

¶ 25 Affirmed.

[3] As noted, the settlement agreement is not contained in the record on appeal.