2017 IL App (1st) 170614-U

SIXTH DIVISION
December 29, 2017

No. 1-17-0614

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

H&S BUILDING INVESTMENTS, LLC, Plaintiff-Appellant, v. BAHRAM IRANI and COLDWELL BANKER RESIDENTIAL BROKERAGE, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 16 L 6055 Honorable Patrick J. Sherlock, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court properly dismissed a real estate buyer's complaint seeking damages for breach of contract and negligent misrepresentation against a real estate broker.

¶ 2 Plaintiff, H&S Building Investments, LLC (H&S), sued defendant Bahram Irani, a licensed real estate broker employed by defendant Coldwell Banker Residential Brokerage (Coldwell). The complaint contained two counts: count I, a claim for breach of contract; and count II, for negligent misrepresentation. The circuit court dismissed the entire complaint with

prejudice pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)) for failure to state a cause of action. We affirm.

¶ 3 The complaint, which we take as true for the purposes of this appeal, essentially alleges as follows. In 2014, H&S was interested in buying an investment property in Chicago and sought Irani's assistance in that endeavor. Irani showed H&S's manager a four-story building in Chicago with commercial space on the first floor and two apartments above. Photographs of the property attached to the complaint show a vacant lot adjoining the property to the north, enclosed by a single continuous fence. Irani told H&S's agent that the "entire vacant lot" was also for sale and recommended that H&S buy both the main property and the adjoining vacant lot. H&S purchased the main property containing the four-story building. H&S also, "in reliance on the representation of the Defendants," entered into an installment contract with the owner of the adjoining vacant lot to obtain a warranty deed for the lot. After closing on both transactions, H&S discovered that the single fenced-in parking lot was actually two separate lots of record, and that it had only purchased one-half of the fenced-in land.

¶ 4 Count I of the complaint also alleges that defendants had a duty to (1) provide H&S with information relevant to the purchase of the properties; (2) negotiate for the purchase of the properties; and (3) provide H&S with accurate information regarding the properties. H&S claims it suffered damages as the "direct and proximate result" of defendants' failure to provide correct information regarding the physical size and location of the parking lot, and their "misrepresentations regarding the sale of the whole vacant lot."

¶ 5 Count II of the complaint alleges that defendants "made a false statement of material fact when they represented to the Plaintiff that the entire vacant lot north of the Subject Premises was for sale." It further alleges that defendants made this statement in a careless or negligent manner,

hoping to increase their commission on the sale. In reliance on the statement, plaintiff contracted to buy the adjoining lot, believing it was purchasing the entire fenced-in area. Because it purchased only half of that area, it suffered damages because the single lot it actually purchased is less valuable than the two lots together.

¶ 6 Attached to the complaint as an exhibit is an installment agreement for warranty deed containing a full legal description of the property to be conveyed, namely "Lot 11" in a particular named subdivision in Chicago, along with the Property Index Number (PIN) 17-04-426-003-0000. The agreement is signed by agents for the seller and for H&S.

¶ 7 Irani and Coldwell moved to dismiss the complaint pursuant to section 2-615 of the Code for failure to state a valid cause of action. They argued that count I failed because it did not identify a specific contract between the parties. They also asserted that count II was fatally defective because defendants had no legal duty to disclose facts about which they had no actual legal knowledge, or to independently investigate the size of the property, and that H&S knew how large the lot it purchased was before it closed the transaction because the contract contained a specific PIN number and legal description. After briefing, the circuit court granted the motion and dismissed the complaint with prejudice. The court later denied H&S's motion to reconsider that ruling. This appeal followed.

¶ 8 Because this case comes to us on a section 2-615 dismissal, we construe all well-pleaded facts in the light most favorable to the plaintiff and take those facts and all reasonable inferences which flow from those facts as true. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 320 (2008). We review dismissal pursuant to section 2-615 *de novo*. *Id*. at 305.

¶ 9 The elements for a breach of contract claim are (1) an offer and acceptance; (2) consideration; (3) definite certain terms of the contract; (4) the plaintiff's performance of all

required contractual conditions; (5) the defendant's breach of the terms of the contract; and (6) damages resulting from the breach. *Barille v. Sears Roebuck & Co.*, 289 Ill. App. 3d 171, 175 (1997).

¶ 10 The elements for a negligent misrepresentation claim are (1) a duty owed by the defendant to the plaintiff to convey accurate information; (2) a breach of that duty; (3) damages resulting from the breach; (4) a false statement of material fact; (5) carelessness or negligence in ascertaining the truth of the statement by the party making it; (6) an intention to induce the other party to act; (7) action by the other party in reliance on the truth of the statement; and (8) damages resulting from the breach. *Board of Education of City of Chicago v. A, C & S, Inc*., 131 Ill. 2d 428, 452 (1989); *Roe v. Jewish Children's Bureau of Chicago*, 339 Ill. App. 3d 119, 131 (2003).

¶ 11 The circuit court dismissed both counts of the complaint based on a lack of an allegation of proximate cause. In short, it found that the actual cause of H&S's loss was its own failure to determine that the legal description on the articles of agreement for deed did not match the property it thought it was buying, rather than any representations or agreements it had with defendants.

¶ 12 On appeal, H&S contends that the circuit court erred in dismissing the complaint, because whether it was reasonable for it to rely on its real estate agent's representation was an issue of fact for a jury to determine. We disagree.

¶ 13 The complaint does not allege that defendants knew the property described in the articles of agreement for deed was less than the entire fenced-in lot. The complaint itself includes a copy of the installment agreement for warranty deed as an exhibit. To the extent the exhibit conflicts with the allegations of the complaint, the exhibit controls. *Charles Hester Enterprises, Inc. v.*

Illinois Founders Insurance Co., 114 Ill. 2d 278, 287 (1986). The contract, signed by H&S's agent, sets forth the specific legal description and PIN number of the property to be conveyed.

¶ 14 Misrepresentations of material fact made negligently by a real estate agent can form the basis for a cause of action for negligent misrepresentation. *Buzzard v. Bolger*, 117 Ill. App. 3d 887, 891 (1983). But a real estate agent has no duty to "undertake an investigation for hidden or latent defects," if the seller fails to disclose them, unless the agent could have discovered the falsity of the representation by exercise of ordinary care. *Harkala v. Wildwood Realty, Inc.*, 200 Ill. App. 3d 447, 454 (1990). Likewise, this court has stated: "A person may not enter into a transaction with his eyes closed to available information and then charge that he has been deceived by another." *Central States Joint Board v. Continental Assurance Co.*, 117 Ill.App.3d 600, 606 (1983). In determining whether reliance is reasonable, all of the facts which the plaintiff had actual knowledge of, as well as all of those it might have learned if it had used ordinary prudence, must be taken into account. *Connor v. Merrill Lynch Realty, Inc.*, 220 Ill. App. 3d 522, 529–30 (1991) (citing *National Republic Bank v. National Homes Construction Corp.*, 63 Ill. App.3 d 920, 925 (1978)). If ample opportunity exists to discover the truth, then reliance is not justified. *Central States*, 117 Ill. App. 3d at 607.

¶ 15 Although, as plaintiff argues, the question of reasonable reliance is normally a question of fact to be decided by a jury, "a court can determine reasonable reliance as a matter of law when no trier of fact could find that it was reasonable to rely on the alleged statements or when only one conclusion can be drawn." (Internal quotation marks omitted.) *Tirapelli v. Advanced Equities, Inc.*, 351 Ill. App. 3d 450, 456 (2004). The legal description of the vacant lot was attached to the articles of agreement for deed and was therefore actually disclosed to H&S. This fact dooms H&S's claims. The disclosure of the legal description and the PIN number put H&S

on notice of the actual size and location of the property, notwithstanding defendants' representations. Therefore, H&S could not have justifiably relied on defendants' purported false statement, and any damages sustained by H&S were not legally sustained as the result of some breach of duty committed by defendants. As "damages resulting from the breach" is an element of both a breach of contract and negligent misrepresentation claim, the circuit court properly dismissed H&S's complaint. H&S contracted to buy half the parking lot and it cannot now place blame on the real estate broker for its surprise regarding the lot size. Put another way, a plaintiff cannot sign a binding contract to purchase a specifically described 1000 square foot lot and then sue its real estate broker when the lot turned out to be 1000 square feet in size as stated in the contract, rather than 2000 square feet verbally described by the broker prior to the sale.

¶ 16 Moreover, the complaint is bereft of any clear factual allegations demonstrating the parties exchanged an offer, acceptance, and consideration. While the complaint alleges generally there was a contract between the parties, those allegations are merely conclusions. To allege the existence of a valid contract, a plaintiff must plead facts indicating there was an offer, an acceptance, and consideration. *Talbert v. Home Savings of America, F.A.*, 265 Ill. App. 3d 376, 380 (1994). A general allegation that a contract exists without supporting facts is a legal conclusion which is subject to dismissal. *Id*. Terms such as "offered," "accepted," and "breached its contract" suggest mere legal conclusions. *Id*. No written brokerage agreement is attached to the complaint, and more importantly, nothing in the complaint itself alleges that H&S paid any consideration for defendants' services.

¶ 17 The circuit court did not err when it dismissed the complaint pursuant to section 2-615 of the Code. It follows that the court also properly denied H&S's motion for reconsideration.

¶ 18 H&S concludes its appellate brief with a request that even if we agree that the complaint was properly dismissed, we should remand the case with instructions that the circuit court allow it to file an amended complaint to cure the defects. We review the denial of leave to amend for abuse of discretion. *Sheffler v. Commonwealth Edison Co*., 2011 IL 110166, ¶ 69. In the circuit court, H&S never presented a specific motion for leave to file an amended complaint, nor any proposed amended complaint. Instead, its first and only request to amend was included at the end of its motion to reconsider the dismissal of the complaint, stating merely: "Plaintiff respectfully requests *** [ ] an opportunity to replead a viable claim." In its order denying the motion to reconsider, the circuit court addressed the possibility of amendment, stating "[b]ecause the contract expressly provides the legal description of the real estate to be purchased and due diligence was readily available, plaintiff cannot ever state any cause of action against defendants."

¶ 19 When exercising its discretion in deciding whether to grant leave to amend, a court must review the proposed amended pleading to determine whether it would cure the defect in the pleadings, whether it was timely, whether it prejudiced the opposing party, and whether there were previous opportunities to amend. *In re Huron Consulting Group, Inc., Shareholder Derivative Litigation*, 2012 IL App (1st) 103519, ¶ 60. A proper motion for leave to amend must contain an argument for permitting amendment pursuant to the above factors *and* include a copy of the proposed amended pleading. *Id*. As the circuit court never was given the opportunity to consider any proposed amended complaint, we cannot say that the court abused its discretion in denying the request to amend. See *id.*

¶ 20 For these reasons, we affirm the circuit court's dismissal of the complaint with prejudice.

¶ 21 Affirmed.