2018 IL App (1st) 171298-U

FIFTH DIVISION
March 30, 2018

No. 1-17-1298

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

JVC HFT LLC, an Illinois limited liability company,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
v.	)	
	)	
ENDOTRONIX, INC., a Delaware corporation,	)	No. 2016 CH 02282
	)	
Defendant-Appellee,	)	
	)	Honorable
(James Hummer, an individual, and Harry D. Rowland, an individual,	)	Anna Helen Demacopoulos,
	)	Judge Presiding.
Defendants).	)	

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County dismissing the counts in a second amended complaint and denying leave to file an additional count.

¶ 2 JVC HFT LLC (JVC) provided $1.5 million in bridge financing to Endotronix, Inc. (Endotronix), through the purchase of a convertible term promissory note. The debt was to convert to equity in the event Endotronix obtained $5 million in additional financing by the maturity date of the note, *i.e.*, JVC would receive preferred shares of Endotronix at a significant discount. The maturity date ultimately passed without the financing in place. JVC filed an

action in the circuit court of Cook County alleging that Endotronix falsely represented that the additional financing was imminent prior to the execution of the note and that Endotronix subsequently delayed the financing to avoid converting JVC's debt into discounted equity in the company. On appeal, JVC challenges (i) the dismissal with prejudice of its fraud and breach of contract claims against Endotronix and (ii) the denial of its motion to reconsider an order denying it leave to file another breach of contract count. For the reasons discussed below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The second amended complaint, in part, provides, as follows. Endotronix is in the business of developing pulmonary artery pressure sensor technology. When Endotronix initially approached JVC in September 2013, JVC explained that it was not interested in lending funds to Endotronix, but would consider only an equity investment. Endotronix subsequently raised $1 million through a series of convertible promissory notes issued in June 2014 (June 2014 Notes) to provide bridge financing until the next round of investment in the company, which would be substantially larger and was referred to as the "Series C" round. Although JVC did not participate in the June 2014 Notes because it did not want to be a lender, the parties continued their discussions regarding a potential investment.

¶ 5 In October 2014, Endotronix solicited JVC to invest using the same form of convertible promissory note used in the June 2014 Notes. In the proposed transaction, the debt owed to JVC would convert into equity in Endotronix when the Series C round closed, and the value of the preferred shares JVC would purchase would be established based on the price paid by the Series C shareholders. According to JVC, the chief executive officer of Endotronix repeatedly represented that the proposed convertible note would achieve JVC's objective of securing an

equity investment because the equity triggering event – the Series C financing – was lined up and set to close shortly. Specifically, the CEO stated that Thoratec, the world's leading ventricular heart assist device company, was ready to anchor the Series C financing, which would occur within the first quarter of 2015. JVC alleged that, to create a confident façade and to "bait" JVC into purchasing the note, Endotronix offered a significant discount on the conversion price if the Series C round did not close by February 28, 2015. JVC agreed to the transaction.

¶ 6 JVC paid $1.5 million in cash, and Endotronix executed a convertible term promissory note dated December 8, 2014, in favor of JVC in the principal amount of $1.5 million (Note). The Note provided that if "Next Equity Financing" (*i.e.*, the Series C financing) generating at least $5 million occurred on or before the maturity date – December 31, 2015 – the principal amount of the Note would automatically convert to shares of preferred stock in Endotronix. The Note further provided that JVC would receive a 20% discount on the shares if the Next Equity Financing occurred on or before February 28, 2015, and a 35% discount after such date. The parties also executed a subscription agreement, and the Endotronix shareholders' agreement was amended to allow JVC to select a director, so long as it held the Note or post-conversion shares.

¶ 7 The first indication that Thoratec was not set to anchor the upcoming financing occurred in January 2015. The chairman of the board of Endotronix informed JVC that Thoratec and another potential co-investor (i) expected JVC to take the lead in the Series C round by investing an additional $1.5 million and (ii) asked JVC to reduce its discount on the initial $1.5 million from 35% to 20%. JVC did not agree to such a reduction. After observing the efforts of Endotronix's chairman and CEO to find alternate investors, JVC initiated its own efforts to secure the Next Equity Financing by December 31, 2015. According to JVC, Endotronix ignored a proposed fact sheet under which JVC would lead the Series C round pursuant to

specified terms. Throughout the remainder of 2015, Endotronix allegedly had multiple opportunities to close on a Next Equity Financing which would generate at least $5 million. JVC asserted that the board chairman of Endotronix intentionally delayed any closing until after December 31, 2015, so as to avoid JVC's 35% discount at conversion and to remove its director.

¶ 8 On January 27, 2016, the Endotronix board was informed by its CEO of a signed term sheet providing for a total of $21.5 million in financing in three separate closings, allegedly involving many of the same parties that were considered prior to the end of 2015. According to JVC, all other "Series 2014 Noteholders" (*i.e.*, the holders of the June 2014 Notes) were allowed to convert in the Series C financing, but Endotronix would not permit JVC to participate in the conversion unless it agreed, among other things, to relinquish its board seat.

¶ 9 JVC filed a verified complaint on February 17, 2016, seeking an injunction prohibiting Endotronix[1] from moving forward with the Series C financing until it allowed JVC to convert its Note into conversion shares at the applicable discount and to retain its board seat. After the circuit court denied any temporary injunctive relief, Endotronix filed a combined motion to dismiss pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2016)). Prior to a ruling on the motion to dismiss, JVC was granted leave to file an amended complaint. In a memorandum of law filed in May 2016 in support of its combined motion to dismiss the amended complaint, Endotronix noted that no closing had yet occurred with respect to any Series C financing and the JVC-selected director remained on its board at that time.[2] The circuit court dismissed the counts against Endotronix with prejudice and denied JVC's oral and written requests to further amend the complaint. JVC subsequently sought leave to file a second amended complaint in September 2016. The circuit court ultimately

[1] JVC has elected not to pursue its claims against two other defendants – the CEO and the chairman of the board of Endotronix – in the instant appeal.

[2] The record indicates that the financing closed in the summer of 2016.

denied such leave but permitted JVC to file a *new* second amended complaint curing certain deficiencies in Counts IV and V of its *proposed* second amended complaint.

¶ 10 In a fraud count (Count IV) of the second amended complaint filed on February 9, 2017, JVC alleged that Endotronix had made false statements with the intent to induce JVC to purchase the Note and enter into the subscription agreement. JVC also alleged that Endotronix breached an express provision of the Note based on its exercise of its contractual discretion in violation of the implied covenant of good faith and fair dealing (Count V). According to JVC, Endotronix exercised its discretion in a manner contrary to the reasonable expectations of JVC by intentionally delaying the closing on the Next Equity Financing until after December 31, 2015, with the intent to deprive JVC of its conversion rights and board seat. The requested relief in Counts IV and V included conversion of the debt to equity with the 35% discount *or* the award of monetary damages equal to the value of the discounted converted shares.

¶ 11 Endotronix filed a motion to dismiss the second amended complaint pursuant to section 2-615 of the Code. As to the fraud claim, Endotronix asserted that JVC failed to sufficiently allege the materiality of the purported misrepresentations and that it relied upon such misrepresentations to its detriment. Endotronix also argued that the alleged misrepresentations were non-actionable statements of opinion. As to the implied covenant claim, Endotronix contended that JVC cannot read a non-existent obligation into the Note and that JVC had not alleged any facts demonstrating that Endotronix improperly delayed the Next Equity Financing.

¶ 12 In an order entered on May 17, 2017, the circuit court granted Endotronix's motion to dismiss Counts IV and V with prejudice. The circuit court also denied with prejudice JVC's motion to reconsider a prior order denying JVC leave to file Count VI of its proposed second amended complaint, wherein it had alleged that Endotronix breached the "*pari passu*" and

"consent" provisions of the Note (discussed further below). JVC timely filed the instant appeal.

¶ 13 II. ANALYSIS

¶ 14 In the instant appeal, JVC argues that Counts IV and V of the second amended complaint should not have been dismissed with prejudice pursuant to section 2-615 of the Code. JVC further contends that the circuit court erred in denying its motion to reconsider an order denying JVC leave to file Count VI of its proposed second amended complaint, in which JVC asserted a breach of contract claim based on the *pari passu* and consent provisions of the Note. We begin with our analysis of the dismissal of Counts IV and V pursuant to section 2-615.

¶ 15 A. Dismissal Under Section 2-615 of the Code

¶ 16 A motion to dismiss pursuant to section 2-615 of the Code attacks the legal sufficiency of the complaint. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18; 735 ILCS 5/2-615 (West 2016). When ruling on a section 2-615 motion, a court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them. *DeHart*, 2013 IL 114137, ¶ 18. A cause of action should be dismissed pursuant to section 2-615 only if it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. *Id.* "The crucial inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action on which relief may be granted." *Id.* As discussed further below, the complaint also includes the attached exhibits. *Rogalla v. Christie Clinic, P.C.*, 341 Ill. App. 3d 410, 413 (2003). Our review of an order granting dismissal under section 2-615 is *de novo*. *DeHart*, 2013 IL 114137, ¶ 18. We may affirm the circuit court's order on any basis appearing in the record. *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 282 (2006).

¶ 17 JVC contends that the circuit court erred in dismissing Count IV (fraud) and Count V

(breach of the Note based on the exercise of contractual discretion in violation of the implied covenant of good faith and fair dealing) under section 2-615. We discuss each count below.

¶ 18 1. Count IV - Fraud

¶ 19 In Count IV of the second amended complaint, JVC alleged Endotronix made false statements intended to induce JVC into entering the subscription agreement and purchasing the Note. Fraudulent inducement is a form of common-law fraud. *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15. "To state a cause of action for common-law fraud, a plaintiff must plead: (1) a false statement of material fact; (2) knowledge or belief by the defendant that the statement was false; (3) an intention to induce the plaintiff to act; (4) reasonable reliance upon the truth of the statement by the plaintiff; and (5) damage to the plaintiff resulting from this reliance." *Id.* See also *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 45 (stating that the elements of fraud in the inducement are (i) a false representation of material fact, (ii) made with knowledge or belief of that representation's falsity, (iii) made with the purpose of inducing another party to act or to refrain from acting, and (iv) the other party reasonably relies upon the representation to its detriment).

¶ 20 Illinois is a fact-pleading state; 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). A higher specificity standard applies to fraud claims. *Avon Hardware*, 2013 IL App (1st) 130750, ¶ 15; *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 30. Therefore, a plaintiff must at least plead with sufficient particularity facts which establish the elements of fraud, including what representations were made, who made them, when they were made, and to whom they were made. *Id.* See *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 457 (1989) ("pleadings must contain specific allegations of facts

from which fraud is the necessary or probable inference"). As discussed below, we conclude that the allegations of the second amended complaint are insufficient to establish a cause of action for fraud.

¶ 21 a. Elements of Fraud – False Statement of Material Fact

¶ 22 The basis of a fraud claim must be a statement of fact, not an expression of opinion. *Avon Hardware*, 2013 IL App (1st) 130750, ¶ 17; *Merrilees*, 2013 IL App (1st) 121897, ¶ 30. Whether a statement is one of fact or opinion depends entirely on the facts and circumstances under which the statement was made. *Id.* ¶ 45. "Furthermore, assurances as to future events are generally not considered misrepresentations of fact." *Id.* ¶ 41. See also *Illinois Non-Profit Risk Management Ass'n v. Human Service Center of Southern Metro-East*, 378 Ill. App. 3d 713, 723 (2008) (providing that "[s]tatements concerning future intent or conduct are not actionable as fraud"); *Barille v. Sears Roebuck & Co.*, 289 Ill. App. 3d 171, 176 (1997) (noting that "[s]tatements regarding future events or circumstances are not a basis for fraud"). The ultimate question of whether a misrepresentation is one of fact is a question of law. *Merrilees*, 2013 IL App (1st) 121897, ¶ 45; *Power v. Smith*, 337 Ill. App. 3d 827, 830 (2003).

¶ 23 The second amended complaint alleged that the CEO of Endotronix verbally represented to a JVC insider (a) that Thoratec was "set to anchor the Series C financing, which was set to close no later than the end of the first quarter of 2015 and, thereby, under the convertible note would trigger the conversion of debt to equity in Endotronix," and (b) "if for some unexpected reason Endotronix did not close the Thoratec[-]led Series C round by February 28, 2015, Endotronix would provide JVC with a steep discount of 35% when the debt was converted to equity." The complaint further alleged that the Endotronix CEO falsely represented in telephone conversations with JVC insiders that "the lead Series C investor, Thoratec, was ready to invest in

the Series C financing, and the Series C financing was already lined-up, imminent, set to close in short order and scheduled to be consummated within the first quarter of 2015."

¶ 24 Citing *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642 (2001), JVC characterizes the foregoing representations as statements of existing fact. We reject such characterization. In *Miller*, an automobile salesperson represented to a customer that a vehicle was "executive driven." *Id.* at 647. After purchasing the vehicle, the customer learned that it had been previously owned by a rental car company. *Id.* The appellate court reversed the grant of summary judgment in favor of the dealership on the customer's fraud claims, finding that there was a material controversy regarding whether the dealership's representation involved a fact. *Id.* at 649. While the appellate court acknowledged that "puffing" is considered a nonactionable assertion of opinion, it concluded that the phrase "executive driven" was "sufficiently susceptible of interpretation as a factual description of a car's history." *Id.*

¶ 25 The statements at issue in *Miller* were substantially different from the challenged representations herein. The ownership and usage of the vehicle involved *past* events or circumstances which the dealership presumably knew at the time of its salesperson's communications with the customer. Conversely, the representations by the Endotronix CEO relating to Thoratec involved *future* financing by a third party other than Endotronix.

¶ 26 We view the instant case as more akin to *Kusiciel v. LaSalle National Bank*, 106 Ill. App. 3d 333 (1982). In *Kusiciel*, the leasing agent for a shopping center represented to a prospective tenant, among other things: (a) the shopping center would be fully rented and all stores would be open by October 1973; (b) two specified companies would be tenants; and (c) road work on the adjacent street would be completed no later than July 1973. *Id.* at 334-35. After the tenant signed the lease, the representations did not prove to be true, and the tenant sued the shopping

center and other defendants for fraud. *Id.* at 335. In affirming the grant of summary judgment in favor of the defendants, the appellate court noted with approval the trial court's finding that "these representations were not promises made without any intention of performing them but instead were predictions of events that depended in essential part on the conduct of others, and were not a proper basis for a charge of fraud." *Id.* at 338.

¶ 27 Similar to *Kusiciel*, the challenged representations in the instant case related to events that were to occur in the future and were not within the exclusive control of Endotronix. See *id.* Because JVC has alleged "broken promises by the defendant rather than material misstatements of fact" (*Ault v. C.C. Services, Inc.*, 232 Ill. App. 3d 269, 271 (1992)), dismissal was appropriate. See also *Power*, 337 Ill. App. 3d at 833 (noting that "misrepresentations as to something to be done in the future generally do not constitute fraud").

¶ 28 We recognize there is an exception to the foregoing rule. A promise to perform an act in the future made by one who intends not to perform is not actionable fraud, *unless* the false promise of future performance is part of a scheme or device to defraud another of his or her property. *Chatham Surgicore, Ltd. v. Health Care Service Corp.*, 356 Ill. App. 3d 795, 804 (2005). The second amended complaint, however, does not "set out the kind of specific factual allegations that would support an inference that the defendant had participated in a scheme to defraud" JVC. *Ault*, 232 Ill. App. 3d at 272. See also *Chatham Surgicore*, 356 Ill. App. 3d at 805 (noting that allegations of a scheme to defraud cannot be inferred or implied from the complaint because they must be pled with specificity).

¶ 29 In sum, Endotronix's purported misrepresentations were "nothing more than opinions and predictions about future conduct" (*Illinois Non-Profit Risk Management Ass'n*, 378 Ill. App. 3d at 723), at least partially within the control of others. Because the representations were not

statements of fact, dismissal of JVC's fraud count pursuant to section 2-615 was appropriate. Although not necessary for our analysis, we further observe that the fraud count was properly dismissed on at least two other bases, discussed below. First, the parties' subscription agreement precludes JVC's recovery based on fraud. Second, JVC waived its fraud claim by failing to disaffirm the Note after the first quarter of 2015 passed without the Series C financing being in place.

¶ 30 b. Elements of Fraud Claim – Reasonable Reliance

¶ 31 To establish common law fraud, the plaintiff must have reasonably relied on the defendant's representation. *Avon Hardware*, 2013 IL App (1st) 130750, ¶ 15. See also *Tirapelli v. Advanced Equities, Inc.*, 351 Ill. App. 3d 450, 455 n.3 (2004) (noting that the terms "justifiable" and "reasonable" are used interchangeably with respect to the reliance element of a fraud claim). Although normally a question of fact (*Miller*, 326 Ill. App. 3d at 652), 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. *E.g., Siegel Development, LLC v. Peak Construction LLC*, 2013 IL App (1st) 111973, ¶ 114. As discussed below, we conclude that the inclusion of certain provisions in the subscription agreement precludes any finding of reasonable reliance. Although JVC asserts that Endotronix forfeited this contention by failing to advance adequate arguments, forfeiture is a limitation on the parties and not on this court. *Pedersen v. Village of Hoffman Estates*, 2014 IL App (1st) 123402, ¶ 44. Moreover, we may affirm on any basis appearing in the record. *White*, 368 Ill. App. 3d at 282.

¶ 32 The subscription agreement was an exhibit to the second amended complaint and was incorporated therein. Any document attached to a complaint will be treated as part of the

complaint if the complaint specifically incorporates it by reference. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 432 (2004); 735 ILCS 5/2-606 (West 2016) (providing that an "exhibit constitutes a part of the pleading for all purposes"). In the case of a conflict between the allegations in a complaint and the written exhibits thereto, the exhibits control. *Bajwa*, 208 Ill. 2d at 431-32. Although JVC alleged in the second amended complaint that it reasonably relied on Endotronix's misrepresentations to its detriment, the terms of the subscription agreement negate the "reasonableness" of any potential reliance.

¶ 33 The Note was issued pursuant to the subscription agreement. By signing the subscription agreement, JVC acknowledged the limited operating history of Endotronix, the speculative nature of the transaction, the high degree of risk involved, and the possibility of losing its entire investment. The subscription agreement also included an "integration" or "merger" clause, providing, in part, that "[t]his Agreement embodies the entire agreement and understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior oral or written agreements and understandings relating to the subject matter hereof." The subscription agreement also included a "nonreliance" clause, wherein JVC acknowledged that it was not relying on any information or representation concerning Endotronix or the securities, except as specifically set forth in the subscription agreement.

¶ 34 "[W]here parties formally include an integration clause in their contract, they are explicitly manifesting their intention to protect themselves against misrepresentations which might arise from extrinsic evidence." *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 464 (1999). The integration clause makes clear that the negotiations prior to the written contract are not part of the agreement. *Id.* In *Barille*, 289 Ill. App. 3d at 177, for example, the appellate court held that the plaintiff failed to state a cause of action for common law fraud based on the

unambiguous language of the integration clause. See also *Colagrossi*, 2016 IL App (1st) 142216, ¶ 47 (concluding that the plaintiff did not establish justifiable reliance on any purported statement and signed an employment agreement containing integration and nonreliance clauses).

¶ 35 In numerous cases involving securities transactions between sophisticated parties – as was the case herein[3] – this court has held that a nonreliance clause defeated any potential fraud claim based on alleged oral misrepresentations. *E.g.*, *Benson v. Stafford*, 407 Ill. App. 3d 902, 928 (2010) (affirming dismissal of fraud claim); *Adler v. William Blair & Co.*, 271 Ill. App. 3d 117, 127 (1995) (same). See also *Kim v. Song*, 2016 IL App (1st) 150614-B, ¶ 67. As stated in *Greer v. Advanced Equities, Inc.*, 2012 IL App (1st) 112458, ¶ 9, "if a purchaser signs an agreement containing a nonreliance clause that disclaims reliance on any oral representations by the seller, then the purchaser cannot thereafter maintain a cause of action for common-law fraudulent oral misrepresentation. This is a logical rule, given that it is hardly justifiable for someone to rely on something that they have agreed not to rely on, and without justifiable reliance there can be no fraud."

¶ 36 The foregoing rule is supported by sound policy reasons. *Tirapelli*, 351 Ill. App. 3d at 457. By placing primacy on the written word, the possibilities of fabrication and flawed memories are reduced. *Id.* "Further, without such a rule, parties to securities transactions would be unable to avoid the risk of claims based on oral representations, thus reducing the value of the securities." *Id.*

¶ 37 In the instant case, because the subscription agreement expressly supersedes all prior oral or written agreements – and JVC agreed that it was not relying on any outside representation about Endotronix or the transaction – JVC could not have reasonably relied on Endotronix's

[3] JVC agreed in the subscription agreement that it was qualified by its experience and knowledge regarding financial and business matters to make an informed decision about the Note.

representations regarding Thoratec as a matter of law. Section 2-615 dismissal was thus proper.

¶ 38 c. Elements of Fraud – Damages

¶ 39 An essential element of a fraud claim is proof of actual injury resulting from the allegedly fraudulent misrepresentations. *Shah v. Chicago Title & Trust Co.*, 119 Ill. App. 3d 658, 661 (1983). Damages for fraud may not be predicated on speculation and must be a proximate consequence of the fraud. *Id.* at 662. JVC alleged in the second amended complaint that if Endotronix's representations had been true, the amounts owed to JVC under the Note "would have been converted into Series C preferred shares of Endotronix no later than the end of 2015 at a discount of 35%" and JVC would have retained its board seat. According to JVC, the value of such shares substantially exceeded the repayment of $1.5 million under the Note.

¶ 40 It is a well-established principle that a person defrauded in a transaction may waive the right to sue by engaging in conduct inconsistent with an intention to sue for damages for fraud. *Kaiser v. Olson*, 105 Ill. App. 3d 1008, 1014 (1981). As noted in *DeSantis v. Brauvin Realty Partners, Inc.*, 248 Ill. App. 3d 930, 937 (1993), quoting *Eisenberg v. Goldstein*, 29 Ill. 2d 617, 622 (1963):

> " 'A person who has been misled by fraud or misrepresentation is required, as soon as he learns the truth, to disaffirm or abandon the transaction with all reasonable diligence, so as to afford both parties an opportunity to be restored to their original position. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit or relief from the misrepresentations.' "

JVC alleged in the second amended complaint that it relied on Endotronix's representations that

the Thoratec-led round of Series C financing was set to close no later than March 31, 2015. After the first quarter of 2015 passed without the financing in place, JVC neither disaffirmed nor abandoned the transaction during the remainder of 2015. "Under Illinois law, nine months of silence and unreasonable delay on the part of a party has been held to be grounds for waiver of damages for fraudulent misrepresentation." *Kaiser*, 105 Ill. App. 3d at 1014-15.

¶ 41 In the instant case, by failing to timely disavow the Note after learning that Endotronix's representations were false, JVC was effectively permitted to "lie back and speculate as to whether avoidance or affirmance of [the] contract will ultimately prove more profitable." *Id.* at 1014. Such practice is not permitted. *Id.* See also *DeSantis*, 248 Ill. App. 3d at 938 (criticizing the plaintiff's effort to effectively "turn the Illinois tort system into a commodity futures market, therefore allowing investors to hedge their investments, when possible, with a cause of action for fraud until such time that the investment sours, at which point they would be able to cash in on their preserved cause of action for fraud").

¶ 42 Based on the foregoing "waiver by conduct" principles, we conclude that JVC failed to adequately plead the damages element of a fraud claim under Illinois law, and section 2-615 dismissal was therefore proper.

¶ 43 d. Circuit Court's Alleged Errors

¶ 44 JVC contends that, in dismissing its fraud count, the circuit court "violated the most basic rules" governing motions under section 2-615 of the Code by drawing inferences in favor of Endotronix and improperly weighing the merits of the allegations. JVC's arguments are misplaced. Because our review is *de novo*, any alleged errors by the circuit court do not affect our analysis herein. *E.g.*, *Hough v. Kalousek*, 279 Ill. App. 3d 855, 861 (1996) (noting that "we summarily disregard any extrinsic facts the trial court may have considered and by doing so

eradicate any error in this case"); *Abbott v. Amoco Oil Co.*, 249 Ill. App. 3d 774, 779 (1993) (concluding that the circuit court's dismissal of the complaint pursuant to section 2-615 was correct, "notwithstanding the alleged procedural errors it made").

¶ 45 2. Count V – Breach of Contract - Implied Covenant of Good Faith and Fair Dealing

¶ 46 In Count V of the second amended complaint, JVC alleged that "Endotronix had broad discretion over whether to accept the terms of the Next Equity Financing and when to close on that transaction." According to JVC, Endotronix exercised its discretion in a manner contrary to JVC's reasonable expectations by intentionally delaying the closing on the Next Equity Financing until after December 31, 2015, with the intent to deprive JVC of its conversion rights with a 35% discount and to remove JVC's representative from the Endotronix board of directors.

¶ 47 "In Illinois, there is a duty of good faith and fair dealing included in every contract as a matter of law." *Barille*, 289 Ill. App. 3d at 175. Accord *JP Morgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 48. The duty requires the party vested with discretion under the contract to exercise that discretion reasonably and with proper motive, and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. *Id.*; *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 165 (2004). Notwithstanding these principles, parties to a contract are entitled to enforce its terms to the letter, and the implied covenant cannot overrule or modify the express terms of the contract. *Leak v. Board of Education of Rich Township High School District 227*, 2015 IL App (1st) 143202, ¶ 14; *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1060 (1999).

¶ 48 The implied covenant of good faith and fair dealing is not an independent source of duties for the parties to a contract. *In re Marriage of O'Malley*, 2016 IL App (1st) 151118, ¶ 38; *Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d 434, 443 (2011). The doctrine is used

as a construction aid in determining the intent of the parties where an instrument is susceptible of two conflicting constructions. *Id.*; *Barille*, 289 Ill. App. 3d at 175. "The purpose of this duty 'is to ensure that parties do not take advantage of each other in a way that could not have been contemplated at the time the contract was drafted or do anything that will destroy the other party's rights to receive the benefit of the contract.' " *McCleary v. Wells Fargo Securities, L.L.C.*, 2015 IL App (1st) 141287, ¶ 19, quoting *RBS-Citizens, National Ass'n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 191 (2011).

¶ 49 In order to plead a breach of the covenant of good faith and fair dealing, a plaintiff must plead the existence of contractual discretion. *Mid-West Energy Consultants*, 352 Ill. App 3d at 165. While the second amended complaint included the conclusory allegation that Endotronix had "broad discretion" with respect to the Next Equity Financing, JVC did not reference any provision of the Note as the source or the memorialization of such discretion. On appeal, JVC contends that it was the *absence* of certain contractual provisions – *e.g.*, that time was of the essence – that gave Endotronix broad discretion regarding the timing of the Next Equity Financing. JVC fails, however, to cite any support for this puzzling proposition. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (requiring argument "with citation of the authorities and the pages of the record relied on"). In any event, JVC may not use the covenant of good faith to read obligations into the Note which do not exist. *Roscetti*, 309 Ill. App. 3d at 1060.

¶ 50 We further note that the cases cited by JVC are inapposite. For example, in *McCleary*, 2015 IL App (1st) 141287, the Illinois Appellate Court concluded that the plaintiff adequately alleged a cause of action for breach of contract based on his former employer's abuse of its contractual discretion with respect to a bonus plan. The appellate court stated that "[w]here a plaintiff has pled that he had a reasonable expectation to a bonus from a defendant that abused its

broad contractual discretion by arbitrarily withholding the bonus in a manner not reasonably anticipated by the parties at the time of contract formation, a valid cause of action has been sufficiently pled to withstand a section 2-615 motion to dismiss." *Id.* ¶ 26. Unlike in *McCleary*, the contracting parties in the instant case plainly anticipated – at the time their contract was formed – the possibility that the Next Equity Financing may not be in place by the end of 2015. The Note expressly addressed what would happen if such financing did not close prior to December 31, 2015. Any expectation of JVC regarding a mandatory 2015 closing would certainly not be a "reasonable expectation" (*id.*), based on the provisions of the Note.

¶ 51 JVC also cites *Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676, wherein the appellate court affirmed the grant of summary judgment in favor of a land developer who had alleged that the city had violated the duty of good faith and fair dealing implied in an annexation agreement when it rezoned the developer's property after the developer submitted a plat. According to the appellate court, "[g]iven the conflicting language in the Annexation Agreement, as to the City's limited rights in paragraph 9 and its unfettered discretion in paragraph 14, we hold that the City's actions of rezoning and disconnecting the property violated its duty of good faith and fair dealing." *Id.* ¶ 45. In this case, neither party has argued that there are conflicting provisions in the Note. In the absence of contractual ambiguity, we need not invoke the "implied covenant" as a construction aid or tool. See *Seip*, 408 Ill. App. 3d at 443. See also *Abbott*, 249 Ill. App. 3d at 784 (noting that use of the implied covenant as a construction aid in determining the parties' intent did not help the plaintiffs given the court's findings that their agreements were unambiguous, "negating the need for interpretive rules").

¶ 52 For the foregoing reasons, we conclude that the dismissal of Count V pursuant to section 2-615 was proper. We also reject JVC's contentions regarding the circuit court's purported

disregard of applicable legal standards in deciding whether Count V was adequately pleaded. As noted in our discussion of Count IV, our review is *de novo* and thus any alleged deficiencies or errors in the analysis of the circuit court do not affect our reasoning or conclusions herein. *Wells Fargo Bank, N.A. v. McCondichie*, 2017 IL App (1st) 153576, ¶ 10 (noting that, under *de novo* review, the appellate court performs the same analysis that a trial court would perform).

¶ 53 B. Denial of Motion to Reconsider - Leave to Amend

¶ 54 In Count VI of the *proposed* second amended complaint, JVC alleged breach of the Note by Endotronix. According to JVC, Endotronix materially breached the so-called "*pari passu*" and "consent" provisions of the Note by treating JVC "differently and unequally" and by "changing the terms of the other Series 2014 Noteholders' rights without JVC's consent to allow all other noteholders except JVC to convert." The *pari passu* provision states, "This Note is one of the notes of like tenor issued by the Company as part of an offering of Convertible Term Promissory Notes (the "Series 2014 Notes") in the aggregate original principal amount of up to approximately $2,500,000. All Series 2014 Notes are being issued on substantially the same terms, and all rights and obligations of the holder of this Note shall be *pari passu* to the rights and obligations of the holders of the other Series 2014 Notes in all respects." The consent provision of the Note states:

> "No modification, amendment or waiver of any provision of this Note shall be effective unless in writing and approved by the Company and the Noteholder Majority and any amendment or waiver approved by the Noteholder Majority shall be binding on the holder of this Note, provided, however, that the principal amount of this Note may not be reduced without the consent of the holder of this Note, and any modification, amendment or waiver of this Note which would

> adversely affect the rights or obligations hereunder in a manner materially different from the manner in which such modification, amendment or waiver would affect the rights of other holders of Series 2014 Notes, shall require the consent of the holder of this Note." (Emphasis in original.)

Based on its purchase of the $1.5 million Note, JVC was the "Noteholder Majority."

¶ 55 In an order entered on January 12, 2017, the circuit court denied JVC leave to file Count VI. In so ruling, the circuit court stated that it had already rejected the "substance of this claim" in an order entered on June 14, 2016. The circuit court subsequently entered an order denying with prejudice JVC's motion to reconsider the denial of leave to file Count VI.

¶ 56 The purpose of a motion to reconsider is to bring to the trial court's attention (1) newly discovered evidence not available at the time of the hearing, (2) changes in the law, or (3) errors in the court's previous application of existing law. *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 324 (2010). An "abuse of discretion" standard of review generally applies to both a motion to reconsider and a motion to amend the complaint. *E.g.*, *Vantage Hospitality Group, Inc. v. Q Ill Development, LLC*, 2016 IL App (4th) 160271, ¶ 51 (motion to reconsider); *Pekin Insurance Co. v. St. Paul Lutheran Church*, 2016 IL App (4th) 150966, ¶ 78 (motion to amend complaint). In reviewing the trial court's denial of a motion to amend the pleadings, a court considers the *Loyola Academy* factors (*Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263 (1992)), *i.e.*, whether (1) the amendment would cure the defect, (2) the amendment would prejudice or surprise the defendant, (3) the amendment was timely, and (4) the plaintiff had prior opportunities to amend the pleadings. *Lake Point Tower Condominium Ass'n v. Waller*, 2017 IL App (1st) 162072, ¶ 21. "Additionally, a court abuses its discretion in denying leave to amend if allowing the amendment would have furthered the ends of justice, the primary consideration."

Id., citing *Bangaly v. Baggiani*, 2014 IL App (1st) 123760, ¶¶ 199-200. Notwithstanding the general rule that amendments should be granted liberally, the right to amend is not unlimited and absolute. *Freedberg v. Ohio National Insurance Co.*, 2012 IL App (1st) 110938, ¶ 41. See 735 ILCS 5/2-616(a) (West 2016) (providing that amendments may be allowed "on just and reasonable terms").

¶ 57 According to the proposed second amended complaint, JVC received a letter from Endotronix containing a check to repay the Note on April 8, 2016 – almost two months after JVC filed this action. Following JVC's refusal to accept the tender, Endotronix informed JVC that "all other Series 2014 Noteholders were being allowed to convert in the Series C financing," but Endotronix would not permit JVC to participate in this conversion unless it agreed, among other things, to the termination of its board seat. In the proposed Count VI, JVC alleged that Endotronix materially breached the *pari passu* and consent provisions of the Note by modifying the terms of the other noteholders' rights without JVC's consent so as to permit those noteholders – but not JVC – to convert.

¶ 58 As an initial matter, we reject JVC's characterization of the consent provision of the Note. The proposed second amended complaint alleged that the consent provision "expressly required JVC's consent to any modification, amendment or waiver to any of the Series 2014 Notes." The consent provision, however, addresses possible changes to JVC's Note, not changes to the *other* notes. "If the words in a contract are clear and unambiguous, we must give them their plain, ordinary and popular meaning." *Empress Casino Joliet Corp. v. W.E. O'Neil Construction Co.*, 2016 IL App (1st) 151166, ¶ 62. Given that the proposed second amended complaint did not allege any changes to the Note, the consent provision appears inapplicable.

¶ 59 We also reject JVC's contention that the circuit court had not previously considered

JVC's arguments regarding the *pari passu* and consent provisions when ruling on an earlier motion to dismiss on June 14, 2016. According to JVC, the circuit court addressed a separate provision of the Note, which requires that "[a]ny payment or prepayment of this Note shall be made *pro rata* in respect on all Series 2014 Notes." We observe, however, that JVC quoted – and advanced arguments based on – the *pari passu* provision in its sur-reply in opposition to Endotronix's motion to dismiss certain counts of the amended complaint, prior to a hearing on June 14, 2016.[4]

¶ 60 Although the consent provision was not expressly discussed during the June 14, 2016, hearing, the circuit court stated that it was "irrelevant" that the "other noteholders have been given the right to convert." During the hearing on January 12, 2017, when denying JVC leave to file Count VI of the proposed second amended complaint, the circuit court specifically noted that the "substance of this claim" was rejected in the June 14, 2016, order, "in that come December 31st of 2015 there were no longer any Convertible Note rights." We agree with the circuit court that because JVC's conversion rights terminated on December 31, 2015, under the plain language of the Note, any subsequent conversion of other parties' notes did not modify this result. As JVC would be unable to state a claim for breach of the Note based on the *pari passu* and consent provisions, denial of leave to file Count VI was proper.

¶ 61 JVC notes that it "sought to amend by adding Counts IV, V and VI in the very same motion and on the very same day." According to JVC, it was an abuse of discretion to deny JVC leave to amend Count VI because the circuit court implicitly found that the *Loyola Academy* factors were satisfied as to Counts IV and V. We reject this reasoning. The circuit court

[4] We further note that in a response filed on July 12, 2016, to a motion to dismiss filed by the Endotronix CEO and board chairman, JVC quoted the *pari passu* provision (and the *pro rata* provision) and made substantially the same arguments as it advances herein.

determined that Counts IV and V could potentially state valid causes of action but Count VI did not – and could not – state a claim. For the reasons discussed above, we conclude that the circuit court did not abuse its discretion in denying JVC leave to file Count VI. See *Lake Point Tower Condominium Ass'n*, 2017 IL App (1st) 162072, ¶ 21. As we find no errors in the circuit court's application of the law in denying JVC leave to amend – and JVC did not argue that there were any changes in the law or newly discovered evidence – the circuit court did not abuse its discretion in denying JVC's motion for reconsideration.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated above, we affirm the judgment of the circuit court of Cook County dismissing Counts IV and V of the second amended complaint with prejudice and denying JVC's motion to reconsider the order denying JVC leave to amend the complaint to include Count VI. In light of our rulings herein, we need not address JVC's argument on appeal that the instant case should be remanded to a different circuit court judge.

¶ 64 Affirmed.