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2020 IL App (4th) 190354-U

NO. 4-19-0354

FILED
March 19, 2020
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JAMES VERMETTE, Plaintiff-Appellant, v. COZAD ASSET MANAGEMENT, INC., STUART T. MEACHAM, GREGORY D. COZAD, RONALD KIDDOO, and MARY McGRATH, Defendants-Appellees.	))))))))	Appeal from the Circuit Court of Champaign County No. 17L124 Honorable Jason Matthew Bohm, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Cavanagh and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not err in dismissing plaintiff's third amended complaint.

¶ 2 Plaintiff, James Vermette, appeals from the trial court's dismissal of his third amended complaint against defendants, Cozad Asset Management, Inc. (Cozad), Stuart T. Meacham, Gregory D. Cozad, Ronald Kiddoo, and Mary McGrath. On appeal, plaintiff argues we should reverse and remand for further proceedings as his complaint alleged sufficient facts to establish a possibility of recovery based on defendants' failure to fully compensate him under the terms of a 2007 employment agreement. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Third Amended Complaint

¶ 5 In September 2018, plaintiff filed a third amended complaint against defendants, alleging one count of breach of contract (count I) and one count of violation of the Illinois Wage Payment and Collection Act (Wage Payment Act) (820 ILCS 115/1 *et seq.* (West 2016)) (count II). Plaintiff's claims were based on defendants' alleged failure to fully compensate him under the terms of a 2007 employment agreement. Attached to the complaint was a 1993 consultant agreement and an addendum thereto, a 2007 employment agreement and amendment thereto, a September 30, 2010, management relationship and option agreement, and an affidavit of defendant-Meacham. The following is gleaned from plaintiff's complaint and the attachments thereto.

¶ 6 1. *The Parties*

¶ 7 Since 1983, plaintiff has worked for defendant-Cozad, an investment advisement company. Plaintiff currently serves as the executive vice president and director of special accounts at Cozad. The other named defendants hold executive positions at Cozad and serve on Cozad's board of directors. Defendant-Meacham specifically holds the position of chief operating officer.

¶ 8 2. *The Cook County Account*

¶ 9 In the late 1980s, plaintiff began working with an individual named Ken Bruce, who had strong working relationships with many institutions that used third-party investment management services. In 1993, plaintiff proposed to Cozad and Bruce the creation of a mutually beneficial business arrangement in which Bruce directly assisted Cozad in securing "farmland asset[ ] management accounts." Cozad and Bruce agreed with the arrangement, and Bruce was hired by Cozad as a consultant. On May 25, 1993, plaintiff, Bruce, and Cozad entered into a

consultant agreement. Under the 1993 consultant agreement, Cozad agreed to compensate both plaintiff and Bruce a percentage of the investment management fees received by Cozad or any of its affiliates in connection with "farmland asset[ ] management accounts" brought to Cozad by Bruce from institutions listed on an attached exhibit A to the agreement. The consultant agreement provided the accounts listed on exhibit A could be changed over time by written agreement.

¶ 10 Sometime prior to 2007, Bruce "secured" a farmland asset management account with Cook County. Exhibit A to the 1993 consultant agreement was not amended to include the Cook County account. Despite not being amended, plaintiff alleged, on information and belief, Bruce was compensated by Cozad per the terms of the 1993 consultant agreement. Plaintiff did not receive an accounting concerning the Cook County account. Sometime after 2010, plaintiff learned during a conversation with defendant-Meacham that "Bruce had previously secured the Cook County account." Plaintiff questioned Meacham why he was not compensated for the account, and Meacham conceded plaintiff should have been compensated, which prompted Cozad to make a payment to plaintiff. The payment was less than the amount to which plaintiff believed he was entitled.

¶ 11 3. *The TIAA-CREF Account*

¶ 12 On August 25, 1997, Cozad and another entity, Westchester Group, Inc., entered into an agreement to form a partnership under the name of Cozad/Westchester Agricultural Asset Management for the purpose of providing various asset management services to Cozad's institutional clients who desired to make fee simple, equity investments in farmland. Cozad and Westchester Group, Inc. each held a 50% share of Cozad/Westchester Agricultural Asset

Management. Westchester Group, Inc. was responsible for all acquisitions, leasing, operations, budgeting, management, improvements/capital expenditures, development, and dispositions. Cozad, on the other hand, was responsible for raising institutional capital and overseeing accounting operations.

¶ 13 In 1997, plaintiff began working to convince the leadership in charge of investments for the Teachers Insurance and Annuity Association of America-College Retirement Equities Fund (TIAA-CREF) to work with him and Cozad/Westchester Agricultural Asset Management. For the decade that followed, plaintiff performed substantial work in demonstrating the potential benefits to TIAA-CREF of farmland investments through Cozad/Westchester Agricultural Asset Management. In 2007, Cozad/Westchester Agricultural Asset Management secured an account with TIAA-CREF to manage investments in farmland and agricultural assets. The account was estimated to be worth upwards of $3 billion at the time. Between 2007 and September 30, 2010, TIAA-CREF and/or its affiliates made $875 million in farmland commitments and Cozad/Westchester Agricultural Asset Management managed those assets.

¶ 14 In 2010, TIAA-CREF expressed an interest in acquiring Cozad/Westchester Agricultural Asset Management's farmland expertise responsibilities and buying out Cozad's financial management responsibilities. On September 30, 2010, Cozad and Cozad/Westchester Agricultural Asset Management entered into a management relationship and option agreement with TIAA-CREF in which TIAA-CREF acquired a majority interest in a substantial portion of Westchester Group, Inc.'s assets and formed a new TIAA-CREF controlled farmland entity, Westchester Group Investment Management, Inc. As part of the transaction, the management

responsibilities relating to TIAA-CREF's farmland commitments made prior to October 1, 2010, were transferred from Cozad/Westchester Agricultural Asset Management to Westchester Group Investment Management, Inc., and Cozad/Westchester Agricultural Asset Management was relieved of any management responsibilities for any TIAA-CREF farmland commitments made after September 30, 2010. Plaintiff alleged, on information and belief, TIAA-CREF and/or its affiliates made over $8 billion in new farmland commitments between September 30, 2010, and the spring of 2016.

¶ 15 Simultaneously with the closing of the TIAA-CREF transaction, Cozad entered into an independent contractor agreement with Westchester Group Investment Management, Inc. Under the agreement, Cozad would perform agricultural management services, unrelated to farmland commitments, for TIAA-CREF. Cozad maintains that relationship with TIAA-CREF.

¶ 16 4. *The 2007 Employment Agreement*

¶ 17 Cozad initially refused to credit plaintiff for the TIAA-CREF account. Plaintiff confronted Cozad leadership with documentation showing he was responsible for the TIAA-CREF account, which caused Cozad to credit plaintiff for the account. As a result of the foregoing confrontation, plaintiff executed a new employment agreement with Cozad, which was memorialized on July 1, 2007.

¶ 18 The factual background of the complaint contains allegations describing various sections and subsections of the 2007 employment agreement, including, *inter alia*, allegations describing a subsection relating to compensation based on "T-C Fees" from TIAA-CREF. Also included within the allegations describing the various sections and subsections of the agreement is

an allegation that, "[o]n information and belief," Cozad has established a " 'bonus pool' " covering all Cozad employees, not just administrative employees, and various Cozad employees have received bonuses from said pool.

¶ 19 Section 4 of the 2007 employment agreement describes the compensation to which plaintiff is entitled for the fulfillment of his employment duties. As amended, it provides:

> "4. COMPENSATION. Employee's compensation hereunder shall be based solely on fees and commissions collected by Cozad from accounts credited to Employee, as described in this Section 4, and Employee shall not be entitled to any base salary. For all services rendered by Employee pursuant to this Agreement, Cozad shall pay Employee as follows:
>
> a. TIAA-CREF Accounts. With regard to any agreement between Cozad or Cozad/Westchester Agricultural Asset Management Partnership ("C/W") relating to financial commitments from TIAA-CREF, or an affiliate of TIAA-CREF, to capitalize any and all investment vehicles, Cozad shall pay Employee an amount equal to the Applicable Percentage (as hereafter defined) of all due diligence fees, property management fees, asset management fees, placement fees, and any other and all compensation (except for any portfolio level net income or total return participation or incentive fees) collected by or paid to Cozad

in connection with the formation, organization, operation and disposition of any such investment vehicle ("T-C Fees"). For purposes of this subsection, the "Applicable Percentage" shall equal in the first calendar year ending December 31, 2007 10% of the first $500,000 of T-C Fees collected by or paid to Cozad (including all T-C Fees received by Cozad in this calendar year prior to the date of this Agreement), and 15% of T-C Fees collected by or paid to Cozad thereafter. Similarly, in each subsequent calendar year, the Applicable Percentage shall equal 10% of the first $500,000 of T-C Fees collected by or paid to Cozad and 15% of T-C Fees collected by or paid to Cozad thereafter.

The payment of such T-C Fees shall be made to Employee or his estate as long as Cozad or its successors has any form of business relationship with TIAA-CREF or its affiliates. Cozad shall deliver to Employee or his estate each quarter a complete accounting including fees collected.

In addition to the T-C Fees, Cozad shall pay Employee an amount equal to 17.5% of any portfolio level net income and total return participation or incentive fees collected by or paid to Cozad in connection with TIAA-CREF investment vehicles.

As additional compensation solely from farmland commitments from TIAA-CREF, or an affiliate of TIAA-CREF, to capitalize any and all farmland investment vehicles, Cozad shall issue to Employee ten (10) share of its capital common stock for each one million dollars ($1,000,000) of new farmland Commitments (excluding, for purpose of this paragraph, (1) increases or appreciation in the value of agricultural investments, and (2) any reinvestment or redeployment of previously committed capital or returns therefrom). The issuance of shares pertaining to farmland commitments from TIAA-CREF, or an affiliate of TIAA-CREF, shall be made to Employee or his estate as long as Cozad or its successors has any form of business relationship with TIAA-CREF or its affiliates. Prior to distribution thereof, such compensation shall be subject to the claims of Cozad's creditors.

b. TRS Account. Cozad shall continue to compensate Employee in connection with Cozad's account with Teacher's Retirement System of the State of Illinois, known as Premiere Partners III Limited Partnership ("TRS") and any new account or accounts. This compensation is based on 12.8% of gross investment management fees collected by Cozad and Westchester Group, Inc. ("WG"). Employee shall also receive 12.8% of total return value

added fees collected by Cozad and WG pertaining to TRS. Such fees shall be payable when collected.

The compensation payable to Employee pursuant to this Paragraph 4b shall be paid during his lifetime and, upon his death, such compensation shall be payable to his spouse, if any, until the earlier of such spouse's death or the tenth anniversary following the death of Employee, whichever is applicable. In the event of the death of his spouse prior to the fifth anniversary of Employee's death, then in that event, payments shall be made to Employee's estate through the fifth anniversary of his death. Prior to distribution thereof, such compensation shall be subject to the claims of Cozad's creditors.

c. Asset Management Accounts. For purpose of this Agreement, it is understood that Employee's retirement from full time service to Cozad was on July 31, 2006. With respect to this Agreement, Employee is being re-employed as outlined in Paragraph 3.

For any asset management accounts which Employee brought to Cozad prior to August 1, 2006, Employee shall receive 25% of the fees collected by Cozad. For any asset management accounts which Employee brings or has brought to

Cozad on or after August 1, 2006, Employee shall receive one-third (1/3) of the asset management fees collected by Cozad.

With respect to all asset management accounts which Employee brought to Cozad as described in the preceding two paragraphs, asset management compensation will be paid out over a 10-year period from August 1, 2006, but will continue as long as Employee actively services these accounts beyond July 31, 2016. If Employee dies during the ten year period August 1, 2006-July 31, 2016, asset management compensation will continue to be paid to Employee's surviving spouse until the death of his surviving spouse or when Employee would have reached the end of his 10-year period after retirement (*i.e.* July 31, 2016), whichever is earlier. In the event of the death of spouse prior to the fifth anniversary of Employee's death, then in that event, asset management compensation shall be paid to Employee's estate through the fifth anniversary of Employee's death. However, asset management compensation will be discontinued if Employee affiliates with an asset management firm other than Cozad or a broker/dealer firm other than one affiliated with Cozad. Prior to distribution thereof, the asset management compensation is subject to the claims of Cozad's creditors.

d. Production Bonus. For all production (other than asset management fees and institutional farmland fees), Employee shall receive as long as he is living and continues to retain his securities license a percentage of the fees generated by Cozad, less any direct cost in maintaining Employee's securities' license, the following:

Client accounts originated on or before July 31, 2006 – 25%

Client accounts originated after July 31, 2006 – 50%

Prior to distribution thereof, such compensation shall be subject to the claim of Cozad's creditors.

e. Bonus Pool. In the event a bonus pool is established which covers all Cozad employees, and not just Cozad administrative employees, Employee shall be a participant in the bonus pool."

f. University of Illinois Alumni Association. In the even that Cozad and the University of Illinois Alumni Association ("UIAA") undertake an agreement (the "UIAA Program") covering investment and insurance services for members of the UIAA, Cozad shall compensate Employee based on the gross revenue generated from these services conducted through the Program on the following

basis:

10% of gross revenues generated by Cozad through the UIAA Program, plus

5% of gross revenues generated by Cozad from accounts developed through any new programs similar to the UIAA Program undertaken by Cozad for members of alumni associations, and other affinity organizations other than the UIAA.

Such payments shall be made quarterly to Vermette or his estate with respect to revenue actually collected by Cozad in the preceding quarter.

In addition, Vermette shall be eligible to receive stock of Cozad as follows, based on the performance of the UIAA Program. For every $100 million in actual contributed assets (but not for fractions thereof) placed in asset management accounts conducted through the Program, Vermette will receive 500 shares of common stock of Cozad. These shares will be subject to the restrictions on transfer generally applicable to share of common stock of Cozad on the date of issue.

On or after the date 20 years following the commencement of the UIAA Program Cozad shall have the right pay Vermette or his estate an amount equal to the present value of

future quarterly payments from affinity groups as described above, based on a calculation of the present value made by a third party agreed to by Cozad and Vermette or his representatives, and upon making such payment Cozad shall have no further obligation to Vermette under this subparagraph (f). In deciding upon a third party to make the valuation Vermette or his representatives shall have the right to consult and seek the input of UIAA."

¶ 20 The 2007 employment agreement also states the following section concerning its construction:

"10. NO RULE OF STRICT CONSTRUCTION. The language contained herein has been approved by both parties to express their mutual intent and no rule of strict construction shall be applied against either party to this Agreement."

¶ 21 In addition, the 2007 employment agreement contains the following integration clause:

"12. ENTIRE AGREEMENT/PRIOR AGREEMENTS.

a. This instrument contains the entire agreement of the parties, and, except as otherwise expressly set forth herein, supersedes any and all prior agreements, understandings, arrangements and obligations of Cozad and its affiliates with respect to the subject matter hereof, including, without limitation, any and

> all prior commission agreements, compensation agreements, employment agreements, and consulting agreements, however denominated (collectively, "Prior Agreements").
>
> b. This Agreement may not be changed orally, but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension, or discharge is sought.
>
> c. This Agreement may be pleaded as a full and complete defense to any action, suit or other proceeding that may be instituted, prosecuted or attempted by either party in violation of this Agreement, or which seeks to enforce or reinstate the Prior Agreements."

¶ 22 5. *Count I*

¶ 23 Count I of the complaint sets forth a claim of breach of contract based on defendant-Cozad's failure to fully compensate plaintiff per the terms of the 2007 employment agreement. As to the TIAA-CREF account, count I (1) describes the subsection of the 2007 employment agreement requiring plaintiff to be compensated with 10 shares of Cozad's capital stock for each $1 million of new farmland commitments made by TIAA-CREF so long as Cozad has any form of a business relationship with TIAA-CREF, (2) notes TIAA-CREF has made over $8 billion in new farmland commitments between September 30, 2010, and the spring of 2016, and (3) asserts Cozad, despite the continuance of a business relationship with TIAA-CREF, failed to issue

plaintiff shares of its capital stock in connection with new farmland commitments made by TIAA-CREF since September 30, 2010. Count I further alleges as follows:

> "91. Additionally, under the terms of the 2007 Employment Agreement, Defendant-Cozad is obliged to pay Plaintiff 25% of the fees collected by Defendant-Cozad for any asset management account brought to Defendant-Cozad by Plaintiff prior to August 1, 2006 and one-third (1/3) of all fees collected by Defendant-Cozad for any asset management account brought to Defendant-Cozad by Plaintiff after August 1, 2006.
>
> 92. Under the 2007 Employment Agreement, Defendant-Cozad is also obliged to pay Plaintiff 25% of all fees generated by Defendant-Cozad, less any direct costs in maintaining Plaintiff's securities' license, for accounts originated on or before July 31, 2006, and 50% of all fees for accounts originated after July 31, 2006. This 'production bonus' compensation does not include asset management and institutional farmland fees. [Citation to subsection 4d of the 2007 Employment Agreement.]
>
> 93. On information and belief, Defendant-Cozad has received more than [$5 million] in fees in connection with the Cook County Account.
>
> 94. Defendant-Cozad has failed to fully compensate Plaintiff

for his share of the investment management fees and/or asset management fees, institutional farmland fees, and remaining production bonus fees Plaintiff is entitled to with respect to the Cook County Account per the terms of the 2007 Employment Agreement.

95. Additionally, Defendant-Cozad has failed to pay Plaintiff the bonus compensation (plus accrued interests) Plaintiff is entitled to per the terms of the 2007 Employment Agreement.

96. Additionally, Defendant-Cozad has failed to pay Plaintiff the 'production bonus' compensation Plaintiff is entitled to under the terms of the 2007 Employment Agreement.

97. Defendant-Cozad's failure to adequately compensate Plaintiff per the terms of the 2007 Employment Agreement constitutes a breach of the terms of the 2007 Employment Agreement with Plaintiff.

98. Defendant-Cozad's failure to adequately provide an account for all compensation due to Plaintiff under the 2007 Employment Agreement constitutes a breach of the terms of the 2007 Employment Agreement and deprives Plaintiff of the opportunity to adequately calculate what is owed to him under the 2007 Employment Agreement."

¶ 24 6. *Count II*

¶ 25 Count II of the complaint sets forth a claim for a violation of the Wage Payment Act based on defendants' failure to fully compensate plaintiff per the terms of the 2007 employment agreement. Count II specifically alleges it is based on defendants' failure to (1) issue plaintiff shares of stock in connection with new farmland commitments made by TIAA-CREF since September 30, 2010, (2) fully compensate plaintiff in connection with the Cook County account, (3) pay plaintiff "bonus compensation (plus accrued interests)," and (4) pay plaintiff "production bonus" compensation.

¶ 26 B. Motion to Dismiss

¶ 27 In November 2018, defendants filed a combined motion to dismiss plaintiff's third amended complaint under section 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)) and a supporting memorandum. Defendants construed plaintiff's complaint as raising claims of breach of contract and violation of the Wage Payment Act based on four independent theories: (1) the TIAA-CREF theory; (2) the Cook County theory, (3) the production bonus theory, and (4) the bonus pool theory.

¶ 28 As to plaintiff's TIAA-CREF theory, defendants argued dismissal under section 2-615 of the Code (*id.* § 2-615) was warranted as the theory was defeated by the plain language of the 2007 employment agreement. Defendants contended the introductory clause of section 4 established an essential condition to be entitled to any compensation—the collection of associated fees or commissions by Cozad. Defendants asserted, because it was undisputed Cozad collected no fees or commissions on TIAA-CREF farmland commitments made after September 30, 2010, plaintiff was not entitled to additional shares of Cozad's stock based on those commitments.

Defendants contended plaintiff's theory suggesting he was entitled to such compensation simply because Cozad maintained an unrelated business relationship with a TIAA-CREF would impermissibly require the language of the agreement to be interpreted in isolation. Alternatively, defendants asserted, to the extent the agreement was susceptible to plaintiff's interpretation, that interpretation must be rejected as it would be unreasonable to believe Cozad intended for plaintiff's compensation to be tied to commitments made through third-parties for which Cozad had no relation and collected nothing.

¶ 29 With respect to plaintiff's Cook County theory, defendants argued dismissal under section 2-615 of the Code (*id.*) was warranted as the theory was defeated by plaintiff's own allegations and a review of the 2007 employment agreement. Defendants noted the agreement provided plaintiff was only entitled to compensation for asset management accounts which he brought to Cozad. Defendant asserted plaintiff's allegation in his complaint that Bruce "secured" the Cook County account established it was Bruce rather than plaintiff who brought the Cook County account to Cozad. Defendants further contended plaintiff's reliance on the 1993 consultant agreement and any alleged statements by defendant-Meacham did not advance his argument given the integration clause in the 2007 employment agreement.

¶ 30 As to plaintiff's production bonus theory, defendants argued dismissal under section 2-615 of the Code (*id.*) was warranted as the theory lacked any allegations of specific fact and was conclusory. Defendants asserted plaintiff failed to identify the time frame or client accounts for which he believed he had not been paid a bonus. Defendants further asserted, to the extent plaintiff was alleging he was not compensated based on the Cook County account, that

claim was defeated both because he did not bring the account to Cozad and because fees from asset management accounts are specifically excluded from any production bonus under the agreement.

¶ 31 With respect to plaintiff's bonus pool theory, defendants argued dismissal under section 2-615 of the Code (*id.*) was warranted as the theory lacked any allegations of specific fact and was conclusory. Alternatively, defendants argued dismissal under section 2-619 of the Code (*id.* § 2-619(a)(9)) was warranted as the theory was defeated by a supplemental affidavit of defendant-Meacham attached to the motion to dismiss. In the supplemental affidavit, Meacham averred, in part, to the following: (1) "I *** have personal knowledge of the facts set forth in this affidavit"; (2) "In my capacity as Vice President and Chief Operating Officer of Cozad, I am familiar with the compensation provided to Cozad employees, including any bonus compensation"; and (3) "At no point since [plaintiff] entered into his employment agreement with Cozad has Cozad established a bonus pool that covers all Cozad employees, and not just administrative employees, nor has Cozad paid bonuses since that time pursuant to a bonus pool that covers all employees and not just administrative employees." Defendants argued these positive averments of fact were sufficient to overcome plaintiff's allegation that, upon information and belief, Cozad established a bonus pool.

¶ 32 C. Response to the Motion to Dismiss

¶ 33 In December 2018, plaintiff filed a response to defendants' combined motion to dismiss and a supporting memorandum. Plaintiff clarified his complaint raised claims of breach of contract and violation of the Wage Payment Act based on "four theories of recovery."

¶ 34 As to his TIAA-CREF theory, plaintiff began by describing the language in the

2007 employment agreement relating to compensation based on T-C Fees. He then asserted:

> "Strikingly, not only have Defendants failed to address in their motion to dismiss how Vermette has supposedly received all the 'T-C Fees' compensation he is entitled to—which he has not—they have also continuously refused to provide Vermette a complete accounting of all fees collected as demanded by the Employment Agreement. [Citations.] This fact alone is sufficient to defeat Defendants' motion to dismiss as it illustrates how dismissal of the complaint would be premature ***."

Plaintiff further maintained, "[n]othwithstanding the aforementioned avenue of relief," Cozad failed to fully compensate him with shares of its capital stock. Plaintiff contended the plain language of the agreement supported his interpretation that such compensation depended only on a continuing business relationship and not the collection of associated fees or commissions by Cozad. In support, plaintiff noted, in part, other subsections explicitly repeated compensation was dependent on the collection of fees or commissions. Plaintiff asserted defendant's interpretation would impermissibly require the language in those other subsections relating to the collection of fees or commissions to be deemed superfluous. Alternatively, plaintiff argued, to the extent the agreement was susceptible to defendants' interpretation, his interpretation was not inequitable or such that a reasonable person would not enter into it as all of the business revenue tied to the TIAA-CREF account would not have been possible but for his decade long efforts to secure the account.

¶ 35 With respect to his Cook County theory, plaintiff asserted his theory was

sufficiently alleged based on the general understandings from the 1993 consultant agreement and the concession of defendant-Meacham that any account brought to Cozad by Bruce was also credited to plaintiff.

¶ 36 As to his production bonus theory, plaintiff asserted his theory was sufficiently alleged based on his allegation "that he has reason to believe that he is missing compensation described as 'production bonus,' at the very least from the Cook County Account."

¶ 37 With respect to his bonus pool theory, plaintiff asserted his theory was both sufficiently alleged and not defeated by defendant-Meacham's affidavit. With respect to defendant-Meacham's affidavit, plaintiff argued it was insufficient to defeat his claim as the affidavit did not have attached thereto sworn or certified copies of all documents upon which Meacham relied.

¶ 38 D. Reply in Support of the Motion to Dismiss

¶ 39 In January 2019, defendants filed a reply in support of their combined motion to dismiss. In part, defendants argued plaintiff's attack on their interpretation of the 2007 employment agreement as it related to the issuance of capital stock based on new TIAA-CREF farmland commitments was unpersuasive as the other subsections repeating the requirement of the collection of fees did so to describe a formula of compensation—a percentage of fees collected. Defendants further argued plaintiff's interpretation would impermissibly render the introductory clause of section 4 meaningless. As to plaintiff's reference to T-C Fees, defendants argued plaintiff was improperly attempting to introduce a new theory in a response to a motion to dismiss and, because he alleged no breach relating to the T-C Fees, any accounting claim based thereon was irrelevant.

With respect to defendant-Meacham's supplemental affidavit, defendants argued it was not deficient as the averments therein were based on Meacham's personal knowledge as chief operating officer and not on any documents.

¶ 40 E. Hearing on the Motion to Dismiss

¶ 41 In February 2019, the trial court held a hearing on defendants' combined motion to dismiss. During arguments, the court inquired about the purported theory relating to the T-C Fees. Defendants maintained the theory was not alleged in the complaint and could not be raised in a response to a motion to dismiss. Plaintiff did not respond to defendants' argument or otherwise address the T-C Fees. Also, as to the Cook County theory, plaintiff acknowledged "Bruce did bring forward the Cook County account" but asserted Bruce would not have done so if plaintiff had not brought Bruce to Cozad as a consultant.

¶ 42 After considering the arguments presented, the trial court found plaintiff's third amended complaint was subject to dismissal. As to the TIAA-CREF theory, the court found it would not be "a reasonable reading" of the 2007 employment agreement to find Cozad would be required to compensate plaintiff with shares of its capital stock for farmland commitments made through a third-party and for which Cozad received nothing in return. With respect to the Cook County theory, the court found the allegation that Bruce secured the account defeated plaintiff's claim, as he did not bring the account to Cozad as required by the 2007 employment agreement. As to the production bonus theory, the court found the Cook County account, an undisputed asset management account, was not subject to any production bonus under the agreement and plaintiff did not allege any other account to which he believed he had not been compensated. With respect

to the bonus pool theory, the court found defendant-Meacham's affidavit defeated the theory by establishing the absence of a bonus pool.

¶ 43 The trial court dismissed plaintiff's third amended complaint with prejudice as it related to the TIAA-CREF, Cook County, and bonus pool theories. As it related to the production bonus theory, the court dismissed plaintiff's complaint without prejudice as it was the first time that theory had been pleaded.

¶ 44 F. Motion to Reconsider

¶ 45 In March 2019, plaintiff filed a motion to reconsider the trial court's dismissal of his third amended complaint. Plaintiff asserted, in part, he alleged sufficient facts to show defendants breached the 2007 employment agreement by failing to (1) fully compensate him with the required shares of stock, (2) "compensate him the adequate percentage of fees collected from the TIAA-CREF account, especially fees related to the sale of said account as provided for in subsection 4(a)," (3) compensate him the adequate percentage of fees relating to the Cook County account, (4) compensate him the adequate percentage of fees for all production, (5) provide him bonus pool compensation, and (6) provide an accounting of the compensation he is entitled as provided for in the 2007 employment agreement. In the event his motion was denied, defendant requested a final written judgment be entered to allow an appeal.

¶ 46 G. Response to the Motion to Reconsider

¶ 47 In April 2019, defendants filed a response to plaintiff's motion to reconsider. Defendants maintained the trial court correctly dismissed plaintiff's third amended complaint. Defendants did not object to plaintiff's request for entry of a final written judgment dismissing the

third amended complaint in its entirety with prejudice.

¶ 48 H. Hearing on the Motion to Reconsider

¶ 49 Following a May 2019 hearing, the trial court denied plaintiff's motion to reconsider and then entered a written final judgment dismissing plaintiff's third amended complaint with prejudice.

¶ 50 This appeal followed.

¶ 51 II. ANALYSIS

¶ 52 On appeal, plaintiff argues we should reverse and remand for further proceedings as his third amended complaint alleged sufficient facts to establish a possibility of recovery based on defendants' failure to fully compensate him under the 2007 employment agreement.

¶ 53 A. Standard of Review

¶ 54 Defendants moved to dismiss plaintiff's complaint under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2016)), which allows a party to file a motion combining a section 2-615 motion to dismiss with a section 2-619 motion to dismiss.

¶ 55 A section 2-615 motion to dismiss challenges "the legal sufficiency of a complaint." *Roberts v. Board of Trustees of Community College District No. 508*, 2019 IL 123594, ¶ 21, 135 N.E.3d 891. "A section 2-615(a) motion presents the question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief may be granted." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. In answering that question, "a court cannot accept as true

mere conclusions of law or fact unsupported by specific factual allegations." *Grant v. State*, 2018 IL App (4th) 170920, ¶ 12, 110 N.E.3d 1089.

¶ 56 A section 2-619 motion to dismiss admits, for the purposes of the motion, the legal sufficiency of a complaint but asserts an "affirmative matter" outside the complaint "that defeats the claim." *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, ¶ 40, 32 N.E.3d 583. "When ruling on a section 2-619 motion, the court construes the pleadings in the light most favorable to the nonmoving party and should only grant the motion if the plaintiff can prove no set of facts that would support a cause of action." *Grant*, 2018 IL App (4th) 170920, ¶ 13.

¶ 57 A dismissal pursuant to either section 2-615 or section 2-619 is reviewed *de novo*. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29, 28 N.E.3d 727.

¶ 58 B. TIAA-CREF Theory

¶ 59 Plaintiff contends his complaint alleged sufficient facts to establish a possibility of recovery based on defendants' failure to fully compensate him as it relates to the TIAA-CREF account. Specifically, plaintiff asserts his complaint alleged sufficient facts to establish a possibility of recovery based on "three separate instances of breach" relating to the TIAA-CREF account.

¶ 60 First, plaintiff asserts his complaint alleged sufficient facts to establish a possibility of recovery based on defendants' failure to issue him shares of capital stock in connection with new farmland commitments made by TIAA-CREF since September 30, 2010. Defendants disagree, maintaining plaintiff's claim is defeated by the plain language of the 2007 employment agreement.

¶ 61 The dispute both before the trial court and now on appeal is not whether plaintiff alleged such a breach but rather whether such a breach has any basis under the 2007 employment agreement given the undisputed fact that Cozad, despite continuing a business relationship with TIAA-CREF, did not receive any fees or commissions from new farmland commitments made by TIAA-CREF after September 30, 2010. Plaintiff asserts the plain language of the agreement conditions the issuance of shares of capital stock in connection with new farmland commitments made by TIAA-CREF only on Cozad's continuance of a business relationship with TIAA-CREF. Conversely, defendants assert the plain language of the agreement conditions the issuance of shares of capital stock in connection with new farmland commitments made by TIAA-CREF on both Cozad's collection of associated fees or commissions and its continuance of a business relationship with TIAA-CREF.

¶ 62 Our primary objective in interpreting the 2007 employment agreement is to "is to give effect to the intention of the parties." *Thompson v. Gordon*, 241 Ill. 2d 428, 441, 948 N.E.2d 39, 47 (2011). To determine the parties' intent, we look first to the language of the agreement. *Id.* We must construe the agreement "as a whole, viewing each provision in light of the other provisions." *Id.*

¶ 63 Section 4 of the 2007 employment agreement addresses the compensation to which plaintiff is entitled for fulfilling his employment duties. Section 4 begins with the following clause: "Employee's compensation hereunder shall be based solely on fees and commissions collected by Cozad from accounts credited to Employee, as described in this Section 4, and Employee shall not be entitled to any base salary." Paragraph 4 of subsection 4a provides for compensation in the form

of the issuance of shares of capital stock for every $1 million of new farmland commitments from TIAA-CREF. It states that such compensation shall be made "as long as Cozad or its successors has any form of business relationship" with TIAA-CREF.

¶ 64 As defendants argue, the plain language of the introductory clause of section 4 appears to establish an essential condition that must be met before plaintiff may be entitled to compensation under any subsection—the collection of associated fees or commissions by Cozad. Construing the agreement as a whole, plaintiff is entitled to compensation relating to new farmland commitments from TIAA-CREF so long as Cozad is collecting associated fees or commissions—no matter what kind of business relationship Cozad has with TIAA-CREF. Under this interpretation, plaintiff's claim fails given the undisputed fact that Cozad did not receive any fees or commissions from new farmland commitments made by TIAA-CREF after September 30, 2010.

¶ 65 Plaintiff asserts we should reject defendants' interpretation as it would render the language in other subsections conditioning compensation on the collection of fees superfluous. As defendants assert, the other subsections referencing the collection of fees do so to describe a formula of compensation—a percentage of fees collected. We are unconvinced the repetitive language precludes defendants' interpretation.

¶ 66 Plaintiff further asserts, even if the 2007 employment agreement is susceptible to defendants' interpretation, it is also susceptible to his interpretation. Assuming, *arguendo*, the agreement is susceptible to plaintiff's interpretation, we, as did the trial court, reject that interpretation as unreasonable. See *Foxfield Realty, Inc. v. Kubala*, 287 Ill. App. 3d 519, 524, 678 N.E.2d 1060, 1063 (1997) ("[T]o the extent that a contract is susceptible of two interpretations,

one of which makes it fair, customary, and such as prudent persons would naturally execute, while the other makes it inequitable, unusual, or such as reasonable persons would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred."). Specifically, we find it would be unreasonable to conclude Cozad intended for plaintiff's compensation to be tied to commitments made through third parties for which Cozad had no relation and collected nothing.

¶ 67 We find plaintiff's complaint failed to sufficiently allege facts to establish a possibility of recovery based on defendants' failure to issue him shares of capital stock in connection with farmland commitments made by TIAA-CREF since September 30, 2010.

¶ 68 Second, plaintiff asserts his complaint alleged sufficient facts to establish a possibility of recovery based on defendants' failure to fully compensate him with the T-C Fees received by Cozad. Defendants disagree, maintaining plaintiff failed to allege any such breach in his complaint.

¶ 69 Neither count I nor count II of the complaint allege defendants failed to fully compensate plaintiff with the T-C Fees received by Cozad. In fact, neither count even references the T-C Fees. To support his position on appeal, plaintiff cites three paragraphs in the factual background of his complaint describing the specific paragraphs of the 2007 employment agreement addressing T-C Fees. Those paragraphs, however, do not allege a breach. Plaintiff also cites the paragraph in count I alleging Cozad's "failure to adequately compensate Plaintiff per the terms of the 2007 Employment Agreement constitutes a breach of the terms of the 2007 Employment Agreement with Plaintiff." That paragraph, however, follows specific allegations of

breach unrelated to T-C Fees and is conclusory. Plaintiff suggests finding his complaint did not sufficiently allege a breach relating to the T-C Fees would improperly render the paragraphs he cites "completely superfluous and irrelevant." As defendants argue, it is not the job of this court to prop up deficient pleadings by reading in allegations of breach that do not exist.

¶ 70 We find plaintiff's complaint failed to sufficiently allege a breach based on defendants' failure to fully compensate plaintiff with the T-C Fees received by Cozad.

¶ 71 Third, plaintiff asserts his complaint alleged sufficient facts to establish a possibility of recovery based on defendants' failure to provide an accounting "for all compensation due to him" as required by the 2007 employment agreement. Defendants disagree, maintaining plaintiff failed to sufficiently allege a breach based on the failure to provide an accounting concerning the T-C Fees.

¶ 72 Count I of the complaint alleged the following: "Defendant-Cozad's failure to adequately provide an account for all compensation due to Plaintiff under the 2007 Employment Agreement constitutes a breach of the terms of the 2007 Employment Agreement and deprives Plaintiff of the opportunity to adequately calculate what is owed to him under the 2007 Employment Agreement." The second paragraph of subsection 4a of the 2007 employment agreement contains a provision obligating Cozad to provide an accounting to plaintiff. That provision relates to T-C Fees. As indicated above, neither count I nor count II alleges a breach based on the T-C Fees or even references the T-C Fees.

¶ 73 We find plaintiff's complaint failed to sufficiently allege a breach based on defendants' failure to provide an accounting concerning the T-C Fees.

¶ 74 C. Cook County Theory

¶ 75 Plaintiff contends his complaint alleged sufficient facts to establish a possibility of recovery based on defendants' failure to fully compensate him as it relates to the Cook County account. Defendants disagree, maintaining the allegations in plaintiff's complaint along with a review of the 2007 employment agreement defeat any such claim.

¶ 76 Plaintiff does not dispute the plain language of the agreement conditions compensation relating to asset management accounts to those accounts which plaintiff "brought" to Cozad. Instead, he asserts a factual issue remains as to whether he brought the Cook County account to Cozad. Conversely, defendants maintain the allegations in plaintiff's complaint establish Bruce, as opposed to plaintiff, brought the account to Cozad.

¶ 77 Absent from plaintiff's complaint is a factual allegation that plaintiff brought the Cook County account to Cozad. In fact, the complaint contains an allegation indicating the contrary to be true—Bruce "secured" the account. Any uncertainty from that allegation was clarified at the hearing on the motion to dismiss when plaintiff acknowledged "Bruce did bring forward the Cook County account." In support of his argument on appeal, plaintiff cites the allegations in his complaint that (1) all accounts brought to Cozad by Bruce were credited to plaintiff under the 1993 consultant agreement and (2) defendant-Meacham conceded plaintiff was entitled to compensation for the account. These allegations, however, do not advance plaintiff's argument given the integration clause in the 2007 employment agreement.

¶ 78 We find plaintiff's complaint failed to sufficiently allege facts to establish a possibility of recovery based on defendants' failure to fully compensate him as it relates to the

Cook County account.

¶ 79 D. Production Bonus Theory

¶ 80 Plaintiff contends his complaint alleged sufficient facts to establish a possibility of recovery based on defendants' failure to fully compensate him with production bonus "related to the TIAA[-CREF] and Cook County accounts." Defendants disagree, maintaining plaintiff failed to sufficiently allege any such breach in his complaint.

¶ 81 Turning first to the Cook County account, the complaint alleged Cozad "failed to fully compensate Plaintiff for his share of the *** remaining production bonus fees Plaintiff is entitled to with respect to the Cook County Account per the terms of the 2007 Employment Agreement." However, as defendants noted before the trial court, the 2007 employment agreement specifically excludes "asset management fees" from any production bonus. Because it is undisputed the Cook County account is an asset management account, any fees obtained therefrom are excluded from any production bonus.

¶ 82 Turning next to the TIAA-CREF account, neither count I nor count II of the complaint alleges defendants failed to fully compensate plaintiff with production bonus related to that account. Plaintiff's bare, conclusory allegation that defendants failed to fully compensate him with respect to any production bonus is insufficient to withstand dismissal.

¶ 83 As a final matter, plaintiff complains he lacked access to the necessary discovery to replead his claim after it was dismissed. Plaintiff, however, waived any opportunity to obtain such discovery by seeking a written order dismissing his claim with prejudice so that he could appeal. Plaintiff cannot be heard to blame the trial court for denying discovery he did not seek.

¶ 84 We find plaintiff's complaint failed to sufficiently allege facts to establish a possibility of recovery based on defendants' failure to fully compensate him with production bonus related to the TIAA-CREF and Cook County accounts.

¶ 85 E. Bonus Pool Theory

¶ 86 Plaintiff contends his complaint alleged sufficient facts to establish a possibility of recovery based on defendants' failure to fully compensate him with a bonus pool. Defendant's disagree, maintaining plaintiff failed to sufficiently allege such a claim and, alternatively, Meacham's affidavit was sufficient to defeat any such claim.

¶ 87 Assuming, *arguendo*, plaintiff's complaint sufficiently alleged a claim based on defendants' failure to fully compensate him with respect to any bonus pool, we find, as did the trial court, the claim to be defeated by defendant-Meacham's supplemental affidavit. The 2007 employment agreement provides plaintiff shall be a participant to any established "bonus pool" which covers all Cozad employees. Meacham's sworn, positive averment of fact that Cozad had not established a bonus pool covering all Cozad employees since plaintiff entered into the 2007 employment was sufficient to overcome plaintiff's allegation that, "upon information and belief," Cozad had established a bonus pool. See *Luciano v. Waubonsee Community College*, 245 Ill. App. 3d 1077, 1084, 614 N.E.2d 904, 909 (1993). Absent the establishment of a bonus pool, plaintiff's claim fails.

¶ 88 As he argued before the trial court, plaintiff asserts defendant-Meacham's affidavit is deficient under Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) because it failed to have attached thereto any documents upon which Meacham relied. The affidavit makes clear Meacham

was relying on his personal knowledge as chief operating officer. As such, the affidavit did not violate Rule 191 by not attaching any documents.

¶ 89 Because plaintiff's third amended complaint failed to allege sufficient facts to establish a possibility of recovery based on defendants' failure to fully compensate plaintiff under the 2007 employment agreement, we find no error in the trial court's dismissal.

¶ 90 III. CONCLUSION

¶ 91 We affirm the trial court's judgment.

¶ 92 Affirmed.