

2014 IL App (1st) 130626-U

No. 1-13-0626

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SIXTH DIVISION
May 23, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHICAGO HOUSING AUTHORITY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 11 CH 35706
)	
3721-3723 ELSTON CONDOMINIUM and TERA)	
HEALY, a/k/a Tera Lynn Siwicki,)	Honorable
)	Sophia H. Hall,
Defendants-Appellees.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Where the prospective purchaser of a condominium sued the seller and the condominium association seeking specific performance, the trial court erred in granting the defendants' motion to dismiss based on the defendants' claim that there was no enforceable contract where the seller did not initial alterations to the short sale addendum to the real estate

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contract.

¶ 2 Plaintiff, Chicago Housing Authority (CHA), sued defendants, Tera Healy and 3721-3723 Elston Condominium (the Association), for the specific performance of a contract for the sale of real estate. Defendants moved the trial court to dismiss the complaint, and the trial court granted the motion based on defendant Healy's failure to completely execute the short sale addendum to the real estate contract.

¶ 3 Plaintiff appeals, contending dismissal was error because the record demonstrates a viable claim that plaintiff and Healy entered into an enforceable contract. Plaintiff also argues that the record does not support resolving the case as a matter of law based on the affirmative defense of equitable estoppel. For the reasons that follow, we reverse the judgment of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 This contract dispute arose from the sale of Healy's condominium unit located at 3723 North Elston Avenue in Chicago. In November 2010, the Habitat Company (Habitat), as the Gautreaux Development Manager (GDM) for the development of new family housing for plaintiff CHA, signed a purchase and sale agreement with defendant Healy to buy her condominium for \$250,000. The transaction was contingent on the plaintiff and Habitat receiving final site acquisition approval from the U.S. Department of Housing and Urban Development (HUD), and Healy's lender approving a short payoff for the contract price. Although those approvals were obtained, on or about May 6, 2011, Healy's real estate attorney informed Habitat that the Association had exercised a right of first refusal and purchased Healy's condominium.

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¶ 6 Plaintiff filed a three-count amended complaint against Healy and the Association, seeking specific performance and alleging tortious interference with contract and breach of contract. Plaintiff alleged that Habitat and Healy executed a valid and binding purchase and sale agreement, which was attached to and made a part of the complaint. Plaintiff alleged it had received HUD's final site approval on February 25, 2011, and sent notice of that approval to Healy and the lender's representative on March 10, 2011. Moreover, a closing was requested for the week of March 14, 2011. Plaintiff alleged that, despite the absence of any articulation of a right of first refusal in the condominium association's declaration or bylaws, the Association, on or about March 15, 2011, informed Healy that it had elected to exercise a right of first refusal on her property.

¶ 7 Further, plaintiff alleged that on April 1, 2011, Habitat, at the request of Healy's attorney, provided a LLC certificate for Habitat and the court order designating Habitat GDM. Healy's attorney told Habitat's attorney that this was the final outstanding requirement on Healy's side. Plaintiff alleged that neither the listing agent nor Healy's attorney had responded to plaintiff's repeated requests for an update until about May 3, 2011. Plaintiff alleged that on May 5, 2011, Healy's attorney informed plaintiff that the bank had approved a short sale several weeks earlier and a closing was scheduled for May 10, 2011. Plaintiff alleged that it was ready, willing and able to purchase Healy's property and perform all the conditions of the contract. However, on May 6, 2011, Healy's attorney informed plaintiff that the Association and Healy had just closed on the sale of the property.

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¶ 8 Plaintiff's amended complaint sought conveyance of the property upon payment of the contract purchase price. Plaintiff also sought over \$16,000 in damages due to the Association's intentional and unjustifiable conduct in exercising a nonexistent right of first refusal, which had caused Healy to cease dealings with plaintiff and instead convey the property to the Association. In addition, plaintiff sought a declaration that Healy had breached their contract and an award of \$14,000 in liquidated damages.

¶ 9 The purchase and sale agreement attached to plaintiff's amended complaint was signed by Habitat on November 3, 2010, and signed by Healy on November 4, 2010. Paragraph 7 of the agreement provided that the obligation to close was conditioned upon the approval of HUD, which had a 60-day period to review certain specified documents, like the condominium declaration, that the parties were required to submit. If the purchaser failed to deliver within that 60-day period notice to the seller of either HUD's approval or disapproval of the transaction, then the purchaser shall be deemed to have delivered a notice of disapproval. Unless the disapproval notice specifically requested termination of the agreement, the seller must use good faith and diligent efforts to remove or correct any deficiencies within 30 days. If the seller could not remove or correct the deficiencies, then the purchaser could elect to terminate the agreement, extend the seller's time to correct the deficiencies, or accept the title commitment in its current condition. Paragraph 9.1(b) of the agreement provided that the seller represented and warranted to the purchaser that no person or entity had any contract or right of first refusal option or other right to acquire the property.

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¶ 10 The short sale addendum to the real estate contract was also attached as an exhibit to the amended complaint. The short sale addendum provided that its terms were incorporated into and made a part of the real estate contract, and, in the event of any conflict between the short sale addendum and contract provisions, the short sale addendum controls. The one-page short sale addendum consists of 10 numbered paragraph provisions and is dated November 3, 2010. The signatures of Healy and the Habitat representative appear on the bottom of the page. Four alterations were made to paragraphs 2, 7, and 9, and the initials of the Habitat representative appear on all of the four lines that were drawn in the margin next to the four alterations. However, the four lines drawn in the margin for Healy's initials are all blank. Healy never initialed any of the four alterations.

¶ 11 In paragraph 2 concerning the negotiator's compensation, text was stricken in two places to provide that the buyer did not agree to ensure that Mortgage Mitigators LLC (MM), an independent contractor negotiator, would be compensated according to the service agreement signed by the seller, and the buyer did not agree that it had a contractual obligation to MM to ensure payment to MM. In paragraph 7 concerning taxes, the text was altered to provide for the proration of real estate taxes at 110%, instead of 100%, of the most recently ascertainable real estate tax bill. In paragraph 9 concerning deadlines, which originally stated that "[c]losing shall be within thirty (30) days after tender approval of short sale," the following text was added: "and ten (10) days after HUD approval of the purchase."

¶ 12 Defendants moved to dismiss the amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (2010)). Defendants argued that (1) plaintiff

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was equitably estopped from repudiating its earlier construction of the contract at the time of the transaction, when plaintiff and its agents took the position that the Association had a right of first refusal on the purchase of Healy's unit; and (2) the contract was not valid and enforceable because Healy never fully executed the short sale addendum where she never initialed handwritten alterations to the short sale addendum.

¶ 13 Concerning the equitable estoppel claim, defendants argued that HUD informed plaintiff's agent Habitat that paragraph 19c of the condominium declaration provided the Association with a right of first refusal within 30 days of presentation of the sale contract. HUD asked Habitat to ascertain if Healy had presented the contract to the Association yet. Habitat emailed that request to its real estate agent, who emailed that request to Healy's real estate agent. That agent forwarded the email to Healy's real estate attorney, Christopher Hacker, who contacted a board member of the Association and asked the Association to waive the right of first refusal. On March 15, 2011, the Association informed Healy that it elected to exercise its right of first refusal. To support its equitable estoppel claim, defendants attached to their motion emails, dated February 17 and 18, 2011, from Habitat, Habitat's real estate agent, and Healy's real estate agent; an affidavit from Healy's real estate attorney Hacker; and the Association's March 15, 2011 letter to Healy.

¶ 14 Concerning the invalid contract claim, defendants argued the undisputed evidence showed that the contract was never fully executed and thus was neither valid nor enforceable where Healy never provided her initials to assent to the handwritten alterations to the short sale addendum. To support its invalid contract claim, defendants again referred to the February 17

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and 18 emails from plaintiff's agents stating that they were "still waiting" for Healy to initial the changes to the short sale addendum and it was one of the "missing pieces" they needed "before approval will be given."

¶ 15 In response, plaintiff argued the court should deny defendants' section 2-619 motion to dismiss because defendants failed to demonstrate all the required elements of the equitable estoppel defense. Plaintiff also argued that the parties' contrary factual assertions concerning the signing of the contract created a genuine and material issue of fact that precluded dismissal under section 2-619 of the Code.

¶ 16 After a hearing on the motion, the trial court granted defendants' motion to dismiss due to Healy's failure to completely execute the short sale addendum to the sales contract attached to the amended complaint. The trial court did not rule on defendants' 2-619 motion to dismiss pursuant to equitable estoppel. Plaintiff timely appealed.

¶ 17

II. ANALYSIS

¶ 18 First, we note defendants' motion to dismiss stated that it was brought pursuant to section 2-619 of the Code only. A section 2-619 motion admits the legal sufficiency of the nonmovant's pleadings but asserts an affirmative defense or other matter that avoids or defeats the nonmovant's claim. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009); *Edelman, Combs & Lattuner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). Defendants' assertion that the contract was invalid because Healy did not sign or initial certain alterations would have been appropriately brought as a 2-615 motion, which "challenges only the legal sufficiency of a complaint and alleges only defects on the face of the complaint." *Sandholm v.*

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Kuecker, 2012 IL 111443, ¶ 54. Nevertheless, the record establishes that defendants' invalid contract argument was treated by the parties and the trial court as a 2-615 motion to dismiss. Because the substance of the motion, rather than the label, determines what the motion is, we also will consider defendants' motion to dismiss due to an invalid contract under section 2-615. *Loman v. Freeman*, 375 Ill. App. 3d 445, 448 (2006).

¶ 19 “A circuit court should grant a section 2-615 motion to dismiss only if it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief.” (Internal quotation marks omitted.) *Estate of Powell ex rel. Harris v. John C. Wunsch, P.C.*, 2013 IL App (1st) 121854, ¶ 15. At this pleading stage, a plaintiff is not required to prove his case and need only allege sufficient facts to state all elements of the cause of action. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008). When reviewing a section 2-615 motion, we accept as true “[a]ll well-pleaded facts and reasonable inferences that can be drawn from those facts.” *Tuite v. Corbitt*, 224 Ill. 2d 490, 509 (2006). We also interpret the allegations in the complaint in the light most favorable to the plaintiff. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 13. Our review of the circuit court's order granting a section 2-615 motion to dismiss is *de novo*. *Id.*

¶ 20 The elements of a claim for breach of contract are (1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of the required conditions, (5) breach, and (6) damages. *Village of South Elgin v. Waste Management of Illinois, Inc.*, 348 Ill. App. 3d 929, 940 (2004). “Contract formation requires only the existence of an offer, an acceptance, and consideration.” *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 979 (1997); see also *Martin v. Government Employees Insurance Co.*, 206 Ill. App. 3d 1031, 1035 ((1990)

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(“Contract formation issues turn on the elements of offer, a strictly conforming acceptance of the offer, and supporting consideration.”). Section 33 of the Restatement (Second) of Contracts states, in part, “Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.” Restatement (Second) of Contracts § 33 (1981). A contract is sufficiently definite and certain if the court is able to ascertain from the contract terms and provisions what the parties have agreed to do. *DiLorenzo v. Valve and Primer Corp.*, 347 Ill. App. 3d 194, 199-200 (2004). A contract does not need to cover every detail to meet the test of definiteness, and the lack of nonessential details will not render a contract unenforceable. *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1091 (2003).

¶ 21 Defendants argue that a valid contract was not formed here because Healy did not initial the four alterations to the short sale addendum. We disagree, even if we assume, *arguendo*, that the four alterations were essential terms of the contract. Although Healy did not initial the four alterations, those alterations were merely reiterations of provisions Healy had signed elsewhere in the real estate contract and attached documents.

¶ 22 The two alterations to paragraph 2 of the short sale addendum concerning the negotiator’s compensation meant that the buyer did not agree to ensure the compensation of MM as described in the service agreement signed by the seller, and the buyer did not agree that it had a contractual obligation to MM to ensure its payment. Although Healy did not initial those alterations when she signed the short sale addendum, she did sign the “Addendum Number 1 To Contract,” which contained terms that were similar to and consistent with the alterations to paragraph 2 of the short

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sale addendum. Specifically, the “Addendum Number 1 To Contract” provided:

“The Purchaser acknowledges that [MM] is an independent contractor hired by Seller to assist in the negotiations of a short sale approval and for its services shall receive compensation in the amount of 1% of the debt lien against the subject property. [MM’s] compensation is to be paid out of the Purchaser’s 3% closing cost credit. However Purchaser shall not be liable to [MM] for any compensation over the 3% closing credit and that [MM] is neither an agent of the Purchaser nor has the Purchaser entered into any contract with [MM].”

¶ 23 Furthermore, Healy did not initial the alteration to paragraph 7 of the short sale addendum, which provided that real estate taxes would be prorated at 110% of the most recently ascertainable real estate tax bill. This un-initialed alteration, however, is completely consistent with paragraph 11.1(b) of the purchase and sale agreement concerning closing adjustments, and there is no dispute that Healy signed the purchase and sale agreement.

¶ 24 Finally, Healy did not initial the alteration to paragraph 9 of the short sale addendum, which provided that the closing would be within 30 days after the lender’s approval of the short sale and 10 days after HUD’s approval of the purchase. This un-initialed alteration, however, is completely consistent with paragraph 10.1 of the purchase and sale agreement concerning the closing, and there is no dispute that Healy signed the purchase and sale agreement.

¶ 25 We conclude that the trial court erred in granting defendants’ motion to dismiss. Plaintiff alleged sufficient facts concerning offer, acceptance and consideration to show the existence of a valid contract. Despite Healy’s failure to initial four alterations to the short sale addendum, the

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contract terms were reasonably certain because the substance of those four alterations were included elsewhere in the contract that Healy had signed. We will not address defendants' 2-619 motion to dismiss based on the affirmative defense of equitable estoppel because the trial court did not rule on that matter.

¶ 26

III. CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the trial court is reversed and the cause is remanded.

¶ 28 Reversed and remanded.