

No. 1-13-1060

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DANIEL KOULIANOS, individually and derivatively on)	Appeal from the
behalf of BioPro, LLC,)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 11 CH 10092
)	
MOHSEN AMIRAN, SHERWIN AMIRAN,)	Honorable
BIOGENESIS ENTERPRISES, INC., AMIRAN)	Rodolfo Garcia
TECHNOLOGIES, LLC, and METAL RECOVERY)	Judge Presiding.
TECHNOLOGIES, LLC,)	
Defendants-Appellees.)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Liu concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err by dismissing the breach of contract claim alleged in count one of plaintiff's second amended complaint because plaintiff did not allege any facts showing that he was injured by the breach. The court did not err by dismissing the breach of contract claim plaintiff brought on behalf of BioPro in count two because plaintiff did not allege facts showing that BioPro was a party to or third-party beneficiary of the alleged contract or that Mohsen breached the contract. The court did not err by dismissing the breach of fiduciary duty claim in count three because plaintiff did not allege facts regarding the manner in which the fiduciary duties were breached or when the breach occurred. The court did not err by dismissing the unjust enrichment claim in count four because plaintiff did not allege facts identifying the intellectual properties or assets that enriched defendants or the benefits they retained. The court did not err by

dismissing the breach of contract claim in count five because the terms of the contract, as alleged by plaintiff, are not sufficiently definite to allow this court to determine the scope of plaintiff's obligations. The court did not err by dismissing the conversion claim in count six because plaintiff did not allege facts regarding the manner in which defendants converted the property or when that event occurred. The court did not err by dismissing the unjust enrichment claim in count seven because plaintiff did not allege facts identifying the intellectual properties or assets at issue or the benefits retained by defendants. The court did not err by dismissing plaintiff's requests for an accounting in count eight and for BioPro's dissolution in counts nine and ten because plaintiff did not allege sufficient facts to state causes of action for breach of contract, breach of fiduciary duty, unjust enrichment, or conversion.

¶ 2 Plaintiff, Daniel Koulianos, as an individual and on behalf of BioPro, LLC (BioPro), appeals from the dismissal of his claims against defendants, Mohsen Amiran, Sherwin Amiran, Amiran Technologies, LLC (Amiran Technologies), Metal Recovery Technologies, LLC (Metal Recovery), and Biogenesis Enterprises, Inc. (Biogenesis). On appeal, plaintiff contends that he alleged sufficient facts to state all the causes of action set forth in his second amended complaint and that he had standing to bring claims derivatively on behalf of BioPro. For the reasons that follow, we affirm.

¶ 3 **BACKGROUND**

¶ 4 On June 22, 2012, plaintiff filed a ten-count second amended complaint in which he alleged various claims against the defendants. Regarding the defendants, plaintiff asserted that Mohsen was a member of BioPro, was a member and/or manager of Amiran Technologies and Metal Recovery, exercised unfettered control over Amiran Technologies and Metal Recovery, and was the majority shareholder and president of Biogenesis. Plaintiff asserted that Sherwin was a member and manager of BioPro.

¶ 5 Plaintiff asserted that on July 21, 2009, he entered into an oral contract with Mohsen to share in the equity ownership of BioPro. At that time, BioPro had not yet engaged in any business operations and did not have any capital assets, but was going to engage in various business ventures involving the recovery of metals from sludge, slag, mill scale, and bag dust,

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which are waste byproducts from steel manufacturing. The agreement contemplated the future development of intellectual properties that consisted of processes to recover materials from those waste byproducts. In the contract, Mohsen agreed to provide plaintiff with a one-third interest in BioPro; assign to BioPro his interest in the intellectual properties he was going to develop with plaintiff; limit the application of his knowledge in particulate matter to the development of those intellectual properties; refrain from engaging in the recovery of metals from sludge, slag, mill scale, and bag dust for the benefit of any entity other than BioPro; and enter into an operating agreement for BioPro that memorialized his contractual responsibilities to plaintiff. In exchange, plaintiff agreed to contribute his services to BioPro, obtain materials to assist in the development of the contemplated intellectual properties, contribute his interest in the intellectual properties to BioPro, and refrain from engaging in the recovery of metals from sludge, slag, mill scale, and bag dust for the benefit of any entity other than BioPro. Plaintiff also asserted that he entered into another oral contract with Mohsen on July 21, 2009, under which Mohsen agreed to provide him with 100,000 shares in Biogenesis in exchange for his agreement to help Biogenesis obtain a contract from the United States Environmental Protection Agency (EPA) for environmental cleanup along the southern rim of Lake Michigan.

¶ 6 Plaintiff further asserted that on March 25, 2010, he and Mohsen agreed to modify the portion of the contract that provided plaintiff a one-third interest in BioPro so that plaintiff would instead receive a 20% interest in intellectual properties and business dealings involving BioPro's recovery of metals from sludge, non-passive slag, mill scale, and flue and bag dust; a 50% interest in intellectual properties and business dealings involving operational slag; and a 2%

interest in intellectual properties and business dealings involving animal waste, gypsum, fly ash, and fire retardant/extinguishing materials. The modified terms also provided that the balance of all remaining intellectual properties and business dealings involving BioPro's recovery of metals from the aforementioned materials would be evenly divided between Mohsen and Sherwin. In addition, the parties agreed to execute an operating agreement for BioPro that would reflect the modifications.

¶ 7 In counts one through four of the second amended complaint plaintiff alleged claims based on the oral contract regarding BioPro and its modification. In count one, plaintiff alleged that Mohsen and Sherwin breached the contract by refusing to execute an operating agreement for BioPro that memorialized Mohsen's contractual responsibilities to plaintiff. In count two, plaintiff, on behalf of BioPro, alleged that Mohsen breached the contract by using the intellectual properties owned by BioPro and engaging in the recovery of metals from sludge, slag, mill scale, and bag dust for the benefit of Amiran Technologies and Metal Recovery. In count three, plaintiff, as an individual and on behalf of BioPro, alleged that Mohsen and Sherwin owed fiduciary duties to plaintiff and BioPro and breached those duties by misappropriating the intellectual properties owned by BioPro for their own benefit and for the benefit of Amiran Technologies, Metal Recovery, and Biogenesis; failing to account to BioPro and hold as trustee any benefit they derived from the use of BioPro's intellectual properties; and competing with BioPro in the conduct of its business. In count four, plaintiff, on behalf of BioPro, alleged that Amiran Technologies and Metal Recovery unjustly retained the benefit of intellectual properties and other assets owned by BioPro.

¶ 8 In counts five through ten, plaintiff repleaded a number of claims from his first amended complaint that had previously been dismissed in order to preserve those claims for an appeal. In count five, plaintiff alleged that Mohsen breached the contract regarding Biogenesis by failing to provide him with 100,000 shares in Biogenesis. In count six, plaintiff, on behalf of BioPro, alleged a conversion claim against all the defendants, asserting that they had wrongfully taken control of intellectual properties and other assets owned by BioPro. In count seven, plaintiff alleged that Amiran Technologies, Metal Recovery, and Biogenesis unjustly retained the benefit of intellectual properties and other assets owned by BioPro. In count eight, plaintiff, as an individual and on behalf of BioPro, sought an accounting of the financial affairs of all the defendants from July 2009 onward. In counts nine and ten, plaintiff, as an individual and on behalf of BioPro, sought the dissolution of BioPro and a distribution of its assets.

¶ 9 On July 23, 2012, Mohsen, Sherwin, Metal Recovery, and Amiran Technologies filed a combined motion to dismiss the second amended complaint under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2010)), asserting that plaintiff's claims should be dismissed pursuant to section 2-615 (735 ILCS 5/2-615 (West 2010)) because the allegations in the second amended complaint were insufficient to state any causes of action and that the claims brought on behalf of BioPro should be dismissed pursuant to section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2010)) because plaintiff did not have standing to bring claims on BioPro's behalf. Plaintiff responded that he set forth sufficient allegations to state all of his causes of action and that he had standing to bring claims on behalf of BioPro because those claims were based on conduct which occurred after he had received an interest in BioPro. On March 8, 2013,

the court entered an order dismissing all of plaintiff's claims and finding that plaintiff did not have standing to bring any claims on behalf of BioPro.

¶ 10

ANALYSIS

¶ 11 A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint based on defects that are apparent from its face (*Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 13), and the relevant inquiry is whether the allegations, considered in the light most favorable to the plaintiff, are sufficient to state a cause of action (*Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 61). A motion to dismiss brought pursuant to section 2-619(a)(9) admits the legal sufficiency of the complaint and asserts an affirmative matter outside the pleading that avoids the legal effect of or defeats the claim. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20. The dismissal of a claim under either section 2-615 or section 2-619(a)(9) is reviewed *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009).

¶ 12

I. Count One – Breach of Contract

¶ 13 Plaintiff contends that the court erred by dismissing the breach of contract claim alleged in count one of his second amended complaint because he alleged sufficient facts to state a cause of action. Illinois is a fact-pleading jurisdiction, which means that a plaintiff is required to allege sufficient facts to bring a claim within a legally recognized cause of action and cannot rely on conclusions of law or fact that are not supported by specific factual allegations. *Simpkins*, 2012 IL 110662, ¶ 26. To establish a breach of contract claim, the plaintiff must prove the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and damages or injury to the plaintiff resulting from the breach. *Sheth v. SAB Tool*

Supply Co., 2013 IL App (1st) 110156, ¶ 68.

¶ 14 In count one plaintiff alleged that he entered into an oral contract with Mohsen to share in the equity ownership of BioPro. Plaintiff also alleged that, pursuant to the terms in the contract, Mohsen was required to enter into an operating agreement for BioPro which memorialized the obligations he assumed under the rest of the contract and that Mohsen breached the contract by failing to enter into that operating agreement. Plaintiff further alleged that, as a result of the breach, "Koulianos has been damaged in an amount in excess of \$50,000.00," but did not allege any facts explaining how Mohsen's failure to enter into the relevant operating agreement caused him any injury except that it damaged him in excess of \$50,000.

¶ 15 As Illinois is a fact-pleading jurisdiction and an essential element of a breach of contract claim is an injury or damages to the plaintiff resulting from the defendant's breach (*Coghlan v. Beck*, 2013 IL App (1st), 120891, ¶ 27), plaintiff was required to allege specific facts showing that he was injured by Mohsen's failure to execute the relevant operating agreement. Instead, plaintiff merely stated the factual conclusion that he was damaged in excess of \$50,000 without alleging any specific facts explaining how he was harmed by Mohsen's failure to enter into the operating agreement. Even if Mohsen failed to enter into the relevant operating agreement, as plaintiff alleged, it is not clear that plaintiff suffered any injury as a result of that failure because the only purpose of the agreement was to memorialize Mohsen's other contractual obligations to plaintiff. As such, plaintiff has not alleged any facts to support one of the elements of the breach of contract claim in count one of his second amended complaint and the circuit court did not err by dismissing that claim.

¶ 16

II. Count Two – Breach of Contract

¶ 17 In count two, plaintiff alleged a breach of contract claim on behalf of BioPro in which he asserted that Mohsen breached his oral contract with plaintiff by engaging in the recovery of metals from sludge, slag, mill scale, and bag dust for the benefit of Amiran Technologies and Metal Recovery. The only parties who may assert rights created by a contract are the parties to and third-party beneficiaries of the contract. *Bank of America National Ass'n v. Bassman FBT, LLC*, 2012 IL App (2d) 110729, ¶ 26. As plaintiff did not allege that BioPro was a party to or third-party beneficiary of the contract Mohsen is alleged to have breached, the court did not err by dismissing the breach of contract claim in count two. In addition, while plaintiff set forth the factual conclusion that Mohsen breached the contract by engaging in the recovery of metals from sludge, slag, mill scale, and bag dust for the benefit of Amiran Technologies and Metal Recovery, he did not allege any specific facts to support that claim. Thus, plaintiff did not allege any facts to support one of the elements of his breach of contract claim and the court did not err by dismissing that claim.

¶ 18

III. Count Three – Breach of Fiduciary Duty

¶ 19 To state a claim for breach of a fiduciary duty, the plaintiff must allege the existence of a fiduciary duty, the breach of that duty by the defendant, and an injury proximately caused by the defendant's breach. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 69. Plaintiff contends that he alleged sufficient facts to state a cause of action for breach of fiduciary duty against Mohsen and Sherwin and that he had standing to bring the claim on BioPro's behalf. Defendants respond that plaintiff did not allege any facts showing that either Mohsen or Sherwin

breached their fiduciary duties to plaintiff or BioPro.

¶ 20 Plaintiff alleged that Mohsen and Sherwin engaged in self-dealing by misappropriating intellectual properties owned by BioPro for their own benefit and for the benefit of entities they owned, including Amiran Technologies, Metal Recovery, and Biogenesis. Plaintiff alleged that Mohsen and Sherwin breached their duties of loyalty by failing to account to BioPro and hold as trustee any profit or benefit they derived from conducting BioPro's business or by using BioPro's intellectual properties, failing to act fairly when dealing with BioPro while acting on behalf of another entity, and competing with BioPro in the conduct of its business. Plaintiff also alleged that Mohsen and Sherwin breached their duties of care "by engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law" and that they "failed to discharge their duties to [plaintiff] consistent with the obligation of good faith and fair dealing."

¶ 21 Although plaintiff alleged that Mohsen and Sherwin misappropriated BioPro's intellectual properties and failed to account for benefits they derived from using those properties, plaintiff did not support those conclusions by alleging any specific facts regarding the manner in which the misappropriation occurred or when it happened. The lack of allegations regarding the date on which the misappropriation occurred is particularly important because the only allegation as to the date on which plaintiff became a member of BioPro related that an annual report filed on behalf of BioPro on January 11, 2010, indicated that plaintiff was a member. Thus, because a manager or member of a limited liability company only owes a fiduciary duty to the company and its members (805 ILCS 180/15-3 (West 2008)) and a member may only bring a derivative action on behalf of the company if that person was a member at the time of the transaction on

which the claim is based (805 ILCS 180/40-5 (West 2008)), plaintiff could only bring a valid breach of fiduciary duty claim, either as an individual or on behalf of BioPro, if the breach occurred while he was a member of BioPro. As such, the court did not err by dismissing the breach of fiduciary claim in count three of plaintiff's second amended complaint.

¶ 22 IV. Count Four – Unjust Enrichment

¶ 23 Plaintiff, on behalf of BioPro, alleged a claim against Amiran Technologies and Metal Recovery based on a theory of unjust enrichment. "To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989).

¶ 24 Specifically, plaintiff alleged that Amiran Technologies and Metal Recovery "unjustly retained the benefit of the Intellectual Property and other assets properly belonging to BioPro *** thereby diminishing the value and marketability of BioPro and Koulianos's membership interest in the company" and that the retention of those benefits "would violate the fundamental principles of justice, equity and good conscience." Plaintiff, however, did not allege any facts identifying the specific intellectual properties or assets at issue or the benefit defendants retained or explaining why the retention of benefits from those properties and assets violated fundamental principles of justice and equity. As such, the allegations set forth by plaintiff consist of factual and legal conclusions that are not supported by any specific factual allegations and the circuit court did not err by dismissing this claim.

¶ 25

V. Count Five – Breach of Contract

¶ 26 Plaintiff contends that he alleged sufficient facts to state a cause of action for breach of contract as to the contract regarding Biogenesis, and defendant responds that plaintiff failed to allege facts showing the existence of a valid and enforceable contract. A valid and enforceable contract satisfies the elements of offer, acceptance, and consideration and contains terms that are sufficiently definite to allow a court to ascertain the intent of the parties. *DiLorenzo v. Valve & Primer Corp.*, 347 Ill. App. 3d 194, 199-200 (2004). For a contract to be valid and enforceable, its terms and provisions must be sufficiently definite to enable a court to determine what the parties agreed to do, and while some nonessential terms may be missing or left to be agreed upon, the parties' failure to agree upon an essential term of the contract indicates that mutual assent is lacking and there is no enforceable contract. *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1090-91 (2003).

¶ 27 Plaintiff alleged that he entered into an oral contract with Mohsen whereby Mohsen agreed to provide him with 100,000 shares in Biogenesis in exchange for his agreement to help Biogenesis obtain a contract from the EPA and that Mohsen breached that contract by failing to tender the Biogenesis shares. Regarding plaintiff's obligations to Mohsen, plaintiff alleged that he agreed to:

"determine the necessary attributes of and assist in site selection to perform the work to be contemplated by [the EPA contract], including if necessary introducing Defendant Mohsen Amiran to elected officials (or their representatives and/or contacts) with the authority to issue permits necessary to perform the work contemplated by [the EPA contract], and including if necessary introducing Defendant Mohsen Amiran to elected officials (or their representatives and/or contacts) and private entities to ascertain and acquire appropriate sites."

Although plaintiff alleged that he agreed to help Biogenesis obtain an EPA contract by assisting Mohsen in site selection, he did not allege contractual terms that are sufficiently definite to allow this court to determine what he agreed to do. The alleged contractual terms do not specify the scope of plaintiff's obligations to Mohsen except to set forth two examples of duties that he may be required to perform in exchange for the Biogenesis shares and do not identify the activities he was required to perform in order to satisfy his obligations. Thus, while plaintiff alleged that he satisfied all of his contractual obligations and set forth various instances in which he allegedly assisted Biogenesis in its attempt to procure an EPA contract, we cannot determine whether that conduct satisfied his obligations under the contract because those obligations are not set forth with sufficient specificity. Moreover, plaintiff does not address this breach of contract claim in his brief or reply except to summarize the allegations set forth in that count or explain why those allegations support his conclusion that the parties entered into a valid and enforceable contract. As such, the court did not err by dismissing plaintiff's breach of contract claim regarding the Biogenesis contract.

¶ 28

VI. Count Six - Conversion

¶ 29 To establish a claim of conversion, the plaintiff must prove that he had a right to the property, had an absolute and unconditional right to the immediate possession of the property, and made a demand for possession and that the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property. *In re Karavidas*, 2013 IL 115767, ¶ 61. Plaintiff, on behalf of BioPro, brought a conversion claim against all defendants, alleging that they "divert[ed] intellectual property and other assets belonging to BioPro" and "deprived

[BioPro] of its property by their unauthorized and wrongful assumption of control, dominion and ownership of such property and assets." Plaintiff, however, did not allege any facts regarding the manner in which defendants diverted BioPro's intellectual property and assets or when that event occurred. As such, the court did not err by dismissing plaintiff's conversion claim.

¶ 30 VII. Count Seven – Unjust Enrichment

¶ 31 A cause of action based on a theory of unjust enrichment requires allegations that the defendant unjustly retained a benefit to the plaintiff's detriment and that the defendant's retention of that benefit violates principles of justice, equity, and good conscience. *HPI Health Care Services*, 131 Ill. 2d at 160. Plaintiff alleged that Amiran Technologies, Metal Recovery, and Biogenesis "unjustly retained the benefit of the Intellectual Property and other assets properly belonging to BioPro," but did not allege any facts identifying the specific intellectual properties or assets at issue or the benefits allegedly retained by defendants. In addition, plaintiff alleged that Biogenesis unjustly benefitted from the assistance he provided Mohsen in pursuing the EPA contract, but did not allege any facts showing how Biogenesis benefitted from that conduct. As such, the court did not err when it dismissed the claims of unjust enrichment in count seven of plaintiff's second amended complaint.

¶ 32 VIII. Count Eight - Accounting

¶ 33 To establish a claim for an accounting in equity, the plaintiff must allege the absence of an adequate remedy at law and either a breach of a fiduciary duty by the defendant, a need for discovery, fraud, or the existence of complex mutual accounts. *Mann v. Kemper Financial Cos., Inc.*, 247 Ill. App. 3d 966, 980 (1992). Plaintiff contends that he alleged sufficient facts to state a

cause of action for an accounting because he alleged breach of fiduciary duty claims against Mohsen and Sherwin. However, for the reasons stated above, plaintiff failed to allege sufficient facts to state causes of action for breach of a fiduciary duty and, therefore, the court did not err by dismissing plaintiff's request for an accounting.

¶ 34 IX. Counts Nine and Ten – Dissolution of BioPro

¶ 35 A court may cause the dissolution of a limited liability company and the winding up of its business when, upon the application of a member of the company, the court enters a judicial decree finding that the managers or members in control of the company have acted, are acting, or will act in an illegal, oppressive, or fraudulent manner with regard to the member requesting the decree. 805 ILCS 180/35-1 (West 2010). In counts nine and ten, plaintiff, as an individual and on behalf of BioPro, sought the dissolution of BioPro and the winding up of its business due to "self-dealing, misfeasance, malfeasance, omissions and breaches" by Mohsen and Sherwin. However, for the reasons stated above, plaintiff did not allege sufficient facts to state causes of action for breach of contract, breach of fiduciary duty, unjust enrichment, or conversion and the court, therefore, did not err by dismissing plaintiff's request for BioPro's dissolution.

¶ 36 CONCLUSION

¶ 37 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 38 Affirmed.