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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> ESTATE OF CHARLES W. WALANKA)	Appeal from the Circuit Court of Lake County.
)	
)	No. 12-P-697
)	
(Henry Porterfield, Petitioner-Appellant, v. Estate of Charles W. Walanka, Respondent- Appellee).)	Honorable Nancy S. Waites, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court erred in dismissing with prejudice plaintiff's amended complaint alleging a violation of the Consumer Fraud and Deceptive Business Practices Act and conversion on the basis that respondent was not a proper party; (2) petitioner abandoned motions to strike an affidavit and to file a sur-reply to respondent's motion to dismiss by failing to request a ruling on the motions and then filing a notice of appeal; and (3) remaining issues raised in petitioner's brief were not properly before reviewing court where trial court did not rule on them.

¶ 2 Petitioner, Henry Porterfield, appeals the judgment of the circuit court of Lake County dismissing with prejudice his amended two-count complaint against respondent, the Estate of Charles W. Walanka.¹ We reverse and remand for further proceedings.

¹ Throughout the record and in the parties' briefs, Walanka is referred to as either

¶ 3 On March 21, 2013, petitioner filed a four-count complaint against respondent in the probate division of the circuit court of Lake County. The trial court dismissed the complaint, but granted petitioner leave to file an amended complaint. Petitioner filed a two-count amended complaint on July 10, 2013. The amended complaint alleged in relevant part as follows. Between 1985 and 2011, petitioner purchased rare coins and precious metal bullion from Charles W. Walanka (Walanka). Although the correspondence and transactions were between petitioner and Walanka as an individual, Walanka purported to conduct business on behalf of Lakeshore Numismatics Investment Corporation (LNI), a corporation owned and operated solely by Walanka. Prior to 2004, some of the assets purchased by petitioner from Walanka came into the possession of petitioner and some of them were retained by Walanka. After 2004, Walanka assumed possession of all of the coins and bullion purchased by petitioner. Walanka represented that the assets being held by him on petitioner's behalf would be stored in a safe deposit box at First Midwest Bank in Lake County, Illinois. Walanka passed away in July 2012. At that time, Walanka had in his possession coins and bullion purchased by petitioner at a cost in excess of \$400,000. Upon Walanka's death, Cathy Papagiorgio, the executor of Walanka's estate, assumed possession and control of the coins and bullion that had been in Walanka's possession. Papagiorgio returned some coins and bullion to petitioner, but failed to return other coins and bullion purchased by petitioner from Walanka for \$128,471. Attached to the amended complaint were various documents, including an affidavit from petitioner and a document identified as Exhibit 5, a list of coins and bullion that Papagiorgio allegedly failed to return to petitioner.

“Charles W. Walanka” or “Charles M. Walanka.” We use the name “Charles W. Walanka” as that is the name referenced on petitioner's notice of appeal.

¶ 4 Count I of the amended complaint alleged a violation of the Consumer Fraud and Deceptive Business Practices Act (Fraud Act) (815 ILCS 505/1 *et seq.* (West 2010)). Count I alleged that Walanka induced petitioner to purchase certain rare coins and bullion and represented that he would hold them in his sole possession and control for the benefit of petitioner, but that Papagiorgio has not returned the coins and bullion identified in Exhibit 5. Count I further alleged that the aforesaid misrepresentations by Walanka to petitioner constitute a violation of section 2 of the Consumer Fraud Act (815 ILCS 505/2 (West 2010)). Count II of the amended complaint alleged conversion in that petitioner gave Walanka \$128,471 to purchase the coins and bullion identified in Exhibit 5, Walanka did not purchase said coins and bullion, and Walanka diverted the \$128,471 in funds to his own benefit. Alternatively, count II alleged that Walanka purchased the coins and bullion identified in Exhibit 5, but subsequently, and without petitioner's authority, disposed of them and retained the proceeds for his own benefit.

¶ 5 On July 23, 2013, respondent filed a combined motion to strike and dismiss petitioner's amended complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2010)) (hereinafter, motion to dismiss). See 735 ILCS 5/2-619.1 (West 2010) (allowing combined motion pursuant to sections 2-615 and 2-619 of the Code). In support of its motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), respondent alleged that petitioner failed to plead specific facts to state a cause of action for a violation of the Fraud Act or for conversion. In support of its motion to dismiss pursuant to section 2-619 of the Code, respondent cited subsections (a)(2) and (a)(9) (735 ILCS 5/2-615(a)(2), (a)(9) (West 2010)). With respect to section 2-619(a)(2), respondent alleged, *inter alia*, that petitioner has no legal standing to make a claim in probate court against respondent because petitioner never had a business relationship with Walanka in his individual capacity and

respondent does not have the legal capacity to be sued for allegations made by petitioner against LNI. Finally, in support of its motion to dismiss pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)), respondent alleged: (1) petitioner lacks standing to bring suit against respondent because he cannot show that he has a legally cognizable interest in the coins and bullion listed in Exhibit 5; (2) petitioner's claims of a violation of the Fraud Act and conversion are beyond the applicable statutes of limitation; and (3) petitioner's agent signed a release of all claims against respondent when the agent took possession of the coins and bullion tendered by Papagiorgio following Walanka's death. Attached to the motion to dismiss was the affidavit of Papagiorgio.

¶ 6 On August 22, 2013, petitioner filed a response to respondent's motion to dismiss. Therein, petitioner asserted, *inter alia*, that Walanka "personally participated in the deception of [petitioner] described" in the amended complaint and is therefore individually liable for petitioner's damages. Attached to the response was an affidavit from petitioner.

¶ 7 On August 29, 2013, respondent filed a motion to strike all or a portion of the affidavits petitioner attached to both the amended complaint and the response to its motion to dismiss. Respondent alleged that portions of petitioner's affidavits should be stricken because they violated the Dead Man's Act (735 ILCS 5/8-201 (West 2010)), lacked "supporting and attached exhibits," violated the Best Evidence Rule, constituted hearsay, lacked proper foundation, and consisted of conclusions not within petitioner's personal knowledge. Also on August 29, 2013, respondent filed a reply in support of its motion to dismiss. Attached to the reply was the affidavit of Papagiorgio. Relying on the Papagiorgio affidavit, respondent asserted in its reply that petitioner had not had any business dealing with Walanka in his individual capacity, any numismatic business with petitioner was conducted by LNI, and petitioner had specific

knowledge of LNI and Walanka operating as LNI from the alleged transactions upon which petitioner's claim is based.

¶ 8 On September 13, 2013, petitioner filed a motion to strike the affidavit of Papagiorgio attached to respondent's reply in support of its motion to dismiss. Petitioner alleged that the Papagiorgio affidavit is argumentative, attempts to present legal conclusions, and is not based on her personal knowledge. Also on September 13, 2013, petitioner filed a motion for leave to file a sur-reply to respondent's reply in support of its motion to dismiss and a response to respondent's motion to strike petitioner's affidavits.

¶ 9 On September 26, 2013, the trial court held a hearing on respondent's motion to dismiss. At the outset of the hearing, the parties briefly discussed respondent's motion to strike petitioner's affidavits, petitioner's motion to strike Papagiorgio's affidavit, and petitioner's motion for leave to file a sur-reply. The parties then argued respondent's motion to dismiss petitioner's amended complaint. Following the hearing, the trial court took the matter under advisement.

¶ 10 On November 18, 2013, the trial court entered an order dismissing with prejudice petitioner's amended complaint. The court found that at the time of Walanka's death and at the times of the alleged transactions, LNI was an Illinois corporation in good standing with the Illinois Secretary of State and that Walanka was a corporate officer and shareholder of LNI. The court then concluded that petitioner's claim cannot be brought against respondent because the transactions at issue took place while petitioner was doing business with LNI, not with Walanka personally. Accordingly, the court determined that "[a]ny action to recover for alleged transactions made by [petitioner] may be brought against the corporate entity 'LNI' an *** Illinois corporation of which *** Walanka was a corporate officer; in an action outside

Walanka's estate." The trial court did not expressly rule on respondent's motion to strike petitioner's affidavits, petitioner's motion to strike Papagiorgio's affidavit, or petitioner's motion for leave to file a sur-reply. On November 27, 2013, petitioner filed a notice of appeal from (1) the judgment entered on November 18, 2013; (2) the trial court's failure to strike the Papagiorgio affidavit; and (3) the trial court's failure to grant petitioner leave to file a sur-reply in response to respondent's reply in support of its motion to dismiss.

¶ 11

II. ANALYSIS

¶ 12 On appeal, petitioner argues that his amended complaint should not have been dismissed because it states a cause of action for both a violation of the Fraud Act and conversion. Petitioner further asserts that the LNI business records attached to the amended complaint are "admissible in evidence," that the amended complaint was timely filed, that the Papagiorgio affidavit should have been stricken by the trial court, and that his motion for leave to file a sur-reply should have been granted by the trial court. Respondent argues that we lack jurisdiction to consider petitioner's appeal because it is not from a final judgment. With respect to the merits, respondent asserts that the trial court properly dismissed petitioner's amended complaint because the business records that petitioner offers in support thereof show that petitioner's business dealings were with LNI, the corporate entity, and not Walanka individually.

¶ 13 Initially, we address respondent's claim that we lack jurisdiction to address petitioner's appeal. With limited exceptions not applicable here, jurisdiction of this court to hear an appeal is limited to reviewing final judgments. Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) ("Every final judgment of a circuit court in a civil case is appealable as of right."); *O'Hara v. State Farm Mutual Automobile Insurance Co.*, 137 Ill. App. 3d 131, 133 (1985). A judgment is final and reviewable if it terminates the litigation between the parties on the merits or disposes of

the parties' rights with regard to the entire controversy or a separate part thereof, so that, if affirmed, the trial court has only to proceed with the execution of the judgment. *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998); *O'Hara*, 137 Ill. App. 3d at 133. This court has stated that for an order of dismissal to be final and appealable it must be entered "with prejudice" as to at least some of the parties or claims. *Howard v. Druckemiller*, 238 Ill. App. 3d 937, 940 (1992); *Schuster Equipment Co., Inc. v. Design Electric Services, Inc.*, 197 Ill. App. 3d 566, 568 (1990).

¶ 14 Respondent observes that the trial court order dismissing petitioner's amended complaint decided only that respondent was not the proper party to the claims being made by petitioner and that petitioner should pursue his claims against LNI, the corporate entity. Respondent then states that the trial court's ruling that petitioner's claims "should have been directed at the corporate defendant and not the estate are jurisdictional issues and not issues on the merits." We disagree. Although the trial court's order did not directly address whether the allegations in petitioner's amended complaint stated a cause of action for a violation of the Fraud Act or conversion, it clearly terminated the litigation between petitioner and respondent. Significantly, the trial court determined that respondent was not the proper party to the claims being made by petitioner, and it dismissed with prejudice his amended complaint. Under these circumstances, we conclude that the trial court's order constituted a final and appealable order.

¶ 15 Next, we address petitioner's claims that the trial court should have granted his motion to strike the affidavit of Papagiorgio and his motion for leave to file a sur-reply. It does not appear from the record that the trial court affirmatively ruled on either of these two motions. It is the responsibility of the party filing a motion to request that the trial judge rule on it. *People v. Flynn*, 341 Ill. App. 3d 813, 821 (2003). A litigant's failure to obtain a ruling on a motion does

not translate into a denial of the motion by the court. *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622, 628 (2008). Rather, where no ruling has been made on a motion, the motion is presumed to have been abandoned absent circumstances indicating otherwise. *Flynn*, 341 Ill. App. 3d at 821-22. Moreover, a subsequently filed notice of appeal following the failure by a litigant to obtain a ruling on a motion serves as an abandonment of the previously filed motion. *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 433 (2007). In this case, the parties briefly discussed the motion to strike Papagiorgio's affidavit and the motion for leave to file a sur-reply at the hearing on respondent's motion to dismiss. However, the trial court never affirmatively ruled on the motions. In addition, after the trial court issued its ruling on the motion to dismiss, petitioner never requested a ruling on the motion to strike Papagiorgio's affidavit or the motion for leave to file a sur-reply. Instead, petitioner filed a notice of appeal. Thus, we find that petitioner abandoned the two motions referenced, and we do not address this issue on appeal. See *Commerce Trust Co. v. Air 1st Aviation Cos., Inc.*, 366 Ill. App. 3d 135, 142 (2006) (holding that the failure to obtain a ruling on a motion to strike an affidavit operates as a forfeiture of the objections to the affidavit).

¶ 16 Turning to the merits, petitioner argues that the trial court erred in dismissing his amended complaint with prejudice on the basis that respondent was not the proper party to the claims being made by petitioner. Respondent contends that the business records attached to petitioner's amended complaint support the trial court's decision that the transactions at issue were between petitioner and LNI, the corporate entity, and not Walanka individually. As such, respondent insists that the trial court properly dismissed with prejudice petitioner's amended complaint.

¶ 17 Respondent's motion to dismiss was filed pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)). That provision is a procedural statute that allows a litigant to combine in one pleading a section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2010)) and a section 2-619 motion for involuntary dismissal (735 ILCS 5/2-619 (West 2010)). 735 ILCS 5/2-619.1 (West 2010); *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1046 (1998). In issuing its ruling, the trial court did not specify whether it was dismissing petitioner's amended complaint pursuant to section 2-615 or section 2-619 of the Code. Where the trial court fails to specify the grounds upon which it relied in granting a motion to dismiss, we will presume it was upon one of the grounds urged by the party filing the motion to dismiss. *Storm & Associates, Ltd.*, 298 Ill. App. 3d at 1046. In this case, the trial court dismissed the amended complaint on the basis that that respondent was not the proper party to the claims being made by petitioner. This was raised in respondent's motion to dismiss pursuant to section 2-619(a)(2) of the Code (735 ILCS 5/2-615 (a)(2) (West 2010)). Accordingly, we will analyze the trial court's dismissal order pursuant to the principles governing section 2-619.

¶ 18 A motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the claims but raises certain defects, defenses, or other matters appearing on the face of the complaint or established by external submissions to defeat the claim. 735 ILCS 5/2-619 (West 2010); *Zahl v. Krupa*, 365 Ill. App. 3d 653, 657-58 (2006). Further, a section 2-619 motion admits all well-pleaded facts and reasonable inferences therefrom. *Department of Financial & Professional Regulation v. Walgreen Co.*, 2012 IL App (2d) 110452, ¶ 13. Dismissal is warranted only if the nonmoving party can prove no set of facts that would support a cause of action. *Department of Financial & Professional Regulation*, 2012 IL App (2d) 110452, ¶ 13. When ruling on a section 2-619 motion, a court must interpret all pleadings and supporting documents in the light most

favorable to the nonmoving party. *Bezanis v. Fox Waterway Agency*, 2012 IL App (2d) 100948, ¶ 8. This court reviews *de novo* a section 2-619 order of dismissal. *Ferris, Thompson, and Zweig v. Esposito*, 2014 IL App (2d) 130129, ¶ 9, appeal allowed, No. 117443 (May 28, 2014).

¶ 19 Count I of petitioner's amended complaint alleged a violation of section 2 of the Fraud Act (815 ILCS 505/2 (West 2010)). The trial court determined that although Walanka was a corporate officer and shareholder of LNI, the amended complaint had to be dismissed because Walanka could not be held personally liable for the actions of his corporation. Our review of the Fraud Act, however, reveals that the trial court erred in so ruling. Section 10a(a) of the Fraud Act (815 ILCS 505/10a(a) (West 2012)) provides that "[a]ny person who suffers actual damage as a result of a violation of this [Fraud] Act committed by another person may bring an action against such person." Section 1(c) of the Fraud Act (815 ILCS 505/1(c) (West 2010)) defines the term "person" to include "any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, *officer*, director, member, *stockholder*, associate, trustee or cestui que trust thereof." (Emphasis added.) Here, petitioner's amended complaint and supporting documents allege that Walanka was an officer and shareholder of LNI, and it is clear from the trial court's ruling that it agreed. Illinois authority holds that officers and stockholders may be named as individual defendants under the Fraud Act where they were personally involved in the activities which gave rise to the cause of action. See *People ex rel. Hartigan v. All American Aluminum & Construction Co., Inc.*, 171 Ill. App. 3d 27, 33 (1988) (holding officers, one of whom was a controlling shareholder, were properly named as parties in action alleging a violation of the Fraud Act); *People ex rel. Fahner v. American Buyers Club, Inc.*, 115 Ill. App. 3d 759, 761 (1983) (holding president and principal shareholder of corporation liable for a

violation of the Fraud Act). Count I of the amended complaint alleges that Walanka induced petitioner to purchase certain rare coins and bullion and represented that he would hold them in his sole possession and control for the benefit of petitioner. These allegations were at least sufficient to allow a reasonable inference that Walanka was personally involved in the activities which gave rise to the cause of action alleged in count I of the amended complaint.

¶ 20 Similarly, a corporate officer may be liable for a variety of torts, including conversion, as charged in count II of the amended complaint. See *People ex rel. Madigan v. Tang*, 346 Ill. App. 3d 277, 284 (2004). Moreover, one's status as a corporate officer does not insulate him or her from individual liability for the torts of the corporation in which he or she actively participates. *Tang*, 346 Ill. App. 3d at 284. Here, count II of the amended complaint alleged that petitioner gave Walanka \$128,471 to purchase the coins and bullion identified in Exhibit 5, but that Walanka did not purchase the coins and bullion, but instead diverted the \$128,471 in funds to his own benefit. Alternatively, petitioner alleged in support of count II that Walanka purchased the coins and bullion identified in Exhibit 5, but subsequently, and without petitioner's authority, disposed of them and retained the proceeds for his own benefit. Again, these allegations are sufficient to allow a reasonable inference that Walanka actively participated in the activities that gave rise to the cause of action alleged in count II of the amended complaint. Accordingly, we find that the trial court erred in granting respondent's motion to dismiss on the basis that the causes of action alleged in the amended complaint could not be brought against respondent because Walanka could not be held personally liable for the actions of LNI.

¶ 21 Petitioner also argues that (1) the LNI business records attached to the amended complaint are "admissible in evidence," (2) he adequately set forth the elements of a claim for violation of the Fraud Act and for conversion, and (3) his claims were timely. The trial court did

not address the first issue, and it did not dismiss petitioner's amended complaint on either of the latter two bases. As such, these issues are not properly before us and we decline to address them. See *In re John Doe Investigation*, 2011 IL App (2d) 091355, ¶ 7 (2011) (noting that a reviewing court will not issue advisory opinions).

¶ 22

III. CONCLUSION

¶ 23 For the reasons set forth above, we reverse the judgment of the circuit court of Lake County and remand the matter for further proceedings consistent with this disposition.

¶ 24 Reversed and remanded.