SECOND DIVISION
JANUARY 25, 2011

1-09-3601

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GLENROY MOREIRA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 07 CH 11893
	)	
WESTERN SITES, L.L.C.,	)	Honorable
	)	Daniel A. Riley,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

Held: Where the plaintiff's complaint alleged that he did not receive a completed and signed residential real estate disclosure report as required by section 55 of the Illinois Residential Real Property Disclosure Act (765 ILCS 77/55 (West 2006)), the complaint was sufficient to state a claim for rescission under the Act and to survive a motion to dismiss under section 2-615 of the Code of Civil Procedure. Questions of fact existed regarding whether plaintiff's offer to purchase real estate was accepted by the defendant before plaintiff withdrew his offer, making summary judgment improper.

Plaintiff Glenroy Moreira sought a declaratory judgment that a contract with defendant Western Sites, L.L.C. for the sale of residential real estate was never formed due to lack of

acceptance prior to plaintiff's withdrawal of his offer. In the alternative, plaintiff sought rescission of the contract based on defendant's alleged failure to provide plaintiff with a residential real property disclosure report pursuant to the Illinois Residential Real Property Disclosure Act (IRRPDA) (765 ILCS 77/1 *et seq.* (West 2006)). Plaintiff appeals orders of the circuit court that dismissed his rescission claim and granted summary judgment to defendant on the contract formation claim. We reverse and remand.

I. BACKGROUND

On January 13, 2007, plaintiff met with a representative of defendant in order to negotiate the purchase of a residential property located at 8248 S. Cornell in the city of Chicago. During negotiations, plaintiff received a copy of a residential real property disclosure report. This report is designed to provide buyers of residential real property with information about any material defects that the seller knows are present on the property. See 765 ILCS 77/35 (West 2006). By law, a seller must provide this report to prospective buyers before completion of the sale. See 765 ILCS 77/20 (West 2006). The version of the report that was in effect at the time of the negotiations contained 22 questions[1] regarding a seller's knowledge of potential defects, which the seller must answer by checking either "yes," "no," or "not applicable," with accompanying explanations for "yes" or "not applicable" answers. See 765 ILCS 77/35 (West 2006).

In the report provided to plaintiff, however, only the first question was answered. The remaining questions were not marked in any way, but were instead covered by a sticker that

[1] The current version of the report contains 23 questions. See P.A. 96-232 §5 (eff. Aug. 11, 2009) (amending 765 ILCS 77/35 (West 2008)).

states, "CORPORATE OWNED, NEVER OCCUPIED BY SELLER." Additionally, the property address listed on the report is 455 W. 103rd Street, not 8248 S. Cornell. The section reserved for the seller's certification by defendant is unsigned on the copy of the report in the record, but there is a signature in the section reserved for the buyer.

In addition to the report, plaintiff received a copy of the sales contract. Among other provisions, the contract contained a provision located immediately above the signature block that states, "THIS DOCUMENT WILL BECOME A LEGALLY BINDING CONTRACT WHEN SIGNED BY BUYER AND SELLER." There are at least two different copies of this contract in the record. The copy of the contract attached to the complaint is signed by plaintiff and dated January 13, 2007, but is not signed by defendant. Another version of the contract, which was attached to defendant's motion to dismiss and motion for summary judgment, is also dated January 13, 2007, but is signed by both defendant's representative and plaintiff.

At the conclusion of the negotiations, plaintiff made a formal offer to purchase the property. In accordance with a provision in the contract, plaintiff tendered $10,000 "as [a] non-refundable down payment." The remaining balance was due in installments over the next two months, with the closing to occur on March 14, 2007. In the meantime, plaintiff took possession of the property.

The closing never occurred, but what happened instead is somewhat unclear from the record. Plaintiff did not make any of the scheduled payments, yet on March 27, 2007, a third party, Pioneer Services, L.L.C., filed a forcible entry and detainer action against plaintiff, alleging that it was entitled to possession of the property. It appears that defendant assigned its

interest in the contract to Pioneer Services, which then attempted to recover the property from plaintiff. However, the written assignment to Pioneer Services that is in the record is dated April 1, 2007, several days after the lawsuit was apparently filed. Regardless of this anomaly, plaintiff and Pioneer Services reached some sort of agreement and the action eventually terminated by agreed order on May 25, 2007.

In response to the lawsuit by Pioneer Services, plaintiff notified defendant by letter on April 20, 2007, that he was withdrawing his offer to purchase the property. Plaintiff demanded the return of his $10,000 deposit but defendant refused, arguing that the deposit was forfeited under the contract as liquidated damages due to plaintiff's failure to make the required installment payments.

The parties failed to resolve the matter, and on May 2, 2007, plaintiff filed the instant declaratory judgment action. The complaint contained two counts. The first count sought return of the deposit on the ground that plaintiff's offer had not been effectively accepted before he withdrew it. Alternatively, the second count sought rescission of the contract based on section 55 of IRRPDA (765 ILCS 77/55 (West 2006)), which allows rescission as a remedy for a seller's failure to provide the residential disclosure report.

Defendant filed a motion to dismiss the complaint, and the circuit court dismissed the rescission count pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)), finding that plaintiff had not properly stated a claim because (1) plaintiff had been provided with a report, and (2) plaintiff had not alleged damages from any defect in the report that he had received. After discovery, defendant moved for summary judgment on the remaining

count. The circuit court granted summary judgment in defendant's favor, although the reasons for the circuit court's order are unknown. The order granting summary judgment that we have in the record states only that "[t]he defendant's motion for summary judgment is granted and the court finds that a valid contract exists." All claims in the case having been resolved, plaintiff timely filed a notice of appeal.

II. ANALYSIS

This appeal presents two issues. First, has plaintiff stated a claim for rescission of the contract under section 55 of IRRPDA (765 ILCS 77/55 (West 2008))? Second, is there an issue of material fact regarding the formation of the contract in this case?

A. Dismissal of the Rescission Claim

We will address the rescission issue first because that count was dismissed on the pleadings. We review *de novo* an order of dismissal under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)). *Aguilar v. Safeway Insurance Co.*, 221 Ill. App. 3d 1095, 1100-01 (1991). Our task on review is to "determine whether the allegations of the complaint, when interpreted in the light most favorable to the plaintiff, are sufficient to set forth a cause of action on which relief may be granted." *Id.* "A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts could be proved which would entitle the plaintiff to recover." *Id.* " 'We take as true all well-pled facts and reasonable inferences therefrom and consider only those facts in the pleading and included in the attached exhibits.' " *University Professionals of Illinois, Local 400 of the Illinois Federation of* Teachers *v. Stukel*, 344 Ill. App. 3d 856, 857-858 (2003), quoting *Safeway Insurance Co. v. Daddono*, 334

Ill. App. 3d 215, 218 (2002).

Under section 20 of IRRPDA (765 ILCS 77/20 (West 2006)), a seller must provide a buyer with a completed copy of this report before completing a residential real estate transaction. The purpose of this report is to "provide the prospective buyer with knowledge of any material defects in the home equal to that of the seller." *Muir v. Merano*, 378 Ill. App. 3d 1103, 1106-07 (2008). In support of this goal, IRRPDA includes an enforcement provision. In the event that a seller "fails or refuses to provide the disclosure document prior to the conveyance of the residential real property, the buyer shall have the right to terminate the contract." 765 ILCS 77/55 (West 2006). In contrast, if the seller provides a report, but it is either incomplete or false, then the buyer may seek damages. See 765 ILCS 77/20 (West 2006); 765 ILCS 77/55 (West 2006).

In this case, plaintiff sought only rescission as a remedy rather than damages, and we therefore must determine whether he has stated a claim under the first provision. A complaint states a claim for rescission under section 55 where it alleges, at a minimum, that (1) plaintiff is a prospective buyer of residential real property (735 ILCS 77/5 (West 2008)); and (2) the seller of that property failed to deliver a residential real property disclosure report to the plaintiff prior to the signing of any contract between the parties (735 ILCS 77/20 (West 2008)). See *Muir*, 378 Ill. App. 3d at 1106-07. Plaintiff argues that he is entitled to rescission because the report that he was given during negotiations was for the wrong property, was incomplete, and was not signed by defendant.

As a threshold matter, we must consider whether plaintiff has forfeited any of these

arguments. Defendant points out that plaintiff never argued in the circuit court that he is entitled to rescission due to the fact that the incorrect address appears on the disclosure report attached to the complaint. The first time that plaintiff raised this point was in a supplement to his opening brief on appeal. Instead, it has been plaintiff's position throughout litigation in the circuit court as well as in the rest of his opening brief on appeal that he is entitled to rescission due solely to the fact that 21 of the 22 questions on the report were incomplete. Plaintiff's position was essentially that receiving an incomplete report such as this is effectively the same as not receiving a disclosure report at all.

Although we are extremely troubled by plaintiff's utter failure to raise the critical point of the incorrect address in proceedings before the circuit court, we find that plaintiff has not forfeited his right to raise this particular point. The general rule is that "[q]uestions not raised in the trial court cannot be argued for the first time on appeal." *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 355 (1998); accord *Robidoux v. Oliphant*, 201 Ill. 2d 324, 343 (2002). However, the question that was raised in the circuit court by defendant's motion to dismiss is whether the complaint states a legal claim for rescission under section 55 of IRRPDA (765 ILCS 77/55 (West 2006)). Plaintiff appealed the circuit court's order dismissing the complaint, and it is our duty on appeal to examine the sufficiency of the complaint *de novo* (*Aguilar*, 221 Ill. App. 3d at 1100-01). In deciding this question, it is the complaint and its attached exhibits that we examine. See *University Professionals of Illinois*, 344 Ill. App. 3d at 857-858. Regardless of whether plaintiff brought the specific point of the incorrect address to the circuit court's attention, the purpose of our review is to determine whether the complaint

itself is legally sufficient. We consequently find that the forfeiture doctrine does not apply in this particular situation.

The complaint alleged that plaintiff received only an "incomplete and unsigned disclosure report" during negotiations and that defendant "fail[ed] to provide a complete and signed disclosure report to [p]laintiff prior to asking [p]laintiff to sign a contract for the purchase of the property." The address listed in the contract is for a property at 8248 S. Cornell, but the address listed in the disclosure report that plaintiff attached to the complaint is for a property at 455 W. 103rd Street. Construing the allegations in the complaint and attached exhibits in the light most favorable to plaintiff (*Aguilar*, 221 Ill. App. 3d at 1100-01), the essence of plaintiff's complaint is that he did not receive a completed residential disclosure report for the property that he had contracted to buy. These allegations are sufficient to make out a claim for rescission under section 55 of IRRPDA (765 ILCS 77/55 (West 2008)), meaning that this count of the complaint is sufficient to survive a motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)). Consequently, the circuit court erred in granting defendant's motion to dismiss the rescission claim.

We emphasize that we take no position on whether plaintiff's claim might ultimately succeed, and we make no finding of fact or law regarding whether the report that plaintiff received during negotiations and attached to the complaint may or may not satisfy the requirements of IRRPDA. Defendant argues that plaintiff acknowledged receipt of the report by signing it and should therefore not be able to assert that he did not receive a report within the meaning of the statute. Alternatively, defendant asserts that the erroneous address designation is

merely a scrivener's error. However, these are factual allegations that are not present on the face of the pleadings and therefore cannot be resolved on a motion to dismiss under section 2-615. At this stage of litigation, it is enough that the complaint and its attached exhibits allege a set of facts under which plaintiff could potentially be entitled to relief. See *Aguilar*, 221 Ill. App. 3d at 1100-01. Whether plaintiff received a disclosure report within the meaning of IRRPDA or whether he may have waived his right to contest the sufficiency of any report that he may have received are questions that must be resolved through further litigation rather than a motion to dismiss under section 2-615 (735 ILCS 5/2-615 (West 2008)).

B. Summary Judgment on the Contract Formation Claim

We turn now to the issue of whether an issue of material fact should have precluded summary judgment on the contract formation count. Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005 (West 2008). We consider the record as a whole, including the pleadings, depositions, affidavits, and admissions, in the light most favorable to the non-moving party. See *Illinois State Chamber of Commerce v. Filian*, 216 Ill. 2d 653, 661 (2005). "Because summary judgment is a drastic method of terminating litigation, the movant's entitlement must be free from doubt." *Equistar Chemicals, L.P. v. BMW Constructors, Inc.*, 353 Ill. App. 3d 593, 599 (2004). We review an order granting summary judgment *de novo*. See *Filian*, 216 Ill. 2d at 661.

The first count of the complaint sought a declaration that the contract was never formed and that plaintiff was entitled to the return of his deposit because he withdrew his offer before

defendant accepted it. "Whether a contract exists, its terms and the intent of the parties are questions of fact to be determined by the trier of fact." See *Hedlund & Hanley, LLC v. Board of Trustees of Community College District No. 508*, 376 Ill. App. 3d 200, 205 (2007). However, "[w]here the facts are not in dispute, *** the existence of a contract is a question of law, which the trial court may decide on a motion for summary judgment and which this court may independently review." *Reese v. Forsythe Mergers Group, Inc.*, 288 Ill. App. 3d 972, 979 (1997).

The crucial question on summary judgment here is whether there is any dispute over material facts regarding contract formation. The general rule is that a contract is formed only when there is "an offer, a strictly conforming acceptance, and consideration." *Hedlund & Hanley*, 376 Ill. App. 3d at 205-06. It is a long-standing rule in Illinois that "if the clear intent of the parties is that neither will be legally bound until the execution and delivery of a formal agreement, then no contract comes into existence until such execution and delivery." *Chicago Title & Trust Co. v. Ceco Corp.*, 92 Ill. App. 3d 58, 69 (1980); see also *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 288 (1990) ("Where the parties make the reduction of the agreement to writing, and its signature by them, a condition precedent to its completion, it will not be a contract until that is done. And this is true although all the terms of the contract have been agreed upon."), quoting *Baltimore & Ohio Southwestern R.R. Co. v. People ex rel. Allen*, 195 Ill. 423, 428 (1902).

There are at least three issues of fact in this case that preclude summary judgment. First, there is an issue of fact as to whether defendant accepted plaintiff's offer before plaintiff

withdrew it on April 20, 2007. The version of the contract attached to the complaint does not have defendant's signature on it, but the copy of the contract in the record that has the signatures of both parties first appeared as an exhibit to a motion that was filed by defendant on August 13, 2007, long after plaintiff sent his letter withdrawing his offer. The deposition testimony of several of defendant's representatives does not clearly indicate when exactly defendant signed the contract. Whether defendant accepted plaintiff's offer by signing the contract or by some other method before plaintiff withdrew the offer is an issue for a finder of fact.

Second, the contract specifically states that it "will become a legally binding contract when signed by buyer and seller." Whether the parties intended this provision to mean that their signatures are a condition precedent to the formation of the contract or whether this provision is merely a statement of the legal effect of the parties' signatures is an issue for the finder of fact, not the circuit court on summary judgment. See *Hedlund & Hanley*, 376 Ill. App. 3d at 205-06.

Third, even if the parties' signatures were a condition precedent to formation, there is an issue of fact as to whether plaintiff may have waived strict compliance with the condition precedent by his conduct. See, *e.g.*, *M X L Industries v. Mulder*, 252 Ill. App. 3d 18, (1993) ("A party seeking the benefit of a condition precedent, however, may waive strict compliance by conduct indicating that strict compliance with the provision will not be required."). Plaintiff took possession of the property immediately after the negotiations completed, and whether this or any other action by plaintiff may have waived the condition precedent is an issue for the finder of fact.

Because there are issues of material fact regarding the formation of the contract,

summary judgment is improper in this case. See 735 ILCS 5/2-1005 (West 2008). The circuit court erred by finding as a matter of law that a contract existed and that defendant was entitled to summary judgment.

III. CONCLUSION

As explained above, we reverse the order of the circuit court dismissing plaintiff's claim for rescission of the contract under section 55 of IRRPDA (765 ILCS 77/55 (West 2008)). We also reverse the circuit court's order granting summary judgment to defendant on plaintiff's claim for a declaration that a contract was never formed. We remand for further proceedings on both counts.

Reversed and remanded.