

2011 IL App. (1st) 102973-U

FIRST DIVISION
December 12, 2011

No. 1-10-2973

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

JEROME ALEXANDER ASSOCIATES, LTD.,)	Appeal from the Circuit Court
an Illinois corporation and JEROME ALEXANDER)	of Cook County.
)	
Plaintiffs-Appellants,)	No. 06 CH 13066
)	
v.)	
)	Honorable
ASSET ARBITRATION RECOVERY PROGRAM)	William Maki,
INC., and SANDOR GROSSMAN,)	Judge Presiding.
)	
Defendants-Appellees.)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

HELD: (1) Dismissal of the plaintiffs' amended complaint was proper pursuant to section 2-619(a)(9). (2) Denial of the plaintiffs' motion for leave to amend their complaint was proper where the motion was brought after the entry of a final judgment.

¶ 1 The plaintiffs, Jerome Alexander Associates, Ltd. (JAAL) and Jerome Alexander, filed an action against the defendants, Asset Arbitration Recovery Program, Inc. and Sandor Grossman

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for breach of contract and for an accounting. The circuit court dismissed the amended complaint and denied leave to file a second amended complaint. The plaintiffs appeal. We affirm the dismissal of the plaintiffs' amended complaint and the denial of leave to file a second amended complaint.

¶ 2 The plaintiffs' verified complaint was filed on June 30, 2006. The complaint alleged that the parties entered into an asset purchase agreement whereby the plaintiffs agreed to sell the assets of JAAL to the defendants. As part of the asset purchase agreement, the parties entered into a consulting agreement, an agreement not to compete, and executed a promissory note providing for the payment of the purchase price in installments. Count I alleged that the defendants had breached the asset purchase agreement and requested specific performance of the asset purchase agreement, an accounting of commissions due to plaintiff Alexander, and a judgment in the amount owed. Count II alleged that the defendants converted office equipment for their own use, terminated the plaintiffs' lease and diverted mail and funds from the plaintiffs. The plaintiffs requested an accounting to determine the exact amount owed to the plaintiffs and for a judgment in the amount owed.

¶ 3 On April 3, 2007, the circuit court granted the defendants' motion to compel arbitration. However, it appears from the record that the matter was never arbitrated. Plaintiff Alexander died on August 22, 2007, and his death was spread of record on September 17, 2007. Thereafter, the case was continued for status. On July 20, 2009, the court granted the defendants' motion to dismiss defendant Grossman as a party but only as to Count I of the complaint.

¶ 4 On August 9, 2009, the defendants filed a motion to dismiss both counts of the complaint.

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They sought dismissal of Count I on the grounds it violated section 2-603(b) of the Code of Civil Procedure (Code) (735 ILCS 5/2-603(b) (West 2008)), which required that separate causes of action be stated in separate counts, and Count II on the grounds that the plaintiffs failed to state a cause of action for an accounting. 735 ILCS 5/2-615 (West 2008). The circuit court dismissed Count I with leave to amend and denied the motion to dismiss as to Count II. On December 9, 2009, the plaintiffs filed their amended complaint.

¶ 5 On March 17, 2010, the defendants filed a motion to dismiss the amended complaint and for judgment on the pleadings. They sought dismissal of the amended complaint on the basis that it was not verified and that plaintiff JAAL was not using its correct corporate name. Specifically as to Count I, the defendants alleged that deceased plaintiff Alexander lacked capacity to sue and should be dismissed as a party pursuant to section 2-619(a)(2) (735 ILCS 5/2-619(2) (West 2008)). They also sought dismissal pursuant to section 2-619(a)(9) (735 ILCS 5/2-619(9) (West 2008)), on the basis that, in a pending suit against an unrelated defendant, the plaintiffs alleged that JAAL's business was ongoing, contradicting their allegations in the present suit that they sold JAAL's assets to the defendants. As to Count II, the defendants alleged that the plaintiffs failed to allege facts entitling them to an accounting.

¶ 6 On June 21, 2010, the circuit court entered an order dismissing Count I of the amended complaint pursuant to section 2-619(2) (lack of capacity to sue) and dismissing Count II pursuant to section 2-619(9) (other affirmative matter). On July 20, 2010, the plaintiffs filed a motion to reconsider the dismissal and for leave to file a second amended complaint. The defendants filed a motion for sanctions. On September 14, 2010, the circuit court denied the plaintiffs' motion for

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reconsideration and denied them leave to file a second amended complaint. The defendants' motion for sanctions was also denied. The plaintiffs appealed.

¶ 7

ANALYSIS

¶ 8

I. Dismissal of the Amended Complaint

¶ 9

A. *Standard of Review*

¶ 10 As the dismissal of both counts of the amended complaint were pursuant to section 2-619 of the Code, our review is *de novo*. *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 954-55 (2008). Review of an appeal from a section 2-619 dismissal is similar to the review of an order granting summary judgment. *Westmeyer*, 382 Ill. App. 3d at 955. The court considers whether a genuine issue of material fact exists that would preclude the dismissal, or, in the absence of a genuine issue of material fact, whether the dismissal is proper as a matter of law. *Westmeyer*, 382 Ill. App. 3d at 955.

¶ 11

B. *Discussion*

¶ 12 "As a reviewing court, we can sustain the decision of a lower court on any grounds which are called for by the record, regardless of whether the lower court relied on those grounds and regardless of whether the lower court's reasoning was correct." *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995). In this case, we conclude that both counts of the amended complaint were properly dismissed, though not necessarily on the bases set forth in the circuit court's order.

¶ 13 The plaintiffs contend, first, that the circuit court erred in dismissing the complaint on the basis that the amended complaint continued to refer to deceased plaintiff Alexander. The

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plaintiffs' contention that the dismissal was based on the continued reference to the deceased plaintiff finds no support in the record. However, we find that it was not error to dismiss the amended complaint as to deceased plaintiff Alexander.

¶ 14 Common law contract actions survive the death of either party. *Parkway Bank & Trust Co. v. LeVine*, 45 Ill. App. 3d 497, 499 (1977). Section 2-1008(b) of the Code (735 ILCS 5/2-1008(b) (West 2008)) provides that where a plaintiff dies during the pendency of the case and the cause of action survives, a motion to substitute a special representative for the deceased plaintiff must be filed within 90 days, or the action may be dismissed as to the deceased party. In this case, no motion for substitution was filed, and therefore, deceased plaintiff Alexander's dismissal from the suit for lack of capacity to sue was proper. Section 2-1008(b) further provides as follows:

"In the event of the death of a party in an action in which the right sought to be enforced survives only as to the remaining parties to the action, the action does not abate. The death may be suggested of record and the action shall proceed in favor of or against the remaining parties." 735 ILCS 5/2-1008(b) (West 2008).

Therefore, as to plaintiff JAAL, the complaint was not subject to dismissal on that basis.

¶ 15 Next, the plaintiffs contend that the failure to verify the amended complaint was not a basis for dismissing the amended complaint. We agree. Section 2-605(a) states that if any pleading is verified, any subsequent pleading must be verified unless excused by the court. 735 ILCS 5/2-605(a) (West 2008). Section 2-605 (a) does not require that a complaint be verified. Therefore, even if the original complaint is verified, the failure to verify a subsequent complaint

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is not grounds for dismissal. See *People ex rel. Hartigan v. All American Aluminum & Construction Co.*, 171 Ill. App. 3d 27, 37 (1988). We further agree with the plaintiffs that the amended complaint was not subject to dismissal because the complaints in this case were brought in the name of the corporation rather than its amended name. See 805 ILCS 105/110.35 (West 2008).

¶ 16 The plaintiffs then contend that Count I of the amended complaint was not subject to dismissal based on "other affirmative matter." 735 ILCS 5/2-619(a)(9) (West 2008).

"Affirmative matter" refers to a defense that negates the cause of action completely or one that refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *Treadway v. Nations Credit Financial Services Corp.*, 383 Ill. App. 3d 1124, 1128 (2008).

¶ 17 The plaintiffs maintain that JAAL's suit against Melvin Alexander, the deceased plaintiff's brother, involved commissions that were specifically excluded from the asset purchase agreement. They argue that, at the very least, whether the two law suits are identical is a genuine issue of material fact precluding dismissal pursuant to section 2-619(a)(9).

¶ 18 A copy of the first amended complaint in *Jerome Alexander & Associates, Ltd. v. Melvin Alexander*, No. 06 CH 15431, was attached to the defendants' motion to dismiss the amended complaint. The first amended complaint was filed on March 26, 2007, and alleged a breach of contract in that "[s]ince February of 1991 to present, the Plaintiff and Defendant have had an ongoing agreement whereby the Defendant was to pay to the Plaintiff a percentage of the commissions on all clients of the Plaintiff referred to the Defendant, MELVIN ALEXANDER."

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The first amended complaint alleged that defendant Alexander was required to account for the clients he obtained through the plaintiff and to remit the sums owed to the plaintiff. The first amended complaint further alleged that since September 2005, defendant Alexander had not accounted for the sums due and owing to the plaintiff. The asset purchase agreement between the plaintiffs and the defendants in the present case specifically excluded "[c]ommissions from all roll-over annuities earned and/or accrued as of the closing date of this transaction," which, according to the amended complaint, took place on January 1, 2006.

¶ 19 Comparing the two complaints, it appears that in the suit against Alexander, the plaintiffs were seeking to recover commissions from referrals earned both before and after the sale of JAAL's assets to the defendants and were not excluded from the sale under the terms of the asset purchase agreement. Therefore, Count I of the amended complaint was properly dismissed as to both plaintiffs on the basis of other affirmative matter. 735 ILCS 5/2-619(a)(9) (West 2008).

¶ 20 We also find dismissal of Count I proper on another ground. Section 2-603(b) requires that "each separate cause of action upon which a separate recovery might be had shall be stated in a separate count *** and each count shall be separately pleaded, designated and numbered ***." 735 ILCS 5/2-603(b) (West 2008). Our court has held that a complaint may be dismissed for failure to meet statutory pleading requirements. *Rubino v. Circuit City Stores, Inc.*, 324 Ill. App. 3d 931, 940 (2001). In this case, the circuit court granted the defendants' motion to dismiss Count I of the original complaint based on the plaintiffs' violation of section 2-603(b) and granted the plaintiffs leave to amend. However, Count I of the amended complaint failed to rectify the violation of section 2-603(b) which required its dismissal. Therefore, dismissal of

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Count I of the amended complaint as to both plaintiffs was proper on that ground as well.

¶ 21 We also determine that the dismissal of Count II of the amended complaint seeking an accounting was proper. In order to state a cause of action for an accounting," the complaint must establish that there is no adequate remedy at law and one of the following: (1) a breach of a fiduciary relationship between the parties; (2) a need for discovery; (3) fraud; or (4) the existence of mutual accounts which are of a complex nature." *Landers v. Fronczek*, 177 Ill. App. 3d 240, 245 (1988). Even if we accepted the plaintiffs' argument that they had no adequate remedy at law, the allegations that the defendants converted office equipment, interfered with the plaintiffs' lease and intercepted the plaintiffs' mail in the period leading up to the closing did not establish any of the elements set forth above to state a cause of action for an accounting.

¶ 22 The plaintiffs then argue that Count II should not have been dismissed with prejudice merely because they sought the wrong remedy. Section 2-617 of the Code provides that where the plaintiff established facts entitling it to relief but sought the wrong remedy, the court "shall permit the pleadings to be amended, on just and reasonable terms, and the court shall grant the relief to which the plaintiff is entitled on the amended pleadings or upon the evidence." 735 ILCS 5/2-617 (West 2008).

¶ 23 "An argument not raised in the circuit court in response to a motion to dismiss and presented for the first time on appeal is waived." *Jespersen v. Minnesota Mining & Manufacturing Co.*, 288 Ill. App. 3d 889, 894-95 (1997). In response to the defendants' motion to dismiss Count I of the original complaint, the plaintiffs argued that if under section 2-617, "seeking the wrong remedy was not fatal then it would follow that the Plaintiff may also seek

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multiple remedies." However, the plaintiffs failed to argue in response to the motion to dismiss the amended complaint that they should be allowed to amend Count II pursuant to section 2-617 because they sought the wrong remedy. Therefore, the argument is waived.

¶ 24 We conclude that the dismissal of the amended complaint was not error.

¶ 25 II. Denial of Leave to Amend

¶ 26 The plaintiffs contend that the circuit court abused its discretion when it denied their motion to file an amended complaint. The plaintiffs sought to add a count alleging conversion to the amended complaint.

¶ 27 Section 2-616(a) of the Code (735 ILCS 5/2-616(a) (West 2008)) provides that at any time prior to final judgment, the court may permit amendments on just and reasonable terms to enable the plaintiff to sustain the claim brought in the suit. However, after a final judgment has been entered, pleadings may be amended only to conform the pleadings to the proof. 735 ILCS 5/2-616(c) (West 2008). Where a circuit court's dismissal of an amended complaint constituted a final judgment, there is no statutory right to amend, and the denial of a motion for leave to amend is not error. *Compton v. County Mutual Insurance Co.*, 382 Ill. App. 3d 323, 332 (2008).

¶ 28 In the present case, the circuit court dismissed the amended complaint pursuant to section 2-619 of the Code. Under Illinois Supreme Court Rule 273 (Ill. S. Ct. R. 273), an involuntary dismissal pursuant to section 2-619, with certain exceptions not applicable here, acts as a final judgment on the merits. *Matejczyk v. City of Chicago*, 397 Ill. App. 3d 1 (2009) (citing *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 335 (1996) quoting Ill. S. Ct. R. 273). Therefore, the denial of the plaintiffs' motion for leave to amend their complaint was not error.

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¶ 29

CONCLUSION

¶ 30 For all of the foregoing reasons, we affirm the orders dismissing the plaintiffs' amended complaint and denying the plaintiffs' motion for leave to file an amended complaint.

¶ 31 Affirmed.