SECOND DIVISION
April 10, 2012

No. 1-11-0874
2012 IL App (1st) 110874-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ACI ENVIRONMENTAL CORPORATION,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	09 L 12583
	)	
MICHAEL SKULSTAD,	)	Honorable
	)	Bill Taylor,
Defendant-Appellee.	)	Judge Presiding.

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

ORDER

Held: Defendant failed to demonstrate that plaintiff's complaint was subject to dismissal under 735 ILCS 5/2-619 (West 2010), where defendant failed to attach affidavit to motion and defendant's only ground for dismissal was a contract that plaintiff was not a party to and that was not relevant to claims in complaint.

¶1 Plaintiff ACI Environmental Corporation appeals from the dismissal of its complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)). We reverse and remand.

¶2 We take the following facts from the allegations in plaintiff's first amended complaint, which we treat as true for purposes of a section 2-619 motion. See *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. Defendant and his wife jointly owned a company called Alf's Painting &

Decorating, Inc. In 2003, plaintiff negotiated to buy the company, with the condition that defendant would remain on as manager after the purchase. The sale went forward and was apparently completed sometime before April 2004.

¶3 At the same time as the parties were negotiating the purchase, Alf's held a contract with Walsh Construction Company to perform work on a judicial facility in DuPage County. At some point before the parties consummated the sale of Alf's, Walsh mistakenly paid Alf's twice for work valued at about $30,000. Instead of alerting Walsh to the error, defendant allegedly created a phony invoice in Alf's records in order to make it appear that Alf's had actually performed work that justified the additional payment. Defendant did not reveal this to either plaintiff or Walsh, and the false invoice made it appear that Alf's was more profitable than it actually was. Walsh eventually discovered the mistake and demanded reimbursement, but only after plaintiff had purchased Alf's. Plaintiff confronted defendant about the situation, and he allegedly admitted to creating the fake invoice. Defendant agreed to compensate plaintiff for the $30,000 and executed a promissory note for that amount in plaintiff's favor.

¶4 Defendant ultimately reneged on his promise and refused to pay, so plaintiff brought this action in order to recover for breach of the promissory note (Count I), interest on the note (Count II), and fraud related to the fake invoice (Count III). Defendant moved to dismiss the first amended complaint under section 2-619, which the trial court granted. Plaintiff now appeals.

¶5 We note that defendant has not filed an appellee's brief, so we review this case pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976). Given that the issues raised are not difficult and the record is simple, we are able to decide this appeal on the merits without the benefit of an appellee's brief. *See id.* at 133.

¶6 As an initial matter, plaintiff argues that the trial court erred by refusing to certify a proposed report of proceedings for inclusion in the record pursuant to Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). The report in question covers the hearing at which the parties argued and the trial court ruled on the motion to dismiss. The trial court denied plaintiff's motion to certify the report on the ground that the trial court did not "remember the case with sufficient particularity." According to plaintiff, the trial court's decision not to certify the report is important because plaintiff contends on appeal that the report would demonstrate that the trial court offered no reasons, either oral or written, for dismissing the complaint.

¶7 We need not reach this issue because the missing report of proceedings does not affect our review. We review dismissal of a complaint under section 2-619 *de novo*. See *Hubble v. Bi-State Development Agency of the Illinois-Missouri Metropolitan District*, 238 Ill. 2d 262, 267 (2010). Under this standard of review, "we afford no deference to the determinations by the lower courts" and are therefore free to undertake our own review of the record in the first instance. *Doe v. Diocese of Dallas*, 234 Ill. 2d 393, 396 (2009). The record contains the pleadings and their supporting documents, defendant's motion to dismiss, and plaintiff's response, which are all we need to understand and review the relevant issues before us on appeal. *See id.* ("When reviewing an order granting a motion to dismiss under section 2-619, we may consider all facts presented in the pleadings, affidavits, and depositions found in the record."). While the report of proceedings might have been of interest, it is not essential for our review of this case.

¶8 The main issue in the appeal is whether plaintiff's complaint is subject to dismissal under section 2-619. "A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's claim, but asserts affirmative matter that defeats the claim. *** When ruling on a section 2-619

motion to dismiss, the circuit court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Id.* We must also ascertain "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Carrol v. Paddock*, 199 Ill. 2d 16, 22 (2002). The burden of proving that dismissal is proper is on the defendant. See *Federated Industries v. Reisin*, 402 Ill. App 3d 23, 27 (2010).

¶9 Most of the paragraphs in defendant's motion to dismiss merely recite allegations from the first amended complaint and state, without support, explanation, or citation, that the allegations are false. This may be appropriate for a responsive pleading such as an answer (see 735 ILCS 5/2-610 (West 2010)), but it has no place in a motion to dismiss. Indeed, far from demonstrating that there are no issues of material fact, the defendant's motion *identifies* disputed issues of fact by denying the truth of plaintiff's allegations. The majority of defendant's motion is therefore irrelevant to the question of whether the first amended complaint is subject to dismissal under section 2-619.

¶10 Based on a single paragraph at the end of the motion, however, it appears that defendant is arguing that a provision in a "Stock Purchase Agreement" between the parties cuts off any claims that plaintiff may have against defendant. Because we do not have an appellee's brief from defendant, we can rely only on his motion to dismiss in determining the grounds on which his motion is based. Defendant argued:

> "Aside from all of the above falsehoods, the contract between the parties is controlling. Said contract in the last paragraph #4 state [*sic*] that any warranties under said contract survive for two (2) years, or until November 2005. The

original complaint was filed in October, 2009 and beyond the two year *contractual* limitation." (Emphasis added.)

¶11 It is not clear from this paragraph what specific ground for dismissal under section 2-619 defendant is arguing. It is possible that defendant is arguing that plaintiff's claim is barred either due to the existence of an implied release, which is a ground for dismissal under section 2-619(a)(6), or some other contractual matter, which would fall under section 2-619(a)(9). The one point that is clear is that, because defendant refers only to a "contractual limitation", he is apparently not arguing that the relevant statute of limitations bars plaintiff's claims under section 2-619(a)(5).

¶12 Regardless, defendant's motion is deficient for multiple reasons. First, the motion is not supported by an affidavit as required by section 2-619. See 735 ILCS 2-619(a) (West 2010) ("If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit."). Defendant has simply attached documents to his motion as exhibits, which is a course of action that does not comply with the express procedural requirements of section 2-619.

¶13 Second, even if we were to overlook the lack of an affidavit, the contract that defendant has attached to his motion and relies on is irrelevant. The contract is a Stock Purchase Agreement that was executed in November 2003 by defendant, his wife, and two companies: Alf's Painting & Decorating, Inc. and Asbestos Control, Inc. Contrary to defendant's assertion in his motion, plaintiff ACI Environmental Corporation is not, in fact, a party to this contract.[1] The Stock Purchase Agreement therefore has no bearing on whether plaintiff's claims against defendant are barred for purposes of section 2-619.

[1] This fact is actually quite interesting, given that plaintiff appears to allege in the first amended complaint that it purchased Alf's around this time. How plaintiff came to own Alf's is unclear from the record, but it ultimately does not make a difference for purposes of our review of defendant's section 2-619 motion. At this point in the litigation, the only basis for dismissal that defendant has advanced is that plaintiff's action is barred by the contract, which is not the case.

¶14 Third, even if we were to consider plaintiff to be bound by the contract, the clause that defendant refers to is a warranty clause regarding representations in the contract. This lawsuit is based on defendant's alleged fraudulent acts in connection with defendant's sale of Alf's to plaintiff and defendant's failure to pay a promissory note that he signed. It is not based on defendant's breach of a contractual warranty. Because defendant is not being sued for breach of warranty, it does not matter when the contractual warranties in the Stock Purchase Agreement expired. The warranty clause in the Stock Purchase Agreement is therefore irrelevant.

¶15 Because our review is governed by *Talandis*, we will address one final point for the sake of a comprehensive analysis. Even if we were to generously interpret the warranty clause in the light most favorable to defendant (which is emphatically not the standard of review for a section 2-619 motion), then at most the warranty clause might be a bar only to plaintiff's common-law fraud count because that count is at least in part based on defendant's representations about the financial health of Alf's during the purchase negotiations. But the promissory note at issue in Count I and Count II is a completely separate legal document that was executed in April 2004, about six months *after* the Stock Purchase Agreement was executed. Consequently, even if there is a potential argument to be made regarding the Stock Purchase Agreement's effect on the fraud count, that contract can have no possible effect on the counts involving the promissory note. At a minimum, those counts should not have been dismissed on this ground.

¶16 But that hypothetical argument is beside the point because the burden of demonstrating that the first amended complaint should be dismissed under section 2-619 is on defendant, not plaintiff. See *Reisin,* 402 Ill. App 3d at 27. Defendant failed to carry his burden, so it was error for the trial court to grant the motion and dismiss the case.

¶17 Reversed and remanded.