SIXTH DIVISION
September 20, 2013

No. 1-12-1366

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

STOVER & COMPANY, INC.,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11 L 7697
	)	
THE SALVATION ARMY and EDGEMARK	)	
COMMERCIAL REAL ESTATE SERVICES, INC.,	)	Honorable Bill Taylor,
	)	Judge Presiding.
Defendants-Appellees.	)	

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The decision of the circuit court to dismiss plaintiff's complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure is reversed and remanded. Plaintiff sufficiently sets forth causes of action against defendants for *quantum meruit*. Defendants failed to assert an affirmative defense to warrant dismissal of plaintiff's complaint.

¶ 2 Plaintiff, Stover & Company, Inc. (Stover), filed an action against defendants, The Salvation Army (Salvation Army) and Edgemark Commercial Real Estate Services, Inc. (Edgemark), seeking compensation for real estate broker services Stover provided. In both counts of the complaint, Stover sought recovery of $36,000 on a theory of *quantum meruit* against each of the defendants. The circuit court dismissed Stover's 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)). Stover appeals from the order dismissing its claims against Salvation Army and Edgemark pursuant to Supreme Court Rule 303. Ill. S. Ct. R. 303 (eff. June 4, 2008). On appeal, Stover contends: (1) the complaint sufficiently alleged causes of action in *quantum meruit* against defendants; and (2) the circuit court improperly determined a question of fact in ruling on a motion to dismiss. For the reasons which follow, we reverse the decision of the circuit court and remand for proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 On July 25, 2011, Stover filed a two-count complaint against Salvation Army and Edgemark. Counts I and II set forth a cause of action in *quantum meruit* against Salvation Army and Edgemark, respectively. The complaint alleged the following facts.

¶ 5 Stover is a commercial real estate broker. Salvation Army is a service organization which operates retail stores. Edgemark is a commercial real estate broker which, at times relevant to the complaint, was acting as the listing agent for the owners of Prairie View Plaza in Morton Grove (Prairie View).

¶ 6 In November 2006, Salvation Army requested Stover search for a location to lease and

operate as a retail store. Stover located a potential location at Prairie View and submitted a proposal to Edgemark on behalf of Salvation Army. In response, Edgemark presented a letter of intent to Salvation Army through Stover. The letter of intent acknowledged Stover as the broker representing Salvation Army. From November 2006 until January 2007, Stover represented Salvation Army in negotiations regarding the lease. In January 2007, Salvation Army informed Stover it could not immediately open a retail store in Prairie View, but that it would revisit the location in the fall of 2007. In August 2008, Salvation Army executed a lease with Prairie View.[1]

¶ 7 Stover asserts it rendered valuable and indispensable non-gratuitous broker services in connection with the executed lease. Stover further set forth it expected to be compensated for its services. Additionally, Salvation Army and Edgemark accepted the benefit of those services and it would be unjust for the defendants to retain these benefits without compensation to Stover. Lastly, Stover alleged the reasonable value of the services rendered was no less than $36,000.

¶ 8 Attached to the complaint was a letter from Salvation Army written by Major Larry R. Manzella (Manzella), Northside Adult Rehabilitation Commander Administrator, dated November 9, 2006. The letter was addressed to Phillip J. Stover, president of Stover, and stated "[t]he Salvation Army is interested in trying to reach a lease agreement for the above mentioned

[1]Stover alleges the lease was executed in August 2008. Salvation Army, however, attaches a copy of the executed lease to the motion to dismiss, which demonstrates the lease was executed on April 15, 2008.

property." The "above mentioned property" was identified as "SEC Dempster St. & Waukegan Rd." The letter went on to state what Salvation Army was willing to offer to lease the property. The letter did not indicate Stover was its exclusive broker or whether Stover would be compensated for these services.

¶ 9 A second letter from Phillip J. Stover to Matthew J. Smetana (Smetana), vice president of Edgemark and dated November 14, 2006, was also attached to the complaint. The letter referenced the property located at "SEC Dempster & Waukegan" and identified the property as being "the vacant 27,748 square foot store at the Prairie View Plaza." The letter thanked Smetana for showing Manzella and Phillip J. Stover the property and set forth the requested terms for the lease agreement. The letter also contained a provision regarding commissions:

> "This proposal is subject to the Owner agreeing to pay Stover & Company, Inc. a real estate brokerage commission equal to a dollar per square foot per year for the term of the lease payable 50% upon lease execution and 50% on occupancy. The Owner agrees to pay a real estate commission of a dollar per square foot per year would [sic] be paid to Stover & Company in the event that an option to extend was exercised."

The proposal was never signed by Edgemark or the owners of Prairie View.

¶ 10 The final exhibit attached to the complaint was a letter dated November 16, 2006, from Smetana to Phillip J. Stover. The letter indicated Edgemark was the agent for the owners of Prairie View and that the letter was a " 'letter of intent' to enter into an agreement with your client to lease space at Prairie View Plaza in Morton Grove, Illinois." The letter included a counter-proposal regarding the lease of "space 1084." A provision regarding commissions was also

included and stated as follows:

> "Landlord and Tenant acknowledge that Stover & Company, Inc. is Broker representing the Tenant in this transaction and Edgemark Commercial Real Estate Services, LLC is Broker representing the Landlord in this transaction. Both parties shall be paid per the terms of a separate fee agreement. Tenant shall indemnify Edgemark and Landlord from any claims of other parties other than Stover & Company, Inc[.] claiming fee's [sic] for this transaction."

The letter further stated it was "solely intended as a memorandum" and "neither party is under a binding obligation to the other until a lease, acceptable by both parties[,] has been prepared and executed."

¶ 11 On September 7, 2011, Salvation Army filed a combined motion to dismiss pursuant to section 2-619.1 of the Code. 735 ILCS 5/2-619.1 (West 2010). Shortly thereafter, Edgemark filed a similar motion which adopted the arguments raised by Salvation Army. Defendants contended the complaint must be dismissed pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) because the lease executed in 2008 was for space 3000, not space 1084 which was the subject of the negotiations in which Stover participated. Additionally, defendants asserted Stover did not allege it provided a benefit to them in order to recover in *quantum meruit*. Defendants further contended the complaint must be dismissed pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)) because Stover was not the procuring cause of the executed lease for space 3000 and therefore was not entitled to a commission.

¶ 12 Salvation Army attached an affidavit from Manzella to the motion. Manzella averred he

is a major for Salvation Army and in November 2006, Stover approached Salvation Army to present a possible retail space for Salvation Army to lease. In November 2006, Stover showed Manzella a vacant unit known as space 1084 in Prairie View. Salvation Army submitted a proposal to lease space 1084 to Edgemark through Stover. Before Salvation Army could enter into the lease of space 1084, the unit had to be approved by Major Graham Allen, the Salvation Army Adult Rehabilitation Commander, and by the Salvation Army Board of Trustees. In January 2007, Major Allen and Manzella visited space 1084 and Major Allen determined the property was not suitable. Thereafter, Manzella informed Stover that Salvation Army could not open a store in space 1084 and negotiations ceased in January 2007.

¶ 13 Manzella further averred that sometime prior to spring of 2008, he contacted Edgemark to inquire about another vacant property at Prairie View. Thereafter, he visited space 3000 at Prairie View. In spring of 2008, Manzella, along with the Salvation Army's attorney, negotiated a lease for space 3000. On April 15, 2008, Salvation Army executed the lease for space 3000 at Prairie View. Manzella stated a true and accurate copy of the lease was attached to his affidavit. Lastly, Manzella averred Stover: (1) was not acting as Salvation Army's real estate broker after January 2007; (2) never showed Salvation Army space 3000; and (3) did not negotiate the 2008 lease.

¶ 14 The executed April 15, 2008, lease was attached to Manzella's affidavit. The lease provided for rental of "the premises commonly known as 6715 Dempster Street, Morton Grove, Illinois and depicted as the 'Premises' on Exhibit A attached hereto *** in the shopping center *** commonly known as Prairie View Shopping Center ***" for a five year lease term. Exhibit

A, entitled "Depiction of Center/Depiction of Premises" was a map of Prairie View and labeled the "Premises" with an arrow directed at a shaded block on the map. No space numbers were visible on the map.

¶ 15 Paragraph 23 of the executed lease contained a provision regarding real estate brokers:

> "Tenant represents that Tenant has directly dealt with and only with Edgemark Commercial Real Estate Services, LLC (whose commission, if any, shall be paid by Landlord pursuant to separate agreement) as broker in connection with this Lease and agrees to indemnify and hold Landlord harmless from all damages, liability and expense (including reasonable attorneys' fees) arising from any claims or demands of any other broker or brokers or finders for any commission alleged to be due such broker or brokers or finders in connection with its participating in the negotiation with Tenant of this Lease."

¶ 16 Manzella also averred he attached a true and accurate copy of a map of Prairie View to the affidavit. The map identified each store by number. The map demonstrated space 3000 as an available 18,300 square foot unit and space 1084 as an available 27,748 square foot unit. Stover filed no counter-affidavit in response.

¶ 17 On February 21, 2011, after the matter was fully briefed and argued by the parties, the circuit court entered an order granting defendants' motions pursuant to both 2-615 and 2-619 of the Code. The circuit court found:

> "the subject property of the executed lease [space 3000] is a property wholly separate and apart from the property which Plaintiff performed work upon which he could

> potentially claim commission had the contract been consummated on Space #1084. Although Plaintiff was instrumental in introducing the parties, absent more, the Court finds Defendant Edgemark to be the procuring agent and as such, Plaintiff is not entitled to recover under a theory of *quantum meruit*."

Additionally, the circuit court found Salvation Army did not consider Stover its broker in connection with space 3000 and did not agree to pay Stover a commission. The circuit court stated this was supported by paragraph 23 of the executed lease which "expressly demonstrates Defendant The Salvation Army's intent that it no longer retained the services of the Plaintiff as its broker in procuring a suitable property." On March 22, 2011, Stover filed a motion to reconsider, which was denied on April 11, 2011. Stover timely filed this appeal on May 10, 2011.

¶ 18 DISCUSSION

¶ 19 Stover contends the circuit court erred in granting the motions to dismiss because it sufficiently alleged causes of action in *quantum meruit* against defendants. Further, Stover contends the circuit court improperly determined a question of fact, that Stover was not the procuring cause of the executed lease, on a motion to dismiss.

¶ 20 Defendants respond the circuit court correctly dismissed Stover's complaint, as it failed to state a cause of action for *quantum meruit*. Specifically, Stover cannot allege it performed a service which benefitted defendants to entitle it to the relief sought. Additionally, defendants assert the circuit court properly determined Stover was not the procuring cause of the executed lease, as Stover failed to produce a counter-affidavit. Therefore, all facts alleged in Manzella's

affidavit must be taken as true and Stover's complaint was appropriately dismissed.

¶ 21 Stover's complaint was dismissed pursuant to a combined motion brought under section 2-619.1 of the Code. 735 ILCS 5/2-619.1 (West 2010). This section permits section 2-615 and section 2-619 motions to be filed together as a single motion, but the combined motion shall be divided into parts which are limited to and specify the single section of the Code under which relief is sought. *Id.* Under either section 2-615 or 2-619, our review is *de novo*. *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, ¶ 64. *De novo* consideration means we perform the same analysis that a trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 22 A motion to dismiss pursuant to section 2-615 of the Code attacks the legal sufficiency of a complaint by alleging defects on the face of the complaint. 735 ILCS 5/2-615 (West 2010); *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). When ruling on a section 2-615 motion, the relevant question is whether, taking all well-pleaded facts as true, the allegations in the complaint, construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004). Exhibits attached to a complaint become part of the pleading for a motion to dismiss. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. When ruling upon a 2-615 motion, a trial court may consider only the allegations of the complaint and may not consider defendant's other supporting material. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 49. A motion to dismiss should not be granted "unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009). Illinois is a

fact-pleading state; conclusions of law and conclusory allegations unsupported by specific facts are not sufficient to survive dismissal. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996).

¶ 23 In contrast, the purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proven issues of fact at the outset of litigation. *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). A motion to dismiss pursuant to section 2-619 of the Code admits the legal sufficiency of a plaintiff's complaint but raises defects, defenses, or other affirmative matters appearing on the face of the complaint or which are established by external submissions acting to defeat the complaint's allegations. 735 ILCS 5/2-619 (West 2010); *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993); *Russell v. Kinney Contractors, Inc.*, 342 Ill. App. 3d 666, 670 (2003). A motion pursuant to section 2-619(a)(9) of the Code asserts the claim is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). Our supreme court has explained the phrase " ' affirmative matter' encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action." *Hodge*, 156 Ill. 2d at 115.

¶ 24 Along with the motion to dismiss a defendant may attach affidavits which assert other affirmative matter. *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073 (1992). These affidavits, however, may not attack the factual basis of the plaintiff's claim. *Id.* Aside from properly raised affirmative matter, "[i]f a defendant wishes to challenge the factual sufficiency of a plaintiff's claim, the summary judgment motion is the proper vehicle." *Id.* "The affidavits filed by a defendant in support of a summary judgment motion, which contest the allegations in plaintiff's complaint, are specifically challenging the truth of these charges." *Id.*

"A section 2-619 motion and its accompanying affidavits, however, are not attacking the factual basis of the plaintiff's claim; they are asserting 'other affirmative matter avoiding the legal effect of or defeating the claim.' " *Id.* (quoting Ill. Rev. Stat. 1991, ch. 110, par. 2-619(a)(9)).

¶ 25 A section 2-619 motion also "admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned from those facts." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). A defendant, however, does not admit the truth of any allegations in plaintiff's complaint that may touch on the affirmative matters raised in the 2-619 motion. *Barber-Colman Co.*, 236 Ill. App. 3d at 1073. "The defendant bears the initial burden of proof of the affirmative matter and, if satisfied, the burden shifts to the plaintiff to show that 'the defense is unfounded or requires the resolution of an essential element of material fact before it is proven.' " *Mondschein v. Power Construction Co.*, 404 Ill. App. 3d 601, 606 (2010) (quoting *Hodge*, 156 Ill. 2d at 116). When a court rules on a section 2-619 motion to dismiss, it "must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). "[I]f it cannot be determined with reasonable certainty that the alleged defense exists, the motion should be denied." *A.F.P. Enterprises, Inc. v. Crescent Pork, Inc.*, 243 Ill. App. 3d 905, 913 (1993). Where the documents contained in the record are too inconclusive to allow disposition of the question, the court must deny the motion to dismiss. *Id.*

¶ 26 Accordingly, we turn to consider not only the legal sufficiency of the claims under section 2-615 of the Code, but also whether defendants have proven affirmative matter avoiding the legal effect of or defeating Stover's claims under section 2-619(a)(9) of the Code.

¶ 27 I. The Section 2-615 Dismissal

¶ 28 Stover's complaint sounds in *Quantum meruit*, which means literally "as much as he deserves." "It is an expression which describes the extent of liability on a contract implied by law, and is predicated on the reasonable value of services performed." *Edens View Realty & Investment, Inc. v. Heritage Enterprises*, 87 Ill. App. 3d 480, 486 (1980). "A contract implied in law exists from an implication of law that arises from facts and circumstances independent of an agreement or consent of the parties; the intention of the parties is entirely disregarded." *Century 21 Castles by King, Ltd. v. First National Bank*, 170 Ill. App. 3d 544, 548 (1988). "A party seeking recovery on a *quantum meruit* theory must demonstrate the performance of services by the party, the conferral of the benefit of those services on the party from whom recovery is sought, and the unjustness of the latter party's retention of the benefit in the absence of any compensation." *First National Bank of Springfield v. Malpractice Research, Inc.*, 179 Ill. 2d 353, 365 (1997). A real estate broker can recover on a contract implied by law under the theory of *quantum meruit*. *Owen Wagener & Co. v. U.S. Bank*, 297 Ill. App. 3d 1045, 1050 (1998).

¶ 29 A broker seeking to recover under this theory must also allege he is the procuring cause of the lease to establish the fact the services he rendered were valuable and beneficial to the defendants. See *Van C. Argiris & Co. v. FMC Corp.*, 144 Ill. App. 3d 750, 754 (1986) (whether the complaining broker is the procuring cause of the sale "is a logical *sine qua non* to the establishment of the fact that the services rendered were valuable and of benefit to the seller, and thus, it is merely a part of the existing elements required for recovery in *quantum meruit*."). A real estate broker may be the procuring cause of a sale:

> "[i]f he brings together the parties who ultimately consummate the transaction [citation], or if he is instrumental in its consummation [citation], *** [or] on the basis of the negotiations he conducts, even though he does not take part in bringing the parties together initially [citation]. Moreover, a real estate broker may be the procuring cause where the transaction is effectuated through information which he disseminates [citations], although it has been noted that in such cases, the broker actually may do more than supply information [citation]. Furthermore, a broker may be deemed the procuring cause of the transaction even though he did not personally introduce the parties to each other [citation], or accompany a customer to a meeting with the principal [citation], or if others participated in the negotiations [citation], or if the transaction was concluded without his presence or knowledge [citations]." *Pietka v. Chelco Corp.*, 107 Ill. App. 3d 544, 549-51 (1982).

These rules "reflect a policy of the law to protect a broker employed or authorized to act and who, in good faith, has so acted on behalf of his principal." *Id.* at 551.

¶ 30 We first turn to consider whether Stover set forth facts demonstrating it performed a service to benefit Salvation Army and Edgemark. Stover contends the allegations of the complaint adequately establish it performed real estate broker services which benefitted defendants. Defendants, however, assert Stover did not perform services which benefitted them, as they were for a different retail space than the one which was ultimately leased.

¶ 31 Whether defendants received a service which benefitted them turns on whether Stover set forth sufficient facts to establish it was the procuring cause of the lease transaction. See *FMC*

Corp., 144 Ill. App. 3d at 754. In the complaint at issue, Stover has alleged it introduced the parties, negotiated on behalf of Salvation Army with Edgemark, and disseminated information the parties used to ultimately consummate the transaction. Moreover, Stover attached to its complaint a letter indicating it, along with Salvation Army, had been shown the property by Edgemark. These facts are sufficient to establish Stover was the procuring cause of the lease and, thus, performed a service to benefit defendants. See *Pietka*, 107 Ill. App. 3d at 549-51.

¶ 32 Defendants' contention that the executed lease was for a different space is supported by Manzella's affidavit in which he states the ultimate space leased was space 3000 and attaches a lease regarding the same. This affidavit cannot support a dismissal pursuant to section 2-615 of the Code because it is not part of Stover's complaint. *Khan*, 2012 IL 112219, ¶ 49. Stover alleged it introduced the parties regarding the Prairie View property and defendants executed a lease within that same property. Taking all well-pleaded facts as true and in the light most favorable to Stover, the complaint as alleged sets forth sufficient facts to establish claims in *quantum meruit* against defendants.

¶ 33 The cases upon which defendants rely are inapposite. In *FMC Corp.*, 144 Ill. App. 3d at 755, we concluded the plaintiff-broker preformed services in order to gain a competitive advantage over other brokers competing for an exclusive listing on the defendant's property. These "preliminary services" were not eligible for recovery under a theory of *quantum meruit*. *Id.* Therefore, we affirmed the jury's verdict in favor of the defendant. *Id.* at 756. In this case, however, Stover alleges the services were rendered after Salvation Army contacted it to find a retail space to lease. No facts are alleged that the services rendered were preliminary services.

¶ 34 Defendants also rely on *Willmette Real Estate and Management Co. v. Luvisi*, 172 Ill. App. 3d 232, 238 (1988), wherein the buyer's broker sought a commission for a property which was sold at public auction pursuant to a court order. We concluded the public auction was an independent occurrence unrelated to any prior solicitations or negotiations. *Id.* Additionally, the terms of the public auction notice expressly stated the sale was subject to terms of the sales contract from which the provision for a broker's commission had been stricken. *Id.* Therefore, the broker was not entitled to recover under *quantum meruit*. *Id.* The present case is distinguishable, as there are no facts alleged in the complaint which support that an independent occurrence intervened to negate the prior introduction, negotiation, and assistance Stover provided defendants.

¶ 35 Defendants further contend Stover cannot allege a cause of action for *quantum meruit* because Stover did not have a reasonable expectation of payment from either defendant. Defendants point to the language of the November 14, 2006, letter in which Stover stated "[t]his proposal is subject to the Owner agreeing to pay Stover & Company, Inc. a real estate brokerage commission ***."

¶ 36 Defendants cite one case, *Paradise v. Augustana Hosp. and Health Care Center*, 222 Ill. App. 3d 672, 677 (1991), to support the proposition that a plaintiff must allege it had a reasonable expectation of payment to be entitled to relief under a theory of *quantum meruit*. The *Paradise* court stated, "a plaintiff is not entitled to recovery under *quantum meruit* where there was no expectation that defendant would pay for the services rendered." *Id.* The court cited three cases in support of that statement. The first, *Industrial Lift Truck v. Mitsubishi*

International, 104 Ill. App. 3d 357 (1982), does not support the proposition, as it involved a plaintiff seeking to circumvent payment under a contract through a theory of *quantum meruit*. *Id.* at 361. The second case, *Matter of Estate of Milborn*, 122 Ill. App. 3d 688 (1984), states there is a *presumption* of a reasonable expectation of payment when services are rendered which are knowingly and voluntarily accepted. *Id.* at 690. The last case cited, *Board of Directors v. Western National Bank*, 139 Ill. App. 3d 542 (1985), also indicated the reasonable expectation of payment would be *implied* when the services were rendered with knowledge and approval of the recipient. *Id.* at 547. In fact, *Board of Directors* states, "The action [for *quantum meruit*] is maintainable wherever one party has benefited [sic] from the services of another under circumstances in which, according to the dictates of equity and good conscience, he ought not to retain such benefit." *Id.* at 548.

¶ 37 In the present case, Stover has alleged defendants acknowledged it was the broker for Salvation Army and that the commission would be shared with Edgemark. These allegations give rise to the presumption the services were performed with a reasonable expectation of payment. Thus, Stover has set forth facts establishing a reasonable expectation of payment from defendants.[2]

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[2]Defendants also assert (with no citation to authority) that the complaint alleges no relationship between Edgemark and Stover. In *Board of Directors*, however, we stated, "in quasi-contract, the obligation arises not from an agreement but from some relation between the parties *or* from a voluntary act of one of them." *Board of Directors*, 139 Ill. App. 3d at 547

¶ 38 Finally, we consider whether Stover has set forth sufficient facts that Salvation Army and Edgemark unjustly benefitted from Stover's services. Stover alleges it did not gratuitously perform the real estate broker services and expected to be compensated and was not, and the reasonable value of its services is $36,000. These facts, along with the facts discussed above, are sufficient to establish defendants unjustly retained the benefit of Stover's real estate broker services. Accordingly, we reverse the decision of the circuit court as it pertains to the dismissal of Stover's complaint pursuant to section 2-615 of the Code.

¶ 39 II. The Section 2-619 Dismissal

¶ 40 Defendants contend the circuit court properly dismissed Stover's complaint under section 2-619 of the Code because the executed lease was for a different space, Stover was not acting as Salvation Army's broker in 2008, and Stover failed to file a counter-affidavit. Stover responds that the record contains issues of fact which must be determined by a jury, therefore the circuit court's decision to grant the motion to dismiss pursuant to section 2-619 of the Code was improper.

¶ 41 Regarding defendants' contention the executed lease was for a different space, we find our determination in *Chiagouris v. Continental Trailways*, 50 Ill. App. 2d 196 (1964), helpful. In *Chiagouris*, we concluded, after a bench trial, the broker was a procuring cause of the sale when he introduced the parties and the property owner accepted the contract for sale on the terms the broker originally provided. Here, defendant attaches to Manzella's affidavit a lease agreement

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(emphasis added).

with different terms than are alleged in the complaint. The affidavit and attached exhibits, however, do not set forth an affirmative matter on which to base the dismissal under section 2-619 of the Code, but instead seek to negate essential allegations of the complaint. Defendant's motion, therefore, is not a proper 2-619 motion. See *Barber-Colman Co.*, 236 Ill. App. 3d at 1073 (When negating essential allegations of the complaint a motion for summary judgment is the appropriate vehicle). Moreover, defendants assert Stover was no longer acting as Salvation Army's broker in spring of 2008 when the lease was executed. This argument, too, seeks to negate facts contained in the complaint and is improper. See *id.* Furthermore, defendants contend absent a counter-affidavit the facts averred in Manzella's affidavit are taken as true. Whether Stover failed to file a counter-affidavit is irrelevant when the affidavit seeks to negate essential elements of the complaint. See *id.*

¶ 42 In the case at bar, we believe there exists a substantial factual dispute regarding whether Stover was the procuring cause for the executed lease. A factual question should not be decided solely on the documents in the record. Moreover, Manzella's affidavit cannot support a dismissal pursuant to section 2-619 of the Code, because the affidavit merely negates the essential allegations of the complaint. *Hodge*, 156 Ill. 2d at 116. For this reason, the contents of the affidavit are not "affirmative matter" warranting dismissal under section 2-619(a)(9) of the Code. *Id.* If defendants wanted to challenge the factual sufficiency of the claim, a summary judgment motion would have been the proper vehicle. *Barbara-Colman Co.*, 236 Ill. App. 3d at 1073. Therefore, we reverse the circuit court's determination dismissing Stover's complaint under section 2-619 of the Code.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, we reverse the decision of the circuit court and remand for further proceedings consistent with this order.

¶ 45 Reversed and remanded.