SECOND DIVISION
June 17, 2014

Nos. 1-12-3117 and 1-13-1206 (Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SYDNEY SCARBOROUGH, Plaintiff-Appellant, v. PRUDENTIAL REAL ESTATE INVESTORS, PGA LILLIBRIDGE II LLC, PGA LILLIBRIDGE III LLC,PGA LILLIBRIDGE III-A LLC, PGA LILLIBRIDGE III-C LP, PGA LILLIBRIDGE IV-DOM LLC, PGA LILLIBRIDGE IV-INT LP, TODD LILLIBRIDGE, JOSEPH KURZYDYM, Defendants-Appellees. (LHRET, LHPT, LHP-B, Lillibridge Healthcare Services, Inc. Defendants.)	)	Appeal from the Circuit Court of Cook County. No. 10 CH 5382 Honorable Peter Flynn, Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

Held: We hold the circuit court applied the proper Illinois pleading standards in this case. Additionally, we hold the circuit court properly dismissed counts I and II of plaintiff's amended complaint and count III of her second amended complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-615 (West 2012).

¶ 1 Plaintiff, Sydney Scarborough, filed an amended complaint alleging Lillibridge Healthcare Services, Inc., and its related Maryland real estate investment trusts (REIT) (collectively LHS), were sold by way of a reverse merger and cash out sale.[1] According to Scarborough, minority shareholders, such as her, were not able to realize the full market value of their shares in the sale due to illegal actions of defendants: Todd Lillibridge and Joseph Kurzydym,[2] who were officers of LHS; and the majority shareholder of LHS, Prudential Real Estate Investors (Prudential). In regard to Prudential, Scarborough alleged it conducted business through the following sub-entities, which it referred to collectively: PGA Lillibridge II LLC; PGA Lillibridge III LLC; PGA Lillibridge III-A LLC; PGA Lillibridge III-C LP; PGA Lillibridge IV-DOM LLC; and PGA Lillibridge IV-INT LP (collectively Prudential).[3] She asserted breach of fiduciary duty claims against both Prudential and Lillibridge and Kurzydym. Both sets of defendants filed motions to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), which the circuit court granted. Scarborough later filed a second amended complaint where, relevant to this appeal, she brought a claim of promissory estoppel against Lillibridge and Kurzydym. Lillibridge and Kurzydym filed another motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)), which the circuit court granted.

¶ 2 Before this court, Scarborough argues the circuit court improperly dismissed counts I and II of her amended complaint, alleging breach of fiduciary duty by Prudential and Lillibridge and

1 We will refer to LHS and its various REIT's collectively as LHS to avoid confusion. The sale in question involved multiple REIT's and Scarborough refers to them, for the most part, collectively.

2 Lillibridge and Kurzydym are represented by a single law firm before this court and have presented a unified defense.

3 Prudential disputes whether Scarborough properly named the relevant entities here and whether she has standing to pursue claims against several of the entities. Due to our conclusion in this case, however, we do not need to address this argument and we will refer to the Prudential affiliated entities collectively to avoid confusion.

Kurzydym respectively, and count III of her second amended complaint, alleging promissory estoppel against Lillibridge and Kurzydym, pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2012). Common to all three counts, Scarborough argues the circuit court applied improper pleading standards when deciding the motions to dismiss at issue here. We hold the circuit court applied the proper Illinois pleading standards in this case. Additionally, we hold the circuit court properly dismissed counts I and II of Scarborough's amended complaint and count III of her second amended complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2012).

¶ 3 JURISDICTION

¶ 4 On August 10, 2012, the circuit court granted Prudential's section 2-615 motion to dismiss count I of Scarborough's amended complaint and Lillibridge and Kurzydym's section 2-615 motion to dismiss counts II and III of Scarborough's amended complaint. 735 ILCS 5/2-615 (West 2012). On October 12, 2012, the circuit court entered an order according to Illinois Supreme Court Rule 304(a) finding no just reason to delay immediate enforcement or appeal of its August 10, 2012, order as to the dismissal of count I of Scarborough's amended complaint. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The circuit court noted in its order that it had earlier, on September 21, 2012, entered a defective order purporting to contain language pursuant to Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The October 12, 2012, order contained the proper findings and was entered to remedy the defective September 21, 2012, order. On October 19, 2012, Scarborough timely filed her notice of appeal. Scarborough and Prudential each completed briefing before this court under appellate case number 1-12-3117.

¶ 5 On September 14, 2012, Scarborough filed her second amended complaint whereby, relevant to this appeal, she re-pleaded count II of her amended complaint which had been

dismissed on August 10, 2012, to preserve it for appeal. She also amended count III into a claim for promissory estoppel. On February 22, 2013, the circuit court dismissed count III of Scarborough's second amended complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2012). On March 12, 2013, the circuit court entered an order with the relevant Rule 304(a) language allowing Scarborough immediate enforcement or appeal of its order to dismiss count II of her amended complaint and count III of her second amended complaint. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). On April 10, 2013, Scarborough timely appealed. Scarborough and Lillibridge and Kurzydym filed briefs before this court under appellate court number 1-13-1206.

¶ 6 On December 27, 2013, this court, on its own motion, consolidated case numbers 1-12-3117 and 1-13-1206. Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 7 BACKGROUND

¶ 8 On January 4, 2012, Scarborough filed an amended complaint alleging LHS and its related REIT's were sold to Ventas, Inc. by way of a reverse merger and cash out sale. [4] According to Scarborough, minority shareholders, such as her, were not able to realize the full market value of their shares in the sale due to illegal actions of two officers of LHS, Lillibridge and Kurzydym; and the majority shareholder of LHS, Prudential. In addition to being a minority shareholder in LHS, Scarborough stated she is also a former director, executive officer, and co-founder, of LHS.

¶ 9 As background, Scarborough alleged that she and Lillibridge formed Lillibridge Health Trust by contributing their existing businesses as capital in exchange for "Founders Warrants" of

4 Ventas is not a party to this appeal.

$305,127 and $98,520. Scarborough alleged in "1998 and 1999," she and Lillibridge raised $840,000 in capital from individual investors, in addition to capital funding from Prudential, "and other institutional investors" in order to purchase medical office building real estate property. They hired Kurzydym as a chief financial officer while Lillibridge became the chief executive officer. In 2002, Lillibridge Health Trust formed a new entity named "LHRET." Scarborough alleged LHRET, "with capital from institutional investor Prudential," began purchasing medical office buildings around the country which were organized as REIT's. This entity eventually became known as LHS. Scarborough alleged that for over a decade, she provided the following services to LHS: she served on various boards of directors of the related entities, marketed healthcare property acquisition, development, property management, program management, and as an advisor. Scarborough also served as the Executive Vice President of LHRET and four related entities where she was responsible for sales, marketing, brand and business development, and strategy. Scarborough claimed in the years 2007 and 2008; she had discussed retirement and transition planning with Lillibridge and Kurzydym.

¶ 10 Scarborough alleged on June 15, 2010, she, along with other minority shareholders, was notified in a letter that LHS would be sold, by way of merger. The letter stated shareholder's ownership interests would be converted into the right to receive cash merger consideration. According to Scarborough, the "actual purpose of the letter," was to claim a tax exemption on the $14.7 million in payments to Lillibridge and Kurzydym. Scarborough claimed upon information and belief that Prudential, who owned 95% of the shares of the various companies affiliated with LHS, negotiated side agreements with Lillibridge and Kurzydym to obtain their cooperation in the sale. Scarborough alleged the letter indicated the $14.7 million in payments to Lillibridge and Kurzydym had already been approved. Scarborough further alleged upon

information and belief that these side agreements ensured the boards of directors of the various LHS entities would approve of the transactions.

¶ 11 Scarborough claimed the purchase price was lowered due to "an erroneous cap rate," inadequate valuation of assets, and misallocation of assets and debts which deprived shareholders of the fair market value of their shares. Scarborough alleged, on information and belief, that Lillibridge and Kurzydym negotiated a $14.7 million diversion of proceeds in their favor from the buyer Ventas at the expense of the fair market value of the shares. According to Scarborough, Prudential and the boards of the various companies approved the $14.7 million payment to Lillibridge and Kurzydym because they were dominated by "insiders." Scarborough alleged the $14.7 million payment was paid to Lillibridge and Kurzydym as follows: $3 million payment to Lillibridge for trade names and marks; $1.424 million in past contribution payments to Lillibridge and Kurzydym; $3 million in restrictive covenant payments to Lillibridge and Kurzydym; and $7.335 million in restricted stock grants to Lillibridge and Kurzydym.

¶ 12 Scarborough alleged that after the announcement of the sale of LHS, defendants demanded that the minority shareholders sign waivers releasing participants in the sale from any future liability "in order to receive their converted-to-cash share proceeds." [5] According to Scarborough, defendants had not "acknowledged" that any independent analyses on pricing or share value were conducted prior to the sale. Scarborough claimed that minority shareholders, such as her, were not allowed adequate time to issue a dissenter's demand because defendants filed the articles of merger one week after the June 15, 2010, letter.

5 Scarborough does not name a specific defendant that demanded she sign a release form.

¶ 13 Scarborough alleged defendants waived statutory limits on shareholder appraisal rights and derivative filing requirements by failing to comply with Maryland law concerning notice of the merger and share pricing documentation. Scarborough explained that any demand made by minority shareholders concerning statutory rights of appraisal or dissent would have been futile as the minority shareholders ceased being shareholders after July 1, 2010. Scarborough attempted to demand shareholder records to review, but was denied because she was not a shareholder at the time she made the demands. She alleged that a demand upon the boards of directors of the various LHS entities would also have been futile as defendants controlled the boards. Scarborough alleged Lillibridge, Kurzydym, and Prudential also controlled "non-managerial" decisions which had the effect of depriving the companies and shareholders of fair market value for the shares.

¶ 14 Count I of Scarborough's amended complaint alleged breach of fiduciary duty against Prudential. According to Scarborough, Prudential, as the majority shareholder of LHS, owed duties of candor and maximization of fair market value to minority shareholders. Prudential's breach of its duties resulted in Scarborough and the minority shareholders being deprived of the fair market value of their shares. Scarborough alleged Prudential failed to obtain independent valuation and investigate alternatives in the sale to Ventas. She claimed Prudential colluded with Lillibridge and Kurzydym by giving them excess parachute payments. Scarborough alleged Prudential breached its fiduciary duties for the following reasons: initiating an employee investment program without disclosing material facts which resulted in losses to investors while reducing its own losses; approved the sale of LHS to Ventas despite knowledge that the timing of the sale would harm investors; allowing Lillibridge and Kurzydym to allocate assets between the various LHS controlled entities without oversight; and failed to obtain a fairness opinion,

independent valuation, or consider alternatives regarding the sale of LHS. Additionally, Scarborough alleged Prudential unlawfully diverted corporate assets to Lillibridge and Kurzydym. Specifically, Scarborough alleged: the trade name and service marks were company property; recognition payments to Lillibridge and Kurzydym were made without independent review; and fidelity payments to Lillibridge and Kurzydym usurped opportunities and assets that belonged to LHS. Scarborough also alleged the "[e]vidence of fairness remains peculiarly in the possession of Defendants as 'Transaction Participants.' "

¶ 15 Count II of Scarborough's amended complaint contained allegations against Lillibridge and Kurzydym individually and was made on an alternative basis. Scarborough described Lillibridge and Kurzydym as long term executive officers of LHS who owed all minority shareholders duties of candor and maximization of shareholder value. Scarborough alleged "[u]pon information and belief," Lillibridge and Kurzydym were the "dominant parties" allocating corporate assets amongst LHS entities prior to the Ventas sale. Scarborough alleged Lillibridge and Kurzydym did not act in good faith in selling LHS to Ventas at a below market rate in exchange for "excessive and improper" payments to themselves. Specifically, Scarborough alleged they committed the following improper acts: withheld information from shareholders prior to the sale; failed to obtain fairness opinions or independent valuations of the LHS entities to ensure fair market value; did not act in good faith or with due care of the minority shareholders; usurped corporate opportunities by threatening to compete with the new company post-sale, but then obtained payments for themselves; did not inform the board of directors while negotiating payments for themselves, denied shareholder's statutory rights after the sale, and failed to provide shareholder proceeds without waiving their rights.

¶ 16 Count III contained allegations against Lillibridge and Kurzydym for intentional misrepresentation and fraudulent inducement. As discussed in more detail *infra*, Scarborough later amended this count and re-labeled it as a count for promissory estoppel in her second amended complaint.

¶ 17 On March 19, 2012, Lillibridge and Kurzydym filed a motion to dismiss pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2012). Relevant to this appeal, they argued count II of Scarborough's amended complaint should be dismissed because Scarborough did not have standing to bring a derivative claim and because she failed to plead a direct claim for breach of fiduciary duty. Lillibridge and Kurzydym acknowledged that under Maryland law, there is a narrow exception to the rule that fiduciary claims must be asserted derivatively, but argued that Scarborough failed to properly allege such a claim.[6]

¶ 18 On May 4, 2012, Prudential filed a motion to dismiss Scarborough's second amended complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2012). Prudential argued Scarborough failed to allege sufficient facts to support her cause of action. Specifically, Prudential pointed out that under Maryland law, majority shareholders only owe a fiduciary duty to minority shareholders in limited circumstances not present under Scarborough's amended complaint. Prudential alleged Scarborough failed to allege Prudential acted in bad faith or with an ulterior motive. Prudential questioned why it would not act in a manner that would maximize its own return on its shares.

¶ 19 In response to Prudential's section 2-615 motion, Scarborough argued she sufficiently alleged the elements necessary for the circuit court to conduct an entire fairness review of the transaction. She explained that Prudential, as the majority shareholder, was a controlling party

6 Absent from the record is any response filed on behalf of Scarborough addressing Lillibridge and Kurzydym's section 2-615 motion to dismiss.

in the transaction. Scarborough maintained Prudential had a fiduciary duty to minority shareholders. According to Scarborough, an entire fairness review of the transaction was needed based on her objection as a minority shareholder.

¶ 20 In reply, Prudential argued Scarborough conflated the elements of two unavailable theories of recovery: a statutory appraisal to determine fair market value and breach of an interested control party's fiduciary duty to minority shareholders. Prudential contended the relief Scarborough requested, a fairness review, was tantamount to an appraisal, which was unavailable to Scarborough under Maryland law. Prudential maintained it owed no duty to minority shareholders under Maryland law unless it acted in bad faith, illegally or *ultra vires*. As such, Prudential argued Scarborough failed to allege any facts that Prudential acted in such a manner. Prudential characterized Scarborough's allegations as conclusory.

¶ 21 After a hearing on August 10, 2012, addressing both Prudential and Lillibridge and Kurzydym's motions to dismiss, the circuit court dismissed counts I and II of Scarborough's amended complaint without leave to replead. Initially, before issuing its findings, the circuit court noted Illinois is a fact pleading state. The circuit court discussed the differences between fact pleading and notice pleading and cited two federal cases as evidence of the current plausibility standard in federal law. The circuit court found count I failed to state a claim on which relief could be granted. The circuit court reasoned the allegations in count I were conclusions and not well-pled facts which would give rise to a cause of action. The circuit court further noted Scarborough basically admitted she could not state a fairness claim by stating that the evidence of fairness remained in the possession of the defendants. Regarding count II, the circuit court pointed out Scarborough again included conclusory allegations. The circuit court found count II to be structurally flawed because Lillibridge and Kurzydym were not the

controlling parties in the sale of LHS. They were not the buyer or the seller. In regards to count III, the circuit court struck count III, but allowed Scarborough to re-plead it.

¶ 22 The circuit court found no just reason to delay immediate enforcement or appeal of its decision to dismiss count I of Scarborough's amended complaint pursuant to Illinois Supreme Court Rule 304(a)(Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)), and Scarborough timely filed her notice of appeal.

¶ 23 On September 14, 2012, Scarborough filed her second amended complaint. She adopted and reserved her allegations in counts I and II of her amended complaint to preserve them for appeal. Relevant here, she amended count III of her complaint into an allegation of promissory estoppel against Lillibridge and Kurzydym. Scarborough alleged that during the years 2007 and 2008, she discussed her status as a long term executive in regard to her retirement with both Lillibridge and Kurzydym. Scarborough stated both Lillibridge and Kurzydym "assured" her that she would be rewarded through control party compensation at acquisition due to her service to the company. They also "encouraged her transition to an outside developer of a new division 'Lillibridge U.' " Scarborough stated that from 2009 through the announcement of the sale in 2010, Lillibridge assured her that Lillibridge U would be funded after acquisition and that she would lead the new division. She continued to occupy an executive suite at the LHS headquarters until she was told to vacate her office without explanation on July 14, 2010.

¶ 24 Scarborough further alleged during the course of several meetings in 2007, she was told that as a key executive, she would be entitled, along with Lillibridge and Kurzydym, to receive control party payments upon a sale or change of ownership of the companies. Scarborough alleged Lillibridge told her that they, as executives, took below market compensation to increase acquisition value and that they would make up for it with an executive compensation package

upon sale of LHS. Scarborough understood this to mean the executives would receive golden parachute payments upon a future sale which would be reviewed by either the LHS compensation committee or by an independent board. Scarborough alleged Lillibridge told her "not to worry" because she would be included in any golden parachute payments he and Kurzydym received.

¶ 25 Scarborough also attached a document to her second amended complaint titled "Confidential Memorandum" with the subject of the memorandum being "Founder's Employment Transition and Separation Agreement" (memorandum). Scarborough alleged the memorandum outlined her transition into retirement. The memorandum stated Scarborough's functions during the time period of January 1, 2008 until December 31, 2008. Under a section titled "Period Subsequent to December 31, 2008," the memorandum provides the following clause:

> "I understand that in the event of a Change of Control of the company or any new entities formed between Lillibridge management and Prudential, I will not be eligible to participate in any retention, bonus, or other employee ownership programs sponsored by the new owners/entities."

Scarborough and Lillibridge signed the separation agreement as contained in the memorandum. The memorandum was dated July 15, 2008.

¶ 26 Scarborough alleged the memorandum attached to her second amended complaint was not a formal employment separation agreement, but rather "a recitation of certain terms outlined for Scarborough's future transition." According to Scarborough, the primary purpose of the memorandum was to confirm her medical benefits. She further stated the memorandum was

"only the partial expression of an eventual formal agreement, to be finalized in 2009 when more information was known." Scarborough alleged it was not in the typical form of an employee separation agreement. Scarborough stated that she resigned from the various LHS controlled boards of trustees to transition to an outside consultant for Lillibridge U in reliance on the assurances of Lillibridge and Kurzydym that she would be included in any type of executive golden parachute type payments upon the future sale of LHS.

¶ 27 According to Scarborough, Lillibridge and Kurzydym did negotiate for and received transition payments that were not paid by the new owners, Ventas. Rather, Scarborough alleged it was paid by Prudential, the majority shareholder. Scarborough explained that Prudential paid Lillibridge $564,625 and Kurzydym $859,775 in recognition of past contributions. She further alleged Lillibridge was paid $3,000,000 for trade names and marks.

¶ 28 Lillibridge and Kurzydym filed a motion to dismiss count III of Scarborough's second amended complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) arguing Scarborough's allegations were virtually identical to those already dismissed. Additionally, they argued the memorandum Scarborough attached to her complaint cannot be reconciled with the allegations in her complaint. Lillibridge and Kurzydym also asserted that any reliance on alleged statements they made were unreasonable and that Scarborough alleged no facts establishing detrimental reliance. Accordingly, Lillibridge and Kurzydym argued count III of Scarborough's second amended complaint should be dismissed.

¶ 29 In response, Scarborough disputed that she waived her alleged promise of an executive parachute payment in the memorandum, claiming the memorandum was related only to retention payments and was not the final separation agreement. She further argued she sufficiently plead a cause of action for promissory estoppel by alleging she relied on Lillibridge and Kurzydym's

representations that she would receive a golden parachute payment as a long term executive, that she transitioned out of her position and resigned her position in reliance on those promises, and that Lillibridge and Kurzydym negotiated for transition payments without her.

¶ 30 In reply, Lillibridge and Kurzydym maintained that Scarborough failed to plead an enforceable promise, detrimental reliance, or in regards to Kurzydym, that he made any of the alleged promises. Lillibridge and Kurzydym argued that Scarborough's own memorandum clearly stated she would not be entitled to future compensation.

¶ 31 After a hearing on February 22, 2013, the circuit court granted Lillibridge and Kurzydym's motion to dismiss count III of Scarborough's second amended complaint without leave to replead. The circuit court noted count III failed to allege that any enforceable promises were made to Scarborough regarding Scarborough receiving a golden parachute. The circuit court described Scarborough's allegations as a "vague assertion" as opposed to an enforceable promise. It noted the complaint made no allegations that Kurzydym made any promises. The circuit court found Lillibridge and Kurzydym could not guarantee that any golden parachute would be issued as it was contingent on the actions of a future unnamed buyer. The court found further that count III failed to allege any sort of detrimental reliance.

¶ 32 On March 12, 2013, the circuit court entered an order pursuant to Illinois Supreme Court Rule 304(a) finding there was no just reason to delay enforcement or appeal of the dismissal of count II of Scarborough's amended complaint or count III of her second amended complaint. On April 10, 2013, Scarborough filed her notice of appeal to this court for review of the dismissal of count II of her amended complaint and count III of her second amended complaint.

¶ 33 ANALYSIS

¶ 34 Before this court, Scarborough argues the circuit court improperly dismissed counts I and II of her amended complaint and count III of her second amended complaint pursuant to section 2-615 of the Code. Common to all three counts, Scarborough argues the circuit court applied improper pleading standards when deciding the motions to dismiss at issue here. We will address this argument first before determining whether counts I and II of Scarborough's amended complaint and count III of her second amended complaint were properly dismissed pursuant to section 2-615 of the Code.

¶ 35 Section 2-615 of the Code

¶ 36 Scarborough first argues the circuit court utilized improper and heightened pleading standards in dismissing counts I and II of her amended complaint and count III of her second amended complaint. Specifically, she points to statements made by the circuit court in which the circuit court judge referred to the pleading standards used in two federal cases. In response, all of the defendants assert the circuit court used the proper pleading standards here and only cited the two federal cases as an example to illustrate that Illinois is a fact pleading jurisdiction.

¶ 37 A motion to dismiss brought pursuant to section 2-615 of the Code attacks the legal sufficiency of the complaint. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348 (2003). The motion does not raise affirmative factual defenses, but rather alleges defects apparent on the face of the complaint. *Id.* Illinois is a fact pleading jurisdiction. *Weiss v. Waterhouse Securities, Inc.*, 208 Ill. 2d 439, 451(2004). Therefore, " ' a pleading must be both legally and factually sufficient. It must assert a legally recognized cause of action and it must plead facts which bring the particular case within that cause of action.' " *Chandler*, 207 Ill. 2d at 348 (quoting 3 R. Michael, Illinois Practice § 23.4 (1989)). "A plaintiff may not rely on

conclusions of law or fact unsupported by specific factual allegations." *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶26. Only well-pleaded facts will be considered as opposed to conclusions which must be disregarded. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368 (2005). Under section 2-615, the question presented "is whether sufficient facts are contained in the pleadings which, if proved, would entitle plaintiff to relief." *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 471(1991).

¶ 38 When ruling on a motion to dismiss pursuant to section 2-615, only the allegations of the pleadings are to be considered. *Id.* "An exhibit attached to a complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss." *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶18. An exhibit controls where it contradicts an allegation in a complaint. *Id.* All well-pleaded facts in the complaint are accepted as true as well as all reasonable inferences drawn from those well-pleaded facts. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 9 (1992). The allegations in the complaint are to be construed in the light most favorable to plaintiff. *Id.* A plaintiff is not required to set forth evidence in the complaint. *Chandler*, 207 Ill. 2d at 348. A plaintiff, however, cannot simply allege conclusions when opposing a motion to dismiss. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996). A cause of action should be dismissed "if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery." *Chandler*, 207 Ill. 2d at 349. Review of a motion to dismiss pursuant to section 2-615 is *de novo*. *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997).

¶ 39 We hold Scarborough's argument regarding the pleading standard used by the circuit court has no merit based on our review of the record. The record shows the circuit court only referenced the pleading standards utilized in two federal cases as a way to illustrate that Illinois

is a fact pleading state. The circuit court specifically stated "Illinois is a fact pleading state." The transcript of the proceeding in questions shows the circuit court only referenced the two federal cases to illustrate that in its opinion, the federal pleading system was moving to a system very similar to the fact pleading system in Illinois. Specifically, the circuit court stated the two cases referenced were significant in that they represented "the federal judicial system that *** lived many years with the notice pleading regime effectively abandoning it in favor of something which comes very close to the Illinois fact pleading system[.]" Notably absent from the record is any indication that the circuit court utilized any standard other than the fact pleading standard proper for cases brought under the jurisdiction of the courts of the state of Illinois. Based on our review of the record, it appears the circuit court digressed into a discussion of various pleading standards in an effort to highlight that Illinois is a fact pleading jurisdiction. The circuit court did not, however, give any indication that it treated Scarborough's complaint in a manner inconsistent with the Illinois fact pleading system.

¶ 40 Additionally, we remind Scarborough that our review of a motion to dismiss brought pursuant to section 2-615 of the Code is *de novo*. *Vernon*, 179 Ill. 2d at 344. As such, we accord no deference to the decision of the circuit court. *Zebra Technologies v. Topinka*, 344 Ill. App. 3d 474, 480 (2003). Accordingly, we will review whether the circuit court properly dismissed counts I and II of her amended complaint and count III of her second amended complaint according to the well-established standards we discussed *supra* governing pleading generally, and specifically, review of motions to dismiss brought pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2012).

¶ 41 Count I: Breach of Fiduciary Duty Against Prudential

¶ 42 Scarborough first argues she sufficiently pled facts to demonstrate that Prudential owed her a fiduciary duty and that it breached that duty by making excessive payments to Lillibridge and Kurzydym, wasting corporate assets, and failed to seek fair market value for LHS's shares.

¶ 43 In response, Prudential argues Scarborough failed to provide any well-pleaded facts to support her claim of breach of fiduciary duty. Specifically, Prudential maintains Scarborough failed to plead any facts demonstrating that Prudential, as the majority shareholder, used its voting power for some ulterior purpose adverse to the interests of the corporation or its shareholders. Prudential characterizes the allegations in count I of Scarborough's amended complaint as legal conclusions. Furthermore, Prudential argues Scarborough conflates the duties owed by directors of corporation with those of owed by a majority shareholder such as Prudential.

¶ 44 Initially, we note the parties agree that the substantive laws of Maryland apply in this matter as all of the relevant entities were formed under the laws of that state. *See CDX Liquidating Trust v. Venrock Associates*, 640 F. 3d 209, 212 (7th Cir. 2011). Illinois law, however, applies to matters of procedure. *Boersma v. Amoco Oil Co.,* 276 Ill. App. 3d 638, 646-47 (1995). Under Maryland law, "minority shareholders are entitled to protection against fraudulent or illegal action of the majority." *Mona v. Mona Electric Group, Inc.*, 176 Md. App. 672, 697 (2007). Maryland courts have thus recognized that, under certain circumstances, majority shareholders have a fiduciary duty to minority shareholders. *Pittman v. American Metal Forming Corp.*, 336 Md. 517, 523 (1994). Specifically, Maryland courts "have held that 'when majority stockholders use their voting power for their own benefit, for some ulterior purpose adverse to the interests of the corporation and its stockholders…, they thereby become

fiduciaries and violate their fiduciary obligations.' " *Id.* at 523-24 (quoting *Cooperative Milk Service v. Hepner*, 198 Md. 104, 114 (1951). Maryland courts will not intervene and afford equitable relief to a minority shareholder absent actions that are in bad faith, illegal, or *ultra vires*. *Ross v. American Iron Works*, 153 Md. App. 1, 21 (2003). Inadequacy of price alone is an insufficient basis for a court to intervene. *Id.*

¶ 45 We hold Scarborough failed to provide any well-pleaded facts in count I of her amended complaint that showed Prudential acted illegally, in bad faith, or fraudulently. Count I of Scarborough's amended complaint is replete with improper conclusions. Scarborough alleged Prudential approved transition payments to Lillibridge and Kurzydym, failed to obtain fairness opinions, instituted an employee investment program despite the poor real estate market, and sold the companies "at the bottom of the real estate market." Missing from Scarborough's conclusory allegations are facts explaining how, who, what, when, where, or why, which would lead this court to an inference that Prudential acted illegally or fraudulently in the sale of LHS. Scarborough failed to explain why or how the transition payments to Lillibridge and Kurzydym affected the share price, whether the transition payments would have gone to the shareholders had Prudential not approved the payments, or most importantly, why or how the transition payments were illegal, fraudulent, or done in bad faith. Scarborough has not alleged that Prudential has any continued interest in the sold companies which would indicate self-dealing. The amended complaint clearly indicates Prudential was the majority shareholder prior to the sale, and that Ventas, another entity, bought LHS.

¶ 46 Furthermore, Scarborough failed to provide any well-pleaded facts that showed Prudential received any improper benefit or profit from the sale of the companies. In fact, most of her allegations in count I focus on alleged improper benefits received by the other defendants,

Lillibridge and Kurzydym. Missing from count I of Scarborough's amended complaint are any well-pleaded facts that would defeat the notion that Prudential, as a shareholder, sought to maximize the value of its shares upon sale. Scarborough has not provided any well-pleaded facts showing Prudential used their voting power as majority shareholder for an ulterior purpose adverse to the corporation or its shareholders. Additionally, even though inadequacy of price of a sale alone is an insufficient basis for a court to intervene in situations such as this under Maryland law (*Ross*, 153 Md. App. at 21), Scarborough failed to provide any well-pleaded facts that indicate that the value paid for the shares was inadequate. Besides making improper and speculative conclusions regarding the state of the real estate market at the time of the sale, Scarborough failed to provide any facts which show that the selling price of the shares was at all inadequate. Scarborough also alleged that "an erroneous cap rate may have reduced the purchase price." This statement, however, is not a statement of fact, but rather a conclusion which we will not consider. Missing from the statement is any indication what the cap rate is or why or how it affected the eventual selling price. Accordingly, we hold the circuit court did not err when it dismissed, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)), count I of Scarborough's amended complaint.

¶ 47 Count II: Breach of Fiduciary Duty as to Lillibridge and Kurzydym

¶ 48 Scarborough argues the allegations in her amended complaint properly state a claim for breach of fiduciary duty against Lillibridge and Kurzydym. Specifically, she argues the transition payments Lillibridge and Kurzydym negotiated for themselves affected the fair market value of the shares to the detriment of minority shareholders such as herself. Accordingly, she argues the circuit court erred when it dismissed count II of her amended complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2012).

¶ 49 In response, Lillibridge and Kurzydym argue Scarborough's claims must be brought derivatively, as opposed to directly, as Scarborough did here. Alternatively, they argue the circuit court properly dismissed any direct claims Scarborough alleged in her complaint because Scarborough failed to provide any well-pleaded facts to state a claim.

¶ 50 We note initially Scarborough devotes most of her brief before this court to argue, in regard to count II of her amended complaint, that majority shareholders have a fiduciary duty to minority shareholders. There are no allegations in her amended complaint that Lillibridge and Kurzydym are majority shareholders. In fact, as discussed *supra*, Scarborough herself alleged in her amended complaint that Prudential owed 95% of the stock of LHS. Scarborough did not, in count II of her amended complaint, allege that Lillibridge and Kurzydym owned a majority of LHS stock. Rather, she alleged Lillibridge and Kurzydym were officers and directors of LHS. As this issue is before us on review of a dismissal pursuant to section 2-615 of the Code, our review is confined to the allegations in the pleadings. *Urbaitis*, 143 Ill. 2d at 471.

¶ 51 Maryland law allows shareholders, in the context of a cash-out merger, to file a direct suit against corporate directors. *Shenker v. Laureate Education, Inc.*, 411 Md. 317, 336 (2009). Specifically, "in the context of a cash-out merger transaction, where the decision to sell the corporation already has been made, corporate directors owe their shareholders common law duties of candor and good faith efforts to maximize shareholder value, and that allegations of breach of those duties may be pursued through a direct suit by shareholders." *Id.* The highest court of review in Maryland has explained that:

> "[w]hen directors undertake to negotiate a price that shareholders will receive in the context of a cash-out merger transaction *** they assume a different role than solely 'managing the business affairs of the corporation.'

> Duties concerning the management of the corporation's affairs change after the decision is made to sell the corporation. *** Beyond that point, in negotiating a share price that shareholders receive in a cash-out merger, directors act as fiduciaries on behalf of the shareholders." *Id.* at 338.

The fiduciary duties of candor and maximization of shareholder value are thus triggered when directors are "faced with an inevitable or highly likely change-of-control situation." *Id.* at 341.

¶ 52 We hold count II of Scarborough's amended complaint, like count I, is also replete with non-specific conclusory allegations and, therefore, was also properly dismissed pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2012). Most importantly, Scarborough failed to provide any well-pleaded facts that Lillibridge and Kurzydym failed to maximize shareholder value. Scarborough's allegations are based on the alleged transition payments paid to Lillibridge and Kurzydym. She has not pled how those payments affected the share price or whether those payments, had they not been made to Lillibridge and Kurzydym, would have somehow raised the share price. Most importantly, Scarborough failed to allege what the fair market value of the shares was at the time of the sale. As in count I, Scarborough did not provide any well-pleaded facts to show the share price was inadequate, or that any of the payments made to Lillibridge and Kurzydym would have somehow raised the share price. Accordingly, we hold the circuit court properly dismissed count II of Scarborough's amended complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2012).

¶ 53 Count III: Promissory Estoppel Against Lillibridge and Kurzydym

¶ 54 Scarborough argues the circuit court improperly dismissed count III of her second amended complaint because the allegations contained in count III support a cognizable claim against Lillibridge and Kurzydym under the doctrine of promissory estoppel. According to

Scarborough, she properly pled facts establishing that both Lillibridge and Kurzydym promised her that she would be compensated as a long-term executive in the event of any future acquisition of the companies. Scarborough characterizes the memorandum she attached to her second amended complaint as not a final separation agreement, but rather an outline of points she had discussed with Lillibridge and Kurzydym.

¶ 55 In response, Lillibridge and Kurzydym argue the memorandum is an agreement showing Scarborough understood she had no rights to any future payments. Lillibridge and Kurzydym argue further that Scarborough failed to plead promissory estoppel because Scarborough admitted the payments she seeks were uncertain and because she failed to show the element of detrimental reliance.

¶ 56 The doctrine of promissory estoppel is an affirmative cause of action available to plaintiffs in the absence of a contract. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 52 (2009). In order to state a claim for promissory estoppel, the plaintiff must establish the following elements: "(1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment." *Id.* at 51.

¶ 57 Count III of Scarborough's second amended complaint alleged that Lillibridge and Kurzydym made several promises to her. For example, in 2007, Lillibridge and Kurzydym represented that as long term executives, Lillibridge, Kurzydym, and Scarborough would receive "control party payments." Scarborough further alleged that when she discussed transition and retirement plans with Lillibridge and Kurzydym, they assured her she would be rewarded with compensation at acquisition and encouraged her to transition as an outside developer of a new division, titled "Lillibridge U." Scarborough additionally alleged Lillibridge and Kurzydym

"repeatedly" told her that her resignation in December of 2008 would not affect her right to receive compensation if LHS were sold.

¶ 58 Scarborough also, however, attached the memorandum to her complaint. Under the section titled "Period Subsequent to December 31, 2008," the memorandum provides the following statement:

> "I understand that in the event of a Change of Control of the company or any new entities formed between Lillibridge management and Prudential, I will not be eligible to participate in any retention, bonus, or other employee ownership programs sponsored by the new owners/entities."

In her second amended complaint, Scarborough characterized the memorandum as "not a formal employment separation agreement but a recitation of certain terms outlined for [her] future transition." She further alleged Lillibridge and Kurzydym revised the memorandum and that it was "only a partial expression of an eventual formal agreement, to be formalized in 2009 when more information was known."

¶ 59 The circuit court dismissed count III of Scarborough's second amended complaint pursuant to section 2-615 of the Code. In our review of a dismissal under section 2-615 of the Code, we accept as true well-pleaded facts in the complaint. *Kolegas*, 154 Ill. 2d at 9. We also must construe any exhibits, such as the memorandum, as part of the pleadings. *Gagnon*, 2012 IL App (1st) 120645, ¶ 18. With these principles in mind, we hold Scarborough failed to state a claim under the doctrine of promissory estoppel because she did not show the either Lillibridge or Kurzydym made her an unambiguous promise. *Newton Tractor Sales, Inc.*, 233 Ill. 2d at 51 (In order to state a claim for promissory estoppel, the plaintiff must establish "***

defendant made an unambiguous promise to plaintiff.") Specifically, Scarborough alleged conflicting statements regarding her future compensation. In count III of her second amended complaint, Scarborough provided several alleged promises made by Lillibridge and Kurzydym regarding her future compensation. She also, however, provided the memorandum, which contract or not, contains a clause where she states that she is "not be eligible to participate in any retention, bonus, or other employee ownership programs sponsored by the new owners/entities." Taking all of these allegations as true, we are left with statements that conflict with each other regarding whether a promise was actually made to Scarborough. Therefore, we cannot say that Scarborough has pled that either Lillibridge or Kurzydym made an unambiguous promise to her as she provided allegations of conflicting statements in her complaint. Accordingly, we hold the circuit court did not err when it dismissed count III of Scarborough's second amended complaint.

¶ 60 CONCLUSION

¶ 61 The judgment of the circuit court of Cook County affirmed.

¶ 62 Affirmed.