2013 IL App (1st) 123777-U

THIRD DIVISION
October 23, 2013

No. 1-12-3777

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH POLAK, Plaintiff-Appellant, v. CHAFFEE-THANH NGUYEN, individually and as agent for Sports Dimensions, Inc., and AMY NGUYEN, individually and as agent for Sports Dimensions, Inc., Defendants-Appellees (Sports Dimensions, Inc., and Marc Hubbard, individually, Defendants).	)	Appeal from the Circuit Court of Cook County No. 11 M4 1945 Honorable Cheryl D. Ingram, Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Neville and Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD*: The circuit court did not err in dismissing the amended complaint where plaintiff did not plead sufficient facts that, if proven, would subject defendants-appellees to a claim of negligent misrepresentation and, thus, the complaint failed to state a cause of action against these defendants. Moreover, the circuit court did not err in dismissing the complaint with prejudice when it had already granted leave to amend the complaint and it did not appear that plaintiff could plead facts that would state a claim against these

defendants.

¶ 2 Plaintiff-appellant Joseph Polak filed a complaint alleging breach of contract against defendants Sports Dimensions, Inc. (SDI) and Marc Hubbard,[1] and misrepresentation by Hubbard and defendants-appellees Chaffee-Thanh Nguyen (Chaffee) and Amy Nguyen (Amy). The circuit court granted the Nguyens' motions to dismiss Polak's original and amended complaints. On appeal, Polak contends that the circuit court erred in granting the motions because the Nguyens failed to comply with section 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2010)). Alternatively, Polak argues that the circuit court erred in dismissing the complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)) because the Nguyens did not raise any affirmative matter that would defeat the claim. Polak further claims that the circuit court erred in dismissing the complaint with prejudice pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) because he should have been allowed to amend the complaint to cure any defect. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On December 28, 2011, Polak filed a *pro se* complaint asserting claims for breach of contract and misrepresentation. According to the complaint, Polak invested $23,000 in SDI, a North Carolina music and entertainment company. Appended to the complaint was an agreement between "IRA Services Trust, Custodian F/B/O Joseph Polak" and SDI and its CEO Marc

[1]Polak voluntarily dismissed SDI and Hubbard as defendants on November 27, 2012, and they are not parties to this appeal.

Hubbard. Polak executed a promissory note on October 28, 2009, with a maturity date of October 28, 2010, that provided for an automatic extension of one year unless either party provided written notice electing to terminate the note. Under the agreement, the note was personally guaranteed by Hubbard. The agreement also provided that SDI agreed to pay Polak a 25% annual rate of return (or $5,750) as interest for the private loan of $23,000, and that the note was secured by a $10 million surety bond. The complaint alleged that Hubbard and the Nguyens were "employees and/or agents" of SDI, and that the Nguyens solicited investors for SDI.

¶ 5 The first count of the complaint alleged breach of contract by SDI and Hubbard, stating that neither party had paid any sums due to Polak under the terms of the note. The second and third counts were misrepresentation claims against the Nguyens and Hubbard, respectively. The misrepresentation counts alleged that all three parties made representations on behalf of and for the benefit of SDI, including representing a guaranteed 25% annual return and stating that the note would be covered by a surety bond, and that such representations were false or made with negligent disregard of the truth. The counts further alleged that Polak relied on the misrepresentations in investing $23,000 in SDI.

¶ 6 Attached to the complaint was an email from Chaffee to Polak, among others, informing the recipients about the investment opportunity with SDI. The email, authored by Chaffee, touted the investment in SDI, a company in which Chaffee said he had previously invested, and encouraged the recipients to "[d]ownload the SDI Presentation and see for yourself the potential here." Chaffee also offered to set up a conference call with SDI's owner (presumably Hubbard) "if there is enough interest" and stated, "I assure you that you will be as impressed as I was with

this company and you will want to work with them."

¶ 7 The Nguyens filed separate *pro se* motions to dismiss the original complaint, stating that, at all relevant times, they were neither agents nor employees of SDI. The motions were heard on June 27, 2012. There is no transcript of the hearing or bystander's report included in the record. According to an order entered that day, the motions were granted and Polak was granted leave to file an amended complaint.

¶ 8 The amended complaint, filed on July 11, 2012, included allegations that the Nguyens exchanged emails with Polak to induce him to invest, and that the Nguyens were engaged at all levels of the investment process, including drafting documents, procuring signatures and facilitating the completion of the transaction. Polak also alleged that Amy telephoned Polak to request that he fax the signed transaction documents to her in order to meet a deadline imposed by Hubbard and SDI. Finally, the complaint alleged that the Nguyens provided an interest or principal payment in the amount of $500 to Polak.

¶ 9 In addition to the initial email from Chaffee that was attached to the original complaint, Polak attached several other emails to the amended complaint. With the exception of one email from Amy to multiple recipients, the remaining emails were communications between Polak and Chaffee regarding Polak's investment in SDI.

¶ 10 The Nguyens again filed separate motions to dismiss Polak's amended complaint. The motions to dismiss were substantially the same as those directed to the original complaint, with the additional argument that neither Chaffee nor Amy ever held themselves out as agents of SDI. Polak contends that the case was set for status on September 26, 2012, but that in fact a hearing

on the motions was held on that date. Again, there is no transcript of the hearing or bystander's report. The circuit court granted the motions to dismiss. The order entered is a form order that indicates that the motion to dismiss as to Chaffee-Thanh Nguyen and Amy Nguyen is granted with prejudice. There is no reference in the order to any section of the Code.

¶ 11 Polak, through counsel, filed a motion to reconsider on October 24, 2012, and noticed it for hearing on November 27, 2012. In the motion, Polak argued that discovery was necessary to determine the nature and extent of the Nguyen's involvement with SDI and that the amended complaint alleged sufficient facts to support the inference that they were agents or employees of SDI. Alternatively, Polak requested leave to file a second amended complaint. The motion did not claim that Polak was in possession of additional facts regarding the claimed agency or employment relationship between the Nguyens and SDI and no proposed amended pleading was attached. The circuit court denied the motion to reconsider. Polak timely filed this appeal.

¶ 12 ANALYSIS

¶ 13 As an initial matter, we note that the Nguyens raised Polak's standing to sue in their motions to dismiss. Although Polak filed suit in his individual capacity, the party to the contract is Polak's self-directed individual retirement account held by IRA Services Trust. However, because Polak was the sole beneficiary of the account, this technical defect could have been easily cured by amending the complaint to add IRA Services Trust as a party-plaintiff. Thus, this issue alone would not mandate dismissal with prejudice.

¶ 14 Further, as already noted, there is no transcript of either hearing on the Nguyens' motions to dismiss, and no bystander's report has been included in the record on appeal. Matters not

properly in the record will not be considered on review. *Jenkins v. Wu*, 102 Ill. 2d 468, 483 (1984). Therefore, in reaching its decision, this court has not considered any references in the Nguyens' brief to any colloquy between the trial court and the parties at the hearings on the motions to dismiss.

¶ 15 We now turn to Polak's arguments on appeal. Polak first contends that the circuit court erred in granting the motions to dismiss because neither motion complied with section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)). Section 2.619.1 of the Code authorizes combined motions to dismiss with respect to the pleadings (735 ILCS 5/2-615 (West 2010)) and for an involuntary dismissal based upon certain defenses (735 ILCS 5/2-619 (West 2010)). 735 ILCS 5/2-619.1 (West 2010). Such a motion must be in parts, and each part must specify the section of the Code under which it is made. *Id.* While a failure to properly label a combined motion to dismiss is not a practice that is encouraged, a reversal on those grounds is only appropriate when it prejudices the nonmovant. *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1029 (2006) (citing *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994)). Other than faulting the Nguyens for failing to comply with section 2-619.1, Polak does not claim he was prejudiced as a result.

¶ 16 Where a motion to dismiss does not designate whether it is pursuant to section 2-615 or section 2-619, reviewing courts typically review the motion according to its grounds, its requests, or its treatment by the parties and the trial court. *Illinois Graphics*, 159 Ill. 2d at 484. Here, both motions are simply labeled motions to strike and dismiss, without any reference to a particular section of the Code in the title. In the first paragraph of each motion, the Nguyens request that

the complaint be dismissed pursuant to both section 2-615 and section 2-619. However, neither motion contains any further reference to the Code. Taking into consideration that the motions were both filed by *pro se* defendants, we will treat these as nondesignated motions and consider the language of the motions to determine whether they are pursuant to section 2-615, section 2-619, or combined motions pursuant to section 2-619.1.

¶ 17 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). A motion to dismiss under section 2-615 attacks the legal sufficiency of the complaint and does not raise affirmative factual defenses but alleges only defects appearing on the face of the complaint. *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004).

¶ 18 Here, both motions state that Polak has "failed to state any claim upon which relief may be granted" and both motions close with a request to strike and dismiss count II of the complaint with prejudice "for failure to state a cause of action upon which relief can be granted." Other than the reference to Polak's standing addressed above, neither motion asserts an affirmative defense or other matter that would defeat the claim, and neither motion admits the legal sufficiency of the complaint. There were no affidavits attached to either motion. Because, apart from the standing issue, the only relief requested is dismissal for failure to state a claim and no affirmative matter is raised in either motion, we shall treat both motions as brought pursuant to section 2-615.

¶ 19 The question presented by a section 2-615 motion is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of

action upon which relief may be granted. *Id*. The cause of action should be dismissed only if it is clearly apparent that no set of facts can be proven that will entitle the plaintiff to recovery. *Id*. at 318. A reviewing court determines *de novo* whether the trial court properly granted a section 2-615 motion to dismiss. *Id*.

¶ 20 Conclusions of law or fact are not considered well-pleaded, even if they generally inform the defendant of the nature of the claim. *Weidner v. Midcon Corp.*, 328 Ill. App. 3d 1056, 1059 (2002). Stated differently, " 'an actionable wrong cannot be made out merely by characterizing acts as having been wrongfully done.' " *Id.* (quoting *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 520 (1989)). Rather, because Illinois is a fact-pleading jurisdiction, a complaint must set forth a legally recognized claim and plead facts in support of each element that brings the claim within the cause of action in order to withstand a motion to dismiss. *Rabin v. Karlin and Fleisher, LLC,* 409 Ill. App. 3d 182, 186 (2011).

¶ 21 The only count in the complaint against the Nguyens is for the tort of misrepresentation. Causes of action for misrepresentation fall into two categories, fraudulent misrepresentation and negligent misrepresentation. Polak's complaint does not specify which category he is alleging. The complaint merely alleges that the Nguyens misrepresented both the rate of return Polak would receive on his investment in SDI and that the investment was secured by a $10 million surety bond, that the misrepresentations were made to induce Polak to invest, and that he justifiably relied on the misrepresentations and invested $23,000 in SDI. The complaint further states that the representations "were false and/or made with negligent disregard of the truth."

¶ 22 To state a cause of action for negligent misrepresentation, a plaintiff must allege: (1) a

false statement of material fact; (2) carelessness or negligence in ascertaining the truth of the statement by the party making it; (3) an intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; (5) damage to the other party resulting from such reliance; and (6) a duty on the party making the statement to communicate accurate information. *First Midwest Bank, N.A. v. Stewart Title Guaranty Co.*, 218 Ill. 2d 326, 334-35 (2006). The elements of a fraudulent misrepresentation claim are essentially the same, except that for fraudulent misrepresentation, the false statement of material fact must be known or believed to be false by the person making the statement. *Doe v. Dilling*, 228 Ill. 2d 324, 342-43 (2008).

¶ 23 The agreement attached to Polak's complaint contains promises by SDI and Hubbard to pay Polak a 25% rate of return that would be guaranteed by Hubbard and secured by a $10 million surety bond. Thus, on its face the complaint shows that Polak got the terms from Hubbard and SDI that the Nguyens said he would. Therefore, the basis for Polak's misrepresentation claim against the Nguyens is unclear.

¶ 24 Perhaps Polak means to suggest that the Nguyens knew at the time Polak entered into his agreement with Hubbard and SDI that the latter had no intention of honoring the terms of the agreement. But the facts alleging such knowledge on the Nguyens' part are nowhere to be found in the amended complaint.

¶ 25 Because the complaint does not allege facts that would support the conclusion that the Nguyens knew or believed that the representations regarding the rate of return and the surety bond were false or that the Nguyens knew or had reason to know that SDI and Hubbard would

fail to honor the note and agreement, the complaint does not state a cause of action for fraudulent misrepresentation. Clearly no facts are alleged in the amended complaint to satisfy Illinois' requirement that fraud be pled with particularity. See *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 457 (1989) (noting that "facts which constitute an alleged fraud must be pleaded with sufficient specificity, particularity and certainty to apprise the opposing party of what he is called upon to answer"). Thus, we will consider whether Polak's complaint states a cause of action for negligent misrepresentation.

¶ 26 Polak's complaint does not specifically allege that the Nguyens owed him a duty to communicate accurate information. Where, as here, the plaintiff seeks purely economic damages, our supreme court has recognized a duty to avoid negligently conveying false information only if the party disseminating the information is in the business of supplying information for the guidance of others in their business transactions. *First Midwest*, 218 Ill. 2d at 335. Moreover, the allegation that a defendant is in the business of providing information for the guidance of others is a legal conclusion that must be supported by well-pled factual allegations. *Tolan & Son, Inc. v. KLLM Architects, Inc.*, 308 Ill. App. 3d 18, 28 (1999). Polak does not allege and nothing in the emails attached to the original and amended complaints supports the conclusion that either of the Nguyens were in the business of supplying information for the guidance of third parties like Polak.

¶ 27 The determination of whether a party is in the business of supplying information requires an analysis of the precise facts of a specific case. *Fox Associates, Inc. v. Robert Half International, Inc.*, 334 Ill. App. 3d 90, 96 (2002). In general, courts have recognized a

distinction between pure information providers (*e.g.*, accountants, attorneys, stockbrokers) and tangible good providers (*e.g.*, computer and software manufacturers and sellers, construction supply firms, manufacturers generally). See *id*. at 94-95 (collecting cases); *Tolan & Son*, 308 Ill. App. 3d at 28-29 (collecting cases). Businesses that supply tangible goods (or non-informational goods or services) as well as information fall somewhere in between. *Tolan & Son*, 308 Ill. App. 3d at 29.

¶ 28 Polak's complaint is deficient because he does not allege facts that would support the conclusion that the Nguyens were in the business of providing information for the guidance of others, which would, in turn, give rise to a duty to communicate accurate information. At most, the allegations of the amended complaint read together with the attached emails support the conclusion that the Nguyens were encouraging recipients of the emails, including Polak, to invest in SDI because Chaffee had invested previously and had a positive experience. Yet, the initial email sent on September 10, 2009, also encouraged the recipients to investigate SDI for themselves. There are simply no facts either alleged in the amended complaint or reasonably inferred from the attached emails that would support the conclusion that the Nguyens owed Polak any independent duty to communicate accurate information regarding Polak's decision to invest in SDI. Without allegations supporting the existence of a duty, Polak's negligent misrepresentation claim fails.

¶ 29 The amended complaint alleges in conclusory fashion that the Nguyens were either employed by or were agents of SDI and the relationship between the Nguyens and SDI is the principal issue Polak argues on appeal. However, even if Polak did or could allege facts

supporting the conclusion that the Nguyens were employees or agents of SDI, that would still not make them amenable to a claim for negligent misrepresentation for the reasons already discussed. Nothing in the amended complaint suggests or implies that SDI itself is in the business of supplying information for the guidance of others and, in fact, the emails establish that SDI is in the music and entertainment business. Thus, even if we agreed with Polak regarding the sufficiency of the allegations of the amended complaint to establish an employment or agency relationship, it would not change the outcome of his appeal.

¶ 30 As a final matter, Polak argues that the circuit court erred in dismissing the amended complaint with prejudice. As Polak correctly notes, Illinois policy favors an adequate and appropriate hearing of a litigant's claim on the merits and a cause of action should not be dismissed with prejudice without first giving the litigant a chance to amend unless it is clear that no set of facts can be proved under the pleading which would entitle the plaintiff to relief. *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 584-85 (2003).

¶ 31 Here, given that Polak cannot establish that the Nguyens owed him a duty to communicate accurate information regarding the investment in SDI and, therefore, Polak had no enforceable right to rely on the accuracy of those representations, there is no set of facts that would allow him to pursue a negligent misrepresentation claim against them. Further, Polak's motion for reconsideration failed to attach any proposed second amended complaint or indicate that Polak was in possession of additional facts that would support any other claim against the Nguyens. Therefore, the circuit court did not err in dismissing the amended complaint with prejudice.

¶ 32 For the reasons stated herein, the judgment of the circuit court is affirmed.

¶ 33 Affirmed.