

No. 1-13-2474

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

M. FAISAL ELKHATIB,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	12 M1 117005
)	
AHMAD SULAIMAN and UNITED REALTY)	Honorable
PARTNERS,)	Sheryl Pethers,
)	Judge Presiding.
Defendants-Appellees.)	
)	
)	

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in dismissing the second amended complaint with prejudice where the underlying transaction that provides the basis for the suit was illegal and therefore plaintiff may not recover under any theory.

¶ 2 Plaintiff-Appellant M. Faisal Elkhatib filed a complaint against defendants-appellees Ahmad Sulaiman and United Realty Partners (United Realty), alleging breach of contract, conversion, unjust enrichment and breach of fiduciary duty. Elkhatib's second amended complaint was dismissed with prejudice. On appeal, Elkhatib raises a variety of arguments in

support of his claim that the trial court erred in dismissing his second amended complaint with prejudice. But we need not address these arguments in any detail because we find that the subject matter of the contract – the sharing of a real estate commission with a broker not licensed in the state where the transaction occurred – is illegal and the trial court properly declined to be involved in its enforcement. Thus, we affirm the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

¶ 4

At the outset, we note that there are many inconsistencies between the various versions of the complaint, the record, and Elkhatib's statement of facts on appeal. The original complaint was filed March 20, 2012, and Sulaiman was the only named defendant. Sulaiman's motion to dismiss was granted pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)) but denied as to section 2-619(a)(6) of the Code (735 ILCS 5/2-619(a)(6) (West 2012)). Elkhatib was granted leave to file an amended complaint.

¶ 5

The first amended complaint was filed October 29, 2012, and Sulaiman's motion to dismiss was again granted without prejudice. Elkhatib filed his second amended complaint, the subject of this appeal, on February 20, 2013, adding United Realty as a defendant.

¶ 6

Elkhatib, a licensed real estate agent in Illinois, worked as an independent contractor for United Realty, a real estate brokerage firm. Sulaiman, a licensed Illinois real estate broker and attorney, allegedly owned and operated United Realty with his brother-in-law, Abdul Suleiman.¹

¹ The second amended complaint alleges that Abdul "Sulaiman" is Ahmad Sulaiman's brother. However, according to Elkhatib's statement of facts on appeal, also supported by other documents in the record, Abdul is Ahmad's brother-in-law and his last name is spelled "Suleiman." There are also conflicting statements in the record regarding whether Sulaiman owned United Realty at the time the complaint was filed or if he had transferred ownership to Suleiman by then.

¶ 7 On May 16, 2005, Elkhatib and United Realty entered into a written independent contractor agreement which provided that Elkhatib would receive 80% of any commissions collected from any real estate listing and/or sale for which he was the real estate agent. According to the second amended complaint, which names both Sulaiman and United Realty as defendants, the "parties" agreed in 2007 that Elkhatib would receive 90% of the commissions paid on any transactions in excess of \$1 million. On appeal, Elkhatib represents that this was an oral agreement between himself and Sulaiman.

¶ 8 In March 2006, Elkhatib secured the listing for a hotel in Indiana. In February 2007, Elkhatib sold the hotel for \$1.8 million. At the time of the real estate closing, Elkhatib was on a business trip to California. United Realty received a commission of \$72,000 from the sale. Under the written agreement with United Realty, Elkhatib was entitled to 80% of that commission, or \$57,600. Because the sale was over \$1 million, under Elkhatib's alleged oral agreement with Sulaiman, his commission was 90% or \$64,800.

¶ 9 The original and first amended complaints, naming only Sulaiman as a defendant, alleged that at Elkhatib's direction, United Realty paid Elkhatib his commission by issuing a draft to be deposited in the client trust account of Sulaiman's law firm. According to the original pleading, when Elkhatib returned from his business trip, Sulaiman told him the money had been used for other purposes but assured him it would be repaid. However, the second amended complaint contained no mention of Elkhatib directing United Realty to pay the commission to Sulaiman or Sulaiman's client trust account, but merely alleged that upon Sulaiman's instruction, United Realty failed to pay the commission when Elkhatib returned from his business trip. Both sets of facts obviously cannot be true.

¶ 10 The second amended complaint further alleged that Sulaiman used Elkhatib's commission to pay personal expenses, law office expenses and payroll, and other United Realty expenses.

Consistent with the earlier versions of the complaint, the second amended complaint then alleged that in March 2007, Sulaiman paid a \$7,200 credit card bill on behalf of Elkhatib, and assured Elkhatib that the remainder of the commission would be paid in full. In May 2007, Sulaiman paid \$24,403.65 to the IRS on Elkhatib's behalf, and in October 2007, Sulaiman paid \$5,266.30 to the Illinois Department of Revenue on behalf of Elkhatib. Elkhatib alleged that Sulaiman did not make any payments after October 2007.

¶ 11 In June 2008, Sulaiman hired Elkhatib as an employee in his law firm, but Elkhatib was terminated in October 2009, allegedly after demanding payment of the outstanding balance on his commission. Elkhatib and his father met with Sulaiman and his father to resolve the dispute in late 2009 and early 2010, but these attempts were unsuccessful. As previously noted, Elkhatib's original complaint against Sulaiman was filed on March 20, 2012, and his second amended complaint adding United Realty as a defendant was filed on February 20, 2013.

¶ 12 The first count of the second amended complaint, against United Realty, alleged that Elkhatib was entitled to receive at least 80% of the commission on the hotel sale, or \$57,600, per the written independent contractor agreement. The second count, against Sulaiman for breach of oral contract, alleged that the following terms had been agreed to orally between Sulaiman and Elkhatib: (1) Sulaiman would accept and retain Elkhatib's commission of 90%, or \$64,800, (2) Sulaiman would pay no interest on the commission but would repay it as he was able to do so, (3) Elkhatib would forgo legal action to compel payment of the commission, and (4) Elkhatib would pay Sulaiman's standard hourly rate for activities related to the holding of Elkhatib's commission. The third through fifth counts were also against Sulaiman and alleged conversion, unjust enrichment and breach of fiduciary duty. The final count was against United Realty for conversion.

¶ 13 United Realty filed a motion to dismiss pursuant to section 2-619(a) of the Code (735 ILCS 5/2-619(a) (West 2012)), arguing that the agreement relevant to the sale of the hotel was an oral agreement because the sale was over \$1 million and therefore the five-year statute of limitations applies. Because the commission was due in February 2007 and Elkhatib filed his complaint in March 2012, United Realty contended that the claims against it were time barred. United Realty further argued that the conversion claim had been waived by Elkhatib and attached a redacted email from Elkhatib to Suleiman. In response, Elkhatib attached a copy of the email in its entirety and argued that the email said nothing regarding Elkhatib's dispute with Sulaiman and United Realty but instead addressed a dispute between Suleiman and Sulaiman.

¶ 14 Sulaiman filed a motion to dismiss the second amended complaint pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)). Although there is no transcript of the hearings on the motions to dismiss the first two complaints, Sulaiman's motion to dismiss states that the trial court twice found that Elkhatib failed to allege (1) facts supporting the existence of consideration to Sulaiman to support an oral contract for the higher commission, (2) facts to show a fiduciary relationship, and (3) fraud, undue influence or other wrongful conduct to support the unjust enrichment claim. Sulaiman noted that the second amended complaint no longer alleged that Elkhatib directed United Realty to pay his commission to Sulaiman, but retained remnants of the earlier allegations that Sulaiman was holding the money for Elkhatib.

¶ 15 Sulaiman argued that the complaint should be dismissed in its entirety because in each claim, Elkhatib was seeking to recover an illegal real estate commission. Sulaiman pointed out that the sale of the hotel, located in Indiana, was governed by Indiana law, which prohibits the sale of real estate in that state without an Indiana license. Sulaiman also argued that the breach of oral contract, unjust enrichment and breach of fiduciary duty claims were barred by the statute of limitations. Moreover, Elkhatib still failed to allege (1) consideration for the oral agreement and

Elkhatib's performance of that agreement, (2) fraud, undue influence or other wrongful conduct in support of the unjust enrichment claim, and (3) facts to show a fiduciary relationship. Finally, as to Elkhatib's newly added conversion claim, Sulaiman argued that (1) he failed to allege facts to support a legal right to the illegal commission, (2) the failure to pay money due under a contract is not a conversion, and (3) the claim was barred by the economic loss doctrine.

¶ 16 On May 30, 2013, United Realty filed a motion to adopt Sulaiman's argument regarding the illegality of the commission and the argument that the failure to pay money due under a contract is not a conversion. The second amended complaint was dismissed with prejudice on July 11, 2013. No detail was provided in the order regarding the grounds for dismissal. Elkhatib timely filed this appeal.

¶ 17 ANALYSIS

¶ 18 Section 2-619.1 of the Code allows a party to combine a section 2-615 motion to dismiss with a section 2-619 motion to dismiss. 735 ILCS 5/2-619.1 (West 2012). A section 2-615 motion to dismiss tests the legal sufficiency of the complaint while a section 2-619 motion to dismiss admits the sufficiency of the complaint but asserts affirmative matter that defeats the claim. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. We review *de novo* an order dismissing a complaint under either section 2-615 or section 2-619. *Id.*

¶ 19 We first address Sulaiman's contention that the complaint was properly dismissed based on the illegality of the underlying transaction. Indiana law prohibits the selling of real estate situated in Indiana without a license. Ind. Code Ann. § 25-34.1-3-2 (West 2006). An exception exists for referrals from out-of-state brokers to brokers licensed in Indiana. *Id.*

¶ 20 Sulaiman argued for dismissal on the grounds of illegality and attached an affidavit to his motion in which he averred that neither Elkhatib nor United Realty was licensed in Indiana. In

his response, Elkhatib merely pointed out the referral exception, stated that he was licensed in Illinois, and, in a non-sequitur, concluded that the transaction was legal. On appeal, Elkhatib argues, again somewhat incoherently, that the real estate contract "was not illegal in itself but was performed illegally by Sulaiman and [United Realty]." He further contends that Sulaiman did not provide any evidence that the transaction was actually performed illegally but that if it was, Sulaiman and United Realty were responsible.

¶ 21 Sulaiman correctly points out that issues not presented to the trial court are deemed waived and may not be raised for the first time on appeal. See *Haudrich v. Howmedica*, 169 Ill. 2d 525, 536 (1996). Elkhatib did not raise these arguments in the trial court and they have therefore been waived. Even if these arguments had not been waived, they are unavailing. By Elkhatib's own admission, he secured the hotel listing and completed the sale, knowing that he was only licensed in Illinois and not in Indiana. Once Sulaiman raised the defense of illegality and included an affidavit stating that Elkhatib and United Realty were not licensed in Indiana, the burden shifted to Elkhatib to prove the transaction was legal. See *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993) (presenting adequate affidavits supporting the asserted defense causes the burden to shift to the plaintiff). However, Elkhatib did not file a counteraffidavit and merely stated in reply that Indiana law contains an exception for referrals from out-of-state brokers, he was licensed in Illinois, and the transaction was therefore legal, an argument that makes no sense given that he has not produced any evidence of a referral. There is no allegation that any broker licensed in Indiana was involved in the transaction on behalf of the seller.

¶ 22 The agreement to pay a commission to a broker not licensed in Indiana was clearly illegal under Indiana law where neither Elkhatib nor United Realty was licensed to sell real estate in Indiana and did not refer the listing to a broker licensed in Indiana. Consequently, the alleged

contract to pay the commission is void because the commission was obtained illegally. Indeed, Elkhatib's amended pleading implicitly acknowledges as much by admitting that rather than paying him the commission directly, Sulaiman instead paid various debts on his behalf, an unusual arrangement evincing an awareness that Elkhatib was not legally entitled to receive the commission directly.

¶ 23 A plaintiff may not recover on a suit to enforce an agreement based on an illegal transaction because the plaintiff is the wrongdoer and enforcing such an agreement would make the court an indirect participant in the wrongful conduct. *Id.* at 121-22. Whether the transaction could have been performed legally is irrelevant and Elkhatib, who by his own admission secured the listing and completed the sale, is not an innocent third party. Thus, because the suit is an attempt to collect monies allegedly due on an illegally obtained commission, it was correctly dismissed with prejudice.

¶ 24 We could affirm the trial court's dismissal on any number of bases, including: (1) failure to demonstrate that United Realty breached the contract given Elkhatib's own admission in his second amended complaint that Sulaiman accepted the commission on his behalf as his agent; (2) failure to allege sufficient consideration for the oral agreement with Sulaiman; (3) failure to allege performance on the part of Elkhatib in making payments to Sulaiman for "activities related to the holding of the commission" (an allegation we note is patently absurd on its face); (4) failure to demonstrate breach by Sulaiman given Elkhatib's admission that Sulaiman was to pay the commission "as he was able;" (5) failure to allege fraud, duress or undue influence in support of the unjust enrichment claim; (6) failure to allege facts that would support a fiduciary relationship; (7) an action for conversion cannot be based on an obligation to pay a debt; and (8) the complaint is time-barred based on the five-year statute of limitations. But given our conclusion that the underlying transaction was illegal and therefore Elkhatib may not recover

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under any theory, we decline to address the remaining bases under which dismissal would also have been proper.

¶ 25 Affirmed.