2015 IL App (1st) 13-2920-U

THIRD DIVISION
June 24, 2015

No. 1-13-2920

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

TOWER CROSSING CONDOMINIUM ASSOCIATION, an Illinois not-for-profit corporation and as assignee of KIMBALL HILL, INC., a dissolved Illinois corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 12 L 9370
PRATE INSTALLATIONS, INC., an Illinois corporation, PRATE SHEET METAL, INC., a purportedly dissolved Illinois corporation, MICHAEL PRATE, individually, UNKNOWN OWNERS AND OPERATORS OF "PRATE SHEET METAL, INC.," individually, HODSCO CONSTRUCTION, INC., an Illinois corporation, and CUSTOM ROOFING CONTRACTING, LTD.,	)	The Honorable Margaret Brennan
Defendants-Appellees,	)	Judge presiding.
CUSTOMS ROOFING CONTRACTING, LTD.,	)	
Third-Party Plaintiff-Appellee,	)	
v.	)	

JONA ENTERPRISES, INC., and CLASSIC ROOFING, INC.,	)
	)
Third-Party Defendants-Appellees.	)

JUSTICE LAVIN delivered the judgment of the court
Presiding Justice Pucinski and Justice Hyman concurred in the judgment

ORDER

¶ 1 *Held*: This court reversed the trial court decision dismissing plaintiff's complaint because its breach-of-contract and indemnity actions against the defendant subcontractors were not time-barred. Plaintiff also adequately alleged the developer-vendor was insolvent, and while the record established plaintiff had some recourse against the developer-vendor, this did not preclude its implied warranty of habitability claims against the subcontractors from proceeding. The denial of leave to file a third-amended complaint was not reasonable.

¶ 2 This case comes to us after Plaintiff Tower Crossing Condominium Association (Tower Crossing), acting on behalf of the condominium association board, filed claims against Kimball Hill, the main developer-vendor of Tower Crossing's 154-unit building in Glenview, Illinois. After the condominium's construction, Tower Crossing asserted that various defects caused water infiltration and mold inside the homes, among other problems, but Kimball Hill then filed for Chapter 11 bankruptcy. Kimball Hill's bankruptcy plan was confirmed in federal court, and Tower Crossing later settled with Kimball Hill's successor as to certain claims filed through the bankruptcy proceedings. The settlement garnered Tower Crossing money and assigned legal rights of Kimball Hill.

¶ 3 While Tower Crossing was involved in the federal bankruptcy proceedings with Kimball Hill, Tower Crossing also filed suit in state court against the project's subcontractors, including Prate Installations, Inc. (Prate Installations), Prate Sheet Metal, Inc. (Prate Sheet)[1], Hodsco Construction, Inc. (Hodsco), and Custom Roofing Contracting, Inc. (Custom) (collectively,

[1] There was some confusion at the trial level as to whether Kimball Hill entered into a subcontract with Prate or Prate Sheet for the construction of the Tower Crossing building, as explained later.

"Defendants"). Defendants allegedly performed roofing and masonry work that led to the construction defects. The state lawsuit was removed to federal court and consolidated with the post-confirmation bankruptcy proceedings, only to be returned to state court after the settlement. Among the 15 or so subcontractors originally sued by Tower Crossing, only Defendants remained parties following the settlement. On Defendants' collective motions, the trial court then dismissed Tower Crossing's second-amended complaint and denied leave to file a third-amended complaint. On appeal, Tower Crossing contends the court erred in determining the assigned breach of contract and indemnity claims were time-barred and the claims relating to implied warranty of habitability were not viable due to the prior settlement with Kimball Hill and its successor. Tower Crossing finally asserts the court abused its discretion in denying leave to file the third-amended complaint. Defendants Hodsco, Custom, and Prate Sheet/Prate Installations have filed responses. They joined in their motions to dismiss before the trial court and now join in each other's responses on appeal. For the reasons stated, we reverse in part and affirm in part.

¶ 4 BACKGROUND

¶ 5 *Chapter 11 Bankruptcy Proceedings & Confirmation Plan*

¶ 6 Since this involves a foray into the terrain of federal bankruptcy law, we offer background facts on the bankruptcy process where necessary as part of the factual discussion. We note that to the extent permissible under the law and for the purpose of providing a thorough review of this case, we have taken judicial notice of Kimball Hill's bankruptcy proceedings, and in particular the Chapter 11 petition, reorganization plan, and order confirming the reorganization plan, all of which affect issues relating to this appeal. See *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, ¶ 3 n. 1; see also Ill. R. Evid. 201(c) (eff. Jan. 1,

2011) (when appropriate, a court may take judicial notice, whether requested or not, at any stage of proceedings of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); 735 ILCS 5/8-1002 (West 2012) (the appellate court shall take judicial notice of all matters of which the circuit court was required to take judicial notice). In addition, as this case also involves the interpretation of federal law, we note decisions of the federal courts are binding on this court where such laws may be given uniform application. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 21 (2011); see also *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶¶ 35, 53.

¶ 7 Kimball Hill designed, developed, and constructed the condominium around 2002 or 2003, also selling the units. The unit owners began operating the condo association in 2005. On April 23, 2008, Kimball Hill filed a voluntary petition for Chapter 11 bankruptcy to reorganize (No. 08-10095). See 11 U.S.C. § 301 (West 2012). Kimball Hill then assumed the additional identity of "debtor in possession," thus succeeding to a set of statutorily defined powers and duties. See 11 U.S.C.A. § 1101 (West 2012); *In re Gordon Sel-Way, Inc.*, 270 F.3d 280, 290 (6th Cir. 2001) (the debtor-in-possession is a separate legal entity from the debtor). A debtor-in-possession is a debtor that keeps possession and control of its assets, continuing to operate its business, while undergoing a reorganization under Chapter 11. *Bankruptcy Basics*, United States Courts, www.uscourts.gov; see also *In re C.W. Mining Co.*, 636 F.3d 1257, 1261 (10th Cir. 2011). While in some cases, a trustee may be appointed to oversee the reorganization due to fraud or mismanagement, that is rare and was not the case here. *C.W. Mining Co.*, 636 F.3d at 1261; see also *Smith v. Rockett*, 522 F.3d 1080, 1084 (10th Cir. 2008) (*in dissent*) (typically there is no trustee in a Chapter 11 case and there can be no "debtor in possession" when a trustee has been appointed).

¶ 8 Acting as a creditor, Tower Crossing then filed a federal "proof of claim" or right to payment against Kimball Hill for breach of contract for over $3 million regarding the alleged defects. See 11 U.S.C. §§ 101(5), 501 (West 2012). Tower Crossing later amended this proof of claim, asserting the damages were actually some $23 million. Tower Crossing also filed a property damage claim on behalf of all the condo owners.

¶ 9 The bankruptcy court entered a confirmation order approving Kimball Hill's reorganization plan, effective March 24, 2009. Pursuant to the confirmation order and plan, Kimball Hill's total assets were transferred to the "KHI Trusts." The KHI Trusts were created under the KHI Post-Consummation Agreement and the KHI Liquidation Trust Agreement, and the KHI Trusts subsequently took charge of liquidating/distributing assets and resolving claims pursuant to the plan following the Chapter 11 reorganization. The Liquidation Trust, run by the Administrator, was then the successor of Kimball Hill (hereinafter, "KHI Liquidation Trust").

¶ 10 Generally, when a Chapter 11 reorganization plan is confirmed by the bankruptcy court, the debtor loses its debtor-in-possession status and with it, standing to pursue the estate's claims. *In re MPF Holdings US LLC v. Anderson*, 701 F.3d 449, 453 (5th Cir. 2012); *U.S. Bank National Association v. Verizon Communications, Inc.*, 761 F.3d 409, 415 (5th Cir. 2014) (same); see also 11 U.S.C. § 1141(d)(1)(A) (West 2012) (Chapter 11 confirmation order on reorganization plan discharges the debtor from all pre-confirmation claims). The purpose of revesting the property in the debtor is to make the debtor master of his own fate in the commercial world, free of creditors to whom he was indebted before Chapter 11. *Prince v. Clare*, 67 B.R. 270, 272 (N.D. Ill. 1986). Claims may nonetheless be reserved in a reorganization plan to a liquidating trustee. *MPF Holdings US LLC*, 761 F.3d at 453-54; see also 11 U.S.C. § 1141(b) (West 2012) (confirmation of a plan vests all estate property in debtor, *unless otherwise provided in the*

confirmation plan or order); 11 U.S.C. 1123(b)(3) (West 2012). As discussed further below, the KHI Liquidation Trust was transferred post-confirmation control of all the estate's assets and acted on behalf of the estate. The KHI Liquidation Trust was also vested with authority to pursue any claims and causes of action of Kimball Hill.

¶ 11 *Post-Confirmation Disputes in State & Federal Court*

¶ 12 On October 30, 2009, Tower Crossing sued the various subcontractors, including Prate Installations, Hodsco, and Custom Roofing, in the Cook County circuit court (No. 2009-L-012904) for breach of implied warranty of habitability and negligence relating to the alleged building defects.

¶ 13 On April 23, 2010, the KHI Liquidation Trust filed a complaint in the bankruptcy case (No. 08-10095) against Prate Installations, Hodsco, Custom Roofing, and other subcontractors, asserting indemnity, breach of contract, and contribution. This commenced an "adversary proceeding" (Adv. No. 10-1042). In the same pleading, the KHI Liquidation Trust also sued Tower Crossing, asking for a judicial declaration of "allowed amounts," if any. Tower Crossing filed a counterclaim asserting any recovery by the KHI Liquidation Trust from trade contractors should go to it.

¶ 14 In light of the bankruptcy proceedings, Tower Crossing's 2009 state lawsuit was then removed to the bankruptcy court (Adv. No. 10-01797) and consolidated with the adversary proceeding.

¶ 15 Tower Crossing and the KHI Liquidation Trust subsequently entered into mediation negotiations. The Defendants in the present litigation were declared to be "Non-Settling Entities" and thus were not part of the settlement.[2] In March 2012, Tower Crossing, KHI Liquidation Trust, and various subcontractors agreed to "settle and resolve all disputes between

[2] Custom Roofing claimed it was never served with the 2009 state lawsuit and did not participate in the mediation.

and among them" by the terms of the settlement agreement. That agreement awarded Tower Crossing $565,000 from the settling subcontractors and Kimball Hill's insurer (which paid $250,000 of that total amount). The KHI Liquidation Trust also consented to the bankruptcy court's entry of a "final, non-appealable judgment" in the adversary proceeding against Kimball Hill and in favor of Tower Crossing for nearly $6.5 million. This represented the $6.6-million special assessment that Tower Crossing charged unit owners to investigate and repair the construction defects. The settlement also stated there would be an "Allowed Claim," as defined in the reorganization plan, of nearly $6.5 million but nonetheless stated the amount distributed from the bankruptcy estate could not exceed $300,000. Tower Crossing agreed to otherwise satisfy the $6.5 million judgment through the Non-Settling Entities and seek no further redress from the bankruptcy estate or Kimball Hill's other insurer.

¶ 16 The settlement specifically stated KHI Liquidation Trust "has the exclusive right, authority and discretion to file, prosecute, defend and resolve the claims and causes of action set forth in the Adversary Proceeding" (a reference to the April 23, 2010 bankruptcy filing against Tower Crossing, the "Settling Contractors" and others). However, through the settlement agreement, any claims involving Tower Crossing, the settling contractors, or insurers were dismissed and further barred.

¶ 17 Additionally, in the settlement agreement, the KHI Liquidation Trust and Kimball Hill assigned to Tower Crossing their rights and interests "in, to and against all Non-Settling Entities arising out of and/or connected to such Non-Settling Entities." This included contracts and any cause of action against the Non-Settling Entities, including Defendants, relating to the property at issue. The KHI Liquidation Trust, however, specifically noted it could not guarantee the existence of rights against the Non-Settling Entities or likelihood of recovery. In conclusion,

through the settlement agreement Tower Crossing obtained $865,000 or 3.7 percent of its $23 million-dollar federal proof of claim, as well as assigned rights from Kimball Hill/KHI Liquidation Trust.

¶ 18 On August 20, 2012, Tower Crossing's state lawsuit (originally filed in 2009) was remanded from the bankruptcy court to the Cook County circuit court (No. 12 L 9370). On January 10, 2013, Tower Crossing filed a second-amended complaint in Cook County against Defendants alleging breach of contract and contractual indemnity (Tower Crossing asserted Kimball Hill assigned these particular claims to them) and also breach of implied warranty of habitability. In an amended pleading, Tower Crossing also added Prate Sheet as a party. In response, the Defendants filed motions to dismiss.

¶ 19 On August 16, 2013, the circuit court granted the motions to dismiss. Consistent with the Defendants' arguments, the court concluded the assigned breach-of-contract claims were time-barred, and the federal savings statute did not apply to salvage the claims. Regarding the implied warranty of habitability claims, the court relied on *Minton v. The Richards Group of Chicago*, 116 Ill. App. 3d 852 (1983), requiring the developer-vendor to be insolvent and the home purchaser without recourse before suing a subcontractor. Although the court found Kimball Hill was insolvent, it further determined Tower Crossing already had recourse through the bankruptcy settlement agreement and, as a result, was not entitled to sue the Defendants as subcontractors for implied warranty of habitability. The court also found there was no contract between Kimball Hill and Prate Installations, and further that Prate Sheet already was dissolved and could not legitimately enter into a contract with Kimball Hill in 2002. The court stated these were additional reasons to grant the motions to dismiss by Prate Installations and Prate Sheet. The court lastly denied Tower Crossing leave to file a third-amended complaint, which alleged

the owners/operators of Prate Sheet were individually liable for fraudulently entering a contract with the developer while Prate Sheet was dissolved.

¶ 20 Tower Crossing timely appealed.

¶ 21 ANALYSIS

¶ 22 Tower Crossing challenges the dismissal of its second-amended complaint. A section 2-615 motion poses the question of whether the complaint states a cause of action upon which relief can be granted. *Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 307 (2002). A section 2-619 motion, on the other hand, raises certain defects or defenses and questions whether a defendant is entitled to judgment as a matter of law. *Id*.; see also *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (2008) (a section 2-619 motion admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matters, appearing on the face of the complaint, or established by external submissions, which defeats plaintiff's claim). Because the resolution of either motion involves a question of law, the standard of review is *de novo*. *Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 16; *Prime Leasing, Inc*, 332 Ill. App. 3d at 307. On a motion to dismiss, this court must accept all well-pleaded facts as true. *Id*.

¶ 23 *Assigned Breach-of-Contract & Indemnity Claims*

¶ 24 Tower Crossing first contends the trial court erred in determining the assigned claims for breach of contract and contractual indemnity (Counts 5-8) against the subcontractors were time-barred. The statute of limitations in Illinois for contractual construction-related claims involving real property is four years "from the time the person bringing an action, or his or her privity, knew or should reasonably have known" of the construction defect. See 735 ILCS 5/13-214(a) (West 2012). Here, the parties agree the statute of limitations on the claim began to run on April

23, 2004, which is the date that Kimball Hill knew or should have known of the alleged construction defects created by the subcontractors.

¶ 25 Exactly four years later, however, Kimball Hill filed for Chapter 11 bankruptcy, not a state lawsuit on this property claim. Section 108 of Title 11 of the United States Bankruptcy Code (Code) may nonetheless extend any relevant state statute of limitation for an additional two years after the filing of a chapter 11 petition (provided the statute of limitations has not expired). 11 U.S.C. § 108 (West 2012); *Wood & Locker, Inc. v. Doran and Associates*, 708 F. Supp. 684, 687 (W.D. Pa. 1989). Section 108 is designed to allow monetary recoveries that might otherwise be lost in order to enlarge or preserve the bankruptcy estate for the benefit of creditors (see *American Bank v. C.I.T. Construction Incorporated of Texas*, 944 F.2d 253, 260 (5th Cir. 1991); *In re Greater Southeast Community Hospital Corp. v. Tuft*, 333 B.R. 506, 535 (2005)), and it specifically states:

"(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, *the trustee* may commence such action only before the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief." (Emphasis added.) 11 U.S.C. § 108 (West 2012).

¶ 26 Reading section 108 in conjunction with the facts of this case, the 4-year statute of limitations did not expire before Kimball Hill filed its bankruptcy petition on April 23, 2008 (as the 4-year limitation period actually expired at the end of that very day). For section 108 to then apply, the trustee had to file the contract action within two years from the "order of relief" under

subsection (a)(2). It appears the order of relief was entered on April 23, 2008, the same day Kimball Hill filed its voluntary petition for bankruptcy. See 11 U.S.C.A. § 301(b) (West 2012) (the commencement of a voluntary case under Chapter 11 constitutes an order for relief under such chapter).

¶ 27 Exactly two years later, on April 23, 2010, the KHI Liquidation Trust filed the contract action against subcontractors as part of the adversary proceeding. It is on this date that Tower Crossing now hangs its statute-of-limitations hat. That is, Tower Crossing argues the breach of contract and contractual indemnity claims were properly brought in federal court within the two-year savings limitation of section 108, thus preserving the claim. When Tower Crossing later stepped into the shoes of Kimball Hill, as the assignee, it had the right to rely on the April 23, 2010, filing date. In other words, Tower Crossing argues it benefitted from the section 108 savings provision.

¶ 28 Here, the trial court found section 108 inapplicable because the 2010 action was not filed by a "trustee," as required by the plain language of section 108. The trial court rejected Tower Crossing's argument below that a debtor-in-possession may also file such an action under section 108.[3] Tower Crossing on appeal still maintains the contract action can be sustained because it was filed by Kimball Hill, as a debtor-in-possession.

¶ 29 Before proceeding on the merits of this argument, it is necessary to identify the various entities involved. As stated, after filing the Chapter 11 petition, Kimball Hill became a debtor-in-possession. Indeed, the confirmation order specifically states that after filing for Chapter 11 bankruptcy, Kimball Hill continued to operate its business and manage its properties as a debtor-

[3] Citing *In re Dohm*, 14 B.R. 701 (1981), which held section 108 was available only to trustees, not *debtors*, the trial court apparently believed Kimball Hill was a "debtor" rather than a "debtor-in-possession" at the relevant times (although they are two distinct entities; again, a debtor takes on the additional status of debtor-in-possession during Chapter 11 bankruptcy).

in-possession "pursuant to sections 1107(a) and 1108 of the Bankruptcy Code." Under section 1107(a) of the Code, a debtor-in-possession has all the rights and powers of a trustee. 11 U.S.C. § 1107(a) (West 2012). Pursuant to section 1107(a) and relevant case law, Kimball Hill as debtor-in-possession shared the same powers and duties of a trustee and thus had the ability to take advantage of section 108's savings provision from the 2008 bankruptcy filing to the 2009 confirmation order. See *Id*; *American Bank*, 944 F.2d at 260 (section 108 applies to trustees and debtors-in-possession); *Wood & Locker, Inc.*, 708 F. Supp. at 687.

¶ 30 Nonetheless, the entity which filed the 2010 action was *not* Kimball Hill acting as debtor-in-possession, but rather the KHI Liquidation Trust. Again, the KHI Liquidation Trust was the entity appointed pursuant to the confirmation plan and order to manage the bankrupt estate's assets during liquidation, and the estate was not revested in Kimball Hill as debtor. The Code makes clear that an appointed "representative of the estate" – here the Liquidation Trust Administrator – is a distinct actor. See *United States v. Bond*, 762 F.3d 255, 260 (2d Cir. 2014); 11 U.S.C. § 1123(b)(3) (West 2012). Neither the parties on appeal, nor the trial court addressed this fact.[4]

¶ 31 However, our *de novo* review of the pleadings, and confirmation plan and order, reveals that the KHI Liquidation Trust succeeded to the rights and powers of Kimball Hill. See 11 U.S.C. § 1141(b) (West 2012). For example, the plan states that effective upon confirmation, Kimball Hill's right to pursue "any and all Causes of Action, whether arising before or after the Petition Date, in any court or other tribunal in an adversary proceeding or contested matter filed in one or more of the Chapter 11 Cases," would be transferred to the KHI Liquidation Trust.

[4] On appeal, Defendants more specifically contend Tower Crossing failed to allege sufficient facts to show Kimball Hill was a debtor-in-possession at the relevant time. Tower Crossing responds, Defendants waived this argument. Because neither party seems to have understood that a debtor-in-possession did not file the 2010 action, we will proceed in our review, noting that both parties should have developed a better understanding of how the bankruptcy case affected the present lawsuit.

This included causes of action in contract that may exist or subsequently arise against "suppliers of goods or services." The plan also states "any claims, rights, and Causes of Action that the respective Debtors may hold against any Entity," would "vest" in the KHI Liquidation Trust in accordance with "section 1123(b)(3) of the Bankruptcy Code." See 11 U.S.C. 1123(b)(3) (West 2012). As alluded to earlier, section 1123(b)(3) permits a plan to provide for "the retention and enforcement by the debtor, by the trustee, *or by a representative of the estate appointed for such purpose*, of any such claim or interest." *Id*. (Emphasis added.) The plan further states the KHI Liquidation Trust could bring claims arising under state law and "all other Causes of Action of a trustee and debtor in possession pursuant to the Bankruptcy Code."

¶ 32 Because Kimball Hill unquestionably had the authority to utilize section 108 of the Code during the period it remained debtor-in-possession, and Kimball Hill transferred all such authority to the KHI Liquidation Trust under the confirmation plan and order for the post-confirmation liquidation process, it appears the KHI Liquidation Trust therefore could also utilize section 108's savings provision to file the 2010 contract action against the subcontractors named in this case. See *Greater Southeast Community Hospital Corp.*, 333 B.R. at 535-38 (rejecting a "literal" reading of section 108 and permitting post-confirmation liquidation trust to invoke section 108 so as to preserve the debtor's estate, where confirmation plan and order provided for transfer of assets to liquidation trust, which then acted as representative of estate); see also *Antioch Litigation Trust v. McDermott Will & Emery, LLP*, 500 B.R. 755, 762-64 (2013) (relying on *Greater Southeast Community Hospital Corp.* and holding same). This is consistent with the purpose of section 108, permitting enlargement of the bankruptcy estate for the creditors' benefit.

¶ 33 When the KHI Liquidation Trust and Kimball Hill assigned their rights to Tower Crossing through the settlement agreement, Tower Crossing stepped into the shoes of the KHI Liquidation Trust and purportedly gained the authority to pursue the timely-filed 2010 action. Thus, the trial court's judgment holding that Tower Crossing's claim was time-barred merely because it was not filed by a trustee was in error. Viewing the pleadings in a light most favorable to Tower Crossing, as we must, we hold the assigned contractual claims as alleged can proceed. See *Peters v. Riggs*, 2015 IL App (4th) 140043, ¶ 40 (section 2-619(a)(9) motion should only be granted if plaintiff can prove no set of facts that would support a cause of action). However, we leave it to the trial court and the parties to determine whether the 2010 action originally timely filed in federal court can now be transferred to state court and sustained for statute of limitations purposes. See *Cimino v. Sublette*, 2015 IL App (1st) 133373, ¶ 3 (reviewing court not a repository for appellant to foist burden of argument and research). We also note this is a complicated area of law. Thus far our research has only uncovered lower federal bankruptcy court cases permitting a post-confirmation liquidating trustee to invoke section 108's savings provision. Therefore, we make no determination as to whether other procedural defects or federal policies nonetheless preclude this action given that neither of the parties developed arguments regarding the legal effect of KHI Liquidation Trust having filed the 2010 action. For the reasons stated, we remand this issue to the circuit court.

¶ 34 We note Defendants raise alternative arguments. For example, they contend the assigned breach-of-contract claims are improper because the settlement agreement "does not specify what damages, if any, [Kimball Hill] suffered as a result of the defendants' alleged negligence." Aside from the fact that Tower Crossing has not raised a negligence claim, Defendants' legally unsupported arguments involve fact issues that are inappropriate to address at this stage. See Ill.

S. Ct. R. 341(h)(7), (i) (eff. Feb. 6, 2013) (argument must contain citation to authority). We decline to entertain them further on appeal.

¶ 35 *Implied Warranty of Habitability*

¶ 36 We turn next to Tower Crossing's contention that Defendants breached the implied warranty of habitability (Counts 1-4). The implied warranty of habitability is a creature of public policy designed to protect purchasers of new houses on discovery of latent defects in their homes. *1324 W. Pratt Condominium Association v. Platt Construction Group, Inc.*, 404 Ill. App. 3d 611, 615-16 (2010) (hereinafter, *Pratt I*). This form of action emerged in the late 1950s as a way to avoid the harsh results in real property sales of *caveat emptor*, where the buyer took the property at his own risk, and merger, where all agreements between the buyer and seller merged into the deed. *Id.*; see also *Petersen v. Hubschman Construction Co., Inc.*, 76 Ill. 2d 31, 38-40 (1979). In other words, historically buyers could only rely on contract law to hold builder-vendors liable for construction defects in new homes. *Pratt I*, 404 Ill. App. 3d at 616. Regarding the warranty, the supreme court explained, "It is implied as a separate covenant between the builder-vendor and the vendee because of the unusual dependent relationship of the vendee to the vendor." *Petersen*, 76 Ill. 2d at 41. The court reasoned that a vendee is often making the single largest purchase and has a right to expect a house reasonably fit for residence based on the builders' skill. *Id.* at 40.

¶ 37 As recent opinions of this court have noted, the implied warranty of habitability has steadily expanded over the years to protect new home purchasers. *Pratt I*, 404 Ill. App. 3d at 616, and cases cited therein. For example, successive purchasers can now utilize the action, and the principle extends not just to defects in new homes but to new additions on existing structures. *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 183 (1982); see also *VonHoldt v. Barba & Barba*

Const., Inc., 175 Ill. 2d 426, 431 (1997). It now applies not just to builder-vendors, but also to builders. *Pratt I*, 404 Ill. App. 3d at 618 (applying doctrine to builders regardless of involvement in sale of home). As the supreme court emphasized, although the warranty has roots in the executed sales contract, it exists independently, and privity of contract is not required. *Redarowicz*, 92 Ill. 2d at 183; *VonHoldt*, 175 Ill. 2d at 432.

¶ 38 In the seminal case, *Minton v. The Richards Group of Chicago*, 116 Ill. App. 3d 852 (1983), this court expanded the class of potential defendants to include subcontractors where the builder-vendor is dissolved, insolvent, and the plaintiff purchaser thus has "no recourse" against the builder-vendor. *Minton* reasoned the warranty aimed to protect purchasers' expectations by holding builder-vendors accountable, especially where the purchaser had no say in hiring subcontractors and the builder-vendor was in a better position to know which subcontractor could perform the work. *Minton* relied on *Redarowicz*'s determination that privity of contract was not required and modified *Waterford Condominium v. Dunbar Corp.*, 104 Ill. App. 3d 371, 375 (1982), a pre-*Redarowicz* case barring a warranty claim against the subcontractor. See *Washington Courte Condominium Association-Four v. Washington-Golf Corp.*, 150 Ill. App. 3d 681, 690 (1986) (noting *Minton* created the sole exception to the *Waterford* rule). Although *Minton* is an appellate court case, it has been the authority on the above-stated points of law for over 30 years, and has not been addressed by our supreme court.

¶ 39 Consistent with this precedent, Tower Crossing argues its breach of implied warranty of habitability claims against the Defendants must be sustained under *Minton*. Defendants respond that Tower Crossing has failed to allege (1) the developer was insolvent or (2) establish Tower Crossing had "no recourse." As to the first requirement, insolvency simply means that a party's liabilities exceed the value of its assets, and that it has stopped paying debts in the ordinary

course of business. *1324 W. Pratt Condominium Association v. Platt Construction Group, Inc.*, 2013 IL App (1st) 130744, ¶ 25 (hereinafter, *Pratt III*). It is the burden of the purchaser to establish the general contractor is insolvent before it can proceed against the subcontractor on a warranty claim. *Pratt III*, 2013 IL App (1st) 130744, ¶¶ 20, 25 (reaffirming *Minton* rule); see also *1324 W. Pratt Condominium Association v. Platt Construction Group, Inc.*, 2012 IL App (1st) 111474, ¶ 39 (hereinafter *Pratt II*) (holding that so long as the builder Platt remained solvent, the condominium association could not proceed against the subcontractor EZ Masonry). Defendants note, and Tower Crossing seems to acknowledge, that insolvency is not a requirement for a Chapter 11 filing or confirmation of a reorganization plan. See *In re Marshall*, 300 B.R. 507, 510 (2003), *affirmed by In re Marshall*, 403 B.R. 668, 685-86 (2009) (noting the Code has no insolvency requirement and a debtor's status in that regard is frequently at the heart of Chapter 11 proceedings). [5] Tower Crossing nonetheless contends: "[a]lleging that one filed for Chapter 11 bankruptcy is the same as alleging insolvency." Tower Crossing posits that it's natural to infer Kimball Hill's insolvency. On these specific facts, we agree.

¶ 40 In ruling on a section 2-615 motion, the court considers (1) those facts apparent from the face of the pleadings, (2) matters subject to judicial notice, and (3) judicial admissions in the record. *Peters*, 2015 IL App (4th) 140043, ¶ 39. A complaint should be dismissed under section 2-615 only if it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. *Id.*

¶ 41 In Tower Crossing's original complaint filed in 2009, which we consider for historical purposes, it alleged that on information and belief Kimball Hill "has insufficient assets to satisfy

[5] Tower Crossing contends Defendants waived this issue, but in responsive pleadings and at oral arguments before the trial court, Defendants specifically argued Tower Crossing could not infer insolvency from the bankruptcy filing and Tower Crossing thus failed to show insolvency. The issues raised below were commensurate with those raised on appeal. See *Huang*, 2014 IL App (1st) 123231, ¶ 22.

Plaintiffs' claims and is otherwise insolvent and, [*sic*] Plaintiffs are or may be unable to obtain any recovery from [Kimball Hill]." By the time this original lawsuit was remanded from federal to state court in August 2012, Tower Crossing had settled with the KHI Liquidation Trust and certain subcontractors. According to the Secretary of State records, of which we may take judicial notice, "Kimball Hill, Inc." was dissolved as of August 2010. See *Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 35. Kimball Hill thus was not operating as a business, and the settlement agreement, attached to the second-amended complaint, barred further recovery from Kimball Hill or its bankruptcy estate. See *Kapotas v. Better Government Association*, 2015 IL App (1st) 140534, ¶ 27 (noting an exhibit attached to a complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss).

¶ 42 Moreover, Defendants (except for Prate Sheet) were part of the federal adversary proceeding. When Tower Crossing subsequently filed its second-amended state-court complaint in January 2013, Defendants had to be aware through the settlement agreement disposing of the federal adversary proceeding, that Tower Crossing only obtained $865,000 or 3.7 percent of its $23 million-dollar federal proof of claim. Defendants acknowledge on appeal that Tower Crossing's $6.5 judgment gained through settlement was unenforceable and uncollectible except for the $300,000 (the settlement stated as much). The only discernible inference from the above-stated facts is that Kimball Hill's liabilities exceeded its debts and Kimball Hill was insolvent, which is consistent with the trial court's finding. On this record and at this pleading stage, the allegation of Kimball Hill's bankruptcy in the second-amended complaint gave rise to the inference that Kimball Hill was insolvent. Tower Crossing satisfied *Minton* standards in that regard, sufficiently stating a cause of action. See *Illinois Graphics Company v. Nickum*, 159 Ill. 2d 469, 488-89 (1994) (a complaint need only allege facts which establish the right to recovery);

Pratt III, 2013 IL App (1st) 130744, ¶ 26; *cf. Washington Courte Condominium Association-Four*, 150 Ill. App. 3d at 689 (*Minton* claim fails where developer insolvency unsubstantiated as matter outside record). We, however, note that the better practice would have been to specifically allege "insolvency" in the amended complaints with supporting facts to contradict any motion to dismiss, rather than leaving it to this court to parse through the record and bankruptcy documents.

¶ 43 Tower Crossing also contends the trial court erred in interpreting the second *Minton* requirement (that the plaintiff purchaser must have "no recourse" against the builder-vendor prior to suing a subcontractor) given the facts in this case. The trial court held Tower Crossing already had recourse through the bankruptcy settlement agreement and this barred the implied warranty claim. Tower Crossing argues the "no recourse" language cannot be interpreted so narrowly as to preclude the present lawsuit against the allegedly at-fault subcontractors, when the plaintiff has only recovered a miniscule percentage from its insolvent developer. Tower Crossing argues such an interpretation vitiates the public policy of protecting innocent home purchasers against the evils of shoddy construction, over which purchasers have little control and which result in latent defects. For the reasons to follow, we agree.

¶ 44 "No recourse" means "The lack of means by which to obtain reimbursement from, or a judgment against, a person or entity." Black's Law Dictionary, (9th ed. 2009). Here, soon after Kimball Hill filed for bankruptcy in 2008, Tower Crossing filed a federal proof of claim for damages totaling $23 million, thus taking on the status of a "creditor" in the bankruptcy proceedings. As stated, the record before us shows those proceedings eventually concluded not with a reorganized business entity, but one that had dissolved and was liquidating its assets. As part of that liquidating process, the KHI Liquidation Trust filed an adversary proceeding against

Tower Crossing to determine how much money the bankruptcy estate owed Tower Crossing. Settlement of that adversary complaint resulted in $565,000 from certain settling subcontractors and an insurance company. As stated, while Tower Crossing gained the $6.5-million judgment, only $300,000 was allowed from the bankruptcy estate, presumably because that was all there was to give. In short, Tower Crossing gained only $865,000 or 3.7 percent on its $23 million-dollar claim. We can hardly say this judgment permitted the "reimbursement" allegedly needed to satisfy the innocent home purchaser claims against the bankrupt developer. Indeed, in its complaint, Tower Crossing alleged the cost to remedy the damages "substantially exceeded" the $6.6-million condo assessment. As such, the record gives rise to the inference that due to the bankruptcy proceedings, Tower Crossing lacked the means to obtain full reimbursement of its claims from the insolvent developer. Pursuant to the public policy on implied warranty claims and *Minton*, itself, we hold that Tower Crossing's claims for breach of implied warranty of habitability against the Defendants therefore should be allowed to proceed. *Pratt III*, 2013 IL App (1st) 130744, ¶ 26 (circuit court found after the fourth-amended complaint and limited discovery that the builder was insolvent but "in good standing with limited assets," and consequently, condo association could proceed against subcontractor on warranty claim). Discovery should then aim to identify whether any subcontractor was indeed at fault for the defective home conditions and aim to identify the degree of fault. The extent of reimbursement due, if any, is a fact question.

¶ 45 Anticipating this holding, Defendants argue alternatively that we must affirm the dismissal of this lawsuit because Tower Crossing contractually waived the right to bring the implied warranty of habitability claims. Such claims, implied by law for the protection of consumers, should not be considered waived except by clear and specific language. *Herlihy v.*

Dunbar Builders Corporation, 92 Ill. App. 3d 310, 316-17 (1980). The party seeking the benefit of the disclaimer must not only show a conspicuous provision fully disclosing the consequences of its inclusion but also that such was in fact the agreement reached. *Id*. at 317.

¶ 46 Defendants point to paragraph 10 in the purchasers' agreement (attached to Tower Crossing's complaint), which states in relevant part in capitalized letters that the builder makes no express or implied warranty of habitability except as provided in the builder's limited warranty or permitted by law. Paragraph 10 also states each home purchaser has received a copy of the limited warranty and had the opportunity to review it. In the contract, after several more paragraphs, there is a signature line for the purchaser. While Defendants now rely on paragraph 10 and the "limited warranty" to justify their waiver argument, they have not provided the full limited warranty in the record (they cite to only a single paragraph quote appearing in Tower Crossing's responsive pleadings). We cannot determine whether the limited warranty document appeared in conjunction with the sales contract's signature page, whether the waiver provision in the limited warranty was conspicuous and fully conveyed the consequences of waiver (since we do not have the full limited warranty document and paragraph 10 does not fully identify the consequences of the waiver), or whether it was in fact the agreement reached. See *Board of Managers of the Village Centre Condominium Association v, Inc., v. Wilmette Partners*, 198 Ill. 2d 132, 141 (2001) (noting such issues are usually fact questions); *Board of Managers of Chestnut Hills Condominium Association v. Pasquinelli, Inc.*, 354 Ill. App. 3d 749, 758-59 (2004). Moreover, we have only a representative sales contract in the record and we question whether paragraph 10 sufficiently apprised the purchasers about the meaning of waiver. *Id*.; c*f. Breckenridge v. Cambridge Homes, Inc.*, 246 Ill. App. 3d 810, 818 (1993) (contract in bold, capitalized letters stated the purchaser's initials represented evidence and acknowledgement of

seller's disclaimer of implied warranty of habitability). In short, we decline to address the matter further because Defendants have not fulfilled their heavy burden of establishing waiver. See *Pratt II*, 2012 IL App (1st) 111474, ¶ 28 (a knowing waiver will not be readily implied).

¶ 47 Lastly, Tower Crossing contends the trial court erred in denying its motion to file a third-amended complaint, wherein Tower Crossing sought to add the owners and operators of Prate Sheet, namely Michael Prate, as parties and to sue them for fraud. We note initially that the record shows there was some confusion as to which "Prate" entity entered into the subcontract with Kimball Hill in 2002 (recall, the right enforce any contract was later assigned to Tower Crossing) for roofing/sheet-metal work. Some background is therefore necessary.

¶ 48 Tower Crossing initially sued Prate Installations (and not Prate Sheet), believing it was the appropriate Prate entity. Presumably, this was because Prate Installations was named in the adversary proceeding. In the second-amended complaint Tower Crossing also sued Prate Sheet and attached the 2002 subcontract between Prate Sheet and Kimball Hill as evidence. Tower Crossing alleged there was also a subcontract with Prate Installations, but acknowledged it did not possess that subcontract, a fact which Prate Installations latched onto in its motion to dismiss. In that motion, Prate Installations attached the affidavit of Michael Prate (President of both Prate Installations and Prate Sheet), wherein Mr. Prate stated that Prate Installations and Prate Sheet were separate business entities. He averred that Prate Sheet was dissolved in 1997 and, while Prate Installations continued in its existence, it was not a successor in interest to Prate Sheet. Thus, the record effectively suggests there was a contract between Kimball Hill and the dissolved corporation of Prate Sheet, but not Prate Installations. Absent any contract, Prate Installations therefore urged its dismissal from the lawsuit, which the trial court granted. Tower Crossing does not now seem to advance any argument that Prate Installations should remain part

of this lawsuit. This is the one point of the trial court's order that we therefore affirm. See Ill. S. Ct. R. 341 (eff. Feb. 6, 2013) ("Points not argued are waived").

¶ 49 Tower Crossing nonetheless urges this court to reverse the decision denying leave to file the third-amended complaint, wherein Tower Crossing sought to add Mr. Prate and any owners/operators of Prate Sheet as parties. Tower Crossing alleged that although Prate Sheet had dissolved in 1997, Mr. Prate and others had entered into the 2002 subcontract with Kimball Hill, purporting to be an intact business and thereby committed fraud. In general, the trial court should be liberal in allowing amendments to pleadings if doing so would further the ends of justice. *Alpha School Bus Company v. Wagner*, 391 Ill. App. 3d 722, 748 (2009). However, refusing amendment is reversible error only if there is an abuse of discretion. *Board of Directors of Bloomfield Club Recreation Association v. Hoffman Group, Inc.*, 186 Ill. 2d 419, 432 (1999). In reviewing whether that was the case, we consider whether the proposed amendment would cure the defective pleading; whether other parties are prejudiced or surprised by the amendment; whether the proposed amendment is timely; and whether previous opportunities existed to amend the pleading. *Loyola Academy v. S & S Roof Maintenance*, 146 Ill. 2d 263, 273 (1992).

¶ 50 Here, as reason to deny leave to amend, the trial court found that Prate Sheet could not have been the entity that entered into the 2002 contract with Kimball Hill because Prate Sheet did not exist as a business and, regardless, based on the court's earlier findings the lawsuit would not have been timely against Mr. Prate. We have already held that there was no time bar and the implied warranty of habitability issues should proceed. We also conclude the court abused its discretion in finding Mr. Prate and others were not appropriate parties. The record shows Prate Sheet entered into a contract with Kimball Hill in 2002 when, by Mr. Prate's own admission, the company was dissolved. This renders Mr. Prate at least potentially individually liable for claims

against that entity. 805 ILCS 5/8.65(a)(3) (West 2012) (providing for joint and several liability of directors of corporation who carry on business after dissolution); *Gonnella Baking Co. v. Clara's Pasta di Casa, Ltd.*, 337 Ill. App. 3d 385, 389-90 (2003); *Cardem, Inc. v. Marketron International, Ltd.*, 322 Ill. App. 3d 131, 136-37 (2001). Given these facts, we conclude adding Mr. Prate and others individually would cure any claim that the contract was unenforceable because the entity did not exist. Mr. Prate cannot legitimately claim he was surprised or prejudiced by such an amendment, as Mr. Prate is connected with both Prate entities. Moreover, this is only the third-amended complaint in a complicated case bouncing between state and federal court. In short, we hold it was an abuse of discretion to deny leave to amend the complaint. To be clear, Prate Sheet should also remain party to the lawsuit, given the early stages in litigation and also given our ruling allowing the third-amended complaint. Tower Crossing should be permitted to make any amendments necessary to strengthen or clarify its complaint following this decision.

¶ 51 CONCLUSION

¶ 52 Based on the foregoing, we reverse the circuit court's dismissal of Tower Crossing's lawsuit against Defendants Hodsco, Custom Roofing, and Prate Sheet. We affirm the court's dismissal of Tower Crossing's lawsuit against Prate Installations.

¶ 53 Reversed in part; affirmed in part.