2014 IL App (1st) 133857-U

SIXTH DIVISION
Filed: December 26, 2014

No. 1-13-3857

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT - SIXTH DIVISION

SEDDIE BASTANIPOUR, Plaintiff and JOEL BELLOWS, Plaintiff-Appellee v. BENJAMIN WARNER and CALDERA PHARMACEUTICALS, INC, Defendants-Appellants (Sigmund Eisenschenk, Defendant).	)	Appeal from the Circuit Court of Cook County. No. 08 L 9801 The Honorable Sanjay Tailor, Judge Presiding

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Appeal was dismissed on mootness grounds.

¶ 2 The defendants, Benjamin Warner and Caldera Pharmaceuticals, Inc., appeal from the circuit court order which denied their motion to enforce a settlement agreement and granted a motion filed by the plaintiff, Joel Bellows, to enforce a different settlement agreement. For the reasons that follow, we dismiss this appeal as moot.

¶ 3 We briefly summarize the background of this case for purposes of context. Defendant Benjamin Warner worked at the Los Alamos National Laboratory (Los Alamos), a government facility that was, at one time, run by the University of California (the University). While employed at Los Alamos, Warner developed technology for use in the development of new medicines. The University obtained several patents based on Warner's research, which it later sold to defendant Caldera Pharmaceuticals, Inc. (Caldera), a biopharmaceutical company founded by Warner.

¶ 4 In 2005, Caldera hired Bellows, an Illinois attorney, as its general counsel, and he prepared a private placement memorandum (PPM) so that Caldera could raise capital by selling shares to investors. In October 2005, Bellows also became an investor in Caldera by purchasing 105,000 shares of common stock for $210,000, a price lower than that offered to others in the 2006 PPM.

¶ 5 In 2008, Bellows and plaintiff Seddie Bastanipour filed their initial complaint against the defendants and a third defendant, Sigmund Eisenschenk, alleging claims for common law fraud, violations of the Illinois Securities Law of 1953 (815 ILCS 5/1 *et seq*. (West 2008)) and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2008)).[1] In October 2011, they filed an amended complaint against the defendants,

[1] After reaching a settlement agreement, plaintiff Seddie Bastanipour was dismissed, with prejudice, from this action and is not a party to this appeal. Defendant Sigmund Eisenchenck

in which they restated their fraud and statutory claims and added additional facts. According to the amended complaint, in September 2005, Warner and Eisenschenk made false statements of material facts to the plaintiffs overstating the value of the patents owned by Caldera in order to induce their investment.

¶ 6 Thereafter, the parties disputed whether the plaintiffs' claims were subject to the arbitration clause of the 2006 PPM. Bellows maintained that his claims did not arise out of that PPM or any other shareholder agreement because he invested before those documents were ever issued. The circuit court agreed, determining that the plaintiffs' claims were not subject to the arbitration clause, and this court affirmed that decision. *Bastanipour v. Warner*, 2012 IL App (1st) 120730-U.

¶ 7 Upon remand, the parties filed cross-motions for summary judgment, which the circuit court denied on January 18, 2013. However, on that date, the court conducted a pretrial conference and assisted the parties in reaching an oral settlement agreement. At the court's request, the parties created a handwritten document (hereinafter referred to as the "January 18th Agreement"), outlining the "salient" terms of the oral settlement agreement. Relevant to this appeal, the January 18th Agreement provided:

"Settlement Terms to be reduced to final settlement agreement

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2) Joel Bellows to be issued 105,000 preferred shares in exchange for his common shares.

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died on June 13, 2012, and his estate was later substituted as a party. However, Bellows's claims against the estate are not at issue in this appeal.

9) Settlement agreed to in principal on foregoing terms but contingent on Joel Bellow's review and acceptance of preferred B shares terms."

¶ 8 At the time, the only "preferred" shares of preferred Caldera stock that existed were Series A convertible preferred shares.

¶ 9 At a status hearing on January 31, 2013, the parties brought to the circuit court's attention the fact that they were disputing material terms of the agreement. The court continued the matter to February 6, 2013, for "presentment of any motions regarding [the] settlement." Pursuant to that circuit court order, both parties submitted motions "to enforce the settlement agreement."

¶ 10 In Bellows's motion, he contended that, on February 1, the defendants wanted to change their agreement to pay him $240,000 in three annual payments to 36-monthly payments. According to Bellows, he rejected the defendants' proposal and asked the court to enforce the original agreement, which he reduced to writing and attached to his motion as "exhibit c". Relevant to this appeal, paragraph 4 of that agreement (hereinafter the "February 6th Agreement") states:

"4. Defendants Caldera and Warner agree that Joel Bellows shall be entitled to exchange his 105,000 shares of common stock in Caldera for either 105,000 shares of Series A cumulative preferred stock or 105,000 shares of Series B cumulative preferred stock, or 105,000 shares comprised of a combination of Series A cumulative preferred stock and Series B cumulative preferred stock. Bellows' choice of Series A, Series B, or some combination thereof will be at his sole election. Immediately upon completion of the Private Placement Memorandum ("PPM"), governing the issuance of the Series B cumulative preferred stock, Caldera will provide Bellows with a copy of this PPM that sets forth all material terms for the Series B cumulative preferred stock. On or before the

close of the offering, as set forth more fully in the PPM, Defendants Warner and Caldera agree to disclose to Bellows the number of Series B shares purchased and issued with such disclosure to be made prior to Bellows election of Series A cumulative preferred stock, Series B cumulative preferred stock, or some combination thereof. Upon close of the Series B cumulative preferred stock offering and following all required disclosures to Bellows, Bellows will make his election to exchange his shares to either Series A cumulative preferred stock, Series B cumulative preferred stock, or some combination thereof."

¶ 11 Regarding the stock conversion, the defendants confirmed that, after the parties reached the January 18th agreement, they informed Bellows of the likelihood that Caldera would issue Series B preferred shares in order to raise capital. According to the defendants, this financing deal would require unanimous approval from its Series A preferred stockholders to convert their shares to this new Series B preferred class. Fearing that Bellows could block the financing deal by refusing to vote for the conversion, the defendants offered him the option to exchange his 105,000 common shares for 105,000 Series A preferred shares, providing that he would agree to vote with the majority of Series A shareholders. Bellows agreed to this term on the condition that the defendants provided him with the terms of the Series B preferred shares so he could review them. The defendants argued that Bellows had agreed to their proposed change to the 36-monthly payments term, but that he was now refusing to honor that agreement. The defendants requested that the court enforce their version of the agreement, which contained the changes from the January 18th Agreement that they believed Bellows had agreed to honor.

¶ 12 On February 6, 2013, the circuit court granted Bellows's motion to enforce the February 6th Agreement. After receiving the terms of the Series B preferred shares, Bellows elected to

receive 105,000 shares of Series A preferred stock, with the agreement that, if the other Series A shareholders unanimously voted to convert to Series B, he would do the same.

¶ 13 On February 13, 2013, Bellows filed an emergency petition and a petition for a rule to show cause, alleging that the defendants should be held in civil contempt for their failure to comply with the February 6th Agreement. According to the petitions, on February 11, the defendants informed Bellows that there was an insufficient number of Series A preferred shares outstanding to issue him 105,000 shares. Instead, the defendants offered to issue him a "*quasi*" class of stock which would not have the same conversion rights as other Series A shares.

¶ 14 On February 15, 2013, the defendants filed a motion to enforce the February 6, 2013, order as well.[2] After hearing some initial arguments, the court noted that the parties sought to enforce different versions of the settlement agreement, and the court ordered Bellows to file a motion to enforce his version in his response to the defendants' motion in order to avoid duplicative briefing. In Bellows's response, he acknowledged that the defendants were seeking to enforce paragraph 4 of the February 6th Agreement, and that he was seeking to enforce a new draft agreement which he attached as "Exhibit B." The amended paragraph 4 in Bellows's new draft stated:

> "4. Within seven business days following the dismissal of the Bellows Lawsuit, Defendant Caldera shall issue to Joel Bellows 105,000 shares of Series A convertible preferred stock in Caldera in exchange for Bellows' 105,000 shares of common stock. Should all other Series A convertible preferred shareholders vote to convert their Series A convertible preferred stock to Series B convertible preferred stock, Joel Bellows agrees

[2] The record includes a cover sheet indicating the defendants' motion to enforce was filed under seal; however, a copy of the actual motion does not appear in the record.

> to vote in favor of this conversion and shall be entitle[d] to convert his shares of Series A convertible preferred stock *on the same terms as if he had originally subscribed and paid for those Series A convertible preferred stock pursuant to Caldera's June 24, 2011 Private Placement Memorandum, including any multiplier afforded to the other shares of Series A convertible preferred stock. Caldera further agrees that Bellows' Series A convertible preferred stock shall in all other instances be afforded no less favorable terms and shall carry all other rights and benefits as Series A convertible preferred stock purchased pursuant to the June 24, 2011 Private Placement Memorandum*." (Emphasis added.) (Hereinafter referred to as the "April 30th Agreement")

¶ 15 At an April 30, 2013, hearing on the parties' motions, the defendants agreed that the intent was always to give Bellows 105,000 Series A preferred shares on the same terms as every other preferred shareholder. However, they objected to the changes contained in the April 30th Agreement, arguing that the changes injected new, material terms, including the use of a "multiplier," that they never contemplated or agreed to. The defendants contended that, under this new formula, Bellows would enjoy a windfall because his formula uses the $5.70 par value applicable to shareholders who purchased their Series A preferred shares pursuant to the June 24, 2011, PPM. The defendants argued that Bellows should be entitled to convert his Series A shares to Series B shares using his $2 par value to calculate his cost basis.

¶ 16 The circuit court rejected the defendants' arguments, stating that the January 18th agreement never expressed a value that the shares represented and never contained a special conversion formula applicable only to Bellows's shares. The court's decision resulted in the following April 30, 2013, order:

> "Defendants Caldera and Warner's motion to enforce settlement is denied and Plaintiff's motion for rule to show cause is granted to the extent that Calder and Warner are ordered to execute and perform the settlement agreement attached as Exhibit B to the Plaintiff's Response to Defendants' motion to enforce [the April 30th Agreement]."

¶ 17 The court order also stated that the parties had reached a settlement and it dismissed Bellows's claims against the defendants, with prejudice. Under protest, the defendants subsequently executed the April 30th Agreement and issued Bellows a stock certificate for 105,000 Series A preferred shares.

¶ 18 On May 29, 2013, the defendants moved for reconsideration of the court's April 30th order, arguing, in relevant part, that the April 30th Agreement contained new terms to which it never agreed and which materially altered the value of Bellows's investment. The defendants attached several documents to their motion and reply, including the Caldera Board of Directors' meeting minutes, dated April 9, 2013, which provided that the Board had voted in favor of issuing shares of Series B Preferred Stock and awarded to Series A preferred shareholders:

> "the right to exchange their existing shares of Series A Preferred Stock together with accrued interest thereon into that number of shares of Series B Preferred Stock, assuming a $2.50 purchase price, as they would have been able to acquire with their initial purchase."

¶ 19 Thus, the defendants argued that the issuance of Series B preferred shares no longer was dependent upon the unanimous vote of the Series A preferred shareholders to convert their shares. Instead, the Caldera Board decided to grant each Series A preferred shareholder the option to convert to Series B preferred shares. The defendants also attached to their motion the executed documents of other Series A preferred stock shareholders who chose to convert to

Series B preferred shares. Defense counsel used these documents during the September 25, 2013, hearing on their motion for reconsideration to provide the court with examples of the conversion process. For example, one Series A preferred shareholder had 13,500 shares with a cost basis of $76,950 ($5.70 per share). In the conversion to the Series B preferred stock, that shareholder's cost basis was divided by $2.50, resulting in his receipt of 30,780 shares of Series B preferred shares.

¶ 20 The defendants asserted that the $5.70 value was not a "multiplier" as Bellows included in the April 30th agreement, but merely represented the par value of the shares paid by the investor pursuant to the June 24, 2011, PPM.[3] According to the defendants, Bellows's 105,000 shares of Series A preferred stock had a cost basis of $210,000, as he acquired his shares before any PPM was issued at a lower price per share ($2 per share) than other investors paid. Dividing his cost basis by the $2.50 factor, which the defendants admit is a factor applied in all Series A-to-Series B conversions, results in Bellows receiving 84,000 Series B preferred shares. However, the defendants argued that, under the April 30th Agreement's new terms, Bellows's cost basis is determined using the "multiplier" ($5.70 per share), instead of his actual cost basis, as if he acquired his stock under the June 24, 2011, PPM. According to the defendants, this interpretation leads to a windfall to Bellows as he would receive 239,400 shares in the conversion from Series A to Series B preferred stock. The defendants contend that their intention was never to more than double the value of Bellows's stock investment, and moreover, this formula was not included in the February 6th Agreement that the court had originally

[3] Since the parties do not dispute the fact, we presume that Series A preferred shares were issued to investors at the $5.70 par value under the terms of the June 24, 2011 PPM. We note that the parties do not cite to the June 24, 2011, PPM in the record, and we do not find a copy of this document in our own search.

enforced. They argued that the court therefore erred in granting Bellows's motion to enforce an entirely new agreement.

¶ 21 Bellows responded that the defendants never raised the conversion-ratio issue at the April 30, 2013, hearing, but regardless, he had chosen not to convert his Series A preferred shares to Series B preferred.

¶ 22 The court rejected the defendants' position and denied their motion for reconsideration on September 25, 2013.

¶ 23 Because Bellows had claims pending against the Estate of Eisenschenk, the defendants moved the court to amend its September 25, 2013, order to include language pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). On November 14, 2013, the court granted the defendants' motion, and this appeal followed.

¶ 24 At the outset, Bellows argues in his appellee brief that this appeal should be dismissed as moot. He contends that his acceptance of 105,000 shares of Series A preferred stock and his request to redeem those shares has ended the parties' controversy. Attached to his appendix, Bellows included various letters between the parties' attorneys, documenting his selection of Series A preferred shares, his decision not to convert to Series B preferred, and his request to redeem his shares.

¶ 25 In a letter dated May 22, 2013, addressed to Bellows, defense counsel wrote that the offer to convert Series A preferred shares to Series B preferred shares was presented to Series A shareholders on April 22, 2013, and held open until April 30, 2013. The letter further stated:

> "To avoid any claims of preferential treatment against Caldera, [Bellows] is hereby afforded the same period of time to convert his Series A Preferred Redeemable Convertible Preferred Stock for Series B Preferred Stock under the same terms and

> conditions as all Series A shareholders. To accept the conversion offer, Mr. Bellows must sign and date the enclosed Exchange Agreement and return an ink original to my office by May 31, 2013. The offer will expire at the end of the day on May 31, 2013."

That letter referenced a compact disc (cd) that was included in the correspondence. The cd purportedly contained: a letter to Caldera Series A preferred stockholders; the April 9, 2013, Board Resolution and exhibits; the April 8, 2013, PPM with all exhibits; and the Exchange Agreement for Bellows to sign in order to convert his shares. Bellows attached to his appendix a copy of the Exchange Agreement that was sent to him, and, in that agreement, the defendants used his cost basis of $210,000 to conclude that his 105,000 shares of Series A preferred stock would convert to 84,000 shares of Series B preferred stock. The other documents on that cd are not contained in the record or attached to any brief or motion by the parties.

¶ 26 In a May 30, 2013, response letter to defense counsel, Bellows's attorney stated that:

> "[W]e have reviewed the materials you provided in your May 22, 2013 correspondence and enclosed CD, including correspondence to Caldera Series A Preferred Stock Holders, the April 9, 2013, Board Resolution, and the April 8, 2013 Private Placement Memorandum.
>
> We do not agree that your conversion calculation or the conditions placed upon the conversion are in compliance with the terms of the settlement agreement or Judge Tailor's orders. With that said, Mr. Bellows does not elect to convert his shares of Series A preferred stock to series B preferred stock *at this time.*" (Emphasis added.).

¶ 27 In response to Bellows's mootness argument, the defendants filed a motion to strike the documents attached to his appendix, contending that those documents should not be considered because they are not part of the appellate record. They further argue that Bellows's mootness

argument fails to comply with Illinois Supreme Court Rule 361(h) (eff. Mar. 14, 2014), which requires a party to submit affidavits to support dispositive motions filed in the appellate court.

¶ 28 Bellows counters that Rule 361(h) does not apply to his mootness argument because he raised it in his brief, not in a motion. Regardless, he attached to his response to the defendants' motion his affidavit and the affidavit of his attorney attesting to the veracity of the correspondence attached to his brief and a copy of the complaint he filed in the Circuit Court of Cook County on August 25, 2014 (*Bellows v. Caldera*, No. 14-CH-13815). That complaint alleges breach of contract and breach of fiduciary duty claims related to the defendants' refusal to redeem Bellows's shares pursuant to the redemption terms contained in the June 24, 2011, PPM. Attached to that complaint was Bellows's letter, dated July 15, 2014, addressed to defense counsel, requesting that his Series A shares be redeemed pursuant to the redemption terms contained in the June 24, 2011, PPM.

¶ 29 First, the parties do not dispute the fact that we may take judicial notice of the pending circuit court case, *Bellows v. Caldera*, No. 14-CH-13815, and consider it in our analysis of his mootness argument. See *Metropolitan Life Insurance Co. v. American National Bank & Trust Co.*, 288 Ill. App. 3d 760, 764 (1997) (appellate court may take judicial notice of public documents that are included in the records of other courts).

¶ 30 Second, we agree with the defendants that, ordinarily, the appropriate method of bringing facts outside of the record which affect the court's jurisdiction to our attention is through a motion supported by an affidavit. *LaSalle National Bank v. City of Chicago*, 3 Ill. 2d 375, 379 (1954); Ill. S.Ct. R. 361(h) (eff. Mar. 14, 2014). However, when deciding whether a claim is moot, we may consider matters *dehors* the record. *PACE, Suburban Bus Division of Reg'l Transportation Authority v. Reg'l Transportation Authority*, 346 Ill. App. 3d 125, 132, 803

(2003) (considering supplemental materials submitted after briefing, upon court's decision to address mootness *sua sponte* and at court's request for supplemental briefing, to determine whether issue was moot); *Steel City Bank v. Village of Orland Hills*, 224 Ill. App. 3d 412, 416 (1991) ("Indeed, it is the duty of this court to consider even matters *dehors* the record in deciding" mootness); *Unity Ventures v. Pollution Control Bd.*, 132 Ill. App. 3d 421, 430 (1985) (considering supporting letters and affidavits regarding matters *dehors* the record insofar as they concern the question of mootness). Given that Bellows has attached supporting affidavits to his response to the defendants' motion to strike affidavits attesting to the authenticity of the documents attached to his brief, we deny the defendants' motion to strike those documents. *Id.* We note that we will consider the documents only in deciding the question of mootness. *Id.*

¶ 31 Whether a case has become moot affects this court's jurisdiction to render a decision. "A case must remain a legal controversy from the time filed in the appellate court until the moment of disposition." *Davis v. City of Country Club Hills*, 2013 IL App (1st) 123634, ¶ 10. The existence of an actual controversy is necessary to vest this court with jurisdiction, as reviewing courts will generally not decide " 'abstract, hypothetical, or moot questions.' " *Id.* (quoting *In re Marriage of Nienhouse*, 355 Ill.App.3d 146, 149 (2004)). An appeal becomes moot where the issues presented in the trial court no longer exist because intervening events have rendered it impossible for the reviewing court to grant effectual relief to the complaining party. *Felzak v. Hruby*, 226 Ill. 2d 382, 392 (2007). The fact that a case is pending on appeal when the intervening events which render an issue moot occur does not alter this conclusion. *Id.*; see *Davis*, 2013 IL App (1st) 123634, ¶ 11 (noting limited exceptions exist where courts will review an otherwise moot case).

¶ 32 Here, we agree with Bellows that this appeal is moot because the offer made to him to convert his Series A preferred shares of stock to Series B preferred shares expired on May 31, 2013. While the defendants point out that Bellows may withdraw his request to redeem his Series A preferred shares at any time or lose his pending circuit court case and then seek to convert his shares to Series B shares under the terms that are at issue in this appeal, they do not address the fact that the offer to convert to Series B shares expired on May 31, 2013.

¶ 33 The record contains the April 9, 2013, meeting minutes related to the Caldera Board's decision to offer its Series A shareholders the option to convert to Series B shares. However, that document does not include the details of the offer, such as an expiration date. We note that, with their motion for reconsideration, the defendants filed the exchange agreements of other Series A shareholders who accepted the offer to convert to Series B preferred shares. Those agreements show an execution date of April 30, 2013. Also, a footnote in the defendants' reply brief stated that "[s]ubsequent to the filing of the instant Motion for Reconsideration, the [one] shareholder who did not convert on April 30, 2013, exercised his option to convert." However, there are no details surrounding that particular conversion and no indication that the offer to convert was indefinite. Moreover, the defendants attached a letter to their motion for reconsideration which supports Bellows's claim that the offer to convert was open only for a limited time period. In that letter, addressed to Bellows and dated May 16, 2013, defense counsel stated that the offer to convert his shares had an expiration date of May 17, 2013 (later extended to May 31, 2013, by subsequent correspondence which Bellows attached to his brief).

¶ 34 The only argument raised by the defendants in support of their position that Bellows may convert his shares "at any time" rests on the May 30, 2013, letter in which Bellows stated that he did not elect to convert his shares "at this time." The defendants argue that this language means

that Bellows may elect to convert his shares beyond the May 31, 2013, date. We disagree. Bellows's letter merely stated that, while he did not agree with the defendants' conversion calculation or the conditions placed upon the conversion, he had chosen not to convert; the letter said nothing about the duration of the offer itself or its extension beyond May 31, 2013. The parties never disputed the fact that Bellows was entitled to 105,000 shares of Series A preferred stock or that his stock was to be treated the same as other Series A preferred stockholders. In their motion for reconsideration and in this appeal, the defendants only argued the fact that Bellows had added language that changed the calculation for his Series A to Series B conversion, if he chose to convert. The parties also do not dispute that Bellows had chosen and was issued 105,000 shares of Series A preferred stock. We have no evidence in the record or outside of the record refuting the fact that Series A shareholders were offered the right to convert their shares to Series B shares until April 30, 2013, and that Bellows's offer was extended until May 31, 2013, because of the ongoing litigation.

¶ 35 Without any evidence that Bellows had, or has, the option to convert his Series A preferred shares to Series B preferred shares beyond the expiration date of May 31, 2013, we have no basis to find that a controversy still exists. It is the burden of the appellant to present a sufficiently complete record for this court to address his appeal (*Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001) (citing *Foutch v. O'Bryant*, 99 Ill.2d 389, 391-92 (1984)), including a record which supports the facts necessary to establish this court's jurisdiction (Ill. S.Ct. R. 341(h) (eff. Feb. 6, 2013); *U.S. Bank Nat. Ass'n v. In Retail Fund Algonquin Commons, LLC*, 2013 IL App (2d) 130213, ¶ 24).

¶ 36 Accordingly, we must dismiss this appeal as no actual controversy exists between the parties.

¶ 37 Appeal dismissed.