2015 IL App (1st) 142663-U

No. 1-14-2663

Fourth Division
[September 10, 2015]

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ROB HUTSON, Plaintiff-Appellant, vs. BARRINGTON BRONCOS HOCKEY CLUB, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 13 L 8542 Honorable Eileen O'Neil Burke, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Ellis concurred in the judgment.

O R D E R

¶ 1 Held: Trial court did not err in granting defendant's section 2-619.1 motion to dismiss because plaintiff's complaint did not give rise to a cause of action; trial court did not err in denying plaintiff's motion to reconsider where the trial court properly applied the law and where plaintiff failed to produce any newly discovered evidence which warranted reconsideration.

¶ 2 Plaintiff Rob Hutson brought this action against defendant Barrington Broncos Hockey Club, Inc. (BBHC), an Illinois non-for-profit corporation, for breach of contract. The complaint alleged that plaintiff fulfilled his obligations under the contract, but defendant paid him approximately half of what he was owed. Defendant filed a combined motion to dismiss pursuant

to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1) (West 2012)), and the trial court granted the motion. On appeal, plaintiff contends that the trial court erred when it granted defendant's section 2-619.1 motion to dismiss; denied his motion to strike an affidavit from BBHC's president which alleged that plaintiff resigned before the end of the contractual period; and denied his motion to reconsider. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On July 21, 2012, plaintiff and defendant entered into an agreement in which plaintiff would become the Director and Head Coach of defendant's hockey program for the 2012-2013 season. Pursuant to the agreement, defendant was to pay plaintiff $1,300 per registered varsity and junior varsity player, not to exceed 42 players, in ten equal monthly installments starting on September 1, 2012. The agreement provided that plaintiff's compensation amount "shall cover training camps, tryouts, the regular season, tournament play, and the spring season." The termination clause of the contract stated that plaintiff's employment was "at will," and either party could terminate the agreement at any time, "without further obligation on the part of either party." On July 29, 2013, plaintiff filed a complaint for breach of contract which alleged that from July 21, 2012, to February 2013, he "did all that he was obligated to do pursuant to the agreement," yet defendant failed to pay him the compensation that he earned and was agreed upon pursuant to the agreement. He sought damages for an amount in excess of $30,000.

¶ 5 On November 21, 2013, defendant filed a section 2-619.1 motion to dismiss. In the motion, defendant asserted that plaintiff's complaint must be dismissed pursuant to section 2-615 for failure to state a claim because the agreement provided for termination at any time, by either party "without further obligation." Alternatively, defendant asserted that plaintiff's complaint must be dismissed pursuant to section 2-619 because even assuming that BBHC owed any

contractual duties to plaintiff, defendant paid all amounts alleged to be owed under the agreement at the time of plaintiff's resignation. In support of its 2-619 motion, defendant attached an affidavit from BBHC's president W. Scott Nehs. The affidavit stated that plaintiff registered 36 players for the 2012-2013 season, thus setting his salary at $46,800 payable in ten equal installments starting in September and ending in June; however, on January 15, 2013, plaintiff resigned from BBHC in a telephone call. The affidavit also stated that, in accordance with the agreement, from September 2012 through January 2013, defendant paid plaintiff $4,680 per month, which totaled $23,400 for plaintiff's five months of employment.

¶ 6 On January 16, 2014, plaintiff responded to defendant's motion to dismiss. He stated that he fulfilled all of his obligations under the agreement and that his compensation was not based on working a certain number of hours, days, weeks, or months. Plaintiff also filed a motion to strike Nehs' affidavit because it failed to comply with Illinois Supreme Court Rule 191(a).

¶ 7 On May 5, 2014, the trial court granted defendant's section 2-619.1 motion to dismiss, finding that the "clear and unambiguous language of the agreement" reveals that it was "patently obvious that BBHC expected [plaintiff] to complete the term of the 2012-2013 season, in order to receive full compensation." The court also found that the language of the agreement established plaintiff's "at-will" status, and his resignation relieved defendant of any further performance. Additionally, the court denied plaintiff's section 2-615 motion to strike, finding that Nehs' affidavit complied with Rule 191(a).

¶ 8 On June 4, 2014, plaintiff filed a motion to reconsider. In the motion, plaintiff alleged that the court misapplied the law and facts and that new evidence required that the order be reconsidered. Plaintiff argued that the court erred by "using only time as a barometer as to the completion of his obligation." Specifically, he argued that he performed all of his duties in regard

to training camps, tryouts, regular season, and tournament play, but was "terminated" prior to the start of spring season. Plaintiff reasoned that because the spring season amounted to only 5% of his duties under the contract, he had completed 95% of his obligation under the agreement, and was entitled to 95% of the compensation. Plaintiff also alleged that although Nehs' affidavit stated that he was paid for October 2012, the bank returned the checks for non-payment on July 5, 2013. In support of his motion, he attached an affidavit outlining the tasks he completed to develop and execute the 2012-2013 season, in an attempt to show that his work was "front loaded," and copies of the alleged returned checks.

¶ 9 On August 12, 2014, the trial court denied plaintiff's motion to reconsider, finding that plaintiff could have raised his claims in response to the previously granted motion to dismiss and that the court's utilization of time as a barometer to measure the completion of plaintiff's obligations was in no way a fundamental error. The court reasoned that because plaintiff completed half of the season he was therefore entitled to half of the compensation. Additionally, the court found that plaintiff's affidavit detailing his performance under the agreement was insufficient to warrant reconsideration. The court also found that the "nearly opaque" copies of the alleged canceled checks "bore no indication of the checks being returned."

¶ 10 ANALYSIS

¶ 11 Motion to Dismiss

¶ 12 First, plaintiff contends that the trial court erred in granting defendant's section 2-619.1 motion which dismissed his complaint. Specifically, plaintiff argues that the trial court erred when it: (1) failed to identify under which section it dismissed his complaint; (2) dismissed his complaint pursuant to section 2-615; (3) did not take his well-pleaded allegations in the complaint as true; and (4) dismissed his complaint without conducting an evidentiary hearing

before ruling on defendant's section 2-619 motion. Defendant responds that the trial court did not err in dismissing plaintiff's complaint as the record reveals that it could have been properly dismissed under either section 2-615 or 2-619.

¶ 13 Section 2-619.1 permits a party to combine a section 2-615 motion to dismiss (735 ILCS 5/2-615) (West 2012)) with a section 2-619 motion to dismiss (735 ILCS 5/2-619) (West 2012)). A motion to dismiss under section 2-615 attacks only the legal sufficiency of a complaint based on defects appearing on the face of the complaint itself and does not raise affirmative factual defenses. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). In comparison, a section 2-619 motion to dismiss, admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 13. It is proper for a court, when ruling on a motion to dismiss under either section 2-615 or section 2-619, to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmoving party. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). We review a combined section 2-619.1 motion to dismiss *de novo*. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10.

¶ 14 In this case, defendant filed a section 2-619.1 combined motion which asserted separate and distinct bases in support of dismissal pursuant to section 2-615 and 2-619. Plaintiff contends that because the trial court did not identify whether it granted defendant's section 2-619.1 motion under section 2-615 or 2-619, the court's ruling implies that both motions were granted. Plaintiff points to both *Janes v. First Federal Savings & Loan Ass'n of Berwyn*, 57 Ill. 2d 398 (1974), and *Morrey v. Kinetic Services, Inc*., 133 Ill. App. 3d 1002 (1985), to support his contention that the court must separate its analysis when ruling on a 2-619.1 motion to avoid confusion regarding

what the court considered when ruling on the combined motion. However, we find these cases inapposite. In *Janes*, our supreme court expressly disapproved of the trial court's simultaneous ruling on a motion to dismiss to test the sufficiency of pleadings, and a motion for summary judgment to determine whether there are any material issues of fact to be tried. *Janes*, 57 Ill. 2d at 405-06. The court found that to appropriately clarify the basis of judgment, a trial court must first rule on the question of whether a pleading states a cause of action and if, and only if, that question is answered in the affirmative should the court entertain a summary judgment motion. *Id.* at 406. Similarly in *Morrey*, this court reversed the trial court's decision to simultaneously grant both defendant's motion to dismiss plaintiff's complaint and motion for summary judgment, finding that the trial court's ruling did not sufficiently indicate the grounds on which plaintiff's complaint was dismissed as both motions required the court to engage in a separate and distinct analysis. *Morrey*, 133 Ill. App. 3d at 1004.

¶ 15 Initially, we note that although under section 2-619.1 parties are required to specify under which section it brings each distinct claim (*Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 72), nothing in section 2-619.1 supports plaintiff's contention that the trial court is required to distinguish between section 2-615 and 2-619 when ruling on a 2-619.1 motion. We are aided in our review of plaintiff's claims by the trial court's written decision. Here, although the trial court did not explicitly distinguish which section of the Code applied for its section 2-619.1 dismissal, the court's ruling makes clear the basis of its disposition. The court stated that its dismissal of plaintiff's case was based on "the clear and unambiguous language of the agreement itself." Further, because the agreement, which is the subject of this dispute, was attached to the complaint, it became part of the complaint. See *Evers v. Edward Hospital Ass'n*, 247 Ill. App. 3d 717, 724 (1993) (exhibits attached to a complaint become a part of the complaint). The trial

court's ruling indicates that defendant's motion to dismiss was granted based on a defect on the face of the complaint itself, specifically, plaintiff's inability to state a cause of action, and properly dismissed pursuant to section 2-615. Thus, unlike the concerns raised by the simultaneous rulings in both *Janes* and *Morrey*, the grounds on which the court here based its judgment were sufficiently clear.

¶ 16 Further, we reject plaintiff's contention that the trial court erred in dismissing plaintiff's complaint pursuant to section 2-615. Citing *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475 (1991), plaintiff correctly notes that the question presented by a section 2-615 motion is whether sufficient facts are contained in the pleadings which, if proved, would entitle plaintiff to relief. He maintains that his complaint, which was both "well reasoned and well plead" sets forth allegations, which, if proven, entitled him to recover.

¶ 17 In a complaint for breach of contract, the complainant must allege: (1) the existence of a valid contract; (2) performance of its contractual obligations; (3) breach by defendant; and (4) resulting damages. *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813, 823 (2005). "A court must first look to the language of the contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent." *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007).

¶ 18 Here, plaintiff was hired as the Director and Head Coach of defendant's hockey program for the 2012-2013 hockey seasons. According to the plain language of the agreement, plaintiff was to receive ten equal installments starting on September 1, 2012, which "shall cover training camps, tryouts, the regular season, tournament play, and the spring season." Plaintiff readily admits in his complaint that he was employed by defendant from July 21, 2012, to February 2013. Therefore, we fail to see how defendant could have possibly completed performance of his

contractual obligation when the language of the agreement clearly contemplated that plaintiff would complete the spring season in order to receive full compensation. See *Meyer v. Miglin, Inc.*, 273 Ill. App. 3d 882, 888 (1995) (stating that "[i]f the contract terms are unambiguous, the parties' intent must be ascertained exclusively from the express language of the contract, as a matter of law"). Thus, we cannot say that the trial court erred in dismissing plaintiff's complaint pursuant to section 2-615. Plaintiff's own pleading supports a conclusion, as a matter of law, that plaintiff did not fulfill his contractual obligations and thus failed to state a cause of action for breach of contract against defendant.

¶ 19 Because we find that the trial court properly granted defendant's motion to dismiss pursuant to section 2-615, we need not address defendant's remaining arguments concerning the trial court's alleged error in ruling on defendant's section 2-619 motion. See *Ultsch v. Ill. Mutual Retirement Fund*, 226 Ill. 2d 169, 192 (2007) (stating that a reviewing court can uphold the decision of the circuit court on any grounds which are called for by the record). We also need not address plaintiff's argument that the trial court erred in denying his motion to strike Nehs' affidavit, which defendant admitted in support of its section 2-619 motion.

¶ 20 Motion to Reconsider

¶ 21 Plaintiff next contends that the trial court misapplied the law in denying his motion to reconsider. In support, he first argues that the court failed to use the individual events of the hockey season to determine what portion of the agreement he completed. He additionally argues that the court failed to consider his complaint in light of new evidence which supported his claim. Defendant responds that under any scenario presented by plaintiff, the trial court did not err in denying his motion to reconsider. We address each argument in turn.

¶ 22 The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law. Plaintiff's motion to reconsider alleged two basis, the court's misapplication of existing law, which we review *de novo* (*Nissan Motor Acceptance Corp. v. Abbas Holding I, Inc.*, 2012 IL App (1st) 111296, ¶ 16) and the court's failure to consider "new evidence," which we review under the abuse of discretion standard. *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1078 (2007). An abuse of discretion occurs when the trial court's ruling is " 'arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009) (citing *People v. Hall*, 195 Ill. 2d 1, 20 (2000)).

¶ 23 We first address plaintiff's argument that the trial court erred in applying existing law when it used only time as a barometer to measure the completion of his obligation under the agreement because his work in executing the hockey program was "front loaded." He maintains, based on his reading of the agreement, that he performed 95% of his obligations under the contract, and was thus entitled to 95% of the compensation. However, we find absolutely nothing in the agreement itself that supports plaintiff's interpretation. Nowhere in the agreement is plaintiff's compensation measured in terms of percentages of duties completed, and we decline his invitation to read such a provision into the agreement. See *St. Paul Mercury Insurance v. Aargus Security Systems, Inc.*, 2013 IL App (1st) 120784, ¶ 59 (holding that the reviewing court "will not alter, change or modify existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented"). Again, the plain language of the agreement leads us to only one logical conclusion: plaintiff was required to complete the duties agreed to in the contract, including participating in spring season, to receive full compensation. Because we

do not find that the trial court misapplied the law in this case, plaintiff's motion to reconsider was properly denied.

¶ 24 Next, plaintiff argues that the trial court failed to consider his complaint in light of "newly offered" evidence which consisted of copies of two alleged canceled checks**,** as proof of non-payment for October 2012, as well as his affidavit which outlines how he determined that he had completed 95% of the tasks under the agreement. First, in terms of the alleged canceled checks, the court found that the copies were "nearly opaque" and that they "[bore] no indication of the checks being returned." We agree. The copies before us are practically illegible. Therefore, we do not find that the trial court abused its discretion in declining to consider the canceled checks.

¶ 25 Regarding plaintiff's affidavit, we do not find the process of plaintiff personally outlining the tasks performed and assigning an apparently arbitrary percentage to them constitutes newly discovered evidence to warrant the trial court's consideration. To justify a hearing based on newly discovered evidence, "a party must show that the newly discovered evidence existed before the initial hearing but had not yet been discovered or was otherwise unobtainable." *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1141 (2004). "In the absence of a reasonable explanation regarding why the evidence was not available at the time of the original hearing, the circuit court is under no obligation to consider it." *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 30. Even if we were able to accept the self-created evidence as somehow meeting the qualitative test for new evidence, plaintiff presents no reason why he could not have earlier presented the affidavit, as the trial court suggests, in response to defendant's motion to dismiss. The affidavit merely expounds on his theory of the case, explicitly outlining how he arrived at the conclusion that he was entitled to 95% of the compensation under the contact. Clearly, these

details were known to defendant upon filing his initial complaint. Accordingly, plaintiff's affidavit does not present any newly discovered evidence and the trial court was under no obligation to consider it.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.