2017 IL App (1st) 143938U

FIRST DIVISION
March 31, 2017

No.14-3938

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BLUE SKY FAIRFIELD, LLC Plaintiff, v. STEVEN LEAVEN, SL AIR INTERNATIONAL, LLC, CHICAGO BUSINESS AIR CHARTER, INC., AND DUNE ENTERPRISES, LLC, Defendant-Appellant/Cross-Appellee. v. BLUE SKY FAIRFIELD, LLC, ALLEN WILSON, and DOUG WILSON, Counter-Defendants. _____ ALLEN WILSON, Cross-Plaintiff-Appellant, v. STEVEN LEAVEN and WILLIAM CARROLL, Cross-Defendants-Appellees.	) Appeal from the Circuit Court of) Cook County, Chancery Division))) No. 11 CH 23059)) Honorable LeRoy K. Martin, Jr.,) Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in dismissing plaintiff's cross complaint in its entirety. Plaintiff sufficiently alleged facts to sustain a cause of action for implied contract and unjust enrichment.

¶ 2 Plaintiff Allen Wilson appeals from a circuit court order dismissing his cross complaint against defendants Steven Leaven and William Carroll. Plaintiff contends that the circuit court erred in granting defendants' motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)) because he sufficiently pled implied contract, implied indemnity, reimbursement and unjust enrichment. For the following reasons we affirm in part, and reverse in part.

¶ 3 BACKGROUND

¶ 4 Wilson's amended second cross complaint alleged that in 2006, Steven Leaven, as the principal shareholder/member of SL Air International LLC ("SL Air"), Wilson, as the as the principal shareholder/member of Blue Sky Fairfield, LLC ("Blue Sky"), and William Carroll as the principal shareholder/member of Dune Enterprises, LLC ("Dune") engaged in negotiations to form a joint business venture for the purpose of owning and operating a jet airplane for profit. SL Air was the owner of a Lear Jet aircraft and purchased it with proceeds from a secured loan pursuant to a promissory note from Harris Bank.

¶ 5 In furtherance of the partnership, the parties agreed that: a) Blue Sky and Dune would each purchase a 1/3 interest in the aircraft and that SL Air would maintain its 1/3 interest; b) the Harris Bank promissory note would be refinanced to add Blue Sky and Dune as borrowers along with SL Air, and the promissory note would be collateralized with the aircraft; c) Wilson would personally guarantee the refinanced promissory note from Harris Bank; d) defendant Leaven

through its other companies, Chicago Business Air Centers LLC and Chicago Business Air Charter Inc., where he was also the principal shareholder/member, would charter the aircraft to third parties, and arrange for its maintenance and storage; and e) Leaven would account to Blue Sky and Dune for the expenses and revenue arising out of the maintenance and operation of the aircraft.

¶ 6 On or about March 1, 2016, Blue Sky and Dune each purchased a 1/3 interest in the Lear Jet aircraft pursuant to the parties' agreement. On August 22, 2006, Leaven personally, William Carroll personally, and Blue Sky executed a promissory note in favor of Harris Bank in the amount of $2,145,353.00. That same day, Wilson executed a personal guaranty of the promissory note.

¶ 7 Wilson's complaint also alleged that defendant Leaven was responsible for negotiating the refinancing of the promissory note with Harris Bank. Defendant Leaven represented to Wilson that the aircraft would be collateralized as security for the promissory note with Harris Bank. According to the complaint, Wilson relied on the representation of Leaven that the promissory note would be collateralized as security for the promissory note. The refinanced promissory note did not collateralize the aircraft because it was not signed by the registered owners of the aircraft, Blue Sky, SL Air, and Dune. Instead, it was signed by defendant Leaven personally, defendant Carroll personally, and Blue Sky. Harris Bank was unable to perfect a secured lien on the aircraft and the promissory note remained unsecured.

¶ 8 In September 2009, defendants and Blue Sky defaulted on the promissory note. Since the note was not properly collateralized, Harris Bank was unable to foreclose upon the aircraft. Harris Bank initiated legal proceedings against the parties in the Circuit Court of Cook County, and on October 12, 2011, incident to the legal proceedings, a judgment in the amount of

$2,327,079.12 was entered against defendants and Blue Sky as borrowers under the promissory note, and against Wilson as the personal guarantor for payment of the promissory note. Wilson paid $2,050,000.00 in partial satisfaction of the judgment pursuant to the guaranty agreement. Defendants entered into a settlement agreement with Harris Bank for the outstanding balance due on the judgment. On October 21, 2013, an order was entered granting the voluntary dismissal of that case as the judgment had been fully satisfied.

¶ 9 Subsequently, Blue Sky filed a complaint in the Chancery Division against defendants Leaven, SL Air, and Dune seeking an accounting and judicial dissolution of the joint venture partnership. Defendants filed a counterclaim. Wilson filed the instant second amended cross claim against defendants Leaven and Carroll alleging implied indemnity (Count I), implied contract (Count II), reimbursement (Count III), unjust enrichment (Count IV) and fraud (Count V). In support of his complaint, Wilson attached the following documents: 1) the promissory note showing the borrowers: Steven Leaven, William Carroll and Blue Sky; 2) the guaranty agreement listing Wilson as the guarantor; 3) the circuit court's judgment against Leaven, Carroll and Blue Sky for the promissory note and against Wilson as guarantor of the promissory note, and 4) the circuit court's order granting the voluntary dismissal of the case with the final finding that the judgment had been satisfied.

¶ 10 Defendants Leaven and Carroll filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2012). The circuit court granted defendants' motion to dismiss with prejudice the implied contract, implied indemnity and reimbursement counts and it dismissed without prejudice the fraud and unjust enrichment counts. The order included Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) language that there was no just

cause to delay the enforcement or appeal of the order. Wilson appeals the dismissal of all the counts except for the fraud count.

¶ 11 ANALYSIS

¶ 12 We review the dismissal of a complaint *de novo. Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. A section 2-615 motion attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008). All well-pleaded facts must be taken as true and any inferences should be drawn in favor of the non-movant. 735 ILCS 5/2-615; *Hammond v. S.I. Boo, LLC* (In re County Treasurer & Ex–Officio County Collector), 386 Ill. App. 3d 906, 908 (2008). Plaintiffs are not required to prove their case at the pleading stage; they are merely required to allege sufficient facts to state all elements that are necessary to constitute each cause of action in their complaint. *Visvardis v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (2007). A section 2-615 motion to dismiss should not be granted unless no set of facts could be proved that would entitle the plaintiff to relief. *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008).

¶ 13 On appeal, Wilson argues that the trial court erred in dismissing his complaint when he alleged sufficient facts to state a claim for implied contract in law. Wilson contends that he paid a debt for which defendants and Blue Sky were primarily liable, jointly and severely, pursuant to a promissory note, and that he made that payment as a guarantor of the promissory note with the expectation that he would recover the amount paid on behalf of defendants. Wilson contends that, based on the facts alleged in his complaint, the law implies a contract in law that entitles him to recover the amount paid for defendants' shares. Wilson also argues that, based on the same factual allegations, he properly stated a claim for implied indemnity or subrogation. Wilson acknowledges that, although the reimbursement and unjust enrichment counts sought the same

relief as the implied contract count, the counts should not have been dismissed but stricken as they provided further support for the implied contract count.

¶ 14 In turn, defendants argue that the court properly dismissed Wilson's complaint as there was no agreement between the parties, implied or otherwise, to obligate defendants, as borrowers, to repay Wilson, the guarantor, who voluntarily and primarily accepted the responsibility for the debt.

¶ 15 A contract implied in law, or a quasi contract, is not a contract at all. *Karen Stavins Enterprises, Inc. v. Cmty. Coll. Dist. No. 508*, 2015 IL App (1st) 150356, ¶ 7. Rather, it is grounded in an implied promise by the recipient of services or goods to pay for something of value which it has received. *Id*. citing *Century 21 Castles by King, Ltd. v. First National Bank of Western Springs*, 170 Ill. App. 3d 544, 548 (1988). A contract implied in law is one in which no actual agreement exists between the parties, but a duty to pay a reasonable value is imposed upon the recipient of services or goods to prevent an unjust enrichment. *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 8 (2004). The essence of a cause of action based upon a contract implied in law is the defendant's failure to make equitable payment for a benefit that it voluntarily accepted from the plaintiff. *Cannella v. Village of Bridgeview*, 284 Ill. App. 3d 1065, 1074 (1996). No claim of a contract implied in law can be asserted when an express contract or a contract implied in fact exists between the parties and concerns the same subject matter. *Zadrozny v. City Colleges of Chicago*, 220 Ill. App. 3d 290, 295 (1991).

¶ 16 In order to state a claim based upon a contract implied in law, a plaintiff must allege specific facts in support of the conclusion that it conferred a benefit upon the defendant which the defendant has unjustly retained in violation of fundamental principles of equity and good conscience. See *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160

(1989). Stated otherwise, to be entitled to a remedy based upon a contract implied in law, a plaintiff must show that it has furnished goods or benefits which the defendant received under circumstances that would make it unjust to retain without paying them back. *Hayes Mechanical*, 351 Ill. App. 3d at 9.

¶ 17 Here, Wilson's cross complaint alleged that there was a joint venture partnership relationship between defendants and Blue Sky for which the promissory note with Harris Bank was entered into, and that the obligation to Harris Bank was primarily defendants' and Blue Sky's responsibility. The complaint also alleged that: defendants and Blue Sky defaulted on the promissory note; Wilson had no obligation under his guaranty contract to pay Harris Bank until defendants and Blue Sky failed to pay their obligations to Harris Bank; Wilson paid Harris Bank pursuant to his guaranty of the promissory note the amount of $2,050,00.00, and that defendants refused upon demand to pay Wilson their respective shares of the amount that Wilson paid on their behalf.

¶ 18 Taking all the allegations contained in the cross complaint as true, we believe that it sufficiently stated a cause of action for implied contract in law. Specifically, the allegations revealed that Wilson provided a benefit to defendants initially when he executed the guaranty contract so that defendants and Blue Sky were able to receive financing. The execution of Wilson's guaranty contract was a material condition for Harris Bank to extend financing to defendants as borrowers under the note. The facts and circumstances pleaded indicate that, when Wilson executed the guaranty contract, defendants received a benefit, with the understanding that the obligation to Harris Bank was primarily defendants' and Blue Sky's responsibility. Clearly, defendants also accepted that, in case of default they would be primarily responsible for the payment to Harris Bank. The default occurred and, after Wilson paid the judgment, defendants

refused to pay Wilson. By refusing to pay Wilson, defendants unjustly retained a benefit when they avoided the monetary liability for which they were also responsible along with Blue Sky, in violation of fundamental principles of equity and good conscience.

¶ 19 Just as the circuit court noted, there was no express agreement between defendants and Wilson regarding their responsibilities and rights for Wilson's execution of the guaranty contract. But the lack of an express contract between the parties concerning the same subject is precisely a requirement for the existence of a contract implied in law. See *Zadrozny v. City Colleges of Chicago*, 220 Ill. App. 3d 290, 295 (1991).

¶ 20 In finding that Wilson's cross complaint stated a cause of action for an implied contract in law, we reject defendants' contention that Wilson was primarily liable for the debt pursuant to his guaranty. It is well settled that "the liability of a guarantor is not fixed and absolute until the party primarily liable on the contract has failed to perform it," and "[u]ntil such failure, the obligation of the guarantor is strictly collateral and contingent." *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 471 (2010) quoting *Allen v. Herrick*, 81 Mass. 274, 285 (1860). Wilson's obligation as a guarantor was secondary and triggered by defendants' and Blue Sky's breach of their obligation on the promissory note. Looking at the cross complaint in its totality, the trial court erroneously dismissed the implied contract. Similarly, the court erroneously dismissed the unjust enrichment count which was premised on the same factual allegations and had the same legal frame as the implied contract count. *Nesby v. Country Mut. Ins. Co.*, 346 Ill. App. 3d 564, 566-67 (2004) ("The theory of unjust enrichment is an equitable remedy based upon a contract implied in law" and "[t]he basis for the unjust enrichment doctrine is that no one ought to enrich himself unjustly at the expense of another.").We therefore reverse the circuit court's dismissal of the implied contract and unjust enrichment counts.

¶ 21 While we find the presence of an implied contract in law, we disagree with Wilson's argument that he properly alleged a cause of action for indemnification or subrogation. Subrogation and indemnification are devices for placing the *entire* burden for a loss on the party ultimately liable or responsible for it and by whom it should have been discharged. *Home Ins. Co. v. Cincinnati Ins. Co.*, 213 Ill. 2d 307, 316 (2004). Here, as conceded during the hearing in the proceedings below, Wilson, the principal and sole member of Blue Sky, was also responsible along with defendants for the amount due under the promissory note and his complaint sought the recovery of the amount paid on behalf of defendants. Accordingly, neither indemnification nor subrogation applies in this case. Finally, the circuit court properly dismissed the reimbursement count because reimbursement is merely a remedy, and not an independent or legally recognized cause of action. *Cartwright v. Moore*, 394 Ill. App. 3d 1, 7 (2009). ("A cause of action consists of a single group of facts giving the plaintiff a right to seek redress for a wrongful act or omission of the defendant").

¶ 22 In sum, we affirm the court's dismissal of the implied indemnification and reimbursement counts (counts I and III) of Wilson's cross complaint. We reverse the dismissal of the implied contract and unjust enrichment counts (counts II and IV). We remand this matter to the circuit court for further proceedings consistent with this order.

¶ 23 CONCLUSION

¶ 24 Based on the foregoing, we affirm in part and reverse in part.

¶ 25 Remanded.