2016 IL App (1st) 151162-U

SIXTH DIVISION
September 23, 2016

No. 1-15-1162

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
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| WE'RE CLEANING, INC, | ) | Appeal from the |
| | ) | Circuit Court |
| Plaintiff-Appellant, | ) | of Cook County. |
| | ) | |
| v. | ) | No. 09 L 3149 |
| | ) | |
| CHICAGO PARK DISTRICT, SMG HOLDINGS I, LLC, and | ) | |
| SMG HOLDINGS II, LLC, | ) | Honorable |
| | ) | Sophia Hall, |
| Defendants-Appellees. | ) | Judge Presiding. |

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

**ORDER**

¶ 1 ***Held:*** The circuit court properly dismissed a complaint seeking relief with respect to the failure of the Chicago Park District to retain plaintiff as a subcontractor on its stadium maintenance contract. The court did not abuse its discretion by denying plaintiff leave to file an eighth version of its complaint.

¶ 2 The Chicago Park District entered into a series of contracts with defendants SMG Holdings I, LLC, and SMG Holdings II, LLC, to provide maintenance services for Soldier Field stadium in Chicago. The SMG companies, in turn, subcontracted part of their work to plaintiff We're Cleaning, Inc. Under the subcontract, We're Cleaning was responsible to clean the stadium bowl and patron bathrooms. Park district policies required contractors such as SMG to allocate a certain percentage of their contracted work to qualified minority-owned

subcontractors. We're Cleaning was qualified as both an Minority Business Enterprise (MBE) and Women-Owned Business Enterprise (WBE) vendor.

¶ 3 When SMG's contract came up for renewal in 2007, it decided to discontinue its relationship with We're Cleaning. Instead, SMG submitted a proposal to the park district naming Eastlake Management Services Corp. instead of We're Cleaning as its minority-owned subcontractor.

¶ 4 We're Cleaning responded by sending letters to the manager of Soldier Field asking him to reconsider what it characterized as *his* decision to exclude We're Cleaning from the new SMG contract, and requesting a meeting to discuss how We're Cleaning could continue "as the MBE/WBE subcontractor." On October 1, 2008, the park district accepted the SMG/Eastlake bid and entered into a new contract (2008 contract) with those companies.

¶ 5 On March 16, 2009, We're Cleaning filed this lawsuit. Its original one-count complaint alleged that various defendants, some of whom are no longer involved in the case, engaged in a civil conspiracy to violate "minority hiring laws". From 2009 to 2014, We're Cleaning filed a total of seven different versions of its complaint, including the original. Various defendants moved to dismiss most of these amended complaints. Rather than resolve those motions on their merits, the court repeatedly granted We're Cleaning leave to amend to cure the defects raised by the motions to dismiss. The amended complaint at issue in this appeal was labeled as the "fifth amended complaint". For consistency with the parties' briefs, we will refer to this complaint as the "fifth amended complaint," although it actually was We're Cleaning's *seventh* complaint.

¶ 6 The fifth amended complaint alleged that the Chicago Park District Code (CPD Code) requires that primary contractors subcontract a certain percentage of their work to MBE/WBE vendors which are at least 51% owned by racial minorities or women. These vendors must also

meet certain gross receipt and other thresholds to be eligible for MBE/WBE designation. For instance, if the vendor has had annual gross receipts of more than $17,000,000 over the previous three fiscal years, the vendor is classified as an "established business" and cannot obtain MBE/WBE status. The CPD Code also provides that a vendor may only qualify for MBE/WBE status in its certified "Area of Specialty." We're Cleaning was so certified to provide cleaning services. The fifth amended complaint alleged that We're Cleaning was duly MBE/WBE certified in the field of cleaning services, but that its replacement, East Lake, was not. Specifically, We're Cleaning claimed that East Lake's certification, issued by the Chicago Minority Business Development Council, Inc., was in the field of property management, not cleaning.

¶ 7 The fifth amended complaint further alleged that when the park district advertised for bids for the contract at issue, it specified that sealed bids were due November 30, 2007, and that "late responses would not be accepted." The CPD Code required that bids be awarded to the "Lowest Responsible Bidder," which "means the bidder who submits the lowest price and meets all other bid specifications, including the stated MBE and WBE percentages." Although We're Cleaning submitted pricing information to SMG to be included in SMG's bid, SMG's bid instead named East Lake as its MBE/WBE partner. We're Cleaning alleged, "on information and belief," that East Lake was not qualified to be an MBE/WBE partner because of the "Established Business" exception in the CPD Code.

¶ 8 The park district did not award the new contract in a timely manner when it expired on December 31, 2007. Instead, it entered into a series of temporary agreements with SMG to extend its prior contract for a few months at a time, the last of which terminated October 31,

2009. In the course of this transition process, it entered into an addendum of its subcontract with We're Cleaning, which we discuss in context below.

¶ 9 Count I of the fifth amended complaint, labeled "CPD's VIOLATION OF ITS OWN COMPETITIVE BIDDING ORDINANCE AGAINST CPD," sought an award of monetary damages, attorney fees and costs in favor of We're Cleaning. Count II alleged a breach of contract against both SMG and the park district. It claimed that the "[c]ontracts in the instant case clearly included language that was designed to benefit a class of" MBE/WBE companies, and that We're Cleaning was a third-party beneficiary of the contracts between SMG and the park district. As such, count II alleged that We're Cleaning had a contractual expectation that "if it was replaced as an MBE that the replacement company would also be MBE certified and qualified as the CPD Code requires." Count II concluded that because East Lake was not qualified when it was substituted as the MBE/MBE subcontractor, the park district and SMG "breached the Contracts," causing damage to We're Cleaning.

¶ 10 The defendants filed a combined motion to dismiss pursuant to section 2-619.1 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-619.1 (West 2014) (Code). The court granted the motion, specifically stating in a written order that it was dismissing the entire fifth amended complaint with prejudice pursuant to sections 2-615 and 2-619 of the Code, without specifying which count had been dismissed pursuant to which section, and for what reason. The court's oral ruling, which is transcribed in the record, provided no further detail.

¶ 11 We're Cleaning moved to reconsider the dismissal and also sought leave to amend the complaint. The proposed sixth amended complaint (which would have been an eighth version of the complaint) re-pled the two counts dismissed from the fifth amended complaint and added a new breach of contract claim based on the January 1, 2007 addendum to the subcontract between

SMG and We're Cleaning. The focus of the new count was a clause in the addendum stating that it "will be effective January 1, 2007 through December 31, 2007 *and will continue in effect*, unless earlier terminated * * *." (Emphasis added). We're Cleaning contended that the "continue in effect" language, read in conjunction with provisions of the CPD Code and earlier contracts regarding substitution of subcontractors, meant that SMG was still required to use We're Cleaning as its subcontractor and could not substitute East Lake for it.

¶ 12 The circuit court denied the motion to reconsider and the motion to file another amended complaint. When it denied the motion to reconsider, the court stated that "clarification of the record was appropriate" and that "[i]t is apparent to the Court that that [sic] must have been a misstatement because the Tort Immunity Act has not been an issue in the We're Cleaning case. * * * I think what the Court intended to say was Statute of Limitations." This appeal followed.

¶ 13 On appeal, plaintiffs first argue that the trial court erred in dismissing the fifth amended complaint pursuant to section 2-615 of the Code. The section 2-615 motion argued that count I of the fifth amended complaint did not state any legally cognizable cause of action, and that count II did not state sufficient facts to support a breach of contract claim. "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts," and we "construe the allegations in the complaint in the light most favorable to the plaintiff." *Id*. Illinois is a fact-pleading jurisdiction, and a plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action. *Id.* at 429-30. However, "a cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery."

*Id*. at 429. We review an order granting or denying a section 2-615 motion *de novo*. *Id.* This court can also consider the exhibits attached to the complaint when reviewing the propriety of a section 2-615 dismissal. *Cowper v. Nyberg*, 2015 IL 117811, ¶ 12. And this court can affirm the granting of a motion to dismiss on any basis in the record, regardless of the trial court's reasoning. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 586 (2005).

¶ 14 In count I of the fifth amended complaint, We're Cleaning sought monetary damages for the park district's failure to: (1) enforce its own purchasing rules; (2) specifically enforce them so as to disqualify East Lake or SMG; and (3) enforce them by enacting additional specific enforcement regulations. Our supreme court has declined to recognize similar claims regarding a governmental body's failure to enforce its own rules, stating: "The general rule governing judicial review of substantive legislation is that 'an act cannot be declared invalid for a failure of a house to observe its own rules. Courts will not inquire whether such rules have been observed in the passage of the act.' " *Illinois Gasoline Dealers Association v. City of Chicago*, 119 Ill. 2d 391, 404 (1988) (quoting 1 A. Sutherland, Statutory Construction §§ 7.01, 7.04 (4th ed. 1985)).

¶ 15 SMG and the park district call this count a "mystery cause of action," and we are inclined to agree with that characterization. The park district's minority business rules do not grant any particular rights to We're Cleaning, a company which is essentially a stranger to the 2008 Soldier Field contract between SMG and the park district. The rules merely impose requirements on potential bidders which they ignore at their own risk. We're Cleaning does not allege that *it* bid on the 2008 contract. Instead, it merely complains about the manner in which its former partner bid on the contract. We're Cleaning did not, and could not, claim that the CPD rules provide that if a bidder obtains a park district contract even though it was unqualified under the rules, a competitor of that bidder, which never itself bid on the contract, was entitled to the contract in

place of the disqualified company. Accordingly, the circuit court properly dismissed Count I pursuant to section 2-615 of the Code for failure to state a cognizable cause of action.

¶ 16 Count II of the fifth amended complaint was captioned as a claim for breach of contract. The essential elements of a breach of contract are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resultant injury to the plaintiff. *Coghlan v. Beck,* 2013 IL App (1st) 120891, ¶ 27. Count II suffers from a fatal infirmity in that it does not identify the material terms of any particular contract between it and either defendant which one of the defendants then breached. The 2008 contract in question was between SMG and the Chicago Park District. While third-party beneficiaries can conceivably sue for breach of a contract to which they are not parties, count II does not even remotely explain how We're Cleaning was a third-party beneficiary to the 2008 contract, or any other contract for that matter.

¶ 17 We're Cleaning's claims are essentially based on the theory that if East Lake was disqualified, then only We're Cleaning could have obtained the MBE/WBE subcontract at issue. It would follow, then, that We're Cleaning might have some claim for damages or lost profits. That theory is not only entirely speculative, but at odds with practical reality. The partnership between SMG and We're Cleaning, while long-standing, was not binding on each party forever. SMG was free to pair with whatever new subcontractor it chose, and to cut We're Cleaning out of the deal in the process without so much as a thank-you note. Because the 2008 contract created a fresh playing field, it effectively eliminated We're Cleaning's ability to rely on the predecessor contracts.

¶ 18 We're Cleaning disputes this conclusion, relying on an ambiguous clause in a July 1, 2007 amendment to the underlying subcontract between it and SMG. The subcontract document

was largely devoted to reciting a host of insurance requirements which SMG imposed on We're Cleaning. The 2007 amendment to it was apparently necessitated by the temporary extensions of the main contract between SMG and the park district. The amendment replaced language in the original subcontract regarding the effective dates of the subcontract. It rather confusingly stated that the new term was: "effective January 1, 2007 through December 31, 2007 and will continue in effect unless earlier terminated as set forth in Section 5." We're Cleaning reads the "will continue in effect" language as giving it perpetual subcontractor status, but that contradicts the immediately preceding language stating that the relationship would end on December 31, 2007. We find this to be a strained interpretation creating an absurd result and believe that the more appropriate interpretation was that SMG was allowed to discontinue its relationship with We're Cleaning as of December 31, 2007.

¶ 19 The 2008 contract also specified that nothing in it was "intended to confer any rights or remedies * * * on any persons other than the parties hereto." Accordingly, We're Cleaning could not claim third-party beneficiary status through the 2008 contract. For these reasons, the circuit court correctly dismissed count II for failure to state a cause of action.

¶ 20 We now address the dismissal of the complaint under section 2-619 of the Code. When ruling on a motion to dismiss under section 2-619, a court must accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Coghlan,* 2013 IL App (1st) 120891, ¶ 24. A court should not grant a section 2-619 motion to dismiss unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Id.* Section 2-619 motions present issues of law which we review *de novo. DeLuna v. Burciaga,* 223 Ill. 2d 49 (2006).

¶ 21 The section 2-619 motion asserted that count I, against the park district, should be dismissed because the park district was immune under section 2-103 of the Local Governmental and Governmental Employees Tort Immunity Act, (745 ILCS 10/2-103 (West 2014) (Tort Immunity Act)), and also because it was barred by the one-year statute of limitations set forth in section 8-101(a) of the same law (745 ILCS 10/8-101(a) (West 2014)). As noted above, the trial court stated that the Tort Immunity Act was "not *** an issue" in the case. However, the only basis in the defendants' section 2-619 motion to dismiss count I was the Tort Immunity Act, and so we will review its decision on that basis. As to count II, defendants contended that We're Cleaning's breach of contract claim was barred by the five-year statute of limitations applicable to oral contracts under section 13-206 of the Code. 735 ILCS 5/13-206 (West 2014).

¶ 22 As noted above, count I of the fifth amended complaint alleged that the park district failed to enforce its own regulations. The Chicago Park District is a "local public entity" under the Tort Immunity Act. See, *e.g., More v. Chicago Park Dist.*, 2012 IL 112788, ¶ 1 (applying Tort Immunity Act to a claim against the Chicago Park District). Section 1-204 of the Tort Immunity Act immunizes governmental bodies against claims arising from "injury to a person, or damage to or loss of property," as well as from claims arising from "any other injury that a person may suffer to his person, reputation, character or estate which does not result from circumstances in which a privilege is otherwise conferred by law and which is of such a nature that it would be actionable if inflicted by a private person." 745 ILCS 10/1-204 (West 2014).

¶ 23 It is particularly relevant to our tort immunity analysis that count I does not seek any equitable remedy of any nature, such as a declaratory judgment that the 2008 contract is void or must be rescinded, an injunction disqualifying East Lake, or an order substituting SBG for East Lake. And We're Cleaning, we again emphasize, did not bid on the project at all, so its damages

claim cannot be grounded on a contractual theory. Legal theories like those enumerated above might have brought We're Cleaning's claim outside the scope of the Tort Immunity Act. However, count I only seeks monetary damages for We're Cleaning in the same manner as a standard tort claim. As we explained above, count I does not neatly lend itself to classification as a particular type of cause of action, but it is essentially a claim for monetary damages for "injuries" as defined in section 1-104 and thus falls within the parameters of the Tort Immunity Act.

¶ 24 Section 2-103 of the Tort Immunity Act provides that "A local public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." The section is not limited to claims relating to the specific enactment (or non-enactment) of a law through a legislative process. *Anthony v. City of Chicago*, 382 Ill. App. 3d 983, 994 (2008). Section 2-103's protections extend to ministerial and discretionary acts. *Donovan v. Community Unit School District 303*, 2015 IL App (2d) 140704, ¶ 25.

¶ 25 In particular, count I alleged that the Chicago Park District "has continuously failed to act in its administrative capacity by continuously failing to adopt regulations pursuant to the CPD Code regarding the 'Established Business' Provision." It further alleged that the CPD "had a duty to regulate and determine whether an MBE was an 'Established Business' " which it should have implemented by requiring the MBE subcontractor to "verify under oath" on "a form." The gravamen of count I is that the park district failed to vigorously enforce its MBE/WBE qualification rules so as to disqualify East Lake. These are textbook examples of the type of activity which section 2-103 immunizes. The trial court did not err in dismissing count I pursuant to section 2-619 of the Code.

¶ 26 This disposition renders it unnecessary for us to consider whether the circuit court also properly dismissed on limitations grounds: specifically, whether count I was barred because the original complaint was filed more than one year after We're Cleaning's injury occurred on limitations grounds (745 ILCS 10/8-101(a)), and whether count II was barred because it was a claim for breach of an oral contract filed more than five-years after the breach (735 ILCS 5/13-206)).

¶ 27 We're Cleaning also argues that the trial court erred by refusing to grant it leave to amend its complaint. As noted above, the next iteration of the complaint would have been We're Cleaning's *eighth* attempt to plead a valid cause of action. The circuit court retains broad discretion in allowing or denying amendment to pleadings prior to the entry of final judgment, and we cannot reverse a trial court's decision to refuse leave to amend unless the court abused its discretion in doing so. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 35. To determine whether the circuit court abused its discretion, we consider four factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether the proposed amendment would surprise or prejudice the opposing party; (3) whether the proposed amendment was timely; and (4) whether the moving party had previous opportunities to amend. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). The right to amend is neither absolute nor unlimited. *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 219 (2010).

¶ 28 We need not engage in an exhaustive analysis of these factors to find that the circuit court did not abuse its discretion in denying the plaintiffs leave to file an eighth amended complaint. We're Cleaning's unsuccessful attempts to plead some valid cause of action spanned the course of six years of litigation, involved seven different complaints, and hauled a host of defendants

into court. Allowing an eighth complaint would clearly be prejudicial to the remaining defendants, who had already been required to defend against a multitude of legal theories, many of them manifestly unsound. Applying the *Loyola* factors, we must conclude that none of the four factors favored granting We're Cleaning leave to file yet another version of its complaint. When it denied leave to amend, the trial court noted that the case had been before the court for over five years, and that despite that passage of time and the fact that various amended complaints had been presented, "The nature of the cause of action has not become clearer. It just seems to become less clear [ ] as time has gone by * * *." We are reminded that there is a "salutary and sound public policy that litigation should come to an end." *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967). The trial court did not abuse its discretion in refusing leave to amend.

¶ 29 Accordingly, the trial court properly dismissed the fifth amended complaint with prejudice, and it did not abuse its discretion by denying leave to file a "sixth" amended complaint.

¶ 30 Affirmed.