2017 IL App (1st) 152277-U

Nos. 1-15-2277 and 15-3279, cons.

Fifth Division
June 30, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

XCEL SUPPLY, LLC,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 09 L 004771
v.	)	The Honorable Thomas E. Flanagan, Judge Presiding.
VICTOR HOROWITZ,	)	
Defendant-Appellant.	)	

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justice Hall concurred in the judgment.
Justice Lampkin specially concurred.

ORDER

¶ 1 *Held:* Defendant forfeited review of the denial of his section 2-615 and section 2-619 motions to dismiss, and the denial of his summary judgment motion merged with the trial verdict. The trial court found that defendant executed a personal guarantee of a promissory note, that plaintiff performed under the contract to its detriment, and that defendant failed to perform under the obligations set forth in the promissory note, and these findings are not against the manifest weight of the evidence. Additionally, the trial court did not abuse its discretion in its award of attorney fees to plaintiff.

¶ 2 Defendant Victor Horowitz appeals from the trial court's denial of: (1) his section 2-615 motion to dismiss; (2) his section 2-619 motion to dismiss; and (3) his summary judgment motion. Defendant also appeals the trial court's judgment at trial in favor of plaintiff Xcel Supply, LLC, and its award of attorney fees. After a bench trial, the trial court found that defendant breached a personal guarantee to plaintiff and was liable for damages and attorney fees. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Complaint

¶ 5 On April 22, 2009, plaintiff filed a one-count complaint for breach of contract alleging that defendant failed to pay his obligations under a "Personal Guarantee" (guarantee). The complaint alleged that defendant was the personal guarantor for a promissory note also executed the same day as the guarantee, by defendant on behalf of Mercy Health Care and Mercy Management (collectively, Mercy), a corporate nursing home facility, and that defendant was personally liable for "compensatory damages in the amount of no less than $269,643.37 plus interest as set forth in the [promissory note]."

¶ 6 At the time the promissory note and guarantee were executed, defendant was the manager of the Mercy nursing home facilities. Mercy received its medical and janitorial supplies from plaintiff.[1]

¶ 7 The complaint alleged that the debtors had "promised to pay to the order of Plaintiff the principal sum of $269,643.37, plus interest at the rate of 11% per annum, said amount to be paid in eighteen (18) monthly installments of $16,628.00 each, including interest, commencing July 1, 2016"; that the promissory note represented "preexisting indebtedness of

[1] The complaint does not allege how many years plaintiff had been supplying Mercy with supplies prior to the execution of the promissory note and guarantee.

the Debtors to Plaintiff"; and that neither the debtors, nor defendant, had ever made a payment under the promissory note and guarantee.

¶ 8 II. Section 2-615 Motion to Dismiss

¶ 9 On June 23, 2009, defendant moved to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2008)), claiming: (1) that the promissory note was not a "negotiable instrument" under the Uniform Commercial Code (UCC). 810 ILCS § 5/3–104(a) (West 2008), because it was not payable at a definite time and it required undertakings "beyond those of repayment of the antecedent debt"; (2) that the promissory note was unenforceable because the preexisting indebtedness did not constitute consideration and the promissory note lacked definite repayment terms; and (3) that the guarantee was consequently unenforceable since the promissory note was unenforceable. The trial court denied defendant's motion to dismiss.

¶ 10 The trial court denied defendant's motion to reconsider or, in the alternative, to certify the question for an interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 1, 1994).

¶ 11 III. Section 2-619 Motion to Dismiss

¶ 12 Defendant then moved to dismiss the complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)),[2] claiming: (1) that the promissory note failed for lack of consideration "beyond the antecedent debt" that was advanced by plaintiff before the execution of the promissory note and guarantee; (2) that internal inconsistencies in the promissory note rendered it invalid and unenforceable; and (3) that the guarantee was necessarily unenforceable because the promissory note was unenforceable. Defendant

[2] Defendant moved to dismiss pursuant to section 2-619 without specifying a particular subsection or ground.

attached his own affidavit to the motion as an exhibit in which he averred: (1) that "[n]o payment was made pursuant to the Promissory Note, as defined in plaintiff's Complaint, on July 1, 2006"; (2) that defendant was, at all relevant times, a member of the debtors, and that "[t]he Debtors[] never intended to be bound by an agreement by which they were automatically in default"; and (3) that "[n]o new consideration was provided by Plaintiff to support the Guarantee." Defendant had argued all of these points in his prior section 2-615 motion which the trial court had denied. The trial court also denied defendant's section 2-619 motion to dismiss.

¶ 13 IV. Answer

¶ 14 On August 23, 2010, defendant filed his answer and asserted four affirmative defenses: (1) that the promissory note lacked mutuality and was unenforceable; (2) that the promissory note lacked a benefit to the debtors or detriment to plaintiff and, therefore, failed for lack of consideration; (3) that material provisions in the promissory note were indefinite making the promissory note unenforceable; and (4) that, Joshua Silvers (Silvers), plaintiff's manager, fraudulently induced defendant to sign the promissory note and personal guarantee by making representations to defendant that led defendant to believe the promissory note would not be enforced.

¶ 15 After several years of discovery and motion practice, defendant moved for and was granted leave to file amended affirmative defenses. Defendant added, as his fifth affirmative defense, that plaintiff submitted false information to a financial institution to obtain credit for which it would not have otherwise been approved. Defendant alleged that, under the doctrine of *in pari delicto*, plaintiff was not entitled to relief and "cannot profit from its participation in the fraudulent, illegal, unethical, immoral, and otherwise wrongful conduct."

¶ 16 V. Summary Judgment Motions

¶ 17 On May 16, 2014, plaintiff moved for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2014)), claiming: (1) that the promissory note and guarantee were supported by adequate consideration; (2) that there existed no admissible evidence to support defendant's fraud claim; (3) that defendant's fraud claim was an "unclean hands" defense, but it still failed; and (4) that there was no dispute concerning the amount that defendant owed plaintiff pursuant to defendant's personal guarantee.

¶ 18 Defendant filed a cross–motion for summary judgment in which he reiterated his claims regarding: (1) the promissory note's unenforceability due to lack of consideration, lack of mutuality, and internal inconsistencies; and (2) his fraudulent inducement and *in pari delicto* defenses. Defendant also argued that plaintiff had failed to establish damages, as allegedly shown by the "Note Receivable Report dated February 8, 2007," produced by Frost, Ruttenberg & Rothblatt PC (FRR), plaintiff's certified public accountant firm, during discovery. In a sworn affidavit, Lisa Hanlon, an accountant at FRR, averred that the outstanding principal due on the promissory note was $201,177.33. However, defendant argued that she failed to attach relevant documentation or to discuss the "Note Receivable Report" which defendant argued showed a final payment on the principal in the amount of $200,600.09, made on December 31, 2006. Hanlon's testimony was later successfully barred at trial by defendant, according to his reply brief.[3]

¶ 19 On September 26, 2014, the trial court entered an order denying both plaintiff's and defendant's motions for summary judgment finding that an issue of material fact existed, namely, that there was a dispute between the parties concerning the representations that

[3] The appellate record does not contain a trial transcript or bystander's report.

Silvers, the owner of 99% of the common stock of plaintiff's corporation, made to defendant when he executed the promissory note and personal guarantee. Silvers' signature does not appear on any of the documents.

¶ 20 VI. Bench Trial

¶ 21 Prior to the bench trial on March 9, 2015, the parties entered into a stipulation that stated, in relevant part, that:

> "The Parties agree that all documents appended to the Parties' respective Trial Materials—i.e., Plaintiff's Exhibits 1 through 5, and Defendant's Exhibits 1 through 8—are deemed authentic and admissible, subject only to relevancy objections, which are expressly reserved. The Parties do not agree or stipulate to the accuracy of the information contained in the Exhibits."

On June 10, 2016, the trial court ruled that it had treated the exhibit binders that were the subject of the stipulation as admitted evidence, stating: "The court is noting that the 3-ring binders were treated as evidence (as the [court] believes the parties did)." The binders included the parties' trial exhibits consisting of: (1) the promissory note; (2) the guarantee; (3) defendant's response to plaintiff's first requests for admissions; (4) defendant's answers and objections to plaintiff's first set of written interrogatories; (5) plaintiff's financial records; (6) a note receivable report;[4] (7) plaintiff's answers and objections to defendant's written interrogatories; (8) plaintiff's supplemental answers to defendant's written interrogatories; (9) plaintiff's responses and objections to defendant's first requests for

[4] This exhibit has since been stricken from the appellate record, as we explain in ¶¶ 33, 34. Although defendant persists in relying on this document, this court cannot consider it as part of the record.

admissions; (10) plaintiff's supplemental responses to defendant's first requests for admissions; and (11) plaintiff's complaint.[5]

¶ 22 At the bench trial on March 10, 2015, only two witnesses testified: (1) defendant; and (2) Silvers. The appellate record does not contain either a transcript of the trial or a bystander's report.

¶ 23 VII. Posttrial Orders and Motions

¶ 24 On April 2, 2015, the trial court entered judgment for plaintiff in the amount of $230,604. The judgment order found that, although there were some internally inconsistent dates in the promissory note, that was understandable and that "[the note] is evidence of an obligation on or about July 28, 2015 for about $269,643.37." The trial court found: (1) that defendant failed to prove "more probably true than not that" Silvers said that the promissory note would " 'never be enforced' "; (2) that "present and future forbearance and promise of continued line of credit was adequate consideration"; (3) that both the promissory note and guarantee were enforceable; (4) that "[defendant] was and is in breach of the personal guarantee as to a clear promise to be obligated on the note (and the credit, past and future)"; and (5) that plaintiff was entitled to an award of $230,604 plus costs and reasonable attorney fees. The trial court reached the damages award by considering the note receivable report dated February 8, 2007, which the trial court believed showed that $200,600.08 had been paid leaving $69,043.29 in principal plus: (1) compounding "default interest" of 18% per year for eight years ($99,422.32); and (2) $1,035.65 monthly interest for six months ($62,139.00).[6] [7]

[5] No court reporter was present for this case.
[6] There are numerous mathematical errors in this verdict. For instance, $1,035.65 multiplied by six is not $62,139.00 as the trial court concluded, but $6,213.90.
[7] The appellate record does not contain a transcript or bystander's report for April 2.

¶ 25 On April 6, 2016, defendant filed a posttrial motion to vacate the trial court's April 2, 2015, order, reiterating his arguments that the promissory note was unenforceable due to lack of consideration, lack of mutuality, and the note's internal inconsistencies.

¶ 26 On April 10, 2016, plaintiff filed a petition for costs of $2,806.54 and attorney fees of $144,156. Plaintiff also filed a motion to modify the April 2, 2015, order, in which it claimed: (1) that the trial court relied on the wrong financial statements, (2) that Silvers' ledger was the only ledger for which testimony was offered, and (3) that the remaining balance on the promissory note was $200,600.08, not $69,043.29, which was the figure with which the trial court had started its calculations. Plaintiff argued that the judgment, not including costs and attorney fees, should be for $507,518.16, not $230,604.

¶ 27 On April 23, 2015, the trial court entered a written order awarding plaintiff its requested costs ($2,806.54) and attorney fees ($144,156).[8]

¶ 28 On May 4, 2015, defendant moved to vacate the April 23, 2015, order, granting plaintiff costs and attorney fees. Defendant argued that the trial court improperly awarded these amounts before plaintiff presented its posttrial motion and before defendant had an opportunity to respond to the petition for costs and fees. Defendant also argued that, when the trial court gave its opinion on plaintiff's petition for costs and attorney fees without an evidentiary hearing, it became impossible for defendant to have a fair hearing on the matter. Defendant requested the trial judge to recuse himself from that issue and transfer the proceeding to another judge. The recusal motion was denied, but the trial court granted defendant's motion for hearing on plaintiff's petition for costs and attorney fees and set a date for an evidentiary hearing.

[8] The appellate record contains no transcript or bystander's report for April 23.

¶ 29 On May 6, 2015, the trial court denied defendant's posttrial motion to vacate the April 23, 2015, order, and vacated the order assessing fees and costs.[9]

¶ 30 On July 8, 2015, the trial court vacated the April 2, 2015, order. On July 17, 2015, the trial court entered a new judgment order finding: (1) that defendant "did not prove as more probably true than not that Mr. Silver[s] (owner of Plaintiff Xcel planned to rely on the Note and Guarantee to get bank credit)" and that the documents were merely executed as a condition for plaintiff to obtain a line of credit; (2) that defendant "is liable on the note and personal guarantee"; (3) that "present and future forbearance and promise of continued line of credit was adequate consideration"; (4) that "both the [n]ote and [g]uarantee were enforceable"; (5) that cross-motions for summary judgment were denied because there were "material issues of fact"; and (6) that plaintiff is entitled to an award of $468,021.87, not including costs and attorney fees. The trial court found that exhibit No. 11 showed $191,812.42 in unpaid principal and added $276,209.63, eight years' interest on $191,812.42 at a rate of 18%, to reach the final figure.[10]

¶ 31 VIII. Appeal

¶ 32 On August 7, 2015, defendant filed a timely notice of appeal from the July 17, 2015, order. On October 21, 2015, the trial court entered an order granting plaintiff costs of $3,312.75 and attorney fees of $153,746.25. On November 17, 2015, defendant filed another timely notice of appeal from the October 21, 2015, award of costs and attorney fees. On January 21, 2016, this court consolidated the two appeals.[11]

[9] The appellate record contains no transcript or bystander's report for May 6.
[10] The appellate record contains no transcript or bystander's report for July 17.
[11] The trial court noted that the only exhibit that the parties had not stipulated to was plaintiff's exhibit No. 3, which was "Defendant's Responses to Plaintiff's First Requests for Admissions." On July 6, 2016, plaintiff moved to correct the record to indicate that exhibit No. 3 was

¶ 33 Defendant does not contest the trial court's striking of the note receivable report[12] but attempts to rely on the document by arguing that the trial court's error was in how it interpreted the document.

¶ 34 ANALYSIS

¶ 35 On appeal, defendant claims that the trial court erred: (1) by denying his section 2-615 motion to dismiss, his section 2-619 motion to dismiss, and his motion for summary judgment; (2) by granting judgment in favor of plaintiff following the bench trial; and (3) by granting plaintiff costs in the amount of $3,262.75 and attorney fees in the amount of $135,756.25. For the following reasons, we affirm.

¶ 36 I. Defendant's 2-615 Motion to Dismiss

¶ 37 Defendant first contends that the trial court erred by denying his section 2-615 motion to dismiss the complaint. The trial court's denial of defendant's section 2-615 motion to dismiss is not reviewable by this court, for reasons that we explain in greater detail below. In sum, because defendant chose not to stand on his motion and instead filed an answer, defendant forfeited his right to review of the trial court's denial of his section 2-615 motion. In addition, the trial court entered a verdict against defendant, and under the doctrine of aider by verdict, the trial court found the complaint was legally sufficient in order to reach its verdict.

¶ 38 Defendant's motion to dismiss was brought pursuant to section 2-615 of the Code; such a motion "challenges the legal sufficiency of a complaint by alleging defects on its face." *Accel*

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defendant's trial exhibit No. 3, not *plaintiff's*. The exhibit was the "Note Receivable Report" which included the amortization schedule. On July 20, 2016, the trial court corrected its previous order, including plaintiff's trial exhibit No. 3, and striking defendant's trial exhibit No. 3 from the appellate record. The trial court noted that the error was the "court's erroneous transposing of the Defendant's trial exhibit 3 with the Plaintiff's trial exhibit 3."

[12] The trial court barred the testimony of Lisa Hanlon, plaintiff's accountant, who could have testified to the contents of her affidavit. See *supra* ¶ 17.

Entertainment Gaming, LLC v. Village of Elmwood Park, 2015 IL App (1st) 143822, ¶ 27 (citing *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004); *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003)); *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). The question is "whether the allegations set forth in the complaint are sufficient to state a cause of action upon which relief may be granted." *Accel*, 2015 IL App (1st) 143822, ¶ 27 (citing *Wakulich*, 203 Ill. 2d at 228). "[A]ll well-pleaded facts, and all inferences that may be drawn from those facts, are taken as true." *Accel*, 2015 IL App (1st) 143822, ¶ 27 (citing *Young*, 213 Ill. 2d at 441). "In addition, we construe the allegations in the complaint in the light most favorable to the plaintiff." *Accel*, 2015 IL App (1st) 143822, ¶ 27 (citing *Young*, 213 Ill. 2d at 441); see also *Marshall*, 222 Ill. 2d at 429. Exhibits attached to a pleading constitute part of the pleading and are considered with the complaint in its entirety for determining whether the pleadings set forth sufficient facts to state a cause of action. *Rubin + Norris, LLC v. Panzarella*, 2016 IL App (1st) 141315, ¶ 26 (citing *Payne v. Mill Race Inn*, 152 Ill. App. 3d 269, 274-75 (1987)). A court should not dismiss a cause of action under this section unless it is clearly apparent that no set of facts can be proved that would have entitled a plaintiff to recovery. *In re Estate of Yanni*, 2015 IL App (2d) 150108, ¶ 19 (citing *In re Estate of Lieberman*, 391 Ill. App. 3d 882, 886 (2009)).

¶ 39 In general, when a defendant files an answer after the trial court denies his motion to dismiss, the defendant forfeits any defect in the plaintiff's complaint. *In re Estate of Yanni*, 2015 IL App (2d) 150108, ¶ 20 (citing *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 60 (1994)); see also *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 155 (1983) ("[T]his court and a majority of the appellate court cases have adhered to the well-established principle that a party who files an amended pleading waives any objection to the

trial court's ruling on the former complaints."). A corollary to the waiver doctrine is the doctrine of aider by verdict. *Adcock*, 164 Ill. 2d at 60. Under the doctrine of aider by verdict, a verdict against a defendant cures not only formal and purely technical defects in the complaint, but also any defects in failing to allege or alleging imperfectly any substantial facts essential to the cause of action. *In re Yanni*, 2015 IL App (2d) 150108, ¶ 20 (citing *Adcock*, 164 Ill. 2d at 60-61). " 'A complaint that fails to state a cause of action cannot support a judgment.' " *In re Yanni*, 2015 IL App (2d) 150108, ¶ 20 (quoting *Lambert*, 186 Ill. App. 3d at 940).

¶ 40 There is an exception to the doctrines of waiver and aider by verdict that allows a defendant to raise at any time a claim that the complaint fails to state a cause of action. *In re Yanni*, 2015 IL App (2d) 150108, ¶ 20 (citing *Adcock*, 164 Ill. 2d at 61). This exception applies only in cases where the complaint "wholly and absolutely fails to state a cause of action that the law will recognize." *Lambert v. City of Lake Forest*, 186 Ill. App. 3d 937, 940 (1989); see *In re Yanni*, 2015 IL App (2d) 150108, ¶ 20 (the exception to the doctrines of waiver and aider by verdict was applied where the complaint alleged conversion of real property which was not a recognized cause of action in Illinois); *Adcock*, 164 Ill. 2d at 62 (the exceptions to the doctrines of waiver and aider by verdict did not apply in this case where the relevant counts in the complaint were based on civil conspiracy which was a recognized cause of action in Illinois). Courts draw a distinction between a complaint that alleges no cause of action, which may be challenged at any time, and one which defectively or imperfectly alleges a cause of action. *Adcock*, 164 Ill. 2d at 62 (citing *Swager v. Couri*, 77 Ill. 2d 173, 185 (1979); *Lasko v. Meier*, 394 Ill. 71, 73–74 (1946)).

¶ 41 Defendant mistakenly relies on *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558 (2006). In *Solaia*, the trial court dispensed with the case through a combined motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2002)), before defendants filed an answer to the complaint and without going to trial. *Solaia*, 221 Ill. 2d at 575. *Solaia* is distinguishable from this current case where there was a trial and an answer was filed.

¶ 42 In *Adcock*, the defendant decided not to stand on its motion to dismiss and instead filed an answer denying the "essential allegations raised in the plaintiff's complaint." *Adcock*, 164 Ill. 2d at 61. The case subsequently went to a jury trial where the trial court entered judgment on the jury verdict. *Adcock*, 164 Ill. 2d at 61. Our Illinois Supreme Court found that (1) the claim was a recognized cause of action in Illinois; and (2) although the complaint may have alleged insufficient facts to support a cause of action, defendant was precluded from arguing that the complaint was factually deficient based on the doctrines of waiver and aider by verdict. *Adcock*, 164 Ill. 2d at 65.

¶ 43 Similarly, defendant chose not to stand on his motion to dismiss pursuant to section 2-615, and instead filed an answer, the case proceeded to trial where a judgment was entered against defendant. As a result, even if plaintiff's complaint was factually or technically deficient at the time it was filed, defendant is precluded from attacking the complaint for factual or technical defects after the entry of a judgment based on the trial.

¶ 44 Thus, instead of addressing whether plaintiff's complaint met the Illinois pleading standard, we ask only whether breach of contract is a recognizable claim in Illinois, which, of course, it is. *E.g.*, *Burkhart v. Wolf Motors of Naperville*, 2016 IL App (2d) 151053, ¶ 14.

¶ 45 Even if this court were to consider the complaint's sufficiency, it did state a cause of action. Plaintiff's complaint alleges one count for breach of contract. The elements of a contract are: (1) offer; (2) "strictly conforming acceptance to the offer"; and (3) supporting consideration. *In re Marriage of Bennett*, 225 Ill. App. 3d 828, 832 (1992). Plaintiff attached both the promissory note and the guarantee to its complaint. It can be presumed that defendant's signature present on each document is evidence that plaintiff offered each document and their corresponding terms to defendant, and defendant unequivocally assented to those terms by affixing his signature to those documents. Plaintiff also alleged in its complaint that the promissory note was to be paid in installments based on "preexisting indebtedness of the Debtors to [plaintiff] for sale made by [plaintiff] to the Debtors on open account," which defendant failed to do. Plaintiff further alleged that defendant signed and delivered the guarantee to plaintiff on the same day in which the promissory note was executed. Finally, plaintiff alleged that each agreement is valid and enforceable. Taken as true, plaintiff clearly alleged that the promissory note and the guarantee were valid contracts binding Mercy as debtors, collectively, and defendant as guarantor.

¶ 46 In a breach of contract action, a plaintiff must allege and prove the following elements: " '(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resulting injury to the plaintiff.' " *Burkhart*, 2016 IL App (2d) 151053, ¶ 14 (quoting *Henderson-Smith & Associates, Inc. v. Nahamani Family Services Center, Inc.*, 323 Ill. App. 3d 15, 27 (2001)). In the case at bar, plaintiff alleges: (1) that both the promissory note and the guarantee are valid and enforceable agreements; (2) that plaintiff "has fulfilled all of its duties and obligations under each of the Note and the Guarantee"; (3) that "[n]either the Debtors, nor [defendant], has ever made a

single payment due under the Note," thereby failing to satisfy their obligations under the promissory note and guarantee, respectively; and (4) that "[a]s a result of the breach of each of the Debtors under the Note and the breach of [defendant] under the Guarantee, [plaintiff] has suffered damages in excess of $269,643.37." Under these circumstances, plaintiff has clearly alleged the necessary elements for a breach of contract claim to survive a 2-615 motion to dismiss for failure to state a claim upon which relief may be granted.

¶ 47 In sum, under both the doctrines of waiver and aider by verdict, defendant has forfeited the right to argue now that plaintiff's complaint was factually or technically deficient when filed. Even if defendant had not forfeited his ability to challenge any factual or technically deficiencies, this court would find the allegations set forth in the complaint are sufficient to survive a 2-615 motion to dismiss for failure to state a claim upon which relief may be granted.

¶ 48 II. Defendant's 2-619 Motion to Dismiss and Summary Judgment

¶ 49 A. The 2-619 Motion

¶ 50 Next, defendant contends that the trial court erred by denying his section 2-619 motion to dismiss. However, defendant basically repeated the allegations and arguments set forth in his section 2-615 motion to dismiss and then attached his own affidavit. See *supra* ¶¶ 8, 11. In sum, defendant's section 2-619 motion was not the correct vehicle to reassert his section 2-615 contentions, and his arguments were more appropriate for a summary judgment motion.

¶ 51 A motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the claim but asserts defects, defenses, or another affirmative matter, appearing on the face of the complaint or established by external submissions, that defeats the claim or operates to avoid its legal effect. *Daniels v. Union Pacific R.R. Co.*, 388 Ill. App. 3d 850, 855 (2009); *Zahl v.*

Krupa, 365 Ill. App. 3d 653, 657-58 (2006); *Ross v. May Co.*, 377 Ill. App. 3d 387, 390 (2007) (citing *Smith v. Waukegan Park District*, 373 Ill. App. 3d 626, 629 (2007)); see also *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). " 'Such a motion admits the legal sufficiency of the plaintiff's complaint but interposes some affirmative matter that prevents the lawsuit from going forward.' " *Daniels*, 388 Ill. App. 3d at 855 (quoting *Travis v. American Manufacturers Mutual Insurance Co.*, 335 Ill. App. 3d 1171, 1174 (2002)). "In a section 2-619 motion to dismiss, the defendant bears the burden of proving the affirmative defense." *Daniels*, 388 Ill. App. 3d at 855 (citing *Luise, Inc. v. Village of Skokie*, 335 Ill. App. 3d 672, 685 (2003)). A reviewing court " 'must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal is proper as a matter of law.' " (Internal quotation marks omitted.) *Daniels*, 388 Ill. App. 3d at 855 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116–17 (1993)). In this sense, this procedure is similar to summary judgment. *Palmisano v. Connell*, 179 Ill. App. 3d 1089, 1097 (1989). The main difference between a section 2-619 motion and section 2-1005 motion for summary judgment is that, under the former, a judge may weigh evidence and resolve factual disputes, while under the latter, a material factual dispute will preclude adjudication. *Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885, 892-93 (2005) (the test is whether, after extrinsic evidence was submitted, did there remain an issue of material fact not to be decided summarily).

¶ 52 " '[A]ffirmative matter,' in a section 2-619(a)(9) motion, is something in the nature of a defense which negates the cause of action completely or refutes crucial conclusion of law or conclusion of material fact contained in or inferred from the complaint." *Illinois Graphics*, 159 Ill. 2d at 486 (citing *John v. Tribune Co.*, 24 Ill. 2d 437, 440–41 (1962)). "Affirmative

matter," in this context, "encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action." *Daniels*, 388 Ill. App. 3d at 855 (citing *Travis*, 335 Ill. App. 3d at 1174); *Kedzie*, 156 Ill. 2d at 116.

¶ 53 For example, in *Turner*, this court determined that the defendants' challenge to the third count of the complaint was misdesignated as a section 2-619(a)(9) motion. *Turner*, 355 Ill. App. 3d at 893. Count III of the complaint alleged that the defendants had illegally commingled plaintiffs' security deposit with defendants' general funds. *Turner*, 355 Ill. App. 3d at 896. "[B]ecause the motion and its supporting extrinsic submissions deny any such commingling and therefore directly traverse the allegations contained in count three," the court determined that defendants' motion was more akin to a section 2-1005 motion for summary judgment, and since the plaintiffs had not demonstrated any resulting prejudice by the misdesignation, the challenge should be reviewed as if it had been presented in a section 2-1005 motion. *Turner*, 355 Ill. App. 3d at 893, 896. The *Turner* court held that the material disputed facts precluded the entry of summary judgment. *Turner*, 355 Ill. App. 3d at 896. See, *e.g.*, *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 54; *Loman v. Freeman*, 375 Ill. App. 3d 445, 448 (2006).

¶ 54 Defendant claimed that plaintiff asked him to sign the note and guarantee so defendant could use it to obtain financing from a third party. As a result, defendant argued that because there existed no valid or enforceable promissory note, there could exist no valid or enforceable guarantee for defendant to breach. To support these allegations, defendant attached his own affidavit which is allowed by section 2-619(a).[13] However, section 2-619(a)

[13] Section 2-619(a) provides, in relevant part, that "[i]f the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit." 735 ILCS 5/2-619(a) (West 2014).

affidavits are governed by Illinois Supreme Court Rule 191(a) (eff. July 1, 2002). *Betts v. City of Chicago*, 2013 IL App (1st) 123653, ¶ 15. Specifically, affidavits submitted in connection with a section 2-619 motion

> " 'shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness can testify competently thereto.' " *Betts*, 2013 IL App (1st) 123653, ¶ 15 (quoting Ill. S. Ct. R. 191(a) (eff. July 1, 2002)).

"To the extent that the statements in the affidavit violate Rule 191(a), we will disregard any *** conclusory statements." *Betts*, 2013 IL App (1st) 123653, ¶ 24.

¶ 55 Defendant provided only three statements with arguable evidentiary weight. Paragraph 2 of his affidavit spoke to the breach of the note by stating that "[n]o payment was made pursuant to the Promissory note, as defined in Plaintiff's Complaint, on July 1, 2006." Paragraphs 3 and 4 spoke to the validity of the contract in conclusory terms. Specifically, paragraph 3 asserted that the debtors lacked an intent to be bound, and paragraph 4 asserted that the guarantee lacked consideration. Paragraphs 3 and 4 "directly traverse[d]" an essential element of plaintiff's complaint. *Turner*, 355 Ill. App. 3d at 893. Paragraph 3's assertion was a conclusory statement about an issue of material fact, and paragraph 4's assertion was a conclusory statement of law.

¶ 56 The only count brought by plaintiff was for breach of contract. By directly attacking the validity and enforceability of the contract, defendant did not assert an *additional* "affirmative

matter" within the meaning of section 2-619(a)(9), but argued that plaintiff failed with the first element of its cause of action for breach of contract. See *supra* ¶ 53. Defendant asked the trial court to consider the record at the time, and summarily rule on the validity of the promissory note and guarantee by attacking an "essential allegation[] of the plaintiff's cause of action." See *Kedzie & 103rd Currency Exchange*, 156 Ill. 2d at 116. Plaintiff has not shown any resulting prejudice in the misdesignation based on the denial of the section 2-619(a)(9) motion, defendant's subsequent motion for summary judgment, and the verdict in plaintiff's favor. See, *e.g.*, *Turner*, 355 Ill. App. 3d at 893 ("[S]ince *** the [plaintiff] have not demonstrated any resulting prejudice from [the misdesignation], we will evaluate the challenge to that count as if presented in a section 2-1005 motion."). Therefore, the allegations and defenses set forth by defendant in his section 2-619 motion to dismiss will be reviewed as if they had been presented in his section 2-1005 motion for summary judgment.

¶ 57 B. Motion for Summary Judgment

¶ 58 Both parties filed summary judgment motions, but only defendant appeals the denial of his motion. In his summary judgment motion, defendant claimed: (1) that the promissory note and guarantee fail for want of consideration; (2) that defendant was fraudulently induced into executing the promissory note and personal guarantee; (3) that defendant and plaintiff were *in pari delicto*, therefore barring plaintiff from recovery; and (4) that plaintiff had failed to prove damages. Each of defendant's claims required the trial court, and now this court, to determine an issue of fact, which under the circumstances, we cannot do for the reasons discussed below.

¶ 59 1. Standard of Review

¶ 60 When parties file cross-motions for summary judgment, as was the case here, they agree that there is no genuine issue of material fact in their motions and invite the court to decide the issues based on the law and the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28 (citing *Allen v. Meyer*, 14 Ill. 2d 284 (1958)); *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 13. However, the filing of cross–motions does not necessarily mean there is not an issue of material fact, nor does it obligate a court to render summary judgment. *Pielet*, 2012 IL 112064, ¶ 28.

¶ 61 "The purpose of summary judgment is not to try an issue of fact but to determine whether a triable issue of fact exists." *Weisberger v. Weisberger*¸ 2011 IL App (1st) 101557, ¶ 42 (citing *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002); *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002)). " 'Although a [party] is not required to prove his [or her] case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment.' " *Weisberger*¸ 2011 IL App (1st) 101557, ¶ 42 (quoting *Robidoux*, 201 Ill. 2d at 335).

¶ 62 A trial court may grant summary judgment only " 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Weisberger*¸ 2011 IL App (1st) 101557, ¶ 43 (quoting 735 ILCS 1005(c) (West 2008)). "The trial court must consider documents and exhibits filed in support or opposition to a motion for summary judgment in the light most favorable to the nonmoving party." *Weisberger*¸ 2011 IL App (1st) 101557, ¶ 43 (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)); see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107,

113 (1995) (a court "must construe [document and exhibits] strictly against the movant and liberally in favor of the nonmoving party"). "A genuine issue of material fact *** exists where the material facts are disputed or, if the material facts are disputed, reasonable persons might draw different inferences from the undisputed facts." (Internal quotation marks omitted.) *Windmill Nursing Pavilion, Ltd. v. Cincinnati Insurance Co.*, 2013 IL App (1st) 122431, ¶ 18. "Unsupported assertions, opinions, and self-serving or conclusory statements made in deposition testimony are not admissible evidence upon review of a summary judgment motion." *Perfection Corp. v. Lochinvar Corp.*, 349 Ill. App. 3d 738, 744–45 (2004). A motion for summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. *Weisberger*¸ 2011 IL App (1st) 101557, ¶ 43 (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992)).

¶ 63 Generally, when a case proceeds to trial after a motion for summary judgment is denied, the order denying the motion for summary judgment merges with the judgment entered and is not appealable; only the judgment is appealable. *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 42 (citing *Labate v. Data Forms, Inc.*, 288 Ill. App. 3d 738, 740 (1992); *Battles v. LaSalle National Bank*, 240 Ill. App. 3d 550, 558 (1992)); see also *Davis v. International Harvester Co.*, 167 Ill. App. 3d 814, 818-19 (1988) ("The denial of a motion for summary judgment is not reviewable on appeal after a trial on the merits, because the ruling merges into the trial that follows."). The merger doctrine applies in these situations because the "subsequent verdict is necessarily based on a more complete presentation of the evidence than was the motion for summary judgment." *Davis*, 167 Ill. App. 3d at 819 (citing

Romano v. Bittner, 157 Ill. App. 3d 15, 22 (1987); *Paulson v. Suson*, 97 Ill. App. 3d 326, 328 (1981)).

¶ 64 An exception exists where the issue raised in the summary judgment motion presents a question of law which would not be decided by the trier of fact. *Young*, 2015 IL App (1st) 131887, ¶ 42; *Labate*, 288 Ill. App. 3d at 740. When the reviewing court is asked to review a question of law, "the denial of a summary judgment does not merge with the judgment and may be addressed on appeal under a *de novo* review." *Young*, 2015 IL App (1st) 131887, ¶ 42 (citing *Labate*, 288 Ill. App. 3d at 740; *American Service Insurance Co. v. Jones*, 401 Ill. App. 3d 514, 520 (2010)). A *de novo* review means that we perform the same analysis a trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 65 In this case, defendant claims: (1) the promissory note's unenforceability due to lack of consideration, lack of mutuality, and internal inconsistencies; (2) the guarantee's unenforceability for lack of consideration; and (3) his fraudulent inducement and *in pari delicto* defenses. All of these unenforceability arguments were argued in his 2-619 motion and reasserted in his summary judgment motion. Defendant also argued in his summary judgment motion that plaintiff had failed to establish damages. However, now there has been a bench trial and a final judgment that merges with the summary judgment decision on review. *E.g.*, *Young*, 2015 IL App (1st) 131887. Thus, we address each of defendant's claims in turn and determine whether his arguments raise issues of law for this court to review *de novo* (*Young*, 2015 IL App (1st) 131887, ¶ 43), or whether his arguments are fact-based and not appealable due to the lack of a trial record. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391–92 (1984) ("an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim or error, and in the absence of such a record on appeal,

it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis"); see also *People v. Chatman*, 2016 IL App (1st) 152395, ¶ 66.

¶ 66 2. Consideration of the Guarantee

¶ 67 Where a guarantee is executed after the guaranteed debt is incurred, new consideration is necessary to support the guarantee. *City National Bank of Hoopeston v. Russell*, 246 Ill. App. 3d 302, 307 (1993) (citing *First National Bank of Red Bud v. Chapman*, 51 Ill. App. 3d 738, 740 (1977)); see also *Webbe v. Romano Oolitic Stone Co.*, 58 Ill. App. 222, 226 (1894) (every contract must be supported by consideration, either expressed in words or implied in the nature of the contract, or the contract is *nudum pactum*—bare or naked promise). Generally, whatever consideration would be sufficient for any other kind of contract will be considered sufficient to support a contract of guarantee. *First National Bank of Red Bud*, 51 Ill. App. 3d at 741 (citing *Stern v. Gelder*, 224 Ill. App. 89 (1922); *Blue Island Brewing Co. v. Fraatz*, 123 Ill. App. 26, 30 (1905)).

¶ 68 "A promise to pay the debt of another in consideration of a forbearance to sue for a *** reasonable time" is good consideration. *Webbe*, 58 Ill. App. at 226; *City National Bank of Hoopeston*, 246 Ill. App. 3d at 307 ("Forbearance from exercising a right to take legal action against a third party constitutes adequate consideration for the guarantee of a debt obligation of the third party."). However, "a mere forbearance, without an agreement to forbear, will not render the promisor liable." *Webbe*, 58 Ill. App. at 226. An agreement to forbear does not need to be in express terms but may be "gathered from the surrounding circumstance from which forbearance for a reasonable time may be implied." *First National Bank of Red Bud*, 51 Ill. App. 3d at 742 (citing *McMicken v. Safford*, 197 Ill. 540, 544–47 (1902); *Zimmerman*

Ford, Inc. v. Cheney, 132 Ill. App. 2d 871, 873 (1971)); *City National Bank of Hoopeston*, 246 Ill. App. 3d at 307.

¶ 69 When reviewing whether forbearance was sufficient consideration for a guarantee, we look to the record. See *City National Bank of Hoopeston*, 246 Ill. App. 3d at 308–09 (motion for summary judgment was improperly granted where the record revealed a genuine issue of fact as to whether the guarantee was supported by sufficient consideration); *First National Bank of Red Bud*, 51 Ill. App. 3d at 742 ("The record here is devoid of testimony concerning any request for forbearance by defendant at the time she executed the agreement, nor was there any testimony even remotely bearing upon the matter of forbearance."). However, defendant has not carried his burden of providing this court with a complete record. See *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001) (on appeal the appellant has the burden to present a sufficiently complete record).

¶ 70 In this case, there is a disagreement about whether there was any agreement to forbear. Plaintiff points to the following language in the guarantee: "With or without notice to Guarantor, Creditor *may later*, compromise, accelerate, extend, or change the time or manner of payment of any indebtedness, increase or reduce the rate of interest thereon, or add or release any one or more other guarantors." (Emphasis added.) Plaintiff argues that, with the word "later," plaintiff agreed to forbear the collection of the promissory note and other outstanding debts, and that this was adequate consideration for the guarantee. However, this sentence does not say that Plaintiff *will* forbear, but merely that it "may."

¶ 71 In response, defendant argues that the record shows a lack of evidence to support plaintiff's position. In his brief to this court, defendant argues that: "[Plaintiff] has offered not a scintilla of evidence at summary judgment or trial suggesting that the Guarantee was

supported by any consideration other than the discredited Promissory Note." The trial court stated in its July 17, 2015, order, that it found that the guarantee was supported by adequate consideration consisting of "present and future forbearance and promise of continued line of credit."

¶ 72 The trial court could have heard testimony at trial to which this court has not been privy. We cannot know whether this testimony exists or decide whether there was, in fact, an understanding between the parties that plaintiff would forbear. This court is in no position to know what was testified to at trial because defendant failed to provide either a transcript or a bystander's report. Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005) (setting forth a process for providing a report of a proceeding when no court reporter was present); *Foutch*, 99 Ill. 2d at 391–92 ("an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim or error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis"); see also *Chatman*, 2016 IL App (1st) 152395, ¶ 66; *Fitzgerald v. O'Donnell*, 2016 IL App (1st) 153112-U, ¶ 44. Here, the trial court entered judgment on three relevant grounds: (1) that "present and future forbearance and promise of continued line of credit was adequate consideration"; (2) that "both [the] Note and [the] guarantee were enforceable'; and (3) that defendant was "liable on the note and guarantee (both signed 7/28)." By failing to carry his burden of providing a complete record, defendant asks this court to make a factual determination without knowing the testimony presented at the bench trial, which we cannot do.

¶ 73 Defendant's argument concerns two separate proceedings: (1) the hearing on defendant's summary judgment motion; and (2) the bench trial. It is certainly possible that there was

testimony regarding forbearance at the bench trial, but we do not know. See *Chatman*, 2016 IL App (1st) 152395, ¶ 66. We cannot engage in this sort of second-guessing of the trial court for two reasons. First, because whether there was an agreement to forbear is an issue of fact and there has been a final judgment, thus, defendant cannot appeal this issue as part of a denial of summary judgment. See, *e.g.*, *Davis*, 167 Ill. App. 3d at 819 (citing *Romano*, 157 Ill. App. 3d at 22; *Paulson*, 97 Ill. App. 3d at 328). Second, because defendant has not provided a transcript or bystander's report of the trial, we cannot determine whether the record lacks an indication that there was an agreement to forbear because we do not have the full record in front of us. The trial court denied both parties' summary judgment motions and proceeded to trial, in part, because of this issue of material fact, and this is a trial of which this court has no record. For these reasons, the consideration issue cannot be considered without a record, and we presume that the trial court was correct in its ruling. See, e.g., *Foutch*, 99 Ill. 2d at 391–92; *Chatman*, 2016 IL App (1st) 152395, ¶ 66; *Fitzgerald*, 2016 IL App (1st) 153112-U, ¶ 44.

¶ 74 3. Fraudulent Inducement

¶ 75 Next, defendant argues that he was fraudulently induced to sign both the promissory note and guarantee based on certain misrepresentations made by Silvers. Specifically, defendant argued that Silvers told defendant that plaintiff had no intention of collecting based on any of the documents and that the documents were prepared so that Silvers could obtain financing from a third party. Both defendant and Silvers were deposed, and complete transcripts of both depositions are in the appellate record as part of the summary judgment proceedings. The trial court denied both parties' summary judgment motions because they "present[ed] arguments that go to the credibility of witnesses' testimony," and contained factual issues

that had to be decided. As noted, summary judgment is appropriate only " 'if the pleadings, depositions, and admissions on file, together with the affidavits *** show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Young*, 2015 IL App (1st) 131887, ¶ 41 (quoting 735 ILCS 1005(c) (West 2010)); *Windmill Nursing Pavilion*, 2013 IL App (1st) 122431, ¶ 18.

¶ 76 The trial court found that Silvers' testimony at trial was more credible than defendant's testimony. In other words, the trial court determined that defendant failed to prove, by a preponderance of the evidence, that Silvers had prepared the documents only to obtain a line of credit, and had no intentions to collect on the promissory note and guarantee. Defendant failed to prove his fraud claim.

¶ 77 Witness credibility is an issue of fact, and we defer to the trial court on this issue since the trial court had better access to the testimony. *Cyclonaire Corp. v. ISG Riverdale, Inc.*, 378 Ill. App. 3d 554, 559 (2007); see also *Clean World Engineering, Ltd. v. MidAmerica Bank, FSB*, 341 Ill. App. 3d 992, 997 (2003) ("The trial judge, as the trier of fact, is in a position superior to a reviewing court to observe witnesses while testifying, to judge their credibility, and to determine the weight their testimony should receive.")

¶ 78 4. *In Pari Delicto* Defense

¶ 79 Next, defendant argues that the promissory note was a "sham" intended only to "fool the bank into believing Plaintiff was on more financially sound footing than it actually was," in order to extend its line of credit from the bank. Defendant argues that the contract was intended to defraud a banking institution, which meant that defendant and plaintiff were *in pari delicto*, thereby barring plaintiff from recovery. In response, plaintiff argues that the promissory note and guarantee were executed without fraudulent intent, and for the purpose

of securing debt to continue providing services to Mercy Health Care and Mercy Management and in order to increase its debt-to-asset ratio. Defendant's appeal of the denial of his summary judgment motion regarding his *in pari delicto* defense was a question of fact which was decided at trial.

¶ 80 The *in pari delicto* doctrine is a legal principle that will protect the "less culpable" party by allowing that party to "obtain relief from otherwise illegal or tortious transactions or occurrences." *O'Hara v. Ahlgren, Blumefeld + Kempster*, 158 Ill. App. 3d 562, 565 (1987), *aff'd* 127 Ill. 2d 333 (1989). The phrase "*in pari delicto*" means "[e]qually at fault." *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 34 (2005); see also Black's Law Dictionary 911 (10th ed. 2009). The *in pari delicto* doctrine embodies the principle that "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." *King*, 215 Ill. 2d at 34; see also Black's Law Dictionary 911 (10th ed. 2009). The *in pari delicto* doctrine is similar to the doctrine of imputed knowledge since, in both doctrines, the principal's knowledge is a requirement. Black's Law Dictionary 586–87 (10th ed. 2009) ("The doctrine serves as a bridge for the applicability of defenses that a third party may assert against a principal in which knowledge is a necessary element, including *in pari delicto*."). "Where the parties to a contract against public policy are *in pari delicto*, a court generally will not aid either party but will leave both parties where it finds them." *Stevens v. Rooks Pitts + Poust*, 289 Ill. App. 3d 991, 999 (1997) (citing *O'Hara*, 127 Ill. 2d at 348).

¶ 81 Defendant relies on the *dicta* in *Guzell v. Kasztelanka Café + Restaurant, Inc.*, 87 Ill. App. 3d 381 (1980). Specifically, defendant argues that, if a contract is executed for the sole purpose of deceiving public authorities and the plaintiff has knowledge of the contract's fraudulent purpose, the parties are *in pari delicto* and Illinois courts will "aid neither party in

the enforcement of the contract but will leave them as they are." *Guzell*, 87 Ill. App. 3d at 387. However, defendant fails to address the presumption with which a trial court is required to review the contract. *Guzell* states that when a contract "appears innocent on its face there is a presumption of legality." *Guzell*, 87 Ill. App. 3d at 387. This presumption may be rebutted only by clear and convincing evidence. *Guzell*, 87 Ill. App. 3d at 387.

¶ 82 Plaintiff argues that the promissory note was not an illegal agreement as in *Guzell*. Instead, plaintiff argues that the contract, on its face, appears innocent, and defendant failed to provide clear and convincing evidence to rebut the presumption.

¶ 83 The *in pari delicto* doctrine has three requirements: (1) that there was an agreement between two or more parties; (2) that the agreement was illegal in some form, including fraud or otherwise against public policy; and (3) that the party wishing to assert rights against a party had knowledge of the illegality of the agreement. *Guzell*, 87 Ill. App. 3d at 386–87; *O'Hara*, 158 Ill. App. 3d at 565; Black's Law Dictionary 586–87 (10th ed. 2009).

¶ 84 Determining whether Silvers *knowingly* executed the promissory note and guarantee in order to defraud a banking institution requires this court to make a determination of fact. While defendant characterizes the promissory note and guarantee as illegal agreements, plaintiff characterizes the execution of the contracts as a valid and legal business practice. Defendant's and Silvers' intent and knowledge at the time of execution of a contract–*i.e.*, whether they executed the contracts solely to defraud plaintiff's bank–is a material fact that, if disputed, was enough to bar summary judgment. See *Young*, 2015 IL App (1st) 131887, ¶ 41 (quoting 735 ILCS 1005(c) (West 2010)) (summary judgment is appropriate only " 'if the pleadings, depositions, and admissions on file, together with the affidavits *** show that

there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law' ").

¶ 85 The purpose of a trial is to resolve factual disputes, such as these, and we will not reverse the trial court's verdict, absent an abuse of discretion, since it is in a better position to resolve issues of witness credibility, such as the one that existed between defendant and Silvers. *Cyclonaire*, 378 Ill. App. 3d at 559 (quoting *Clean World Engineering*, 341 Ill. App. 3d at 997). The trial court resolved this factual dispute in favor of plaintiff and we were not provided a transcript of that proceeding and can only affirm the trial court's decision.

¶ 86 5. Damages

¶ 87 Next, defendant argues that plaintiff failed to prove damages by not providing any "reasonable computation" of damages which plaintiff could then be awarded. According to defendant, the evidence showed that the promissory note had been paid off, and that there were no damages because there was no outstanding debt. In support of his argument, defendant relies on the "Note Receivable Report," which the trial court struck from the record.[14] Defendant further argues that Silvers provided no evidence at trial that there were proven damages because Silvers allegedly had no personal knowledge of the financial documents on which plaintiff relied to establish damages.

¶ 88 In response, plaintiff argues that Silvers testified at the bench trial regarding the financial exhibits in plaintiff's trial exhibit No. 5, which Silvers asserted he had personal knowledge of. Plaintiff argues that defendant combines the "Note Receivable Report," of which Silvers did not have personal knowledge, and plaintiff's trial exhibit No. 5, about which Silvers was

[14] The trial court had previously ruled to supplement the record on appeal with defendant's exhibit Nos. 1-8 and plaintiff's exhibit Nos. 1, 2, 4, and 5, but not exhibit No. 3. On July 20, 2016, the trial court corrected its "erroneous transposing of the Defendant's trial exhibit 3 with the Plaintiff's trial exhibit 3." The rejected exhibit was the note receivable report.

able to testify at trial. However, this court lacks a trial transcript or bystander's report to substantiate either party's assertions regarding trial testimony.

¶ 89 The party seeking damages has the burden to establish that he sustained damages and establish a "reasonable basis for computation of those damages." *Perfection*, 349 Ill. App. 3d at 744; *Turner*, 355 Ill. App. 3d at 894; *Midwest Software, Ltd. v. Willie Washer Manufacturing Co.*, 258 Ill. App. 3d 1029, 1055 (1994). Damages may not be awarded based on mere speculation and conjecture. *Perfection*, 349 Ill. App. 3d at 744 (citing *Finance America Commercial Corp. v. Econo Coach, Inc.*, 118 Ill. App. 3d 385, 390 (1983)); *Turner*, 355 Ill. App. 3d at 894; *Midwest Software*, 258 Ill. App. 3d at 1055.

¶ 90 Without a transcript we have no basis which to question the trial court's computation of damages.

¶ 91 III. Judgment Against Defendant

¶ 92 Under the facts of this case, defendant has failed to carry his burden of providing a sufficiently complete record by neglecting to provide this court with either a transcript or a bystander's report. It is for that reason and the reasons discussed below that we show deference to the trial court's order.

¶ 93 The standard of review "when a challenge is made to a trial court's ruling following a bench trial is 'whether the trial court's judgment is against the manifest weight of the evidence.' " *Emigrant Mortgage Co., Inc. v. Chicago Financial Services, Inc.*, 386 Ill. App. 3d 21, 25–26 (2007) (quoting *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1071 (2007)); *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 382 Ill. App. 3d 849, 859 (2008). A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or "when findings appear to be unreasonable,

arbitrary, or not based on evidence." *Emigrant*, 386 Ill. App. 3d at 26; see also *Stoval*, 374 Ill. App. 3d at 1071; *Chicago's Pizza*, 384 Ill. App. 3d at 859. "[A] reviewing court should not overturn a trial court's findings merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the trier of fact." *In re Application of the County Treasurer*, 131 Ill. 2d 541, 549 (1989); see also *Emigrant*, 386 Ill. App. 3d at 26.

¶ 94 "As the trier of fact, the trial judge was in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony." *Chicago's Pizza*, 384 Ill. App. 3d at 859; see also *Cyclonaire*, 378 Ill. App. 3d at 559; *Clean World Engineering*, 341 Ill. App. 3d at 997 ("The trial judge, as the trier of fact, is in a position superior to a reviewing court to observe witnesses while testifying, to judge their credibility, and to determine the weight their testimony should receive."); *Staes + Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 37 ("It is not the role of this court to substitute our judgment for that of the circuit court on credibility determinations."). Even if contradictory testimony that could support an opposite conclusion is given at a bench trial, "an appellate court will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent." *Chicago's Pizza*, 384 Ill. App. 3d at 859; see also *Buckner v. Causey*, 311 Ill. App. 3d 139, 144 (1999).

¶ 95 Similarly, an award of damages after a bench trial's standard of review is whether the trial court's judgment is against the manifest weight of the evidence. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13. In order to overturn a damages award, a reviewing court "must find that the trial judge either ignored the evidence or that its measure of damages was erroneous as a matter of law." *Feinerman*, 2013 IL App (1st) 121191, ¶ 13

(citing *MBC, Inc. v. Space Center Minnesota, Inc.*, 177 Ill. App. 3d 1126, 234 (1988)). "An award of damages is not against the manifest weight or manifestly erroneous if there is an adequate basis in the record to support the trial court's determination of damages." *Feinerman*, 2013 IL App (1st) 121191, ¶ 13; *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 147 (1972); *Aenta Insurance Co. v. Amelio Brothers Meat Co.*, 182 Ill. App. 3d 863, 865 (1989).

¶ 96 However, "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error." *Foutch*, 99 Ill. 2d at 391; *Webster*, 195 Ill. 2d at 432. In the absence of a "sufficiently complete record," the reviewing court will presume that the order entered by the trial court "was in conformity with law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 392 (the supreme court held there was no basis for holding that the trial court abused its discretion where appellant did not provide a transcript or report of the proceedings, a bystander's report, or an agreed statement of fact regarding appellant's motion to vacate judgment); *Skaggs v. Junis*, 28 Ill. 2d 199, 201–02 (1963) (it is presumed that the court heard adequate evidence to support the decisions that was rendered unless the record indicates otherwise). Any doubt arising from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392; *Block & Co. v. Storm Printing Co.*, 40 Ill. App. 3d 92, 96 (1976); *Sandberg v. American Machining Co.*, 31 Ill. App. 3d 449, 452 (1975).

¶ 97 In the instant case, the record contains no report of proceedings, no bystander's report, and no agreed statement of facts. Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005). As such, we know only that, on March 10, 2015, the parties appeared in front of the trial court and during the bench trial plaintiff called two witness, Silvers and defendant, and offered documentary

evidence that sheds no light on the truth of the matter. We do not know what the witnesses testified to. We do not know the full basis for the trial court's decision. However, we know that the trial court entered judgment in favor of plaintiff and awarded plaintiff damages in the amount of $468,021.87, excluding costs and attorney fees. Under these circumstances, we will presume that the trial court heard adequate testimony to support its decision and that its judgment for plaintiff was in conformity with the law. *Webster*, 195 Ill. 2d at 432; *Foutch*, 99 Ill. 2d at 392; *Skaggs*, 28 Ill. 2d at 201–02.

¶ 98 On appeal, defendant points to the lack of trial record to support his argument that plaintiff has not proved its case. However, our supreme court rejected the argument that where the record lacks information of evidence presented at a hearing, we must assume none was heard. *Skaggs*, 28 Ill. 2d at 201–02. Instead, it was defendant's burden to prove that, in light of all the evidence, including trial testimony, the trial court's judgment was against the manifest weight of the evidence. However, without a report of proceedings, a bystander's report, or an agreed statement of facts, we cannot know whether there was an agreement to forebear, whether Silvers was able to lay proper foundation for relevant financial documents, or whether Silvers had told defendant that plaintiff did not intend to collect on the promissory note and guarantee. Although the initial award may have erroneously relied on the now–stricken trial exhibit, the damages awarded were corrected and relied on financial documentation which was likely testified to at trial. Presumably, all issues of fact were answered at trial, and without the necessary record we must presume that the trial court's judgment was in conformity with law and had a sufficient factual basis. *Gataric v. Colak*, 2016 IL App (1st) 151281, ¶ 31 (without a transcript, "we must presume the court heard

adequate evidence to support it decisions. *** [B]ased on the inqdequacy of the record in this case, we must presume the result below was correct and affirm the trial court's judgment.").

¶ 99 IV. Attorney Fees

¶ 100 Finally, defendant claims that the trial court abused its discretion in granting plaintiff $153,746.25 in attorney fees because the trial court allegedly (1) allowed impermissible block billing and (2) could not determine the reasonableness of certain billing entries. Defendant argues that the trial court could not determine the reasonableness of billing entries for certain e-mails because the attorney-client privilege barred the disclosure of those e-mails during discovery. Defendant does not contest plaintiff's assertion of the attorney-client privilege, but rather he argues that plaintiff cannot withhold the documents and then collect fees where the "reasonableness of [the] fees can be tested only through [the] review of analysis of the privileged items." We find these arguments unpersuasive.

¶ 101 A properly supported fee petition must specify the services performed, by whom, the time expended and the rate charged. *Young*, 2015 IL App (1st) 131887, ¶ 102 (citing *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 984 (1987)). The party seeking fees bears the burden of presenting sufficient evidence to support a determination that the desired fees are reasonable. *Gambino*, 398 Ill. App. 3d at 66; *Young*, 2015 IL App (1st) 131887, ¶ 102 (citing *Kaiser*, 164 Ill. App. 3d at 983); *Heckman v. Hospital Service Corp.*, 104 Ill. App. 3d 728, 732 (1982); *Ealy v. Peddy*, 138 Ill. App. 3d 397, 399 (1985); Ill. R. Prof. Conduct (2010) R. 1.5(a) (eff. Jan. 1, 2010) (prohibiting lawyers from charging unreasonable fees and specifying factors governing determination of reasonableness). "One of the most critical components of a fee petition is detailed entries describing services rendered based on records 'maintained during the course of the litigation containing facts and

computations upon which the charges are predicated.' " *Young*, 2015 IL App (1st) 131887, ¶ 103 (quoting *Kaiser*, 164 Ill. App. 3d at 984); *Gambino*, 398 Ill. App. 3d at 66.

¶ 102 Generally, an appellate court reviews a trial court's award of attorney fees for an abuse of discretion. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 51 (2009); *Young*, 2015 IL App (1st) 131887, ¶ 105 (citing *Kaiser*, 164 Ill. App. 3d at 984). A trial court does not abuse its discretion unless its decisions is entirely unreasonable and no one would be able to reach the same conclusion as the trial court. *Gambino*, 398 Ill. App. 3d at 51; *In re Marriage of Demar*, 385 Ill. App. 3d 837, 852 (2008). If an evidentiary hearing is held, we will reverse the trial court's determination only if it is against the manifest weight of the evidence. See *Young*, 2015 IL App (1st) 131887, ¶ 102. The trial court is allowed to use its own knowledge and experience in making this determination and is "not limited to the evidence presented" by the attorneys. *Anderson v. Anchor Organization*, 274 Ill. App. 3d 1001, 1008 (1995).

¶ 103 There is no transcript or bystander's report for an evidentiary hearing on attorney fees, and the record does not indicate one was held. Therefore, we review the trial court's award of attorney fees for an abuse of discretion (*Gambino*, 398 Ill. App. 3d at 51; *Young*, 2015 IL App (1st) 131887, ¶¶ 102, 105 (citing *Kaiser*, 164 Ill. App. 3d at 984)), and conclude that that the trial court did not abuse its discretion by awarding attorney fees in the amount of $153,746.25.

¶ 104 Defendant argues that this award was improper for two reasons. First, defendant argues that not an insignificant portion of plaintiff's billing statements contain impermissible "block billing" – specifically, 175.1 hours resulting in $64,365.50 in fees, by his calculations. Defendant argues that the October 21, 2015, order, "makes it plain that block billing was not

considered by the trial court ***." However, this is not our reading of the trial court's order. The trial court took into consideration both parties' arguments regarding plaintiff's fee petition. Specifically, the trial court reduced plaintiff's attorney fees by $15,757.75 for four reasons: (1) $2,289.25 for fees pre-dating the enforcement of the guarantee; (2) $4,133.75 for certain entries added to the amended fee petition; (3) $3,312.75 for attorneys other than Carey Stein, plaintiff's principal attorney; and (4) $5,925.00 for compensation for the fee petition. Thus, the trial court did consider defendant's arguments, and each of the proposed reductions mentioned during the fee petition motion practice. Thus, we find unpersuasive defendant's argument that the trial court simply ignored his concerns about block billing.

¶ 105 Additionally, we are unpersuaded that the trial court abused its discretion in its award where defendant has not pointed to any concrete evidence that the trial court failed to address the block billing issue in its October 21, 2015, order. By going through the fee petition and systematically eliminating certain entries, the trial court clearly considered the entries which defendant characterized as "impermissible block billing" and determined the description was reasonable enough. Block billing is a reason to strike time entries in billing statements. Defendant quotes *Young* which states that the defects surrounding block billing include "bundled descriptions of services, including multiple tasks under one time entry, thus rendering it impossible for the trial court to determine whether the time spent on any particular task was reasonable." *Young*, 2015 IL App (1st) 131887, ¶ 87. In *Young*, the fee petition suffered from a number of defects, leaving the trial court with only one option, to use its own admittedly "unorthodox" method of reaching a justified award. *Young*, 2015 IL App (1st) 131887, ¶ 94. However, even in that case, this court found no basis to reverse or modify

the award given by the trial court. *Young*, 2015 IL App (1st) 131887, ¶ 94. Similarly, we conclude that the trial court did not abuse its discretion.

¶ 106 The second ground on which defendant challenges the attorney fee award is plaintiff's alleged failure to provide attorney-client correspondence to corroborate several entries in its billing statement, an argument articulated in his response to plaintiff's amended fee petition, and an argument considered by the trial court in its October 21, 2015, order. These entries amount to 20.5 hours for $7,765 in fees, by defendant's calculations. While the Illinois standard requires that the party seeking attorney fees provide "detailed records" in support of a determination that the desired fees are reasonable (*Gambino*, 398 Ill. App. 3d at 66), defendant fails to support his argument that this standard requires the disclosure of otherwise privileged communications between attorney and client. See *Rosier v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 568 (2006) (by failing to offer supporting legal authority or "any reasoned argument," plaintiffs waived consideration of their theory for asserting personal jurisdiction over defendants); *People v. Ward*, 215 Ill. 2d 317, 332 (2005) ("point raised in brief but not supported by citation to relevant authority *** is therefore forfeited); *In re Marriage of Bates*, 212 Ill. 2d 489, 517 (2004) ("A reviewing court is entitled to have issues clearly defined with relevant authority cited."); *Ferguson v. Bill Berger, Associates, Inc.*, 302 Ill. App. 3d 61, 78 (1998) ("it is not necessary to decide this question since the defendant has waived the issue" by failing to offer case citation or other support as Supreme Court Rule 341 requires); Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (argument in appellate brief must be supported by citation to legal authority and factual record).

¶ 107 Much of defendant's argument focuses on e-mail correspondence. Specifically, defendant argues that "[w]hile [plaintiff] may rely on privilege claims to protect from disclosure [*sic*]

privileged information, it cannot do so and also attempt to collect fees where the reasonableness of said fees can be tested only through review and analysis of the privileged items." Defendant asks that this court remand for "further consideration of the Amended Petition."

¶ 108 This court is unaware of any precedent that supports defendant's argument, nor does defendant provide any. See *Rosier*, 367 Ill. App. 3d at 568; *Ward*, 215 Ill. 2d at 332; *Bates*, 212 Ill. 2d at 517; *Ferguson*, 302 Ill. App. 3d at 78; Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Defendant argues, essentially, that every document for which plaintiff billed must be disclosed and reviewed for the trial court to determine the reasonableness of the fees associated with it. Does that mean that every time an attorney works on a draft, though unfinished, they must submit the draft for inspection by the court to determine if the hours billed were reasonable? That outcome would be absurd and place an immense burden on attorneys, their clients, and trial courts.

¶ 109 We find that the trial court did not abuse its discretion in awarding plaintiff $153,746.25 in attorney fees.

¶ 110 CONCLUSION

¶ 111 Defendant forfeited review of the denial of his section 2-615 and section 2-619 motions to dismiss, and the denial of his summary judgment motion merged with the trial verdict. The trial court found that defendant executed a personal guarantee of a promissory note, that plaintiff performed its part of the contract to its detriment, and that defendant failed to perform under the obligations set forth in the promissory note, and these findings are not against the manifest weight of the evidence. Additionally, the trial court did not abuse its discretion in its award of attorney fees to plaintiff.

¶ 112 Affirmed.

¶ 113 JUSTICE LAMPKIN, specially concurring.

¶ 114 Although I do not agree with all the analysis and discussion presented by the majority, I specially concur in the result reached by the majority based on a succinct analysis.

¶ 115 Defendant forfeited review of the denial of his 2-615 motion to dismiss by filing an answer to the complaint. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 60 (1994).

¶ 116 Also, the trial court properly denied defendant's 2-619 motion to dismiss because such a motion, which admits the legal sufficiency of the complaint, must assert a defense outside the complaint that defeats it. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Section 2-619 of the Code was the wrong vehicle for defendant to challenge the existence of a valid and enforceable contract because that issue did not constitute "affirmative matter," *i.e.*, some kind of defense other than a negation of the essential allegations of the plaintiff's breach of contract cause of action. *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th),120207, ¶¶ 27-30.

¶ 117 Furthermore, as the appellant, defendant had the burden to present a sufficiently complete record of the trial court proceedings to support his claims of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Consequently, this court resolves any doubts arising from the incompleteness of the record against defendant and presumes that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Id*. Here, the trial court resolved disputes of fact during the hearing on defendant's summary judgment motion and the bench trial proceeding to conclude that the guarantee was supported by adequate consideration, the note and guarantee were enforceable, and defendant was liable on the note and guarantee. In the absence of a trial transcript or bystander's report, these conclusions by

the trial court are presumed to have a sufficient factual basis and to be in conformity with the law.

¶ 118 Finally, I agree with the majority's result and analysis that the trial court's award to plaintiff of attorney fees was not an abuse of discretion.