2016 IL App (1st) 153510

SIXTH DIVISION
September 16, 2016

No. 1-15-3510

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH ISENBERGH,	)	Appeal from the
	)	Circuit Court of
Plaintiff and Counterdefendant-Appellant,	)	Cook County.
	)	
v.	)	No. 08 L 8071
	)	
SOUTH CHICAGO NISSAN,	)	
	)	
Defendant and Counterdefendant-Appellee,	)	Honorable
	)	John C. Griffin,
(AmeriCredit Corporation, Defendant and Counterplaintiff).	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the dismissal of plaintiff's breach of contract claim, as it was barred by the Statute of Frauds applicable to the sale of goods, and we dismiss his appeal from an order striking a portion of his complaint, due to his noncompliance with Illinois Supreme Court Rule 341(h)(7) and because that this issue is moot.

¶ 2 Plaintiff and counterdefendant-appellant, Joseph Isenbergh, appeals from the circuit court's orders dismissing the breach of contract claim contained in his fifth amended complaint against defendant and counterdefendant-appellee, South Chicago Nissan (South Chicago), and striking portions of the allegations contained in that complaint. For the following reasons, we

affirm the dismissal order and dismiss that part of plaintiff's appeal relating to the order striking portions of the complaint.

¶ 3 On April 27, 2015, plaintiff filed his six-count, fifth amended complaint (complaint) against South Chicago, a car dealership.[1] The six-count complaint arises from plaintiff's negotiations for the purchase of a Nissan Versa from South Chicago. Plaintiff alleged claims of: common law fraud and deceit (count I), violations of the Consumer Fraud and Deceptive Practices Act (815 ILCS 505/1, *et seq*. (West 2010)) (count II), the Motor Vehicle Retail Installment Sales Act (815 ILCS 375/1, *et seq*. (West 2010)) (count III), and the Truth in Lending Act (15 USC § 1601 (West 2010) (count IV), breach of contract (count V), and promissory estoppel (count VI). In a separate section of the complaint, plaintiff set forth his requests for relief including claims for compensatory, statutory, and punitive damages. The basis of his punitive damages claim included allegations of a "violation of the principle of judicial estoppel" by South Chicago.

¶ 4 The complaint set forth the following relevant factual allegations. Plaintiff visited South Chicago on January 10, 2008, seeking a new 2008 Nissan Versa (Versa) with manual transmission, anti-lock brakes, and other features. He was told by the employees of South Chicago that a Versa with those features was not in stock, but could be ordered, and would be delivered within 60 days. Because plaintiff would need a car during the 60-day period before delivery of the Versa, he inquired whether he could rent or purchase a used car for $4,000 to $5,000 from South Chicago. South Chicago offered, instead, to sell him a new automobile under

[1] On December 21, 2015, the circuit court entered an order granting plaintiff's motion to limit the record on appeal pursuant to Illinois Supreme Court Rule 321 (eff. Feb. 1, 1994)). The prior complaints were not included in the record. This suit was commenced in July 2008.

a retail installment contract for monthly payments of $550 (referred to in the complaint as the "temporary car"), and then to buy back the temporary car from plaintiff when the Versa was delivered. South Chicago allegedly promised that it would "buy back" the temporary car "at a formula price" which would limit plaintiff's costs in purchasing the temporary car to no more than the total of two monthly payments under the retail installment contract.

¶ 5 On that date, plaintiff signed a retail installment contract showing the price of the temporary car as $26,141, the amount financed as $28,115.19, and the monthly charges as $552.26. The retail installment contract was later assigned to defendant and counterplantiff, AmeriCredit Corporation (AmeriCredit).

¶ 6 On May 24, 2008, plaintiff returned to South Chicago for delivery of the Versa. At that time, South Chicago denied that it had agreed to buy back the temporary car from plaintiff at a price that would limit plaintiff's costs for the purchase of the temporary car to the amount of two months' payments under the retail installment contract.

¶ 7 After South Chicago denied the existence of the buyback agreement, plaintiff asserted that he would bring a legal action against it. Plaintiff later also notified AmeriCredit, by a letter dated July 18, 2008, of his dispute with South Chicago, and that he would no longer make payments under the retail installment contract. In all, plaintiff made five payments totaling $2,761.30.

¶ 8 In his breach of contract claim (count V), plaintiff alleged that South Chicago had "entered into a binding contract – the Return Agreement – on January 10, 2008." Plaintiff further alleged that the terms of the return agreement were that plaintiff agreed to order the Versa for future delivery in exchange for South Chicago's "promise to buy back the temporary car on

the agreed terms." Plaintiff claimed to have fulfilled his obligations by ordering the Versa and was ready and willing to purchase the Versa. South Chicago violated the contract by failing "to take back the temporary car on the terms it had promised Plaintiff on January 10, 2008."

¶ 9 Paragraphs 87 through 101 of the complaint, contained in a section reciting factual background, included allegations describing a counterclaim which had been brought against South Chicago by AmeriCredit. It appears from the limited record before us that AmeriCredit had been previously named a defendant in this action and filed counterclaims against both plaintiff and South Chicago.[2] In its counterclaim against plaintiff, AmeriCredit sought possession of the temporary car and full payment under the retail installment agreement. The other counterclaim alleged that South Chicago breached the provisions of the dealer agreement between AmeriCredit and South Chicago, wherein South Chicago warranted that the retail installment agreement was free from fraud, defenses, and claims and agreed to indemnify and hold AmeriCredit harmless as to the retail installment agreement.

¶ 10 On April 26, 2010, a final judgment on the counterclaim in favor of AmeriCredit and against South Chicago was entered, pursuant to a prior order of default. In addition, plaintiff's claims against AmeriCredit and AmeriCredit's counterclaim were dismissed pursuant to a settlement.[3]

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[2] While the claim against South Chicago was labeled a "cross-claim," we refer to it as a counterclaim. See 735 ILCS 5/2-608(a) (West 2014) ("Any claim by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action, and when so pleaded shall be called a counterclaim.").

[3] The limited record before us does not include a settlement agreement or the order dismissing the claims between plaintiff and AmeriCredit. Nevertheless, the settlement and dismissal of these claims were both alleged in the complaint and were asserted without dispute in the briefs and status reports filed with this court. Moreover, this court's review of the circuit court's electronic docket indicates that orders allowing the strike or withdrawal of a complaint and counterclaim, or portions thereof, were entered on April 26, 2010.

¶ 11 On May 28, 2015, South Chicago filed a motion to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). The motion sought dismissal of counts I through IV under section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)), for failure to state causes of action and dismissal of counts I, II, V, and VI under section 2-619 of the Code. 735 ILCS 5/2-619 (West 2014). In its 2-619 motion to dismiss the breach of contract action, South Chicago argued that the Statute of Frauds contained in the Uniform Commercial Code (UCC) (810 ILCS 5/2-201 (West 2010)), barred enforcement of the purported oral return agreement. South Chicago also moved, pursuant to section 2-615, to strike paragraphs 87 through 101 of the complaint and plaintiff's claims for punitive damages.

¶ 12 After briefing, the circuit court entered an order on August 20, 2015, which denied South Chicago's section 2-615 and 2-619 motions to dismiss. The court, in denying the section 2-619 motion to dismiss the breach of contract claim, stated that there was a question of fact as to whether the Statute of Frauds applied. The order granted the motion to strike plaintiff's claims for punitive damages due to South Chicago's purported violation of the principles of judicial estoppel and allegations contained in paragraphs 87 through 101 of the complaint. In striking paragraphs 87 through 101, the circuit court stated that "[p]aragraphs 87-101 contain allegations surrounding AmeriCredit's cross claim against South Chicago and are unnecessary for [plaintiff's] claim against South Chicago."

¶ 13 South Chicago then filed a motion to reconsider only the circuit court's denial of its section 2-619 motion to dismiss as to plaintiff's breach of contract claim. South Chicago argued, as it did in its motion to dismiss, that the alleged oral return agreement was unenforceable under the Statute of Frauds for the sale of goods as set forth in section 2-201(1) of the UCC (810 ILCS

5/2-201(1) (West 2010)). On October 21, 2015, the circuit court entered an order which granted defendant's motion to reconsider and dismissed plaintiff's breach of contract claim as barred by the Statute of Frauds. In reaching its decision, the circuit court examined the allegations of the complaint defining the return agreement, including the allegations that South Chicago had agreed to "buy back the Temporary Car at a formula price."

¶ 14 On October 26, 2015, plaintiff filed a motion to reconsider or to clarify the October 21, 2015, order. In the motion, plaintiff argued that the return agreement was not a contract for the sale of goods because it "does not obligate either party in this case to sell anything to the other." The circuit court, on November 24, 2015, denied plaintiff's motion to reconsider or clarify the October 21, 2015, order stating that "the Court believes that a 'purchase' means 'taking by sale' as set forth in UCC 5/1-201(b)(29)."

¶ 15 On December 1, 2015, plaintiff presented a motion to voluntarily dismiss the remaining claims pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2014)). On that date, the circuit court entered an order stating that the case was "voluntarily dismissed without prejudice" pursuant to section 2-1009, and plaintiff had the right to refile his voluntarily dismissed claims under section 13-217 of the Code (735 ILCS 5/13-217 (West 2014)). Plaintiff has now appealed from the orders dismissing his breach of contract claim against South Chicago, pursuant to section 2-619, and striking the allegations of paragraphs 87 through 101 of the complaint, pursuant to section 2-615.[4]

¶ 16 On appeal, plaintiff first argues that the circuit court erred in dismissing his breach of contract claim because the Statute of Frauds is inapplicable to his breach of contract claim.

[4] Upon the entry of the voluntary dismissal, " '[prior] final orders *** become appealable.' " *Hudson v. City of Chicago*, 228 Ill. 2d 462, 489 (2008) (quoting *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 503).

¶ 17 " 'A motion to dismiss, pursuant to section 2-619 *** admits the legal sufficiency of the *** complaint, but asserts an affirmative *** defense [or] matter that avoids or defeats the *** claims.' " *Eighteen Investments, Inc. v. NationsCredit Financial Services Corp*., 376 Ill. App. 3d 527, 532 (2007) (quoting *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006)). In considering a motion to dismiss under section 2-619, a court must interpret all pleadings and supporting materials in favor of the nonmoving party. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). A Statute of Frauds defense is properly raised under section 2-619(a)(7). 735 ILCS 5/2-619(a)(7) (West 2014)). We review *de novo* a ruling on a section 2-619 motion. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 418-19 (2002).

¶ 18 The Statute of Frauds applicable to the sale of goods is found in section 2-201(1) of the UCC, which provides in relevant part:

> "(1) Except as otherwise provided in this Section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." 810 ILCS 5/2-201(1) (West 2010).

¶ 19 Plaintiff argues that the oral return agreement does not fall within the scope of section 2-201. The interpretation of a statute is reviewed *de novo*. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 394 (2001).

¶ 20 Section 2-106(1) of the UCC defines "contract for sale" as including "both a present sale of goods and a contract to sell goods at a future time." 810 ILCS 5/2-106(1) (West 2010).

"A 'sale' consists in the passing of title from the seller to the buyer for a price." *Id.* A " '[b]uyer' means a person who buys or contracts to buy goods," (810 ILCS 5/2-103)(1)(a) (West 2010)), while a " '[s]eller' means a person who sells or contracts to sell goods." (810 ILCS 5/2-103)(1)(d) (West 2010)). The UCC defines "goods" as "all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale." 810 ILCS 5/2-105(1) (West 2010). A "purchase" is defined as "taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property." 810 ILCS 5/1-201(b)(32) (West 2008).

¶ 21 Plaintiff does not dispute that the temporary car satisfies the definition of "goods" under the UCC. Plaintiff does contest that the return agreement was a transaction for the sale of goods.

¶ 22 Plaintiff alleged in his complaint that, in return for his agreement to order the Versa, South Chicago had orally agreed to purchase back the temporary car at a price which would result in the costs of his purchase of the temporary car equaling the amount of two payments under the retail installment contract. The sales price of the temporary car was over $26,000 and two payments under the retail installment contract totaled over $1,100. As a result, the price involved for the buy back of the temporary car was over the limit of $500 found in the Statute of Frauds. Therefore, as alleged in the complaint, the return agreement provided that South Chicago, as buyer or purchaser, agreed to purchase the temporary car (the goods) from plaintiff (the seller), at the time the Versa was delivered for a price, which would result in plaintiff's costs for his purchase of the temporary car to be equal to two payments under the retail installment agreement. That amount was clearly over $500, and the return agreement was, therefore, one for the sale of goods and was subject to the Statute of Frauds contained in section 2-102 of the UCC.

¶ 23 Plaintiff argues on appeal that the return agreement was an "option to sell," "an option is not a sale" and, therefore, the return agreement was not covered by the Statute of Frauds. Plaintiff cites *Keller v. Reed*, 347 Ill. 645 (1932), and *Fried v. Barad*, 175 Ill. App. 3d 382 (1988) in support of this argument. We disagree.

¶ 24 First, plaintiff's argument disregards that the UCC covers the sale of goods to be made at a future date. 810 ILCS 5/2-106(1) (West 2010). The fact that the oral return agreement contemplated a future purchase of the temporary car by South Chicago does not take the return agreement out of the reach of the UCC and its Statute of Frauds. Second, the *Keller* and *Fried* cases cited by plaintiff do not support an opposite conclusion.

¶ 25 In *Keller*, the defendant, Lawrence Keller, sought specific performance of a contract against the plaintiff, Elizabeth Reed, who was the owner of the property at issue. The contract granted Mr. Keller "an option for thirty days" to purchase Ms. Reed's land for $400. *Keller*, 347 Ill. at 647. At the time of the agreement, Mr. Keller made a deposit of $25. *Id*. Mr. Keller sought to purchase the land by offering Ms. Reed $375. *Id*. On review, our supreme court found that the agreement was an option to purchase and not a contract of sale which was enforceable only if Mr. Keller had fulfilled its conditions. *Id*. at 648.

¶ 26 At issue in *Fried* was a written lease with an express option to purchase real property by the lessee. *Fried*, 175 Ill. App. 3d at 385. The appellate court found that the lessee was entitled to specific performance where he had fulfilled the requirements for the purchase and the terms of the agreement were sufficiently definite. *Id*. at 390.

¶ 27 We first note that the option contracts in *Keller* and *Fried* were both in writing and were not subject to the UCC as they dealt with real property. Further, as described in the complaint at

hand, there are no allegations that the oral return agreement was an option to purchase by South Chicago should it fulfill certain terms, as was specifically expressed in the written contracts at issue in *Keller* and *Fried*.

¶ 28 The circuit court did not err in finding the alleged oral return agreement involved a contract for the sale of goods over $500, which was subject to the Statute of Frauds of the UCC. Therefore, the dismissal of count V was proper.

¶ 29 Next, plaintiff argues that the circuit court erred in striking paragraphs 87 through 101 of the complaint under section 2-615.

¶ 30 Section 2-615 allows a court to strike a portion of a pleading on the grounds that it is "substantially insufficient at law" or "immaterial". 735 ILCS 5/2-615(a) (West 2014). We review an order granting a motion under section 2-615 *de novo*. *Performance Electric, Inc. v. CIB Bank*, 371 Ill. App. 3d 1037, 1041 (2007).

¶ 31 Plaintiff argues that his allegations relating to the counterclaim of AmeriCredit against South Chicago, paragraphs 87 through 101 of the complaint, were relevant and necessary to establishing liability against South Chicago under counts I through IV of the complaint. Plaintiff argues that the default judgment entered against South Chicago, on AmeriCredit's counterclaim, had preclusive effect on his claims against South Chicago under either the doctrine of law of the case or collateral estoppel. For the following reasons, we dismiss the appeal from the order striking paragraphs 87 through 101.

¶ 32 In his initial and reply briefs, plaintiff cites to no legal authority in support of his appeal from the order striking paragraphs 87 through 101. Under Supreme Court Rule 341(h)(7) (Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016)), plaintiff was required to present reasoned arguments

supported by citation to legal authority. His failure to provide legal authority in support of his claim of error forfeits review of the issue. *Kensington's Wine Auctioneers and Brokers, Inc. v. John Hart Fine Wine, Ltd*., 392 Ill. App. 3d 1, 10 (2009). Further, this court has the discretion to strike those portions of plaintiff's briefs which pertain to the order striking paragraphs 87 through 101, and to dismiss the appeal from that order. *McCann v. Dart*, 2015 IL App (1st) 141291, ¶ 12.

¶ 33 However, there is an additional reason for dismissing that part of plaintiff's appeal. Plaintiff voluntarily dismissed counts I through IV. The record does not show whether those claims were refiled and, if so, the nature and extent of the allegations which may have been raised. A case will be considered moot where subsequent events "make it impossible for the reviewing court to render effectual relief." *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill. 2d 1, 7-8 (1997) (citing *Balmoral Racing Club, Inc. v. Illinois Racing Board*, 151 Ill. 2d 367 (1992). Therefore, we find the issue, as to whether the circuit court erred in striking paragraphs 87 through 101 as they applied to counts I through IV, is now moot. See *Indlecoffer v. Village of Wadsworth*, 282 Ill. App. 3d 933, 939 (1996).

¶ 34 For the reasons stated, we affirm the order of the circuit court dismissing plaintiff's breach of contract claim as set forth in count V of the complaint, because it is barred by the Statute of Frauds. We also strike those portions of plaintiff's briefs addressing his appeal from the order striking paragraphs 87 through 101 of the complaint and dismiss his appeal from that order for plaintiff's noncompliance with Rule 341(h)(7); in addition, we find that this issue is moot.

¶ 35 Affirmed in part; dismissed in part.