FOURTH DIVISION
June 29, 2017

No. 1-16-3114

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GEOFFREY SHURE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 CH 10060
	)	
PAUL TSAKIRIS and OOR,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment granting defendants' motion to dismiss plaintiff's complaint for specific performance with prejudice is affirmed; the complaint failed to allege facts demonstrating the existence of a valid and enforceable contract to purchase real property, and there is no set of facts that will entitle plaintiff to specific performance.

¶ 2 Plaintiff, Geoffrey Shure, filed a one-count complaint against defendants, Paul Tsakiris and OOR, an Illinois limited liability company, seeking specific performance of a contract. Defendants filed motions to dismiss the complaint pursuant to section 2-615 and 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619(a)(9) (West 2014)). The trial

court granted defendants' motion to dismiss with prejudice. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff's complaint alleges that on or about April 18, 2016, plaintiff and OOR entered into a written contract for the purchase of real estate in Chicago (the original contract). The complaint alleges Tsakiris is the member-manager of OOR and that he formed OOR to consummate the sale of the property to Shure. According to the allegations in the complaint, the parties declared the original contract null and void because OOR was not able to convey clear title to plaintiff due to a lawsuit filed by the City of Chicago based on various building code violations. Plaintiff's complaint further alleges that on or about July 10, 2016, plaintiff and Tsakiris "exchanged e-mails entering into a new Agreement for the purchase of the Property." Plaintiff attached a copy of "the new Agreement" to the complaint. Plaintiff's complaint alleges the terms of the "new agreement" call for plaintiff to pay Tsakiris a total of $1,199,000 for the property with $600,000 paid in cash at closing, and for plaintiff to give Tsakiris a note for the balance of $600,000. The complaint does not allege any terms for the note.

¶ 5 Plaintiff's complaint alleges that on July 25, 2016 Tsakiris "repudiated the new Agreement and has since failed to honor its terms." Plaintiff attached an email dated July 25, 2016 allegedly showing Tsakiris's repudiation. The complaint alleges plaintiff "has performed all of his duties and obligations under the new Agreement and stands ready to consummate the purchase of the Property on the agreed-upon terms." Plaintiff sought an order of specific performance against defendants "to consummate the sale of the Property as contemplated under the new Agreement."

¶ 6 The "new Agreement" consists of an email exchange between plaintiff and Tsakiris. The complete exchange plaintiff alleges constitutes the "new agreement" reads as follows:

Email from plaintiff to Tsakiris:

> "Paul,
>
> I just want to be clear on our way forward so we can get this deal done.
>
> I've already started the process on my end and want to make sure we have some specifics in place before I make arrangements with the banks.
>
> 1. We have to close on the sale NLT 8/21/16.
>
> 2. The City of Chicago will re-inspect on Tuesday the 16th and provide documentation stipulating violations are complled [*sic*] except items 6 & 7 to be continued until 2/8/17).
>
> 3. You need minimum of $600,000 cash to satisfy your note.
>
> 4. You will take back paper (seller finance) est $600,000 for a period TBD (short term) until I can put permanent financing in place. You'll also have to subordinate to lender.
>
> 5. I'll sign a subordination agreement with City of Chicago so lender can have clear title. Also, I will assume responsibility of curing items 6&7 after closing.
>
> 6. Time is of the essence.
>
> Let me know if my assessment is correct or I missed anything."

Response email from Tsakiris to plaintiff:

> "Agreed. I have cc'd Fahim my CFO and Chuck Gryll my attorney so we are all on the same page."

¶ 7 Plaintiff also attached and incorporated another series of email exchanges culminating with the alleged July 25, 2016 repudiation by Tsakiris. That series of emails begins with a July 16, 2016 email from plaintiff to Tsakiris in which plaintiff wrote as follows:

> "Paul, I have $500,000 in cash today to close deal. Optimally I would like to use Gold Coast to finance deal so you don't have to take back paper if you don't have too [*sic*]. I'll know in the next couple of days what kind of appetite the bank will have. Chase is on board for permanent financing a couple of months down the road (they can't close before your 8/15/16 date)."

Plaintiff's July 16 email goes on to provide two options for structuring the purchase of the property which both differed from what was stated in the July 10 email from plaintiff to Tsakiris.

¶ 8 Tsakiris moved to dismiss the complaint pursuant to sections 2-615 and 2-619 of the Code. Tsakiris moved to dismiss pursuant to section 2-615 on the grounds the parties "did not enter into, form, or agree upon a valid, binding, and enforceable real estate [*sic*] under Illinois law with clear, definite, and unequivocal terms." The "specific, pertinent and material terms" Tsakiris claims are missing from the purported contract include the annual interest rate and duration of the loan to be financed by the seller. Tsakiris moved to dismiss the complaint pursuant to section 2-619(a)(9) on the grounds plaintiff refused to move forward with proposed financing terms Tsakiris allegedly sent plaintiff after plaintiff filed this suit. The motion to dismiss alleges defendant wrote plaintiff "in an attempt to clarify the missing terms of the negotiation, specifically the 'short term financing' terms." Tsakiris alleges plaintiff refused to accept his proposal and he argues plaintiff's "failure to complete the terms of the contract bar Plaintiff from being able to now bring a suit for Specific Performance."

¶ 9 In response to Tsakiris's motion to dismiss plaintiff asserted defendants approached him to move forward with the sale after defendants cleared most of the building violations and as a result "the Parties entered into an agreement on July 10, 2016." Plaintiff's response also argued that the correspondence to plaintiff after he filed suit constitutes a confidential settlement negotiation the court should disregard. Plaintiff asserted the parties agreed upon all of the

essential terms of the contract in the July 10 correspondence and did not require a formal contract to be executed. Plaintiff's response to Tsakiris's motion to dismiss argued the July 10 "agreement" does contain financing terms; specifically, 0% interest for 90 days plus 3.75% interest for an additional 90 days (which would extend the financing through the court date on the building violations). In support of that assertion plaintiff attached a section from the same series of emails attached to the complaint. On July 23, 2016 plaintiff wrote an email to Tsakiris stating as follows:

> "Paul,
>
> You got it. I'll honor your asking price of $1,199,000.00. [(In a July 22, 2016 email, plaintiff proposed a new purchase price of $1,124,000, which Tsakiris rejected.)]
>
> I'll still close by August 5, 2016.
>
> Revised owner financing terms:
>
> 1. $571,000 - Owner financing as 1st mortgage
>
> 2. Owner financing terms - 0% interest through February, 3.75% from March to September 2017.
>
> You still haven't answered the important question of what else is lurching out there that would prevent you from providing clear title. You blew this deal apart by not being able to perform on our original deal.
>
> Let's do the deal? I'm amenable. This property is 'bad mojo' for you. You'll be able to rest easy on the sunny beaches of Greece knowing that you put this thing behind you."

In response Tsakiris wrote:

> "Geoff, To be clear, there is nothing else out there. Violations were a surprise to anyone. Also, you would not be in a first position until bank loan is paid in full. Partial payment cannot be used towards pay off, as I need those funds for the other deal. Lastly, our agreement is for 90 days at no interest (if you recall I wanted 60) and 90 more days at 3.75% if necessary."

¶ 10 On appeal, although not contained in the record, the parties agree that before ruling on the motion the trial court asked plaintiff what additional evidence plaintiff possessed that would add to the already presented email chains, whereupon plaintiff presented the court with the July 23, 2016 email containing the interest rate. The trial court granted the motion to dismiss with prejudice.

¶ 11 This appeal followed.

¶ 12 ANALYSIS

¶ 13 A motion to dismiss pursuant to section 2-615 raises the question of whether the allegations in the complaint, taking the well-pled facts as true including all reasonable inferences that may be drawn therefrom, viewed in the light most favorable to the plaintiff are sufficient to state a cause of action. *Kopnick v. JL Woode Management Company, LLC*, 2017 IL App (1st) 152054, ¶ 21. "A cause of action should not be dismissed with prejudice pursuant to section 2-615(a), unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recover. [Citation.]" *Id.* Documents attached to the pleading and incorporated by reference are treated as part of the pleading. *Garrison v. Choh*, 308 Ill. App. 3d 48, 53 (1999). We review a dismissal pursuant to section 2-615 *de novo*. However, we review the trial court's decision to dismiss a complaint with prejudice for an abuse of discretion. *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405 (2008). A complaint should be dismissed with prejudice only if it is apparent that plaintiff can prove no set of facts that will entitle him to recover. *Id.* "Where a

claim can be stated the trial court abuses its discretion if it dismisses the complaint with prejudice and refuses the plaintiff further opportunities to plead. [Citation.]" *Id.* In this case, Tsakiris moved to dismiss plaintiff's complaint under both section 2-615 and 2-619. The trial court did not specify under which section it dismissed the complaint. We find the trial court properly dismissed the complaint with prejudice pursuant to section 2-615; therefore, we have no need to address Tsakiris's arguments under section 2-619 or the alleged insufficiency thereof asserted by plaintiff.

¶ 14 This court has consistently held that specific performance may be granted only where there is a valid and enforceable contract. *D'Agostino v. Bank of Ravenswood*, 205 Ill. App. 3d 898, 903 (1990). For a contact to be enforceable the material terms must be definite and certain. *Babbitt Municipalities, Inc. v. Health Care Service Corp.*, 2016 IL App (1st) 152662, ¶ 29. "A party is entitled to specific performance of a contract for conveyance of real estate upon establishing that it was ready, willing, and able to perform under the contract but was prevented from doing so by the acts of the other party." *Ruffolo v. Jordan*, 2015 IL App (1st) 140969, ¶ 14.

> "[W]here a party seeks specific performance of a contract, the law requires a greater degree of specificity than is demanded for other purposes. Where the court would be left to order further negotiations and where the parties have yet to reach agreement on essential terms, specific performance is not available. Specific performance requires as a prerequisite a clear and precise understanding of the terms of the contract. [Citation.] There must be a description of the property, the price, the terms and conditions of sale and the names and signatures of the parties to be charged." *Cinman v. Reliance Federal Savings & Loan Ass'n*, 155 Ill. App. 3d 417, 423-24 (1987).

¶ 15 Section 2 of the Frauds Act reads as follows:

> "No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party. This section shall not apply to sales for the enforcement of a judgment for the payment of money or sales by any officer or person pursuant to a judgment or order of any court in this State." 740 ILCS 80/2 (West 2014) (hereinafter the Statute of Frauds).

"From the foregoing, it is clear that some written document must be signed by the defendant or by his authorized agent in order to enforce a contract for the sale of real estate." *Sims v. Broughton*, 225 Ill. App. 3d 1076, 1080 (1992). On appeal, plaintiff argues the July 10 email exchange between plaintiff and Tsakiris "constituted a 'writing' as required by Illinois law." Plaintiff does not, however, address the signature requirement. In the motion to dismiss, Tsakiris argued that "Plaintiff's Complaint at Law fails to include as an exhibit a real estate sales contract after the Original Sales Contract terminated, instead it only attaches an email negotiation and deems that a valid contact." Tsakiris did not invoke the Statute of Frauds. "The statute of frauds constitutes an affirmative matter outside of the facts alleged in a complaint and should be raised in a motion to dismiss pursuant to section 2-619(a)(7) of the Code [Citation.]" *Armagan v. Pesha*, 2014 IL App (1st) 121840, ¶ 38 n 1. "A contract alleged to be invalid on the basis of the statute of frauds is merely voidable, not void. The contract may be enforced unless the defendant sets up the statute as a defense." *Cain v. Cross*, 293 Ill. App. 3d 255, 258 (1997). See also *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 986 (1997) (party "risked a finding of waiver by not affirmatively pleading her Statute of Frauds defense").

¶ 16 Despite defendants' forfeiture of the issue we do not need to resort to the Statute of Frauds. Plaintiff's complaint fails to state a cause of action for specific performance because the facts alleged in the complaint, taken as true and in a light most favorable to plaintiff, fail to allege the existence of a contract that is "so certain and unambiguous in its terms and in all its parts that a court can require the specific thing contracted for to be done." *Schilling v. Stahl*, 395 Ill. App. 3d 882, 884-85 (2009). In *Stahl*, the court wrote as follows:

> "In order for a party to be entitled to specific performance, the contract must be so certain and unambiguous in its terms and in all its parts that a court can require the specific thing contracted for to be done. [Citation.] It is not sufficient to show the existence of some kind of agreement between the parties; where there is ambiguity, doubt, or uncertainty with respect to its terms, equitable enforcement by specific performance will be denied. [Citation.] The method or manner of payment is an essential part of an agreement to purchase real estate, and the contract must specify not only the price but the terms and conditions of the sale as well. [Citation.]" *Id.*

The decision in *Stahl* is instructive.

¶ 17 In *Stahl*, the plaintiffs sued for specific performance of a contract for the sale of property. *Id.* at 883-84. In a motion for summary judgment the defendants argued "the agreement was too indefinite to be enforceable." *Id.* at 884. The written contract included an addendum that was also signed by the parties requiring the plaintiff to provide cash at closing "and a promissory note and mortgage." *Id.* at 885. The defendants admitted the contract and addendum had sufficient terms as to the promissory note but argued "the parties did not discuss, let alone come to an agreement on, any terms of the mortgage." *Id.* at 886. The *Stahl* court found there was no evidence that the missing mortgage terms were disputed, not agreed upon, or not considered. *Id.*

at 887. The "missing" terms did not preclude specific performance because they were "a list of 'what ifs' that could arise at some future date, not terms that are essential to the creation of *** an interest [in land.]" *Id.* at 888. On the contrary the court found the "parties, price, and terms of payment" were "clear and unambiguous." *Id.* In *Stahl*,

> "the contract clearly identified the parties, the property, the price, and the earnest money provided. It also clearly notified the parties that they were entering into a binding legal contract. The addendum to the contract clearly included the amount to be provided at closing, the amount of the promissory note and mortgage, the interest rate, the method of interest calculation, the date from which interest was to accrue, the term of the note, the payment schedule, and the address to which payments were to be sent." *Id.*[1]

The court held that the contract and addendum "were so certain and unambiguous in their terms and in all their parts that the [plaintiffs] were entitled to specific performance of the contract." *Id.* The same is not true in the case before us.

¶ 18 The purported agreement in this case does not clearly inform the parties they were entering into a binding legal contract. The "agreement" did not include the amount to be provided at closing. The July 10 email states: "You need minimum of $600,000 cash to satisfy your note." Not only is this not a clear statement of the cash to be provided at closing, plaintiff's assertion this meant the parties mutually agreed that plaintiff would provide $600,000 in cash at

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[1] "The Schillings would provide to the Stahls $435,000 cash at closing and a promissory note and mortgage in the amount of $240,000. The promissory note was to bear interest at 4% simple interest per annum for five years, with interest to begin accruing from the closing date. The first payment was due one month from closing with payments in consecutive months thereafter; payments were to be mailed to the Stahls at 817 Blakely Street in Woodstock, Illinois. The payments were to be 'interest only or more' at the Schillings' option. All outstanding principal was to be paid to the Stahls on or before five years from closing." *Stahl*, 395 Ill. App. 3d at 885.

closing is belied by his subsequent email on July 16 stating plaintiff had "$500,000 in cash today to close deal." Plaintiff's July 16 email is also evidence the parties had not agreed on all of the material terms in the July 10 email and that there was no contract. See *Citadel Group Ltd. v. Washington Regional Medical Center*, 692 F.3d 580, 587 (7th Cir. 2012) ("A 'preliminary writing that reflects a tentative agreement contingent upon the successful completion of negotiations that are ongoing, does not amount to a contract that binds the parties.' [Citation.]"). If the July 10 email does state that the amount of the "paper" that would be used to finance the purchase is $600,000, it does not state the interest rate, the method of interest calculation, the date from which interest was to accrue, the term of the note, or the payment schedule. The July 10 email explicitly states the finance period is "to be determined." "When any essential term of an agreement is left to future negotiation, there is no binding contract. (Citations omitted.)" (Internal quotation marks omitted.) *Cinman*, 155 Ill. App. 3d at 424 (quoting *Hintz v. Lazarus*, 58 Ill. App. 3d 64, 67 (1978)).

¶ 19 Plaintiff's argument the July 23 email proves the parties had agreed to the length and interest rate for the seller financing, and that he should be allowed to amend his complaint to include those terms, is disingenuous and unpersuasive. Plaintiff fails to address the fact Tsakiris's statement in the July 23 email that "our agreement is for 90 days at no interest (if you recall I wanted 60) and 90 more days at 3.75% if necessary" was part of a series of communications discussing the sale of the subject property. It is unclear if Tsakiris's statement on July 23 referenced the July 10 email exchange or any of the intervening emails between the parties. The allegations do not establish an agreement on July 10 as to the term and interest rate. Amending the complaint to include the July 23 email will not permit plaintiff to state a claim because plaintiff's further negotiations are evidence that the July 10 email exchange does not constitute an enforceable contract.

¶ 20 In *Cinman*, the plaintiffs maintained that a letter constituted a contract for the sale of property. *Cinman*, 155 Ill. App. 3d at 418. The court held the letter did not give rise to the level of an enforceable contract. *Id.* at 424. The court reached that conclusion "for several reasons, but primarily because [the parties] continued to negotiate over a long period of time after the writing of the letter regarding certain material elements of the proposal." *Id.* at 424-25. The court found that the facts "conclusively establish that the prior letters and conversations constituted mere negotiations between the parties." *Id.* at 425. We reach the same conclusion in this case.

¶ 21 After the July 10 email which purportedly contains an agreement to provide $600,000 in cash at closing, plaintiff wrote back to Tsakiris stating he had $500,000 to close the deal. In that same email, despite an alleged agreement for Tsakiris to finance the purchase at no interest for 90 days and 3.75% interest for another 90 days if necessary, plaintiff wrote he would optimally like to finance the deal through a lender so that Tsakiris did not "have to take back paper" if he did not want to. That same communication contained two different financing options, neither of which resembled the alleged agreement between the parties. Neither of those new offers provided a proposed term for a period of owner financing of the sale. On July 23, when Tsakiris allegedly confirmed the parties' July 10 agreement as to financing terms, plaintiff was asking how Tsakiris would deliver clear title and still proposing revised owner financing terms. We believe the July 10 email and subsequent emails "constituted mere negotiations between the parties." See *id.* We also note from our review of the parties' communications that receiving clear title was a primary concern for plaintiff. The July 10 email contains no mention of plaintiff receiving clear title to the property, and this was a subject that came up in subsequent communications. On July 23, plaintiff asked Tsakiris what was his proposal "to deliver a relatively clear title?" Tsakiris responded that the attorneys could try to "provide language (and

even possibly pledge a free and clear asset) to make you comfortable." But Tsakiris was clear that cash from the sale of the subject property would not be used to satisfy the existing mortgage on the subject property. The absence of any agreement as to the material question of whether plaintiff would receive clear title and the parties' subsequent communication on that point is further evidence the July 10 emails did not constitute a valid and enforceable contract. *Cf. Stahl*, at 888-89 (finding argument contract contained no explanation of whether mortgage would be first or second mortgage a "red herring" were contract contained detailed substitution of collateral clause showing "not only that the terms of the mortgage were discussed but that a specific agreement was reached").

¶ 22 Because the complaint failed to allege facts demonstrating the existence of a certain and unambiguous contract, the trial court properly dismissed plaintiff's complaint for specific performance. Because the evidence proves the July 10 email exchange and subsequent emails constituted mere negotiation but the parties failed to enter an enforceable contract, there is no set of facts plaintiff can prove that will entitle him to specific performance of a contract based on the July 10 emails. The trial court properly dismissed plaintiff's complaint for specific performance of a July 10 contract for the purchase of property with prejudice.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 25 Affirmed.