2018 IL App (1st) 18-0865-U



THIRD DIVISION
October 31, 2018

No. 1-18-0865

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| MARK GOLD and MSG ENTERTAINMENT, L.L.C., | ) | Appeal from the Circuit Court of Cook County, Illinois, |
| Plaintiffs-Appellants, | ) | Chancery Division. |
| v. | ) | No. 2015 CH 16448 |
| THOMAS PRASIL, | ) | The Honorable Neil H. Cohen, |
| Defendant-Appellee, | ) | Judge Presiding. |
| GET IT ENTERTAINMENT MGMT, L.L.C., 4D ALIVE L.L.C., STONE LAKE PARTNERS, L.L.C., SEAN O'BRIEN, VINCE BENDINELLI, EPIC PRODUCTIONS, L.L.C., | ) | |
| Defendants. | ) | |

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Ellis concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court properly granted the defendant's section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2016)) on the basis that the plaintiffs' third amended complaint was barred by judicial admissions made by the plaintiffs in their prior pleadings.

¶ 2 The plaintiffs, Mark Gold (Gold) and MSG Entertainment, L.L.C. (MSG) appeal from the

circuit court's order dismissing their third amended complaint against the defendant, Thomas Prasil (Prasil), on the basis that it was barred by a prior judicial admission. 735 ILCS 5/2-619(a)(9) (West 2016). The plaintiffs contend that the trial court erred when it found that the allegations regarding the existence of a written agreement made in their second amended complaint unequivocally negated the existence of a prior oral agreement between the parties, as alleged in their third amended complaint. In the alternative, the plaintiffs contend that even if these allegations constituted judicial admissions, they were made as a result of a mistake, and therefore should have been excused. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record before us is voluminous. For purposes of brevity we set forth only those facts and procedural history relevant to the issues raised in this appeal. On November 9, 2015, the plaintiffs, Gold and his solely owned limited liability company, MSG, filed an eight-count complaint against seven defendants, Get It Entertainment Management, L.L.C. (Get It Management), 4D Alive, L.L.C. (4D Alive), Stone Lake Partners, L.L.C. (Stone Lake), Sean O'Brien (O'Brien), Epic Productions, L.L.C. (Epic), Vincent Bendinelli (Bendinelli) and Prasil, who were involved in the investment, management and operation of an adult entertainment establishment in Stone Lake, Illinois, known as "Club Allure" (the club). That complaint was subsequently amended to verify the underlying pleadings.

¶ 5 The first amended complaint alleged: (1) a derivative claim of breach of contract on behalf of Get It Management against Stone Lake (count I); (2) a derivative claim of conversion on behalf of Get It Management against O'Brien, Prasil, Bendinelli, Epic and 4D Alive (count II); (3) an accounting against all of the defendants (count III); (4) breach of the operating agreement against 4D Alive, Get It Management, Epic, O'Brien, Prasil, Bendinelli and Stone Lake (count IV); (5)

injunctive relief to reinstate Get It Management against 4D Alive (count V); (6) breach of fiduciary duties against Stone Lake, Epic, 4D Alive, Prasil, Bendinelli, and O'Brien (count VI); and (7) breach of contract by MSG against Epic (count VII). Only count VII is relevant for purposes of this appeal.

¶ 6 Before setting forth the factual allegations of count VII, however, we briefly set forth the procedural history of the remaining counts. On February 5, 2016, the trial court entered a default judgment against O'Brien, continuing the cause of action for prove-up of damages. On March 10, 2016, the court ordered O'Brien to submit to an accounting as to those damages. After the parties briefed numerous motions to dismiss, on July 29, 2016, the trial court dismissed Prasil and Bendinelli from the litigation, without prejudice. The court also dismissed counts I, IV, and VI (in their entirety) and count III (as to Stone Lake, Epic and 4D Alive) without prejudice. Counts II, and V were dismissed with prejudice. Count VII was allowed to stand.

¶ 7 The plaintiffs sought to amend Count VII three times. Count VII of the first amended complaint sought to enforce a written purchase agreement allegedly entered into between the defendant, Epic, and the plaintiff, MSG. In this respect, count VII alleged that in September 2013, the plaintiff Gold, through MSG invested $600,000 in Get It Management, which operated the club. Gold made the investment at the request of Robert Itzkow (Itzkow), the manager of 4D Alive (which, in turn, was the manager of Get it Management), and his business associate, O'Brien, a member of Get It Management and the day-to-day manager of the club. According to the first amended complaint, Itzkow represented to Gold that he was experienced in building, opening, operating and reselling adult entertainment establishments, and that investors in similar prior projects had made substantial profits. Itzkow told Gold that he was in charge of building and opening the club, which was nearing completion, but that he had run out of money, and

needed approximately $600,000 to complete construction. Itzkow told Gold that he would receive 12 shares (or 12% interest) of Get It Management for $600,000. According to the first amended complaint, on May 10, 2013, Gold paid the $600,000 and acquired his interest, which was held by his limited liability company, MSG.

¶ 8 According to count VII of the first amended complaint, by 2014 Gold and MSG had received no return on their investment and Gold's repeated requests for information had been ignored. In or about September 2014, in an attempt to get information about the business, Gold spoke with the defendant Prasil, who had since acquired most or all of Itzkow's interest in Get It Management, together with O'Brien and Epic, and who Gold knew as a participant in the day-to-day management of the club. According to count VII of the first amended complaint, at that time, Prasil "verbally offered" to buy MSG's 12 shares in Get it Management for $600,000, the original amount of Gold's investment. The complaint further alleged:

> "Thereafter, Gold negotiated with O'Brien (who represented that he was speaking on behalf of Prasil and Epic) for the sale of Plaintiffs' interest. Thereafter, Gold received from Itzkow a Membership Interest Purchase Agreement between MSG and Epic Productions. After further negotiations, Gold executed the Agreement on behalf of MSG. O'Brien signed the Agreement on behalf of Epic Productions."

Under the terms of the executed Membership Interest Purchase Agreement, which was attached to the pleading, Epic was required to pay MSG $200,000 at closing, and an additional $400,000 on or before October 29, 2014.

¶ 9 According to count VII of the first amended complaint, on September 24, 2014, referring to the $600,000, O'Brien sent an email to Gold, stating, in part, "I will try to get this money to you as soon as humanly possible." Afterwards, on October 14, 2014, Prasil caused a wire transfer of

$100,000 to Gold's bank account. On December 5, 2014, Prasil sent an email to Gold stating "I am doing all I can to get your next payment," referring to the $500,000 due to MSG from Epic under the Membership Interest Purchase Agreement. However, according to the first amended complaint, Gold and MSG never received the remainder owed by Epic under that written agreement.

¶ 10 The defendant Epic moved to dismiss count VII of the first amended complaint on the basis that O'Brien lacked authority to bind it to any legal agreement, specifically the Membership Interest Purchase Agreement. The trial court denied that motion, finding that Epic had failed to attach an affidavit necessary to support its argument that O'Brien lacked agency authority.

¶ 11 Following the trial court's order, on September 12, 2016, the plaintiffs filed their second verified amended complaint. With respect to count VII, that complaint set forth identical facts to those set forth in the first amended complaint, seeking to enforce the Membership Interest Purchase Agreement against Epic.

¶ 12 On October 11, 2016, Epic again moved to dismiss count VII, but this time attached an affidavit from Prasil to support its argument that O'Brien lacked agency authority to bind Epic to the written Membership Interest Purchase Agreement. In his affidavit, Prasil averred that he was a principal of Epic, and that he at no time authorized O'Brien to negotiate the terms or enter into the Membership Interest Purchase Agreement on behalf of Epic, or told O'Brien that he had any authority to act as an agent of Epic. According to the affidavit, Prasil also never told Gold that O'Brien had authority to act as an agent of Epic. In addition, Prasil averred that his wire of $100,000 to Gold was not made in connection to or performance of the Membership Interest Purchase Agreement.

¶ 13 On October 19, 2016, the plaintiffs were granted leave to take a limited deposition of Prasil to explore the content of his affidavit. That deposition was held on December 23, 2016.

¶ 14 In his deposition, among other things, Prasil stated that he never told Gold that O'Brien either had or did not have authority to speak on his behalf. He stated that he had no knowledge of, and did not see the written Membership Interest Purchase Agreement signed by O'Brien until the plaintiffs filed the instant lawsuit. Prasil also stated that he never made any oral offer to Gold to purchase his shares of Get It Management. Instead, in October 2014, O'Brien approached Prasil about the possibility of Epic acquiring the shares of Get it Management owned by Gold and another investor, Brian Abraham (Abraham). Prasil averred that O'Brien told him he had reached an agreement with Gold under which Epic would put up $200,000 in cash, and sell 10 percent of its holdings of Stone Lake to an entity known as GACA for $200,000. GACA would then fund the last $400,000 of Gold's and Abraham's share purchase. In total Gold would receive $600,000 and Abraham $200,000. In his deposition, Prasil stated that this oral agreement was never memorialized in writing. He explained, however, that his wire of $100,000 to Gold was made in performance of this oral agreement, and not the one alleged by the plaintiffs, and involving the written Membership Interest Purchase Agreement. Prasil also explained that as part of this oral agreement, involving GACA, he sent another $100,000 to Abraham. Prasil explained that GACA should have sent Gold the remaining $400,000. He admitted, in his deposition, however, that he personally never informed Gold that the remainder of the payment would come from GACA.

¶ 15 After the deposition, on January 30, 2017, the plaintiffs filed their third amended verified complaint, without first seeking leave of court. In that complaint, they sought to voluntarily dismiss, without prejudice, all remaining counts of their complaint and to proceed solely on a

new version of count VII, with the exception of all defendants except O'Brien (against whom default judgment had already been entered).

¶ 16 Count VII of the new pleading, abandoned the plaintiffs' previous attempt to enforce the written Membership Interest Purchase Agreement against Epic and instead alleged a breach of oral contract by MSG against Prasil. As such, Count VII now abandoned all factual allegations about the negations and the execution of the written Membership Interest Purchase Agreement and instead alleged that on August 2014,[1] Prasil "verbally offered" to purchase MSG's 12 shares in Get It Management, and "Gold (on behalf of MSG) agreed to Prasil's offer." Count VII of the third amended complaint further alleged that this "offer and acceptance formed an oral agreement in which Prasil agreed to purchase MSG's membership shares in Get It Management." According to Count VII of the third amended pleading Prasil partially performed on this oral agreement by wiring $100,000 to Gold's bank account. Nonetheless, despite many subsequent assurances to the contrary that the remainder would be paid, Gold and MSG had not received the remaining $500,000.

¶ 17 On February 23, 2017, the trial court set a briefing schedule and gave the plaintiffs until February 27, 2017, to file a motion for leave to file their third amended complaint and to voluntarily dismiss of all their remaining counts.

¶ 18 On February 27, 2017, the plaintiffs filed such motions. In the motion for leave to file their third amended complaint, the plaintiffs simply stated that the new "claim" in count VII "results, in part, from additional information learned in Prasil's deposition taken in December 2016."

[1] All prior iterations of the plaintiffs' pleading alleged that such an offer was made on or about September 2014. There was no explanation provided in the third amended pleading as to why the timing was now changed.

They, however, did not set forth any specific facts that were learned at this deposition, or any mistake or inadvertence that occurred in their prior verified allegations, which would justify replacing their breach of written contract claim with a breach of oral agreement count.

¶ 19 On March 10, 2017, Prasil filed a response in opposition to the plaintiffs' motion for leave to file the third amended complaint. Therein, Prasil argued that: (1) the proposed amendment failed to cure any defects in the second amended verified complaint because the plaintiffs had failed to disclose any inadvertence or mistake and thus set forth judicial admissions; (2) the amendment would result in an unfair surprise to Prasil (3) the proposed third amended complaint was untimely; (4) the plaintiffs had previous opportunities to amend the pleadings; and (5) permitting the filing of the third amended complaint would not further the ends of justice. Specifically, Prasil argued that the plaintiffs had failed to disclose what, if any, new information was learned at Prasil's deposition that could give rise to the new amendment.

¶ 20 On March 29, 2017, the plaintiffs filed a reply brief in support of their motion for leave to file their third amended complaint. Therein they argued that in his December 2016, deposition Prasil admitted that he and Gold "did talk about [the agreement] *** [W]e had the conversations about where to send the money, to wire it to him." According to the reply, although during his deposition Prasil claimed that when he made this statement he was referring to a different oral agreement, one that involved a third party known as GACA as co-purchaser, Prasil admitted that he could not recall ever mentioning this fact to Gold. According to the reply, Prasil also admitted that his version of the purchase agreement was not documented anywhere and that he sent $100,000 to Gold. The plaintiffs further pointed out that in his deposition Prasil also admitted that he never told Gold that the balance of the $600,000 would be coming from someone other

than him. The plaintiffs therefore argued that under these facts, Gold reasonably understood his oral agreement was with Prasil.

¶ 21 In their reply, the plaintiffs also argued that the third amended complaint was not contradicted by the second amended complaint. They asserted that the new pleading was necessary and "a direct result of Prasil's disavowal of O'Brien as his agent, and the disavowal of the written modification of the oral agreement between Prasil and Gold." The plaintiffs pointed out that they have consistently alleged that Prasil's offer to purchase their interest for $600,000 preceded the written modifications that O'Brien negotiated, purportedly on behalf of Epic, and that their prior pleadings nowhere alleged that Gold failed to accept Prasil's oral offer to purchase those shares, or that no agreement arose until the written agreement was negotiated and/or signed.

¶ 22 On April 7, 2017, Prasil filed a surreply in his opposition to the plaintiffs' motion for leave to file the third amended complaint. Therein, Prasil argued that contrary to the plaintiffs' arguments, he never made any admissions regarding any alleged oral agreement to personally purchase MSG's shares from the plaintiffs (*i.e.*, he never testified that he made an offer to the purported plaintiffs, that he personally agreed to purchase the plaintiffs' shares, or that he had any knowledge of the purported oral agreement). In addition, the surreply noted that the plaintiffs failed to make any argument regarding any new evidence in their original motion for leave to file a third amended complaint, but rather waited until their reply to do so. The surreply further argued that the third amended complaint was untimely because the plaintiffs knew of O'Brien's lack of agency authority as far back as April 2016, when Epic filed a motion to dismiss the first amended complaint on the basis of lack of such authority, but did not amend their pleadings accordingly. In addition, the surreply pointed out that in the third amended complaint

the plaintiffs' changed the date of when the purported oral offer occurred from September to August 2014 (again without any explanation).

¶ 23 After a hearing, on April 24, 2017, the trial court granted the plaintiffs' leave to file their third amended complaint. In doing so, the court noted its concern over the "ping-pong" nature of the plaintiffs' pleadings but reminded the parties that it must adopt a liberal policy in permitting amendments of pleadings. Accordingly, the court agreed to dismiss the remaining claims in the plaintiffs' prior pleadings, but only if the plaintiffs agreed to a dismissal *with* prejudice. The court's written order granting leave to file the third amended complaint and dismissing the remaining counts, therefore stated in pertinent part: "All counts other than that sated in Count VII of the third amended complaint are dismissed with prejudice, pursuant to representation of plaintiffs' counsel."

¶ 24 The plaintiffs subsequently filed their third amended complaint. Apart from the newly pleaded count VII, that complaint explicitly stated that the plaintiffs were not waiving or releasing their right to "seek to recover on any default judgment orders" that had been entered against O'Brien (relating to any conversion, and accounting claims).

¶ 25 On June 5, 2017, Prasil filed a section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2016)). Therein, Prasil argued that with respect to count VII the plaintiffs had failed to explain or disclaim any contradictory allegations from prior pleadings, and thus had set forth judicial admissions that they could not now abandon in their third amended complaint. Specifically, Prasil contended that the plaintiffs set forth judicial admissions that they negotiated any purported offer made by Prasil with O'Brien and Itzkow, and that the resulting contract was the written Membership Interest Purchase Agreement, which had been attached to and incorporated in the prior iterations of their verified pleadings, and that the receipt of $100,000 was the result

of Epic's payment toward that written agreement. Additionally, Prasil asserted that the written agreement originally sought to be enforced by the plaintiffs explicitly disclaimed the existence of any oral contract.

¶ 26 In their response to the motion to dismiss, the plaintiffs argued that there were *no* conflicts or inconsistencies between the allegations made in the two pleadings, and that therefore there was no need to disclaim any mistake or inadvertence. Specifically, they asserted that Gold has always alleged that after Prasil made the oral offer, he accepted that offer and then merely worked with O'Brien to implement that verbal agreement by way of a written contract. In addition, the plaintiffs asserted that Gold entered into the written agreement because he believed O'Brien was someone who had authority to modify the existing agreement they had with Prasil.

¶ 27 On August 16, 2017, the trial court granted Prasil's motion to dismiss with prejudice. In doing so, the court ruled that the plaintiffs' second amended complaint created judicial admissions with respect to the written agreement between MSG and Epic, which the plaintiffs were now attempting to directly contradict, thereby making it impossible for them to support a cause of action for oral breach of contract. The court further found that there were no allegations in the third amended complaint showing that the allegations in the second amended complaint were made through mistake or inadvertence, so as to excuse the judicial admissions. In addition, apart from granting dismissal, the trial court's written order set the status date "as to the remaining parties."

¶ 28 On August 23, 2017, the plaintiffs filed a motion to reconsider arguing that the trial court had incorrectly found that they had made no showing that their allegations about the written agreement were made through mistake or inadvertence. In support, the plaintiffs pointed out that

all such prior inconsistencies in their earlier verified pleadings were properly disclaimed in their reply to the motion for leave to file their third amended complaint.

¶ 29 After Prasil filed his response to the motion to reconsider, the plaintiffs filed a reply, to which they attached a "Verification" signed by Gold on September 28, 2017, explaining the reasons for the relevant omissions in their second amended complaint. According to the verification, Gold stated that the reason for the omission of the allegation that he reached an oral agreement with Prasil after Prasil verbally offered to purchase his interest in Get It Management was that he reasonably believed that O'Brien was authorized to act for Prasil on behalf of Epic, in reaching the subsequent written agreement. Gold further averred that he believed this subsequent written agreement implemented the prior oral agreement he had reached with Prasil.

¶ 30 On October 10, 2017, the trial court denied the plaintiffs' motion for reconsideration. In doing so, the court ruled that the plaintiffs had previously "unequivocally stated that there w[ere] no conflicts between the allegations of the two pleadings and did not assert that any mistake had been made," and therefore could not raise such an argument for the first time in their motion to reconsider. In addition, the trial court held that even if the plaintiffs were not barred from raising this new argument, their "explanation of the supposed mistake [wa]s unconvincing and introduce[d] even more contradictions." Aside from denying the plaintiffs' motion to reconsider, the trial court's written order set a status date "as to the remaining parties."

¶ 31 On November 11, 2017, Epic filed a counterclaim against the plaintiffs seeking the return of the $100,000 payment received by the plaintiffs. In response, the plaintiffs filed motions to dismiss the counterclaim and for an Illinois Supreme Court Rule 304(a) finding (Ill. S. Ct. R. 304(a) (eff. March 8, 2016)).

¶ 32 On March 7, 2018, the trial court granted the plaintiffs' motion to dismiss the counterclaim,

finding the Epic had no standing to pursue the litigation because it was voluntarily dismissed from the case on April 24, 2017. The court noted that if Epic sought the return of this sum it would have to file a new lawsuit. The trial court then denied the plaintiffs' request for 304(a) language (Ill. S. Ct. R. 304(a) (eff. March 8, 2016)), noting that there remained pending in the lawsuit the outstanding default order entered against O'Brien on February 5, 2016, which had not yet been reduced to judgment. The court noted that this issue could be easily resolved by the plaintiffs filing a motion for prove-up.

¶ 33 At the following status hearing on March 19, 2018, the plaintiffs voluntarily released their right to prove up damages against O'Brien and final judgment was entered. The plaintiffs filed their notice of appeal on April 11, 2018.

¶ 34 II. ANALYSIS

¶ 35 A. Jurisdiction

¶ 36 As an initial matter, we must first address whether this court has jurisdiction over this appeal. In a motion filed with this court on June 7, 2018, which was denied, the defendant Prasil asserted that we lacked jurisdiction because the plaintiffs' notice of appeal was filed well over 30 days after the entry of the order denying the plaintiffs' motion to reconsider the dismissal of their third amended complaint. In that respect, Prasil contended that the plaintiffs' April 24, 2017, voluntary dismissal of all of their claims (including the request for an accounting from all the defendants) converted the March 10, 2016, default order against O'Brien, requiring an accounting, into a final judgment, which precluded the plaintiffs from enforcing the accounting relief already entered against O'Brien and proving-up actual damages. Accordingly, Prasil argued that when the trial court dismissed count VII of the third amended complaint, and denied the plaintiffs' motion for reconsideration, a final judgment was entered and the plaintiffs had 30

days from that date to file their notice of appeal. Prasil now renews this argument on appeal. For the reasons that follow, we disagree, and find that we have jurisdiction.

¶ 37 It is axiomatic that jurisdiction is conferred upon this court by the filing of a notice of appeal within 30 days of the entry of the final judgment from which the appeal is taken from. *D'Agostino v. Lynch*, 382 Ill. App. 3d 639, 643 (2008). Illinois Supreme Court Rule 303 provides that a "notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, *** within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order ***." Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017). This requirement is both mandatory and jurisdictional. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill .2d 209, 213 (2009). "If the appellant fails to comply with the deadline ***, this court lacks authority to consider the appeal." *McCorry v. Gooneratne*, 332 Ill. App. 3d 935, 939 (2002).

¶ 38 The deadline for filing an appeal is triggered by "the final decision of the court resolving the dispute and determining the rights and obligations of the parties." (Internal quotation marks omitted.) *McDonald v. Health Care Service Corp.*, 2012 IL App (2d) 110779, ¶ 21; see also *D'Agostino v. Lynch*, 382 Ill. App. 3d at 641 ("Generally, appellate jurisdiction exists only to review final orders." ) A "final judgment" for purposes of appeal is one that fixes absolutely and finally the rights of the parties in a lawsuit, and determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. *Indiana Insurance Co. v. Powerscreen of Chicago, Ltd.*, 2012 IL App (1st) 103667, ¶ 22; see also *In re Detention of Hardin*, 238 Ill. 2d 33, 42-43 (2010); *Richter v. Prairie Farms Dairy, Inc*., 2016 IL 119518, ¶ 24-25 (An order or judgment is final if it "terminate[s] the litigation and fix[es]

absolutely the parties' rights, leaving only enforcement of the judgment") (citing *In re Detention of Hardin*, 238 Ill. 2d 33, 42-43 (2010); *Village of Niles v. Szczesny*, 13 Ill. 2d 45, 48 (1958)); *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 223, 232-233 (2005) ("A judgment is final if it determines the litigation on the merits so that, if affirmed, nothing remains for the trial court to do but to proceed with its execution."). In determining when a judgment or order is final, a reviewing court looks to its "substance rather than form." *Richter*, 2016 IL 119518, ¶ 24-25.

¶ 39 In the present case, contrary to Prasil's position, the plaintiffs' notice of appeal was properly filed on April 11, 2018, well within 30 days of the final order of judgment entered on March 19, 2018, by the circuit court. No final judgment was entered prior to that date.

¶ 40 Contrary to Prasil's position, both the order dismissing the third amended complaint with prejudice, and the order denying the plaintiffs' motion to reconsider that dismissal contained language setting future status dates "as to the remaining parties." As such, neither order fixed absolutely and finally the rights of all of the parties in the lawsuit. *Powerscreen of Chicago, Ltd.*, 2012 IL App (1st) 103667, ¶ 22

¶ 41 Moreover, contrary to Prasil's contention, the April 24, 2017, order voluntarily dismissing the plaintiffs' remaining counts as to all other defendants not subject to the default order, had no impact on the default judgment or the pending prove-up already entered against O'Brien. In that respect, the record reveals that the plaintiffs' motion for voluntary dismissal, which prompted the April 24, 2017, order expressly sought dismissal "as to all defendants except O'Brien (against whom default judgment has been entered.)" In addition, in the subsequently filed third amended complaint, the plaintiffs expressly reserved their claims against O'Brien including their right to prove up damages against him at a later date. The fact that the plaintiffs dismissed accounting

claims not yet adjudicated against other defendants in no way precluded them from enforcing the judgment already obtained against O'Brien, which compelled him to produce his books, records and relevant financial transactions, and from proving-up their damages against him.

¶ 42 The trial court found as much when it dismissed Epic's counterclaim and denied the plaintiffs' Illinois Supreme Court Rule 304(a) motion (Ill. S. Ct. R. 304(a) (eff. March 8, 2016)) on the basis that there remained an issue as to the prove-up of the default order against O'Brien. In making that determination, at the hearing, the trial court noted that there was no order that the plaintiffs could point to that had dismissed the default judgment and prove-up as to O'Brien. Accordingly, until the plaintiffs voluntarily released their right to prove up their damages against O'Brien, and the court entered final judgment on March 19, 2018, the plaintiffs could not have appealed the dismissal of their third amended complaint. Since the plaintiffs properly filed their notice of appeal within 30 days of March 19, 2018, we have jurisdiction to consider this appeal.

¶ 43 B. Dismissal of the Third Amended Complaint

¶ 44 On appeal, the plaintiffs contend that the trial court erred when it granted Prasil's section 2-619 motion to dismiss on the basis that in their second amended complaint they made binding judicial admissions that directly contradicted the allegations in their third amended complaint. In the alternative, they assert that any such admissions should have been excused by reason of their mistaken belief that O'Brien had authority to negotiate on behalf of Prasil. For the reasons that follow, we disagree.

¶ 45 A motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2016)) admits the legal sufficiency of a claim but asserts certain defects or defenses that defeat that claim. *Patrick Engineering, Inc. v. City of Naperville,* 2012 IL 113148, ¶ 31. Specifically, section 2–619(a)(9) permits involuntary dismissal where the claim is barred by an

"affirmative matter." 735 ILCS 5/2–619(a)(9) (West 2016). An "affirmative matter" is "something in the nature of a defense which negates the cause of action completely" (*Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003)) or "refutes crucial conclusions of law or material fact contained in or inferred from the complaint" (*Dewan*, 363 Ill. App. 3d at 368). When ruling on a section 2-619 motion to dismiss, a court must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise therefrom, and view all pleadings and supporting documents in the light most favorable to the nonmoving party. *Patrick Engineering*, 2012 IL 113148, ¶ 31. The court need not, however, admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts. *Better Government Association v. Illinois High School Association*, 2017 IL 121124, ¶ 21; see also *Patrick Engineering*, 2012 IL 113148, ¶ 31. Our review of the trial court's ruling on a section 2-619 motion to dismiss is *de novo*. *Patrick Engineering*, 2012 IL 113148, ¶ 31.

¶ 46 In the present case, the trial court granted Prasil's motion to dismiss on the basis of judicial admissions made by the plaintiffs in their second amended complaint. It is axiomatic that a court may consider judicial admissions when ruling on a motion to dismiss. *Weiss v. Waterhouse Securities, Inc.*, 335 Ill. App. 3d 875, 882 (2002). Judicial admissions are defined as " 'deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.' " *North Shore Community Bank and Trust C. v. Sheffield Wellington L.L.C.*, 2014 IL App (1st) 123784, ¶ 102 (quoting *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998) (citing *Hansen v. Ruby Construction Co*., 155 Ill. App. 3d 475, 480 (1987)). They are " 'formal concessions in the pleadings in the case *** that have the [function] of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.' " *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 557–58 (2005) (quoting John Williams Strong, McCormick on Evidence § 254, at

142 (4th ed. 1992)); see also *Lawlor v. North American Corp. of Illinois*, 409 Ill. App. 3d 149, 163 (2011). "In other words, if a fact is judicially admitted, the adverse party has no need to submit any evidence on that point." *North Shore Community Bank*, 2014 IL App (1st) 123784, ¶ 102. The admission serves as a substitute for proof at trial. *Lowe v. Kang*, 167 Ill. App. 3d 772, 776 (1988) (judicial admissions "dispens[e] with proof of a fact claimed to be true, and are used as a substitute for legal evidence at trial" (cited with approval in *People v. Howery*, 178 Ill. 2d 1, 40–41 (1997))).

¶ 47 Accordingly, our courts have repeatedly held that a verified pleading remains part of the record despite any subsequent amendments to that pleading "and any admissions not the product of mistake or inadvertence become binding judicial admissions." *Rynn v. Owens*, 181 Ill. App. 3d 232, 235 (1989) (citing *American National Bank & Trust Co. of Chicago v. Erickson*, 115 Ill. App. 3d 1026, 1029 (1983)); see also *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24 ("unless they are the product of mistake or inadvertence, a party's admissions contained in an original verified pleading are judicial admissions that bind the pleader throughout the litigation, even after the filing of an amended pleading that supersedes the original.") (citing *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86, (2010)).

¶ 48 The purpose of judicial admissions "is to remove the temptation to commit perjury." *In re Estate of Rennick*, 181 Ill. 2d at 407 (citing *Smith v. Ashley*, 29 Ill. App. 3d 932, 935 (1975)). Therefore, a party "cannot create a factual dispute by contradicting a previously made judicial admission." *Burns v. Michelotti*, 237 Ill. App. 3d 923, 932 (1992); see also *In re Estate of Rennick*, 181 Ill. 2d at 406.

¶ 49 In the present case, the plaintiffs first argue that the trial court erred in concluding that

allegations that they made in their second amended complaint were in direct conflict with those made in their third amended complaint so as to constitute binding judicial admissions. We disagree.

¶ 50 A review of the plaintiffs' pleadings reveals a direct conflict between their allegations regarding the offer and negotiation of any purported oral agreement.

¶ 51 The record reveals that the second amended complaint expressly alleged a written agreement between MSG and Epic. Specifically, the second amended complaint alleged: (1) that Prasil verbally offered to buy MSG's shares of Get It Management for $600,000; (2) that thereafter Gold negotiated with O'Brien for the sale of MSG's shares; and (3) that as result of these negotiations, Gold, on behalf of MSG, executed a written agreement between MSG and Epic for the purchase of those shares. The second amended complaint further alleged that under the terms of that written agreement Epic was required to pay MSG $200,000 at closing and an additional $400,000 by October 29, 2014. The second amended complaint further alleged that Gold's September 14, 2013, email seeking a payout schedule, and Prasil's subsequent wire of $100,000 to Gold's account were made pursuant to this written agreement between MSG and Epic.

¶ 52 In direct conflict, the third amended complaint alleged an oral agreement between MSG and Prasil based on the same identical facts as alleged in the second amended complaint. The third amended complaint only replaced the prior allegations regarding the negotiation and execution of the written agreement, with the allegation that upon Prasil's verbal offer, Gold accepted that offer, constituting an oral agreement.

¶ 53 These allegations are in direct conflict. By initially alleging that Prasil's verbal offer was succeeded by further negotiations and then an execution of the written agreement based on which the funds were owed, the plaintiffs unequivocally, deliberately and clearly expressed that no

agreement was reached before that written agreement was executed. The plaintiffs cannot subsequently change course and allege that an agreement was reached immediately after that verbal offer was made by alleging that Gold accepted that offer. This is particularly true where no allegation of such acceptance by Gold was made in their second amended complaint. Whether Gold accepted the offer immediately, or instead continued to negotiate with Prasil through third parties before reaching an agreement and executing the written agreement, was clearly a fact within Gold's personal knowledge.

¶ 54 The plaintiffs nonetheless argue that any conflict in their pleadings should be excused as a result of mistake, namely their belief until December 2016 that a valid written contract existed between MSG an Epic because they did not know that O'Brien had no authority to enter into the written agreement on behalf of Epic. We disagree.

¶ 55 The plaintiffs failed to disclose or argue any such mistake until after their third amended complaint was dismissed. In fact, they did not attach a sworn statement by Gold to this effect until they filed their reply to their motion to reconsider this dismissal.

¶ 56 What is more, this argument has no merit because it is directly contradicted by the third amended complaint, in which they alleged that in October 2014, Gold emailed Prasil seeking a schedule of the remaining payments due to MSG from Prasil under the alleged oral agreement. If Gold had been under the mistaken belief that a valid written contract existed between MSG and Epic until December 2016, he could not have made such a request in October 2014, on this oral agreement. As already noted above, whether there was an immediate oral agreement, or whether an agreement was not reached until after negotiations with O'Brien and Itzkow took place, was a fact within Gold's personal knowledge.

¶ 57 The plaintiffs' argument regarding a mistake would be more plausible if, as part of their

second amended complaint, they had alleged that an oral agreement was reached before Gold negotiated with O'Brien, and that in continuing those negotiations, Gold believed O'Brien was merely "documenting" the deal between Gold and Prasil, or, alternatively that those negotiations involved a "modification" of the existing deal. However, since no such allegations were made, the plaintiffs are bound by the judicial admissions made in their second amended complaint.

¶ 58 III. CONCLUSION

¶ 59 For the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 60 Affirmed.