2011 IL App (2d) 110143-U
No. 2-11-0143
Order filed December 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GEORGE R. WALLS,	)	Appeal from the Circuit Court
	)	of De Kalb County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-SC-818
	)	
LISA NIETO,	)	Honorable
	)	Melissa S. Barnhart,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

Held: (1) By failing to object at trial to the oral nature of defendant's motion to dismiss, and to the lack of notice of the motion, plaintiff forfeited those contentions; (2) the trial court properly dismissed plaintiff's complaint, which was subject to the 5-year limitations period for oral contracts rather than the 10-year period for written contracts: the writings on which plaintiff relied lacked crucial terms and thus did not constitute a written contract.

¶ 1 Plaintiff, George R. Walls, appeals an order dismissing his small-claims complaint for breach of contract as barred by the statute of limitations (see 735 ILCS 5/2-619(a)(5) (West 2010)). Plaintiff contends that (1) the trial court erred in granting defendant's motion, because the motion was not in writing and plaintiff did not receive proper notice; and (2) the court erred in holding that the case was

governed by the 5-year statute of limitations for unwritten contracts (735 ILCS 5/13-205 (West 2000)), not the 10-year statute for written contracts (735 ILCS 5/13-206 (West 2000)). We affirm.

¶ 2 On May 28, 2010, plaintiff filed a complaint alleging that defendant owed him "the contract sum of $4,100." Attached to the complaint were two exhibits. The first was a photocopy of a check, dated April 26, 2001, for $4,100, payable on the account of plaintiff and his wife to defendant. Below the copy of the check was a handwritten notation, "This was a loan to Lisa, for a downpayment [*sic*], on her loan, to buy a lot from me and for me to build her a house." The second exhibit was an e-mail dated April 1, 2001, from plaintiff to defendant, attaching a house plan from "Homestyles.com" and asking him what he thought of proceeding on the plan with modifications.

¶ 3 On June 1, 2010, defendant filed an appearance and an answer. The trial date was set and continued to October 20, 2010. On that date, plaintiff's attorney announced, "We're ready for trial." The following exchange ensued:

> "MR. CLARK [Defendant's attorney]: We are, Judge. I also would make an oral motion for pursuant [*sic*] to 2-619. On the face of the complaint, Judge, it's beyond the statute of limitations. It was an oral contract.
>
> THE COURT: Okay.
>
> MR. JOHNSON [Plaintiff's attorney]: Judge, the writings are attached so [*sic*].
>
> MR. CLARK: If I could go out and look at that to determine whether—
>
> MR. JOHNSON: Signatures.
>
> THE COURT: You already have seen it?
>
> MR. CLARK: I have. I expect the Court will accept the allegations in the complaint and attachments. I think the Court will rule as a matter of law there is no written contract.

MR. JOHNSON: Judge, there are e-mails with plans and there's a written check for the amount of the debt, made a cash transfer.

MR. CLARK: There's no signed document as to terms, to repayment, to purpose.

THE COURT: Is there a contract to build a house or to build the structure?

MR. CLARK: No, Judge.

THE COURT: I assume that's a house.

MR. JOHNSON: No, there isn't, Judge."

Plaintiff argued that the documents "put together" were a written contract for a loan. The judge observed that a loan is a contract and that the documents attached to the complaint omitted such contractual terms as the duration and any interest. The court granted defendant's motion.

¶ 4 On November 19, 2010, plaintiff moved to reconsider the dismissal. Plaintiff's motion asserted that defendant's motion to dismiss should have been denied because "A. it was not in writing and B. it was not correct." The motion said nothing further about "A." but, as to "B.," argued that the exhibits attached to plaintiff's complaint created a written contract.

¶ 5 At the hearing on the motion to reconsider, plaintiff's attorney stated that "the 2-619 [motion] should have been in writing if it was going to be made." He did not support this argument. The parties then contested whether the five-year statute of limitations for actions on unwritten contracts applied. The judge, noting that the documents included nothing that defendant had signed, held that no written contract had been pleaded, so that the five-year limitation period applied. After the court denied plaintiff's motion to reconsider, he timely appealed.

¶ 6 On appeal, plaintiff argues that the dismissal must be reversed because (1) section 2-619 required defendant's motion to dismiss to be in writing and defendant gave plaintiff no notice of the

motion; and (2) the 10-year statute of limitations for written contracts applies. Defendant has not filed an appellee's brief, but, as the record is short and the issues are straightforward, we shall reach the merits of plaintiff's appeal. See *Village of Richmond v. Magee*, 407 Ill. App. 3d 560, 565 (2011).

¶ 7 Plaintiff's first argument is forfeited. When defendant orally moved to dismiss the complaint, plaintiff did not object to the form of the motion but proceeded directly to the merits. Only after losing on the merits did he contend, via a motion to reconsider, that the form of the motion was improper. Even then, plaintiff raised the matter minimally and did not pursue it at the hearing. We shall not allow plaintiff to have the proverbial second (or third) bite at the apple by first opposing the dismissal motion on the merits and, only after failing in that effort, attacking it on formal grounds. It is well established that a plaintiff may forfeit an objection to the form of a motion to dismiss. See, *e.g.*, *Russell v. Hertz Corp.*, 139 Ill. App. 3d 11, 15 (1985). Also, insofar as plaintiff now claims that he did not receive proper notice of the motion, that argument is forfeited. See *Williamsburg Village Owners' Ass'n v. Lauder Associates*, 200 Ill. App. 3d 474, 479 (1990).

¶ 8 Plaintiff's second argument is that the section 2-619(a)(5) dismissal was erroneous because his action was subject to the 10-year statute of limitations for written contracts. On our *de novo* review (see *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)), we disagree.

¶ 9 Plaintiff asserts that the documents attached to his complaint, considered together, amount to a written contract for a loan. However, acknowledging that these documents lacked crucial terms, such as a repayment schedule or interest obligations, he concedes, "There are no terms of repayment spelled out, but it is entirely possible that there were no exact terms of repayment that had been settled on at that point." Put bluntly, plaintiff admits that the alleged written contract is incomplete.

¶ 10 The issue, of course, is not whether there was a contract of some sort, but whether plaintiff pleaded that there was a written contract that would make his action timely. See *Portfolio Acquisitions, L.L.C. v. Feltman*, 391 Ill. App. 3d 642, 655 (2009). A contract will be considered written only if parties are identified and all the essential terms are in writing and ascertainable from the instrument itself. *Id.* at 647. By plaintiff's own concession, the documents at issue, considered collectively as the "instrument," do not pass this test. All we have is a check from defendant to plaintiff and an earlier e-mail from plaintiff to defendant suggesting that he build a house for her. We can infer little from these documents—not even whether there was an offer and acceptance. Not all of the essential terms of the alleged contract were in writing—indeed, none were in writing.[1]

[1]The weight of authority is that, as the trial court stated, the duration and applicable rate of interest are essential terms of a contract to lend money. *Demos v. National Bank of Greece*, 209 Ill. App. 3d 655, 660-61 (1991); *McErlean v. Union National Bank of Chicago*, 90 Ill. App. 3d 1141, 1146 (1980). A recent opinion appears to state otherwise, at least as regards oral agreements to lend money. *Barnes v. Michalski*, 399 Ill. App. 3d 254, 266-68 (2010). *Barnes* does not cite *Demos* or *McErlean*. At this point, we need not resolve any conflict between these authorities, as (1) plaintiff does not contend that the terms of repayment were not essential elements of the alleged written contract; and (2) *Barnes* appears to be limited to "informal word-of-mouth transactions" (*id.* at 267), *i.e.*, oral contracts to lend. Thus, under *Barnes*, plaintiff's failure to allege any terms of repayment might not prevent him from recovering for breach of an oral contract. But the issue here is not whether he stated a cause of action but whether the alleged agreement was a written one and thus within the applicable statute of limitations.

¶ 11 Plaintiff does not contend that the notation underneath the copy of the check was one of the documents that composed the written contract. The notation, obviously added long after the fact, was at most an allegation that the parties orally agreed to various contractual terms, which of course does not help plaintiff here.

¶ 12 The trial court correctly held that the action was governed by the five-year statute of limitations, which plaintiff did not satisfy and, indeed, has never contended that he satisfied.

¶ 13 For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed.

¶ 14 Affirmed.