2014 IL App (2d) 130782-U
No. 2-13-0782
Order filed April 22, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

J & P CASA DE CAMBIO, INC.,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-CH-77
	)	
RED LATINA CORPORATION,	)	Honorable
	)	David R. Akemann,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiff's complaint for an injunction: there was no issue of fact regarding the nature of defendant's business, and the undisputed facts did not establish that defendant's business was an unlicensed community currency exchange as opposed to an exempt retailer that engaged in only incidental check cashing.

¶ 2 The trial court dismissed the complaint of plaintiff, J & P Casa de Cambio, Inc, against defendant, Red Latina Corporation, for injunctive relief under the Currency Exchange Act (Act) (205 ILCS 405/0.1 *et seq*. (West 2012)), under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)). This appeal followed. Plaintiff now asserts that the trial court improperly determined disputed issues of material fact and that,

regardless of the disputed issues, the facts before the court were sufficient to show that defendant was operating an unlicensed currency exchange, entitling plaintiff to an injunction. We disagree; plaintiff has failed to show that the dismissal was error. We therefore affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff initially filed its complaint for injunctive relief under the Act in Cook County. In its complaint, it asserted that it was entitled to an injunction to bar defendant from cashing checks and thereby acting as an unlicensed community currency exchange. The Act defines "community currency exchange" as follows:

> " 'Community currency exchange' means any person, firm, association, partnership, limited liability company, or corporation, except an ambulatory currency exchange as hereinafter defined, banks ***, engaged in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services." 205 ILCS 405/1(a) (West 2012).

The Act provides, "No [legal entity] shall engage in the business of a community currency exchange *** without first securing a license to do so from the Secretary." 205 ILCS 405/2 (West 2012).

¶ 5 As amended, the complaint alleged that plaintiff operated licensed community currency exchanges, including one in the Kane County part of Aurora. Defendant operated six businesses,

including one in Aurora near plaintiff's Aurora location. Further, "on May 26, 2012 and again on August 7, 2012, Defendant specifically violated the Act by cashing payroll checks without a license." The complaint referenced the affidavit of Anabel Montero, which describes two transactions in which defendant's Aurora store allowed Montero to cash a paycheck to make a small purchase. Montero averred that the cashier told her that store policy required a purchase to cash a check and suggested that she could buy an inexpensive candy or a prepaid calling card. The complaint also pointed to a previous filing of defendant's in which it asserted that it allowed customers to cash checks, for a fee of no more than 1%, in conjunction with purchases. Plaintiff concluded that "[u]pon information and belief, at all relevant times hereto, Defendant has been conducting unlicensed currency exchange business[.]"

¶ 6 Defendant moved to dismiss the complaint, invoking section 2-619(a)(9) of the Code. It asserted that it fell under the Act's exemption for retailers of tangible property:

> "Nothing in this Act shall be held to apply to any [entity] who is *** engaged in the business of selling tangible personal property at retail who, in the course of such business and only as an incident thereto, cashes checks, drafts, money orders or other evidences of money." 205 ILCS 405/1(b) (West 2012).

It further argued that section 2 of the Check Cashing Act (815 ILCS 315/2 (West 2012)) was also applicable:

> "A merchant may offer check cashing services, in the course of such business and only as an incident thereto, and may charge fees for each check cashed provided that the check cashing services are incidental to the main business of the merchant. However, check cashing services shall not include any transaction where a customer presents a check for the exact amount of any purchase. The fees charged shall not exceed the greater of $.50

> or 1% of the face value of the check cashed. No license shall be required as a condition for providing such services." 815 ILCS 315/2 (West 2012).

¶ 7 Defendant asserted that the Aurora store that Montero had visited sold shipping materials, prepaid calling cards, candy, and cookies and offered services including wire transfers, bill payment, and Internet access. The store allowed customers to make purchases of goods or services with their paychecks, charging a fee that never exceeded 1%, and that it never cashed checks other than in conjunction with purchases. On May 26, 2012, the day of Montero's first visit, the Aurora store had 126 customers, of whom Montero was the only one who paid with a check. On August 7, 2012, the day of Montero's second visit, the Aurora store had 100 customers; 18 transactions involved checks, 2 of which were Montero's. A record of the checks cashed on the two relevant days, included as an exhibit, showed that, of the 19 transactions involving checks, 7 involved purchases whose value was less than 10% of the check amount. Defendant asserted that its "primary business [was] selling goods such as boxes, envelopes and packing material for shipping purposes, pre-paid calling cards, chocolate, candy, and cookies and services such as wire transfers, bill pay, and computer and internet access." The affidavit of Josefina Alba, defendant's president, was attached to the motion and supported the assertions in the motion.

¶ 8 After defendant filed its motion to dismiss, the court ruled that venue in Cook County was improper under the doctrine of *forum non conveniens*. The court transferred the case to Kane County.

¶ 9 In its first filing after the transfer to Kane County, plaintiff filed a response to the motion to dismiss, implying that defendant's retail business was a subterfuge and a cover for its check-cashing business. It asserted that case law holds that "the sales of numerous items of small value

in conjunction with check cashing does [*sic*] not remove a business from the ambit of the Currency Exchange Act." Defendant filed a reply, asserting that plaintiff had conceded that defendant was engaged in retailing. It further argued that the evidence it had provided showed that its check cashing was incidental to its retailing.

¶ 10 According to plaintiff's bystander's report, at the hearing on the motion and other matters, plaintiff argued that, because defendant was "in the business of selling envelopes, calling cards, wire transfers, and bill pay services, all of which constitute services that are specifically referenced in the definition of 'currency exchange' within the Act," defendant "cannot deny that it is a currency exchange."

¶ 11 The court entered an order granting the motion to dismiss on July 2, 2012:

> "[The court] FINDS: The Defendant's Motion to Dismiss the Plaintiff's Verified Complaint for Injunctive Relief, pursuant to 2-619 should be granted. The Complaint contains a[] section entitled 'Argument' but the actual factual averments made, in light of the affidavits attached to said Motion to Dismiss make granting of the Motion in view of *Heidelberger v. Jewel Companies, Inc.*, 57 Ill 2d [87] (1974) appropriate."

Plaintiff timely appealed.

¶ 12 II. ANALYSIS

¶ 13 Plaintiff's claims of error on appeal are not wholly clear to us. Nevertheless, two are clear enough for us to address: first, plaintiff asserts that the court improperly decided contested issues of fact; second, it argues that the facts before the court were sufficient to show that defendant was operating an unlicensed currency exchange. We agree with neither argument. First, we find no contested facts; plaintiff's and defendant's claims about the business were

consistent. Second, those facts do not establish that defendant was operating a currency exchange.

¶ 14 We do not consider the merits of plaintiff's arguments that relate to "judicial notice." The standard legal meaning of "judicial notice" is a "court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact." Black's Law Dictionary 863-64 (8th ed. 2004). The case on which plaintiff relies for the effect of judicial notice on consideration of a section 2-619 motion, *Island Lake Water Co., Inc. v. La Salle Development Corp.*, 143 Ill. App. 3d 310, 319-20 (1986), uses "judicial notice" in exactly this sense. Plaintiff, however, seems be using "judicial notice" to mean no more than "notice taken by a judge." This mismatch results in a wholly disjointed argument.

¶ 15 A court may, pursuant to section 2-619(a)(9) of the Code, dismiss a complaint when "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012). A motion under section 2-619 "admits all well-pleaded facts together with all reasonable inferences that can be drawn therefrom." *Brennan v. Kadner*, 351 Ill. App. 3d 963, 967 (2004). When a court rules on a section 2-619 motion, "all pleadings and supporting documents are construed in [the] light most favorable to the nonmoving party." *Brennan*, 351 Ill. App. 3d at 967. "The relevant inquiry for [the reviewing] court is 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Romanek v. Connelly*, 324 Ill. App. 3d 393, 398 (2001) (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). Where, as here, the court did not hold an evidentiary hearing to resolve issues of fact, the disposition of a section 2-619

motion involves only matters of law, so that our review is *de novo*. See *Brennan*, 351 Ill. App. 3d at 967 (stating the *de novo* standard).

¶ 16 We first consider plaintiff's assertion that the trial court improperly resolved issues of fact to grant defendant's motion. We find no disputed facts concerning defendant's operations in the record.

¶ 17 Initially, we note that plaintiff's assertion "that Defendant-Appellee constitutes an unlicensed currency exchange" is not a properly pleaded fact. "Well-pleaded facts" are allegations made with sufficient specificity; we distinguish such allegations from "mere conclusory allegations unsupported by specific facts." *Primax Recoveries, Inc. v. Atherton*, 365 Ill. App. 3d 1007, 1010 (2006). "[A] court cannot accept as true mere conclusions unsupported by specific facts." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Thus, when we address whether facts were in dispute, we consider only specific facts, and not conclusions.

¶ 18 Giving plaintiff the benefit of the assumption that the evidence in its exhibits can be treated as part of the complaint, we see that essentially all of the facts that plaintiff pleaded concerning the operations of defendant's store are to be found in Montero's averments. However, that evidence is consistent with the evidence that defendant presented in the motion to dismiss. Defendant does not dispute that its cashier allowed Montero to purchase small items with a third-party check of much greater value and charged a check-cashing fee to do so. Plaintiff has not at this stage challenged defendant's evidence that, on the days that plaintiff put at issue, the great majority of customers did not cash checks and, for most of those who did, the purchase took at least 10% of the check's value. The parties agree about the goods and services available at the store. Thus, we conclude that the parties are in essential agreement on the facts.

¶ 19 Plaintiff also argues that the facts before the court were sufficient to show that defendant was operating an unlicensed currency exchange. It argues that the mix of goods and services that defendant provided are characteristic of those provided by a currency exchange. This argument has two parts. One, it asserts that "selling envelopes, calling cards, wire transfers, and bill pay services" are all "services that are specifically referenced in the definition of 'currency exchange' within the Act." Two, it argues that, under Illinois case law, an establishment that offers the mix of goods and services that defendant's does is using its sales as a subterfuge to avoid currency-exchange licensing requirements. Plaintiff's arguments misstate the authority on which they are based and are otherwise unpersuasive.

¶ 20 Plaintiff asserts that "selling envelopes, calling cards, wire transfers, and bill pay services" are all "services that are specifically referenced in the definition of 'currency exchange' within the Act." This is incorrect. The definition of "currency exchange" occurs in section 1 of the Act. 205 ILCS 405/1 (West 2012). The section that best matches what plaintiff describes is section 3, entitled "Powers of community currency exchanges" (205 ILCS 405/3 (West 2012)). That section states that a community currency exchange "is permitted to engage in, and charge a fee for, [certain enumerated] activities." 205 ILCS 405/3 (West 2012). These activities include the obvious: "cashing of checks, drafts, money orders, or any other evidences of money acceptable to the currency exchange." 205 ILCS 405/3(i) (West 2012). They also include services typical of other kinds of businesses, for instance, "(vi) photocopying and sending and receiving facsimile transmissions" and "(xx) sale of candy, gum, other packaged foods, soft drinks, and other products and services by means of on-premises vending machines." 205 ILCS 405/3(vi), 3(xx) (West 2012). Sale of prepaid phone cards is an enumerated activity (205 ILCS 405/3(xvi) (West 2012)), but shipping services, and the sale of shipping material or

envelopes, are not enumerated activities. That the law *permits* a currency exchange to engage in certain commercial activities does not mean that these activities are specific to currency exchanges. That selling food items in vending machines is an enumerated activity makes this clear. Thus, the overlap between the goods and services available at defendant's store and those a licensed community currency exchange could permissibly provide has scant to no value in showing that defendant's store operates as a currency exchange.

¶ 21 Plaintiff also argues that, under our case law, "the sales of numerous items of small value in conjunction with check cashing does not remove a business from the ambit of the *** Act." This is not a satisfactory statement of the law. The most relevant case on this point is *Chicago-Crawford Currency Exchange, Inc. v. Thillens, Inc.*, 48 Ill. App. 2d 366 (1964). The retail operations of the defendant in that decision were entirely a pretext for check cashing:

> "Thillens obtained a peddler's license from the City of Chicago and began to sell numerous items of small value, such as tie clasps, cuff links, sun glasses, money clips, greeting cards, perfume containers and the like. The items were sold for 24¢ plus 1¢ sales tax. ***
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> *** During the week of May 14-19, 1962, Thillens sold 2,953 items of merchandise for a total of $738.25, and received checks totaling $228,341.63 in payment of merchandise." *Chicago-Crawford Currency Exchange, Inc.*, 48 Ill. App. 2d at 368-69.

That is, Thillens' business was entirely based upon cashing checks of tens or hundreds of dollars in conjunction with 25¢ sales. The court held that the defendant was engaged in "the subterfuge of operating 'ambulatory currency exchanges under the form and guise of a retail merchandising business.' " *Chicago-Crawford Currency Exchange, Inc.*, 48 Ill. App. 2d at 370. Nothing in the decision suggests that a retailer, such as a dollar store, legitimately in the business of selling low-

value items cannot cash its customers' checks. Another case that plaintiff cites in its support, *People v. B. Coleman Corp.*, 57 Ill. App. 3d 655, 659 (1978), is inapposite, as the defendant there presented no evidence whatsoever that it engaged in the sale of tangible property. *Heidelberger*, 57 Ill. 2d at 93, which plaintiff also discusses, makes clear that the retailer's exception is broad enough to cover a legitimate retailer that cashes checks for a fee even if no purchase occurs in conjunction with the cashing. *Heidelberger* thus makes clear that a retailer's occasional check cashing in conjunction with small purchases is not a violation. Plaintiff's authority does not support its contention that defendant's business mix made its store a currency exchange.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the dismissal of plaintiff's complaint for injunctive relief.

¶ 24 Affirmed.