2015 IL App (2d) 141253-U
No. 2-14-1253
Order filed June 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEVIN ARKIN,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14-L-308
	)	
NORBERT KLAUCENS,	)	Honorable
	)	Christopher C. Starck,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Plaintiff forfeited his challenge to the trial court's dismissal of his complaint: he argued that he alleged viable causes of action, but defendant moved to dismiss not under section 2-615 (failure to state a cause of action) but under section 2-619; (2) the trial court properly dismissed plaintiff's breach-of-contract claim, as the court's agreed order did not create a contract that could support such a claim.

¶ 2 Plaintiff, Devin Arkin, filed a three-count complaint against defendant, Norbert Klaucens, alleging breach of contract, private nuisance, and civil conspiracy. The trial court granted defendant's motion to dismiss (735 ILCS 2-619(a)(3)-(5) (West 2014)). Following the denial of his motion for reconsideration, plaintiff timely appealed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff and defendant resided in the same subdivision. In 2006, plaintiff sued defendant (case No. 06-CH-772), seeking enforcement of the terms of the subdivision's declaration of covenants and restrictions (the declaration) to stop defendant from keeping swans on his lot. Ultimately, on December 22, 2006, the trial court entered an "Agreed Order" (the 2006 order), which provided as follows:

"IT IS HEREBY ORDERED:

1. Judgment is entered against [defendant] and in favor of [plaintiff] as follows: [Defendant] shall not keep or maintain swans on his lot in the [subdivision] unless and until paragraph 16 of the [declaration] *** is amended to permit same;

2. By the entry of this judgment, the Court finds that all matters in controversy are hereby determined and this is a final order; and

3. Defendant shall pay plaintiff costs in the amount of $750.00."

¶ 5 On April 28, 2014, plaintiff filed a three-count complaint against defendant, alleging breach of contract, private nuisance, and civil conspiracy. Count I of plaintiff's complaint alleged breach of the 2006 order. According to plaintiff, the 2006 order was a binding contract, and defendant breached it by keeping swans on his property between 2007 and 2012. Count II alleged private nuisance, based on the keeping of the swans. Count III alleged civil conspiracy, based on defendant's agreement with others to continue to keep the swans in violation of the declaration and create a nuisance.

¶ 6 Defendant filed a motion to dismiss pursuant to sections 2-619(a)(3), (a)(4), and (a)(5) of the Code of Civil Procedure (Code) (735 ILCS 2-619(a)(3)-(5) (West 2014)). Defendant argued that plaintiff had previously filed a motion to enforce the 2006 order, which was denied for failure to comply with local rules, and that, although plaintiff had been given leave to file a

proper motion, he failed to do so. Defendant argued that, as a result, the 2006 order had lapsed and was no longer enforceable. Defendant further argued that the 2006 order was a judgment, not a contract. Defendant maintained that the complaint should be dismissed (1) under section 2-619(a)(3) of the Code, because there was another action pending, (2) under section 2-619(a)(4) of the Code, because the cause of action was barred by another judgment, and (3) under 2-619(a)(5) of the Code, because the action was not filed within the time limited by law.

¶ 7 The trial court granted defendant's motion and dismissed the complaint. The record does not contain a transcript from the hearing or a bystander's report. The dismissal order provides only that "the Complaint is dismissed with prejudice" and that "Plaintiff is directed to seek relief before Judge Hoffman, the judge having jurisdiction over 06 CH 772."

¶ 8 Plaintiff filed a motion for reconsideration, which the trial court denied. Plaintiff timely appealed.

¶ 9 II. ANALYSIS

¶ 10 Plaintiff argues that his complaint should not have been dismissed, because "[a]ll three counts adequately allege viable causes of action." With respect to count I, plaintiff argues that he "pled all of the elements necessary to state a cause of action for breach of contract" and that the trial court erred in finding that the 2006 order "did not create a contract between the parties." With respect to counts II and III, plaintiff argues that they "unquestionably properly allege causes of action for private nuisance and civil conspiracy, respectively" and thus should not have been dismissed.

¶ 11 Plaintiff's argument misses the mark, as it pertains to motions to dismiss filed under section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). A motion to dismiss filed under section 2-615 attacks the legal sufficiency of the complaint. *Beahringer v. Page*, 204 Ill. 2d 363,

369 (2003). "The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Id*. Here, however, defendant filed his motion under sections 2-619(a)(3), (a)(4), and (a)(5) of the Code. "[A] motion to dismiss under section 2-619 admits the legal sufficiency of the plaintiff's claim but asserts certain defects or defenses outside the pleading that defeat the claim." *In re Estate of Brewer*, 2015 IL App (2d) 140706, ¶ 10. Subsection (a)(3) allows for dismissal when "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2014)). Subsection (a)(4) allows for dismissal when "the cause of action is barred by a prior judgment." 735 ILCS 5/2-619(a)(4) (West 2012). Subsection (a)(5) allows for dismissal when "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2014)).

¶ 12 Plaintiff does not challenge the dismissal on any of the bases presented by defendant in his motion. Without a transcript of the proceedings, a bystander's report or other substitute, or a trial court order establishing otherwise, we must presume that the trial court's dismissal was in accordance with one of the sections cited by defendant. *Zielinski v. Miller*, 277 Ill. App. 3d 735, 739 (1995) ("Where the trial court does not specify the grounds upon which it relied in allowing a motion to dismiss, we must presume that it was upon one of the grounds properly presented."). We simply have no basis upon which to conclude that the trial court dismissed the complaint for failure to state a cause of action. Because plaintiff makes no argument as to why dismissal under any of the sections relied on by defendant was improper, he has forfeited review of the issue. Where an appellant does not present an argument in its opening brief, the appellant forfeits the issue. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010).

¶ 13 Even if we were to accept plaintiff's unsupported assertion that the trial court's dismissal (at least as to count I) was based on a finding that the 2006 order "did not create a contract between the parties," we would affirm. Defendant argued in his motion that the 2006 order was not a contract. Under section 2-619(a)(9) of the Code, a complaint may be dismissed where "the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014). Affirmative matter is "something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004).

¶ 14 First, we note that, given the nature of the controversy, the relief sought and awarded, and the plain language of the 2006 order, it is clear that the order was a final judgment. *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 512 (2001) (orders should be interpreted in the context of the record and circumstances that existed at the time of their rendition). Indeed, in his motion for enforcement, filed in the chancery court, plaintiff seemed to agree that the 2006 order was, in fact, a final judgment.

¶ 15 In any event, the question seems to be whether the 2006 order can form the basis of a breach-of-contract claim. Plaintiff claims that, "when one party breaches the terms of an agreed order, the other party is permitted to bring a breach of contract action against it." However, the cases on which he relies do not support this proposition. Instead, they hold only that, in *interpreting* agreed orders, principles of contract law apply. See *Draper & Kramer, Inc. v. King*, 2014 IL App (1st) 132073, ¶ 27; *San Roman v. Children's Heart Center, Ltd.*, 2010 IL App (1st) 091217, ¶ 26; *Advance Iron Works, Inc. v. ECD Lincolnshire Theater, L.L.C.*, 339 Ill. App. 3d 882, 887 (2003). Plaintiff's reliance on *In re Marriage of Rolseth*, 389 Ill. App. 3d 969, 971-72

(2009), is also tenuous as that case holds only that "agreed orders may be modified or vacated only upon a showing that meets the standard applied to section 2-1401 petitions, a standard that may or may not, depending on the circumstances, be met by a showing of one or several of the types of challenges enumerated in our case law." Therefore, even if the trial court dismissed count I on the basis that the agreed order cannot form the basis of a breach-of-contract action, the dismissal was proper.

¶ 16 III. CONCLUSION

¶ 17 For the reasons stated, we affirm the order of the circuit court of Lake County granting defendant's motion to dismiss plaintiff's complaint.

¶ 18 Affirmed.