2018 IL App (2d) 180113-U
No. 2-18-0113
Order filed October 23, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TAREK FARAG, SOONA FARAG, and MATTHEW FARAG,	)	Appeal from the Circuit Court of Kane County.
Plaintiffs-Appellants,	)	No. 2017-SC-2288
v.	)	
SOUTHWEST AIRLINES COMPANY,	)	Honorable Alice C. Tracy
Defendant-Appellee.	)	Judge, Presiding

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Hudson and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed plaintiffs' claims pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2016)), as they are barred by defendant's Contract of Carriage; there are no genuine issues of material fact to preclude dismissal; and because plaintiffs are bound by the terms of the Contract of Carriage, no amendment would cure any defective pleading. Based on our holding, we need not address plaintiffs' remaining arguments on appeal. Affirmed.

¶ 2 Plaintiffs, Tarek Farag, Soona Farag, and Matthew Farag, filed a smalls claims complaint against defendant, Southwest Airlines Company, alleging breach of contract (count I), fraud (counts II, III, and IV), and a claim sounding in negligence (count V). All of plaintiffs' claims

arose from the inconvenience they allegedly suffered when their flight on defendant's airline was cancelled due to weather. Defendant filed a motion to dismiss plaintiffs' complaint pursuant to sections 2-619(a)(1), 2-619(a)(9), and 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 619(a)(1), 619(a)(9) (West 2016)), arguing that the claims were (1) barred by defendant's Contract of Carriage; (2) preempted by the Airline Deregulation Act of 1978 (ADA) (49 U.S.C. § 41713(b)(1)); and (3) legally defective. The trial court dismissed the claims with prejudice on all bases set forth in the motion to dismiss, and subsequently denied plaintiffs' motion to reconsider and plaintiffs' motion for leave to amend their complaint. Plaintiffs appeal, *pro se*, raising a number of issues, contending, *inter alia*, that the ADA does not preempt plaintiffs' claims, that plaintiffs were entitled to amend their complaint; and that the court erred in dismissing the complaint with prejudice where there were material and genuine disputed questions of facts. We hold that all of plaintiffs' claims are barred by the Contract of Carriage, that there were no genuine issues of material fact to preclude dismissal; and that the trial court did not abuse its discretion in denying their motion to amend. Accordingly, we affirm.

¶ 3 I. FACTS

¶ 4 Plaintiffs purchased three tickets from defendant to travel from Fort Lauderdale, Florida, to Chicago, Illinois, on May 2, 2015. They were scheduled to travel on Flight 152 on June 15, 2015. However the flight was cancelled due to inclement weather. Defendant, in accordance with its Contract of Carriage, rebooked plaintiffs on the same flight number, Flight 152, but for travel the next day, June 16, 2015. As a condition of their ticket purchases and travel on defendant, plaintiffs agreed to be bound by defendant's Contract of Carriage, which governs defendant's relationship with plaintiffs. The Contract of Carriage is available on defendant's website and notice of the contract was given to plaintiffs in the confirmation e-mail plaintiffs

admittedly received from defendant. Section 9(a) of the Contract of Carriage limits a passenger's remedy in the event of a cancelled flight to (1) rebooking a passenger at no additional charge on defendant's next flight(s) on which space is available to the passenger's intended destination; or (2) a refund of the unused portion of the passenger's fare. Plaintiffs eventually travelled back to Chicago on Flight 8837 on July 16, 2015.

¶ 5 Although plaintiffs were rebooked on the next available flight in accordance with the Contract of Carriage, plaintiffs filed a complaint against defendant alleging breach of contract, fraud, and a claim sounding in negligence. The trial court granted defendant's motion to dismiss and dismissed plaintiffs' complaint with prejudice on November 29, 2017.

¶ 6 Prior to the dismissal, plaintiffs filed a motion for sanctions on November 2, 2017. Following argument, the court denied the motion. In its order, the court specifically directed plaintiffs to cease filing frivolous motions and cautioned plaintiffs that they could be liable for fees incurred by defendant responding to future frivolous motions.

¶ 7 Plaintiffs filed a motion to reconsider the previous court orders, which the court denied in its entirety on January 12, 2018. On February 2, 2018, plaintiffs presented a motion to preserve issues for appeal, which was denied. The court initially imposed a $100 sanction on plaintiffs but reversed that decision and did not issue sanctions against either party, manually crossing out that portion of the order. Plaintiffs then filed a notice of appeal on February 8, 2018, and filed a corrected notice of appeal on February 13, 2018.

¶ 8 On March 26, 2018, plaintiffs filed an emergency motion to certify a bystander's report of proceedings for their appeal. The trial court denied the motion, noting that plaintiffs failed to present anything to the court before the hearing to review for certification of the bystander's report.

¶ 9 I. ANALYSIS

¶ 10 The trial court granted defendant's motion to dismiss plaintiff's claims on the basis that the claims were (1) barred by the Contract of Carriage under section 2-619(a)(9); (2) preempted by the ADA under section 2-619(a)(1); and (3) legally deficient under section 2-615. Although plaintiffs do not directly raise this issue, we begin our analysis by examining whether the trial court properly dismissed plaintiffs' claims on the basis of the Contract of Carriage under section 2-619(a)(9).

¶ 11 Section 2-619(a)(9) of the Code permits the involuntary dismissal of 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 2016). "The purpose of involuntary dismissal of actions pursuant to section 2-619(a)(9) of the Code based on an affirmative matter is to provide a mechanism to dispose of issues of law or easily proved issues of fact at the outset of litigation." *Coles-Moultrie Electric Co-op v. City of Sullivan*, 304 Ill. App. 3d 153, 158 (1999). When considering a motion to dismiss, we "must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). Our review is *de novo*. *Id*.

¶ 12 It is well established that a passenger enters a contract for carriage with a carrier when the passenger offers himself to ride on the carrier's transportation and the carrier expressly or impliedly accepts by carrying the passenger to the agreed-upon destination for a designated fare. *Howard v. Chicago Transit Authority*, 402 Ill. App. 3d 455, 458 (2010).

¶ 13 As stated, the terms set forth in section 9(a) of defendant's Contract of Carriage limits remedies of defendant's cancelled flights to (1) rebooking the passenger at no additional charge on defendant's next flight on which space is available to the passenger's destination; or (2) a

refund of the unused portion of the fare. Section 9(a)(4) of the contract further provides that, "except to the extent provided above in this Section 9(a), [defendant] shall not be liable for any failure or delay in operating any flight with or without notice for reasons of aviation safety or when advisable, in its sole discretion."

¶ 14 Plaintiffs' response to defendant's motion to dismiss admitted that the Contract of Carriage governed the parties' relationship; that they purchased three tickets from defendant; and that they received a confirmation e-mail, which incorporates the Contract of Carriage. Plaintiffs further admitted that defendant rebooked them on the next available flight at no charge after their flight was cancelled and that they ultimately arrived at their destination the next day. Thus, there is no question that defendant performed its contractual obligations to plaintiffs. Accordingly, any demand for relief in addition to the accommodations defendant already made to plaintiffs under the Contract of Carriage was expressly barred by section 9(a)(4). Because all five of plaintiffs' claims sought extra-contractual damages due to the cancellation of the original flight, the trial court's dismissal of plaintiffs' suit was proper because the contractual language of section 9(a)(4) governing these incidents unambiguously bars plaintiffs' claims as a matter of law under section 2-619(a)(9). On this basis alone, we may affirm the trial court's dismissal of plaintiffs' complaint. See *Krilich v. American National Bank and Trust Company of Chicago*, 334 Ill. App. 3d 563, 573 (the trial court's judgment may be affirmed on any basis that is supported by the record).

¶ 15 Plaintiffs argue that the trial court erred in dismissing their complaint because there were disputed issues of material fact. Here, defendant submitted the affidavit of Elizabeth Behrens, a customer relations specialist for defendant, in support of its motion to dismiss. She averred the following: plaintiffs purchased three tickets to travel on Flight 152 on June 15, 2015, from Ft.

Lauderdale, Florida, to Chicago, Illinois; the flight was cancelled due to weather; in accordance with defendant's Contract of Carriage, defendant rebooked plaintiffs on the same flight for travel the next day; and, plaintiffs ultimately traveled to Chicago on Flight 8837 on June 16, 2015. Behrens attached a copy of the Contract of Carriage in effect on the date plaintiffs booked their travel on Flight 8837 on June 16, 2015, and a copy of the ticketing confirmation email sent by defendant to plaintiffs. Plaintiffs never submitted a counter-affidavit or evidentiary material in response to defendant's motion, or otherwise refuted defendant's supporting affidavit. "[W]here a party moving for dismissal pursuant to section 2-619 files supporting affidavits containing well-pleaded facts and the party opposing the motion files no counteraffidavits, the facts set forth in the movant's affidavits are accepted as true despite any contrary assertions in the nonmovant's pleadings." *Wood v. Village of Grayslake*, 229 Ill. App. 3d 343, 349-50 (1992). Therefore, the trial court properly accepted the facts set forth in defendant's supporting affidavit as true despite any assertions to the contrary in plaintiffs' pleadings, and the court properly dismissed the complaint as a matter of law, finding there were no genuine issues of material fact to preclude dismissal. See *Id*.

¶ 16 Plaintiffs argue that they were entitled to amend their complaint. It is well-settled that plaintiffs do not have an absolute or unlimited right to amend pleadings. *McDonald v. Lipov*, 2014 IL App (2d) 130401 ¶ 47. "The decision to grant leave to amend a complaint rests within the sound discretion of the trial court and we will not reverse such a decision absent an abuse of that discretion" *Id*. We find no merit in plaintiffs' contention that the trial court should have granted them leave to amend. It is not an abuse of discretion to deny leave to amend a pleading where a proposed amendment is not submitted to the trial court. See *Ochoa v. Maloney*, 69 Ill. App. 3d 689, 693 (1979). While plaintiffs requested leave to amend, they failed to submit a

proposed amendment to the trial court, and thus, we cannot say that the trial court abused its discretion. Regardless, any amendment could not cure the defects in plaintiffs' pleading because plaintiffs are bound by the terms of the Contract of Carriage, which limits their remedies to rebooking on the next flight on which space is available to the passenger's intended destination or a refund of the unused portion of the passenger's fare. Since plaintiffs admitted that they were given seats on another flight and reached their destination in accordance with the Contract of Carriage, no amendment would cure any defective pleading. See *McDonald v. Lipov*, 2014 IL App (2d) 130401, ¶ ¶ 48, 49 (citing *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004) (when the proposed amendment would not cure a defective pleading, reviewing courts will often not proceed with further analysis).

¶ 17 By holding plaintiffs' claims are barred by an affirmative matter under section 2-619(a)(9), we need not address any of plaintiffs' remaining arguments on appeal, including their contention that the ADA does not preempt their claims.

¶ 18 For the reasons set forth above, we affirm the judgment of the circuit court of Kane County.

¶ 19 Affirmed.