

**NOTICE**

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-10-0555

Order Filed 4/18/11

IN THE APPELLATE COURT  
OF ILLINOIS

FOURTH DISTRICT

JAN KOTYNEK, M.D.,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
CARLE CLINIC ASSOCIATION, P.C.,	)	No. 10MR34
Defendant-Appellee.	)	
	)	Honorable
	)	Michael Q. Jones,
	)	Judge Presiding.

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JUSTICE McCULLOUGH delivered the judgment of the court.  
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

**ORDER**

*Held:* As the plaintiff's claim for relief was defeated by an affirmative matter, the trial court did not err in dismissing the plaintiff's complaint with prejudice; further, as the plaintiff failed to comply with Illinois Supreme Court Rule 191(b) (eff. July 1, 2002), the court did not abuse its discretion in denying the plaintiff's request for a continuance to conduct further discovery.

In July 2010, the trial court dismissed with prejudice the two-count first amended complaint of plaintiff, Jan Kotynek, M.D., and struck plaintiff's affidavit requesting a continuance to conduct further discovery under Illinois Supreme Court Rule 191(b) (eff. July 1, 2002). Plaintiff appeals, arguing the court erred by (1) dismissing his amended complaint with prejudice and (2) striking his Rule 191(b) affidavit. We affirm.

First, plaintiff argues the trial court erred when it

granted defendant's motion to dismiss plaintiff's amended complaint with prejudice under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2008)). Defendant, Carle Clinic Association, P.C., responds the court did not err because plaintiff was not entitled to his requested relief. We agree with defendant.

A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's complaint but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59, 857 N.E.2d 229, 236 (2006). We review the trial court's dismissal pursuant to section 2-619 *de novo*. *Id.* For purposes of this review, we accept as true all well-pleaded facts in the complaint, and we interpret all pleadings and supporting documents in the light most favorable to the plaintiff. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352, 882 N.E.2d 583, 588 (2008).

In this case, plaintiff claims entitlement to certain rights and compensation as a shareholder of defendant. Defendant maintains plaintiff is no longer a shareholder. Plaintiff's claim is governed by defendant's bylaws. A corporation's bylaws constitute a contract defining the rights and duties of the corporation and its shareholders with respect to each other. *Teschner v. Chicago Title & Trust Co.*, 59 Ill. 2d 452, 457, 322 N.E.2d 54, 57 (1974). These rights and duties are "subject at

all times to variation, modification or change to the extent that the articles [of incorporation or bylaws] could be amended from time to time." (Internal quotation marks omitted.) *Id.* at 458, 322 N.E.2d at 57.

The "words of corporate bylaws are to be interpreted in their ordinary, popular sense." *Maimon v. Sisters of the Third Order of St. Francis*, 120 Ill. App. 3d 1090, 1096, 458 N.E.2d 1317, 1321 (1983). In the specific context of defining the rights and responsibilities of shareholders with respect to a corporation, "the plain language of a corporation's bylaws is to be enforced [because] it is reasonable to believe the shareholders who took their shares in reliance on the bylaws intended the requirements of the bylaws as written." *Kern v. Arlington Ridge Pathology, S.C.*, 384 Ill. App. 3d 528, 532, 893 N.E.2d 999, 1004 (2008).

The heart of the parties' dispute is their disagreement concerning the effect that plaintiff's disability had on his status as a shareholder. In March 1990, plaintiff began working for defendant as a surgeon. In May 1992, plaintiff acquired 65 shares of Class A stock in defendant and, contemporaneously, entered an "Acceptance Agreement" acknowledging his consent to be bound as a shareholder by defendant's bylaws and articles of incorporation. In August 2008, plaintiff permanently ceased working for defendant and applied for long-term disability

benefits through defendant's insurer. In a letter dated October 17, 2008, defendant's insurer informed plaintiff he had been awarded insurance benefits for permanent and total disability. According to plaintiff, plaintiff received this letter on October 20, 2008.

Defendant's bylaws lay out the consequences of a Class A shareholder's total and permanent disability. Section 2.1 of the bylaws requires all shareholders to enter an acceptance agreement as plaintiff did. Further, it provides, in relevant part, "Holders of Class A shares shall remain shareholders until \*\*\* total and permanent disability as defined in Section 2.3 of these Bylaws." If a shareholder becomes totally and permanently disabled, section 2.1 provides, then "the corporation shall acquire the shareholder's shares of Class A shares in the corporation in accordance with Section 7.3.1 of these Bylaws."

Section 2.3 of the bylaws defines permanent and total disability. It provides, in relevant part:

"A shareholder who is unable to engage in his/her professional practice for a continuous period of six \*\*\* months from the date the shareholder is notified his/her disability is approved by the provider of [defendant's] long term disability plan and devotes less than 50% of the normal working

time of a full-time shareholder to professional practice at [defendant] as provided in Section 2.1, shall be deemed to be totally and permanently disabled and shall relinquish his/her right to hold Class A shares in [defendant]."

Section 2.3 further sets forth a procedure for extending this six-month period.

Section 7.2 of the bylaws provides, in the event of a shareholder's total and permanent disability, defendant "shall have the right and obligation to acquire the shares of such shareholder." Section 7.3.1 further defines this obligation. It provides, in relevant part:

"[I]f any holder of Class A shares \*\*\* is totally and permanently disabled, \*\*\* then immediately upon the happening of that event all shares of [defendant] theretofore held by that person shall be purchased and become owned by and shall be, without further action, the property of [defendant] \*\*\*. [Defendant] shall immediately become obligated to pay to that holder \*\*\*, as the purchase price for the shares so acquired by [defendant], the amount per share equal to the

Repurchase Price \*\*\*. The Repurchase Price for all purchases hereunder shall be paid by [defendant] to the shareholder[] \*\*\* not later than [30] days after the event which occasioned the purchase."

In turn, section 7.5 of the bylaws provides a formula for calculating the "Repurchase Price."

Plaintiff contends he remains a shareholder of Class A stock in defendant despite his total and permanent disability as defendant failed to exercise what plaintiff characterizes as defendant's right to repurchase plaintiff's shares within 30 days of his disability. This is significant because, in connection with a merger that occurred after plaintiff became disabled, defendant's Class A shares were bought out at a fair-market price allegedly 20 times the repurchase price provided for in the bylaws. Under plaintiff's interpretation of the bylaws, plaintiff would be entitled to compensation at the rate negotiated in the merger, allegedly totaling more than \$900,000 for his 65 Class A shares. Defendant maintains plaintiff automatically ceased to be a shareholder under the bylaws when he became totally and permanently disabled. According to defendant, plaintiff is merely entitled to the repurchase price for his shares, totaling \$48,159, plus interest from the date by which plaintiff's shares should have been repurchased. We agree with

defendant that plaintiff is no longer a shareholder.

Plaintiff's position that his disability gave defendant, essentially, a 30-day option to repurchase plaintiff's shares for the repurchase price lacks merit. Defendant's bylaws unambiguously provide plaintiff ceased to be eligible to hold Class A shares of defendant on April 20, 2009, when he became totally and permanently disabled within the meaning of the bylaws. At that point, as he did not file for an extension of the six-month period following the insurance provider's notification that it had approved his claim for disability benefits, plaintiff was required to relinquish his right to hold his Class A shares. In exchange for this relinquishment, plaintiff became entitled to receive the repurchase value of the shares within 30 days. The bylaws do not contemplate that a shareholder whose disability disqualifies him from retaining his Class A stock would receive any compensation for his shares other than the repurchase price regardless of any possible fluctuation in their fair-market value. Plaintiff is not entitled to retain his shares or to be compensated for their fair-market value determined in light of events occurring after he was disqualified from owning them.

As plaintiff's claims for relief are refuted by the terms of his shareholder agreement, plaintiff's first amended complaint was properly dismissed with prejudice pursuant to

defendant's section 2-619 motion.

Next, plaintiff argues the trial court erred by striking his Rule 191(b) affidavit requesting a continuance to perform discovery. Defendant responds the court did not err since plaintiff's affidavit was deficient. We agree with defendant.

The granting or denial of a motion to continue lies within the sole discretion of the trial court, and the disposition of such a motion will not be overturned absent an abuse of discretion. *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 692, 737 N.E.2d 662, 670 (2000).

Illinois Supreme Court Rule 191(b) (eff. July 1, 2002) permits a trial court to grant a continuance to conduct further discovery if a party cannot obtain an affidavit containing material facts. An affidavit requesting such a continuance must name the persons in possession of the material facts, show why their affidavits cannot be obtained and what the affiant believes they would testify to if sworn, and indicate the basis of such belief. Ill. S. Ct. R. 191(b) (eff. July 1, 2002); see also *Williams*, 316 Ill. App. 3d at 692, 737 N.E.2d at 670. In general, "a party who fails to comply with Rule 191(b) may not complain on appeal that the trial court allowed an insufficient time for discovery." *Id.* at 692, 737 N.E.2d at 671.

In this case, plaintiff inadequately complied with Rule 191(b). In his affidavit, plaintiff requested a continuance to



depose three current and former employees of defendant whose affidavits were attached to defendant's motion to dismiss. While his affidavit named the persons whose depositions he sought and the reason why their affidavits could not be procured, plaintiff failed to indicate what he believed they would testify to and the source of his belief. Accordingly, the trial court did not abuse its discretion in striking plaintiff's affidavit and denying the continuance he requested therein.

For the reasons stated, we affirm the circuit court's judgment.

Affirmed.