2016 IL App (5th) 150009-U

NO. 5-15-0009

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LAURIE PIECHUR, Individually and on Behalf of All Others Similarly Situated,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiff-Appellant,	)	
v.	)	No. 09-L-562
REDBOX AUTOMATED RETAIL, LLC,	)	Honorable Vincent J. Lopinot,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Where the plaintiff has failed to state a cause of action under either the Rental-Purchase Agreement Act (815 ILCS 655/0.01 *et seq.* (West 2012)) or the Automatic Contract Renewal Act (815 ILCS 601/1 *et seq.* (West 2012)), the trial court's denial of her motion for class certification and dismissal of her individual claims is affirmed.

¶ 2 The appellant, Laurie Piechur (Piechur), filed a class action complaint against the appellee, Redbox Automated Retail, LLC (Redbox), alleging that Redbox violated the Rental-Purchase Agreement Act (Rental Agreement Act) (815 ILCS 655/0.01 *et seq.* (West 2012)) and the Automatic Contract Renewal Act (Automatic Renewal Act) (815 ILCS 601/1 *et seq.* (West 2012)) by charging its customers undisclosed late fees for

rented DVDs, which accumulated automatically, without following the statutory requirements of the Rental Agreement Act and without any of the required disclosures necessitated by the Automatic Renewal Act. Piechur also filed a motion for class certification, seeking certification of four proposed classes in connection with consumers who were charged these undisclosed late fees. The trial court denied class certification. Following the denial of class certification, Redbox filed a motion to dismiss Piechur's individual claims pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)). The court thereafter dismissed the individual claims. For the reasons which follow, we affirm the decision of the circuit court.

¶ 3 Redbox rents and sells DVDs to consumers through automated, self-service kiosks located at various retail outlets throughout the United States. Redbox requires consumers to use credit or debit cards to rent or purchase their DVDs. During the time period in question, Redbox charged consumers $1 per day for the rental (plus tax, if applicable).[1] The consumer must return the DVD to any Redbox kiosk by 9 p.m. the following night or automatically incur an additional $1 charge. The $1 daily rental fee continues to accrue until either the DVD has been returned to any Redbox kiosk or the consumer has retained the DVD for 24 additional nights, thereby incurring an automatic total charge of $25, at which point the consumer becomes the owner of the DVD. The rental agreement terminates when either the consumer returns the rented DVD to any Redbox kiosk or the consumer retains the DVD for 25 days. At the time relevant to the complaint, these terms

[1]The rental price for the DVDs has since increased.

were displayed on large stickers on the Redbox kiosks, were available for review on all Redbox kiosks during a rental transaction, and were located on the Redbox website. Redbox also displayed its toll-free number on the kiosks and the website in case a consumer had any questions about a rental.

¶ 4 The record indicates that Piechur rented three DVDs from Redbox and returned all three movies two days later, incurring a $3 charge in addition to the $3 initial charge for the first rental day. During her deposition, Piechur testified that she subsequently rented three more DVDs, but never returned them. However, the Redbox records contained in the record on appeal indicate that she instead rented two DVDs, which were never returned to a Redbox kiosk. Although she incurred a $50 charge for this transaction, the prepaid card that Redbox had on file for automatic charges declined the transaction. During the course of the lawsuit, Piechur tendered $50 to Redbox in payment of this obligation, but the tender was not accepted.

¶ 5 On October 21, 2009, Piechur filed a seven-count class action complaint against Redbox, which was thereafter amended by interlineations on April 19, 2012. In October 2012, Piechur voluntarily dismissed five of the seven counts asserted in her amended complaint, with the two remaining causes of action based exclusively on the Rental Agreement Act and the Automatic Renewal Act. According to her complaint, the transaction between Redbox and its consumers constituted a rental-purchase agreement, which is defined by section 1(6) of the Rental Agreement Act (815 ILCS 655/1(6) (West 2012)) as "an agreement for the use of merchandise by a consumer for personal, family or household purposes for an initial period of 4 months or less that is automatically

renewable with each payment after the initial period and that permits the consumer to become the owner of the merchandise." Because the Redbox agreement constituted a rental-purchase agreement, it must comply with the statutory requirements set forth in the Rental Agreement Act. The complaint alleged that Redbox had violated section 2(c)(5) of the Rental Agreement Act (815 ILCS 655/2(c)(5) (West 2012)), which prohibits a rental-purchase agreement from containing the following provision:

> "[a provision] requiring the payment of a late charge or reinstatement fee unless a periodic payment is delinquent for 3 days and the charge or fee is in an amount not more than $5."

Section 2(d) of the Rental Agreement Act (815 ILCS 655/2(d) (West 2012)) provides that "[o]nly one late charge or reinstatement fee may be collected on a payment regardless of the period during which it remains in default." Furthermore, the rental-purchase agreement must provide that "a charge in addition to periodic payments, if any, must be reasonably related to the service performed." 815 ILCS 655/2(e)(1) (West 2012). According to the complaint, Redbox had violated the above sections of the Rental Agreement Act in that it had charged a late fee for a delinquency less than three days and also charged a "maximum charge" of $25 for ownership of an unreturned DVD, which amount was not reasonably related to the price of a new, retail DVD.

¶ 6 In addition, the complaint alleged that the contract between Redbox and its consumer was a contract that automatically renewed until cancelled by the consumer and, therefore, must comply with the Automatic Renewal Act. Section 10(a) of the Automatic

Renewal Act provides as follows with regard to contracts that automatically renew until canceled by the consumer:

> "Any person, firm, partnership, association, or corporation that sells or offers to sell any products or services to a consumer pursuant to a contract, where such contract automatically renews unless the consumer cancels the contract, shall disclose the automatic renewal clause clearly and conspicuously in the contract, including the cancellation procedure." 815 ILCS 601/10(a) (West 2012).

The complaint alleges that Redbox has violated section 10(a) of the Automatic Renewal Act because its "Terms of Use" did not "clearly and conspicuously" disclose the automatic renewal clause or the cancellation procedure.

¶ 7 Piechur also filed an amended motion for class certification,[2] seeking certification of the following classes:

> "(1) Late Fee Class (IL Only 2004-2009): All persons in Illinois, who, from January 1, 2004 until January 1, 2009, rented a DVD disc from a Redbox kiosk, returned the disc and were charged more than $5.00.
>
> (2) Maximum Charge Class (IL Only 2004-2009): All persons in Illinois, who, from January 1, 2004 until January 1, 2009, rented a DVD disc from a Redbox kiosk and were charged the 'Maximum Charge' for the disc.

[2]In Piechur's first motion, she defined two proposed classes. In the amended motion, she redefined those classes as well as added two more proposed classes.

(3) Late Fee Class: All persons in the United States, who, from January 1, 2009 until the date of final judgment, rented a DVD disc from a Redbox kiosk, returned the disc and were charged more than $5.00.

(4) Maximum Charge Class: All persons in the United States, who, from January 1, 2009 until the date of final judgment, rented a DVD disc from a Redbox kiosk and were charged the 'Maximum Charge' for the disc."

¶ 8 On August 8, 2012, Redbox filed an objection to Piechur's motion for amended class certification, arguing that class certification was not appropriate in this case for the following reasons, in pertinent parts: (1) Piechur failed to state a claim under the Rental Agreement Act as it was not applicable to the rental of DVDs from a Redbox kiosk; (2) Piechur failed to state a claim under the Automatic Renewal Act as it was not applicable to the rental of DVDs from a Redbox kiosk; (3) Piechur was not an adequate class representative for any of the four proposed classes as she had never paid Redbox more than $5 for any single DVD rental nor had she paid the $25 maximum charge before the lawsuit was filed; (4) Piechur did not have a viable claim as Redbox's rental fees and terms were disclosed in multiple places and Piechur admitted in her deposition testimony that the rental fees and terms were fully understood by her when she rented the DVDs from the Redbox kioks; (5) the four proposed classes were not objectively ascertainable because the trial court would have to determine whether each potential class member was either deceived by or understood Redbox's "Terms of Use" "and common-sense method of ending the rental"; and (6) common questions of fact did not predominate because determining whether proposed class members were actually deceived by Redbox's

"Terms of Use" and method of ending the rental period would require an individualized inquiry into each potential class member.

¶ 9 On May 21, 2013, after considering the arguments of counsel, the trial court entered an order denying class certification. First, the court concluded that Piechur had failed to state a cause of action under the Rental Agreement Act as well as the Automatic Renewal Act. As for the Rental Agreement Act, the court found that Redbox's rental contracts were not "rent-to-own" contracts, as defined by section 1(6) of the Rental Agreement Act (815 ILCS 655/1(6) (West 2012)). The court found that there was no automatic renewal of the Redbox rental agreement with "each payment" and, at most, Redbox customers made a payment at the start of each rental period and at the end of the rental period.

¶ 10 In the alternative, the trial court found that Redbox had not violated section 2(c)(5) of the Rental Agreement Act (815 ILCS 655/2(c)(5) (West 2012)) in that Redbox did not charge late or restatement fees for delinquent periodic payments in addition to the $1 daily rental fee nor did it charge its customer periodic payments.

¶ 11 With regard to the Automatic Renewal Act, the trial court concluded that Piechur had not stated a cause of action as Redbox's agreements with its customers did not automatically renew. Instead, those agreements automatically terminated upon the return of the rented DVD to any Redbox kiosk or after 25 days. The court found that there was a single contract formed between Redbox and its customers with each rental and each rental agreement had a duration that lasted as long as the customer wanted, up to 25 days.

The accruing rental fees ceased upon the return of the rented DVD to any Redbox kiosk or after 25 days, whichever occurred sooner. Therefore, there was no renewal.

¶ 12 Alternatively, the trial court found that Redbox had not violated section 10(a) of the Automatic Renewal Act (815 ILCS 601/10(a) (West 2012)), in that Redbox's rental return procedure was clearly and conspicuously disclosed and that Piechur fully understood how to terminate the rental agreements with Redbox.

¶ 13 In addition, the trial court denied class certification because Piechur did not establish the requisite elements for class certification. The court determined that Piechur was an inadequate class representative of any of the proposed four classes because she was not a member of any of the proposed classes. Specifically, the court found that Piechur never paid more than $2 to Redbox for any DVD she rented and returned to Redbox in 2008; she never paid the $25 maximum charge for any of the rented DVDs before the lawsuit was filed as her card on file declined the charges, and her Redbox DVD rentals took place exclusively in 2008.

¶ 14 The trial court also found that Piechur had not shown predominance of common questions of fact and law for the following reasons: adjudication would require an individualized determination of which Redbox "Terms of Use" applied to each individual purported class member; adjudication of the claims of each class member would require an individualized determination as to whether each purported class member understood the Redbox "Terms of Use" then in effect for his or her rental; the choice of law clauses contained in the Redbox 2009 and 2011 "Terms of Use" applied only to contract claims and not statutory claims, which rendered the law of the place where the DVD was rented

the law applicable to each purported class member's claim; and individualized evidence would be required to determine whether customers knowingly or intentionally kept the DVDs that they rented.

¶ 15 Furthermore, the trial court concluded that Piechur failed to show that her proposed class action was an appropriate method to resolve the dispute as the Redbox "Terms of Use" in effect before 2009 and in 2011 required that all disputes be tried in federal or state court in Du Page County, Illinois, and these venue provisions had not been waived with regard to other Redbox customers. The court found that Piechur's claims concerned statutes that did not have extraterritorial application and that, without a basis to apply these Illinois statutes to non-Illinois residents, the proposed class action was not appropriate to resolve any claims by such persons. Thus, the court denied Piechur's motion for class certification.

¶ 16 Following the denial of class certification, Piechur proceeded with the case on an individual basis. On May 14, 2014, Redbox filed a motion to dismiss Piechur's individual claims pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). In the motion, Redbox noted that in an effort to "expedite the efficient conclusion" of the lawsuit, it had tendered to Piechur $11, constituting the approximate value of the total amount of payments that Piechur made for DVD rentals at issue in her amended complaint as well as interest. Thus, the motion argued that Piechur's claims were moot and must be dismissed. In addition, the motion argued that Piechur's claims should be dismissed pursuant to the doctrine of *de minimis non curat lex* ("The law does not concern itself with trifles." Black's Law Dictionary 443 (7th ed. 1999)). Further, the

motion argued Piechur's complaint should be dismissed as she failed to state a cause of action either under the Rental Agreement Act or the Automatic Renewal Act.

¶ 17 On December 11, 2014, the trial court granted Redbox's motion to dismiss Piechur's claims pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). Piechur appeals the denial of class certification as well as the dismissal of her individual claims.

¶ 18 We will first address Piechur's claims related to the circuit court's denial of class certification.

¶ 19 The circuit court's decision regarding class certification is within the sound discretion of the court and will not be disturbed on appeal unless the circuit court abused its discretion or applied impermissible legal criteria. *Coy Chiropractic Health Center, Inc. v. Travelers Casualty & Surety Co.*, 409 Ill. App. 3d 1114, 1118 (2011). Section 2-801 of the Code establishes four prerequisites for the maintenance of a class action claim. Those prerequisites are as follows: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801 (West 2012). The party seeking class certification bears the burden of establishing all four of the prerequisites. *Coy Chiropractic Health Center, Inc.*, 409 Ill. App. 3d at 1118.

¶ 20 However, a trial court does not need to determine whether the prerequisites for a class action are satisfied, if, as a threshold matter, the record establishes that the plaintiffs have not stated an actionable claim. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 72 (2007). A named representative must have a valid cause of action. *Cwik v. Topinka*, 389 Ill. App. 3d 21, 32 (2009). Thus, before we determine whether Piechur has established the four prerequisites necessary in order to maintain a class action, we must first consider whether she has stated an actionable claim under the Rental Agreement Act and/or the Automatic Renewal Act.

¶ 21 The Rental Agreement Act governs rental-purchase agreements, which are defined as follows: "an agreement for the use of merchandise by a consumer for personal, family or household purposes for an initial period of 4 months or less that is automatically renewable with each payment after the initial period and that permits the consumer to become the owner of the merchandise." 815 ILCS 655/1(6) (West 2012).

¶ 22 In this case, the trial court concluded that Piechur did not state an actionable claim under the Rental Agreement Act. As previously stated, the court found that Redbox's rental contracts with consumers were not rent-to-own contracts as defined by the Rental Agreement Act. The court concluded that there was no automatic renewal of the Redbox rental agreement with "each payment" and that, at most, Redbox customers make a payment at the start of each rental and then at the end of the rental. The court noted that Piechur was assessed $1 plus tax for each DVD at the inception of the rental and was charged the balance that had accrued at the end of each rental. Thus, the court determined that there was no renewal after a payment.

¶ 23 Because we agree with the trial court that Redbox's rental agreements with its consumers are not automatically renewable "with each payment," we find that Redbox's rental agreement does not fit within the definition of a rental-purchase agreement. As previously explained, Redbox charges consumers a $1-per-day rental fee for rented DVDs. If the consumer does not return the DVD to a Redbox kiosk by 9 p.m. the following night, then the consumer will incur a charge based on the amount of time that he or she has retained the DVD. Thus, there is no automatic renewal with each payment, and we conclude that Redbox's rental agreement with its consumer does not fit within the definition of rental-purchase agreement as defined by the Rental Agreement Act. Accordingly, Piechur does not have an actionable claim under the Rental Agreement Act.

¶ 24 The Automatic Renewal Act governs contracts that automatically renew unless the consumer cancels the contract. 815 ILCS 601/10(a) (West 2012). Section 10 of the Automatic Renewal Act (815 ILCS 601/10(a) (West 2012)) requires that an automatic renewal contract "disclose the automatic renewal clause clearly and conspicuously in the contract, including the cancellation procedure."

¶ 25 In the present case, the trial court found that Piechur does not have an actionable claim under the Automatic Renewal Act. According to the court, Redbox's agreements with its consumers do not renew automatically. The court concluded that, instead, Redbox's agreement with its consumers terminate automatically upon the return of the rented DVD to any Redbox kiosk or after 25 days. The court determined that there was a single contract formed with each rental and that the rental fees charged to consumers cease accruing upon the return of the rented DVD or after 25 days, whichever occurs

sooner. Therefore, the court found that there was "no renewal, let alone an automatic one."

¶ 26 Piechur argues that the following language used in Redbox's "Terms of Use" which makes reference to the "rental periods," "initial Rental Period," "additional Rental Period," and "1st Rental Period through and including a 24th Rental Period" supports its position that Redbox's contracts are multiple one-day contracts that automatically renew. Further, Piechur points to the deposition testimony of Redbox president and CEO Mitch Lowe where he responded "I think that's how I understand it" to the following question: "Would you say that that this is a contract that automatically renews day-to-day up to the 25th day?" According to Piechur, the language used in the "Terms of Use" and Lowe's deposition testimony establishes that Redbox's contracts with its consumers are "not *** single 25 day contract[s] that the customer[s] can terminate early."

¶ 27 However, after carefully reviewing the record, we conclude that Redbox's "Terms of Use" establishes a single rental agreement with its consumers. Unlike the rental agreement at issue in *Pulcini v. Bally Total Fitness Corp.*, 353 Ill. App. 3d 712, 718 (2004), the contract created between Redbox and its consumers does not automatically renew indefinitely until the consumer actively cancels the contract. Redbox's agreement with its consumers does not automatically renew after each 24-hour period but instead continues until either the DVD is returned to any Redbox kiosk or 25 days, whichever is less; at which point, the contract then automatically terminates. Thus, we conclude that Piechur does not have an actionable claim under the Automatic Renewal Act.

¶ 28 Because we conclude that Piechur does not have an actionable claim under either the Rental Agreement Act or the Automatic Renewal Act, we need not determine whether Piechur has satisfied the four class prerequisites. Thus, we conclude that the lawsuit as presently constituted should not proceed as a class action. In making this decision, we recognize that Piechur has argued that the denial of class certification directly conflicts with previous orders entered by the trial court.[3] However, the entry of the previous orders did not prevent the trial court from subsequently denying class certification after the court was presented with a complete record. Thus, we affirm the circuit court's denial of class certification.

¶ 29 The second issue on appeal is whether the trial court erred in dismissing Piechur's individual claims based on the Rental Agreement Act and the Automatic Renewal Act.

¶ 30 Following the denial of class certification, Redbox filed a motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)), based on the following three grounds: that Piechur's individual claims were moot where Redbox had

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[3]Redbox had filed a motion to dismiss Piechur's original complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), which was summarily denied by the trial court on May 27, 2010. Redbox thereafter filed a motion for summary judgment based on the original complaint, which was denied by the court on February 24, 2012. Last, Redbox filed a combined motion to dismiss the amended complaint pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)), which was denied by the court on August 16, 2012.

tendered a check for $11, representing the amount that had accrued for the rentals plus interest, in an attempt to resolve any potential claims; Piechur's claims should be dismissed under the doctrine of *de minimis non curat* as her potential claims amount to no more than $11; and the court had previously ruled that Piechur's class action complaint failed to state an actionable claim based on the Rental Agreement Act or the Automatic Renewal Act.

¶ 31 The trial court dismissed Piechur's individual claims, but did not identify which of the three bases that it relied on in making this decision. However, it is well established that we may affirm on any basis or ground for which there is a factual basis regardless of the trial court's reasoning. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 586 (2005).

¶ 32 With regard to the third ground, that the trial court denied class certification based on its finding that Piechur had failed to state an actionable claim under either the Rental Agreement Act or the Automatic Renewal Act, Piechur argues that this issue is not an appropriate ground for dismissal to be considered pursuant to a section 2-619 motion.

¶ 33 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats plaintiff's claim. *Hassebrock v. Ceja Corp.*, 2015 IL App (5th) 140037, ¶ 24. Section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)) allows for the dismissal of a cause of action based on one of the nine enumerated defenses. Piechur argues that only section 2-619(a)(9), which permits dismissal where 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 2014)), could apply to the mootness issue raised by Redbox. Piechur

argues that the remaining two grounds for dismissal, failure to state a cause of action and the doctrine of *de minimis non curat lex*, do not fall within one of the enumerated nine defenses and, therefore, mootness, is the only arguably proper section 2-619 argument that Redbox can make in its motion to dismiss.

¶ 34 Piechur contends that Redbox's argument that she has failed to state a cause of action should have been brought in a section 2-615 motion to dismiss. A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint. *Barber-Colman Co. v. A&K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1068 (1992). Unlike a section 2-619 motion, a section 2-615 motion does not raise affirmative defenses, and instead, attacks only defects apparent on the face of the complaint. *Id.* Thus, "[a]llegations pertaining to a complaint's failure to state a cause of action must be raised pursuant to section 2-615 of the Code, not section 2-619." *Fremont Compensation Insurance Co. v. Ace-Chicago Great Dane Corp.*, 304 Ill. App. 3d 734, 738 (1999). However, notwithstanding Piechur's argument that Redbox improperly raised the failure to state a claim argument in a section 2-619 motion, we will consider this issue as Piechur has had the opportunity to respond to the merits of Redbox's motion to dismiss and in fact did so before the trial court. See *id.* (the First District considered the merits of defendant's attack on the legal sufficiency of plaintiff's complaint based on its failure to state a cause of action even though that issue was improperly brought under a section 2-619 motion to dismiss in the interests of judicial economy and because plaintiff had an opportunity to respond to the merits of the motion).

¶ 35 Turning to the merits of Redbox's motion to dismiss, we conclude that the trial court did not err in dismissing Piechur's individual claims. As we have already concluded, Piechur has failed to state an actionable claim pursuant to either the Rental Agreement Act or the Automatic Renewal Act. Thus, we affirm the trial court's dismissal of her individual claims.

¶ 36 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 37 Affirmed.