2024 IL App (1st) 230289-U

THIRD DIVISION
March 29, 2024

No. 1-23-0289

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BARROWS LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 21 L 12769
	)	
MAGELLAN PARCEL C/D, LLC,	)	Honorable
	)	Mary Colleen Roberts,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Van Tine concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the dismissal of an amended complaint for breach of contract under section 2-615 of the Code of Civil Procedure where the operative complaint fails to adequately allege that the plaintiff performed under the contract.

¶ 2 Barrows LLC (Barrows) and Magellan Parcel C/D LLC (Magellan) entered into an advisory services agreement (agreement). After Magellan allegedly failed to pay Barrows under the agreement, Barrows filed a breach of contract action in the circuit court of Cook County. On appeal, Barrows challenges a circuit court order dismissing its amended complaint with prejudice under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2020)). For the reasons discussed below, we affirm.

¶ 3 BACKGROUND

¶ 4 Barrows filed a complaint against Magellan for breach of the agreement. After Magellan filed a motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2020)), the circuit court dismissed the complaint under section 2-615 (735 ILCS 5/2-615 (West 2020)) with leave to amend.

¶ 5 *Amended Complaint*

¶ 6 Barrows filed an amended complaint which alleged, in part, as follows.

¶ 7 Andrew Oksner (Oksner) is the managing member of Barrows, a Delaware limited liability company. Oksner is also the managing member of Campanile LLC.

¶ 8 Magellan, an Illinois limited liability company, was (or is) a member of Parcel C LLC (Parcel LLC). Parcel LLC purchased the land and developed the building previously known as the Wanda Vista Tower, now known as The St. Regis, a multi-use luxury high rise located on the Chicago Riverwalk (Chicago project).

¶ 9 Magellan partnered with Wanda Chicago Real Estate LLC (Wanda), an Illinois limited liability company, to develop the Chicago project. Wanda is a subsidiary of Wanda Hotel Development Company Limited, a Bermuda company listed on the Hong Kong Stock Exchange, and 40% owned by subsidiaries of Dalian Wanda Group, a conglomerate headquartered in China. In 2018, Dalian Wanda Group – under economic and political pressure in China – decided to sell its investments in the United States, including the Chicago project and a development project in Beverly Hills, California (Beverly Hills project).

¶ 10 In July 2018, Campanile LLC was retained by the Wanda organization on a non-exclusive basis to assist in disposing of Wanda's investments in the Chicago project and the Beverly Hills project. According to the amended complaint, the custom in China is that such consultants are

paid on a contingent basis at sale by the buyer.

¶ 11 Oksner and Campanile LLC were introduced to Dalian Wanda Group by Xinghong Hua (Hua), a Chinese national with whom they had conducted other business in the past. During 2018 and 2019, Oksner/Campanile LLC and Hua devoted substantial time and their own funds to locating and negotiating with potential buyers of the Chicago project and the Beverly Hills project, *e.g.*, Oksner estimated that he spent 1000 hours on the Wanda dispositions.

¶ 12 Although Campanile LLC made certain introductions to sell the Beverly Hills project, Wanda ultimately sold the project directly to the owner of an adjacent parcel. Oksner/Campanile LLC and Hua did not receive any payment in connection with the Beverly Hills project sale.

¶ 13 Most of the work performed by Oksner/Campanile LLC and Hua related to the disposition of Wanda's interest in Parcel LLC and the Chicago project. Out of the 10 to 20 investors contacted, the most promising potential acquiror was "Victory" (a pseudonym). As discussions with Victory advanced, Oksner attended meetings in New York with Victory, its financing source, and its potential partner which would lead certain rebranding and design of the Chicago project. According to the amended complaint, the Victory transaction eventually failed, as Victory would not pay the desired price, and Victory and Magellan could not agree on how to work together.

¶ 14 The amended complaint alleged that, after the Victory deal collapsed, it became apparent that Magellan wanted to buy out Wanda's 90% share. Wanda asked Oksner and Hua to continue to be involved in the disposition of Parcel LLC and the Chicago project. Wanda felt that the continued involvement of Oksner and Hua would maximize the probability of a successful closing of the transaction. The decision was made to use Barrows – a different limited liability company managed by Oksner – as the consultant entity for the Magellan negotiations.

¶ 15 Magellan commenced negotiations with Wanda to acquire Wanda's ownership in Parcel LLC, and thus the Chicago project. According to the amended complaint, Magellan knew Wanda wanted Magellan to compensate Oksner and Hua for the work they had performed on the disposition of Parcel LLC and the Chicago project. Barrows and Magellan thus entered into the agreement in January 2020. The agreement was edited and approved by both the general counsel and the chief executive officer (CEO) of the Magellan entities.

¶ 16 The agreement – which was appended to the amended complaint – stated that Magellan engaged Barrows to assist Magellan in acquiring Wanda's ownership interest in the Chicago project. Pursuant to the agreement, Barrows was entitled to a "success fee" equal to 2% of the total amount paid to Wanda for the Chicago project, even if not entirely funded by Magellan or if the funding was not procured by Barrows. The fee would be payable only if the total payment amount equaled a "[p]roject discount" of at least $35 million and $0 for any transfer fees.[1] The term of the agreement was until December 31, 2020, but the agreement could be terminated upon 30 days prior written notice by either party. The agreement stated that it "embodies the entire understanding of the parties and shall supersede all previous communications, representations, or undertakings, either verbal or written between the parties related to the subject matter hereof."

¶ 17 In the amended complaint, Barrows alleged it had provided the contracted-for services in assisting Magellan in acquiring Wanda's share of the Chicago project. Barrows checked with Magellan as to the status of the project and was told to remain on standby. Barrows also communicated with Dalian Wanda during the term of its Magellan engagement. According to the amended complaint, Barrows was "continually available" to assist Magellan in its acquisition

[1] The agreement further provided: "If the discount is less than $35 million and/or the transfer fees are more than $0, then the Fees will be reduced by the discount amount that is less than $35 million and the transfer fee amount that is more than $0."

of Parcel LLC and the Chicago project.

¶ 18 The amended complaint alleged that Magellan knew that, based on Chinese custom, Barrows was entitled to compensation as Wanda's sales consultant or broker, without regard to whether and to what extent Magellan utilized Barrows' services. The amended complaint further alleged that Magellan derived "tremendous benefits" from the work Oksner and Hua performed with Victory and by having them available during the term of the agreement. For example, Magellan used the same hotel brand (St. Regis) and the same senior lender (J.P. Morgan Chase) as Victory was planning to use.

¶ 19 In July 2020, Magellan and Wanda entered into a membership purchase agreement, whereby Magellan was to purchase Wanda's membership interest in Parcel LLC and to repay Wanda's loans to Parcel LLC. According to the amended complaint, a substantial portion of the purchase price was financed by Wanda at below market interest rates.

¶ 20 In August 2020, Oksner emailed the Magellan CEO to congratulate him on the pending sale. The CEO thanked Oksner but stated that he assumed Oksner understood that no fee would be due, as Magellan had not obtained a discount from Wanda. The amended complaint alleged, however, that the ultimate purchase price did, in fact, represent a discount of at least $35 million within the meaning of the agreement. Barrows thus maintained that its fee was 2% of the price paid by Magellan for Wanda's membership interest in Parcel LLC, minus transfer fees, *i.e.*, at least $5.4 million. According to the amended complaint, Magellan breached the agreement when it failed to pay Barrows upon the closing of the transaction with Wanda on November 24, 2020.

¶ 21 *Motion to Dismiss and Ruling*

¶ 22 Magellan filed a motion to dismiss the amended complaint pursuant to section 2-615 of the Code, as well as a supporting memorandum, which provided, in part, as follows.

¶ 23 Magellan initially argued that Barrows could not demonstrate that it performed under the agreement. Magellan observed that the agreement was expressly governed by Illinois law and did not refer to Chinese custom. According to Magellan, if Wanda wanted it to pay Wanda's broker or consultant of choice, then such obligation could have been included in the membership purchase agreement between Wanda and Magellan. Magellan also argued that the agreement repeatedly referred to "services" to be provided by Barrows. Given the inclusion of an integration clause in the agreement – which provided that the agreement embodied the entire understanding of the parties – Magellan maintained that Barrows agreed to perform services but admittedly did nothing.

¶ 24 Magellan next contended that Barrows' construction of the agreement was "fatally flawed," *i.e.*, if the parties intended for Barrows to be entitled to an advisory fee regardless of whether it provided advisory services, then there was no need for the contractual provision which permitted either party to terminate the agreement. According to Magellan, even assuming that the agreement could be construed to mean that Barrows earned a fee regardless of whether it provided services, Barrows' promise to perform under the agreement was "clearly illusory" and thus inadequate to support a claim that an enforceable contract existed.

¶ 25 Finally, Magellan argued that the agreement was properly terminated prior to the November 2020 closing and that the agreement did not include a provision that would impose an obligation to pay the success fee notwithstanding the termination.

¶ 26 In its response to the motion to dismiss, Barrows argued that many businesses – *e.g.*, landlords, lawyers, accountants, consultants, brokers, bankers, and snow removal services – routinely charge for access to services without regard to whether or how frequently those services are used. According to Barrows, Wanda's desire that Magellan compensate Barrows for

the work already performed by Barrows' principals in connection with the Chicago project constituted consideration, "for if Wanda had agreed to pay Barrows directly it undoubtedly would have insisted Magellan pay more, so that Wanda netted the same amount." Barrows maintained that *access* to its services also constituted consideration.

¶ 27 Barrows further challenged Magellan's contention that the agreement had been properly terminated. First, Barrows maintained that a section 2-615 motion was an improper vehicle for raising this contention. Second, Barrows asserted that there were no allegations in the amended complaint that the agreement was terminated, let alone that it was properly terminated. Finally, Barrows argued that Magellan's "prospective termination" of their arrangement could not affect Barrows' "already-crystallized rights to compensation for past services."

¶ 28 In a written order entered on January 17, 2023, the circuit court granted Magellan's motion and dismissed the amended complaint with prejudice under section 2-615 of the Code. The circuit court found, in part, that the breach of contract claim failed as a matter of law since the complaint did not allege substantial performance by Barrows. Barrows subsequently filed this timely appeal.

¶ 29 ANALYSIS

¶ 30 Barrows contends on appeal that the circuit court erred in dismissing its breach of contract complaint with prejudice. Magellan maintains that Barrows' construction of their agreement is "fatally flawed" and that Barrows failed to perform services under the agreement, as is required to successfully assert a breach of contract claim.

¶ 31 *Section 2-615 Dismissal*

¶ 32 The circuit court granted Magellan's motion to dismiss the amended complaint pursuant to section 2-615 of the Code. A motion to dismiss under section 2-615 challenges the legal

sufficiency of the complaint and asserts that the plaintiff has failed to state a cause of action. 735 ILCS 5/2-615 (West 2020). "A section 2-615 motion presents the critical question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff and taking all well-pleaded facts and all reasonable inferences from those facts as true, are sufficient to state a cause of action upon which relief may be granted." *Village of Kirkland v. Kirkland Properties Holdings Company, LLC I*, 2023 IL 128612, ¶ 44. "A court should not dismiss a cause of action under section 2-615 unless the pleadings clearly show that no set of facts can be proven that would entitle plaintiff to recover." *Harper v. Health Care Service Corp.*, 2023 IL App (1st) 220078, ¶ 26. Our review of the dismissal of a complaint pursuant to section 2-615 is *de novo* (*Village of Kirkland*, 2023 IL 128612, ¶ 44), meaning we perform the same analysis which a trial judge would perform. *Kapotas v. Better Government Ass'n*, 2015 IL App (1st) 140534, ¶ 26.

¶ 33 *Contract Interpretation*

¶ 34 To the extent that we are required to interpret the agreement between Barrows and Magellan, the basic rules governing contract interpretation are well settled. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). The primary objective in construing a contract is to give effect to the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). "A court must initially look to the language of the contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent." *Id.* at 233. "Moreover, because words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others." *Id.* See also *Thompson*, 241 Ill. 2d at 441 (noting that the intent of the parties is not determined by viewing a provision or clause in isolation, or in examining detached portions of the contract). When the language of a contract is

clear and unambiguous, it must be given its plain, ordinary, and popular meaning. *Ritacca Laser Center v. Brydges*, 2018 IL App (2d) 160989, ¶ 15. If, however, the contractual language is susceptible to more than one meaning, it is ambiguous, and a court may consider extrinsic evidence to determine the intent of the parties. *Thompson*, 241 Ill. 2d at 441. The interpretation of a contract presents a question of law subject to *de novo* review. *Ritacca Laser Center*, 2018 IL App (2d) 160989, ¶ 15.

¶ 35 *Barrows' Breach of Contract Claim*

¶ 36 The amended complaint filed by Barrows asserts a single cause of action: breach of the agreement by Magellan. To state a claim for breach of contract, a plaintiff must plead: (a) the existence of a valid and enforceable contract; (b) performance by the plaintiff; (c) a breach of the contract by the defendant; and (d) that the defendant's breach resulted in damages. *McCleary v. Wells Fargo Securities, L.L.C.*, 2015 IL App (1st) 141287, ¶ 19. While the dispute between Barrows and Magellan primarily centers on whether Barrows performed under the agreement, the parties also disagree regarding the impact of the purported termination of the agreement.

¶ 37 Performance of Services

¶ 38 In the amended complaint, Barrows alleged that it "provided the contracted-for services in assisting Magellan in acquiring Wanda's share" of the Chicago project. According to Magellan, Barrows admitted in the amended complaint that it did not perform any services.

¶ 39 The amended complaint alleged, in part, that Magellan "derived tremendous benefits from the work Oksner and Hua did with Victory" and "knew that Wanda wanted Magellan to compensate Oksner and Hua for all the work they had done" on the disposition of Parcel LLC and the Chicago project. To the extent, however, that the amended complaint alleged that the parties' intent was to pay Oksner and Hua for their prior work with respect to Victory, such

allegation runs counter to the plain language of the parties' agreement. The agreement was between two limited liability companies – Barrows and Magellan – and does not reference any services performed by or payments owed to Oksner or Hua. We note that the agreement also included a so-called "integration" clause, wherein Barrows and Magellan expressed that they intended the agreement to be a "final and complete expression of the agreement between them." *Midwest Builder Distributing, Inc. v. Lord and Essex, Inc.*, 383 Ill. App. 3d 645, 661 (2007). "When such a clause is present, Illinois courts will accept it at face value as an expression of the parties' will that the written contract be the final deal." *Id.* at 662. The inclusion of the integration clause precludes recovery by Barrows for work purportedly performed by Oksner and Hua prior to the execution of the agreement. See *id.*

¶ 40 The amended complaint further alleged that Barrows was "told to remain on standby" by Magellan and was "continually available to assist Magellan" in its acquisition of the Chicago project. Barrows maintains this *access* to assistance was itself a service under the agreement.

¶ 41 We initially observe that the agreement provided minimal details regarding the services to be performed by Barrows. Section 1 of the agreement, captioned "Services," stated as follows:

> "[Magellan] engages [Barrows] to assist [Magellan] in acquiring Wanda's ownership interest in the Project. The services to be rendered by [Barrows] pursuant to this Section 1 shall be referred to herein as the 'Services.' "

The agreement thus appeared to impose few strictures on the scope or nature of the "[s]ervices" to be provided thereunder. See, *e.g.*, *Stephen L. Winternitz, Inc. v. National Bank of Monmouth*, 289 Ill. App. 3d 753, 758 (1997) (referring to a contract as "a minimalist's delight"). Nevertheless, we find that the plain language of the agreement contemplated that Barrows would engage in some affirmative conduct.

¶ 42 As noted above, the best indication of the parties' intent is the language of the contract, given its plain and ordinary meaning. *Gallagher*, 226 Ill. 2d at 233. In the agreement at issue – which is captioned as an "Advisory Services Agreement" – Barrows agreed to provide "Services" to Magellan, *i.e.*, Magellan engaged Barrows to "assist" Magellan in acquiring Wanda's ownership interest in the Chicago project. Magellan agreed to pay Barrows a fee "[i]n consideration for the Services" if certain requirements were satisfied, and the parties agreed that Barrows would "furnish the Services as an independent contractor."

¶ 43 While Barrows maintains that remaining on "standby" – effectively suspended in a state of readiness to provide assistance – was itself a service, such an interpretation is neither explicitly stated nor implicitly suggested by the plain language of the agreement. *E.g.*, *McGinley Partners, LLC v. Royalty Properties, LLC*, 2018 IL App (1st) 171317, ¶ 66 (noting that a term is not ambiguous merely because parties can suggest creative possibilities for its meaning). Although we recognize that there are contracts under which a payment may be owed to a party irrespective of the party's role in a transaction, there is simply no indication that Barrows "assisted" Magellan in acquiring Wanda's interest in the Chicago project, as was required by the agreement. *Cf. Grubb & Ellis v. Bradley Real Estate Trust*, 909 F. 2d 1050, 1057 (7th Cir. 1990) (interpreting Illinois law; finding that an agreement between a real estate broker and a building owner unambiguously provided for payment of a commission to the broker upon the sale of the building, without regard to the broker's role in the sale).

¶ 44 We should not dismiss a cause of action under section 2-615 unless it is clearly apparent that no set of facts can be proved which would entitle the plaintiff to recovery. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25. Based on Barrows's inability to adequately plead that it performed under the agreement, we conclude that the circuit court

properly dismissed its breach of contract action with prejudice. We therefore need not consider the parties' arguments with respect to the purported termination of the agreement.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in its entirety.

¶ 47 Affirmed.