2013 IL App (1st) 130426-U

FIRST DIVISION
August 26, 2013

No. 1-13-0426

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JIN PAK, Individually and as Representative of Holly Crest, LLC, Plaintiff-Appellant, v. FOSTER BANK, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 2012 L 009294 Honorable Frank B. Castiglione, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the dismissal of plaintiff's complaint of breach of an oral credit agreement, holding that section 160/2 of the Credit Agreements Act (815 ILCS 160/2 (West 2010)) is constitutional and bars plaintiff's cause of action because the credit agreement was not in writing.

¶ 2 Plaintiff, Jin Pak, individually and as representative of Holly Crest, LLC, filed a breach of contract action against defendant, Foster Bank, arising out of defendant's alleged breach of an oral credit agreement modifying certain loan transactions. The circuit court dismissed plaintiff's complaint, finding it was barred by section 160/2 of the Credit Agreements Act. 815 ILCS 160/2

(West 2010). Plaintiff appeals. We affirm.

¶ 3 In his complaint, plaintiff alleges he owned certain real estate mortgaged with defendant. To avoid possible default on the underlying loans secured by the mortgages, plaintiff and defendant entered into an "oral agreement of forbearance and modification of the loan transactions." The oral agreement provided in pertinent part:

> (1) Plaintiff would engage professional management to collect rents, deposit the same in the defendant bank, and manage the units in which defendant has a mortgage.
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> (2) Defendant would draft, and plaintiff would execute, two new mortgages to take the place of the current mortgages. These mortgages would be labeled A mortgage and B mortgage. The A mortgage would have a principal balance of 62% of the principal balance then due, and the B mortgage would have a principal balance of 38% of the principal balance then due. The A mortgage would be payable in amortized installments over 30 years at current interest rates, and the B mortgage would be due in full in the year 2114.
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> (3) Out of the proceeds deposited with defendant by the professional manager, $2,500 per month would be paid to plaintiff, and the balance would be used by the professional manager to defray interest, principal, assessments, real estate taxes, management fees, upkeep, reserve, and taxes.
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> (4) Plaintiff would continue to manage and collect the rent on two shopping centers he was currently managing.

¶ 4 Plaintiff alleges he complied with all terms of the oral agreement. Plaintiff further alleges that after "several months" of accepting the benefits of the agreement, defendant breached said

agreement by failing to draft the A and B mortgages and by subsequently selling the loans (and the mortgages securing the same) to a third party. Plaintiff alleges the oral agreement constituted a contract, the breach of which by defendant caused him millions of dollars in damages. Plaintiff seeks damages for the millions of dollars lost as a result of the alleged breach of contract, plus punitive damages.

¶ 5 Defendant filed a motion to dismiss ostensibly pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)), arguing plaintiff's cause of action for breach of contract was premised on an oral credit agreement and, as such, was barred by section 160/2 of the Credit Agreements Act which requires all such credit agreements to be in writing.

¶ 6 Specifically, section 160/2 of the Credit Agreements Act states:

> "Credit agreements to be in writing. A debtor may not maintain an action on or in any way related to a credit agreement unless the credit agreement is in writing, expresses an agreement or commitment to lend money or extend credit or delay or forbear repayment of money, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." 815 ILCS 160/2 (West 2010).

¶ 7 The Credit Agreements Act defines "credit agreement" as "an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money not primarily for personal, family or household purposes, and not in connection with the issuance of credit cards." 815 ILCS 160/1 (West 2010).

¶ 8 Defendant argued plaintiff's breach of contract action should be dismissed as the credit agreement upon which it was based was not in writing as required by section 160/2 of the Credit

Agreements Act.

¶ 9 The circuit court noted that although defendant's motion to dismiss was labeled as a section 2-615 motion, the court would analyze it as a section 2-619 motion as it asserted affirmative matter completely barring plaintiff's cause of action.[1] The circuit court agreed with defendant that plaintiff's cause of action for breach of an oral credit agreement was barred by section 160/2 of the Credit Agreements Act, and dismissed plaintiff's complaint. Although the dismissal order does not specifically state that it was "with prejudice," the dismissal was due to a perceived legal deficiency and therefore is final and appealable. *Schal Bovis, Inc. v. Casualty Insurance Co*., 314 Ill. App. 3d 562, 567-68 (2000). Plaintiff appeals.

¶ 10 Initially, we note the circuit court correctly analyzed defendant's motion as a section 2-619 motion to dismiss, as it asserted affirmative matter (violation of the Credit Agreements Act) defeating plaintiff's claim for breach of contract. A section 2-619 motion admits the legal sufficiency of the complaint and asserts affirmative matters defeating the claim. *Dixon, Laukitis and Downing, P.C. v. Busey Bank*, 2013 IL App (3d) 120832, ¶ 9. "An appeal from a section 2-619 dismissal is the same in nature as one following a grant of summary judgment; both are matters given to *de novo* review. [Citation.] In such cases, the reviewing court must determine whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Guzman v. C. R. Epperson Construction, Inc.*, 196 Ill. 2d 391, 397 (2001).

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[1]On appeal, defendant does not argue that the circuit court erred in analyzing its motion as a section 2-619 motion to dismiss.

¶ 11 In the present case, plaintiff does not dispute that the oral agreement at issue is a credit agreement that is in violation of section 160/2 of the Credit Agreements Act, which requires that such an agreement be in writing in order for a debtor to maintain a cause of action thereon. Plaintiff's argument on appeal is that section 160/2 violates the due process and equal protection clause of the Illinois Constitution (Ill. Const. 1970, art. I. § 2), the "certain remedy" provision of the Illinois Constitution (*id*., §12), and the Illinois Constitution's proscription against laws impairing contracts. *Id*., § 16.

¶ 12 A legislative enactment enjoys a strong presumption of constitutionality, and the challenging party bears the burden of clearly establishing a constitutional violation. *Choice v. YMCA of McHenry County*, 2012 IL App (1st) 102877, ¶ 59. We must resolve all interpretative doubts in favor of upholding the validity of a statute. *Choice*, 2012 IL App (1st) 102877, ¶ 59.

¶ 13 Plaintiff's arguments attacking the constitutionality of section 160/2 of the Credit Agreements Act have previously been addressed and rejected by this court. See *Teachers Insurance & Annuity Ass'n of America v. La Salle National Bank*, 295 Ill. App. 3d 61 (1998); *Nordstrom v. Wauconda National Bank*, 282 Ill. App. 3d 142 (1996). We adhere to *Teachers Insurance* and *Nordstrom* and hold that section 160/2 of the Credit Agreements Act is constitutional.

¶ 14 Plaintiff next argues that the circuit court erred in determining that the oral credit agreement at issue here is automatically unenforceable as a result of the statutory violation. Plaintiff cites in support *K. Miller Construction Co., Inc. v. McGinnis*, 238 Ill. 2d 284 (2010). In *K. Miller Construction Co*., the supreme court addressed the Home Repair and Remodeling Act (815 ILCS 513/15 (West 2006)), which states that "[p]rior to initiating home repair or remodeling work for over

$1,000, a person engaged in the business of home repair or remodeling shall furnish to the customer for signature a written contract or work order." The issue was whether a home remodeling contractor who violated this provision and entered into an oral contract for home remodeling work over $1,000 may enforce the oral contract. *K. Miller Construction Co*., 238 Ill. 2d at 286. The appellate court concluded that because there was a statutory violation, the contractor may not enforce the oral contract. *Id*. at 290. The supreme court reversed in pertinent part, holding that where a statute is silent regarding whether a contractual term that violates the statute is unenforceable, the trial court must "balance the public policy expressed in the statute against the countervailing policy in enforcing contractual agreements." *Id*. at 294. The supreme court noted that the Home Repair and Remodeling Act "left it an open question as to whether a statutory violation rendered an oral contract unenforceable" *(id*. at 297-98) and, therefore, the appellate court should have "conducted a balancing analysis and considered the relevant facts and public policies before concluding that plaintiff could not pursue relief for breach of contract." *Id*. at 298.[2]

¶ 15 In contrast to the Home Repair and Remodeling Act at issue in *K. Miller Construction Co*., the legislature made clear in section 160/2 of the Credit Agreements Act that a credit agreement must be in writing *and* that a violation thereof rendered an oral credit agreement unenforceable. Specifically, (unlike in the Home Repair and Remodeling Act at issue in *K. Miller Construction Co*.) section 160/2 of the Credit Agreements Act expressly states that "[a] debtor may not maintain an

[2]The supreme court noted it would ordinarily remand to the appellate court to perform the required balancing analysis or conduct the analysis itself. *Id*. However, the supreme court held that it need not do so in the case before it, because the General Assembly recently had enacted legislation clarifying it did not intend for violations of the writing requirement under the Home Repair and Remodeling Act to render oral contracts unenforceable. *Id*.

action on or in any way related to a credit agreement unless the credit agreement is in writing." As section 160/2 explicitly provides that an oral credit agreement is unenforceable, *K. Miller Construction Co*. is inapposite and we need not conduct any balancing analysis before concluding that plaintiff cannot pursue relief for breach of contract here.

¶ 16 Next, plaintiff argues that defendant violated the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) (815 ILCS 505/2 (West 2010)) when it required plaintiff to maintain accounts with it in exchange for extending credit and when it otherwise failed to abide by the oral credit agreement. Plaintiff waived review of this issue by only pleading a cause of action for breach of contract and failing to plead a cause of action for violation of the ICFA. See *Keefe-Shea Joint Venture v. City of Evanston*, 332 Ill. App. 3d 163, 170 (2002) (a party waives review of a theory that is not contained in the complaint).

¶ 17 For the foregoing reasons, we affirm the circuit court.

¶ 18 Affirmed.