

No. 1-13-3595-U

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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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FRED BIELAT,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	2013 L 003921
	)	
3DR LABORATORIES, LLC, a Kentucky Corp.,	)	
a/k/a/ 3 DR LABS II, LLC, and 3 DR Inc.,	)	The Honorable
	)	Raymond Mitchell,
Defendant-Appellee.	)	Judge Presiding.

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JUSTICE LAVIN delivered the judgment of the court.  
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the parties' employment agreement unequivocally granted the employer the right to unilaterally modify the employee's benefits, the trial court properly dismissed the employee's complaint seeking relief for the reduction of his salary and the elimination of his commission. The trial court also properly denied the employee leave to file an amended complaint where it would not cure the defect.

¶ 2 This appeal arises from an employment dispute between plaintiff Fred Bielat and his former employer, defendant 3DR Laboratories, LLC, A Kentucky Corporation, a/k/a 3 DR Labs II, LLC, and 3 DR INC. The trial court granted defendant's motion to dismiss the complaint, agreeing with defendant's contention that the employment agreement did not support plaintiff's assertion that defendant violated the agreement by unilaterally reducing plaintiff's salary and eliminating his commission. On appeal, plaintiff essentially challenges the trial court's interpretation and application of the employment agreement. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In April 2013, plaintiff filed a two-count complaint against defendant, his former employer. Count I alleged that defendant violated the employment contract by reducing his salary without his written consent because section 14 of that agreement stated, "This agreement may be amended only by written agreement signed by you and the Company." Count II alleged that defendant violated section 14 by eliminating his commission payments after July 15, 2009, without his written consent. Specifically, plaintiff alleged that defendant owed him \$66,000 for the commissions he generated between July 15, 2009, and December 31, 2012.<sup>1</sup> Although plaintiff's employment was terminated on the latter date, the complaint did not assert that defendant's action in that regard violated the contract. Attached to the complaint was the agreement entered into between the parties in July 2007. Three sections of that agreement are pertinent to the issues raised on appeal.

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<sup>1</sup> The complaint actually referred to July 15, 2008, but it appears from the complaint's other allegations and plaintiff's statements in his appellant's brief that plaintiff meant July 15, 2009. See Appellant's Brief p. 12 (stating that plaintiff only sought commissions due from the balance of 2009, 2010, 2011, and 2012).

¶ 5 Section 1, titled "Position," stated, in pertinent part, "You should note that the Company reserves the right to modify job titles, responsibilities, salaries and benefits from time to time, as it deems necessary." In addition, section 9, titled "At-Will Employment" stated as follows:

"Your employment is at-will as defined under applicable law. This means you may voluntarily quit for any reason whatsoever simply by notifying the company.

Likewise, the Company may terminate your employment at any time and for any reason whatsoever with or without cause or advance notice. This at-will employment relationship cannot be changed except in a writing signed by a Company officer. We request however that, in the event of resignation, you give the Company at least two weeks of notice."

Furthermore, section 14, titled "Entire Agreement," stated that the agreement constituted the entire agreement between the parties and "may be amended only by written agreement signed by you and the Company. Accordingly, the agreement permitted defendant to unilaterally change defendant's compensation at any time but required plaintiff's signed written consent to amend the agreement.

¶ 6 Defendant then filed a combined motion to dismiss plaintiff's complaint under sections 2-615 (735 ILCS 5/2-615 (West 2012)) and 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2012)), arguing that the employment agreement, in conjunction with an affidavit from defendant's chairman and senior managing director, David Ferguson, defeated plaintiff's claims. Specifically, defendant argued that Count I challenging defendant's reduction of plaintiff's salary should be dismissed pursuant to section 2-615 because it conflicted with the very agreement plaintiff relied on, as section 1 of the agreement authorized defendant to modify plaintiff's salary as deemed necessary by defendant. In addition, defendant argued that Count II

seeking additional payment for commissions generated after July 15, 2009, should be dismissed pursuant to section 2-619(a) (9), relying on Ferguson's affidavit. Specifically, Ferguson stated that plaintiff was paid commissions for 2008 and the first two quarters of 2009, but at the end of the second quarter, defendant discontinued the commission structure as a business decision. Similar to the discontinuance of other employees' commission, the decision was exercised pursuant to section 1 of plaintiff's employment agreement.

¶ 7 In response, plaintiff acknowledged with respect to Count I that section 1 of the agreement established defendant's right to modify job benefits. Plaintiff nonetheless asserted that such amendments required a writing signed by both parties, a requirement that was not satisfied. As to Count II, plaintiff argued defendant had not identified an affirmative matter defeating plaintiff's claim absent written documentation signed by the parties agreeing to eliminate commission. Plaintiff's response also sought leave to file an amended complaint, which was attached to the response, and added that the actions taken by defendant violated both section 9 and 14. Furthermore, plaintiff attached an affidavit in which he disagreed with Ferguson's assertion that defendant could take unilateral actions with respect to plaintiff's benefits. Defendant's reply in support of its motion argued that section 1 of the agreement granted defendant the right to unilaterally modify plaintiff's benefits and that neither section 9 nor 14 applied.

¶ 8 On October 23, 2013, the trial court entered a written order granting defendant's motion to dismiss the complaint, stating, in pertinent part, that the employment agreement gave defendant the right to unilaterally modify plaintiff's benefits. In addition, the court found that section 9 of the agreement only applied to plaintiff's at-will employment relationship. Furthermore, section 14 applied only to amendments to the agreement, rather than implementing

the agreement as defendant did by unilaterally modifying plaintiff's benefits. Accordingly, defendant's actions did not require a signed writing. Finally, the trial court denied plaintiff's motion to file an amended complaint because the agreement unequivocally showed plaintiff was not entitled to relief and amending the complaint would not rectify the defects in plaintiff's position. Plaintiff now appeals.

¶ 9

## II. ANALYSIS

¶ 10 As stated, on appeal, plaintiff essentially challenges the trial court's interpretation and application of the employment agreement. As a threshold matter, however, plaintiff's briefs suffer from several deficiencies. Plaintiff's fact section contains facts lacking any citation to the record. ILCS S. Ct. R. 341(h) (6) (eff. Feb. 6, 2013). In addition, his arguments contain citations to legal authority without pinpoints. ILCS S. Ct. R. 341(h) (7) (eff. Feb. 6, 2013). His reply brief also contains case names without any citation whatsoever. ILCS S. Ct. R. 341(h) (7), (j) (eff. Feb. 6, 2013). Furthermore, his arguments contain purported legal principles not supported by any authority. ILCS S. Ct. R. 341(h) (7) (eff. Feb. 6, 2013). Finally, we note that plaintiff's arguments are not entirely cohesive. For example, plaintiff presents lengthy and irrelevant argument challenging the trial court's determination that the parties had an at-will relationship, despite that the issue presented by the pleadings was defendant's right to unilaterally modify plaintiff's benefits, not defendant's right to terminate plaintiff's employment.

¶ 11 The reviewing court is not a depository into which an appellant may dump the burden of argument. *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 348 (2006). It is well settled that a reviewing court is entitled to a cohesive argument containing clearly defined issues and citations to pertinent authority. *Bartlow v. Costigan*, 2014 IL 115152, ¶ 52. With these deficiencies in mind, we will proceed to address plaintiff's assertions.

¶ 12 We review the trial court's order granting a combined motion to dismiss *de novo*. *Cohen v. McDonald's Corp.*, 347 Ill. App. 3d 627, 632 (2004). As a result, we may affirm on any basis in the record. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10. A section 2-615 motion to dismiss attacks the complaint's legal sufficiency. *Id.* In addition, it is well settled that a trial court properly dismisses a complaint pursuant to section 2-615 where the complaint's allegations are rebutted by the documents attached to the complaint. *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1035-36 (2006) (the contract attached to the complaint belied the plaintiff's breach of contract claim); *Metrick v. Chatz*, 266 Ill. App. 3d 649, 653 (1994) (factual matters contained in exhibits attached to the complaint negate any inconsistent facts alleged in the complaint).

¶ 13 Moreover, a section 2-619 motion admits the sufficiency of the complaint, but asserts an affirmative matter that defeats the plaintiff's claim. *Bjork v. O'Meara*, 2013 IL 114004, ¶ 21. Affirmative matter refers to a defense other than negating essential allegations in the plaintiff's cause of action. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120-21 (2008). With that said, an affirmative matter may be a matter that refutes crucial conclusions of material fact or law found in the complaint. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 344 (2010). Under either section 2-615 or 2-619, courts must consider all pleadings and supporting documentation in the light most favorable to the nonmovant. *Gatreaux*, 2011 IL App (1st) 103482, ¶ 10; *Snyder v. Heidelberg*, 2011 IL 111052, ¶ 8.

¶ 14 Here, there is no factual dispute. The parties agree that the employment agreement was enforceable as drafted. In addition, there is no dispute that defendant reduced plaintiff's salary and eliminated commission. Furthermore, there is no question that plaintiff did not agree to the aforementioned modifications of his benefits in a signed writing or otherwise. Unfortunately for

plaintiff, however, the agreement itself rebuts plaintiff's conclusion that his signed written consent was required.

¶ 15 Our primary goal in interpreting the parties' agreement, a contract, is to give effect to their intent. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2014 IL App (1st) 111290

¶ 75. If the language is clear and unambiguous, however, such intent must be determined solely from the language itself. *Id.* In addition, we must give unambiguous contractual language its plain and ordinary meaning, and must construe the contract as a whole. *Paluch v. United Parcel Service, Inc.*, 2014 IL App (1st) 130621, ¶ 13. Furthermore, no provision should be rendered superfluous. *Wolfensberger v. Eastwood*, 382 Ill. App. 3d 924, 934 (2008).

¶ 16 Section 1 of the agreement governed modifications to plaintiff's benefits. That section's plain language unambiguously granted defendant discretion to modify plaintiff's benefits, including his salary, and contained no requirement that defendant first obtain plaintiff's signed written consent. In addition, section 9 stated only that the parties' at-will employment relationship could not be changed unless signed in writing by one of defendant's officers. Thus, that section's signed writing requirement does not pertain to modifications to plaintiff's benefits. Furthermore, section 14 states only that modifications to the agreement, rather than defendant's implementation of the agreement, required both parties' signed written consent. Thus, according to the plain language of these provisions and when considered as a whole, defendant was not required to obtain plaintiff's signed written consent before exercising defendant's contractual right to modify plaintiff's benefits. To hold otherwise would render the discretion granted to defendant by section 1 meaningless.

¶ 17 It follows that the agreement attached to the complaint rebutted the complaint's allegations that defendant was required to obtain plaintiff's signed consent before reducing his

salary. Accordingly, the trial court properly granted defendant's motion to dismiss Count I asserting plaintiff's loss of salary pursuant to section 2-615. Similarly, section 1 of the employment agreement granted defendant the option of choosing to terminate its commission program. In addition, Ferguson's affidavit, attached to the motion to dismiss, showed that defendant exercised that option after the second quarter of 2009. Thus, his affidavit constitutes an affirmative matter defeating plaintiff's claim that he was owed commission earned after that date. As a result, the trial court properly dismissed Count II pursuant to section 2-619, as that count sought commission earned after the commission program was discontinued.

¶ 18 Plaintiff's reliance on *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill. 2d 482 (1987), is misplaced. In *Duldulao*, the supreme court recited the general rule that an employment relationship that does not have a fixed duration may be terminated at will by either party. *Id.* at 489. The court also held, however, that this constituted a rule of construction mandating only a presumption that employment without a fixed term is at will. *Id.* Accordingly, the presumption could be overcome by demonstrating that the parties contracted that the employment relationship could not be terminated at will. *Id.* Where the employee was given a handbook detailing termination procedures, the employer was required to follow those procedures. See *Id.* at 491-94.

¶ 19 In contrast, here, plaintiff's complaint is not based on his termination. In addition, defendant does not dispute that the employment agreement is enforceable as originally drafted. On the contrary, defendant contends only that the agreement itself permitted defendant to unilaterally reduce plaintiff's salary and terminate commission. Accordingly, *Duldulao* has no bearing on that issue.

¶ 20 Finally, we reject plaintiff's assertion that the trial court abused its discretion by denying plaintiff leave to file an amended complaint. See *Brown Leasing, Inc. v. Stone*, 284 Ill. App. 3d 1035, 1044 (1996) (reviewing the denial of leave to amend the complaint for an abuse of discretion). As the case law plaintiff relies on states, the trial court may consider whether the proposed amendment will cure the defect. *Bowe v. Abbot Laboratories, Inc.*, 240 Ill. App. 3d 382, 389 (1992). Because none of the proposed changes to that complaint would entitle plaintiff to relief here, the trial court did not abuse its discretion.

¶ 22 For the foregoing reasons, we affirm the trial court's judgment.

¶ 23 Affirmed.