2016 IL App (1st) 150384-U

No. 1-15-0384

FIFTH DIVISION
September 30, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

iMETALS, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 L 005664
	)	
MB FINANCIAL BANK, N.A. f/k/a Cole Taylor Bank, an Illinois Banking Corporation, and HOWARD B. SAMUELS,	)	
	)	
Defendants,	)	
	)	
(MB FINANCIAL BANK, N.A. f/k/a Cole Taylor Bank, an Illinois Banking Corporation,	)	The Honorable
	)	Eileen O'Neill Burke,
Defendant-Appellee.)	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

O R D E R

¶1 *HELD*: Plaintiff's amended complaint was properly dismissed for lack of standing where no issues of material fact existed demonstrating the assignment of assets and claims was invalid as a product of duress.

¶2 Plaintiff, iMetals, Inc., appeals the order of the circuit court granting a section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2014)) in favor of defendant, MB Financial Bank, f/k/a Cole Taylor Bank (Bank). Plaintiff contends the circuit court erred in finding it lacked standing to sue the Bank where there were disputed issues of material fact demonstrating the assignment of its assets *vis a vis* a trust agreement to a third-party assignee, including any claims or causes of action, was voidable as a result of duress. Based on the following, we affirm.

¶3 FACTS

¶4 In 2006, plaintiff entered into a Loan and Security Agreement (loan agreement) with the Bank for revolving lines of credit valued at $15 million (note 1) and $500,000 (note 2) to fund its daily operations. The funding for the notes was dependent upon plaintiff's eligible inventory and accounts, and was subject to the Bank's discretion. In addition, the loan agreement provided the Bank with "an irrevocable power of attorney coupled with an interest for the purpose of exercising and perfecting any and all rights and remedies available to [the Bank]." Plaintiff's founder, Jason Fowler, signed a personal guaranty for the notes on plaintiff's behalf. Fowler and his wife also issued a mortgage and security agreement, pledging their home as security for note 2. Additional guarantors for the notes included Thomas Kreher, one of plaintiff's creditors who executed a $2 million limited guaranty, and Metcut, Inc., a company owned by Fowler. In September 2007, the Bank issued plaintiff another promissory note in the amount of $1 million (note 3) to fund the company's growth. In exchange for the additional note, the Bank demanded additional guarantees, which were provided by Kreher and Mr. Wilhelm.[1] The Bank provided assurances that plaintiff would remain in good standing so long as it maintained a $20,000 minimum monthly profit margin.

[1] Mr. Wilhelm's first name does not appear in the record. Mr. Wilhelm owned an investment company called Wilhelm Management LLC.

¶5 On May 31, 2008, the debt under the loan agreement became due. The parties, however, executed a first loan modification agreement, extending the maturity date of the agreement to August 31, 2008. As of August 2008, plaintiff estimated $1.6 million in profits for the upcoming year and approximated $13 to $15 million in inventory. As the August 31, 2008, maturity date approached, the Bank informed plaintiff that it would not further extend the maturity date of the agreement nor provide future financing. Notwithstanding, plaintiff entered into a second loan modification with the Bank, extending the maturity date of the loan agreement to November 30, 2008, or until plaintiff could secure outside financing. In conjunction with the second loan modification, the terms of the loan agreement were altered, such that note 3 was reduced, the interest rates increased, all inventory over one year was ineligible for qualification, and plaintiff was required to pay the Bank $250,000 per month to "cure" certain over advances based on the now ineligible inventory. According to plaintiff, it was forced to enter the second loan modification due to the state of the economy at the time and its resulting significant business losses as customers stopped placing orders and refused to accept delivery of pending orders.

¶6 In November 2008, the Bank called the outstanding loan agreement due. Because plaintiff was unable to satisfy the loan, the parties entered into a third loan modification agreement, extending the maturity date of the loan agreement to May 31, 2009, or until plaintiff could secure outside financing. Plaintiff, however, was told by the Bank that another extension or renewal would be offered if plaintiff was unable to obtain outside financing by the new maturity date. The third loan modification agreement again modified the terms of the loan agreement, such that note 1 was reduced from $15 million to $12 million, the interest rates increased, the monthly profit term was increased to $25,000, and the definition of eligible accounts and income was reduced further.

¶7 Then, in March 2009, as a condition of their continued financing, the Bank instructed plaintiff to hire Rally Capital Services, LLC (Rally Capital) as a business consultant. Rally Capital also was hired by the Bank to perform a field examination of plaintiff. As a result of the field examination, Rally Capital valued plaintiff's inventory at $9.22 million. The company's inventory had previously been valued at $10.6 million, between $10.3 and $10.4 million, and $9.975 million by three different companies following appraisals in December 2008 and February 2009.

¶8 Plaintiff believed the imposition of Rally Capital was a conflict of interest because the Bank additionally hired Rally Capital as an auditor. In fact, plaintiff alleged the Bank engaged in a scheme to devalue the company in an effort to force plaintiff into liquidation. More specifically, plaintiff alleged the Bank settled on a lower valuation of its inventory despite the conflicting audits providing a higher value; the Bank refused to issue a bridge loan to a potential purchaser that offered to purchase plaintiff's assets for $7 million; the Bank, who exerted control over plaintiff's accounts payable, refused to issue checks to plaintiff's other creditors; and the Bank demanded that plaintiff assign its assets to Rally Capital or note 2 would be immediately called due, effectively threatening to foreclose on Fowler's home, which was pledged as security. Plaintiff further alleged that Howard Samuels of Rally Capital informed Fowler that the Bank would bankrupt the company if plaintiff did not acquiesce in an assignment of its assets for the benefit of creditors to Rally Capital. Then, on May 29, 2009, the Bank required plaintiff to enter into a trust agreement, causing plaintiff to assign all of its assets, including the right to any claims and causes of action, to Rally Capital. Under the trust agreement, plaintiff named Samuels as the trustee/assignee.

¶9 Thereafter, according to plaintiff, Samuels and the Bank engaged in a mission to sell plaintiff's assets on the open market, holding a public sale without providing notice to plaintiff or its creditors. Ultimately, Charles Baxter, plaintiff's former landlord, purchased plaintiff's assets for $1.688 million and subsequently sold the assets for approximately $9.5 million.

¶10 On May 28, 2014, plaintiff filed its original seven-count complaint against the Bank, alleging: (1) breach of contract; (2) breach of fiduciary duty; (3) fraud and misrepresentation; (4) duress/undue influence; (5) disposition of collateral in a commercially unreasonable manner; (6) disposition of assets without notice to guarantor/creditor; (7) tortious interference with prospective economic advantage. Plaintiff filed a jury demand and requested damages. On June 16, 2014, the Bank filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code), arguing that plaintiff lacked standing to bring its claims where, pursuant to the terms of the trust agreement, plaintiff had assigned all of its assets, including any claims or causes of action, to its assignee, Samuels.

¶11 On June 23, 2014, plaintiff filed a motion for leave to amend its complaint, requesting to add a count against Samuels and a count for declaratory judgment seeking to avoid the assignment on the grounds the assignment was procured under duress. The motion was granted and plaintiff filed its amended complaint adding Samuels as a party defendant and adding a count for declaratory judgment (newly numbered count I)[2] pursuant to section 2-701 of the Code (735 ILCS 5/2-701 (West 2014)). Plaintiff additionally filed a response in opposition to the Bank's motion to dismiss. In its response, plaintiff argued that standing was not a proper subject for a section 2-619(a)(9) motion to dismiss, especially in light of its amended complaint seeking

[2] The amended complaint repeated the claims of the original complaint, renumbering them as follows: breach of contract (count II); breach of fiduciary duty (count III); fraud and misrepresentation (count IV); duress/undue influence (count V); disposition of collateral in a commercially unreasonable manner (count VI); disposition of assets without notice to guarantor/creditor (count VII); and tortious interference with prospective economic advantage (count VIII).

a declaratory judgment, which would avoid the assignment in its entirety or to the extent it precluded plaintiff from raising claims.

¶12 On August 8, 2014, the Bank filed a reply in support of its motion to dismiss. In the reply, the Bank maintained that plaintiff lacked standing to sue because it assigned its interests to do so to Samuels. In addition, the Bank argued that plaintiff would be unable to obtain standing in the future because plaintiff could not assert a valid claim for duress to void the assignment. Then, on August 15, 2014, plaintiff filed a motion for leave to file a surreply in further opposition to the motion to dismiss, or, in the alternative, to strike the Bank's reply because it challenged plaintiff's first amended complaint and exceeded the scope the standing issue raised in the Bank's motion to dismiss. The circuit court granted plaintiff's motion and plaintiff subsequently filed its surreply in further opposition to the Bank's motion to dismiss, addressing the new arguments raised in the Bank's reply. Plaintiff's surreply argued that the Bank improperly interjected fact-based argument regarding the first amended complaint and relating to plaintiff's pleadings surrounding the purported duress, thus implying a basis of dismissal under 2-615 of the Code and causing the dismissal motion to be an impermissible hybrid motion.

¶13 Ultimately, on October 6, 2014, in a written order, the circuit court granted the Bank's section 2-619(a)(9) motion to dismiss counts II through VIII of plaintiff's first amended complaint with prejudice. The circuit court determined that the Bank's motion to dismiss filed in response to the original complaint equally applied to plaintiff's amended complaint. In response to plaintiff's argument in its surreply alleging the Bank improperly interjected fact-based arguments and impermissibly altered its motion to dismiss into a hybrid motion, the circuit court found that plaintiff placed the facts regarding the purported duress into issue by virtue of its response. Accordingly, the circuit court concluded the Bank's reply was appropriate in light of

plaintiff's response. With regard to the effect of the trust agreement, the circuit court reasoned that, in the absence of a jury demand, it acted as the trier of fact to determine that plaintiff did not enter into the trust agreement under duress and that plaintiff lacked standing to bring its causes of action against the Bank by reason of the assignment of its claims to Samuels. The court further noted that there was an appearance of an adequate remedy at law, which could make declaratory relief an unavailable remedy.

¶14 Plaintiff subsequently filed a motion to reconsider the October 6, 2014, order. In the motion to reconsider, plaintiff argued that: (1) the circuit court's October 6, 2014, order overlooked plaintiff's jury demand that was timely made in accordance with 2-1105(a) of the Code (735 ILCS 5/2-1105(a) (West 2014)); (2) the court erred in failing to accept as true the well-pled facts in plaintiff's amended complaint and failed to accept them as material issues of fact; and (3) the court inappropriately determined factual issues at the motion to dismiss stage. Plaintiff also requested leave to further amend its complaint. On December 3, 2014, the circuit court entered a written order denying plaintiff's motion to reconsider. In so doing, the court found there were no issues of fact regarding plaintiff's lack of standing. With regard to the matter of duress, the court found that none of plaintiff's allegations provided issues of material fact concerning the execution of the assignment; thus, the court was not prevented from dismissing the action pursuant to section 2-619 of the Code despite plaintiff's jury demand. On January 7, 2015, the circuit court issued an order granting plaintiff's request for a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) finding no just reason for delay of an appeal. This timely appeal followed.

¶15 ANALYSIS

¶16 Plaintiff contends the circuit court erred in granting the Bank's section 2-619(a)(9) motion to dismiss. More specifically, plaintiff argues the court erred in making findings and determinations of material fact despite plaintiff's timely jury demand, in failing to accept as true all the factual allegations in the amended complaint which supported plaintiff's causes of action, and in denying plaintiff leave to file a second amended complaint.

¶17 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts an affirmative matter to otherwise defeat the claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. In considering a section 2-619 motion to dismiss, a court reviews all pleadings and supporting documents in a light most favorable to the nonmoving party. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367-68 (2003). The purpose of a section 2-619 dismissal motion is to dispose of a case on the basis of issues of law or easily proved issues of fact. *Hertel v. Sullivan*, 261 Ill. App. 3d 156, 160 (1994). "However, the court may not decide a disputed question of fact if a jury demand is filed." *Id*. Section 2-619(c) of the Code states:

> "If, upon hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time." 735 ILCS 5/2-619(c) (West 2014).

A court, therefore, must determine whether the existence of a genuine issue of material fact precludes dismissal or, absent such an issue of fact, whether the asserted affirmative matter makes dismissal proper as a matter of law. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). We review the dismissal of a complaint pursuant to section 2-619 *de novo*. *Id*. at 116.

¶18 Here, the Bank's section 2-619(a)(9) motion argued that plaintiff lacked standing to assert its claims against the Bank where plaintiff assigned its rights under the loan agreement to Samuels, the trustee/assignee. Plaintiff was then granted leave to file its amended complaint, asserting the same seven claims against the Bank, but adding Samuels as a party defendant and asserting a claim for declaratory judgment against him. In so doing, plaintiff requested that the assignment be declared voidable as a result of duress.

¶19 At the outset, we find the Bank's section 2-619 dismissal motion was not rendered moot as a result of plaintiff's amended complaint. The amended complaint added a claim for declaratory judgment against Samuels, but the allegations against the Bank remained unchanged from the original complaint. The Bank's section 2-619 motion to dismiss for lack of standing, therefore, remained relevant. We further find the Bank's section 2-619 motion to dismiss was not improperly modified into a hybrid motion by means of the Bank's reply to plaintiff's response in opposition to the motion. The reply maintained that plaintiff lacked standing to sue the Bank by way of the assignment, but replied to plaintiff's duress argument raised in its response.

¶20 In light of plaintiff's jury demand, the question for this court on appeal is whether there is a disputed question of material fact preventing the dismissal of the claims against the Bank. Simply stated, the answer is no. There is no dispute that plaintiff entered into the trust agreement with the Bank, thereby assigning its rights under the loan agreement to Samuels, as

trustee/assignee. "An assignment for the benefit of creditors is a voluntary transfer by a debtor of [its] property to an assignee in trust for the purpose of applying the property or proceeds thereof to the payment of [its] debts and returning the surplus, if any, to the debtor." *Illinois Bell Telephone Co. v. Wolf Furniture House, Inc.*, 157 Ill. App. 3d 190-194-95 (1987). Absent some defect in the creation of the assignment itself, an assignment passes legal and equitable title to the debtor's property to the assignee. *First Bank v. Unique Marble & Granite Corp.*, 406 Ill. App. 3d 701, 707 (2010). The assignment in this case provided that Samuels had the right, power, and duty to sue and to prosecute any claim or claims existing in favor of plaintiff. Plaintiff relinquished its rights to sue under the loan agreement.

¶21 We recognize plaintiff's argument that the assignment was voidable as a product of duress; however, the duress argument was part of plaintiff's claim for declaratory judgment asserted against Samuels, not the Bank. Again, because plaintiff had transferred to Samuels its personal property assets and all claims and authority to assert those claims on its behalf, plaintiff had no rights or interests to raise claims against the Bank under the loan agreement at the time of the filing of the amended complaint. "A voidable contract can be ratified and enforced by the obligor, although not by the wrongdoer, while the void contract cannot be." *Hodge*, 234 Ill. App. 3d at 1023. Even assuming, *arguendo*, the assignment was voidable, Samuels had the authority to enforce the trust agreement, thereby denying plaintiff's standing to bring its claims against the Bank. See *Amtech Systems Corp. v. Illinois State Tollway Authority*, 264 Ill. App. 3d 1095, 1103 (1994) (a party must "assert his own legal rights and interests, instead of basing his claim for relief upon the rights of third parties").

¶22 Plaintiff seemingly contends its amended complaint demonstrated issues of material fact regarding Samuels' participation in the duress, thereby prohibiting Samuels from enforcing the

assignment because he was "the wrongdoer." The amended complaint provided that "Howard Samuels informed Mr. Fowler that [the Bank] would bankrupt the company if [plaintiff] did not acquiesce to the Assignment for the Benefit of Creditors. Mr. Samuels knew of, and in fact relayed, [the Bank's] threats to [plaintiff]." These "facts," however, are not relevant to the claims *against the Bank*, which are the claims that were dismissed by the circuit court—the subject of which is before us on appeal. Whether the assignment was voidable as a result of duress on the part of Samuels is relevant only to plaintiff's remaining declaratory judgment action, which remains pending *against Samuels*.

¶23 "Duress has been defined as a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of the exercise of his free will, and it may be conceded that a contract executed under duress is voidable." *Kaplan v. Kaplan*, 25 Ill. 2d 181, 185 (1962). In order to establish duress, the movant must demonstrate that the threat has left him "bereft of the quality of mind essential to the making of a contract." *Id*. at 186. This court has explained:

> "Acts or threats cannot constitute duress unless they are wrongful. However, the term 'wrongful' is not limited to acts that are criminal, tortious, or in violation of contractual duty, but extends to acts that are wrongful in a moral sense as well. [Citation.] In terms of 'economic duress,' also known as 'business compulsion,' the defense of duress cannot be predicated upon a demand which is lawful or upon doing or threatening to do that which a party has a legal right to do. [Citation.] Furthermore, duress does not exist where consent to an agreement is secured because of hard bargaining positions or the pressure of financial circumstances. Rather, the conduct of the party obtaining the advantage must be shown to be tainted with some degree of fraud and wrongdoing in

> order to have an agreement invalidated on the basis of duress. [Citation.]" *Alexander v. Standard Oil Co.*, 97 Ill. App. 3d 809, 815 (1981).

The party alleging duress must establish he was induced to enter into a contract by some wrongful act of the other contracting party. *Herget National Bank v. Theede*, 181 Ill. App. 3d 1053, 1057 (1989).

¶24 Taking the facts in plaintiff's amended complaint regarding *the Bank's actions* that allegedly constituted duress as true and considering all of the pleadings in a light most favorable to plaintiff, we continue to conclude that plaintiff lacked standing to bring its claims against the Bank. We first clarify that the only facts relevant to the duress analysis pertain to those activities that occurred prior to May 29, 2009, the date the trust agreement was entered into by plaintiff and Samuels. The activities that occurred thereafter, including anything alleged to be improper in conjunction with the sale of plaintiff's assets, have no bearing on the voidability of the May 29, 2009, assignment. A summation of the facts alleged by plaintiff occurring before the assignment provide that: (1) the Bank repeatedly changed the terms of the loan agreement, making them more restrictive and less likely to be satisfied, from the original loan agreement to the third loan agreement; (2) the Bank forced plaintiff to consult with Rally Capital, which devalued the company's assets despite prior competing valuations; (3) the Bank refused to extend the maturity date of the third loan agreement; (4) the Bank, having control over plaintiff's accounts, failed to extend payments to satisfy plaintiff's outstanding creditors; (5) the Bank refused to extend a bridge loan to a potential purchaser of plaintiff; (6) and the Bank threatened to foreclose on Fowler's house, which had been pledged as security for note 2, and threatened to bankrupt the company if plaintiff refused to assign its assets under the loan agreement to Samuels. In addition, at the time of all this activity, the global economic market was depressed as a result of the

collapse of the residential housing market. Plaintiff conceded that its business was affected by the market crisis, but yet maintained that it retained marketability and profitability.

¶25 We conclude that none of the actions taken or threats made by the Bank were fraudulent or otherwise illegal. As the lender, the Bank had the authority to restrict the terms of the loan agreement, to call the loan when the terms were not satisfied, to refuse to provide additional credit, to refuse to deplete plaintiff's already reduced assets by paying off third-party creditors, and to threaten to collect on some of plaintiff's outstanding debt by liquidating an asset pledged to satisfy the loan, *i.e.*, Fowler's home. "It is well settled that, where consent to an agreement is secured merely through a demand that is lawful or upon doing or threatening to do that which a party has a legal right to do, economic duress does not exist." *Bank of America, N.A. v. 108 N. State Retail, LLC*, 401 Ill. App. 3d 158, 174 (2010). Moreover, plaintiff was free to default under the loan agreement, to refuse to accept the terms of the second and third loan agreements, or to liquidate its assets to pay off some of its debt. "The mere presence of economic power, without some wrongful use of that power, does not in and of itself constitute economic duress." *Alexander*, 97 Ill. App. 3d at 815-16. The Bank's methods of hard bargaining did not rise to the level of economic duress under the uncontested facts presented by plaintiff.

¶26 These facts alleged by plaintiff do not invalidate the assignment; an assignment that plaintiff recognized was authorized by the Bank under the terms of the loan agreement. Because there were no issues of material fact, we find the circuit court properly dismissed the claims of plaintiff's amended complaint that were asserted against the Bank.

¶27 We finally conclude the circuit court did not err in dismissing plaintiff's complaint against the Bank with prejudice. We note plaintiff failed to cite to any authority as support for its cursory argument that the circuit court erred in dismissing its amended complaint with prejudice

in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). Ill. S. Ct. R. 341(h)(7) ("arguments, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. ***. Points not argued are waived and shall not be raised in the reply brief, oral argument, or on petition for rehearing").

¶28 Forfeiture aside, a circuit court has broad discretion to determine motions to amend pleadings. *In re Estate of Nicholson*, 268 Ill. App.3d 689, 695 (1994). A court's denial of a motion to amend is not considered reversible error unless there has been a manifest abuse of that discretion. *Id*. Here, plaintiff requested an opportunity to amend its complaint in its motion to reconsider the October 6, 2014, judgment. The request was cursory at best and failed to establish the factors used in determining whether the denial of a motion to amend constituted an abuse of discretion, namely: (1) whether the proposed amendment will cure the defective pleading; (2) whether the proposed amendment would surprise or prejudice the opposing party; (3) whether the proposed amendment was timely filed; and (4) whether the movant had previous opportunities to amend. *Id*. Most notably, plaintiff failed to provide the substance of the proposed amendment and this failure continues on appeal. As a result, we cannot find the circuit court abused its discretion in denying plaintiff an opportunity to file a second amended complaint.

¶29 CONCLUSION

¶30 We affirm the dismissal of counts II through VIII of plaintiff's amended complaint.

¶31 Affirmed.