2016 IL App (1st) 151932-U

FOURTH DIVISION
August 18, 2016

No. 1-15-1932

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SAUL AZAR, Plaintiff-Appellant, v. FY DEVELOPMENTS, LLC, FLORA KATSNELSON, YAN KATSNELSON, Defendants-Appellees, and ALEX LOYFMAN, Defendant.	)	Appeal from the Circuit Court of Cook County 13-CH-16669 Honorable Diane J. Larsen, Judge Presiding

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PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in dismissing as factually deficient third amended complaint regarding purported oral contract to invest in, manage, and resell Chicago real estate.

¶ 2 This action concerns title to a large residential and commercial building located in Chicago at 2715-41 North Milwaukee Avenue, which plaintiff Saul Azar lost in 2013 through foreclosure and judicial sale to defendants Flora and Yan Katsnelson and their limited liability

company FY Developments. For simplicity, we will refer to one or more of the defendants as the Katsnelsons. Azar contends the Katsnelsons orally agreed to be interim owners only while he recovered from financial problems and have reneged on their commitment to allow him to continue to manage and earn income from the property before exercising an option to repurchase the building. In this suit, Azar sought specific performance of an oral option contract for his repurchase and damages based on breach of the oral contract, promissory estoppel, breach of fiduciary duty, fraud, and unjust enrichment, as well as the declaration of a constructive trust over the property and its income. According to the Katsnelsons, they considered contracting with Azar but decided against it because they uncovered "red flags" about his reputation and character and they had "concerns about the legality of certain aspects of the proposed transaction." The Katsnelsons bought the lender's rights without Azar's "direct or indirect involvement" and then proceeded with the pending foreclosure. Azar appeals from the dismissal of his third amended complaint with prejudice pursuant to § 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2014) (Code). The Katsnelsons contend that in this fourth version of his pleading, Azar contradicted previous allegations and omitted inconvenient facts in an attempt to circumvent prior dismissal orders, and yet still failed to state a cause of action.

¶ 3 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint by alleging defects on its face. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364, 821 N.E.2d 1099, 1110 (2004); 735 ILCS 5/2-615 (West 2014). We review *de novo* the dismissal of a complaint pursuant to § 2-615. *Beretta U.S.A.*, 213 Ill. 2d at 364, 821 N.E.2d at 1110; 735 ILCS 5/2-615 (West 2014). We accept as true all well-pled facts and all reasonable inferences that may be drawn from those facts, and we construe the allegations in the light most favorable to the plaintiff. *Beretta U.S.A.*, 213 Ill. 2d at 364, 821 N.E.2d at 1110. This principle, however, does

not overcome the principle that Illinois is a fact-pleading jurisdiction where conclusions of law and conclusory factual allegations unsupported by specific facts are disregarded. *Alpha School Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 735, 910 N.E.2d 1134, 1148 (2009). A pleading that merely paraphrases the elements of a cause of action in conclusory terms is insufficient. *Alpha School Bus*, 391 Ill. App. 3d at 735, 910 N.E.2d at 1148. Absent the necessary facts, even the general policy favoring the liberal construction of pleadings will not satisfy the requirement that a complaint set forth facts necessary for recovery under the theory asserted. *Alpha School Bus*, 391 Ill. App. 3d at 735, 910 N.E.2d at 1148.

¶ 4 The Milwaukee Avenue property is a three-story brick and frame structure containing 78 studio apartments on the two upper floors and about 20,000 square feet of commercial space on the ground floor, and according to Azar, the gross rent receipts are $80,000 a month. Azar's property management experience dates to 1974. In 2006, he and his wife, Marsha, each bought 50% of the subject property through their two respective companies, 2715 N. Milwaukee LLC (2715 North) and Foster LZ, LLC (Foster), by contributing $1 million cash and taking a $6.6 million mortgage loan. In September 2007, Azar took over the management of the property. Shortly after the Azars took the loan, their lender filed a foreclosure action in 2008 in the circuit court of Cook County. The action was automatically stayed in May 2009 when Azar's company, 2715 North, voluntarily filed for Chapter 11 bankruptcy for the first of two times during the foreclosure. During this period in 2009 or early 2010 Azar sought an investor who was willing to buy and hold the property for up to a year and share some of its monthly income under Azar's management while he prepared to repurchase the property at a set price that was profitable to the investor.

¶ 5 Azar initiated the current action on July 12, 2013, seeking specific performance and damages due to either an oral option contract or an oral joint venture agreement that he purportedly reached when the Katsnelsons' company, FY Developments, "negotiated and consummated the agreement through its in-house counsel, principal and agent, Alex Drapatsky." Azar stated "FY [Developments] authorized Mr. Drapatsky to act on [its] behalf to negotiate and authorize all the documentation for the agreement." However, Azar did not specify facts indicating Drapatsky had authority to bind the company. Also, Azar undercut his conclusion that an agreement was reached by alleging Drapatsky was supposed to have a written agreement "countersigned [by his clients] and returned within two days," but "Mr. Drapatsky never returned the signed documents." In December 2013, the trial court granted the defendants' motion to dismiss pursuant to § 2-615 of the Code because of a lack of factual specificity (735 ILCS 5/2-615 (West 2014)), but gave Azar leave to replead. The judge remarked upon some of the deficiencies in the allegations of an option contract, including, "there must be further allegations as to when the oral contract was entered into; how it was entered into; who entered into it," and whether the wife's company, Foster, was a party to the oral agreement. Also, "What was the procedure for effectuating the oral agreement; what is the breach of the oral agreement; when did the breach occur?" With regard to the allegations of a joint venture agreement, the judge said, "there needs to be clarity" on "whether this is a joint venture or simply an investment *** because certainly the elements of a joint venture are not pled in this present case."

¶ 6 Azar repled, but after briefing and a hearing in August 2014, the judge granted the Katsnelsons' § 2-615 motion to dismiss the first amended complaint. 735 ILCS 5/2-615 (West 2014). The judge reasoned in part that "it is clear from the pleading [and the complexity of the transaction that] the parties would have intended a written agreement" and that Azar would have

to "factually allege why [execution of a written agreement was] not a condition precedent [to a valid option]."

¶ 7 Azar filed a second amended complaint in which he actually omitted many of his prior factual allegations. Azar realleged "FY [Developments] authorized Mr. Drapatsky, who is FY's in-house counsel, principal, and agent, to act on FY's behalf to negotiate and consummate the agreement with Messrs. Azar and [the Azars' real estate broker, Alex] Loyfman." He contended the Katsnelsons initially intended to purchase the property with another investor, Alex Lipets, and in this version of the pleading, instead of alleging there were written contracts which the Katsnelsons never signed, Azar simply concluded, "the Katsnelsons decided they did not want to invest with Mr. Lipets and instead proceeded in investing solely through their entity FY [Developments] based on the terms set forth in Mr. Loyfman's April 23rd e-mail." When dismissing the pleading in January 2015 pursuant to § 2-615 (735 ILCS 5/2-615 (West 2014)), the court found "the allegations in paragraph 19 that Mr. Drapatsky was [the Katsnelsons'] principal agent and was authorized to negotiate and consummate the arrangement on [their] behalf are not supported by any facts." The court granted leave to amend but cautioned Azar's attorney about inconsistencies in the successive complaints, stating, "I think counsel needs to be aware that the court does find the allegations in the first, the verified complaint, to be binding judicial admissions." The court discussed precedent on the topic of judicial admissions in verified pleadings and concluded, "So to the extent you've alleged facts, you're going to be bound by those facts going forward."

¶ 8 In his third amended complaint—the one on appeal—Azar contended that a series of conversations resulted in an enforceable oral contract. Azar alleged that in April 2010, the Azars' real estate broker, defendant Loyfman, introduced the Katsnelsons and Alex Lipets to the

property and that negotiations ensued for Yan Katsnelson to purchase the property with Alex Lipets through the bankruptcy court in what is known as "363 Sale," in reference to § 363 of the Bankruptcy Code. 11 U.S.C. § 363 (2010). See Michael J. Davis, 363 Sales in Bankruptcy, 22 DCBA Brief 27 (2009) (indicating one advantage of a § 363 sale is that it may occur relatively quickly without resolving competing interests, because under the statute, an asset may be transferred "free and clear" of any liens, claims or encumbrances).

¶ 9 The Azars' broker, Loyfman, sent an email to the Azars' attorney, Ariel Weissberg, dated April 23, 2010, stating, "Ariel, I discussed this deal with [co-investor] Alex Lipets and I believe the deal should be conducted as follows: [Alex Lipets and Yan Katsnelson will purchase the property for $2.6 million, Azar will continue to manage the property and remit $17,400 per month, and Azar will have a one-year option to repurchase the property for a price of $2.6 million plus an investors' premium of $416,000]." On or about the same day, Azar was "concerned that [the lender] would sell the Note and Mortgage to a third party, and consistent with Mr. Loyfman's e-mail *** Mr. Azar, with the knowledge of Mr. Weissberg and Mr. Drapatsky, paid [the lender] a $50,000 fee to be refunded back to Mr. Azar so that [the lender] would not sell to a third party and would lock in a sale of the Note and Mortgage with the investors by the end of April or beginning of May 2010."

¶ 10 "Around the timing of this email," Azar met "at the Starbucks on West Lake Avenue in Wilmette, Illinois" with his own broker and attorney (Loyfman and Weissberg) and Lipets, but neither of the Katsnelsons. It is undisputed that neither of the Katsnelsons attended any of the meetings which purportedly resulted in his company's oral contract with Azar. At this meeting in what appears to be in late April, Azar "agreed to the terms of the deal as reflected in the April 23rd e-mail" written by his broker (Loyfman) to potential investor Lipets and Azar's attorney

Weissberg. We note that there is no corresponding allegation that any other person also "agreed to the terms of the deal." Furthermore, there is no indication from the pleading whether Yan Katsnelson and Alex Lipets, who were purportedly buying the property together, would be equal investors in the purchase; there is no closing date; there is no due date for the monthly remittances; there is no indication of who would be entitled to Azar's monthly remittances; there is no indication of how or when Azar would give notice of his intention to repurchase the property; and there is no indication of the timing of the subsequent repurchase or other deadlines for the parties to fulfill their obligations. In any event, later that same month, the Katsnelsons "decided they did not want to invest with Mr. Lipets." The pleading does not indicate how the rejection was communicated or who conveyed it to Azar.

¶ 11 The pleading indicates that only minor revisions had to be made to "the deal" in order to finalize the terms of an agreement with the Katsnelsons. These revisions were accomplished orally through two meetings at the Starbucks in early May with Azar, his broker Loyfman, his attorney Weissberg, and Drapatsky, who is again alleged to be FY Developments' "in-house counsel, principal, and agent." At a meeting "[o]n or about May 2, 2010," the parties "prepared for [the Katsnelsons] to purchase the Note and Mortgage the first week in May 2010 on or about May 4th." Earlier, the Azars had given their lender $50,000 so that the lender would sell only to Lipets and Yan Katsnelson instead of a third party and it was now agreed that the Katsnelsons would pay the lender $2.555 million and refund the Azars' $50,000. However, due to a delay in closing caused by a mechanic's lien encumbering the property, the same individuals met at the same coffee shop "[o]n or about May 6, 2010, and no later than May 8, 2010," to address the lien. It was agreed amongst the parties that for $100,000 from FY Developments an unnamed entity or person would resolve the mechanic's lien; the Azars' $50,000 would not be refunded;

the Katsnelsons' purchase price and the Azars' subsequent option price would increase to $2.7 million; and the investor's premium which the Katsnelsons would receive if the Azars went through with the option to repurchase would be $459,000. These were "final and essential terms" and "[a]t no time did FY [Developments] or Azar discuss that the agreement had to be in writing or that a writing was required as a condition before the agreement would be in effect." The pleading also indicates that in May 2010, attorney Weissberg drafted a written § 363 sale contract and an option contract reflecting the agreed-upon terms and that the Azars executed the documents. However, the parties agreed to abandon the § 363 transaction because the bankruptcy proceeding was going to be involuntarily dismissed in June.

¶ 12 The Katsnelsons instead purchased the note and mortgage rights for the Milwaukee Avenue property directly from the lender in May 2010. Azar contends, without providing any supporting documents, that the purchase price was $2.6 million, which reflected "the deal" Azar negotiated with the lender and the fact that he "already committed his own $50,000 for the deal." Azar also contends that although the Katsnelsons' documented purchase from the lender did not include an option contract for his repurchase, it was nonetheless consistent with "the deal" he negotiated with FY Developments in April and May, and that he is suing because the Katsnelsons chose not to honor the contract terms. He contends, "How ownership would be transferred to [the Katsnelsons] was not material to the parties because they recognized there were alternative ways [the Katsnelsons] could take ownership under the agreement, including a 363 Sale or a foreclosure sale." Also, "As soon as the parties agreed to the terms of the Option, the parties began performing under the oral agreement." Azar's performance consisted of his $50,000 payment to the lender (we note that his payment actually occurred when Mr. Lipets was part of the negotiations and before Drapatsky purportedly bound the Katsnelsons to be the sole

investors), Azar's three $18,000 income payments to FY Developments (which occurred after FY Developments held the note and mortgage rights), and Azar's "continued management of the Property." The Katsnelsons' performance consisted of their purchase of the note and mortgage.

¶ 13 Azar further alleges that after buying the note and mortgage rights, the Katsnelsons stepped into the shoes of the lender and were then substituted as the plaintiff in the foreclosure action in June 2010. That same month, the bankruptcy action filed by Azar's company, 2715 North, was involuntarily dismissed and the Katsnelsons were then free to proceed on the foreclosure. In July 2010, while Azar was still managing the property, the Katsnelsons obtained the court's approval to appoint a receiver. According to plaintiff Azar, he "agreed to the appointment" and did not file an objection because the Katsnelsons told him it was "friendly" and "just a technicality" and that Azar could continue to manage the property. For the next few months, Azar continued to collect the rents and remit $18,000 per month to the Katsnelsons, but by September 2010, they told him to stop making the payments, and by early 2011, their court-appointed receiver fully took over the property management duties. In January 2012, the Katsnelsons obtained a summary judgment of foreclosure and sale.

¶ 14 According to the statement of facts section of the Katsnelsons' appellate brief, the foreclosure proceedings were automatically stayed in February 2012, because Azar's company, 2715 North, filed for Chapter 11 bankruptcy for the second time during the foreclosure and his wife's company, Foster, also filed for protection. According to the Katsnelsons, in the bankruptcy actions, the Azars made arguments that contradict Azar's current contentions that the relationship between the parties was friendly and included an option to repurchase. The record on appeal includes documents from the bankruptcy proceedings in which 2715 North and Foster argued that their real estate broker, Loyfman, and the Katsnelsons, worked together to "steal the deal

and embark[] upon a plan and scheme to steal the Property," by pursuing the foreclosure and then prevent a redemption by "asking for a judgment of more than $11 million." The bankruptcy actions concluded in May 2013.

¶ 15 On June 19, 2013, the Milwaukee Avenue property was sold for $6.7 million to the Katsnelsons through the foreclosure proceedings and the trial court confirmed the judicial sale on July 12, 2013. Azar alleged he stands ready, willing, and able to exercise the repurchase option he reached with the defendants.

¶ 16 When dismissing the third amended complaint with prejudice as factually deficient, the court also commented that it would be inappropriate to "allow what is the fourth iteration of this case to depart from the facts that were alleged in the earlier iterations of the complaint." Because the court disposed of the pleading under § 2-615, it did not reach the defendants' separate § 2-619 motion to dismiss on grounds that the statute of frauds requires a contract to convey land to be in writing and that some of the claims were barred by the doctrines of *res judicata* and collateral estoppel because they had been resolved in the foreclosure action or two bankruptcy actions. 735 ILCS 5/2-615, 2-619 (West 2014).

¶ 17 This summary brings us to the appellate arguments. Counts I and II of the pleading are claims that an option contract was formed and breached and, thus, Counts I and II are the keystone of Azar seven-count action for specific performance of the contract (Count I) and damages (Count II). Azar, however, leaves it to the court to analyze and resolve the sufficiency of his allegations. Rather than making a thorough and persuasive argument, Azar cites authority, quotes large, entire sections of his pleading, and then, without any attempt to apply the authority to his own allegations, concludes, "these [68] paragraphs of the Plaintiff's Third Amended Complaint stated the requisite facts to establish each of the necessary elements of this claim."

We would expect Azar to discuss, one by one, the necessary elements of a contract, to pair each of them with his allegations, and lead us to the conclusion that he was entitled to specific performance and damages. His broad brush approach is not effective. He similarly concludes without analysis that in the 10 paragraphs and subparagraphs that he numbered as paragraphs 43 through 47 of the third amended complaint, he "sufficiently pled that Mr. Drapatsky had both actual and apparent authority to enter in the contract at issue." Azar next states that if there is "agreement on the essential terms of a contract, the Court will enforce the contract even if other terms are needed," but Azar offers no analysis here either and gives no hint as to what specific terms he suspects are missing from his alleged contract and why he believes this legal principle might be relevant to his appeal. His presentation is perplexing rather than persuasive to this court. He then concludes that the dismissal of Counts I and II "was reversible error," and that "he should have his day in Court." We disagree.

¶ 18 In our opinion, Azar has not alleged the details necessary to obtain specific performance of a contract (Count I) nor has he alleged a cause of action for breach of contract (Count II). In order to be specifically enforceable, a contract between the parties must include essential terms that are "definite, certain, complete and conclusive." *Cowen v. McNealy*, 342 Ill. App. 3d 179, 96 N.E.2d 100 (1950) (addressing purported oral contract regarding patents). *Thomas v. Pope*, 380 Ill. 206, 210, 43 N.E.2d 1004, 1006-07 (1942) (a negotiation or expectation of a contract to convey real estate is not subject to specific performance; to obtain specific performance of a contract to convey land, the terms "must be certain and must be concluded so that is can be seen that the parties have agreed on the same terms and mutually signified their assent thereto"). A cause for breach of contract consists of facts indicating the existence of a contract, plaintiff's performance of all required contractual conditions, the facts of the alleged breach, and

consequential damages. *Martin-Trigona v. Bloomington Federal Savings & Loan Ass'n.*, 101 Ill. App. 3d 943, 946, 428 N.E.2d 1028, 1031 (1981). Allegations of the existence of a contract are facts indicating an offer, acceptance, and consideration. *Martin-Trigona*, 101 Ill. App. 3d at 946, 428 N.E.2d at 1031. A general allegation that the parties entered into a contract, without supporting facts, is a legal conclusion. *Martin-Trigona*, 101 Ill. App. 3d at 946, 428 N.E.2d at 1031. We reiterate that a complaint that merely paraphrases the elements of a cause of action in conclusory terms is insufficient, does not satisfy the requirement that a complaint set out facts necessary for recovery under the theory asserted, and cannot be saved by this jurisdiction's general policy favoring the liberal construction of pleadings. *Alpha School Bus*, 391 Ill. App. 3d at 735, 910 N.E.2d at 1148. In an action for breach of an oral contract, the plaintiff bears the burden of pleading and proving the essential terms of the agreement that he or she sues upon. *Richco Plastic Co. v. IMS Co.*, 288 Ill. App. 3d 782, 786, 681 N.E.2d 56, 59 (1997).

¶ 19 Azar failed to factually allege definite and sufficient terms that were unambiguously offered and unequivocally accepted so as to result in a contract. After considering the pleading at issue, we agree with the defendants' argument that, at best, Azar alleged that some terms were discussed at a series of negotiations between various people who expected that any agreement would be memorialized in a writing to be executed by the contracting parties.

¶ 20 Specifically, Azar alleged that his broker sent an email dated April 23, 2010, stating "I discussed this deal with Alex Lipets and I believe the deal should be conducted as follows." The email indicates the "INVESTORS" in the property are "ALEX and YAN;" however, Alex Lipets and Yan Katsnelson are individuals and not the company, FY Developments, that purportedly contracted to buy and sell the property. The "premium" earned by the investors for holding the property for Azar's repurchase would be 16% of the purchase price, in addition to monthly

payments. "Around the timing of this e-mail, Mr. Azar then met with Messrs. Loyfman, Lipets and Weissberg to discuss the terms of the deal *** and [orally] agreed to the terms of the deal as reflected in the April 23rd email," which is an allegation that Azar agreed to "the terms" but not an allegation that any other person or entity agreed to "the terms." Azar next alleged that the Katsnelsons decided to exclude Lipets from "the deal" and "instead proceeded in investing solely through their entity FY based on the terms set forth in Mr. Loyfman's April 23rd e-mail," but, there are no facts indicating how this decision was communicated by or to anyone or how the individual investors described in the e-mail, who were "ALEX and YAN," were replaced by the company FY Developments. Azar alleged that on May 2, 2010, "Mr. Drapatsky [orally] agreed to one modification to the terms already agreed to," which was that "[o]f the $2.6 million for the Note and Mortgage, FY would pay $2,550,000 to [the lender] and $50,000 back to Mr. Azar for the payment he already made to [the lender]." Then, at some point between May 6 and 8, 2010, Azar, Loyfman, Weissberg, and Drapatsky "held their final meeting" at the Starbucks and orally agreed that FY Developments would pay $100,000 to an unnamed entity in order to "assign and/or remove" a mechanics lien on the property, the interest rate that Azar would pay as an investor's premium would increase by 1%, and "Mr. Drapatsky, on behalf of FY, [orally] represented, and Mr. Azar accepted, that FY would no longer pay Mr. Azar the $50,000 because it was now non-refundable, and instead FY would pay [the lender] the $2.6 million."

¶ 21 Even assuming these are allegations of a purchase price and repurchase price, they are allegations of general and preliminary negotiations rather than of one party's offer and the other party's acceptance of comprehensive contract terms involving two real estate transactions worth millions of dollars. Real estate transactions are "often the most complex contracts." *Culbertson v. Carruthers*, 66 Ill. App. 3d 47, 52, 383 N.E.2d 618, 623 (1978) (rejecting argument that there

was a binding oral offer and acceptance for the sale of 107 acres). Furthermore, this is not alleged to be an ordinary real estate purchase but a more complicated series of transactions starting with the purchase of real estate from either a bankruptcy proceeding or a foreclosure action; a property management period of up to a year involving numerous tenants in the building's commercial spaces and 80 residential units; and Azar's repurchase. Azar's allegations, however, do not include basic duties or provide deadlines or details for the parties to fulfill their obligations for the purchase, the interim management period, and the repurchase.

¶ 22 For instance, while he alleged that FY Developments was to pay Azar's lender $2.6 million, the lender is not alleged to be contracting party, and, thus, not obligated to accept that particular price, and there is no indication of what the parties must do, if anything, if another bidder offers the lender more than $2.6 million. Also, while it is alleged that Azar will manage the property and collect $80,000 in monthly income during FY Developments' temporary ownership, there is no indication of what will happen if the property is damaged or destroyed to the extent that it does not generate the income Azar purportedly needs to repurchase the property, and whether the property owner, who will have the insurable interest in the property, will share any insurance proceeds with Azar or shoulder him with any insurance litigation expenses, repair costs, or other expenses. In addition, the April 23rd email includes the mysterious sentence fragment, "After paying all bills and expenses including property taxes, etc.," indicating that the email's author, broker Loyfman, considered the subject, but it is unclear from the fragment or its context which of the potential parties will be responsible for paying maintenance expenses and real estate taxes for this substantial, mixed-use property.

¶ 23 In addition, the email does not specify who will have ultimate authority over property management and operation decisions, whether there are any performance benchmarks for Azar's

management work, or whether there is any restriction on FY Developments' right to terminate him from the management role and cut off the income he purportedly needs to regain ownership. Also, while it is alleged that Azar's premium to the investor will include monthly payments, there is no due date for the payments, no indication of who will accept them, and no indication of what will happen if the payments are not paid or are late.

¶ 24 Most notable is the failure to indicate when and how Azar can effectively communicate that he is ready to exercise the repurchase option or when the subsequent, long-awaited closing must occur. There is also no indication of who is responsible for clearing any title impediments that originate during the interim ownership or whether any warranties are included when Azar retakes title to the property.

¶ 25 Despite these numerous gaps in the allegations, Azar, who "has been in the real estate business since 1974" and is apparently capable of a multi-million dollar transaction, contends there was an offer and acceptance for a complicated arrangement between individuals who never executed a written, definitive contract. His suggestion that the trial court "enforce the [oral] contract even if other terms are needed" is reminiscent of the plaintiff's argument in *Cowen* that research physicians had reached an oral contract regarding patent, stock, and royalty rights in new pharmaceutical products, despite needing the addition of "such terms and provisions as may be directed by the court." *Cowen*, 342 Ill. App. at 183-84, 96 N.E.2d at 102. The court stated, "This indicates that the oral agreements set forth in the complaint were really provisional understandings arrived at in contemplation of a final written agreement, and the court is now asked to do what probably would have been done if the negotiations had been finally completed and embodied in a written agreement." *Cowen*, 342 Ill. App. at 184, 96 N.E.2d at 102. In our opinion, that statement is applicable here and, like that court, we conclude that a plaintiff who is

unable to allege a contract consisting of "definite, certain, complete, and conclusive terms" has not met the fundamental requirements for specific performance. *Cowen*, 342 Ill. App. at 184, 96 N.E.2d at 102. Moreover, preliminary, tentative negotiations are not the basis for an award of damages for breach of a purported contract. "A contract is sufficiently definite and certain to be enforceable if the court is able from its terms and provisions to ascertain what the parties intended, under proper rules of construction and applicable principles of equity." *Halloran v. Dickerson*, 287 Ill. App. 3d 857, 868, 679 N.E.2d 774, 782 (1997). "A contract may be enforced even though some contract terms may be missing or left to be agreed upon, but if essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." *Halloran*, 287 Ill. App. 3d at 868, 679 N.E.2d at 782. Azar's failure to allege the essential, specific terms of a contract resulted in the failure of Counts I and II of his pleading.

¶ 26 We also reach an adverse conclusion regarding the allegations of attorney Drapatsky's authority to bind the Katsnelsons to a contract with Azar or the Azars. Azar's allegations are numerous and are typified by the following two:

> "j. Flora [Katsnelson] has sworn under oath that she authorized Mr. Drapatsky to send on May 7, 2010, an email to Mr. Weissberg, with copies to Mr. Loyfman and Mr. Azar, with the subject line, 'Closing Dcos' [(*sic*)], with the attachments noted near the top thereof as, 'Real Estate Purchase Agreement (2715).doc; OPTIONAGREEMENT.docx; BINDING_MEMORANDUM_OF_UNDERSTANDING.doc.
>
> ***
>
> l. Flora has sworn under oath that on [(*sic*)] she authorized Mr. Drapatsky on May 7, 2010 to send an email to Mr. Weissberg, with copies to Mr. Loyfman, Mr. Azar, Mr.

> Meza and Flora, stating 'As discussed please lets all meet at Starbucks in Wilmette tomorrow at 9:15 to sign the necessary docs to allow use to close on Monday. I've emailed those docs to you previously and I will do so again. Hopefully [the lender] will still accept the wire on Monday.' "

¶ 27 Azar contends that with statements including these, he sufficiently pled that Drapatsky had both actual and apparent authority to enter into the alleged contract on behalf of FY Developments. "Apparent authority arises when the principal holds an agent out as possessing the authority to act on its behalf, and a reasonably prudent person, exercising diligence and discretion, would naturally assume the agent to have this authority in light of the principal's conduct." *A.J. Maggio Co. v. Willis*, 316 Ill. App. 3d 1043, 1049-50, 738 N.E.2d 592, 598 (2000). "To prove the existence of an apparent authority, the plaintiff must show: (1) the principal consented to or knowingly acquiesced in the agent's exercise of authority; (2) based on the actions of the principal and agent, the third person reasonably concluded that the party was an agent of the principal; and (3) the third person justifiably relied on the agent's apparent authority to his detriment." *A.J. Maggio Co.*, 316 Ill. App. 3d at 1049-50, 738 N.E.2d at 598. These allegations indicating Drapatsky sent certain emails suggest that he was authorized to negotiate with the others, but it would be quite a leap of logic to conclude that he was authorized to also orally bind either of the individual clients or their corporations to the terms he negotiated. We scrutinized the third amended complaint and were unable to find any factual allegations indicating the Katsnelsons "consented to or knowingly acquiesced" that Drapatsky was an agent with capacity to contract on behalf of the Katsnelsons. *A.J. Maggio Co.*, 316 Ill. App. 3d at 1049-50, 738 N.E.2d at 598. Furthermore, the allegation that the parties were meeting to sign

documents suggests that they ultimately intended to memorialize their final agreement in a written document.

¶ 28 Azar's failure to allege facts indicating Drapatsky had authority to orally contract for the defendants is additional grounds for the dismissal of Counts I and II.

¶ 29 Then there is Azar's contention that "he should have his day in Court." He erroneously relies on cases such as *Hartbarger v. SCA Services, Inc.*, 200 Ill. App. 3d 1000, 558 N.E.2d 596 (1990), for the proposition that whether he stated a claim in Counts I and II should not have been determined at a hearing on a § 2-615 motion and instead should be determined by a trial. Azar focuses on the court's statement in *Hartbarger* that "whether a contract exists, its terms and conditions, and the intent of the parties are questions of fact to be determined by the trier of fact" based on the evidence presented. *Hartbarger*, 200 Ill. App. 3d at 1013, 558 N.E.2d at 604. The issue, however, in *Hartbarger* was whether a $225,000 jury verdict was consistent with the law and evidence. *Hartbarger*, 200 Ill. App. 3d at 1004, 558 N.E.2d at 598. Thus, the case had proceeded well past the initial pleading stage of Azar's suit, through discovery, jury selection, and a trial. The appellate court was not reviewing a § 2-615 dismissal and its remark, lifted out of context, is not relevant to this appeal regarding a pleading. Moreover, Azar has had his day in court. The parties spent almost two years actively litigating in the circuit court. He filed suit on July 12, 2013, and after considerable motion practice and numerous opportunities to replead, the court dismissed Azar's third amended complaint with prejudice on June 10, 2015. Azar's contention is not well founded in law or fact.

¶ 30 For these numerous reasons, we conclude that Counts I and II were factually insufficient and properly dismissed on that basis.

¶ 31 We find that Azar's next three claims fail because he did not allege that he negotiated with a person who had authority to bind the defendants. To state a claim in Count III for promissory estoppel, Azar needed to allege that the defendants made an unambiguous promise to him. *Quake Construction*, 141 Ill. 2d at 310, 565 N.E.2d at 1004. To state a claim in Count IV for breach of a fiduciary duty owed between joint venturers, Azar needed to allege that he and the defendants reached an "express or implied agreement to carry on some enterprise." *Ambuul v. Swanson*, 162 Ill. App. 3d 1065, 1068, 516 N.E.2d 427, 429 (1987). To state a claim in Count V for fraud, Azar needed to allege that the defendants made an actionable misrepresentation of material fact. *Soules v. General Motors Corp.*, 79 Ill. 2d 282, 286, 402 N.E.2d 599, 601 (1980). Azar alleged that he met with and exchanged emails with Drapatsky about certain contract terms and that on one occasion "Flora [Katsnelson] represented to Mr. Loyfman that FY would pay the $100,000 [to an unspecified person or entity] to clear the mechanics lien." Azar never factually alleged that Drapatsky had authority to contract, and Azar's allegations regarding Flora Katsnelson's do not lead to that conclusion either. Azar's allegations do not separately or together indicate the defendants made an unambiguous promise, committed to a joint venture, or made an actionable misrepresentation to Azar. Instead, the allegations suggest that the parties discussed the possibility of doing business together, but ultimately the defendants did not commit or promise to give Azar a repurchase option and that the defendants independently purchased the note and mortgage from Azar's lender without any obligation to resell the property to the former owners. Also, as discussed in conjunction with Counts I and II, we reject his contention here, and throughout his brief, that the sufficiency of his allegations should not have been determined at a hearing on a § 2-615 motion and instead should be determined by a trial. This is not the

appropriate standard and Azar has "had his day in court." Counts III, IV, and V do not state claims which could survive the § 2-615 motion to dismiss. 735 ILCS 5/2-615 (West 2014).

¶ 32 Count VI, which was styled as an unjust enrichment claim, fails because Azar pled no facts indicating a benefit was conferred to or unjustly retained by the defendants. Under this theory of recovery he needed to allege there was "unjust retention of a benefit, by one party, to the detriment of another party against the fundamental principles of justice, equity, and good conscience (*Michael Reese Hospital & Medical Center v. Chicago HMO, Ltd.*, 196 Ill. App. 3d 832, 836, 554 N.E.2d 472, 474 (1990)), or he needed to allege the defendants "voluntarily accepted a benefit which would be inequitable for [them] to retain without payment" (*Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App. (1st) 102670, ¶ 14, 952 N.E.2d 1278).

¶ 33 In his unjust enrichment count, Azar relies primarily on his allegation, "91. Mr. Azar conferred a benefit on the Defendants because they would not have known about the Property or the opportunity to purchase the Note, Mortgage and Property, without the introduction by Mr. Azar and [Azar's broker] Mr. Loyfman." Mere knowledge, however, of the property's availability is not a "benefit" for unjust enrichment purposes or a benefit voluntarily accepted by the defendants, when Azar alleged that his broker sought out the Katsnelsons and told them about the property without seeking a confidentiality agreement or other contract prohibiting them from purchasing the loan documents from Azar's lender unless they also reached an agreement with Azar on a separate option and property management contract. Under Azar's logic, a claim for unjust enrichment would arise any time a person was informed by another that a third party (Azar's lender) had a property or product for sale (Azar's loan documents), and the person then bought the property or product. Moreover, the property's availability had become a matter of public record when the lender filed its foreclosure action in Cook County circuit court. Not only

was knowledge about the circumstances not a benefit for purposes of unjust enrichment, it was also not to Azar's detriment. The defendants' knowledge of the foreclosure proceedings was not a detriment to Azar, as his consent was not required for the defendants or any other person(s) to purchase the lender's rights, he could not have prevented the transaction or chosen the buyer, and his rights to the property were exactly the same before and after the purchase – the loan was in default and the lender was foreclosing on the property.

¶ 34 Azar also alleged he "conferred additional benefits on the Defendants because Mr. Azar took steps, in reliance of the Defendants, to secure the sale of the Note and Mortgage to FY [Developments], by his $50,000 forfeited payment to [the lender], as well as his $18,000 payments and continued management of the Property." Azar alleged, however, that he made the $50,000 payment to the lender, not to stave off an actual, competing bidder but only because he was "concerned that [the lender] would sell the Note and Mortgage to a third party;" that the $50,000 payment to the lender was forfeited to the lender, not to the defendants; and the "contribution" to the lender did not reduce the $2.6 million price that FY Developments paid for the lender's rights. Accordingly, Azar did not factually allege the $50,000 was beneficial to the defendants. Furthermore, the three $18,000 monthly payments, out of the $80,000 per month Azar alleged he received for managing the property, were made to FY Developments when it was the holder of the note and mortgage rights but was not receiving any mortgage payments from the defaulting borrowers. Therefore, if the $18,000 payments were beneficial to FY Developments, Azar did not allege they were benefits retained by the lender's assignee "against the fundamental principles of justice, equity, and good conscience (*Michael Reese Hospital*, 196 Ill. App. 3d at 836, 554 N.E.2d at 474), or that it was "inequitable for [the defendants] to retain

[them] without payment" (*Karimi* 2011 IL App. (1st) 102670, ¶ 14, 952 N.E.2d 1278). Count VI was properly dismissed by the trial court.

¶ 35 The last count of the pleading also fails. In Count VII, Azar sought the court's imposition of a constructive trust, which is an equitable form of relief in which the court would declare the defendants to have wrongfully acquired the property, that their retention is inequitable, and that they must transfer title and possession to Azar. *Frederickson v. Blumenthal*, 271 Ill. App. 3d 738, 740, 648 N.E.2d 1060, 1061 (1995) (describing the nature of a constructive trust and the circumstances under which courts will order this remedy). In paragraph 101 of Count VII, Azar sought a constructive trust over the property and its income based on his earlier counts of breach of contract or promissory estoppel. In paragraph 102, Azar sought a constructive trust based on his allegations of fraud or breach of fiduciary duty or because "the Defendants acquired the Property through *** duress or undue influence." On appeal, he states "the Defendants will be unjustly enriched if a constructive trust *** is not imposed" and he cites authority indicating a constructive trust is a remedy that prevents unjust enrichment. *See* Restatement (First) of Restitution § 160, cmt. c (1937). He also cites case law indicating that although constructive trusts are imposed typically to address some form of wrongdoing or a mistake, this form of relief may be ordered when a party has innocently acquired property but his or her continued retention of the property is contrary to "equity and good conscience." *Frederickson*, 271 Ill. App. 3d at 740, 648 N.E.2d at 1062 (constructive trust imposed where the defendant complied with his aunt's request to hold her savings in his bank account, but after her death nearly 30 years later he would not release the funds to her estate). Azar quotes a sentence of the court's opinion, but does not attempt to apply the court's reasoning to any facts. We find that it was proper to dismiss Azar's constructive trust claim pursuant to § 2-615 because he did not allege sufficient facts in

his underlying contract and equitable claims which indicate either (a) that the defendants wrongfully acquired the Milwaukee Avenue property or (b) that it is contrary to equity and good conscience for the defendants to retain the property and its income. 735 ILCS 5/2-615 (West 2014).

¶ 36 For these reasons, we affirm the dismissal of Azar's third amended complaint on the basis of § 2-615. 735 ILCS 5/2-615 (West 2014). We do not reach the parties' arguments regarding the theories for dismissal set out in the defendants' separate § 2-619 motion, which included the statute of frauds and the doctrines of *res judicata* and estoppel. 735 ILCS § 5/2-619 (West 2014).

¶ 37 Affirmed.