2016 IL App (1st) 152539-U

FIFTH DIVISION
October 28, 2016

No. 1-15-2539

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
FARI JAOS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14 L 12773
	)	
JONATHAN VOLD,	)	
	)	Honorable
Defendant-Appellee.	)	Eileen O'Neill Burke,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Reversing the judgment of the circuit court of Cook County dismissing plaintiff's legal malpractice claim pursuant to section 2-619(a)(9) of the Code where material issues of fact existed regarding (1) defendant's breach of duty and (2) whether his breach proximately caused the plaintiff damages.

¶ 2 Plaintiff Fari Jaos (plaintiff) appeals the circuit court of Cook County's dismissal of his legal malpractice complaint against defendant Jonathan Vold (defendant) pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)).

On appeal, plaintiff contends that the circuit court committed reversible error when it dismissed his legal malpractice complaint because: (1) no affidavit was attached to defendant's motion to dismiss as required by section 2-619; (2) the circuit court applied the wrong legal standard; (3) he alleged issues of fact in his complaint that cannot be defeated by a section 2-619 motion; and (4) the circuit court dismissed his complaint without providing him leave to amend. For the reasons that follow, we reverse the circuit court's judgment and remand for proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 On December 9, 2014, plaintiff filed a one-count legal malpractice complaint against defendant for his representation of plaintiff during the purchase of a business commonly known as "The Dill Pickle Grill" (the business). Plaintiff retained defendant in September 2012. As part of defendant's responsibilities, he conducted a lien search to determine if there were any encumbrances on the business. In December 2012, defendant informed plaintiff that the Illinois Department of Revenue had a $20,000 lien on the business seller, Mark Muehlfelder (the seller). On December 12, 2012, the day before the closing, defendant provided plaintiff with the results of the lien search. The search identified a federal tax lien against the seller in the amount of $51,493.22.

¶ 5 On December 13, 2012, plaintiff and defendant met with the seller and the seller's attorney to close the transaction for the purchase of the business. According to the complaint, for the first time, defendant advised plaintiff of the further liabilities of the business, including the federal tax lien. Defendant and the seller's attorney orally agreed that $60,000 of plaintiff's purchase price would be placed into an escrow account until the seller could reach a settlement regarding his respective tax liens. This agreement was not reduced to writing.

¶ 6 In March 2013, plaintiff discovered that his payments were not being deposited into an escrow account pursuant to the oral escrow agreement, but instead were being delivered directly to the seller. Plaintiff contacted defendant and inquired why the payments were not being made pursuant to the oral escrow agreement. Defendant advised plaintiff to continue making payments. Plaintiff followed this advice; however, plaintiff later discovered that the seller's tax liabilities had automatically attached to plaintiff as the purchaser of the business and that the seller's liabilities had remained attached to the business equipment.

¶ 7 In June 2013, plaintiff discontinued making payments to the seller due to the seller's failure to escrow the money owed on the liens and the impact of those liens on his continued business operations. As of June 2013, plaintiff had made payments to the seller in the amount of $19,000. As a result of his nonpayment, the seller threatened to evict plaintiff. On July 2, 2014, plaintiff sold the business for a substantial loss.

¶ 8 Plaintiff alleged defendant breached his duty to act as a reasonably competent attorney and was negligent in his representation of plaintiff by failing to: (1) secure a written escrow agreement in violation of Rule 1.1 of the Rules of Professional Conduct; and (2) adequately advise him as to the effect of the liens on the business in violation of rules 2.1 and 1.4 of the Rules of Professional Conduct. Plaintiff further alleged that as a proximate cause of defendant's negligent acts or omissions, plaintiff suffered damages in the purchase and sale of the business as well as attorneys fees. According to plaintiff, but for defendant's negligence, he would not have purchased the property.

¶ 9 Attached to the complaint was a copy of the lien search defendant performed for plaintiff along with a letter, dated December 12, 2012.

¶ 10 On February 26, 2015, defendant filed a combined motion to dismiss pursuant to section

2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)) alleging plaintiff failed to state a cause of action for legal malpractice and that other affirmative matter defeated plaintiff's claim. Defendant argued that he did not breach the standard of care because: (1) a written escrow agreement was executed by plaintiff and the seller; and (2) the escrow agreement and the installment contract for the business (the installment contract) establish plaintiff was advised of the effect of the liens. Defendant attached to his motion a copy of the written escrow agreement and the installment contract.

¶ 11 The written escrow agreement, which was signed by plaintiff, the seller, and the seller's attorney, provided:

> "Parties listed below hereby agree the scheduled monthly payments of $2,257.91 shall be escrowed with [the seller's attorney]. Disbursement of said monthly payments shall be $625.00 to Golden Eagle Community Bank, $750.00 to the Illinois Department of Revenue and the remainder shall be held in his escrow account until such time as the balance due the state and federal is stated in writing. The balance of such monies shall be used for such payments."

The installment contract provided, in pertinent part:

> "Seller hereby covenants to Purchaser that Seller will pay all of Sellers [*sic*] obligations incurred prior to closing including, but not limited to, all sales taxes. Seller will give Purchaser timely proof of compliance. Should Seller fail to meet these obligations, at final closing Seller shall provide a bulk sales stop order or equivalent thereof from the Illinois Department of Revenue, and similar statements from any other creditor, to confirm that the total amount remaining due is less than the amount of future installment payments, and Purchaser may offset monthly payments under this agreement

to satisfy any of Sellers [*sic*] obligations."

¶ 12 In response, plaintiff argued that because defendant's argument relied on matters outside the pleading and defendant failed to attach an affidavit to his motion as required by section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)), the circuit court should deny the motion. Plaintiff further contended that he sufficiently set forth a cause of action for legal malpractice. Plaintiff maintained that he was not aware of the existence of the written escrow agreement prior to filing the complaint, but did not dispute its authenticity or that his signature appeared on the document. Regardless, plaintiff argued that the written escrow agreement itself was woefully inadequate to provide him with the basic protections as to the effect of the liens if left unpaid. Plaintiff maintained that a reasonably competent attorney would have taken measures to ensure that he was protected by drafting in reasonable constraints on the timing and condition of payment to lienholders, and to include reporting requirements to plaintiff with respect to the payments made. Plaintiff further asserted that the complaint demonstrated that defendant was negligent when defendant instructed him to continue to make payments and did not advise him that he could offset monthly payments to satisfy any of the seller's obligations. Plaintiff attached to his response copies of: (1) the complaint; (2) the installment contract; and (3) the written escrow agreement. Plaintiff also included his own affidavit in which he averred that he was provided with the lien search results and informed by defendant of the existence of the liens, but that defendant did not explain the legal effect of those liens. Plaintiff further averred that during the negotiation of the purchase, defendant and the seller's attorney discussed an oral escrow agreement, but that he was unaware that an escrow agreement had been reduced to writing.

¶ 13 In reply, defendant argued that, based on the pleadings before the court along with the exhibits and affidavit, plaintiff's claim regarding the lack of an escrow agreement must be

dismissed. Defendant maintained that because plaintiff admitted he was aware of the liens, he cannot thereafter claim that he possessed no understanding of their effect.

¶ 14 The circuit court granted defendant's motion to dismiss pursuant to section 2-619(a)(9) of the Code finding (1) plaintiff was aware of the liens prior to closing, (2) defendant did secure a written escrow agreement, (3) the agreement imposed no duty on defendant in ensuring compliance, and (4) it was the seller's attorney's burden to properly direct the payments to the escrow account. The court further found that the lien search, the escrow agreement, and the installment contract demonstrated that plaintiff took measures to request the lien search be conducted and have an escrow agreement executed. Thus, the circuit court found that defendant did not breach any duty owed to plaintiff in conjunction with his representation.

¶ 15 Thereafter, plaintiff filed a motion to reconsider based on the circuit court's misapplication of the law as well as the absence of leave to replead. After the matter was fully briefed, the circuit court denied the motion and indicated that the dismissal of the complaint was with prejudice. This appeal followed.

¶ 16 ANALYSIS

¶ 17 Defendant filed a combined motion to dismiss involving both sections 2-615 and 2-619 pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)). The circuit court dismissed the complaint pursuant to section 2-619(a)(9). Our review of such a motion to dismiss is *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009).

¶ 18 The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). Section 2-619(a)(9) allows a defendant to move to dismiss on the basis that the claim is barred by "other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-

619(a)(9) (West 2014). The affirmative matter brought to the attention to the court in a section 2-619 motion may be "something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Golden v. Mullen*, 295 Ill. App. 3d 865, 869 (1997). The moving party thus admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993).

¶ 19 Section 2-619 further provides that if the affirmative matter is not clear on the face of the complaint, the movant must include an affidavit to support his motion. *Harris v. Vitale*, 2014 IL App (1st) 123514, ¶ 23; 735 ILCS 5/2-619(a) (West 2014). No affidavit is required to support a section 2-619 motion where the affirmative matter asserted is apparent on the face of a pleading. *Sierens v. Clausen*, 60 Ill. 2d 585, 588 (1975).

¶ 20 In ruling on a section 2-619 motion to dismiss, the circuit court may consider external submissions of the parties, including depositions and *affidavits*. *Lopez v. Clifford Law Offices, P.C.*, 362 Ill. App. 3d 969, 974 (2005) (citing *Zedella*, 165 Ill. 2d at 185). The court construes the pleadings and any supporting documentary evidence in the light most favorable to the nonmoving party. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367-68 (2003). "If a cause of action is dismissed during hearing on a section 2-619 motion on the pleadings and affidavits, the question on appeal is whether there is a genuine issue of material fact and whether defendant is entitled to judgment as a matter of law." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 494 (1994).

¶ 21 Defendant asserts the circuit court properly dismissed the complaint because there was a written escrow agreement and installment contract which addressed the liens and, thus, it follows

that plaintiff was advised of the effect those liens could have on the business.

¶ 22 The complaint at issue alleged that defendant was negligent in his representation of plaintiff by failing to: (1) secure a written escrow agreement; and (2) adequately advise him as to the effect of the liens on the business. The complaint specifically alleged that although there had been a discussion between defendant and the seller's attorney regarding an escrow agreement, it had not been reduced to writing. Nothing in the complaint referred to an actual written escrow agreement. Consequently, the grounds for defendant's attack on the complaint do not appear on the face of the complaint. Where the grounds for dismissal do not appear on the face of the pleadings, section 2-619(a) mandates that the motion "shall be supported by affidavit." 735 ILCS 5/2-619(a) (West 2014). Accordingly, defendant was required to support his claim with an affidavit.

¶ 23 While plaintiff argues that defendant's failure to support his motion with an affidavit is fatal, we disagree. Our inquiry does not end solely based on the fact an affidavit was not attached. See *Asset Acceptance, LLC v. Tyler*, 2012 IL App (1st) 093559, ¶ 24 ("Even if an affidavit should have been filed, the absence of an affidavit may not be fatal.") The Code needs to be construed liberally to fulfill its purpose of providing substantial justice and resolution on the merits, rather than imposing seemingly insurmountable procedural obstacles to litigation. *Id.* (quoting *Doe v. Montessori School of Lake Forest*, 287 Ill. App. 3d 289, 296 (1997) (overlooking the failure to support section 2-619(a)(5) and section 2-619(a)(9) motions with affidavits)). Defendant maintains that plaintiff judicially admitted the existence of the written escrow agreement in his written response to the motion to dismiss as well as in his affidavit.

¶ 24 Judicial admissions are formal acts by a party or his attorney for the purpose of dispensing with proof by the opposing party of some fact claimed by the latter to be true. *Feret*

v. Schillerstrom, 363 Ill. App. 3d 534, 539 (2006). Judicial admissions are defined as "deliberate, clear, unequivocal statements" by a party about a concrete fact within that party's knowledge. *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 468 (2009). In order to constitute a judicial admission, a statement must not be a matter of opinion, estimate, appearance, inference, or uncertain summary. *Id.* An admission in an unverified pleading signed by an attorney is binding on the party as a judicial admission. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 558 (2005).

¶ 25 Here, the filing of the written response to the motion to dismiss along with plaintiff's affidavit was a formal act. In the response, plaintiff stated that "the parties subsequently created an escrow agreement that provided for the monthly payments to the Seller to be escrowed by the Seller's attorney." Although plaintiff asserted he "did not believe that such an agreement was ever reduced to writing prior to this litigation" the motion clearly and unequivocally indicates that "an Escrow Agreement was produced by Defendant in this litigation." Plaintiff further acknowledged that he had "no reason to doubt [the written escrow agreement's] authenticity." In support of this statement, plaintiff attached a copy of the written escrow agreement to his response. Furthermore, in his affidavit plaintiff did not refute that his signature was on the written escrow agreement. Based on these statements, we find plaintiff clearly and unequivocally admitted the existence of the document, which had the effect of withdrawing that fact from issue. See *id.* at 557-58 (judicial admissions have the effect of withdrawing a fact from issue and dispensing with the need for proof of the fact).

¶ 26 In addition, plaintiff does not dispute the validity of the installment contract that defendant attached to its motion to dismiss. In fact, plaintiff also attached the installment contract to his response and relies on portions of the installment contract in making his response.

Accordingly, we also find that plaintiff clearly and unequivocally admitted the existence of the installment contract. See *id.*

¶ 27 We now turn to consider whether the circuit court erred in granting defendant's motion to dismiss pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)). Prior to examining the merits of this case, we acknowledge that on appeal plaintiff has abandoned his argument that defendant breached his duty by failing to secure a written escrow agreement. Accordingly, the only remaining claim concerns defendant's breach of duty in failing to adequately advise plaintiff as to the effect of the liens on the business.

¶ 28 We first address plaintiff's contention that the circuit court applied an incorrect legal standard when dismissing the complaint. According to plaintiff, the circuit court did not accept all well-pleaded facts as true, accord him with all reasonable inferences, or view the matter in a light most favorable to him. While this is the proper legal standard, we need not consider arguments made by parties attacking the circuit court judge's errors where our review of the matter is *de novo*, we simply consider whether defendant sufficiently established "other affirmative matter" which would defeat the allegations of the complaint. See *Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, ¶ ¶ 14, 16.

¶ 29 On appeal, plaintiff asserts that the circuit court erred in dismissing his complaint because he alleged facts that defendant breached his duty by failing to advise him of the effect of the liens on his business. Plaintiff maintains that the complaint and the exhibits attached are devoid of any facts that indicate he requested the attorney perform the lien search or that he understood the effect of the liens on the business he was acquiring. Plaintiff concludes that an issue of material fact existed with regard to whether defendant breached his duty to properly advise him of the effect of the liens.

¶ 30 In response, defendant asserts that there is "other affirmative matter" defeating plaintiff's allegations that he breached his duty, as it is "well-settled that breach of duty can be determined as a matter of law where the breach, or lack thereof, is obvious." According to defendant, the lack of a breach is obvious here where there is no dispute that a written escrow agreement was prepared and executed, the installment contract included provisions regarding the liens, and plaintiff admits his knowledge of the liens prior to the closing.

¶ 31 In order to establish a claim of legal malpractice, a plaintiff must establish the following elements: (1) that the attorney owed the client a duty of due care arising from the attorney-client relationship; (2) that the attorney breached that duty; (3) that as a proximate result, the client suffered injury; and (4) damages. *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 196 (2007). "The injury in a legal malpractice action is not a personal injury, nor is it the attorney's negligent act itself. Rather, it is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission." *Id.* at 226. "Damages will not be presumed, and the client bears the burden of proving he suffered a loss as a result of the attorney's alleged negligence." *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 526 (1995).

¶ 32 Attorneys are liable for damages in legal malpractice actions only when they fail to exercise a reasonable degree of skill and care. *Barth v. Reagan*, 139 Ill. 2d 399, 406 (1990); *Sharpenter v. Lynch*, 233 Ill. App. 3d 319, 323 (1992). The question of whether a lawyer has exercised a reasonable degree of care and skill in representing and advising his client has always been one of fact. *Nelson v. Quarles and Brady, LLP*, 2013 IL App (1st) 123122, ¶ 30 (quoting *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 1020 (1974)). In other words, whether a duty is owed is a question of law, but whether an attorney breached a duty of care owed to his client is a question of fact. *Keef v. Widuch*, 321 Ill. App. 3d 571, 577-78 (2001). Generally, the existence of such a

disputed question of fact is enough, in and of itself, to preclude dismissal under section 2-619. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 115; see *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 48 (holding that specific counts of the plaintiffs' complaint were sufficient to survive dismissal under section 2-619 of the Code as a question of fact remained); *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 122 (2008) (holding the circuit court erred in granting the defendant's section 2-619(a)(9) motion to dismiss where there remained a disputed issue of fact).

¶ 33 Defendant, however, notes there is an exception to this rule. Defendant relies on *Barth v. Reagan*, 190 Ill. App. 3d 516, 522 (1989), for the proposition that "expert evidence is required in a legal malpractice case to establish the attorney's breach of his duty of care except in cases where the breach or lack thereof is so obvious that it may be determined by the court as a matter of law, or is within the ordinary knowledge and experience of laymen." This proposition was subsequently affirmed by our supreme court. See *Barth*, 139 Ill. 2d at 407-08. We, however, find that the facts of *Barth* are inapposite and that the court's ultimate conclusion does not support defendant's position. In that case, the plaintiff alleged the defendant-attorney breached the duty of care when he: (1) failed to advise her of the pending foreclosure actions on the four properties in which she had a beneficial interest; (2) failed to inform her of her right to cure the defaults on the mortgages or redeem the properties from foreclosure; and (3) forged her signature on papers filed by defendant's firm. *Id.* at 408. On the facts presented, our supreme court could not say "that defendant's failure to directly communicate with plaintiff was negligence so grossly apparent that a lay person would have had no difficulty recognizing it." *Id.* at 409. Accordingly, the court held that the standard of care was not so obvious that the plaintiff could have proven her case of legal malpractice without an expert witness. *Id.* at 408-09.

¶ 34 Moreover, cases where the exception has been applied have typically involved attorneys failing to meet deadlines. In *Gray v. Hallett*, 170 Ill. App. 3d 660, 664 (1988), the reviewing court concluded that no expert testimony was needed to establish that the defendant breached his duty of care when he failed to obtain service of process before the statute of limitations ran. Similarly, in *House v. Maddox*, 46 Ill. App. 3d 68 (1977), the reviewing court held that the defendant-attorney's "failure to comply with the statute of limitations was so grossly apparent *** that a layman would have no difficulty appraising it." (Internal quotation marks omitted.) *Id.* at 73 (quoting *Graham v. St. Luke's Hospital*, 46 Ill. App. 2d 147, 158 (1964)).

¶ 35 In contrast, the reviewing court in *Sheetz v. Morgan*, 98 Ill. App. 3d 794, 799 (1981), held that it was unable to make a determination regarding the attorney's alleged breach of duty as a matter of law. In that case, the plaintiff filed a claim against the estate of his attorney for breach of contract, alleging that the attorney neglected to file certain documents in connection with the preparation of an equipment lease, resulting in the plaintiff's loss of property. *Id.* at 796. Following summary judgment in the plaintiff's favor without any expert testimony regarding the standard of care, the attorney's estate appealed arguing an issue of fact existed as to the standard of care which precluded summary judgment. *Id.* at 798. The reviewing court agreed, and held that "expert legal testimony is necessary to establish the prevailing standard of care for attorneys in the community *** for the type of services requested *** and to determine whether [the attorney] deviated from that standard of care." *Id.* at 799.

¶ 36 The present matter comes before us after a dismissal pursuant to section 2-619(a)(9). In such a procedural posture the existence of a disputed fact is generally enough to preclude dismissal. *Kedzie & 103 Currency Exchange, Inc.*, 156 Ill. 2d at 115. We conclude that the exception defendant advocates for does not apply to the facts presented here. We cannot say that

defendant's failure to advise plaintiff regarding the effect of the liens was "so grossly apparent that a lay person would have no difficulty recognizing it." *Barth*, 139 Ill. 2d at 409. This is not a case where an attorney has failed to file a lawsuit before the statute of limitations ran (*House*, 46 Ill. App. 3d at 73), or failed to serve process on a prospective defendant (*Gray*, 170 Ill. App. 3d at 664); indeed, this is a case that presents a question of fact that requires an inquiry into the standard of care a reasonable attorney would be held to in such a transaction. The alleged breach of duty is not one that is so obvious that would allow a circuit court to determine this issue as a matter of law and dismiss the complaint pursuant to section 2-619(a)(9) of the Code. See *Barth*, 139 Ill. 2d at 409.

¶ 37 Defendant, however, further asserts that, assuming he breached his duty, plaintiff cannot prove that this breach proximately caused damages. Defendant argues that he: (1) notified plaintiff of both the federal and state tax liens; (2) provided for language in the installment contract for offsetting payments to address those liens; and (3) secured a written escrow agreement regarding the liens. Defendant maintains that plaintiff signed the escrow agreement and installment contract which indicated he read and understood those documents. Thus, according to defendant, it is plaintiff who caused the alleged damages when he chose to proceed with the purchase of the business even after being fully advised of the existence of the liens and the content of the contracts.

¶ 38 At the outset we note that defendant has failed to provide any citations to legal authority in support of his position in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016). Specifically, defendant has not provided us with any citation to a case where the reviewing court upheld the dismissal of a complaint pursuant to section 2-619(a)(9) of the Code based on the argument that the plaintiff could not prove proximate cause. As a reviewing court,

we are entitled to have the issues clearly defined, pertinent authority cited, and a cohesive legal argument presented. *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5. "The appellate court is not a depository in which the appellant may dump the burden of argument and research." *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986). Arguments that are not supported by citations to authority fail to meet the requirements of Rule 341(h)(7) and are procedurally defaulted. *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720 (2010).

¶ 39 Procedural default aside, our research reveals the case of *Lopez*, in which the reviewing court reversed the dismissal of the plaintiff's complaint under section 2-619(a)(9) where the plaintiff's complaint and affidavit were sufficient to create questions of fact regarding proximate cause. *Lopez*, 362 Ill. App. 3d at 983. While the particular issues of proximate cause in *Lopez*, *i.e.* superseding cause, are not before this court, we find the *Lopez* court's application of the law to the facts to be instructive. As stated in *Lopez*, the treatment of proximate cause as a question of law is an exception to the general rule that proximate cause is a fact-laden issue and should be decided by a trier of fact. *Id.* at 982 (citing *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257 (2004)). In addition, the pertinent inquiry is whether the defendants' negligence "was a material and substantial element in bringing about [the plaintiff's] legal injuries ('cause in fact' component), and, if so, whether the injuries were of the type that a reasonable attorney would see as a likely result of his or her conduct ('legal cause' component)." *Id.* (citing *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258-59 (1999)).

¶ 40 Ultimately, the *Lopez* court found that the plaintiff's allegation that, " 'If I had known the statute of limitations in my daughter's case was one year, I would have obtained an attorney immediately' " sufficiently alleged the "cause in fact" component. *Id.* The *Lopez* court further

found it was not unreasonable to conclude that the outcome in the matter was foreseeable to the defendants, thus establishing the "legal cause" component. *Id.* at 983. Accordingly, the *Lopez* court concluded that the complaint, together with the affidavit supporting the allegations, was sufficient to create a question of fact as to the issue of proximate cause and reversed the dismissal of the complaint. *Id.*

¶ 41 Here, viewing the matter in the light most favorable to plaintiff, we find the allegations of the complaint establish that defendant did not advise him regarding the effect the liens could have on his business. Similar to the complaint in *Lopez*, plaintiff here alleged "[b]ut for the negligent acts or omissions of [defendant], [plaintiff] would not have purchased the property and would not have had to sell the property at a loss and incurred expenses related to the business and its operation," thus establishing the "cause in fact" component. See *id.* While the written escrow agreement and installment contract clearly reference the liens and provide a mechanism for their repayment overtime, these documents do not explicitly state that plaintiff was advised of the effect these liens could have on his future business operations, particularly if the seller or the seller's attorney, as the case may be, neglected to pay the liens as required by the written escrow agreement and installment contract. Thus, plaintiff also set forth the "legal cause" component, as it is not unreasonable to conclude that the outcome, plaintiff having to sell his business at a loss and incurring expenses related to its operation, was foreseeable to defendant. See *id.* Drawing all reasonable inferences in favor of plaintiff, we conclude that the issue of proximate cause cannot be determined as a matter of law because the "other affirmative matter" asserted by defendant does not completely negate the cause of action or conclusions of material fact contained in or inferred from the complaint. See *Golden*, 295 Ill. App. 3d at 869. Therefore, the circuit court erred when it dismissed the complaint pursuant to section 2-619(a)(9) of the Code.

¶ 42 Lastly, plaintiff asserts the circuit court improperly dismissed his complaint with prejudice. "Where an affirmative defense negates the alleged cause of action, the circuit court may properly dismiss the pleading with prejudice." *Land v. Auler*, 186 Ill. App. 3d 382, 384-85 (1989). As previously noted, the record is absent of any affirmative defense set forth by defendant which would negate the cause of action requiring it be dismissed with prejudice. Except for the failure to memorialize the oral escrow agreement, plaintiff here has alleged a cause of action for negligence. Accordingly, we reverse the judgment of the circuit court and remand this cause to the circuit court with directions to afford plaintiff a reasonable opportunity to amend his complaint. See *Cammon v. West Suburban Hosp. Medical Center*, 301 Ill. App. 3d 939, 951-52 (1998).

¶ 43 CONCLUSION

¶ 44 For the reasons stated, we reverse the judgment of the circuit court of Cook County and remand this cause to the circuit court with directions to afford plaintiff a reasonable opportunity to amend his complaint.

¶ 45 Reversed and remanded with directions.