FIRST DIVISION
JANUARY 17, 2017

No. 1-15-1975

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MANFRED ICKERT, Plaintiff-Appellant, v. COUGAR PACKAGE DESIGNERS, INC., an Illinois corporation, COUGAR PACKAGING SOLUTIONS, INC., an Illinois corporation, and JOHN SENESE, Individually, Defendants-Appellees.	))))))))))))	Appeal from the Circuit Court of Cook County. No. 12 L 5765 Honorable Eileen O'Neill Burke, Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's order dismissing plaintiff's fraud and civil conspiracy counts is affirmed in part and reversed in part.

¶ 2 Plaintiff Manfred Ickert appeals from a circuit court order dismissing with prejudice the fraud (count I) and civil conspiracy (count VI) counts in his complaint against defendants Cougar Packaging Solutions, Inc., ("New Cougar") and John Senese, individually (collectively

"defendants") and Cougar Package Designers, Inc., ("Cougar").[1] Plaintiff contends that the circuit court erred in granting defendants' motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)) (Code) because he sufficiently pled fraud and civil conspiracy and was not required to attach an allegedly fraudulent financial disclosure. For the following reasons, we affirm in part and reverse in part.

¶ 3 This case arises out of plaintiff's $200,000 un-repaid loan to Cougar. Plaintiff initially filed a complaint on May 25, 2012, alleging fraud in the inducement (count I), breach of contract (count II), fraudulent transfer (count III), breach of fiduciary duties (count IV), conversion (count V), and civil conspiracy (count VI) against defendants, Cougar, and Michael Sullivan, who is not a party to the instant action. Defendants moved to dismiss counts I, III, IV, V, and VI under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)), arguing plaintiff failed to establish any claim other than breach of contract. The circuit court dismissed counts I, V, and VI without prejudice and granted plaintiff leave to re-plead these counts.

¶ 4 On March 28, 2013, plaintiff filed an amended complaint alleging fraud (count I), breach of contract (count II), fraudulent transfer (count III), conversion (count V), and civil conspiracy (count VI) against defendants, Cougar, and Sullivan. Plaintiff withdrew his claim of breach of fiduciary duties (count IV). Defendants moved to dismiss the fraud and civil conspiracy counts, alleging plaintiff failed to establish either cause of action. The circuit court dismissed plaintiff's fraud and civil conspiracy claims without prejudice. Specifically, the court found that plaintiff failed to plead both claims with the required specificity.

[1] Cougar is a defendant in the case at the trial level but is not a party to this appeal.

¶ 5 Plaintiff thereafter filed the second amended complaint at issue here. It alleged fraud against defendants and Cougar (count I), breach of contract against Cougar (count II), fraudulent transfer against New Cougar (count III), conversion against Cougar and Senese (count V), and civil conspiracy against Senese and Sullivan (count VI) on August 18, 2014. Defendants moved to dismiss the fraud and civil conspiracy counts against them under section 2-615, alleging plaintiff failed to cure the deficiencies in his earlier complaint.

¶ 6 The second amended complaint alleged that Mark Cottone, Sullivan, and Senese were officers of Cougar, an Illinois corporation that provided packaging services to commercial and governmental customers.[2] Cottone, Sullivan, and Senese allegedly collaborated to induce plaintiff to loan Cougar $200,000. On April 14, 2010, Cottone approached plaintiff about contributing to a bridge loan for Cougar. Cottone falsely informed plaintiff that a Cougar investor, later identified as Sullivan, agreed to match any other loan to Cougar. To induce plaintiff to give Cougar a loan, Cottone and Sullivan falsely represented that Cougar's inventory doubled between February 2010 and April 2010.

¶ 7 The complaint further alleged that Cougar had an $880,589 high-risk loan from MB Financial Bank ("MB Financial"). Cougar's loan contract with MB Financial prohibited Cougar from acquiring other loans and provided that Cougar would be in default if it procured outside loans. During April 2010, Senese and plaintiff negotiated the terms of the loan, but Senese made false representations about Cougar's financial stability and failed to disclose to plaintiff that his loan would cause Cougar to default on its loan with MB Financial. Additionally, Cottone falsely

[2] Cottone is not a named defendant. He filed for bankruptcy on March 27, 2012 (No. 12-12305, Northern District of Illinois). Plaintiff filed an adversary complaint in the bankruptcy action (No. 12-00872, Northern District of Illinois Bankruptcy Court).

represented that ARPAC Food Group, and one of its employees, Michael Wiener, was involved with Cougar.

¶ 8 Further, the complaint alleged that on April 28, 2010, after learning of plaintiff's reluctance to loan Cougar money, Cottone falsely told plaintiff that Sullivan contributed $200,000 to match plaintiff's anticipated loan. Cottone additionally informed plaintiff that he could secure his loan by filing a UCC financing statement and that he would be "in second position" behind MB Financial. Cottone and Senese allegedly conspired to deliberately withhold the fact that plaintiff's loan would cause Cougar to default on its loan with MB Financial and failed to disclose that Cougar's loan with MB Financial was high-risk, because they knew plaintiff would not agree to the loan had he known these facts.

¶ 9 Additionally, the complaint alleged that two days later, on April 30, 2010, Cottone falsely informed plaintiff that filing a UCC financing statement would "provide [plaintiff] maximum protection behind [MB Financial]." However, asserting that Cougar intended to negotiate a new deal on its current note with MB Financial, Cottone requested that plaintiff wait until June 15, 2010, to file his UCC financing statement. Senese indicated that Cougar would be in a better negotiating position with MB Financial if the bank did not know about plaintiff's loan, but was actually attempting to prevent the bank from learning about plaintiff's loan so Cougar would not be in default. Both Cottone and Senese separately promised plaintiff that his loan would be fully protected. Although Cougar was insolvent, Cottone falsely represented to plaintiff that it was fiscally sound.

¶ 10 The complaint also alleged that on May 8, 2010, plaintiff received a fraudulent financial disclosure that Senese created to falsely inflate Cougar's financial assets. Cottone made

handwritten additions on the disclosure to further falsely inflate Cougar's assets and month-to-month growth. Plaintiff did not attach a copy of the disclosure to the complaint. Instead, the complaint alleged that the disclosure falsely provided that (1) Cougar's March 31, 2010 inventory value was $331,412; (2) Cougar's May 8, 2010 inventory value was $766,222; (3) the only Cougar inventory not pre-sold was floor inventory, valued at $13,717; (4) Cougar's total resale value of inventory and receivables was $1,720,041; (5) two new Cougar customers would add approximately $100,000 per month to Cougar's monthly sales and receivables; (6) RMH, a new customer, would increase Cougar's inventory value to over $900,000; and (7) Cougar would add $300,000 in total inventory and accounts receivable, Cougar's total receivables would be over $425,000, and the total inventory value would be over $1,000,000 by the end of July. Cottone additionally falsely informed plaintiff that he would be Cougar's only secured creditor aside from MB Financial and that Cougar's assets exceeded its liabilities by more than $300,000.

¶ 11 The complaint additionally alleged that in reliance on the false information and representations by Cottone and Senese, plaintiff loaned Cougar $200,000 on May 10, 2010. The terms of the loan were set forth in the parties' Promissory Note and Security Agreement, which were attached to the complaint. Cottone signed both the Promissory Note and Security agreement in his capacity as Cougar's president, and Senese notarized both documents. Cottone and his wife, Debra Cottone, personally guaranteed the loan.

¶ 12 Further, the complaint alleged that on July 1, 2010, Senese, by email, dissuaded plaintiff from filing a UCC financing statement, reiterating that Cougar would be better able to negotiate with MB Financial if the bank did not know about plaintiff's loan. No copy of the email was attached to the complaint. By August 8, 2010, MB Financial learned about plaintiff's loan and

demanded Cougar disassociate itself from the bank by August 13, 2010. To prevent plaintiff from "taking any action" on his loan, Cottone informed plaintiff that Cougar "was getting a deal" with Mango Pack for $1,400,000 per year.

¶ 13 The complaint alleged that MB Financial accused Cottone, Sullivan, and Senese of misappropriating funds from the bank's loan, thereby prompting the Secretary of Labor to file an action against Cottone personally (*Solis, Secretary of Labor, United States Department of Labor v. Cottone*, Court No. 12-01554 (N.D. Ill. Bkcy 2012)). MB Financial investigated Cougar's financial transactions and arranged for ARPAC Food Group to buy out MB Financial's position with Cougar. (C00342) As a result, ARPAC Food Group assumed control of the food division, Cougar's most profitable division. Cottone informed plaintiff on August 29, 2010, that ARPAC Food Group's involvement with Cougar was different than what Cottone and Senese previously represented.

¶ 14 Finally, the complaint alleged that on August 30, 2010, Cottone informed plaintiff that he was starting a successor company, New Cougar, in order to abandon Cougar's debt. He also informed plaintiff that his loan would not be repaid. Senese and Sullivan became officers of New Cougar.

¶ 15 On February 4, 2015, the circuit court entered an order dismissing with prejudice the fraud and civil conspiracy counts against defendants of plaintiff's second amended complaint. As to the fraud count, the court stated that plaintiff failed to allege sufficient facts relating to the misrepresentations allegedly made by Senese and Cougar. Specifically, the court concluded that plaintiff failed to distinguish between representations made by Senese and Cottone. The court found that Cottone was responsible for most of the misrepresentations alleged in plaintiff's

complaint. Further, plaintiff failed to include the fraudulent financial disclosure that Senese created and failed to provide more than general allegations regarding Senese's misrepresentation of Cougar's financial stability. Additionally, the court concluded that plaintiff failed to demonstrate that Senese owed a duty of disclosure relating to MB Financial's loan to Cougar. The court also dismissed plaintiff's civil conspiracy count, reasoning that section 2-606 of the Code (735 ILCS 5/2-606 (West 2012)) required plaintiff to attach the fraudulent financial disclosure because it was "the thrust" of his claim. Without the disclosure attached, the court concluded plaintiff was unable to state a claim for civil conspiracy. The order included Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) language that there was no just cause to delay the enforcement or appeal of the order.

¶ 16 Plaintiff thereafter moved the court to reconsider its order dismissing the fraud and civil conspiracy counts. The circuit court denied plaintiff's motion to reconsider, reiterating that plaintiff failed to sufficiently plead fraud and attach the required fraudulent financial disclosure pursuant to section 2-606. The court additionally found that plaintiff failed to sufficiently plead civil conspiracy because his complaint merely concluded that an agreement between Cottone and Senese existed to defraud him. Further, the court noted that because plaintiff did not establish a cause of action for fraud, his civil conspiracy claim also failed. This appeal followed.

¶ 17 On appeal, plaintiff asserts that the circuit court erred by dismissing with prejudice plaintiff's fraud and civil conspiracy counts pursuant to section 2-615 of the Code. Plaintiff argues that his pleadings were sufficient to establish fraud and civil conspiracy and that he was not required to attach the fraudulent financial disclosure. Plaintiff additionally contends that the circuit court should have permitted him to amend his complaint to cure any deficiencies.

¶ 18 "A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of a complaint based on defects apparent on its face." *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors,* 2012 IL 112479, ¶ 15; see 735 ILCS 5/2–615 (West 2012). When reviewing a section 2-615 motion, we ask whether, taking all well-pleaded facts as true, the allegations in the complaint, construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Canel v. Topinka,* 212 Ill. 2d 311, 317 (2004). The circuit court should not grant a motion to dismiss "unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009). "However, a plaintiff must allege sufficient facts to bring his claim within a legally recognized cause of action." *Id.* We review an order granting a section 2-615 motion to dismiss *de novo*. *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶14.

¶ 19 Prior to considering the court's dismissal of plaintiff's fraud and civil conspiracy claims, we initially note that plaintiff argues that the circuit court erred by finding that section 2-606 of the Code requires that plaintiff attach the allegedly fraudulent financial disclosure, as it was the basis of both the fraud and civil conspiracy claims. We agree that section 2-606 does not require that plaintiff attach the financial disclosure because it was not the basis of plaintiff's fraud or civil conspiracy claims. Section 2-606, in relevant part, provides that, "If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein." 735 ILCS 5/2-606 (West 2010). However, "there is no law that every relevant document which counsel seeks to introduce as an

exhibit at trial must be attached to his pleading." *Farm Credit Bank of St. Louis v. Biethman*, 262 Ill. App. 3d 614, 622 (1994).

¶ 20 Here, plaintiff alleged that Cottone and Senese, together on behalf of Cougar, committed fraud and conspired to induce plaintiff to loan Cougar $200,000 by engaging in a series of deceptive acts, including falsely inflating Cougar's financial viability through oral misrepresentations and the fraudulent financial disclosure, as well as falsely informing plaintiff of growing inventory and new clients. Thus, the financial disclosure was not the basis of either count, but was instead merely evidence of the alleged fraud and conspiracy. See *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App. (1st) 101849, ¶ 32 *Garrison v. Choh*, 308 Ill. App. 3d 48, 53 (1999) (noting that section 2-606 "generally applies to instruments being sued upon, such as contracts or agreements"). Accordingly, we find that plaintiff was not required to attach the allegedly fraudulent financial disclosure under section 2-606.

¶ 21 We next address the court's dismissal of plaintiff's claim of fraud. Plaintiff contends that his complaint alleged facts with sufficient particularity to plead fraud. Defendants do not dispute the facts for purposes of the 2-615 motion, but respond that plaintiff did not sufficiently plead fraud because he failed to (1) distinguish between representations made by Cottone or Senese, (2) establish that Cottone or Senese had a duty to disclose to plaintiff MB Financial's loan provision prohibiting outside loans, and (3) allege any facts that Senese made a misrepresentation to plaintiff.

¶ 22 To sufficiently plead common-law fraud, a plaintiff must establish: "(1) a false statement of material fact; (2) knowledge or belief by the defendant that the statement was false; (3) an

intention to induce the plaintiff to act; (4) reasonable reliance upon the truth of the statement by the plaintiff; and (5) damage to the plaintiff resulting from this reliance." *Avon Hardware Co.*, 2013 IL App (1st) 130750, ¶ 15. "Fraud claims must be pleaded with sufficient specificity, particularity, and certainty to apprise the opposing party of what he is called upon to answer." *Id.* Accordingly, a plaintiff must "plead with sufficient particularity facts which establish the elements of fraud, including what misrepresentations were made, when they were made, who made the misrepresentations, and to whom they were made." *Id.*

¶ 23 Here, we first find that plaintiff's complaint failed to establish fraud against New Cougar. New Cougar was not formed until after the alleged fraud occurred, and thus could not have engaged in fraud prior to its existence. Moreover, plaintiff's complaint failed to make any allegations of fraud against New Cougar. We therefore conclude that the circuit court properly dismissed the fraud claim against New Cougar.

¶ 24 However, accepting all of plaintiff's well-pleaded allegations as true, as we must, we find that plaintiff's complaint contained sufficient allegations to establish fraud against Senese. Although many of plaintiff's allegations pertain to false statements made by Cottone, plaintiff alleged that Senese, individually, made several false representations of material fact. Namely, plaintiff specifically alleged that (1) on April 14, 2010 Senese represented to plaintiff that Cougar's inventory doubled; (2) on May 8, 2010, plaintiff received a fraudulent financial disclosure that Senese created to falsely inflate Cougar's financial assets; and (3) Senese knew that plaintiff's loan would cause Cougar to default on its loan from MB Financial, and failed to inform him of that fact.

¶ 25 Plaintiff additionally alleged that Senese knew the previous statements about Cougar's financial status were false and intended to induce plaintiff to loan Cougar $200,000. The circuit court did not specifically discuss intent but found that neither Cottone nor Senese had a duty to disclose to plaintiff Cougar's financial relationship with MB Financial. It is true that, generally, mere silence does not amount to fraud. *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 421, (2003). However, silence accompanied by deceptive conduct or suppression of a material fact is active concealment and the party that has concealed information is then under a duty to speak. *Mitchell v. Skubiak*, 248 Ill. App. 3d 1000, 1005 (1993).

¶ 26 Plaintiff alleges that Cottone, Sullivan, and Senese collaborated to induce him into making a loan by falsely telling him that another investor would match the capital they raised. But what Senese and the others materially omitted was that taking on any other outside loans would cause a default on the MB loan. Since plaintiff alleges that Cottone and Senese deceptively and deliberately withheld the fact that taking his loan would cause a default on the MB loan and they did so knowing that plaintiff would not have made the loan had he known the information, plaintiff has pled sufficient facts to go forward on a claim for a fraud.

¶ 27 Furthermore, plaintiff's complaint alleges that he relied on Senese's false statements by loaning Cougar $200,000 and delaying filing the UCC financing statement. Although the circuit court noted that plaintiff had knowledge that his loan was secured second behind MB Financial's, knowing about another secured creditor does not necessarily make plaintiff's reliance unreasonable. Additionally, in the context of the numerous other false statements made by Cottone and Senese, we are not persuaded that plaintiff's reliance was unreasonable because the financial disclosure revealed Cougar had more debts than assets, as the circuit court found.

Moreover, in this case, whether plaintiff's reliance was reasonable is a question of fact not properly decided on a motion to dismiss. See *Siegel Development, LLC v. Peak Const. LLC*, 2013 IL App (1st) 111973, ¶ 114 (noting that whether a plaintiff's reliance is reasonable is a question of fact in circumstances where more than one conclusion may be drawn from the undisputed facts); see also *Lee v. City of Decatur*, 256 Ill. App. 3d 192, 195 (1994) ("Questions of fact can never be resolved in a section 2-615 motion.") The complaint also alleges $200,000 in damages from the un-repaid loan. Thus, we conclude that plaintiff sufficiently pleaded the elements of fraud with respect to Senese, and the circuit court erred by dismissing that claim against Senese on his motion to dismiss.

¶ 28 Turning to the next claim, plaintiff argues that the court erred by dismissing count VI because he sufficiently pleaded civil conspiracy. Specifically, plaintiff contends that the court erroneously concluded that his civil conspiracy claim failed because his fraud claim failed. Plaintiff argues that even without the fraud claim, the fraudulent transfer claim, which had not been dismissed, was sufficient to establish the unlawful act element of civil conspiracy. Defendants respond that plaintiff's civil conspiracy claim was properly dismissed because he failed to properly plead the requisite elements.

¶ 29 To sufficiently plead civil conspiracy, the plaintiff must allege (1) an agreement by two or more persons or entities to accomplish by concerted action either an unlawful purpose or a lawful purpose by unlawful means; (2) a tortious act committed in furtherance of that agreement; and (3) an injury caused by the defendant. *Reuter v. MasterCard International, Inc.*, 397 Ill. App. 3d 915, 927 (2010). Because conspiracies are secretive, they are "rarely susceptible to direct proof." *Id.* at 927-28. However, "the agreement is a necessary and important element" of civil

conspiracy, (internal quotations omitted) (*McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999)) and it is insufficient to merely conclude that the defendants agreed with others to achieve an illicit purpose (*Reuter*, 397 Ill. App. 3d at 928). "Mere knowledge of the fraudulent or illegal actions of another is also not enough to show a conspiracy." *McClure*, 188 Ill. 2d at 132 (citing *Tribune Co. v. Thompson*, 342 Ill. 503, 530 (1930)).

¶ 30 The circuit court did not err in dismissing plaintiff's civil conspiracy claim. It is well-settled that a civil conspiracy cannot exist between a corporation's own officers or employees. *Van Winkle v. Owens-Corning Fiberglas Corp.*, 291 Ill. App. 3d 165 (1997). Plaintiff affirmatively alleges in paragraph one of the operative complaint that Cottone and Senese are officers of Cougar, so his claim fails as a matter of law.

¶ 31 We next address the circuit court's denial of plaintiff's request to amend his complaint. Although leave to amend a complaint should be freely given when justice so requires, the right to amend pleadings is not unlimited or absolute. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). We review a circuit court's decision to grant or deny leave to amend pleadings for abuse of discretion. *Id.* In deciding whether to allow a plaintiff to amend pleadings, the court may consider whether the amendment would cure a defect in the pleadings, whether the other party would be prejudiced or surprised by the proposed amendment, whether the proposed amendment is timely, and whether there were previous opportunities to amend the pleadings. *Id.* at 467-68.

¶ 32 In the case at bar, plaintiff was afforded the opportunity to amend his complaint three times but was unable to sufficiently plead fraud committed by New Cougar. Indeed he could not,

as New Cougar was not formed until after the alleged fraud occurred. See *Lee*, 152 Ill. 2d at 467-68. For the same reason, he cannot sufficiently plead civil conspiracy against New Cougar.

¶ 33 Plaintiff has similarly failed to sufficiently allege civil conspiracy in each complaint, despite having prior opportunities to amend. A review of plaintiff's proposed third amended complaint reveals that granting leave to amend the complaint will not cure the deficiencies in the civil conspiracy count. The allegations in the proposed complaint are same as in the second amended complaint and again do not set forth any allegations that support an agreement to achieve an illicit purpose, as required to establish civil conspiracy.

¶ 34 Because plaintiff was afforded several opportunities to amend the complaint and the proposed third amended complaint fails to cure the deficiencies in the second amended complaint, we conclude that the circuit court did not abuse its discretion in dismissing with prejudice plaintiff's claims for fraud with respect to New Cougar and civil conspiracy with respect to all defendants. See *Gajda v. Steel Solutions Firm, Inc.*, 2015 IL App (1st) 142219, ¶31 ("Generally, it is within the court's discretion to dismiss a complaint pursuant to section 2-615 *** with prejudice.")

¶ 35 For the foregoing reasons, the order of the circuit court dismissing plaintiff's fraud and civil conspiracy counts is affirmed with respect to count I against New Cougar and count VI against New Cougar and Senese, and reversed with respect to count I against Senese. We remand this matter to the circuit court for further proceedings not inconsistent with this order.

¶ 36 Affirmed in part and reversed in part; cause remanded.