2017 IL App (1st) 153376-U

FOURTH DIVISION
May 18, 2017

No. 1-15-3376

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PASCHEN GILLEN SKIPPER MARINE JOINT VENTURE, et al., Plaintiffs,	)	Appeal from the Circuit Court of Cook County.
v.	)	
EDWARD E. GILLEN COMPANY, a Wisconsin Corporation, Defendant,	)	
ISP MINERALS, INC., n/k/a SPECIALTY GRANULES, INC., Plaintiff and Counter-Defendant-Appellee,	)	No. 12 CH 3946
v.	)	
PASCHEN GILLEN SKIPPER MARINE JOINT VENTURE, et al., Defendant Counter-Plaintiffs Third-Party Plaintiffs-Appellant.	)	Honorable Anthony Kyriakopoulos, Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

Held: We affirm the trial court's denial of the defendant's motion for leave to amend its counterclaims where the proposed amendments would have been futile.

¶ 1 Defendant, Paschen Gillen Skipper Marine Joint Venture (the Joint Venture), appeals from the trial court's order denying its motion for leave to file amended counterclaims against ISP Minerals, Inc., n/k/a Specialty Granules, Inc. (Specialty Granules). For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Except where otherwise indicated, the following facts are taken from the Joint Venture's initial counterclaim, its proposed amended counter-complaint and exhibits attached thereto, and the trial court order at issue in this appeal.

¶ 4 The Joint Venture has three members: F.H. Paschen, S.N. Nielsen & Associates, LLC (Paschen); Edward E. Gillen Company (Gillen); and Skipper Marine Development, Inc. (Skipper). Paschen, Gillen, and Skipper formed the Joint Venture for the purpose of bidding on certain projects of the Public Building Commission of Chicago (the PBC), including the 31st Street Harbor-Coastal Project (Project). The PBC accepted the Joint Venture's bid and awarded a contract to the Joint Venture on or about April 13, 2010, as the general contractor of the Project.

¶ 5 Gillen was both a member of the Joint Venture and subcontractor to the Joint Venture.[1] Gillen entered into a subcontract with Specialty Granules (Materials Contract), dated April 22, 2010, under which Specialty Granules agreed to sell, and Gillen agreed to buy, certain quantities of stone from Specialty Granules' quarry.

¶ 6 A dispute eventually arose between Gillen and Specialty Granules. Gillen alleged that Specialty Granules breached the Materials Contract by failing to timely produce the stones and

[1] The Joint Venture's initial counterclaim alleged its subcontract with Gillen related "to the performance of certain stated portions of" the work outlined in the contract with the PBC, including "the installation of various sized rock provided to construct the Project breakwater and stub groin." In its amended counter-complaint, the Joint Venture removed this paragraph of its initial counterclaim relating to the subcontract between the Joint Venture and Gillen.

by failing to perform certain work in its quarry.[2] Specialty Granules denied it had breached the agreement and counterclaimed for the balance of payments that Gillen purportedly owed for stone Specialty Granules had delivered.

¶ 7 Gillen and Specialty Granules resolved their dispute through arbitration. In an April 2014 final arbitration award, the Honorable David Coar (Ret.) found that Specialty Granules breached the Materials Contract by requiring Gillen to muck, sort, and break in the quarry and by materially delaying delivery of stone. Judge Coar awarded Gillen damages in excess of $14,000,000, while awarding Specialty Granules damages in excess of $1,000,000 for the balance of unpaid stone deliveries.

¶ 8 During the pendency of the arbitration proceedings, the Project spurred multiple lawsuits in the trial court. In September 2012, Specialty Granules filed an amended complaint against, *inter alia*, the Joint Venture. Specialty Granules set forth a breach of contract claim against the Joint Venture, alleging that when Gillen entered into the Materials Contract with Specialty Granules, he was acting as an agent of the Joint Venture and in furtherance of the Joint Venture's enterprise. Specialty Granules claimed the Joint Venture was jointly and severally liable for Gillen's breach of the Materials Contract. Specialty Granules later filed a motion to voluntarily dismiss its amended complaint, which the trial court granted without prejudice in August 2014.

¶ 9 In June 2014, the Joint Venture filed a counterclaim against Specialty Granules, alleging it was a third-party beneficiary of the Materials Contract between Specialty Granules and Gillen. Thereafter, Specialty Granules filed a motion to dismiss the Joint Venture's counterclaim pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)).

[2] Facts relating to the arbitration proceedings are taken from the final arbitration award, which SGI has included in its appendix and to which both parties have cited.

¶ 10 Following a December 2014 hearing, the trial court granted Specialty Granules' motion and dismissed the Joint Venture's counterclaim with prejudice. The court found the Materials Contract did not contain any language "that would lead to an interpretation or inferences that there was some intended third-party beneficiary" of the contract.

¶ 11 In June 2015, the Joint Venture filed a written motion for leave to file an amended counter-complaint. In its proposed amended counter-complaint, the Joint Venture set forth a direct breach of contract claim against Specialty Granules, alleging upon information and belief that Gillen entered into the Materials Contract with Specialty Granules as an agent of the Joint Venture. The Joint Venture further alleged that Specialty Granules' delays in producing the stone "caused significant delays in the construction of the 31st Street Harbor Project from 2010 through and including 2013." Further, the Joint Venture alleged, it "sustained significant additional Project costs attributable to [Specialty Granules'] breach and consequential Project delays."[3]

¶ 12 In October 2015, the trial court denied the Joint Venture's motion with prejudice, finding the Joint Venture's proposed amendment was futile because the arbitration proceedings were *res judicata* to the proposed breach of contract claim. The court made a finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), that its order was final and no just reason existed to delay enforcement or appeal. This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, the Joint Venture argues the trial court erred by denying its motion to amend its counterclaims.

[3] In addition to its direct breach of contract claim, the Joint Venture also alleged a third-party beneficiary claim, but indicated that it was doing so to preserve its objections to the dismissal of that claim. The Joint Venture has not made any arguments on appeal relating to the third-party beneficiary claim.

¶ 15 Section 2-616(a) of the Code provides that "[a]t any time before final judgment amendments may be allowed on just and reasonable terms," including adding "new causes of action." 735 ILCS 5/2-616(a) (West 2014). In determining whether to allow a party to amend its pleading, a trial court should generally consider "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). The party must meet all four factors, and if the proposed amendment does not state a cognizable claim and therefore fails the first factor, reviewing courts will often not proceed with any further analysis. *In re Marriage of Lyman*, 2015 IL App (1st) 132832, ¶ 51.

¶ 16 We review a trial court's decision to deny a motion to amend pleadings for an abuse of discretion. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 148. A court abuses its discretion by denying a motion to amend pleadings if allowing the amendment would further the ends of justice. *Bangaly v. Baggiani*, 2014 IL App (1st) 123760, ¶ 199. As a court of review, we may affirm the trial court's judgment on any basis appearing in the record. *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 16.

¶ 17 Here, the trial court denied the Joint Venture's motion to amend its counter-complaint based on the first *Loyola* factor, finding the proposed amendment was futile because the arbitration between Specialty Granules and Gillen was *res judicata* to the Joint Venture's proposed breach of contract claim. On appeal, the Joint Venture argues that *res judicata* does not apply. In response, Specialty Granules argues, *inter alia*, that the trial court correctly found the proposed amendment would not cure the defective pleading because the proposed counter-

complaint contains the same material allegations as the original counter-complaint, and because Gillen did not enter into the Materials Contract as the Joint Venture's agent.

¶ 18 At the outset, Specialty Granules argues the Joint Venture has forfeited its ability to challenge the trial court's order by failing to make arguments regarding the three other *Loyola* factors. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (points not argued in an appellant's opening brief are waived). We disagree. The trial court denied the Joint Venture's motion to amend solely on the basis of the first *Loyola* factor; accordingly, it was logical for the Joint Venture in its brief to argue only that the court's finding as the first *Loyola* factor was erroneous. Further, the Joint Venture has made arguments in its reply brief regarding the other three *Loyola* factors in response to Specialty Granules' claim that these factors were not met. See Ill. S. Ct. R. 341(j) (eff. Jan. 1, 2016) (reply brief is confined to replying to arguments in the appellee's brief). Under these circumstances, we will address the Joint Venture's contentions.

¶ 19 In considering those contentions, however, we conclude the trial court did not abuse its discretion by denying the Joint Venture's motion to amend its counterclaims.

¶ 20 In its initial counterclaim, the Joint Venture set forth a third-party beneficiary claim, alleging that the Materials Contract between Specialty Granules and Gillen was made for the Joint Venture's benefit. "A third-party beneficiary may sue under a contract even when not a party to it, provided the benefit of the contract is direct to him, as opposed to being merely incidental." (Internal quotation marks omitted). *Barry v. St. Mary's Hospital Decatur*, 2016 IL App (4th) 150961, ¶ 82. The trial court reviewed the Materials Contract and dismissed the Joint Venture's third-party beneficiary claim because the court saw nothing in the Materials Contract indicating the Joint Venture was an intended third-party beneficiary of the contract.

¶ 21 In its amended counterclaims, the Joint Venture now seeks to assert a direct breach of contract claim, alleging that when Gillen entered into the contract, he did so as an agent of the Joint Venture. However, the defect in the Joint Venture's initial counterclaim—that the Materials Contract was not intended to benefit the Joint Venture—is equally fatal to the Joint Venture's proposed breach of contract claim, because if Gillen had entered into the contract as the Joint Venture's agent, he would have done so to benefit the Joint Venture. See Restatement (Third) of Agency § 8.01 (2006) ("[a]n agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship"). However, the Materials Contract contains no language indicating the contract was made to benefit the Joint Venture. If the Joint Venture was not even an intended third-party beneficiary of the contract, we fail to see how the Joint Venture could be considered a party to the contract under an agency theory. Further, the Joint Venture has not set out any additional factual allegations in its proposed amended pleading that would support a finding that the Materials Contract was made to benefit the Joint Venture. The Joint Venture has essentially just added the allegation that Gillen entered into the Materials Contract "as an agent of the Joint Venture." Thus, the Joint Venture's proposed amended counterclaim does not cure the deficiency identified in the Joint Venture's initial counterclaim, *i.e.*, that the Materials Contract was not intended to benefit the Joint Venture.

¶ 22 Similarly, the Materials Contract fails to suggest, as the Joint Venture alleges, that Gillen entered into the Materials Contract as the Joint Venture's agent. The Materials Contract states as follows: "This letter agreement (the 'Agreement'), when accepted and agreed to on behalf of [Specialty Granules] ('Seller') and Edward E. Gillen Company ('Buyer'), shall constitute the agreement between Seller and Buyer pursuant to which Seller shall sell to Buyer and Buyer shall purchase from Seller Product as more particularly set forth herein[.]" The contract is signed by

Gillen's vice president of operations and Specialty Granules' vice president and general manager. These are the only signatures that appear on the contract. In addition, the Materials Contract also explicitly states it "shall inure to the benefit of the parties hereto" and never mentions the Joint Venture. Thus, the contract is clearly between Gillen and Specialty Granules, not the Joint Venture, and there is nothing in the contract suggesting that Gillen was acting as an agent for the Joint Venture when Gillen entered into the contract.

¶ 23 The Joint Venture's proposed amended counterclaim also contains no factual support for the allegation that Gillen entered into the Materials Contract as the Joint Venture's agent.[4] The Joint Venture's pleading merely alleges "[u]pon information and belief" that Gillen entered the contract as the Joint Venture's agent. On appeal, the Joint Venture argues that members of a joint venture are considered agents for the joint venture for purposes of carrying on the joint venture's usual course of business. See *Coleman v. Charlesworth*, 240 Ill. App. 3d 662, 666 (1992). Relying on the parties' Joint Venture Agreement (JVA), the Joint Venture contends the purpose and scope of the Joint Venture in this case explicitly included Gillen's work on the project, which in turn included Gillen's contracting with Specialty Granules. Based on the foregoing, the Joint Venture contends Gillen was an agent of the Joint Venture as a matter of law and entered the Materials Contract as such.

¶ 24 The Joint Venture's argument is unpersuasive because there is simply no language in the Materials Contract or factual allegations in the Joint Venture's proposed amended pleading that would suggest Gillen did, in fact, enter into the Materials Contract in its capacity as a member or agent of the Joint Venture as opposed to in its individual capacity. The Joint Venture is not

[4] We note the Joint Venture contends Specialty Granules has forfeited its argument that Gillen did not enter the Materials Contract as an agent of the Joint Venture because the Joint Venture failed to make this argument in the trial court. However, an appellee may argue in support of the trial court's judgment on any basis in the record, and our court may affirm the trial court's judgment on any basis in the record. *Baumgartner v. Greene County State's Attorney's Office*, 2016 IL App (4th) 150035, ¶ 41.

mentioned anywhere in the Materials Contract, nor is there any indication Gillen signed the contract in a representative capacity. Accordingly, the trial court did not abuse its discretion by denying the Joint Venture's motion to amend its counterclaims.

¶ 25 In reaching our conclusion, we necessarily reject the Joint Venture's contention that courts may not consider the merits of a proposed claim when reviewing a motion under section 2-616 of the Code. We acknowledge that some prior appellate decisions have held that courts should not consider the merits of a claim when ruling on a motion to amend. See, *e.g.*, *Trinity Bible Baptist Church v. Federal Kemper Insurance Co.*, 219 Ill. App. 3d 156, 163 (1991) ("[t]he mechanism for challenging a pleading which is claimed to be substantially insufficient in law is not through objection to a motion for leave to amend, but through a motion with respect to pleadings filed under section 2-615"). However, more recent First District decisions have established that a court may consider the ultimate efficacy of a claim as stated in a proposed amended pleading instead of requiring the opposing party to test the sufficiency of a complaint by filing a motion to dismiss. See *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 220 (2010); *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004).

¶ 26 We also reject the Joint Venture's claim that the issue of whether Gillen was an agent is a factual question to be determined during discovery, not a reason to prevent the Joint Venture from amending its claims. While the existence of an agency relationship is generally a question reserved for the trier of fact, "a plaintiff must still plead facts which, if proved, could establish the existence of an agency relationship." *Saletech, LLC v. East Balt, Inc.*, 2014 IL App (1st) 132639, ¶ 15. Here, the Joint Venture has failed to allege sufficient facts that Gillen entered into the contract as the Joint Venture's agent, and the language of the Materials Contract belies such a

claim. Accordingly, the court did not abuse its discretion by denying the Joint Venture's motion to amend its counterclaims.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court's judgment.

¶ 29 Affirmed.