2017 IL App (1st) 153387-U

SECOND DIVISION
February 14, 2017

No. 1-15-3387

NORTH SPAULDING CONDOMINIUM ASSOCIATION, an Illinois not-for-profit corporation, Plaintiff/Counterdefendant-Appellee, v. MICHAEL CAVANAUGH and TIFFANY CAVANAUGH, Defendants/Counterplaintiffs -Appellants,	)	Appeal from the Circuit Court of Cook County No. 13 M1 717924
MICHAEL CAVANAUGH and TIFFANY CAVANAUGH, Third-Party Plaintiffs-Appellants, v. WESTWARD MANAGEMENT, INC., Third-Party Defendant-Appellee.	)	Honorable David A. Skryd, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed the unit owners' counterclaim and third-party complaint.

¶ 2 A condominium association initiated a forcible entry and detainer action against the

defendant unit owners for unpaid assessments. The unit owners filed an amended counterclaim against the condominium association alleging a breach of its fiduciary duties, breach of contract, and fraud. The unit owners also filed an amended third-party complaint against the property manager asserting claims of breach of contract and breach of fiduciary duty. The trial court dismissed the unit owners' amended counterclaim and amended third-party complaint with prejudice pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2014)), and made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 6, 2010). The unit owners appeal. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On August 1, 2013, North Spaulding Condominium Association (North Spaulding) initiated a forcible entry and detainer action pursuant to section 9-102 of the Code of Civil Procedure (Forcible Entry and Detainer Act) (735 ILCS 5/9-102 (West 2012)) against Michael and Tiffany Cavanaugh (collectively, the Cavanaughs). North Spaulding's verified complaint alleged that the Cavanaughs owned a condominium unit in North Spaulding's building. North Spaulding alleged that it sent a "Notice and Demand," dated December 5, 2012, by certified mail to the Cavanaughs for the delinquent assessments. Copies of the Notice and Demand and a certificate of mailing were attached to North Spaulding's complaint, indicating that the Notice and Demand was sent to the condominium unit's address. North Spaulding alleged that the Cavanaughs had "failed and refused" to pay their monthly assessments since September 1, 2012, and that North Spaulding was entitled to possession of the condominium unit and a judgment for unpaid and accrued common expenses, late fees, interest, and attorneys' fees.

¶ 5 The Cavanaughs initially sought to quash service of the complaint, but withdrew that motion and filed a verified answer, along with affirmative defenses, a counterclaim, and a third-

party complaint. Relevant to the issues in this appeal, the trial court granted the Cavanaughs leave to file an amended counterclaim against North Spaulding[1] and an amended third-party complaint against Westward Management, Inc. (Westward).[2] The Cavanaughs alleged that Westward was the "management company charged with preparing the accounts" for North Spaulding.

¶ 6 The Cavanaughs' amended counterclaim and amended third-party complaint contained the following factual allegations.[3] North Spaulding's "common practice" was to assess association fees on an irregular basis and that "[a]lthough [the Cavanaughs], at times, paid the association fees on a semi-regular basis, during those times when [they] paid the association fees in a lump sum, North Spaulding did not take legal action." The Cavanaughs alleged that North Spaulding "did not provide notice *** that it would be strictly enforcing payment of the association fees on a monthly basis" instead of accepting lump sum payments. They further alleged that North Spaulding sent notice "that it would be taking legal action" to the condominium unit and not to the Cavanaugh's home address, "although [North Spaulding] knew" that the Cavanaughs did not reside at the condominium unit. The Cavanaughs alleged that North Spaulding did not send a "customary" 30-day demand letter regarding delinquent payments, and that the Cavanaughs did not learn of the "legal action" until a condominium board meeting in September 2013. Finally, they alleged that, despite Michael's attempt to work out a payment plan, North Spaulding "continued to proceed with legal action and continued to incur,

[1] The Cavanaughs' original counterclaim was dismissed for failing to seek leave of court before filing. After the Cavanaughs were granted leave to file their counterclaim, North Spaulding and Westward filed a joint motion to dismiss, and the trial court dismissed the counterclaim without prejudice.

[2] North Spaulding's motion to dismiss the third-party complaint against Westward was originally denied for lack of standing. After Westward filed an appearance, North Spaulding and Westward filed a joint motion to dismiss, and the trial court dismissed the third-party complaint without prejudice.

[3] The first amended counterclaim and first amended third-party complaint, while filed as separate pleadings, contain identical factual allegations.

and assess against [the Cavanaughs], unreasonable attorneys' fees and expenses."

¶ 7 The amended counterclaim contained four counts. Count I alleged that North Spaulding owed the Cavanaughs a fiduciary duty by virtue of section 18.4 of the Illinois Condominium Property Act (Condominium Property Act) (765 ILCS 605/18.4 (West 2014)) and that North Spaulding breached that duty by failing to act with reasonable care by: "fail[ing] to give [the Cavanaughs] notice and demand for payment during the calendar year 2013," assessing attorneys' fees prior to a court determination of the reasonableness of those fees, incurring "unreasonable and unnecessary" attorneys' fees, failing to inform the Cavanaughs that their prior method of payment would not be accepted, and failing to allow a reasonable opportunity to correct any deficiencies.

¶ 8 Count II alleged that a contract existed between the Cavanaughs and North Spaulding that governed the assessment and collection of association fees.[4] The Cavanaughs alleged that North Spaulding breached that contract and its implied covenant of good faith and fair dealing by "fail[ing] to give [the Cavanaughs] notice and demand for payment during the calendar year 2013," assessing attorneys' fees prior to a court determination of the reasonableness of those fees, incurring "unreasonable and unnecessary" attorneys' fees, failing to inform the Cavanaughs that their prior method of payment would not be accepted, and failing to allow a reasonable opportunity to correct any deficiencies.

¶ 9 Count III alleged fraud, and asserted the same allegations as count I with the additional assertion that the Cavanaughs "reasonably relied on the information that they had been given by North Spaulding, including the fact that legal action would not be instituted against them if they paid fees and assessments on a semi-regular or quarterly basis."

[4] The Cavanaughs' counterclaim alleges that "a written contract existed" but that it had been "misplaced and therefore cannot be attached to this Counterclaim."

¶ 10 Count IV alleged a breach of "an oral modification of the contract between the parties."[5] This "oral modification" arose from a "course of conduct," namely "North Spaulding's acceptance of association payments on a semi-regular or quarterly basis without instituting legal action." North Spaulding allegedly breached this contract by "fail[ing] to give [the Cavanaughs] notice and demand for payment during the calendar year 2013," assessing and incurring "unreasonable and unnecessary attorneys' fees and costs," by "neglect[ing] to inform [the Cavanaughs] that their prior method of payment would no longer be accepted," failing to allow a reasonable amount of time to correct any deficiencies, and "unilaterally refus[ing] to accept the payments made by [the Cavanaughs] pursuant to the terms of the oral modification."

¶ 11 The Cavanaughs' amended third-party complaint against Westward contained the same factual allegations as the counterclaim, and contained two counts: breach of fiduciary duty (count I) and breach of contract (count II). Count I alleged that Westward was North Spaulding's "actual or apparent agent for the collection, assessment, and computation of assessments and fees regarding the Unit," that Westward owed the Cavanaughs a fiduciary duty that was created by the agency relationship between Westward and North Spaulding, and that the Cavanaughs "reasonably trusted" Westward to carry out its fiduciary duty. Westward allegedly breached this fiduciary duty by failing to act with reasonable care by "fail[ing] to give [the Cavanaughs] notice and demand for payment during the calendar year 2013," assessing and incurring "unreasonable and unnecessary" attorneys' fees, "neglect[ing] to inform [the Cavanaughs] that their prior method of payment would no longer be accepted," and "fail[ing] to allow a reasonable opportunity to correct any deficiencies before instituting costly legal action[.]"

¶ 12 Count II alleged "upon information and belief" that a written contract existed between North Spaulding and Westward regarding collection of association fees of individual unit

[5] The Cavanaughs' counterclaim does not identify which contract had been modified.

owners.[6] The Cavanaughs alleged the contract contained the implied covenant of good faith and fair dealing, and that the Cavanaughs were "intended third party beneficiaries of this contract." Westward allegedly breached the contract by "fail[ing] to give [the Cavanaughs] notice and demand for payment during the calendar year 2013," assessing and incurring "unreasonable and unnecessary" attorneys' fees, "neglect[ing] to inform [the Cavanaughs] that their prior method of payment would no longer be accepted," and "fail[ing] to allow a reasonable opportunity to correct any deficiencies before instituting costly legal action[.]"

¶ 13 In each count in the amended counterclaim and amended third party complaint, the Cavanaughs alleged that, due to North Spaulding's and Westward's actions, the balance on the Cavanaughs' "account" increased from "$2,072.42 to $7,230.83 in three months' time," and over the course of one year, increased "from $2,072.42 to $13,080.91."

¶ 14 North Spaulding and Westward filed separate motions to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). North Spaulding moved to dismiss the breach of fiduciary duty and fraud claims (counts I and III, respectively) of the amended counterclaim pursuant to section 2-619(a)(9) of the Code, since the Notice and Demand "completely defeat[ed]" the Cavanaughs' assertion that North Spaulding failed to give notice that delays in payment would no longer be permitted. The Notice and Demand informed the Cavanaughs that they were in default, that they had thirty days to pay the past due balance, and that their failure to pay would result in legal action. North Spaulding also asserted that the Declaration of Condominium Ownership and of Easements, Restrictions, and Covenants for North Spaulding (Declaration) and the By-Laws of the North Spaulding

[6] Again, the Cavanaughs alleged that they "do not have a copy of this contract and therefore [*sic*] cannot be attached to this [*sic*] Counterclaim."

Condominiums, which were recorded with Cook County Recorder of Deeds,[7] governed the parties' relationship. The Declaration provided that assessments were due the first day of every month, and that "no terms, obligations, covenants, conditions, restrictions or provisions, imposed hereby or contained herein shall be abrogated or waived by any failure to enforce the same, no matter how many violations or breaches occur." Furthermore, the Declaration contained an arbitration clause that provided that "any claim by a Unit Owner against the Association *** arising out of or relating to the Declaration, By-Laws, or rules and regulations of the Association shall be settled by arbitration ***."

¶ 15 Westward moved to dismiss the breach of fiduciary duty claim (count I) of the amended third-party complaint pursuant to section 2-619(a)(9) of the Code for the same reasons that North Spaulding moved to dismiss counts I and III of the amended counterclaim. Additionally, Westward relied on an unpublished federal district court decision to argue that it could not be sued for breach of fiduciary duty where there were no contractual duties between it and the Cavanaughs.

¶ 16 Both North Spaulding and Westward moved to dismiss the breach of contract claims (counts II and IV of the amended counterclaim and count II of the amended third-party complaint) pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)) because the Cavanaughs failed to attach a copy of any written contracts, in violation of section 2-606 of the Code (735 ILCS 5/2-606 (West 2014)).

¶ 17 The Cavanaughs, in response to the motion to dismiss the breach of fiduciary duty and fraud claims, admitted that the Notice and Demand was sent to the unit address, but argued that

[7] The Declaration was recorded with the Cook County Recorder of Deeds as Document No. 0432239078, and we may take judicial notice of recorded documents. Judicial notice is proper where the document in question is part of the public record and where such notice will aid in the efficient disposition of a case. *Muller v. Zollar*, 267 Ill. App. 3d 339, 341-42 (1994).

North Spaulding "fraudulently and intentionally sent notice to the Unit when it knew that the Cavanaughs did not reside there and would never receive actual notice of the claim." They further asserted that whether they received the Notice and Demand was a disputed question of fact. They argued that North Spaulding's argument regarding arbitration was "unsubstantiated," and that North Spaulding attached only a few pages of the Declaration, which prevented the Cavanaughs from fully addressing the argument. In response to the motion to dismiss the breach of contract claims, the Cavanaughs argued that they did not need to attach written contracts to their amended counterclaim because their claims were not "founded" on a written contract. The Cavanaughs made similar arguments in response to Westward's motion to dismiss.

¶ 18 On October 22, 2015, the trial court heard oral argument on the motions,[8] and entered a written order that stated: "Plaintiff's motions to dismiss (combined [*sic*] 215 – 219) is granted. Defendant's counterclaim and third-party complaint are dismissed w/ prejudice." The written order contained the following language: "Pursuant to Ill. S. Ct. R. 304(a), the Court finds that there is no just reason for delaying an appeal of this present Order."

¶ 19 On November 17, 2015, the Cavanaughs filed an "Emergency Motion to Correct the Court's Order of October 22, 2015," asserting that, due to a "scrivener's error," the October 22, 2015, order did not accurately set forth the language required for a Rule 304(a) finding, and requested that the trial court correct the order. On November 18, 2015, the trial court granted the motion, finding "The Court's order of 10/22/15 is corrected as follows[:] *** 'Pursuant to Ill. S. Ct. R. 304(a), the Court finds that there is no just reason for delaying either enforcement or appeal or both of this Order.' " The Cavanaughs filed their notice of appeal on November 23, 2015.

¶ 20 ANALYSIS

[8] The record on appeal does not include a transcript or bystanders report from the hearing.

¶ 21 At the outset, neither Westward nor the Cavanaughs address whether the Cavanaughs could properly bring a third-party complaint against Westward in this case, which began with North Spaulding's forcible entry and detainer complaint. Section 2-406 of the Code governs third-party proceedings, and provides that "a defendant may by third-party complaint bring in as a defendant a person not a party to the action who is or may be liable to him or her for all or part of the plaintiff's claim against him or her." 735 ILCS 5/2-406(b) (West 2014). "A proper third party action requires derivative liability where the liability of the third party defendant is dependent on the liability of the third party plaintiff to the original plaintiff." *Board of Trustees of Community College No. 508 v. Coopers & Lybrand LLP*, 296 Ill. App. 3d 538, 549 (1998). That is clearly not the case here, and thus the Cavanaughs' third-party complaint against Westward was procedurally improper. However, since the parties did not raise or brief this issue, we will address the merits of the arguments on appeal.

¶ 22 On appeal, the Cavanaughs argue that the trial court erred in dismissing each count of their amended counterclaim and amended third-party complaint with prejudice. They argue that North Spaulding's and Westward's section 2-619.1 motions improperly conflated sections 2-615 and 2-619 of the Code. They argue that neither North Spaulding nor Westward properly alleged an affirmative matter pursuant to section 2-619(a)(9) that would defeat the Cavanaughs' breach of fiduciary duty and fraud claims, since North Spaulding's and Westward's assertions that the Notice and Demand was properly sent "disputed the truth of the *** well-pleaded allegations." They further argue that neither North Spaulding nor Westward produced a complete copy of the Declaration containing all of the "relevant provisions," or demonstrated that the Cavanaughs' claims fell within the Declaration's arbitration provision. They claim that the trial court erred in dismissing all of their breach of contract claims because it was not necessary for them to attach

the written contracts, since their claims were based on the implied covenant of good faith and fair dealing and on oral modifications to a written contract, which "is its own, independent contract." Finally, the Cavanaughs argue that if the trial court found that any of their claims contained insufficient factual allegations, the dismissals should have been without prejudice.

¶ 23 Section 2-619.1 of the Code permits a party to file a motion to dismiss that combines a motion under section 2-615 and a motion under section 2-619. 735 ILCS 5/2-619.1 (West 2014). Section 2-619.1 of the Code permits hybrid motions, but requires that such motions be presented in parts. 735 ILCS 5/2-619.1 (West 2014). "The Code requires that each part be limited to and specify that section under which it is being brought, and that each part clearly show the points or grounds relied upon under the section upon which it is based." *Phelps v. Land of Lincoln Legal Assistance Foundation, Inc.*, 2016 IL App (5th) 150380, ¶ 13.

¶ 24 A motion to dismiss pursuant to section 2-615 challenges the legal sufficiency of a complaint, and inquires whether the allegations state a cause of action upon which relief may be granted. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. All well-pleaded facts must be taken as true, but conclusions of law will not be taken as true unless supported by specific factual allegations. *Id.*

¶ 25 Section 2-619(a)(9) of the Code permits the involuntary dismissal of a claim where the claim asserted is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014). Affirmative matter is "something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). "Unless the affirmative matter is already apparent on the face of the complaint, the defendant must support the affirmative matter with an affidavit or with

some other material that could be used to support a motion for summary judgment." *Pleasant Hill Cemetery Ass'n v. Morefield*, 2013 IL App (4th) 120645, ¶ 21. Once a defendant has presented adequate affidavits or other evidentiary support, " 'the defendant [has] satisfie[d] the initial burden of going forward on the motion' " and the burden then shifts to the plaintiff who is required to establish that the affirmative matter is either unfounded or involves an issue of material fact. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 37 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). A plaintiff may overcome this burden by presenting "affidavits or other proof." 735 ILCS 5/2-619(c) (West 2014). However, a plaintiff cannot rely on the allegations from his own complaint to refute such evidence. *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1101-02 (2009). In addition, if a plaintiff does not come forward with a counteraffidavit refuting the evidentiary facts in the defendant's affidavit or other evidence, those facts may be admitted and the motion may be granted on the basis that plaintiff "failed to carry the shifted burden of going forward." *Hodge*, 156 Ill. 2d at 116; *Pleasant Hill Cemetery Ass'n*, 2013 IL App (4th) 120645, ¶ 21.

¶ 26 Our review of a dismissal under either section 2-615 or 2-619 of the Code is *de novo*. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 27 The Cavanaughs first argue that North Spaulding and Westward improperly conflated sections 2-615 and 2-619 in their section 2-619.1 motions to dismiss. The Cavanaughs argue that North Spaulding's and Westward's section 2-619.1 motion improperly attacked the legal sufficiency of the Cavanaughs' pleadings in the part of their motions designated for section 2-619.

¶ 28 The Cavanaughs forfeited this issue by failing to object to the form of the motion in the trial court. *Economy Fire & Casualty Co. v. GAB Business Services, Inc.*, 155 Ill. App. 3d 197, 202 (1987) ("The failure by a party to object at any time to the form or substance of a motion to dismiss bars that party from raising that issue for the first time on appeal as grounds for reversal."). They also have failed to identify any prejudice resulting from any failure to properly label the motions. See *Burton v. Airborne Express Inc.*, 367 Ill. App. 3d 1026, 1029-30 (2006). Therefore, we decline to reverse the trial court's judgment on the basis of conflation. Furthermore, we are able to discern the relevant arguments presented within the motions to dismiss as well as the arguments presented on appeal, and therefore we will address the merits of those arguments.

¶ 29 The Cavanaughs argue that the trial court erred by dismissing their breach of fiduciary duty claims against North Spaulding (count I of the amended counterclaim) and Westward (count I of the amended third-party complaint) pursuant to section 2-619 of the Code. They argue that neither North Spaulding nor Westward raised any affirmative matter that defeated their claim, that North Spaulding and Westward failed to provide a complete basis for their motions to dismiss by not presenting the entire Declaration, and failed to demonstrate that the Cavanaughs' breach of fiduciary duty was subject to the Declaration's arbitration provision. The Cavanaughs further argue that they alleged sufficient facts to state a cause of action. Alternatively, they argue that the trial court abused its discretion in dismissing their claims with prejudice.

¶ 30 The circuit court dismissed the Cavanaughs' breach of fiduciary duty claim against North Spaulding pursuant to section 2-619 of the Code. The record supports a finding that North Spaulding complied with both the Condominium Property Act and the Forcible Entry and Detainer Act (735 ILCS 5/9-101 (West 2012)) by sending a Notice and Demand to the

Cavanaughs on December 5, 2012. The Notice and Demand attached to the complaint listed the Cavanaughs' address as the unit address. Included with the Notice and Demand was a notarized Certificate of Mailing, which reflected that the Notice and Demand was addressed to the unit address and deposited in the U.S. Mail by certified mail with proper postage. The Notice and Demand made clear that the Cavanaughs were in default, it specified the amount due, it informed the Cavanaughs they had thirty days to pay the amount due in full, and it stated that only payment in full would be accepted. The motion to dismiss was further supported by the affidavit of David Westveer, an employee of Westward with personal knowledge of the storage of Westward's documents, who averred that the copy of the Notice and Demand attached to the motion to dismiss was a "true and correct copy." North Spaulding's motion clearly refuted a conclusion of material fact contained in or inferred from the Cavanaughs' counterclaim, namely that North Spaulding failed to give notice of the default, failed to inform the Cavanaughs that their prior method of payment would not be accepted, and failed to give them an opportunity to correct the deficiency.

¶ 31 The Cavanaughs' response to the motion to dismiss count I of the amended counterclaim admitted that the notice had been sent to the unit, but argued that North Spaulding "fraudulently and intentionally sent notice to the Unit when it knew that the Cavanaughs did not reside there and would never receive actual notice of the claim." The response did not include any counteraffidavit or other evidence that might suggest that North Spaulding did not send the notice in accord with the proof of mailing attached to the Notice and Demand, or that the address to which the notice was sent was not the Cavanaughs' last known address in December 2012.

¶ 32 Simply put, the Cavanaughs came forward with no evidence at all to refute the motions to dismiss the breach of fiduciary duty claims.[9] The Notice and Demand clearly informed the Cavanaughs that they were in default, how they could cure that default, and the consequences of failing to cure the default. The Cavanaughs did not challenge Westveer's affidavit in any way, and they failed to present any counterevidence that might show the existence of any disputed material fact. The Notice and Demand defeats the Cavanaughs' claims that North Spaulding and Westward breached any fiduciary duty.

¶ 33 Finally, the Cavanaughs' breach of fiduciary duty claims alleged that North Spaulding and Westward breached their fiduciary duties by seeking attorneys' fees, which the Cavanaughs alleged were "unnecessary and unreasonable," and which North Spaulding and Westward sought without first having a court determine the reasonableness of the fees. The Cavanaughs advanced no argument in the trial court or on appeal on this point, and have therefore forfeited this argument. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); see also *Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009) (finding that failure to properly develop an argument does "not merit consideration on appeal and may be rejected for that reason alone"). Forfeiture aside, we note that section 9.2(b) of the Condominium Property Act provides that "[a]ny attorneys' fees incurred by the Association arising out of a default by any unit owner *** in the performance of any of the provisions of the condominium instruments, rules and regulations *** shall be added to, and deemed a part of, his respective share of the common expense." 765 ILCS 605/9.2(b) (West 2014). The Cavanaughs fail to explain how North Spaulding breached its fiduciary duty by doing something it was statutorily authorized to do.

[9] Westward's motion to dismiss raised nearly identical arguments, but also disputed whether it owed the Cavanaughs any fiduciary duty. Assuming *arguendo* that Westward did owe a fiduciary duty as the agent of North Spaulding, the Notice and Demand would defeat the Cavanaughs' claim that there was any breach of that fiduciary duty.

¶ 34 In sum, we find that the trial court properly dismissed count I of the amended counterclaim and count I of the amended third-party complaint with prejudice pursuant to section 2-619(a)(9). Because the breach of fiduciary duty claims were defeated by the Notice and Demand, we need not address whether they are also barred by the arbitration provision of the Declaration.

¶ 35 Next, the Cavanaughs argue that the trial court erred in dismissing their fraud claim against North Spaulding (count III of the amended counterclaim) pursuant to section 2-619(a)(9). They argue that North Spaulding's motion to dismiss advanced "no independent argument regarding [the Cavanaughs'] fraud claim," and that North Spaulding "merely re-recited [*sic*] its argument regarding Count I and adopted it, almost word-for-word, as its argument regarding Count III.[10]

¶ 36 Count III of the Cavanaughs' amended counterclaim recites, almost word for word, the allegations set forth in count I of the amended counterclaim. The only substantive difference is that the Cavanaughs alleged in count III that they "reasonably relied on the information they had been given by North Spaulding, including the fact that legal action would not be instituted against them if they paid fees and assessments on a semi-regular or quarterly basis." We note that the Cavanaughs' fraud claim is not well-pleaded, as it fails to allege facts forming the basis of their fraud claim with any specificity or particularity. See *People ex rel. Peters v. Murphy-Knight*, 248 Ill. App. 3d 382, 387 (1993) ("The facts which constitute an alleged fraud must be pleaded with specificity and particularity, including 'what representations were made, when they were made, who made the representations and to whom they were made.' ") (quoting *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 457 (1989)). Regardless,

[10] In fact, North Spaulding's motion to dismiss addressed counts I and III of the first amended counterclaim together.

assuming *arguendo* that the facts alleged stated a claim for fraud, those facts were refuted by the Notice and Demand for the reasons described above. The Cavanaughs fail to develop any meaningful, independent argument as to how they can maintain a fraud claim in light of the Notice and Demand. Therefore, we find that the trial court properly dismissed count III of the Cavanaughs' amended counterclaim pursuant to section 2-619(a)(9) of the Code, since the factual allegations were defeated by the Notice and Demand.

¶ 37 Next, the Cavanaughs argue that the trial court erred in dismissing their breach of contract claims against North Spaulding (counts II and IV of the amended counterclaim) and against Westward (count II of the amended third-party complaint) pursuant to section 2-615 of the Code. They argue that it was not necessary to attach any written contracts to their pleadings pursuant to section 2-606 of the Code (735 ILCS 5/2-606 (West 2014)) because count II of the amended counterclaim was based on North Spaulding's breach of the covenant of good faith and fair dealing which is implied in all contracts, count IV of the amended counterclaim was based on North Spaulding's breach of an oral modification to a contract which is, by nature, not written, and count II of the amended third-party complaint was based on Westward's breach of the implied covenant of good faith and fair dealing contained in the contract between North Spaulding and Westward. Alternatively, they argue that the trial court abused its discretion by dismissing the claims with prejudice.

¶ 38 North Spaulding and Westward argue that the Cavanaughs failed to allege sufficient facts to state a cause of action for breach of contract. North Spaulding argues the Cavanaughs failed to allege any circumstances leading to an oral modification or how such a modification overcame the no-waiver clause in the Declaration, and failed to attach the written contract giving rise to

their claims or any affidavit explaining the unavailability of the written contracts in violation of section 2-606 of the Code (735 ILCS 5/2-606 (West 2014)).

¶ 39 In order to state a cause of action for breach of contract, plaintiff must establish an offer and acceptance, consideration, the terms of the contract, plaintiff's performance of all required contractual conditions, the defendant's breach of the terms of the contract, and damages resulting from the breach. *Penzell v. Taylor*, 219 Ill. App. 3d 680, 688 (1991). "A general allegation that a contract exists, without supporting facts, is a legal conclusion which is not admitted as true by a motion to dismiss or strike." *Martin-Trigona v. Bloomington Federal Savings & Loan Ass'n*, 101 Ill. App. 3d 943, 946 (1981).

¶ 40 Although every contract implies good faith and fair dealing, the duty of good faith and fair dealing is a derivative principle of contract law that is essentially used as a construction aid in determining the intent of the parties where an instrument is susceptible of two conflicting constructions. *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 112 (1993). The purpose of the implied covenant of good faith and fair dealing "is to ensure that parties do not take advantage of each other in a way that could not have been contemplated at the time the contract was drafted or do anything that will destroy the other party's right to receive the benefit of the contract." *Gore v. Indiana Insurance Co.*, 376 Ill. App. 3d 282, 286 (2007). It is axiomatic that parties are entitled to enforce the terms of the contract to the letter and an implied covenant good faith cannot overrule or modify the express terms of a contract. *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 367 (1995) (citing *Resolution Trust*, 248 Ill. App. 3d at 113).

¶ 41 Here, neither count II of the amended counterclaim nor count II of the amended third-party complaint alleges sufficient facts to establish the existence of a contract into which the

covenant of good faith and fair dealing is implied. In count II of the amended counterclaim, the Cavanaughs alleged that this covenant is contained in "a written contract existed between [the Cavanaughs] and North Spaulding, dealing in part with the assessment and collection of association fees[,]" but "[t]his contract has been misplaced and therefore cannot be attached to this counterclaim." The Cavanaughs failed to establish when this contract was formed, the material terms of the contract, and whether they had performed their obligations under the contract. This is patently inadequate, and fails to establish the existence of any contractual agreement between the parties. See *Penzell*, 219 Ill. App. 3d at 688. The trial court correctly dismissed count II of the amended counterclaim pursuant to section 2-615 of the Code.

¶ 42 The Cavanaughs also did not comply with section 2-606 of the Code, which states in relevant part:

> "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, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her." 735 ILCS 5/2-606 (West 2014).

Here, the Cavanaughs failed to attach the written instrument, and similarly failed to attach an affidavit "stating facts showing that the instrument is not accessible to him or her." Within their counterclaim, they conclusorily stated that the contract "has been misplaced and therefore cannot be attached." This is insufficient as there is no factual support for this claim. The failure to comply with section 2-606 of the Code was also a proper basis for dismissal under section 2-615 of the Code. *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 300 (2010).

¶ 43 In count II of the amended third-party complaint, the Cavanaughs alleged that "upon information and belief," a written contract existed between North Spaulding and Westward regarding collection of association fees of individual unit owners, that the contract contained the implied covenant of good faith and fair dealing, and that the Cavanaughs were third party beneficiaries of the contract. They also alleged that they "do not have a copy of this contract and therefore cannot be [*sic*] attached to this Counterclaim [*sic*]." They then alleged that Westward breached the implied covenant of good faith and fair dealing.

¶ 44 On appeal, the Cavanaughs argue that they were not required to attach a copy of a written contract to their third-party complaint because they were "unsure whether or not the contract between [North Spaulding] and [Westward] was actually in writing because [the Cavanaughs] were only third party beneficiaries of the contract, not parties themselves."

¶ 45 Count II of the amended third-party complaint suffers from the same defects as count II of the amended counterclaim. The Cavanaughs do not allege sufficient facts to establish the existence of a contract between North Spaulding and Westward, they admit they are unsure of its nature, and instead merely allege that one exists. As discussed above, this is insufficient. See *Martin-Trigona*, 101 Ill. App. 3d at 946 ("A general allegation that a contract exists, without supporting facts, is a legal conclusion which is not admitted as true by a motion to dismiss or strike."). This is particularly true where the Cavanaughs claim to be intended third party beneficiaries of the contract. As we explained in *Martis v. Grinnell Mutual Reinsurance Co.*:

> "Whether someone is a third party beneficiary depends on the intent of the contracting parties, as evidenced by the contract language. It must appear from the language of the contract that the contract was made for the direct, not merely incidental, benefit of the third person. Such an intention must be shown by an express provision in

> the contract identifying the third party beneficiary by name or by description of a class to which the third party belongs. If a contract makes no mention of the plaintiff or the class to which he belongs, he is not a third party beneficiary of the contract. The plaintiff bears the burden of showing that the parties to the contract intended to confer a direct benefit on him." (Internal citations omitted.) *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1020 (2009).

¶ 46 Here, the Cavanaughs allege no facts to support their assertion that they were intended third party beneficiaries of a contract between North Spaulding and Westward. Third party beneficiary status depends on the precise terms of the contract, which the Cavanaughs make no effort to describe. The trial court correctly dismissed count II of the amended third-party complaint pursuant to section 2-615 of the Code.

¶ 47 Count IV of the amended counterclaim suffers from similar defects. The Cavanaughs alleged that the "parties' course and conduct constituted an oral modification of the contract between the [Cavanaughs and North Spaulding]." They fail, however, to identify the contract allegedly modified. Again, the Cavanaughs failed to allege facts that establish the existence of a contract, the material terms of that contract, and whether the Cavanaughs themselves had performed their obligations under the contract. Furthermore, they assert that there was an oral modification to the contract without explaining which, or identifying how, the terms of the contract were modified. Their statement that the "parties' course and conduct constituted an oral modification" is a legal conclusion devoid of factual support, which is insufficient to survive a motion to dismiss. *Martin-Trigona*, 101 Ill. App. 3d at 946. The trial court correctly dismissed count IV of the amended counterclaim pursuant to section 2-615 of the Code.

¶ 48 Furthermore, we note that the Cavanaughs did not allege the existence of an oral contract,

but instead alleged the existence of an oral *modification* to a *written* contract. They were therefore required by section 2-606 of the Code to attach the written contract to their counterclaim, (see 735 ILCS 5/2-606 (West 2014) (requiring attachment of a written contract or the relevant portion thereof "[i]f a claim or defense is founded upon a written instrument")), and then allege the terms of the oral modification. *Penzell*, 219 Ill. App. 3d at 688. Otherwise, they were required to attach an affidavit "stating facts showing that the instrument is not accessible to him or her." 735 ILCS 5/2-606 (West 2014). Therefore, the failure to comply with section 2-606 of the Code was also a proper basis for dismissal pursuant to section 2-615 of the Code. *Velocity*, 397 Ill. App. 3d at 300.

¶ 49 Finally, the Cavanaughs argue that the trial court abused its discretion by dismissing their breach of contract claims with prejudice. They argue that their breach of contract counts are "based on claims that [are] outside the four corners of any written contract that would have existed," and that any violation of section 2-606 of the Code could be "easily remedied by amendment to include either a copy of the contract or the required affidavit." The Cavanaughs made the same argument in the trial court in their response to the motion to dismiss. Their response did not attach any proposed amended pleading or proposed affidavit.

¶ 50 Regardless of whether the Cavanaughs could re-plead their breach of contract claims to comply with section 2-606 of the Code, any amendment would be futile. The breach of contract counts asserted that North Spaulding and Westward breached their contractual obligations by "fail[ing] to give [the Cavanaughs] notice and demand for payment during the calendar year 2013," assessing attorneys' fees prior to a court's determination of the reasonableness of those fees, incurring "unreasonable and unnecessary" attorneys' fees, failing to inform the Cavanaughs that their prior method of payment would not be accepted, and failing to allow a reasonable

opportunity to correct any deficiencies. Count IV of the amended counterclaim further alleged that North Spaulding "unilaterally refused to accept the payments made by [the Cavanaughs] pursuant to the terms of the oral modification."

¶ 51 The allegation that no proper notice was sent is belied by the Notice and Demand dated December 5, 2012. The notice and demand made clear that the Cavanaughs were in default, it specified the amount due, informed the Cavanaughs they had thirty days to pay the amount due in full, and stated that only payment in full would be accepted. Additionally, as previously stated, North Spaulding was statutorily authorized to seek reasonable attorneys' fees in connection with its attempt to recover the unpaid assessments. These are affirmative matters that would bar the Cavanaughs' re-pleaded breach of contract claims. We therefore affirm the trial court's dismissal of counts II and IV of the amended counterclaim and count II of the amended third-party complaint with prejudice.

¶ 52 CONCLUSION

¶ 53 In sum, the trial court properly dismissed counts I and III of the amended counterclaim, as well as count I of the amended third party complaint, with prejudice pursuant to section 2-619 of the Code. The trial court properly dismissed counts II and IV of the amended counterclaim, as well as count II of the amended third party complaint, with prejudice pursuant to section 2-615 of the Code.

¶ 54 For the foregoing reasons, we affirm the trial court's judgment.

¶ 55 Affirmed.