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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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CENTURY 21 McMULLEN REAL ESTATE, INC.,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellant,	)	of Cook County.
	)	
v.	)	No. 15 M1 108653
	)	
DIAMOND ELECTRIC CONTRACTING, INC.,	)	The Honorable
	)	Daniel P. Duffy,
Defendant-Appellee.	)	Judge Presiding.
	)	
	)	

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PRESIDING JUSTICE GORDON delivered the judgment of the court.  
Justices Lampkin and Reyes concurred in the judgment.

**ORDER**

¶ 1 *Held:* Plaintiff adequately alleged its breach of contract claim by alleging: (1) the existence of a valid and enforceable listing agreement; (2) performance by the plaintiff; (3) breach of the listing agreement by the defendant; and (4) resulting damages to the plaintiff. The trial court improperly dismissed plaintiff's third amended complaint with prejudice.

¶ 2 Plaintiff Century 21 McMullen Real Estate, Inc., appeals the trial court's dismissal of its complaint against defendant Diamond Electric Contracting, Inc. The trial court dismissed on its own motion and without specifying the statutory section under which it granted the

dismissal. The complaint alleged that defendant breached an agreement which made plaintiff the exclusive broker for defendant's property. For the following reasons, we reverse.

¶ 3

#### BACKGROUND

¶ 4

On April 17, 2015, plaintiff filed a one-count complaint, alleging that defendant had entered into an "Exclusive Commercial-Investment Listing Agreement" (the listing agreement) which granted plaintiff the right to be the exclusive broker to list and sell defendant's property at 5583 and 5585 North Northwest Highway, Chicago, Illinois (the property).<sup>1</sup> The complaint further alleges that defendant subsequently entered into a contract with The Third Synthesis, d/b/a Chicago Sweet Connection (CSC), to sell the property for \$400,000. Finally, the complaint alleged that plaintiff had "produced [CSC] as a buyer of the [property] thereby earning its compensation of \$20,000," which was the commission specified in the listing agreement. On April 20, 2015, plaintiff filed a *lis pendens* notice on the property, a copy of which is in the appellate record.

¶ 5

The listing agreement was attached as an exhibit to the complaint, and it provided three situations which would require defendant to pay plaintiff a 5% commission. Specifically, lines 33 and 37–42 stated, in relevant part, that:

"Owner [defendant] agrees: \*\*\* to pay Broker [plaintiff] a commission or compensation in the amount of 5% in the event [(1)] Broker produces a Purchaser ready, willing and able to purchase the premises on the terms herein provided; or [(2)] if the property is sold, gifted, exchanged, optioned (and such option is exercised before or subsequent to the termination of this agreement), a joint venture is

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<sup>1</sup> The complaint described the property as lots 4 and 5 in Elmore's addition to Admore Manor, being subdivision in the east 1/2 of the northwest 1/4 of section 8, township 40 north, range 13, east of the third principal meridian, in Cook County, Illinois, PIN #s 13-08-105-003-0000 and 13-08-105-004-0000.

contracted, or the property is exchanged through or as a result of Broker's services and efforts, or Owner's, or any other person or persons during the period of this agreement; or [(3)] if the property is sold, gifted, options, joint ventured, or exchanged within one hundred eighty (180) days after termination of this agreement to any person to whom the property was submitted during the term of this agreement."

The listing agreement provided that plaintiff's "commission is to be paid at time of execution and delivery of deed, option, lease, joint venture agreement, or installment agreement for deed, whichever occurs sooner, and [plaintiff] is authorized to deduct the commission and expenses from the earnest money deposit at such time."

¶ 6 The listing agreement provided that, in the event of "any dispute, controversy, or claim arising out of or relating to this exclusive listing agreement, or any breach thereof by either party," the dispute "shall be resolved by arbitration in accordance with the Code of Ethics and Arbitration Manual of the National Association of Realtors \*\*\* through the facility of the Chicago Association of Realtors."

¶ 7 The listing agreement provides for situations where, if defendant were to default, "earnest money, at option of Purchaser, and upon written direction by Owner and Purchaser or as directed by a Court of competent jurisdiction, shall be refunded to Purchaser, but such refunding shall not release Owner from the obligations of this agreement."

¶ 8 On April 28, 2015, plaintiff moved and received leave to file an amended complaint which alleged that defendant and CSC had entered into a sales contract for \$425,000, thereby making plaintiff's 5% commission \$21,250.

¶ 9 On September 3, 2015, defendant moved to dismiss pursuant to section 2-619.1<sup>2</sup> of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)), arguing: (1) that plaintiff's first amended complaint should be dismissed under section 2-615 because plaintiff had failed to allege specific facts that indicated plaintiff had "produced" a potential buyer; and (2) that plaintiff's first amended complaint should be dismissed under section 2-619 because plaintiff had not "produced" CSC as a potential buyer. In support, plaintiff attached the affidavit of Larry Garland, one of defendant's principals. Garland averred that CSC "has been a neighbor of Defendant at the Property for many years," and Garland has personally:

"been in discussions with the owner of CSC for several years regarding his desire to purchase the [Property]. \*\*\* Neither [plaintiff] nor the employee of [plaintiff] with whom I dealt (Barbara Angarone, a formerly close, longstanding family friend) had any connection with the Property or the prospective sale of the Property to CSC prior to early 2015."

Garland further averred that he had asked Angarone, *prior* to the execution of the listing agreement, to speak to CSC about its intent to sell the Property.

¶ 10 On October 9, 2015, plaintiff filed its response to defendant's motion to dismiss. Plaintiff argued that defendant had breached the listing agreement which stated: "OWNER AGREES: To cooperate fully with the Broker (and Owner's Designated Agent) and refer all inquiries to Broker \*\*\* and to conduct all negotiations through Broker" (the cooperation clause). Plaintiff argued that, as a consequence of defendant's breach of the listing agreement,

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<sup>2</sup> Section 2-619.1 allows for combined motions. The movant may combine section 2-615 motions to dismiss, section 2-619 motions for involuntary dismissal, and 2-1005 motions for summary judgment. A combined motion will contain parts that are limited and specify pursuant to which section each is brought under and "clearly show the points or grounds relied upon under the section upon which it is based." 735 ILCS 5/2-619.1 (West 2014).

plaintiff was deemed, by default, to have produced the buyer. Plaintiff attached the affidavit of its employee, Barbara Angarone, in which she averred: (1) that Larry Garland, one of defendant's principals, had never informed her that an agreement reached between defendant and CSC would not be subject to the listing agreement; (2) that she had informed Garland, prior to his executing the listing agreement, that any agreement between CSC and defendant would be covered by the listing agreement; and (3) that Garland had agreed that a deal with CSC would be covered by the listing agreement. On November 10, 2015, the trial court granted defendant's section 2-619.1 motion to dismiss and gave plaintiff until November 24, 2015, to amend its complaint. The trial court's written order did not state whether the court granted the motion under section 2-615 or section 2-619.<sup>3</sup>

¶ 11 On November 12, 2015, plaintiff filed its second amended complaint in which it alleged the same facts and claims as the first amended complaint, but added (1) that plaintiff had, in fact, produced CSC as a buyer according to the cooperation clause and (2) that plaintiff had produced CSC as a potential buyer *after* the execution of the listing agreement.

¶ 12 On December 3, 2015, defendant again moved to dismiss plaintiff's second amended complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). Defendant argued that the trial court had previously dismissed plaintiff's complaint because it contained insufficient "factual allegations demonstrating that Plaintiff 'produced' the purchaser at issue." Defendant argued that, although plaintiff's second amended complaint added allegations about the cooperation clause, the complaint should still be dismissed because it

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<sup>3</sup> The appellate record does not contain a transcript or bystander's report of the November 10, 2015, proceedings. See Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005) (setting forth a process for providing a report of a proceeding when no court reporter was present).

suffered from the same infirmity—namely, that plaintiff still had not provided sufficient factual detail to support its claim that it had “produced” a potential purchaser.

¶ 13 On January 19, 2016, plaintiff filed a response to defendant’s section 2-615 motion, in which it disputed the reason for the dismissal of its first amended complaint. Plaintiff argued that the reason its first amended complaint was dismissed was: “the Court held that the language in the Listing Agreement that all inquiries had to be referred to the Broker and that all negotiations had to be conducted through the Broker was a necessary element that had to be plead.” Plaintiff argued that it had corrected the second amended complaint accordingly. Plaintiff further argued that:

“[a]n Exclusive Listing Agreement means that if the property is sold during the term of the Agreement the Broker earns its commission because only the Broker may enter into negotiations with a potential buyer. If the seller goes behind the back of the Broker, fails to refer a potential buyer to the Broker and cuts its own checks [*sic*] deal, the seller breaches the Agreement and must pay the Broker.”

¶ 14 In reply, defendant argued that no sale had occurred between CSC and defendant, and thus, no compensation was warranted. Defendant argued that the *lis pendens* filed by plaintiff had prevented defendant from selling the property to CSC, which had resulted in foreclosure of the property and its sale at public auction. Defendant did not attach any documents in support of its argument, but cited to the foreclosure proceedings in the circuit court of Cook County’s chancery division.<sup>4</sup> The trial court granted defendant’s section 2-615 motion to

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<sup>4</sup> Although the following documents are not in the record, we may take judicial notice of circuit court orders. See *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 35 (indicating that we make take judicial notice of public records); *Johnson v. Ames*, 2016 IL 121563, ¶ 8 (exercising the ability to take judicial notice of public records); *People v. Carter*, 2016 IL App (3d) 140196, ¶ 59 (exercising the ability to take judicial notice of public records); *People v. Garrett*, 62 Ill. 2d 151,

dismiss without prejudice and gave plaintiff until March 16, 2016, to file another amended complaint.

¶ 15 On March 11, 2016, plaintiff filed its third amended complaint which alleged: (1) that defendant and plaintiff were parties to an exclusive listing agreement; (2) that, during the term of the listing agreement, defendant entered into a sales contract with CSC for the property; (3) that the listing agreement contains a cooperation clause; (4) that defendant was in breach of the cooperation clause by failing to refer CSC's inquiries to plaintiff; (5) that CSC qualified as a willing and able purchaser of the property; (6) that defendant entered into a contract to sell the property to CSC for \$435,000 during the period of the listing agreement; and (7) that plaintiff was thus entitled to \$21,250 in commission.

¶ 16 After plaintiff filed its third amended complaint, defendant did not renew its motion to dismiss.

¶ 17 On April 11, 2016, the trial court issued a written order in which it stated that it dismissed plaintiff's third amended complaint with prejudice. The order stated that "[o]n court's motion, the third amended complaint is dismissed with prejudice," but the order did not specify under which section of the Code the dismissal occurred. On April 28, 2016, plaintiff filed a timely notice of appeal, and on February 7, 2017, this court took the appeal on the appellant's brief only.

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163 (1975) (holding that the appellate court may take judicial notice of the contents of public records). On October 19, 2015, the circuit court of Cook County entered an "Order Confirming Sale (Order Approving)" stating: (1) that Associated Bank, N.A. was the successful bidder at the public auction; (2) that the deed to the Property shall be issued to Associated Bank; and (3) that an *in personam* deficiency judgment is entered against defendant, Larry A. Garland, and Lisa Garland, jointly and severally, in the amount of \$48,118.61. See Associated Bank, N.A. v. Chicago Title Land Trust, No. 14 CH 14085 (Cir. Ct. Cook Co. Oct. 19, 2015). The court also entered a memorandum of judgment against defendant, Larry A. Garland, and Lisa Garland. See Associated Bank, N.A. v. Chicago Title Land Trust, No. 14 CH 14085 (Cir. Ct. Cook Co. Oct. 19, 2015).

¶ 18

## ANALYSIS

¶ 19

On appeal, plaintiff argues that it provided sufficient factual detail in its third amended complaint to support a claim of breach of contract and thus, the trial court erred by dismissing it.

¶ 20

Specifically, plaintiff argues that, because defendant went behind its back and contracted with CSC during the time of the listing agreement, defendant breached the listing agreement. Plaintiff argues that, because defendant breached the agreement by failing to direct the negotiations to plaintiff, plaintiff “therefore ‘produced’ the buyer according to the terms of the [listing] agreement,” entitling it to a brokerage commission.

¶ 21

For the following reasons, we reverse.

¶ 22

### I. Appellant’s Brief

¶ 23

First, we observe that we took this appeal on the appellant’s brief only. A reviewing court may exercise its discretion to take an appeal in absence of an appellee’s brief. *Thomas v. Koe*, 395 Ill. App. 3d 57, 577 (2009). A reviewing court (1) may serve as an advocate for the appellee and decide the case when the court determines justice so requires, (2) may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of the appellee’s brief, or (3) may reverse the trial court when the appellant’s brief demonstrates *prima facie* reversible error that is supported by the record. *Thomas*, 395 Ill. App. 3d at 577 (citing *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976)); see also *Myers v. Brantley*, 204 Ill. App. 3d 832, 833 (1990) (describing the three discretionary options the appellate court may exercise when an appellee fails to file a brief).



¶ 24 In this case, the record is not lengthy, and the issues on appeal are simple and legal, not factual. Therefore, under *Talandis*, we may consider the merits of an appeal despite the absence of an appellee’s brief since “ ‘the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee’s brief.’ ” *People v. Guillen*, 2014 IL App (2d) 131216, ¶ 20 (quoting *Talandis*, 63 Ill. 2d at 133).

¶ 25 II. Arbitration Clause

¶ 26 Even where no party raises the question, a reviewing court has a duty to consider *sua sponte* its own jurisdiction. *Vowell v. Pederson*, 315 Ill. App. 3d 665, 665 (2000); see also *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 44 (the appellate court has an “independent duty to consider its own jurisdiction”).

¶ 27 In the case at bar, the listing agreement contains an arbitration clause which subjects “any dispute, controversy, or claim arising out of or relating to this exclusive listing agreement, or any breach thereof by either party” to arbitration in “accordance with the Code of Ethics and Arbitration Manual of the National Association of Realtors \*\*\* through the facility of the Chicago Association of Realtors.” (Emphasis added.) Because plaintiff alleged a breach of the listing agreement, the arbitrability of the breach could have been an issue. However, Illinois courts have held that the right to arbitration may be waived like any other contractual right. *TSP-Hope Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1174 (2008) (citing *Kostakos v. KSN Join Venture No. 1*, 142 Ill. App. 3d 533, 536 (1986)). Waiver occurs when a party’s conduct “has been inconsistent with the arbitration clause so as to indicate” an abandonment of such right. *Applicolor, Inc. v. Surface Combustion Corp.*, 77 Ill. App. 2d 260, 266 (1966); see also *TSP-Hope*, 382 Ill. App. 3d at 1174–75 (providing six examples of cases in which courts have held conduct inconsistent with a party’s contractual

right to arbitration); *Kostakos*, 142 Ill. App. 3d at 536 (comparing examples of what courts have and have not determined to be actions inconsistent with a party’s right to arbitrate).

¶ 28 Specifically, “[a] party acts inconsistently with its right to arbitrate when it submits arbitrable issue to a court for decision.” *TSP-Hope*, 382 Ill. App. 3d at 1174; but see *Atlas v. 7101 Partnership*, 109 Ill. App. 3d 236, 240–41 (1982) (filing two complaints and two motions for preliminary injunctions did not waive plaintiff’s right to arbitrate); *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 347 Ill. App. 3d 997, 1003–04 (2003) (filing a section 2-619 motion to dismiss does not constitute “substantial participation in the litigation to a point that is inconsistent with the defendant’s intent to arbitrate”).

¶ 29 In the case at bar, neither party addressed the issue before the trial court nor have they briefed the issue on appeal. It was not part of defendant’s motion to dismiss, nor was it mentioned by plaintiff. “Issues not raised in the trial court are waived and may not be raised for the first time on appeal.” *Liberty Chevrolet, Inc. v. Rainey*, 339 Ill. App. 3d 949, 952 (2003) (citing *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996)); see also *Gateway Drywall & Decorating, Inc. v. Village Construction Co.*, 76 Ill. App. 3d 812, 815 (1979) (citing *People ex rel. Delisi Construction Co., Inc. v Board of Education, Willow Springs School District 108*, 26 Ill. App. 3d 893, 896 (1975)). Generally, “the appellate court has jurisdiction only over those matters raised in a notice of appeal.” *E.J. De Paoli Co. v. Novus, Inc.*, 156 Ill. App. 3d 796, 798 (1987). Thus, the arbitration clause is not a bar to our jurisdiction. The conduct of both parties illustrates a waiver of the arbitration clause.

¶ 30 III. Standard of Review

¶ 31 This case involves a dismissal by the trial court on its own motion. As we have already observed, the trial court did not specify the statutory section under which it dismissed. “A

litigant whose cause of action has been terminated by the court *sua sponte* may bring an appeal, which invites *de novo* review of the legal sufficiency of the complaint.” *People v. Vincent*, 226 Ill. 2d 1, 25–26 (2007); *People v. Ryburn*, 378 Ill. App. 3d 972, 978–79 (2008); *People v. Malloy*, 374 Ill. App. 3d 820, 821–22 (2007). *De novo* review means that we perform the same analysis a trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Exhibits attached to the complaint are integral parts of the complaint and must be so considered. *Talbert v. Home Savings of America, F.A.*, 265 Ill. App. 3d 376, 379 (1994) (citing 735 ILCS 5/2-606 (West 1992)). Pleadings are to be liberally construed with a view of doing substantial justice between the parties. *Wysocki v. Bedrosian*, 124 Ill. App. 158, 162 (1984) (citing 735 ILCS 5/2-606 (West 1981)).

¶ 32

#### IV. Breach of the Listing Agreement

¶ 33

##### A. Elements

¶ 34

To survive a dismissal of a breach of contract claim, a plaintiff must allege the following elements: “ ‘(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resulting injury [or damage] to the plaintiff.’ ” *Burkhart*, 2016 IL App (2d) 151053, ¶ 14 (quoting *Henderson-Smith & Associates, Inc. v. Nahamani Family Services Center, Inc.*, 323 Ill. App. 3d 15, 27 (2001)).

¶ 35

Plaintiff argues that it alleged the first element, namely, a contract, by alleging that plaintiff and defendant executed a listing agreement in which defendant agreed to fully cooperate with plaintiff and refer all inquiries to plaintiff. Second, plaintiff argues that it alleged its own performance by alleging that, during the time period of the listing agreement, defendant and CSC entered into a sales agreement. Third, plaintiff argues that it alleged a breach by alleging that defendant failed to abide by the listing agreement which infers a

breach of the contract. Fourth, plaintiff argues that it alleged damages by alleging that it did not receive the commission it was entitled to. In support, plaintiff attached the listing agreement to the complaint.

¶ 36

#### B. Valid Contract

¶ 37

To allege the existence of a valid contract, a plaintiff must plead facts indicating there was an offer, an acceptance, and consideration. *Talbert v. Home Savings of America, F.A.*, 265 Ill. App. 3d 376, 380 (1994) (citing *Martin v. Government Employees Insurance Co.*, 206 Ill. App. 3d 1031, 1035 (1990)).

¶ 38

In the case at bar, plaintiff alleged that defendant wanted plaintiff's services in listing and selling defendant's property, and plaintiff offered defendant a brokerage contract to that effect. Defendant's signature is present on the listing agreement evincing acceptance of the offered listing agreement. Finally, "[a]ny act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract." *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 330 (1977). Plaintiff alleged that, for plaintiff's services, defendant would provide a 5% commission on the sale price of the property. Thus, plaintiff has sufficiently alleged the existence of a valid contract between the parties.

¶ 39

#### C. Performance

¶ 40

Second, the listing agreement contained language that stated:

"Owner [defendant] agrees: \*\*\* to pay Broker [plaintiff] a commission or compensation in the amount of 5% in the event \*\*\* the property is sold, gifted, exchanged, optioned (and such option is exercised before or subsequent to the termination of this agreement), a joint venture is contracted, or the property is

exchanged through or as a result of Broker's services and efforts, or Owner's, or any other person or persons during the period of this agreement \*\*\*."

This language covers a wide range of possibilities, but they generally refer to situations in which the property is sold or otherwise transferred. Therefore, if the property were sold or otherwise transferred during the period of the listing agreement, plaintiff would be considered as having performed its obligations under the contract. Alleging facts that indicate the property was sold or otherwise transferred would be sufficient to survive a dismissal. See, *e.g.*, *Wysocki*, 124 Ill. App. 3d at 163 (the trial court properly denied defendants' motion to dismiss where "pleadings, including the attached exhibits, together with all reasonable inferences which can be drawn from them, they constitute allegations of specific facts which, if proven, would establish that plaintiff" would prevail). In its third amended complaint, plaintiff alleged that CSC and defendant had entered into a contract to sell the property during the time that the listing agreement was in force, which plaintiff alleged amounted to a sale. Under the language of the listing agreement, laying out three ways in which plaintiff could earn its commission, all plaintiff needed to allege as to performance was that the property was sold or otherwise transferred during the time the listing agreement was in force. Therefore, plaintiff adequately alleged that it had performed its obligations under the listing agreement.

¶ 41

#### D. Breach

¶ 42

Third, plaintiff alleged that defendant breached the listing agreement, namely, the cooperation, referral, and negation clause. The listing agreement stated that "[defendant] agrees to cooperate fully with [plaintiff] \*\*\* and refer all inquiries to [plaintiff] \*\*\* and to conduct all negotiations through [plaintiff]." Plaintiff alleged that it did not learn of the

negotiations between CSC and defendant until after they had executed a contract to purchase the property. Plaintiff also alleged that the contract was executed within the period of the listing agreement, under which defendant was allegedly compelled to refer all inquiries and negotiations to plaintiff.

¶ 43 The case at bar is similar to *AMA Realty Group of Illinois v. Melvin M. Kaplan Realty, Inc.*, 2015 IL App (1st) 143600, ¶ 21, where the appellate court found a breach of contract. In *AMA Realty Group*, the defendant argued, in its countersuit, that the listing agreement precluded the plaintiff from “engag[ing] in negotiations or schedul[ing] meetings with prospective purchasers.” *AMA Realty Group*, 2015 IL App (1st) 143600, ¶ 21. The defendant argued that the plaintiff was “permitted only to refer interested parties to [defendant], which had the ‘exclusive right’ to market and sell the property.” *AMA Realty Group*, 2015 IL App (1st) 143600, ¶ 21. The appellate court found that the language of the listing agreement meant that the plaintiff “was prohibited from negotiating directly with *any* prospective purchaser \*\*\* regardless of whether [the defendant] was actually responsible for originally introducing or procuring the prospect.” (Emphasis in original.) *AMA Realty Group*, 2015 IL App (1st) 143600, ¶ 22; see also *Podolsky*, 297 Ill. App. 3d at 1023–24 (failing to notify broker of an inquiry and meeting with a potential purchaser amounted to claims of a present breach where there was a contractual duty to refer inquiries to broker).

¶ 44 Thus, plaintiff sufficiently alleged that defendant breached the cooperation, referral, and negotiation clause.

¶ 45 E. Damages

¶ 46 Fourth, the plaintiff alleged that it suffered damages in the amount of \$21,250, which represented 5% of CSC and defendant’s contract to purchase the property. This 5% figure is

included in the listing agreement as plaintiff's compensation, should any of three listed conditions occur. See *supra* ¶ 6. Plaintiff alleged that, had defendant not breached the listing agreement, plaintiff would have earned its commission, and therefore, plaintiff suffered damages in a lost commission. These allegations, taken in the light most favorable to the plaintiff, sufficiently allege that plaintiff suffered damages pursuant to its performance and defendant's breach.

¶ 47

#### CONCLUSION

¶ 48

Plaintiff adequately alleged its breach of contract claim by alleging: (1) the existence of a valid and enforceable listing agreement; (2) performance by the plaintiff; (3) breach of the listing agreement by the defendant; and (4) resulting damages to the plaintiff. The trial court improperly dismissed plaintiff's third amended complaint with prejudice.

¶ 49

Reversed.