2017 IL App (1st) 163214-U
No. 1-16-3214

THIRD DIVISION
August 9, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FREDERICH GOPEZ,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 16 CH 7506
	)	
CITY OF CHICAGO,	)	
	)	The Honorable
Defendant-Appellee.	)	Neil H. Cohen,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Although the trial court erroneously concluded that the defendant's Personnel Rules were not, as a matter of law, an enforceable contract, dismissal of the plaintiff's complaint was otherwise proper for failure to allege all of the necessary elements of a claim for specific performance. Nevertheless, the plaintiff was to be provided with the opportunity to amend his complaint. Thus, the trial court's decision to dismiss the complaint with prejudice was reversed and the matter remanded to allow the plaintiff to replead.

¶ 2 The plaintiff, Frederich Gopez, appeals from the trial court's dismissal with prejudice of his "Complaint for Specific Performance of Contract" ("Complaint") against the defendant, the City of Chicago, pursuant to section 2-619.1 of the Code of Civil Procedure ("Code") (735 ILCS

5/2-619.1 (West 2016)). On appeal, the plaintiff argues that the trial court erred in concluding that the "City of Chicago Personnel Rules" ("Rules") did not constitute a contract between the parties, as a matter of law, and that, in the alternative, he should be given leave to file an amended complaint. For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On June 2, 2016, the plaintiff instituted this action against the defendant by the filing of the Complaint. In it, he alleged the following. Plaintiff had been employed with the Chicago Police Department ("CPD") since August 2000. In October 2014, the defendant announced that it would be administering an examination for promotion to lieutenant in the CPD, an examination that is given only about once every ten years. At the time of the announcement, the plaintiff was a sergeant with the CPD and had been since 2008. Accordingly, he was eligible to take the examination. In preparation of taking the examination, the plaintiff applied for the test, paid his required fee, and studied the materials recommended by the defendant.

¶ 5 The written component of the test took place on June 6, 2015, at the McCormick Place Convention Center. Approximately 600 sergeants took the written examination. They were seated three to a table, with the tables described by the plaintiff as "lightweight folding tables." On behalf of the defendant, the examination was administered by an out-of-state contractor ("contractor") that provided proctors for the test. With respect to those proctors, the plaintiff pleaded the following upon information and belief: the defendant delegated to the contractor all responsibility for hiring the proctors; the contractor hired all of the proctors through a temp agency; neither the defendant nor the contractor performed any investigation into the education of the proctors; neither the defendant nor the contractor performed any background investigation into any of the proctors; neither the defendant nor the contractor established a written procedure

for the proctors to follow to prevent fraud or other misconduct during the examination; and neither the defendant nor the contractor provided training to the proctors on how to prevent fraud or other misconduct during the examination.

¶ 6 During the administration of this examination, the defendant alleges that there was in effect two relevant provisions of the Rules. Section 4 of Rule VI provided that "[e]xamination procedures shall be conducted, and tests shall be held in such ways and under such conditions as to prevent fraud or other misconduct." Section 5 of Rule VI provided the following:

> "Fraudulent conduct or false statements by an applicant or by others with the applicant's connivance, in any application or examination, shall be cause for the exclusion of such applicant from an examination, or for removal of such applicant's name from all employment lists, or for discharge from the service after appointment."

¶ 7 According to the plaintiff's allegations, while he was taking the examination, a proctor falsely reported that the plaintiff was engaging in fraud or other misconduct. As a result of this report, the defendant did not permit the plaintiff to complete the examination process. The plaintiff alleges that he at no time engaged in any fraud or other misconduct during the examination and that the defendant did not allow him an opportunity to demonstrate that the proctor's report was false. The plaintiff attempted to challenge his expulsion from the examination process by filing a grievance against the defendant pursuant to the relevant collective bargaining agreement, but he was informed that the issue could not be addressed in a grievance.

¶ 8 Ultimately, the plaintiff complains that the defendant did not provide him with any procedure to demonstrate that the proctor's report was false and that his exclusion was thus without cause. According to the plaintiff, had he been given this opportunity, he would have

demonstrated that there was no cause to exclude him from the examination process. He also claimed that he did not have an adequate remedy at law and requested that the trial court "fashion an appropriate remedy to make plaintiff whole for the breach by defendant City of Chicago of the duties it owes to plaintiff under Sections 4 and 5 of Rule VI of its Personnel Code."

¶ 9 The defendant filed a motion to dismiss, arguing that the Complaint should be dismissed (1) pursuant to sections 2-619(a)(1) and (9) of the Code (735 ILCS 5/2-619(a)(1), (9) (West 2016)), because the plaintiff lacked standing for failing to exhaust his administrative remedies; (2) pursuant to section 2-619(a)(9) of the Code because the plaintiff could not, as a matter of law, make out a claim of specific performance where the Rules did not form an express or implied contract between the parties; and (3) pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)), because the plaintiff failed to state a cause of action for breach of contract, where he failed to allege the contract he claims to have been breached, performance by him, breach by the defendant, and the specific performance that would make him whole.

¶ 10 After complete briefing of the motion to dismiss by the parties, the trial court issued its written decision. First, the trial court denied the defendant's motion with respect to standing, because the defendant failed to provide the trial court with the relevant collective bargaining agreement and because the dismissal of the plaintiff's grievance indicated that the dispute was not governed by the collective bargaining agreement. The trial court did, however, grant the defendant's motion to dismiss with respect to its latter two arguments. According to the trial court, the Rules were not an enforceable contract between the parties as a matter of law because the Rules contained an unambiguous disclaimer that they created contractual rights between the parties, and that disclaimer precluded the formation of a contract. Even aside from that, the trial

court also held that the plaintiff failed to state claim for relief. The trial court's specific conclusion was as follows:

> "The Complaint does not allege a single specific factual allegation that would support a claim for specific performance. Nor does the Complaint allege any specific facts that would support some other valid cause of action.
>
> In his Response, Plaintiff suggests other unpled remedies to which he might be entitled. Plaintiff does not, however, identify any possible valid cause of action which would entitle him to any remedy. The Personnel Code is not an enforceable contract and there is no statutory private cause of action for violation of the Personnel Code. The Complaint fails to state any claim."

Accordingly, the trial court dismissed the plaintiff's Complaint with prejudice.

¶ 11 The plaintiff then filed this timely appeal.

¶ 12 ANALYSIS

¶ 13 On appeal, the plaintiff argues that the trial court erred in holding that the Rules could not be an enforceable contract between the parties as a matter of law and that, in the alternative, he should be permitted to file an amended complaint. We disagree with the trial court's conclusion that the Rules, as a matter of law, could not be an enforceable contract between the parties, but do agree that the plaintiff failed to state a claim for specific performance. Nevertheless, the plaintiff should be permitted to replead, as it is not clear that he is incapable of pleading any set of facts on which relief may be granted.

¶ 14 Section 2-619.1 of the Code permits a litigant to combine motions to dismiss pursuant to sections 2-615 and 2-619 of the Code in a single filing. 735 ILCS 5/2-619.1. Whether addressing a motion to dismiss under section 2-615 or section 2-619, a trial court must accept all

well-pleaded facts of the complaint as true and must draw all reasonable inferences from those facts in favor of the nonmoving party. *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003). Our standard of review of motions to dismiss brought under either section is *de novo*. *Id.*

¶ 15 We first address the trial court's conclusion that the Rules could not be, as a matter of law, an enforceable contract between the parties. The trial court granted this portion of the defendant's motion to dismiss pursuant to section 2-619 of the Code, which permits the dismissal of a claim based upon certain defects or defenses. 735 ILCS 5/2-619.

¶ 16 According to the trial court, the Rules could not be an enforceable contract between the parties as a matter of law because they contained a disclaimer of contractual rights that precluded the formation of a contract. See *Habighurst v. Edlong Corp.*, 209 Ill. App. 3d 426, 429 (1991) ("The weight of authority in this state has held the existence of disclaiming language in an employee handbook to preclude the formation of a contract."). Specifically the disclaimer to the Rules states in relevant part:

> "The City of Chicago does not intend that its Personnel Rules, whether provided to employees at the time of employment, after commencement of employment, or at any other time, or through any manner of dissemination, constitute part of any offer of employment or are otherwise the basis for the formation of any contract, whether expressed or implied. These Rules should not be interpreted expressly or by implication as evidence of the existence of an employment contract between the City of Chicago and any employee."

¶ 17 Relying on *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill. 2d 482 (1987), the defendant argues that the trial court was correct in concluding that the disclaimer precluded the formation of a contract between the parties. In *Duldulao*, our supreme court held that:

> "an employee handbook or other policy statement creates enforceable contract rights if the traditional requirements for contract formation are present. First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement. When these conditions are present, then the employee's continued work constitutes consideration for the promises contained in the statement, and under traditional principles a valid contract is formed."

According to the defendant, the existence of the disclaimer within the Rules defeats the possibility that an employee would reasonably believe an offer had been made under the first factor of *Duldulao*.[1]

¶ 18 Although we do not disagree with the premise that a disclaimer could negate the formation of a contract, we observe one major problem with the application of that premise to the present case: the disclaimer was not added to the Rules until December 2009, more than nine years after the plaintiff is alleged to have joined the CPD. Accordingly, the disclaimer was not present to preclude the formation of a contract between the parties at the time that the plaintiff accepted an offer of employment with the CPD. Therefore, it is entirely possible, provided that

[1] The defendant also argues that the plaintiff failed to allege facts demonstrating the existence of the second and third *Duldulao* factors. As the failure to plead the requisite elements of a cause of action relate to the defendant's motion to dismiss pursuant to section 2-615 of the Code and not whether the Rules could be an enforceable contract between the parties as a matter of law, we will address this contention when we address the trial court's dismissal under section 2-615.

plaintiff pleaded the requisite elements under *Duldulao* in his Complaint, that the Rules could be an enforceable contract between the parties—formed before the addition of the disclaimer—and the trial court erred in holding otherwise.

¶ 19 In making his argument about the late addition of the disclaimer to the Rules, the plaintiff focused on the fact that its addition to the existing employment contract would have required separate consideration. The defendant responds to this contention by arguing that the plaintiff waived this contention by not raising it in the trial court and, regardless, he failed to plead a valid contract predating the disclaimer and failed to plead a lack of consideration for the disclaimer addition in his Complaint. We note two things with respect to these competing positions. First, we decline to find waiver here, because the issue of whether the disclaimer precluded the formation of a contract was before the trial court. The defendant argued in the trial court that the disclaimer precluded the formation of a contract, and even pointed out in its reply in support of its motion to dismiss that the disclaimer was not added to the Rules until December 2009 (eliminating any suggestion that it is surprised by this fact). Accordingly, the necessary facts, although raised by the defendant and not the plaintiff, were before the trial court, and it goes without saying that in order to determine whether the existence of a disclaimer applies to preclude the formation of a contract, one must first ascertain whether that disclaimer existed at the time the contract was claimed to have been formed. Finally, to the extent that the disclaimer's addition in 2009 was not explicitly raised by the plaintiff in the trial court, the argument was fully developed in the plaintiff's opening appellate brief, giving the defendant a complete opportunity to offer an explanation why the disclaimer should nevertheless apply to negate the formation of a contract nine years prior.

¶ 20 This brings us to our second point. The defendant's substantive response to the plaintiff's argument is circular and gets us nowhere. The defendant contends that in order to argue that separate consideration was required to amend the Rules (*i.e.*, the alleged contract) to include the disclaimer, the Rules must first have been a contract between the parties. This, according to the defendant, could not be done for the reasons the defendant explained "above," *i.e.*, the existence of the disclaimer. In other words, the defendant argues that the plaintiff's consideration argument fails because the plaintiff could not plead a valid contract predating the disclaimer, because the disclaimer, which did not then exist, precluded the formation of a contract. With respect to the defendant's contention that the plaintiff failed to plead a lack of consideration for the addition of the disclaimer, such a contention relates to the plaintiff's ability to state a claim, not whether the Rules were an enforceable contract as a matter of law.

¶ 21 Having concluded that the trial court erred in holding that the Rules could not, as a matter of law, be an enforceable contract between the parties, we turn now to the question of whether the plaintiff pleaded sufficient facts to state a claim for specific performance. A motion to dismiss under section 2-615 of the Code challenges the legal and factual sufficiency of a claim. *Edelman*, 338 Ill. App. 3d at 167. Because Illinois is a fact-pleading state, conclusions of law do not suffice, and the plaintiff is required to set out the ultimate facts supporting his cause of action. *Id.* at 167-68.

¶ 22 To state a cause of action for specific performance, the plaintiff must allege "(1) the existence of a valid, binding, and enforceable contract; (2) compliance by the plaintiff with the terms of the contract, or proof that the plaintiff is ready, willing, and able to perform the contract; and (3) the failure or refusal of the defendant to perform his part of the contract." *Hoxha v. LaSalle National Bank*, 365 Ill. App. 3d 80, 85 (2006). Here, the Complaint contains a number

of factual deficiencies. For example, with respect to the existence of a valid, binding, and enforceable contract, the plaintiff has failed to plead the second and third factors under *Duldulao*—the dissemination of the statement to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer, and the acceptance of the offer by the employee's commencing or continuing to work after learning of the policy statement. These factors are necessary to establish the Rules as a binding and enforceable contract between the parties. In addition, the plaintiff did not allege any facts supporting or implying the plaintiff's performance of the contract terms or the plaintiff's readiness, willingness, and ability to perform the terms of the contract. Because the plaintiff failed to plead sufficient facts establishing the existence of these elements or from which one could reasonably infer the existence of these elements, the trial court was correct in dismissing the Complaint pursuant to section 2-615 of the Code.

¶ 23 The plaintiff requests that if we find, as we do, that the trial court did not err in dismissing the Complaint, that we nevertheless remand the matter to the trial court to permit him to replead. The defendant argues that because the plaintiff did not request leave to amend from the trial court, he has waived any right to request such relief from us. The defendant is certainly correct that where the trial court dismisses a complaint and the plaintiff chooses to stand on his complaint in the trial court, he cannot then request leave to amend from the appellate court. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 435-36 (2004). However, courts have declined to apply this general rule in circumstances where a request to amend in the trial court would have been futile or where the defendant is not prejudiced. See *Id.* at 436 (futility); *Indesco Products, Inc. v. Novak*, 316 Ill. App. 3d 53, 58 (2000) (lack of prejudice to the defendant).

¶ 24 Here, requesting leave to amend in the trial court would have been futile, given the trial court's conclusion that the Rules were not, as a matter of law, an enforceable contract, that there existed no statutory private cause of action for violations of the Rules, and that the facts pleaded by the plaintiff could not support any other valid cause of action. See *Bajwa*, 208 Ill. 2d at 436-37 (holding that requesting leave to amend from the trial court would have been futile, given the trial court's narrow view that a cause of action could only be maintained if the plaintiff alleged actual knowledge). In other words, it appears that the trial court believed the plaintiff could not plead any set of facts that would entitle him to relief. See *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶36 ("a complaint generally should not be dismissed for failing to state a cause of action unless it clearly appears that no set of facts could be proved under the pleadings that would entitle the plaintiff to relief"). As discussed below, we disagree with this assessment.

¶ 25 In determining whether to allow plaintiff to amend his complaint, our supreme court has directed that we consider four factors: "(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).

¶ 26 With respect to the first factor, the plaintiff argues that because much of the deficiencies in the Complaint relate to the valid and enforceable contract element of his specific performance claim, he should be allowed to amend the Complaint to pursue a claim for injunction, mandamus, or declaratory judgment, none of which would require establishing the existence of a valid and enforceable contract. We agree. As demonstrated in a number of cases in this state, causes of action requesting such relief may be maintained based on allegations that police departments

and/or their governing agencies acted outside the authority bestowed upon them by the relevant personnel rules. See *Nolan v. Hillard*, 309 Ill. App. 3d 129, 144 (1999) (the plaintiff was entitled to maintain his action for injunctive and declaratory relief where the imposition of a two-year college education requirement violated the promotional process described in the Rules); *McArdle v. Rodriguez*, 277 Ill. App. 3d 365, 375-76 (1995) (affirming the trial court's grant of a preliminary injunction to the plaintiff where the defendant exceeded the authority provided to him by the Chicago Municipal Code, when he promoted some sergeants based solely on merit and not on examination results); *Fahey v. Cook County Police Department merit Board*, 21 Ill. App. 3d 579, 587 (1974) (holding that the trial court improperly dismissed the plaintiff's complaint for declaratory judgment on the basis that the defendant's setting of a mandatory retirement age exceeded its authority under the relevant statutes). As the plaintiff would not be required to demonstrate the existence of a valid and enforceable contract under any such claim, such an amendment would cure the identified defects in the plaintiff's current Complaint.

¶ 27 The defendant would not suffer any surprise or prejudice as the result of such an amendment. Whether seeking specific performance, an injunction, or declaratory relief, the basis of the plaintiff's claim is the same: the defendant violated the Rules in excluding him from the examination process based on false allegations of fraud or other misconduct, without affording the plaintiff the opportunity to disprove those allegations. We hardly think that a change in the label applied to the claim and the relief requested will significantly impact the defendant's ability to defend against it. See *Cowper v. Nyberg*, 2015 IL 117811, ¶ 22 (permitting amendment where correcting the allegations regarding the defendant's duty would constitute "only a minor adjustment to the claim already filed"); *Indesco*, 316 Ill. App. 3d at 57-58 (the plaintiff permitted to amend its complaint where it improperly sought a new judgment based on a criminal

restitution order, rather than seeking enforcement of the existing order, because the plaintiff's procedural error did not prejudice the defendant); *Selcke v. Bove*, 258 Ill. App. 3d 932, 938 (1994) (concluding that the defendant would not be prejudiced by the plaintiff's amendment of his complaint where the proposed amendment would only provide a greater factual basis for the same claim that was already before the court).

¶ 28 Finally, there is nothing untimely about the plaintiff's request, as this matter was dismissed at the pleadings stage and was not ready for trial. In addition, from the record, it appears that the plaintiff had not been afforded any prior opportunities to amend the Complaint. See *Selcke*, 258 Ill. App. 3d at 939 (allowing amendment where the case was still in the discovery and pre-trial motions stage and where the plaintiff had not had previous opportunities to amend). Given that all of the factors weigh in favor of permitting the plaintiff the opportunity to amend the complaint, we reverse the "with prejudice" portion of the trial court's dismissal of the Complaint and remand to allow the plaintiff the chance to replead.

¶ 29 We note that we have framed our discussion in terms of plaintiff amending the Complaint to seek declaratory or injunctive relief, because this is how the plaintiff framed his request for leave to amend. Nevertheless, because we conclude that the trial court erred in holding that the Rules are not an enforceable contract as a matter of law, that only factual deficiencies warranted the dismissal of the Complaint, and that the plaintiff should otherwise be permitted to replead, we see no reason why the plaintiff should not be allowed to amend his claim for specific performance, if he believes that he can properly plead a claim for specific performance. Such amendment would not cause any prejudice to the defendant. *Selcke*, 258 Ill. App. 3d at 938 (concluding that the defendant would not be prejudiced by the plaintiff's amendment of his

complaint where the proposed amendment would only provide a greater factual basis for the same claim that was already before the court).

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the Circuit Court of Cook County is reversed and the matter remanded for further proceedings consistent with this decision.

¶ 32 Reversed and remanded.