2017 IL App (1st) 170399-U

THIRD DIVISION
November 29, 2017

No. 1-17-0399

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ULTIMATE GAS AND MINI MART, INC. and NICKY'S IN AND OUT, INC.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 15 L 2289
PHONCO COMMUNICATIONS, INC.,	)	
Defendant-Appellee.	)	The Honorable James E. Snyder Eileen O'Neill Burke Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in granting defendant's motion to dismiss under section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615) (West 2016)), where plaintiffs' complaint failed to properly state a cause of action. Further, plaintiffs' tort claims are barred by the economic-loss doctrine. We affirm.

¶ 2 This interlocutory appeal arises from the trial court's order granting defendant Phonco Communications, Inc.'s motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)) against plaintiffs Ultimate Gas and Mini Mart, Inc. (Ultimate Gas) and Nicky's In and Out, Inc. (Nicky's). On appeal, plaintiffs contend that the

circuit court improperly dismissed their complaint for breach of contract. In addition, plaintiffs contend that although they are seeking purely economic damages, their tort claims are not barred under the *Moorman* doctrine because they have alleged fraud on behalf of defendant. *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 91 (1982). We affirm.

¶ 3 I. BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. On March 5, 2015, plaintiffs filed their initial complaint at law, seeking damages arising out of alleged unpaid transaction fees that incurred on defendant owned Automated Teller Machines (ATMs) that were placed in plaintiffs' businesses. Count I alleged that on January 30, 2011, Ultimate Gas entered into a written agreement with defendant to place an ATM terminal at 4244 S. Wentworth Avenue in Chicago, Illinois, whereby Ultimate Gas would fund defendant's ATM and pay certain other set up fees. In exchange, defendant would process the transactions at the ATM to receive the interchange fee and Ultimate Gas would be paid $2.95 per ATM withdrawal by consumers using a debit card. Ultimate Gas further asserts that, while it complied and promptly funded the ATM with its capital, it began to notice that "the volume of transactions from the ATM site produced less and less fees on a monthly basis, despite the fact that the transaction volume was consistent." In addition, count II alleged the same set of facts involving an identical written agreement entered into by Nicky's on January 2, 2009, for an ATM housed at 4240 S. Wentworth Avenue in Chicago, Illinois. Further, counts III and IV alleged unjust enrichment. Thereafter, plaintiffs filed a first-amended complaint where they added the additional counts of breach of an oral contract and conversion.

¶ 5 Defendant responded by filing a section 2-619 motion to dismiss with prejudice. 735 ILCS 5/2-619 (West 2016). Defendant argued that it entered into an asset purchase agreement with a third-party entity, Payment Alliance International Inc. (PAI), whereby defendant sold various ATMs and assigned its rights and obligations under various processing agreements with customers, including the agreements entered into with plaintiffs. Thus, after March 17, 2014,

defendant had no role in the processing of transactions on the ATMs funded by plaintiffs that are the subject of this action. Further, both agreements entered into with plaintiffs expressly provided that defendant "may assign this Agreement at any time."

¶ 6 The circuit court then dismissed count I without prejudice pursuant to section 2-615 (735 ILCS 5/2-615 (West 2016)) and granted leave for plaintiffs "to file a second-amended complaint with a sufficiently definite date of the alleged breach." The court noted that "[if] defendant in fact assigned its rights prior to the alleged breach occurring, then plaintiffs could not prove the breach of its cause of action against defendant as a matter of law." The court further concluded that since the conversion counts alleged were of a purely economic nature, and the complaint contains no allegations of fraudulent activity, the *Moorman* doctrine (or economic-loss doctrine) exception applied and dismissed the complaint without prejudice.

¶ 7 Plaintiffs then filed a second-amended complaint alleging two counts for breach of contract. Namely, plaintiffs contended that defendant had registered the ATMs at issue to another entity, AllPoint Network, without plaintiffs' consent, knowing that plaintiffs would then be deprived transaction fees since AllPoint Network affords consumers a reduced transaction fee or no transactional fee for using an ATM registered to the network. Plaintiffs, however, failed to note a definite date for the alleged breach. At this time, plaintiffs also filed a motion to reconsider the dismissal of the conversion counts because plaintiffs *may* be able to establish fraud in the course of discovery. In turn, defendant argued in its section 2-615 motion to dismiss the second-amended complaint that the contracts between defendant and plaintiffs did not impose an obligation for defendant to pay surcharges out of its own pocket on transactions where an AllPoint Network customer paid no surcharge. 735 ILCS 5/2-615 (West 2016). Further, plaintiffs' claims were barred by provisions in both contacts that waived the right to recover consequential damages. The circuit court denied plaintiffs' motion to reconsider and granted defendant's motion to dismiss with prejudice. Plaintiffs responded by filing a subsequent motion to reconsider, where the circuit court converted the dismissal to one without prejudice.

¶ 8 Thereafter, plaintiffs filed a third-amended complaint abandoning the contract claims and alleging two counts of tortious interference with prospective advantage against defendant for allegedly interfering with plaintiffs' potential to receive surcharges from AllPoint Network customers by programming its ATMs to accept AllPoint transactions. Plaintiffs also added PAI as a second defendant, but the record reflects that PAI was never served. Plaintiffs essentially alleged that defendant contracted with PAI to provide processing services to defendant customers, and thorough PAI, defendant registered the plaintiffs' respective ATMs to the AllPoint Network. Defendant then filed a section 2-615 motion to dismiss the third-amended complaint with prejudice, because plaintiffs sought in tort to recover purely economic damages from a contractual relationship. 735 ILCS 5/2-615 (West 2016). Subsequently, the circuit court allowed plaintiffs to amend their third-amended complaint to incorporate and preserve for appeal the previously dismissed claims from the first-amended complaint and second-amended complaint. The circuit court then entered an order granting defendant's motion to dismiss plaintiff's third-amended complaint with prejudice. Plaintiffs filed this timely appeal.

¶ 10 II. ANALYSIS

¶ 11 A motion to dismiss brought under section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)) challenges the legal sufficiency of the complaint by showing defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004). In turn, a motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)) admits the legal sufficiency of plaintiffs' complaint, but asserts an affirmative matter which defeats the claim. *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 15. Review under either section 2-615 or section 2-619 is *de novo*. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 12 (2005).

¶ 12 A complaint should be dismissed under section 2-615 for failure to state a cause of action only when it clearly appears that no set of facts could be proved under the pleadings that would

entitle the plaintiff to relief. *McLean v. Rockford Country Club*, 352 Ill. App. 3d 229, 232 (2004). Although a section 2-615 motion to dismiss admits all well-pled facts as true, it does not admit conclusions of law or factual conclusions that are unsupported by allegations of specific facts. *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, 457 (1995). If after disregarding any legal and factual conclusions, the complaint does not allege sufficient facts to state a cause of action, the motion to dismiss should be granted. *Id.*

¶ 13 We initially observe that plaintiffs' brief is deficient in that its statement of facts fails to include necessary information for a clear understanding of the matter before us. Illinois Supreme Court Rules governing practice in the appellate court are mandatory, not suggestive, and if an appellant's brief violates the supreme court rules, this court has discretion to dismiss the appeal. *Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748, ¶ 21. Under Rule 341(h)(6) (eff. Jan. 1, 2016), the appellant's statement of facts must contain facts necessary for understanding the case, stated accurately and fairly. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 9. Plaintiffs' section completely lacks a procedural history of the case. The parties and affiliates are not properly identified, making it difficult to comprehend the nature of the dispute. Further, it is devoid of appropriate references to the pages of the record relied on. *3432 West Henderson Building, LLC v. Gizynski*, 2017 IL App (1st) 160588, ¶ 20. Nonetheless, since the argument and record is adequate to resolve the matter before us, we will consider the merits of plaintiffs' appeal. *Id.*

¶ 14 In order to state a claim for breach of contract, plaintiffs must allege (1) the existence of a contract; (2) plaintiffs' performance of all required contractual duties; (3) the defendant's alleged breach of the contract; and (4) the existence of damages which resulted from the breach."

Burkhart v. Wolf Motors of Naperville, Inc., 2016 IL App (2d) 151053, ¶ 14. Plaintiffs first contend that the circuit court erred in dismissing the breach of contract claims in plaintiffs' first-amended complaint because it did so pursuant to section 2-615 as opposed to the ground stated in defendant's section 2-619 motion to dismiss. Ordinarily, when a defendant raises an affirmative defense the motion should be brought and ruled on under section 2-619. Nevertheless, in the interest of judicial economy, circuit courts have repeatedly reviewed motions to dismiss based on combined section 2-615 and section 2-619 reasons. See *Harris v. Johnson*, 218 Ill. App. 3d 588, 592 (1991). Here, since the circuit court gave plaintiffs leave to file a second-amended complaint, plaintiffs were not prejudiced. *Id.*

¶ 15 Based on the record before us, we cannot say the circuit court erred in dismissing plaintiffs' contract claims. The circuit court correctly noted that if defendant had assigned its rights to PAI prior to the alleged breach, plaintiffs could not prove the breach element of its underlying cause of action against defendant. See *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 76 (2004) ("mere conclusions of law or fact unsupported by specific factual allegations in a complaint are disregarded on a motion to dismiss"). And while the circuit court gave plaintiffs another bite at the apple, plaintiffs' second-amended complaint fared no better. Plaintiffs again failed to identify a specific date for the breach. Further, they continued to allege that under each agreement "plaintiff would be paid $2.95 per ATM withdrawal by customers using a debit card," a provision that is absent from the written agreements attached as exhibits. See *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18 ("where an exhibit contradicts the allegations in a complaint, the exhibit controls"). In addition, plaintiffs do not allege that defendant breached any of its written obligations under the attached agreements, such as failing to process and settle ATM transactions or provide service and maintenance on plaintiffs' ATMs. Nothing in the

agreements expressly imposed a duty on defendant to insure that plaintiffs received a surcharge on *every* transaction. See *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (if the language of a contract is unambiguous, both the meaning of a written agreement and the intent of the parties is to be gathered from the face of the document without assistance from extrinsic evidence). Furthermore, both agreements contain a provision waiving consequential damages, stating that "neither [defendant], not any other person, firm or corporation is responsible for the loss and revenue or profits *** caused by the use, misuse or inability to benefit from any services." See *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 99 (2006) (consequential damages provision was enforceable unless it was found to be unconscionable). Moreover, plaintiffs' references to exhibits E and F are forfeited as plaintiffs failed to include these exhibits in the pleadings or the record on appeal. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (Illinois courts have long held that in order to support a claim of error on appeal the appellant has the burden to present a sufficiently complete record). Thus, as a matter of law, the circuit court did not err in dismissing plaintiffs' breach of contact claims.

¶ 16 Plaintiffs next contend that although they are seeking purely economic damages, their tort claims, such as tortious interference with prospective advantage, are not barred under the *Moorman* doctrine because they have alleged fraud on behalf of defendant. To prevail on a claim for tortious interference with prospective advantage, a plaintiff must plead (1) a reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference. *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1038 (1998).

¶ 17 In *Moorman*, the supreme court held that a "plaintiff cannot recover for solely economic loss under the tort theories of strict liability, negligence, and innocent misrepresentation." *Moorman*, 91 Ill. 2d at 91. The rationale behind the *Moorman* doctrine is that tort law provides a remedy for losses from personal injuries or property damage, and contract law and the Uniform Commercial Code (UCC) provide remedies for economic losses resulting from diminished commercial expectations without personal injury or property damage. *Hecktman v. Pacific Indemnity Co.*, 2016 IL App (1st) 151459, ¶ 14. Nonetheless, there are three exceptions to the *Moorman* doctrine: "(1) where the plaintiff sustained damage, i.e., personal injury or property damage, resulting from a sudden or dangerous occurrence; (2) where the plaintiff's damages are proximately caused by a defendant's intentional, false misrepresentation, i.e., fraud; and (3) where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions ." *1324 W. Pratt Condominium Association v. Platt Construction Group, Inc.*, 404 Ill. App. 3d 611, 618 (2010).

¶ 18 In the case *sub judice*, it is unclear how plaintiffs' pleadings could properly state a claim under any exception to the *Moorman* doctrine. As alluded to above, plaintiff's brief lacks a thorough analysis applying the facts of the case at issue to this area of law. See *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 852 (2010) ("cursory argument does not meet the standard of Illinois Supreme Court Rule 341(h)(7)"). Further, the contractual agreements entered into by plaintiffs again do not state that plaintiffs will receive a surcharge on *every* transaction. Each agreement, however, expressly states that, while plaintiffs are barred from assigning or transferring any obligations under the agreements without defendant's consent, defendant "may assign" the agreements "at any time." See *Continental Mobile Telephone Co., Inc. v. Chicago*

SMSA Ltd. Partnership, 225 Ill. App. 3d 317, 325 (1992) (the plaintiff telephone company's "assertion that defendant [a cellular telephone transmission system's] solicitation of plaintiff's retail customers under the [agreement] without giving plaintiff advance notice of that rate constitutes tortious interference fails in view of [the reviewing court's] previous discussion that defendant was not contractually obligated to render advance notice of retail rate revisions"). Plaintiffs do not allege any facts establishing fraud, only that they *may* be able to establish fraud during the course of discovery. Plaintiffs' pleadings also do not include sufficient facts to assert that defendant purposefully interfered with plaintiffs' expectations under the contract. Accordingly, the record demonstrates that plaintiffs and defendant entered into contractual agreements with a contract remedy available to resolve any disputes, and thus, plaintiffs' tort claims are barred by the *Moorman* doctrine. See *Oldenburg v. Hagemann*, 159 Ill. App. 3d 631, 636 (1987) (where a contractor and subcontractor "were directly connected by virtue of their oral and written agreements" *** "any duty [the contractor] may have owed to [the subcontractor] arose as a result of their direct contractual relationship, and, if that duty was breached, [the subcontractor's] remedies would be contractual").

¶ 19 We finally observe that plaintiffs fail to provide any legal authority or substantive argument for their contentions that the trial court erred in dismissing plaintiffs' claims for oral contract, unjust enrichment and conversion. See Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Thus, plaintiffs have forfeited these contentions on appeal. See *Country Mutual Insurance Co. v. Styck's Body Shop, Inc.*, 396 Ill. App. 3d 241, 254-255 (2009) (bare contentions in the absence of argument or citation of authority do not merit consideration on appeal and are forfeited).

¶ 20 CONCLUSION

¶ 21 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.