2017 IL App (2d) 160370-U
No. 2-16-0370
Order filed February 17, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SYNCHRONY BANK,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 15-SC-1697
	)	
JANICE JOHANSSON,	)	Honorable
	)	Peter W. Ostling,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: A money judgment in favor of plaintiff in connection with a credit card debt was affirmed; plaintiff was not required to plead 59 separate counts of breach of contract, as opposed to a single count encompassing all of the charges that defendant made on her credit card.

¶ 2 Plaintiff, Synchrony Bank, filed a small claims action against defendant, Janice Johansson, alleging that she owed $4,013.21 on a credit card. Following a bench trial, the court entered judgment in plaintiff's favor. Defendant appeals. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed this action on April 22, 2015. The court subsequently granted defendant's

motion to dismiss the original complaint, without prejudice, pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)).

¶ 5 On December 18, 2015, plaintiff filed an amended complaint alleging as follows. Plaintiff was a federally chartered bank located in Utah, which, prior to June 2, 2014, had been known as "GE Capital Retail Bank." At defendant's request, she was issued credit by way of a Lord & Taylor credit account. Each use of the account constituted an oral contract between plaintiff and defendant. The original terms and conditions were mailed to defendant with the credit card. Any subsequent terms and conditions were also mailed to her. Defendant incurred the indebtedness on the account and agreed to pay all charged amounts. The unpaid balance was $4,013.21, and defendant was in default for failing to make payments under the terms of the agreement. Although payment was demanded, it had not been made. Plaintiff prayed for judgment in the amount of $4,013.21, plus costs. Attached to the amended complaint was an affidavit signed by Tajesha Shaviss, an employee of plaintiff. She attested to the unpaid balance and asserted that defendant had not made payments toward the account since February 2014.

¶ 6 The matter was scheduled for a bench trial on April 19, 2016. On April 7, 2016, apparently without leave of court, defendant filed a motion to dismiss the amended complaint pursuant to section 2-615 of the Code. She argued that the amended complaint failed to state any specific cause of action, let alone a cause of action for breach of an unwritten contract. Quoting *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 34, defendant asserted that "[t]o plead a cause of action for breach of an unwritten contract, 'there must be allegations or documents reflecting the terms of the agreement between defendant and plaintiff (or plaintiff's predecessor), that the terms pertained to defendant's account, and that she received or was mailed the

agreement, and that she agreed to those terms when she used the card thereafter.' " According to defendant, plaintiff failed to allege or detail the terms of the agreement at issue.

¶ 7 Defendant also noted in her motion to dismiss that *Razor Capital* recognized that each time a person uses a credit card, there is a new contract between the parties according to the terms then in effect. Furthermore, defendant observed that section 2-603(b) of the Code (735 ILCS 5/2-603(b) (West 2014)) provides, in relevant part, that "[e]ach separate cause of action upon which a separate recovery might be had shall be stated in a separate count ***." Construing *Razor Capital* in conjunction with section 2-603(b) of the Code, defendant proposed that plaintiff was required to separately plead each breach of contract by alleging: the terms at each time the card was used, that those terms were communicated to defendant, and that defendant accepted those terms by thereafter using the card. Insisting that Illinois is a fact-pleading jurisdiction, defendant contended that the amended complaint "failed to state one cause of action in one count, let alone separate causes of action in separate counts."

¶ 8 Instead of directly ruling on defendant's motion prior to the scheduled trial, the court allowed her to raise these issues as an "affirmative defense." The matter proceeded to a bench trial on April 19, 2016. Latasha Brown, a recovery liaison specialist employed by plaintiff, was the only witness. She provided the foundation for the four exhibits that were admitted into evidence (none of which are in the record on appeal). Exhibit A was a document reflecting plaintiff's June 2014 name change; Exhibit B was the electronic application that defendant used to open the account; Exhibit C reflected the terms and conditions applicable to the account; and Exhibit D contained defendant's monthly account statements. According to Brown, the terms and conditions reflected in Exhibit C were "in place at the time that the account was opened[,]

other than the name being changed to Synchrony Bank." She testified that defendant was in default, having last made a payment on or about February 1, 2014.

¶ 9 On cross-examination by defendant's counsel, Brown testified that she did not know the number of individual charges that defendant incurred on her credit card. Asked whether it would surprise her to know that there were 59 charges, Brown said that it would not. Nor would it surprise her if the largest charge on the account was $569.73. Brown acknowledged that there was no single credit card transaction in the amount of $4,013.21.

¶ 10 Plaintiff rested its case, and defendant presented no evidence of her own. In its closing argument, plaintiff emphasized that: defendant had opened a credit card account with plaintiff; the only thing that had changed was plaintiff's name; the court was presented with the terms and conditions of the account along with the statements; defendant violated her obligation to pay the amount due on the account; and the balance was $4,013.21, plus costs. Defendant's entire closing argument was as follows:

> "All right. Illinois is a very simple state. Each swipe of the credit card is a new cause of action. They have only pled one cause of action. And as an oral contract, there is no single swipe of the card that accounts for the full balance. As such, I request that you grant for [*sic*] Ms. Johansson."

In rebuttal closing argument, plaintiff emphasized that pleadings must be liberally construed so as to do substantial justice between the parties. According to plaintiff, the amended complaint reasonably informed defendant of the nature of the claim.

¶ 11 The court found that the amended complaint "sufficiently alleges a cause of action based on an unwritten contract." The court rejected defendant's argument that plaintiff should have separately pleaded and proved each transaction. The court acknowledged that even unwritten

contracts have terms and that "each time a credit card is used, a new contract exists between the parties according to the terms in effect at the time of the use of the credit card." Additionally, the court understood that "it is possible that several versions of terms can apply to a particular defendant's account if those terms were modified between a defendant's credit card transactions, in which case a plaintiff would then be required to separately plead and prove its claim under each version of terms." However, the court found, Brown testified that defendant opened the account with plaintiff, that the terms and conditions were communicated to defendant, that defendant used the card after having received the terms and conditions, and that defendant defaulted. The court further found that "but for the plaintiff's name change, the terms and conditions in the defendant's case have remained the same throughout." Accordingly, the court ruled that "plaintiff was not required to allege and prove separate counts for some 59 or more credit transactions." The court entered judgment in favor of plaintiff in the amount of $4,013.21, plus $241 in costs.

¶ 12 Defendant timely appealed.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues that the court erred in granting a judgment in plaintiff's favor by misinterpreting *Razor Capital*. Specifically, she contends that, because she used her credit card 59 times, plaintiff was required to plead 59 separate counts. She notes that she did not have a contract with plaintiff in the amount of $4,013.21, as there was no single charge in that amount.

¶ 15 Citing cases with facts and procedural backgrounds that are entirely different from the present circumstances, defendant urges *de novo* review. Ordinarily, "when we are faced with a challenge to the trial court's judgment following a bench trial, we will reverse that judgment only if it is against the manifest weight of the evidence." *Vician v. Vician*, 2016 IL App (2d) 160022,

¶ 27. Notwithstanding this general rule, the procedural posture of the present case is unusual. A defendant in a small claims action may not file a section 2-615 motion to dismiss the complaint without prior leave of court. *Porter v. Urbana-Champaign Sanitary District*, 237 Ill. App. 3d 296, 299 (1992); see also Ill. S. Ct. R. 287(b) (eff. Aug. 1, 1992). Here, defendant filed such a motion shortly before trial, and apparently without leave of court. The court elected to address the issues raised in that motion at the time of trial, purportedly as affirmative defenses. However, a motion to dismiss a complaint for failure to state a claim is quite different from an affirmative defense: "A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of a complaint, based on defects apparent on its face" (*Salvi v. Village of Lake Zurich*, 2016 IL App (2d) 150249, ¶ 25), whereas an affirmative defense "gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." *American Family Mutual Insurance Co. v. Albers*, 407 Ill. App. 3d 569, 573 (2011).

¶ 16 The trial court here rejected defendant's arguments about the purported inadequacy of the amended complaint only after holding a bench trial. In its ruling, the court made comments and findings regarding both the sufficiency of the complaint itself and the evidence that was introduced at trial. Defendant perpetuates this irregularity on appeal, purportedly challenging the sufficiency of the complaint while also reciting the trial evidence. In light of the unusual posture of this appeal, and given that the parties' arguments focus exclusively on their respective interpretations of the holding of *Razor Capital*, we agree that our review is *de novo*. We note that plaintiff does not propose any alternate standard of review.

¶ 17 We reject defendant's suggestion that plaintiff was required to plead separate counts of breach of contract for every purchase made on the credit card. For one thing, defendant's argument is at odds with the rules governing small claims actions. The principle underlying

small claims court is that "litigants with a minimum of legal expertise should be allowed to present their grievances to the trial court [citation] and that they should be provided with an expeditious, simplified and inexpensive procedure for the resolution of disputes involving small amounts." *Tannenbaum v. Fleming*, 234 Ill. App. 3d 1041, 1043 (1992). Although Illinois is a fact-pleading jurisdiction and a plaintiff generally "must allege sufficient facts to bring [the] claim within the scope of a legally cognizable cause of action," there are relaxed pleading requirements for small claims actions. *Tannenbaum*, 234 Ill. App. 3d at 1043. Specifically, where a claim is not based upon a written instrument, the plaintiff is merely required to submit "a *short and simple complaint* setting forth (1) plaintiff's name, residence address, and telephone number, (2) defendant's name and place of residence, or place of business or regular employment, and (3) the nature and amount of the plaintiff's claim, giving dates and other relevant information." (Emphasis added.) Ill. S. Ct. R. 282(a) (eff. July 1, 1997). "If a complaint in a small claims action clearly notifies the defendant of the plaintiff's claim, it states a cause of action." *Tannenbaum*, 234 Ill. App. 3d at 1044; see also *Porter*, 237 Ill. App. 3d at 300 ("All that is necessary in a small claims case for the complaint to be sufficient is that it clearly notify the defendant of the nature of plaintiff's claim. [Citation.] Particularly in small claims cases, the complaint is to be liberally construed because the small claims procedure is designed to be simple and inexpensive.").

¶ 18 It would defeat the purpose of the small claims rules to require plaintiff here to plead 59 separate causes of action to recover on a $4,000 debt. Instead of providing an expeditious, simplified, and inexpensive procedure, defendant's proposal would needlessly and exponentially increase the cost and duration of the litigation. Plaintiff alleged the following in its amended complaint: defendant was issued credit with Lord & Taylor; each use of the account was an oral

contract between the parties; the original terms and conditions were mailed to defendant with the credit card; any subsequent terms and conditions were mailed to her; defendant incurred the indebtedness and agreed to pay the charged amounts; the unpaid balance was $4,013.21; defendant was in default for failing to make payments under the terms of the agreement; and payment was demanded but not received. These allegations adequately notified defendant of the nature of the claim.

¶ 19 Furthermore, defendant's argument rests on a misreading of this court's decision in *Razor Capital*, a case which did not involve a small claims complaint. In *Garber v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675, 678 (1982), the court held that "a separate contract is created each time [a credit] card is used according to the terms of the cardholder agreement at the time of such use." In *Razor Capital*, we considered the pleading requirements for breach of an unwritten credit card contract in light of *Garber*. We explained that "[t]he elements of a breach-of-contract cause of action include the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and resultant damages or injury to the plaintiff." *Razor Capital*, 2012 IL App (2d) 110904, ¶ 30. Even if a contract is "unwritten" in the sense that the *Garber* court described, to plead the existence of a valid contract, the plaintiff must allege facts indicating the terms of the contract. *Razor Capital*, 2012 IL App (2d) 110904, ¶ 30. Accordingly, to pursue a claim on an unwritten contract, the plaintiff "must both plead or attach the terms of the agreement allegedly breached and tie those terms to the defendant." *Razor Capital*, 2012 IL App (2d) 110904, ¶ 33. A plaintiff ties the terms to the defendant by alleging that such terms were communicated to the defendant and that he or she subsequently accepted them by using the card. *Razor Capital*, 2012 IL App (2d) 110904, ¶ 32. We clarified that "[a] complaint alleging breach of an unwritten contract is not, by virtue of pleading or

attaching the *terms* of the alleged agreement, converted into one claiming breach of a written contract such that *** the absence of an attached written contract (or affidavit explaining the absence of same) is fatal to the claim." (Emphasis in original.) *Razor Capital*, 2012 IL App (2d) 110904, ¶ 33.

¶ 20 We held that the plaintiff's second amended complaint in *Razor* did not properly plead a cause of action for breach of an unwritten contract, because the plaintiff attached a generic agreement to the complaint without alleging that such terms were communicated to the defendant and thereafter accepted by her. *Razor Capital*, 2012 IL App (2d) 110904, ¶ 34. We remanded the matter to afford the plaintiff an opportunity to amend its complaint under the standards that we announced. *Razor Capital*, 2012 IL App (2d) 110904, ¶ 36. We added that "it is theoretically possible, under *Garber*, that several versions of terms applied to defendant's account, if the terms were modified between defendant's credit card transactions. *Razor Capital*, 2012 IL App (2d) 110904, ¶ 34. If that were the case, "to the extent that plaintiff seeks to recover for charges defendant incurred under different versions of terms of the unwritten agreement, those terms, the communication of those terms to defendant, and defendant's subsequent use of the card will need to be separately pleaded for each version of terms under which plaintiff seeks to recover." *Razor Capital*, 2012 IL App (2d) 110904, ¶ 34.

¶ 21 *Razor Capital* does not support defendant's argument that plaintiff in the present case was required to plead 59 separate counts of breach of contract. In *Razor Capital*, we merely recognized the possibility that a plaintiff may be required to separately plead multiple counts of breach of contract *if* different terms applied to the various credit card transactions. We did *not* hold that a plaintiff must, in all instances, plead a separate breach-of-contract count for each individual charge that the defendant incurred. Indeed, where, as Brown's trial testimony

established here, the terms of the agreement never changed, it would be absurd to require a credit card company to plead separate breach-of-contract counts for each cup of coffee or tank of gas that the cardholder purchased.

¶ 22 We note that apart from challenging the amended complaint, defendant does not appear to question the sufficiency of the evidence supporting the trial court's judgment.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 25 Affirmed.