Order filed
November 17, 2017.
Modified upon denial
of rehearing May 7, 2018.

2017 IL App (5th) 160226-U

NO. 5-16-0226

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

TROYT AARON COX,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Effingham County.
	)	
v.	)	No. 15-L-46
	)	
WASHINGTON SAVINGS BANK,	)	Honorable
	)	James J. Eder,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Moore and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: An agreement between bank and debtor for disposition of insurance proceeds was oral—the agreement was not enforceable under the Credit Agreements Act.

¶ 2 Plaintiff, Troyt Aaron Cox, secured a mortgage for his business building through defendant, Washington Savings Bank. After his business sustained extensive fire damage, his insurance company paid his claim. Plaintiff deposited the proceeds into an account with defendant. Defendant used a portion of the proceeds to get plaintiff current on both his business and residential mortgage payments and purportedly made an oral agreement with him that he could use the remaining funds to rebuild his business. Defendant later

applied the majority of plaintiff's insurance proceeds to plaintiff's mortgage obligations, making it impossible for plaintiff to rebuild his business. Plaintiff filed a three-count complaint in which he asserted that defendant reneged on its promise to allow him to use the fire insurance proceeds to rebuild his business. Plaintiff alleged damages caused by the business being unable to reopen.

¶ 3 Defendant filed a motion for summary judgment and raised a defense based upon the Credit Agreements Act (Act) (815 ILCS 160/1 *et seq.* (West 2012)). Defendant asserted that the parties' existent credit agreement was modified, and because the modification was oral and not in writing and signed by the parties, it constituted an improper modification of the credit agreement and was unenforceable pursuant to the Act. The trial court agreed. Plaintiff now appeals from the order of the circuit court of Effingham County granting summary judgment in favor of defendant. The issue on appeal is whether the trial court erred in granting summary judgment in favor of defendant. We affirm.

¶ 4 BACKGROUND

¶ 5 Plaintiff filed a three-count complaint against defendant in which he alleged that prior to November 19, 2012, he owned and operated a business known as Illinois Prefinish. On November 19, 2012, plaintiff's business became inoperative due to a fire. At the time of the fire, defendant held a mortgage on the real estate and improvements of plaintiff's business, located at 10350 North 450th Street, Altamont, Illinois, as well as a security interest in the personal property used in the business. The record shows that on November 30, 2011, plaintiff executed a promissory note in favor of defendant in the

amount of $300,850.22. On that date, plaintiff also executed a business loan agreement, a commercial security agreement, a mortgage, and an agreement to provide insurance on the business. In addition, plaintiff and his wife also had a residential real estate loan with defendant for their primary residence, which was documented through a promissory note in the amount of $215,000, dated April 5, 2010, and secured by a mortgage.

¶ 6 Plaintiff's insurance company paid a total of $352,577.64 for the loss of the business building and personal property. That sum was paid in two checks, both which were made payable to plaintiff and defendant, as mortgagee. According to the complaint, plaintiff and defendant, acting through duly authorized agents, officers of the bank, agreed that the insurance proceeds would be used to rebuild the business, and a "construction account" would be opened with those funds being used to rebuild the business.

¶ 7 Plaintiff alleges that on January 25, 2013, he met with James Rutledge, defendant's vice president, and Michael Defend, defendant's senior vice president, and an oral agreement was reached that the remaining insurance proceeds would be used to rebuild the business destroyed by fire. In reliance upon that agreement, he delivered the insurance proceeds to defendant. On January 25, 2013, an account was opened in the name of Illinois Prefinish and defendant. A deposit slip shows the full amount of the insurance proceeds was deposited into the account.

¶ 8 The record further shows that $7,941.44 was transferred from the account at plaintiff's request to bring plaintiff's mortgage on his primary residence up to date. $9,824.90 was also transferred at plaintiff's request from the account to bring the

mortgage on plaintiff's business up to date. $34,811.30 was then transferred at plaintiff's request to the business account of plaintiff. The remaining amount ($300,000) is the source of the dispute.

¶ 9 On January 30, 2013, at 11:37 a.m., James Rutledge sent an e-mail to plaintiff, advising him as follows:

> "Based on the damage that was sustained to your commercial property which is the collateral for loans with the bank, I need to inform you of the following.
>
> In loan committee on 1-29-13 the President and Sr. Vice President stated that the bank needs to be paid off on your business loan from the insurance proceeds. In addition the bank had taken the commercial property as additional collateral on your home loan. We need a principal pay down on your home loan to bring it down to a balance of $172,000.00 from the insurance proceeds as well.
>
> This will pay off your business loan and eliminate the payment, and will pay down your home loan to 80% of the original purchase price, putting you and the bank in the correct equity position with the remaining collateral. Please contact myself *** with any questions."

At 1:06 p.m., plaintiff, without defendant's authorization, transferred the $300,000 remaining in the account by way of an electronic transfer to his personal business account.

¶ 10 At 1:15 p.m., plaintiff went to defendant's drive up facility and attempted to withdraw the $300,000 from his personal business account. Defendant did not allow the withdrawal. Defendant then reversed the transfer of the funds, effectively returning the

funds to the account opened with the insurance proceeds in both the name of plaintiff and defendant.

¶ 11 On January 30, 2013, defendant seized most of the funds in the account and applied them to plaintiff's debt as follows: (1) transferred $260,900.25 to pay off the promissory note of November 30, 2011, secured by the assets of plaintiff d/b/a Illinois Prefinish and plaintiff's wife, including the real estate known as 10350 North 450th Street; (2) transferred $36,293.78 to pay down the promissory note of April 5, 2010, secured in part by plaintiff's primary residence. Because of the seizure, plaintiff was not able to rebuild his business.

¶ 12 On October 19, 2015, plaintiff filed his three-count complaint, alleging breach of contract (count I), fraudulent misrepresentation (count II), and violation of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/10a (West 2012)) (count III). All three counts are based upon the breach of the alleged oral agreement to use the insurance proceeds to rebuild plaintiff's business. Defendant contends that none of its agents or employees ever agreed that the $300,000 would be used to rebuild plaintiff's business, and filed a motion for summary judgment as to counts I and II.

¶ 13 Plaintiff filed a response to defendant's motion for summary judgment as to counts I and II. Defendant filed a reply to plaintiff's response in which it alleged that plaintiff's theory is barred by the Act. Defendant later filed a motion for summary judgment as to count III on the basis of the Act. The trial court granted summary judgment in favor of defendant, finding all three counts of the complaint barred by the Act. Plaintiff now appeals.

¶ 14 ANALYSIS

¶ 15 The issue on appeal is whether the trial court erred in granting summary judgment in favor of defendant. Plaintiff contends that even though defendant's motion was for summary judgment, the trial court's decision was more akin to a ruling under section 2-615 or 2-619 of the Code of Civil Procedure (Code) (735 ILCS 2-615, 2-619 (West 2012)). Plaintiff insists that the alleged oral election by defendant to use the fire insurance proceeds to allow plaintiff to rebuild his business and forbear from applying those proceeds to plaintiff's existing debts did not involve creation of debt or qualify as "credit agreement" under the definition contained in the Act. We disagree.

¶ 16 Whether we view this as a motion to dismiss or a motion for summary judgment, the standard of review is the same. Under section 2-619(a)(9) of the Code, a complaint may be dismissed 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 2012). When ruling on a motion to dismiss, all pleadings and supporting documents must be interpreted in the light most favorable to the nonmoving party. *Johnson v. Chicago Transit Authority*, 366 Ill. App. 3d 867, 869 (2006). A court should grant a motion to dismiss where the plaintiff can prove no set of facts that would support his or her cause of action. *Id.* Our standard of review on a motion to dismiss is *de novo*. *Rodriguez v. Sheriff's Merit Comm'n of Kane County*, 218 Ill. 2d 342, 349 (2006). A movant may only be granted summary judgment when all the pleadings, discovery materials, admissions, and permissible inferences, when analyzed in the light most favorable to the nonmoving party, so overwhelmingly favor the movant that no fair-minded individual could dispute

the movant's right to summary judgment in his or her favor. *Wysocki v. Bedrosian*, 124 Ill. App. 3d 158, 164 (1984). Summary judgment appeals are also reviewed *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 17 Illinois courts have relied on the broad language of the Act in determining whether a credit agreement was entered into between the parties. *First National Bank in Staunton v. McBride Chevrolet, Inc.*, 267 Ill. App. 3d 367, 372 (1994). The Act defines "credit agreement" as "an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money not primarily for personal, family or household purposes, and not in connection with the issuance of credit cards." 815 ILCS 160/1(1) (West 2012). Section 2 of the Act specifically states:

> "A debtor may not maintain an action on or in any way related to a credit agreement unless the credit agreement is in writing, expresses an agreement or commitment to lend money or extend credit or delay or forbear repayment of money, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." 815 ILCS 160/2 (West 2012).

The Act goes on to state:

> "The following actions do not give rise to a claim, counter-claim, or defense by a debtor that a new credit agreement is created, unless the agreement satisfies the requirements of Section 2:
>
> (1) the rendering of financial advice by a creditor to a debtor;
>
> (2) the consultation by a creditor with a debtor; or

(3) the agreement by a creditor to modify or amend an existing credit agreement or to otherwise take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies in connection with an existing credit agreement, or rescheduling or extending installments due under an existing credit agreement." 815 ILCS 160/3 (West 2012).

There is no limitation to the type of actions by a debtor which are barred by the Act, so long as the action is in any way related to a credit agreement. *McBride Chevrolet*, 267 Ill. App. 3d at 372.

¶ 18 "[E]nforcing the Act as written causes harsh results for bank customers in some circumstances, but the Act is very broadly worded and dictates such a result." *McAloon v. Northwest Bancorp, Inc.*, 274 Ill. App. 3d 758, 765 (1995) (citing *McBride Chevrolet*, 267 Ill. App. 3d at 372-73). Accordingly, all actions which are dependent upon an oral credit agreement are barred by the Act. *McBride Chevrolet*, 267 Ill. App. 3d at 372. In *McBride Chevrolet*, the defendants' counterclaim alleged, *inter alia*, estoppel and fraud in connection with a bank officer's failed promise to hold a check drawn on a car dealer's account, resulting in the dealership being forced out of business. After determining that the officer's promise was a credit agreement within the meaning of the Act, the court went on to hold that all of the defendants' claims, whether sounding in tort or contract, were barred by the Act. *Id*. In reaching its decision, the court distinguished the language of the Frauds Act (740 ILCS 80/0.01 *et seq.* (West 1992)), which bars actions upon certain agreements which are not in writing, and the Act, which bars all actions by a

debtor based on, *or related to*, an oral credit agreement (815 ILCS 160/2 (West 1992)). *Id.*

¶ 19 In *Hubbard Street Lofts LLC v. Inland Bank*, 2011 IL App (1st) 102640, the plaintiff claimed it had an agreement with the bank that the interest rate for a loan would be calculated at 8.000%. *Id.* ¶ 25. The agreement, however, was not in writing. *Id.* Because the plaintiff could not show in writing that they had an agreement with the bank to apply the 8.000% rate, the count was barred under the Act. *Id.*

¶ 20 Similarly here, plaintiff claims he had an agreement with the bank to use the fire insurance proceeds to rebuild his business. However, this agreement was not in writing and was not signed by both parties. Plaintiff's reliance on this purportedly oral agreement is precisely the situation the Act prohibits and is typical of the types of disputes which caused our General Assembly to enact a statutory bar to actions by debtors on oral promises. See *Klem v. First National Bank of Chicago*, 275 Ill. App. 3d 64, 67 (1995).

¶ 21 We disagree with plaintiff's assertion that the election to use the insurance proceeds to rebuild the business did not involve creation of debt or qualify as a credit agreement so that the Act is inapplicable. Our colleagues in the Second District rejected a similar argument in *Nordstrom v. Wauconda National Bank*, 282 Ill. App. 3d 142 (1996). In that case, the issue was on review after the trial court dismissed the plaintiff's promissory estoppel and breach of contract claims. *Id.* at 144.

¶ 22 The plaintiffs asserted the Act barred neither claim and argued that an oral statement by an agent of the defendant's after the closing date of the loan was not an agreement to modify or amend the credit agreement. *Id.* at 145. According to the

plaintiffs, the agent's statement that she would obtain insurance for the collateral on the loan was an act in conformity with the provisions of the agreement. *Id.* The court disagreed, specifically stating as follows:

> "Because the written agreement did not obligate defendant to procure insurance, the agent's statement that she would take care of the insurance is a modification of the contractual agreement providing that it was plaintiffs' duty to procure insurance.
>
> Plaintiffs cannot maintain an action alleging promissory estoppel or breach of contract based on the oral modification. *** Although the modification agreement to procure insurance is not, itself, a credit agreement, the requirement of insurance for the collateral is an integral part of the credit agreement. Therefore, the agreement relates to the credit agreement and the claims predicated on it are thereby barred by the Act." *Id.* at 145-46.

The instant situation is similar.

¶ 23 Here, the plaintiff alleges that he entered into an agreement of forbearance concerning the original credit agreement, which was neither in writing nor signed by both parties. Thus, the trial court was justified in concluding that as a matter of law the oral promise to allow plaintiff to use the insurance proceeds to rebuild his business was a "credit agreement" covered by the Act. As the agreement between defendant and plaintiff for disposition of insurance proceeds was oral, the agreement was not enforceable under the Act. Accordingly, all three counts of plaintiff's complaint were properly dismissed either pursuant to section 2-619(a)(9) of the Code or pursuant to summary judgment.

¶ 24 For the foregoing reasons, the judgment of the circuit court of Effingham County is affirmed.

¶ 25 Affirmed.