2018 IL App (1st) 163402-U

FIRST DIVISION
March 12, 2018
Supplemental Order Upon Denial of Rehearing June 18, 2018

No. 1-16-3402

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LAKESHORE CENTRE HOLDINGS, LLC, Plaintiff-Appellant, v. LHC LOAN, LLC; PETER GOLDMAN; JOHN READING WILSON; JONATHAN BROSS; and LHC INVESTMENT, LLC, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County No. 12 L 10029 The Honorable James E. Snyder, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justice Griffin[1] concurred in the judgment.
Justice Mikva dissented in part.

ORDER

¶ 1 *Held:* Plaintiff abandoned any claim that it properly exercised an option where the circuit court entered summary judgment against plaintiff on a breach of contract claim under this theory and plaintiff failed to preserve its claim in its operative complaint. The circuit court properly granted summary judgment in favor of defendants on plaintiff's remaining breach of contract claims. The circuit court properly dismissed plaintiff's tortious interference with contract claims as well as plaintiff's fraud claims.

[1]Justice Simon was originally assigned to the panel but resigned while the petition for rehearing was pending. Justice Griffin was substituted and has read all of the briefs, including the briefs on the petition for rehearing, and has listened to the audio recording of the oral argument.

¶ 2 Plaintiff Lakeshore Centre Holdings, LLC (Lakeshore) ran into financial difficulties with a health club and sought financing from LHC Loan, LLC (Loan). Lakeshore agreed to sell its membership interest in LHC Operating, LLC (Operating) to Loan and retain an option to repurchase the interest for a fixed price before a date certain. Operating was co-owned by Lakeshore and LHC Investment, LLC (Investment). Lakeshore attempted to exercise the repurchase option but was unsuccessful. Lakeshore sued Loan for breach of contract and for making fraudulent misrepresentations related to the underlying sale and the repurchase option. Lakeshore also brought claims against Investment for fraudulent inducement, and against Peter Goldman, John Reading Wilson, and Jonathan Bross, the individuals that controlled Loan and Investment, for tortious interference with Lakeshore's contract with Loan. The circuit court granted summary judgment in favor of Loan on Lakeshore's breach of contract claims and dismissed the remaining claims with prejudice. Lakeshore appeals. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Lakeshore's statement of facts fails to provide us with all of the facts necessary to understand the case, in violation of Supreme Court Rule 341(h)(6) (eff. July 1, 2017). It provides virtually no description of the pleadings filed or any explanation of the procedural history of the case in the circuit court. Notably, none of the parties reference, acknowledge, or discuss the fact that, on November 12, 2015, the circuit court entered summary judgment against Lakeshore on its breach of contract claim that it properly exercised the repurchase option based on a finding that Lakeshore did not properly exercise the repurchase option. The parties also do not acknowledge or discuss the fact that the November 12, 2015, summary judgment order has not been appealed. In spite of these deficiencies and despite the inadequate description of the

pleadings, we address the issues on appeal based on our understanding of the following facts taken from the record on appeal.

¶ 5 Lakeshore owned a 34% membership interest in Operating and Investment owned the remaining 66%. The 2010 operating agreement for Operating (the 2010 operating agreement) provided, in part, that any transfers between Operating and Investment (which was Operating's managing member)[2] or Goldman, Wilson, and Bross (three of the individuals that controlled all of the LHC entities) required the approval of Lakeshore. The agreement allowed a member to transfer its interest in Operating without approval, but before the transferee could become a member, Operating's manager had to approve.

¶ 6 Lakeshore ran into financial difficulties related to a health club and turned to defendants Goldman, Wilson, and Bross for financing. The parties initially discussed a loan but ultimately agreed that Loan would purchase all of Lakeshore's 34% membership interest in Operating for $334,000 (the purchase agreement). The purchase agreement contained an option for Lakeshore to repurchase the 34% membership interest in Operating either on or before December 31, 2011, for $367,400, or after December 31, 2011, but on or before June 30, 2012, for $422,510 (the repurchase option). The repurchase option contained no reference to any retained rights held by Lakeshore nor did it contain any restrictions on Loan's right to modify or amend the 2010 operating agreement.

¶ 7 As part of Loan's purchase agreement, Lakeshore and Investment agreed to amend the operating agreement for 1320 W. Fullerton, LLC (of which Lakeshore was a member) to provide that Loan would receive the first $10 million in distributions to Lakeshore's membership interest in 1320 W. Fullerton, LLC. This amendment would be removed if Lakeshore exercised the

[2]The 2010 operating agreement's recitals identify LHC Investment, LLC as the managing member of Operating. The 2010 operating agreement's definitions, however, define "Managing Member" as "LHC Management, LLC." The parties do not address this discrepancy.

repurchase option. Attached to the purchase agreement as "Exhibit B" was a draft "repurchase agreement" that Lakeshore and Loan were required to execute if Lakeshore exercised the repurchase option.

¶ 8 Lakeshore did not attempt to exercise the option on or before December 31, 2011. On January 1, 2012, Operating's 2010 operating agreement was amended by its members. The second amended and restated operating agreement (2012 operating agreement) included a new provision stating:

> "Restrictions of Transfer: In addition to the general restrictions set forth herein, no Member shall sell, exchange, pledge, mortgage, hypothecate or otherwise transfer or encumber its interest and/or Units in the Company without the prior written consent of the Manager. Any such transfer or encumbrance shall be void from inception and of no force or effect whatsoever."

The 2012 operating agreement also provided that if a member received an offer to purchase the member's interest, the other members had the "right and option *** to purchase all or any portion of the Offered Interest upon the express terms and conditions and at the purchase price set forth in the Offer ***."

¶ 9 On June 28, 2012, counsel for Lakeshore sent an email with an executed proposed repurchase agreement to Loan's counsel. The contents of Lakeshore's email indicated that the proposed repurchase agreement should be held in escrow "until we direct you to release it at the time of the Closing." Lakeshore indicated that it was making "final arrangement for the funds and would appreciate the correct wire instructions for [Loan]." Lakeshore proposed a closing date of June 30, 2012. Counsel for Loan emailed Lakeshore on June 29, 2012, stating, "As we discussed, we are happy to honor your client's right to repurchase but the operating agreement

has been amended to restrict the ability of members to transfer, assign or pledge their units without the manager's approval." Lakeshore was unaware of the 2012 operating agreement or that the members of Operating had approved amendments to the 2010 operating agreement until June 29, 2012.

¶ 10 Lakeshore intended to fund the repurchase option with money from a third party, Collins and Elm Club Investors, LLC (Collins and Elm Club). In another June 29 email, Lakeshore's counsel emailed Walter Kaiser (a member of Lakeshore) and J. Brian Schaer (one of the owners of Collins and Elm Club), suggesting that they attend the closing on June 30 "and deliver the certified check to be held in escrow pending the approval of the Manager to the contribution to Collins and Elm Club *** of [Lakeshore's] interest in [Operating] *** (the club) and 1320 West Fullerton (the real estate)." Later on June 29, Lakeshore's counsel delivered a cashier's check to Loan's counsel for $422,510 drawn on the account of Schaer and directed that the funds be "held in ESCROW pending (a) both the General Partner's approval of the contribution of Lakeshore's Interest in *both* [Operating] *and* 1320 W. Fullerton, LLC to Collins and Elm Club ***, and (b) the written directions of [Schaer] authorizing the release of funds." (Emphases in original.) Lakeshore's letter acknowledged that "General Partner approval could not be obtained on June 29, 2012[,] because Peter Goldman was out of the country." The letter further noted that Collins and Elm Club was owned by Lakeshore, Schaer, and Salvatore Balsamo.

¶ 11 After delivering the letter and check, Lakeshore's counsel sent an email to Loan's counsel stating: "This email will confirms [*sic*] our discussion at your office and that on June 29, 2012[,] I delivered to you a Cashiers Check to be held in escrow by your firm." The email also reiterated Lakeshore's understanding that Goldman was out of the country and unable to consent to the repurchase, and further stated, "Please let us know when [Goldman] is back in the country

and able to complete the repurchase transaction and provide the Manager's consent." One minute later, counsel for Loan replied via email, "Confirmed. Have a great weekend." At his deposition, Loan's counsel explained that he was confirming that a discussion took place and "a check was presented a receipt was signed. Yes, we met. When I said confirmed, I was referring to the very first clause or the very first sentence, [']This email will confirm our discussion at your office.['] Yes, we had a discussion."

¶ 12 On June 30, 2012, Bross went to 1320 West Fullerton where the closing was to take place and waited for Lakeshore to tender or release from escrow the $422,510. No one from Lakeshore appeared and no instructions authorizing the release of the funds were ever given by Schaer.

¶ 13 On July 10, 2012, Loan sent Lakeshore a letter informing it that the repurchase had not occurred by June 30, 2012, and that the delivery of the cashier's check with instructions for payment that were never fulfilled did not constitute payment as required under the repurchase agreement.

¶ 14 The following procedural history is relevant to our disposition. Lakeshore's initial complaint alleged in count I that Loan fraudulently induced Lakeshore to enter into the purchase agreement because Loan never intended to allow Lakeshore to exercise the repurchase option. In count II, pleaded in the alternative to count I, Lakeshore asserted that Loan breached the purchase agreement by refusing to return Lakeshore's interest in Operating after Lakeshore exercised the repurchase option. Count III alleged that Goldman, Wilson, and Bross intentionally interfered with the contract between Loan and Lakeshore "by preventing conditions precedent they and Loan have asserted existed in relation to [Lakeshore's] exercise of the [repurchase] [o]ption." Finally, count IV asserted that Goldman, Wilson, and Bross fraudulently misrepresented that the purchase agreement was the equivalent of a loan transaction because they

never intended to return Lakeshore's interest or to honor the repurchase option, and knew that they would amend the 2010 operating agreement to prevent Lakeshore from repurchasing the same interest that was sold to Loan. Loan, Goldman, Wilson, and Bross moved to dismiss the initial complaint. In a written order, the circuit court granted the motion to dismiss Lakeshore's claims in counts I and IV pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), but denied the motion as to counts II and III.

¶ 15 On August 18, 2015, Loan moved for summary judgment on Lakeshore's breach of contract claim pleaded in the initial complaint. Loan argued that it did not breach the purchase agreement and that Lakeshore failed to exercise the repurchase option. On August 26, 2015, the circuit court allowed Lakeshore to file a first amended complaint that added Investment as a defendant. Lakeshore repleaded its previously-dismissed counts I and IV to preserve those claims for appeal and repleaded verbatim counts II and III of its initial complaint. Lakeshore added count V, asserting that Investment tortiously interfered with the purchase agreement by amending the 2010 operating agreement to require the prior approval of Operating's manager of the transfer of Lakeshore's interest in Operating, thereby preventing Lakeshore from repurchasing its prior interest. Loan's motion for summary judgment on count II in the initial complaint was understood to apply to count II in the first amended complaint.

¶ 16 Lakeshore responded to the motion for summary judgment by arguing that the changes to the 2010 operating agreement amounted to an anticipatory repudiation of the purchase agreement's repurchase option, which rendered moot the question of whether Lakeshore exercised the repurchase option. Lakeshore further argued that the 2012 operating agreement prevented Lakeshore from exercising the repurchase option and that the changes to the 2010

operating agreement violated the duty of good faith and fair dealing. Lakeshore did not argue that it exercised the repurchase option.

¶ 17 On November 12, 2015, the circuit court granted summary judgment on count II of the first amended complaint in favor of Loan, finding that Lakeshore did not properly exercise the purchase option and that Loan did not breach the agreement by failing to reconvey an interest to Lakeshore. Lakeshore was given leave to file a second amended complaint.

¶ 18 On January 19, 2016, Lakeshore filed its second amended complaint. Count I asserted a claim for fraudulent inducement against Loan. Count II alleged that Loan breached the purchase agreement by amending the 2010 operating agreement thereby preventing Lakeshore from obtaining third-party financing to fund the repurchase option. Count III also alleged breach of contract against Loan, asserting that Loan's counsel confirmed that Loan would contact Lakeshore and complete the repurchase transaction and provide the manager's consent when Goldman returned to the country. Count IV alleged that Goldman, Wilson, and Bross intentionally interfered with the contract between Loan and Lakeshore "by preventing conditions precedent they and Loan have asserted existed in relation to [Lakeshore's] exercise of the [repurchase] [o]ption." Count V asserted a fraudulent misrepresentation claim against Goldman, Wilson, and Bross. Finally, count VI asserted that Investment tortiously interfered with the purchase agreement by amending the 2010 operating agreement to require the approval of Operating's manager of the transfer of Lakeshore's interest in Operating, thereby preventing conditions precedent to Lakeshore's exercise of the repurchase option.

¶ 19 Defendants moved for summary judgment on the breach of contract claims in the second amended complaint and moved to dismiss all of Lakeshore's remaining claims. The motion was fully briefed and argued on May 26, 2016, and was taken under advisement. On June 3,

Lakeshore filed a cross-motion for summary judgment on its breach of contract claims. Lakeshore argued that Loan breached the purchase agreement by refusing to close on or after June 30, 2012. Lakeshore argued that it exercised the option on June 28, 2012, which was all it was required to do prior to June 30, 2012, contending that it was only required to tender the purchase price at the closing, but that the closing was not required to occur on or before June 30, 2012. Lakeshore further argued that the changes to the 2010 operating agreement repudiated the repurchase option. Lakeshore's motion for partial summary judgment was also fully briefed. In response, defendants noted, among other things, that on November 12, 2015, the circuit court previously ruled that Lakeshore failed to properly exercise the repurchase option when it granted summary judgment in favor of Loan on this breach of contract theory.

¶ 20 On July 12, 2016, the circuit court entered a written order (1) granting summary judgment in favor of defendants on the breach of contract claims in counts II and III of the second amended complaint, (2) denying Lakeshore's cross-motion for summary judgment on the breach of contract claims, (3) granting defendants' motion to dismiss the fraudulent inducement, tortious interference with contract, and fraudulent misrepresentation claims in counts I, IV, V, and VI, and (4) granting Lakeshore leave to amend its fraudulent inducement and fraudulent misrepresentation claims set forth in counts I and V. The circuit court also denied Lakeshore's pending motion for leave to file its third amended complaint *instanter*, which the circuit court had previously entered and continued pending the outcome of the dispositive motions on the second amended complaint.

¶ 21 On August 9, 2016, Lakeshore filed a third amended complaint. Count I alleged that Loan fraudulently induced Lakeshore to enter into the purchase agreement because Loan never intended to return Lakeshore's interest in Operating, and after executing the purchase agreement,

Loan treated Lakeshore as if it had no interest in Operating or 1320 W. Fullerton, LLC. Count V asserted that Goldman, Wilson, and Bross fraudulently misrepresented to Lakeshore that it would be able to recover its interest in Operating. The third amended complaint also asserted claims for breach of contract against Loan (counts II and III), tortious interference with a contract against Goldman, Wilson, and Bross (count IV), and tortious interference with a contract against Investment (count VI). Plaintiff did not indicate in the third amended complaint that the claims in counts II, III, IV, and VI were repleaded for the purpose of preserving those claims for appeal.

¶ 22 Defendants filed a combined motion to dismiss the third amended complaint pursuant to section 2-615 of the Code, or alternatively, for summary judgment. The motion was fully briefed, and on November 30, 2016, the circuit court dismissed the third amended complaint pursuant to section 2-615.

¶ 23 On December 28, 2016, Lakeshore filed a notice of appeal, identifying the circuit court's July 12, 2016, order granting summary judgment in favor of defendants on counts II and III of the second amended complaint, denying Lakeshore's cross-motion for summary judgment on counts II and III, and dismissing counts I, IV, V, and VI of the second amended complaint, and the circuit court's November 30, 2016, order dismissing counts I and V of the third amended complaint.

¶ 24 ANALYSIS

¶ 25 Lakeshore identifies seven issues on appeal but only advances arguments on six of those issues.[3] It argues that the circuit court erred by (1) denying its motion for partial summary judgment with respect to its breach of contract claims in the second amended complaint,

[3]Lakeshore's "Issues for Review" section includes a reference to the circuit court's denial of leave to file a third amended complaint. Lakeshore, however, does not raise any argument with respect to this issue in the body of its appellant's brief, and it is therefore forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("Points not argued are waived ***.")

(2) granting summary judgment in favor of defendants on Lakeshore's breach of contract claims, (3) finding that Loan's changes to the 2010 operating agreement did not amount to an anticipatory repudiation of the repurchase option, (4) dismissing Lakeshore's tortious interference with contract claims against Goldman, Wilson, Bross, and Investment, (5) dismissing Lakeshore's fraudulent inducement claim against Loan, and (6) dismissing Lakeshore's fraudulent misrepresentation claim against Goldman, Bross, and Wilson. We address these arguments in turn.

¶ 26 We review *de novo* both the circuit court's decision to grant summary judgment (*Evans v. Brown*, 399 Ill. App. 3d 238, 244 (2010), and to dismiss Lakeshore's complaint pursuant to section 2-615 of the Code of Civil Procedure (*Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003)).

¶ 27 Plaintiff's first contention is that the circuit court erred by denying Lakeshore's motion for summary judgment on its breach of contract claims in the second amended complaint. It contends that Loan breached the agreement by failing to honor Lakeshore's exercise of the repurchase option. We find that Lakeshore abandoned its claim, pleaded in the initial and first amended complaints and thereafter not repleaded, that it exercised the repurchase option. It is well-established that "a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints." *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153-54 (1983). " 'Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.' " *Id.* at 154 (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)).

¶ 28 Here, Lakeshore's breach of contract theory that defendants were in breach of the purchase agreement because Lakeshore exercised the option and Loan failed to return the 34% membership interest in Operating was pleaded in its initial and first amended complaints. On November 12, 2015, the circuit court granted summary judgment in favor of Loan on this breach of contract claim asserted in count II of the first amended complaint. Lakeshore's second amended complaint—which is the operative complaint for the purposes of our review of plaintiff's breach of contract claims—omitted any claim that Loan breached the purchase agreement by failing to honor Lakeshore's exercise of the repurchase option. The second amended complaint did not restate or incorporate by reference the allegations of count II of the first amended complaint. The second amended complaint is devoid of factual allegations that Lakeshore properly exercised the repurchase option. Therefore, Lakeshore failed to preserve that claim by not repleading count II of the first amended complaint in its second amended complaint. As a consequence, Lakeshore abandoned its claim that Loan breached the purchase agreement by failing to honor Lakeshore's purported proper exercise of the repurchase option.

¶ 29 Lakeshore attempted to revive its claim that it exercised the option when it moved for partial summary judgment on count III of the second amended complaint. But, as discussed, the circuit court had already granted summary judgment in favor of Loan on that breach of contract theory on November 12, 2015, when it found that Lakeshore did not properly exercise the repurchase option and that Loan was not in breach under that theory. Lakeshore never sought reconsideration of the November 12, 2015, order, did not seek to appeal that order, and did not preserve the issue for appeal by repleading this theory in any of its subsequent complaints. Furthermore, Lakeshore's attempt to obtain summary judgment on the basis that it properly exercised the repurchase option—after the circuit court's ruling on that breach of contract theory

alleged in the initial and first amended complaints—could not succeed because the second amended complaint did not allege that Lakeshore exercised the repurchase option. At that stage of the proceedings, Lakeshore could not move for summary judgment on its claim that it exercised the option because that claim was not set forth in the operative complaint. *Filliung v. Adams*, 387 Ill. App. 3d 40, 51 (2008) ("If a plaintiff desires to place issues in controversy that were not named in the complaint, the proper course of action is to move to amend the complaint. [Citations.] If the plaintiff does not seek to amend, then it cannot move for summary judgment on those issues.").

¶ 30 Lakeshore did not plead in its second amended complaint, the operative complaint, that it performed its obligations under the purchase agreement to repurchase its interest in Operating. It never sought reconsideration of the circuit court's November 12, 2015, summary judgment order, and it did not seek to appeal or preserve for appeal the circuit court's determination that Lakeshore failed to properly exercise the option. We find that Lakeshore abandoned its claim that it properly exercised the repurchase option.

¶ 31 Because Lakeshore is precluded from arguing that it exercised the option, it advances alternative theories to support a finding that Loan breached the option agreement. First, Lakeshore argues that there were genuine issues of material fact that precluded the entry of summary judgment in favor of defendants on Lakeshore's breach of contract claim based on Loan's failure to complete the repurchase agreement after June 30, 2012. Lakeshore contends that on June 29, 2012, Loan's counsel "confirmed that he would inform [Lakeshore] when Goldman *** was back in the country 'to complete the repurchase transaction and provide the Manager's consent.' " Lakeshore argues that there is a question of fact as to whether Loan agreed to extend the date for obtaining Goldman's approval. Lakeshore's argument, however,

ignores the undisputed deposition testimony of Loan's counsel in which he explained, "When I said confirmed, I was referring to the very first clause or the very first sentence, ['']This email will confirm our discussion at your office.['] Yes, we had a discussion." Lakeshore fails to develop any argument that defendants' counsel's statements on behalf of his client constituted an agreement to extend the deadline for obtaining manager approval or that his statements create a genuine issue of material fact that preclude the entry of judgment in favor of defendants on count III of the second amended complaint. Furthermore, this argument assumes that Lakeshore timely exercised the option agreement, but we have already noted that the circuit court found that this was not the case. Therefore, any claim that Loan breached the purchase agreement by failing to schedule a closing after June 30, 2012, or failing to return Lakeshore's interest in Operating must fail. We find that the circuit court properly granted summary judgment in favor of Loan on Lakeshore's claim in count III of the second amended complaint that defendants failed to complete the repurchase agreement after June 30, 2012.

¶ 32 Next Lakeshore argues that it was entitled to summary judgment on its claim in count II that defendants' amendments to the 2010 operating agreement repudiated the repurchase option, a claim which would excuse any failure to exercise the repurchase option by Lakeshore. Lakeshore contends that after executing the purchase agreement, Loan and Investment changed the contractual rights governing interests in Operating by amending the 2010 operating agreement. Those amendments included eliminating a member's rights to (1) an independent appraisal to determine the value of an interest, (2) require the controlling member to obtain Lakeshore's approval for any proposed self-dealing, and (3) transfer an interest without manager approval. Lakeshore contends that these amendments altered "the subject of the [repurchase] option" such that Loan "could not return the contractual rights constituting the [i]nterest it had

received from [Lakeshore], thus rendering it unnecessary for [Lakeshore] to attempt to perform any obligations related to the [repurchase option]." Lakeshore concludes that the changes to the 2010 operating agreement were an anticipatory repudiation of the repurchase option. We disagree.

¶ 33 To determine whether a plaintiff can maintain a claim for anticipatory breach of a contract, we must consider whether (1) there was a repudiation of the contract, (2) the conditions of the contract could be fulfilled had the contract not been allegedly repudiated, and (3) damages resulted from the alleged repudiation. *Pope ex rel. Pope v. Economy Fire & Casualty Co.*, 335 Ill. App. 3d 41, 46 (2002). "An anticipatory repudiation has been defined as a manifestation by one party to a contract of an intent not to perform its contractual duty when the time fixed in the contract has arrived. [Citations.] The party's manifestation must clearly and unequivocally be that it will not render the promised performance when it becomes due." *Id.*

¶ 34 We find that there was no repudiation of the repurchase option because the changes to the 2010 operating agreement did not reflect an intent by Loan not to perform under the purchase agreement or repurchase option. The purchase agreement reflected that Lakeshore owned an undivided 34% membership interest in Operating and that Lakeshore desired to sell that interest to Loan. The purchase agreement set forth the terms of the sale and the terms of the repurchase option, which permitted Lakeshore to repurchase from Loan the 34% membership interest in Operating for a certain price if exercised on or before two certain dates. The purchase agreement does not contain any provisions restricting Loan or any other member of Operating from amending the 2010 operating agreement. The agreement does not contain any provision reflecting that Lakeshore or Loan intended or agreed that the transaction was to be subject to the 2010 operating agreement, or that the exercise of the option would be under the terms of the

2010 operating agreement. There was no agreement between Loan and Lakeshore that Loan would refrain from taking any action with regard to the 2010 operating agreement. Lakeshore did not negotiate, and Loan did not agree to, any provision whereby Loan was required to inform Lakeshore of any changes in the 2010 operating agreement. The closest the agreement comes to addressing future modifications to any document are sections 10 and 11 of the purchase agreement and the repurchase option. Section 10 of the purchase agreement provided that the purchase agreement "may not be amended or modified except in writing by the parties." Section 11 provided, "This agreement contains the entire understanding of the parties and supersedes any prior understandings and agreements, written or oral, respecting the subjects discussed herein." Lakeshore and Loan simply did not memorialize in the agreement any restriction on the modification or amendment of the 2010 operating agreement. Furthermore, there was no impediment to Lakeshore's ability to inquire as to the status of Operating, its condition, or whether changes had been made to the 2010 operating agreement. Instead, Lakeshore waited until the very end of the option period before attempting to exercise the repurchase option. The fact that Lakeshore did not find out about the changes to the 2010 operating agreement until the last minute with little or no time to adjust its financing vehicle cannot be viewed as an obstacle imposed by Loan.

¶ 35 The purchase agreement allowed Lakeshore to repurchase the 34% membership interest in Operating at any time before June 30, 2012. The 2012 operating agreement eliminated the requirement for an appraisal, the limits on self-dealing, and a member's unrestricted right to transfer its interest. The first two complained of changes have no bearing on Lakeshore's claim that its attempt to repurchase the 34% membership interest in Operating was improperly rejected. Arguably, amending the unrestricted right to transfer a membership interest may be relevant to

this appeal, but neither this nor the other changes prevented Lakeshore from repurchasing the interest on or before the dates indicated and for the amounts stated in repurchase option. The fact that the 34% membership interest would be subject to the terms of the 2012 operating agreement, which did not exist in the 2010 operating agreement, has no bearing on whether Loan manifested an intent to honor Lakeshore's right to repurchase the 34% ownership interest. Therefore, Lakeshore neither established that Loan anticipatorily repudiated the repurchase or option agreement nor established any genuine issue of material fact on that issue that might preclude the entry of summary judgment in favor Loan.

¶ 36 Lakeshore insists that Loan would only return the membership interest subject to the 2012 operating agreement. But the members of Operating were free to amend the terms of the 2010 operating agreement, and nothing in the purchase agreement or repurchase option limited Operating's members' right to amend the 2010 operating agreement after the purchase agreement was executed. Furthermore, the primary reason that Lakeshore finds the 2012 amendments objectionable is because Lakeshore attempted to finance the repurchase option with funds from third parties who imposed conditions on providing the funds for the repurchase: instructing that the option money be held in escrow pending Operating's manager's approval of Lakeshore's intended transfer of the 34% membership interest to its lender, Collins and Elm Club, and the written directions of Schaer authorizing the release of funds to Loan. Even assuming that Lakeshore had properly exercised the option, it was Lakeshore that conditioned its payment of the option price on Goldman's approval of Lakeshore's intention to convey the membership interest to Collins and Elm Club, which was funding the repurchase. These additional conditions imposed by Lakeshore were not contemplated by, or reflected in, either the purchase agreement or the repurchase option. Acceptance of an offer that "changes the terms of an option or that

varies, alters or adds conditions to the offer set forth in an option constitutes a counter-offer rather than an acceptance." *Farley v. Roosevelt Memorial Hospital*, 67 Ill. App. 3d 700, 703 (1978) (noting the basic principle of contract law "that for the exercise of an option to be valid, the acceptance must be in the precise terms of the offer contained in the option."). Here, there is nothing to suggest that Loan would have refused to honor the repurchase option had Lakeshore come forward unconditionally and in a timely manner with the funds necessary to repurchase the 34% membership interest.

¶ 37 At most, the record shows that Loan informed Lakeshore that, should Lakeshore repurchase the 34% membership interest, the current operating agreement for Operating required manager approval of Lakeshore's intended transfer of that interest to Collins and Elm Club. There is nothing in the record that indicates Loan was not ready, willing, and able to accept the option funds on June 30. If anything, the record supports the conclusion that Lakeshore was unwilling to release the option funds absent preapproval by Operating of the intended transfer of Lakeshore's interest to Collins and Elm Club, a nonparty to the relevant agreements. Lakeshore conditioned the payment of the option price on preapproval by Operating's manager, which was a condition not agreed upon or stated in the purchase agreement or in the option agreement between Lakeshore and Loan. The circuit court therefore properly granted summary judgment in favor of defendants and against Lakeshore on count II of the second amended complaint.

¶ 38 Next, Lakeshore argues that Loan violated the duty of good faith and fair dealing by amending the 2010 operating agreement. Lakeshore argues that Loan used the 2012 operating agreement to "preclude [Lakeshore] from obtaining the funds to repurchase the [i]nterest." This argument fails, however, because as we explained, the 2012 amendments to the 2010 operating agreement did not preclude Lakeshore from exercising the repurchase option. How Lakeshore

acquired the funds necessary to repurchase the 34% membership interest was not an element of its agreement with Loan. At most, the 2012 amendments required the consent of Operating's manager to a later transfer of any membership interest acquired by Lakeshore to Collins and Elm Club.

¶ 39 In sum, the circuit court properly granted summary judgment in favor Loan on counts II and III of the second amended complaint and properly denied Lakeshore's cross-motion for summary judgment on those counts.

¶ 40 Lakeshore correctly acknowledges that if we were to affirm the circuit court's judgment in favor of Loan with respect to the breach of contract claims, then Lakeshore's tortious interference with contract claims against Investment, Goldman, Wilson, and Bross must fail. To prevail on a claim of tortious interference with a contract, the plaintiff must plead and prove: (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of this contractual relation; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's wrongful conduct; and (5) damages. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 154-55 (1989).

¶ 41 Here, we have affirmed the circuit court's order granting summary judgment in favor of Loan finding there was no breach of a contract. Lakeshore cannot establish the existence of a breach of contract necessary to sustain a tortious interference with a contract claim. The circuit court's judgment dismissing Lakeshore's tortious interference claims in counts IV and VI of the second amended complaint is therefore affirmed.

¶ 42 Next, Lakeshore argues that the circuit court erred in granting defendants' section 2-615 motion to dismiss its fraudulent inducement claim against Loan and its fraudulent

misrepresentation claim against Goldman, Wilson, and Bross, as pleaded in the third amended complaint. Lakeshore alleged that Loan, Goldman, Wilson, and Bross never intended to perform under the repurchase option when the purchase agreement was executed. On appeal, Lakeshore argues that it alleged sufficient facts to survive a section 2-615 motion to dismiss. We disagree.

¶ 43 "Fraudulent inducement is a form of common-law fraud." *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 17 (1995). To state a claim for fraud, a plaintiff must allege (1) a false statement of material fact, (2) by one who knows or believes it to be false, (3) made with the intent to induce action by another in reliance on the statement, (4) action by the other in reliance on the statement, and (5) injury to the other resulting from that reliance. *Village of Palatine v. Palatine Associates, LLC*, 2012 IL App (1st) 102707, ¶ 80.

¶ 44 Illinois recognizes what is known as the promissory fraud doctrine, which precludes a plaintiff from maintaining a fraud action based on a fraudulent promise to perform a future act. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 32. In other words, an alleged misrepresentation must be a statement of present or preexisting facts, and not a statement of future intent or conduct. *Abazari v. Rosalind Franklin University of Medicine & Science*, 2015 IL App (2d) 140952, ¶ 15. However, the promissory fraud doctrine is limited by the rule that "such fraud is actionable if it was part of a scheme or artifice to defraud." *Gagnon*, 2012 IL App (1st) 120645, ¶ 33.

¶ 45 Here, we have already found that defendants had a right to amend the 2010 operating agreement, that the 2012 amendments to the 2010 operating agreement did not prevent Lakeshore from exercising the repurchase option, and that defendants did not anticipatorily repudiate the repurchase option. Furthermore, the 2012 amendments to the 2010 operating agreement did not occur until January 1, 2012. Section 3(a) of the repurchase option expressly

provided that, "On or before December 31, 2011, the Seller shall have the right to repurchase the entire Seller's Interest from Buyer for a purchase price equal to *** ($367,400.00) ***." The 2012 amendments to the 2010 operating agreement cannot support an inference that, at the time the purchase agreement was executed, defendants did not intend to honor the repurchase option because the changes to the 2010 operating agreement occurred after the initial date on which Lakeshore had a right to exercise the repurchase option. Furthermore, Lakeshore's complaint did not allege any facts that defendant misrepresented any material fact in order to defraud Lakeshore of its ownership interest in Operating when the parties mutually agreed to execute the purchase agreement. We affirm the circuit court's dismissal of counts I and V of the third amended complaint because Lakeshore cannot prove any set of facts that would establish promissory fraud.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 48 Affirmed.

¶ 49 Mikva, J., dissenting in part:

¶ 50 While I agree with much of what the court says in this case, I must nonetheless respectfully dissent. I believe that count III of the second amended complaint sets forth a claim that defendants prevented plaintiff from the timely and unconditional exercise of the option agreement, and that disputed issues of fact should preclude summary judgment for defendants on this claim.

¶ 51 The majority treats count III as though plaintiff alleged in it only that the defendants made a verbal agreement to extend the closing date for the option purchase beyond June 30, 2012. See *infra* ¶ 31. The court concludes that such an agreement could not have existed based

on Loan's counsel's testimony that all he agreed to was that the parties had had a "discussion" about extending the date for the closing. I am not convinced that this self-serving testimony precludes an issue of fact as to whether the parties agreed, on June 29, 2012, to schedule a closing after Mr. Goldman was back in the country, with the understanding that this would necessarily be after June 30, 2012. However, as the majority points out, according to the circuit court's ruling that we have no jurisdiction to review, the timely exercise of the option provision in the purchase agreement required plaintiff to make an unconditional payment of the option price to Loan before June 30, 2012, and this did not occur. This fact dooms any claim that Loan breached the option provision by failing to schedule a closing after June 30, 2012. In addition, the purchase agreement required that any changes be in writing and, for that reason, an oral agreement to extend the date for the closing would not have been effective to amend the agreement.

¶ 52 But the essence of count III, which I believe that the majority glosses over in its analysis, is that "Defendants *precluded* Plaintiff from obtaining the loan to pay the Option exercise price." (Emphasis added). Because plaintiff could not obtain the loan until Mr. Goldman approved the transfer of plaintiff's interest, plaintiff had no choice but to tender a conditional cashier's check rather than make an unconditional payment prior to June 30, 2012. I believe that this claim, that defendants interfered with plaintiff's ability to timely and properly exercise its right to repurchase, precluded a judgment on all claims in defendants' favor.

¶ 53 This claim is factually supported. Plaintiff alleged in the second amended complaint that, on June 29, 2012, its counsel informed defense counsel that plaintiff would be obtaining a loan to fund the repurchase under the option provision of the purchase agreement, and that the loan would be secured by plaintiff then transferring its interest to a new entity after it exercised the

option. Plaintiff also alleged that it was told that it could not transfer its interest without Mr. Goldman's approval and therefore "could not exercise the Option as it was attempting to do." Plaintiff alleged that this was the first time it learned of the 2012 operating agreement and the changes made by that agreement that precluded the transfer of its interest. As the majority recognizes in its recitation of the factual background (see *infra* ¶¶ 10-12), these allegations were confirmed in the summary judgment documents.

¶ 54 Plaintiff's briefs on appeal offer support for its claim that, if an unconditional payment by plaintiff was required to exercise the option, defendants interfered with its ability to meet this requirement. In its opening brief, plaintiff argues that "where, as here, a party prevents the condition it asserts as a defense to its breach of contract, the party is precluded from using the failure of that condition to avoid its contractual obligation." Plaintiff also argues that by relying on the change in the 2012 operating agreement "to argue that Goldman's approval was necessary for the planned transfer, LHC Loan attempted to preclude Plaintiff from obtaining the funds to repurchase the Interest." In addition, plaintiff argues in its brief that "The covenant of good faith and fair dealing that is implied in every contract requires contracting parties 'to use reasonable efforts to bring about a condition precedent' " (quoting *Dayan v. McDonald's Corp.*, 125 Ill. App. 3d 972, 990 (1984)). Thus, I believe that plaintiff properly alleged in its operative complaint and argued on appeal that defendants interfered with its ability to unconditionally tender the purchase price in order to exercise the purchase option, and that defendants therefore cannot rely on this failure to bar plaintiff's claim for breach of contract.

¶ 55 There can be little dispute that this is a viable argument and that, if plaintiff was able to prove at trial that defendants engaged in such interference, plaintiff could succeed on a breach of

contract claim. In support of its argument, plaintiff cites *Dayan* and *Leonard v. Koval*, 187 Ill. App. 3d 924, 931 (1989).

¶ 56 In *Dayan*, the court reasoned that, if the defendant had terminated the plaintiff's franchise agreement with an improper motive and without good cause—despite this not being expressly prohibited by the franchise agreement—the defendant would be exercising contractual discretion in a manner inconsistent with the reasonable expectations of the parties and, therefore, violating the implied covenant of good faith. *Dayan*, 125 Ill. App. 3d at 991. However, the court in *Dayan* found that the defendant did have good cause for terminating the franchise agreement and thus the plaintiff's claim was properly resolved against him. *Id.* at 995.

¶ 57 In *Leonard*, this court reversed a directed verdict for the buyer of a warehouse in a breach of contract case because the buyer had interfered with the seller's ability to perform a condition precedent. *Leonard*, 187 Ill. App. 3d at 930-31. Under the contract, the buyer was required to use its best efforts for nine months to get a zoning change and then, if the buyer were unsuccessful, the seller was to use its best efforts to get the change in the next nine-month period. *Id.* at 925. During the eighteen-month period, $55,000 was held in escrow, to be paid to the seller and the real estate broker only if the zoning change was accomplished. *Id.* During the first nine-month period, the buyer resold the property without obtaining the zoning change. *Id.* at 927. This was not prohibited by the contract but, as the court noted, tended to show a lack of the buyer's best efforts to get a zoning change. *Id.* at 930. The seller sued for breach of contract to recover the amount in escrow. *Id.* at 924-25. The buyer responded that the seller had breached when it stated in writing that he would not use the second nine-month period to seek a zoning change. *Id.* at 927, 931. However, the court ruled that because the buyer had made obtaining such a change impossible by its own lack of best efforts and by reselling the property, the seller's refusal to

seek a zoning change was not a defense, stating: "A party cannot claim the failure of a condition when that party prevented the actualization of the condition upon which the contractual liability depends." *Id.* at 931.

¶ 58 Although neither of the cases that plaintiff cites are option cases, the doctrine that plaintiff relies on has particular relevance in the option context. "It is a general rule that an optioner who has given the right to purchase property within a specified time may not do any act or omit to perform any duty calculated to cause the optionee to delay in exercising the right." H.D. Warren, *When Optionee's Delay in Exercising Option Excused*, 157 A.L.R. 1311, 1312 (1945).

¶ 59 In *In re Edgewater Medical Center*, 373 B.R. 845, 860 (2007), the bankruptcy court, following Illinois law, ruled as follows:

> "In Illinois, an option to purchase real estate given under a lease is enforceable by specific performance. [Citation.] Specific performance is appropriate even in cases where the optionee did not exercise the option prior to its expiration if the failure to exercise was caused by the optionor. [Citation.] In the case at bar, it was the actions of Rogan and EPC that directly caused EMC not to exercise the option. The court finds that, if not for the deceptive actions of Rogan and EPC described above, EMC would have exercised the option."

¶ 60 The actions of the defendants in *Edgewater* included concealing information, causing inaccurate and overvalued appraisals to be presented to the plaintiff, and influencing the plaintiff to take certain actions—none of which was specifically prohibited by the express terms of the contract but which the court found violated an "implied covenant of good faith and fair dealing that required both parties to refrain from doing anything to destroy or injure the other's right to

receive the benefit of the contract." *Id.* at 857. See also *Foster Enterprises, Inc. v. Germania Federal Savings and Loan Association*, 97 Ill. App. 3d 22, 30-31 (1981) (finding that the buyer was entitled to specific performance on an option contract despite the seller not having approved the appraisal—a condition precedent to exercising the option—because the seller's refusal to accept appraisal was in bad faith and for a bad motive.)

¶ 61 As these cases make clear, the burden is on plaintiff to show that defendants acted in bad faith with the motive of preventing plaintiff from timely exercising the option agreement. There is evidence that defendants did so by amending the operating agreement, failing to notify plaintiff of the amendment, failing to timely approve the transfer that was necessary for plaintiff to get the loan it needed to repurchase, and perhaps in suggesting to plaintiff that it could wait until Mr. Goldman returned to seek his approval for the transfer. None of this is prohibited by the purchase agreement and plaintiff has clearly not shown bad faith interference as an undisputed fact on summary judgment. However, I would remand and give plaintiff the opportunity to make this showing at trial. Therefore, I dissent.

¶ 62 **SUPPLEMENTAL ORDER UPON DENIAL OF REHEARING**

¶ 63 Lakeshore filed a timely petition for rehearing asserting that this court lacked jurisdiction to consider the circuit court's July 12, 2016, order. Lakeshore argues for the first time in its petition for rehearing that Loan filed a counterclaim in January 2014 that was unadjudicated at the time Lakeshore filed its notice of appeal. Lakeshore contends that, while the circuit court's November 30, 2016, order contained a finding pursuant to Supreme Court Rule 304(a) (eff. Mar. 8, 2016), the circuit court's July 12, 2016, order did not, and, therefore, the July 12, 2016, order was not final and appealable until Loan's counterclaim was dismissed in October 2017. For the reasons that follow, we disagree and deny Lakeshore's petition for rehearing.

¶ 64 It is abundantly clear that the circuit court's November 30, 2016, order was a final disposition of all of Lakeshore's claims. Defendants moved to dismiss the third amended complaint or alternatively for summary judgment. Lakeshore's third amended complaint asserted two amended fraud claims (counts I and V) and also repleaded Lakeshore's breach of contract claims (counts II and III) and tortious interference with contract claims (counts IV and VI) from the second amended complaint. These repleaded counts were included for the purpose of preserving those claims for appeal, as those claims were fully adjudicated in the July 12, 2016, order. During briefing on defendants' motion, defendants and Lakeshore explicitly acknowledged that counts II, III, IV, and VI had been repleaded for the purpose of preserving those claims for appeal and that no further briefing or substantive arguments or proceedings on those counts was necessary in light of the circuit court's July 12, 2016, order. According to the bystander's report of the November 30, 2016, hearing on defendants' motion to dismiss, the parties presented oral argument consistent with their briefs and the acknowledgement that the previously disposed of counts were included in the third amended complaint but had previously been disposed of. Therefore, it is indisputable that all of Lakeshore's claims in the third amended complaint were before the circuit court for a final disposition. The parties and the circuit court were fully aware that a dismissal of plaintiff's amended fraud claims with prejudice would bring Lakeshore's case to an end. On November 30, 2016, the circuit court then entered an order effectuating the intention of the parties and the understanding of the circuit court, stating, "The aspect of [defendants'] motion to dismiss based on the failure to state a claim is granted. The portion of the motion for summary judgment is moot. This order is final and appealable[,] the court determining that there is no just reason to delay enforcement or appeal."

¶ 65 Under the facts of this case, there is no doubt that circuit court's November 30, 2016, order was a final adjudication of all of the claims set forth in the third amended complaint, including the breach of contract and tortious interference with contract claims that were previously disposed of on July 12, 2016, through summary judgment or dismissal with prejudice and repleaded to preserve those claims for appeal. The circuit court's Rule 304(a) finding in the November 30, 2016, order therefore includes the July 12, 2016, order that fully resolved the preserved, repleaded counts from the second amended complaint. Therefore, regardless of whether Loan's counterclaim remained pending, Lakeshore was entitled to immediately appeal the circuit court's rulings with respect to all of the claims set up in the third amended complaint. Lakeshore's notice of appeal, its statement of jurisdiction in its opening brief, the substance of its briefs, and its oral arguments to this court plainly show that Lakeshore, defendants, and the circuit court understood this to be true.

¶ 66 Lakeshore's notice of appeal acknowledged that it repleaded its breach of contract and tortious interference with contract claims in the third amended complaint to preserve the circuit court's July 12, 2016, order for appellate review, and specifically identified the circuit court's July 12, 2016, and November 30, 2016, orders as the orders being appealed. The statement of jurisdiction in Lakeshore's appellate brief to this court correctly identified Rule 304(a) as the basis of this court's jurisdiction over Lakeshore's appeal from those orders. Lakeshore's opening brief to this court devoted over 20 pages of argument to reversing the circuit court's July 12, 2016, judgment orders, and devoted only five pages of argument to the circuit court's dismissal of the amended fraud claims in the third amended complaint on November 30, 2016. Furthermore, at oral argument, Lakeshore's counsel devoted nearly his entire argument to circuit court's grant of summary judgment in favor of defendants on Lakeshore's breach of contract

claims. Finally, during oral argument, Lakeshore's counsel stated, "In the briefing on the third amended complaint, both parties agreed that the judge's determination, including the addressing exhibit B, applied to the breach of contract counts. And that's why there's not a renewal of the summary judgment motion because we're [unintelligible] the court's decisions *** related to Exhibit B." Lakeshore's counsel further stated the "[the circuit court] agreed that because [defendants] had already addressed the Exhibit B arguments in our summary judgment motion—everybody agreed that we're not gonna recreate the wheel on that because its already addressed in the court's—and those changes to the complaint aren't gonna change the judge's ruling."

¶ 67 Based on the foregoing, it is clear that that the parties and the circuit court were all fully apprised and in agreement at the November 30, 2016, hearing that no further proceedings were necessary on the breach of contract and tortious interference with contract claims in the second amended complaint, which were preserved for appeal in the third amended complaint. When the circuit court dismissed the amended fraud claims in the third amended complaint, the circuit court found that there was no just cause to delay enforcement or appeal of any of Lakeshore's claims in the third amended complaint, including those claims that were resolved by the July 12, 2016, order. This court therefore has jurisdiction over the circuit court's rulings in the July 12, 2016, order, and therefore Lakeshore's contention in its petition for rehearing—that Loan's unadjudicated counterclaim affects this court's jurisdiction—is meritless.

¶ 68 We further note that Lakeshore admitted in its reply in support of its petition for rehearing that it was aware of the unadjudicated counterclaim prior to filing its opening brief in this court. We also note, as we did in our original order, that Lakeshore's statement of facts failed to provide us with all of the facts necessary to understand the case. *Supra* ¶ 4. Lakeshore failed to inform us at any time prior to its petition for rehearing that Loan's counterclaim even

existed. For Lakeshore to now assert a fact of which it was aware that might affect this court's jurisdiction—and that it did not disclose to this court—after having lost its appeal on the merits smacks of an attempt by Lakeshore to gainsay its own lack of candor in order to obtain a second bite at the appellate apple. The briefing on Lakeshore's petition for rehearing makes it plain that Lakeshore was aware of the counterclaim at the time it filed its initial brief in this court. And yet at no point during either the briefing of its appeal or at oral argument did Lakeshore bother to inform this court of the known potential defect. To now claim that it "forgot" about the pending counterclaim and to attempt to snatch victory from the defeat it sustained in this appeal by claiming that this court lacked jurisdiction is nothing more than "sandbagging" (see *Puckett v. United States*, 556 U.S. 129, 134 (2009)), which is unprofessional, disrespectful, and cannot be tolerated. Plaintiff's counsel are duly admonished and advised that any future similar conduct will be dealt with through appropriate sanctions.