

No. 1-17-1318

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

SOHAIL SHAKIR and RUBINA SHAKIR,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Cook County
)	
v.)	No. 16 CH 10196
)	
ANVI, LLC; SATISH GABHAWALA; and)	
SUBHASHINI GABHAWALA,)	The Honorable
)	Neil H. Cohen
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiffs failed to allege sufficient facts to support their fraud claims against the individual defendants and those claims were properly dismissed, but that dismissal should have been without prejudice. The circuit court erred by finding that plaintiffs were not intended third party beneficiaries of the deed-in-lieu agreement who lacked standing to pursue breach of contract and specific performance claims under the agreement. Although plaintiffs’ complaint failed to properly state a breach of contract claim and specific performance claim based on Anvi’s alleged failure to provide plaintiffs with indemnification, the circuit court should have dismissed those claims without prejudice. Plaintiffs cannot pursue a breach of contract or specific performance claim individually based on Anvi’s failure to sell the vacant parcels, but should be allowed the opportunity to replead.

¶ 2 Plaintiffs Sohail Shakir and Rubina Shakir sued Satish Gabhawala and Subhashini Gabhawala (collectively, the Gabhawalas) and Anvi, LLC (collectively, defendants) for breach of contract, specific performance, and common law fraud. The circuit court found the plaintiffs lacked standing to pursue breach of contract claims and specific performance claims because they were not parties to the subject contract, and further found that plaintiffs failed to allege sufficient facts to support their fraud claim. The circuit court therefore granted defendants' motions to dismiss plaintiffs' complaint with prejudice pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)). For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

¶ 3 **BACKGROUND**

¶ 4 For the purposes of this appeal, we accept as true all the well-pleaded facts in the plaintiffs' complaint and draw all reasonable inference in their favor. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003).

¶ 5 Prior to July 25, 2015, plaintiffs were the sole members of SRS, LLC. SRS owned and operated a hotel in Crawfordsville, Indiana, consisting of three parcels of real property, one of which contained the hotel's facilities. The other two parcels were vacant. Huntington National Bank held a mortgage on all three parcels that secured a promissory note executed by SRS (the Huntington loan). Plaintiffs personally guaranteed the Huntington loan. After the hotel suffered casualty losses due to a fire and then a flood, SRS defaulted on its mortgage. Huntington filed an action in Indiana state court to foreclose on the mortgage and to enforce plaintiffs' guarantees. The Indiana state court entered a judgment in favor of Huntington for over \$2.7 million on its guarantee claims against plaintiffs. On September 29, 2015, Anvi purchased an assignment of the note and mortgage from Huntington and became the owner of the judgment against plaintiffs.

¶ 6 On July 25, 2015, SRS filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois. During the course of the SRS bankruptcy action, Satish Gabhawala, on behalf of Anvi, negotiated a deed-in-lieu of foreclosure agreement (the agreement) with SRS and plaintiffs “to avoid the delays associated with” the foreclosure process and “in lieu of *** proceeding to foreclose the mortgage and pursue the judgment against the guarantors or otherwise on the note” and to “obtain a voluntary dismissal of the SRS bankruptcy case and the foreclosure case.” Under the agreement, SRS agreed to assign deeds for the three parcels to Anvi along with an insurance check and SRS’s interest in the balance of insurance claim proceeds of approximately \$1 million. In exchange, Anvi agreed to vacate or satisfy “the judgment against the Shakir guarantors” entered in Huntington’s foreclosure, and to issue “the full and irrevocable general release by [Anvi as successor to Huntington] of SRS and the Guarantors and all other members, managers and agents of SRS.” Plaintiffs assert that under the agreement, SRS and plaintiffs were to receive releases from Anvi and indemnification from all debt related to the Huntington loan as well as the proceeds from the sale of the vacant parcels in excess of \$473,264.

¶ 7 Shortly before the parties executed the agreement, Satish informed plaintiffs that Anvi would not proceed with the deal unless Satish and Subhashini were made majority and managing members of SRS. Plaintiffs executed documentation to make the Gabhawalas the majority and managing members of SRS. Plaintiffs allege that the Gabhawalas have transferred the parcels of land to Anvi, have initiated litigation in SRS’s name related to outstanding insurance claims, and have taken over control of the hotel. Plaintiffs further allege that they have not received the releases, indemnification, or the proceeds from the sale of the vacant parcels.

¶ 8 On August 3, 2016, plaintiffs initiated this action for specific performance, breach of contract, and fraud. In count I, plaintiffs alleged that Anvi and the Gabhawalas have not provided plaintiffs with releases or indemnification of the Huntington loan and that plaintiffs have received dunning letters from the United States Department of Agriculture (USDA) claiming that plaintiffs owe the USDA approximately \$650,000 “related to a guarantee of the Huntington debt by that agency.” Plaintiffs further alleged that they have not received any funds from the sale of the two vacant parcels because defendants have made no efforts to sell the parcels. Count I of the complaint sought specific performance under the agreement compelling Anvi and the Gabhawalas to indemnify plaintiffs and to sell the vacant parcels.

¶ 9 Count II asserted that Anvi and the Gabhawalas “have failed and refused to honor their obligations to [p]laintiffs” under the agreement, resulting in damages of approximately \$650,000 (the amount allegedly owed to the USDA), plus the lost proceeds from the sale of the vacant parcels. Count III asserted that the Gabhawalas committed fraud because plaintiffs relied to their detriment on Satish’s false representation “that the transfer of their interest in SRS was a necessary condition of Anvi” to the agreement, when the true purpose of making the Gabhawalas majority owners of SRS was “so that [the Gabhawalas] might profit thereby and usurp [plaintiffs’] rights” under the agreement.

¶ 10 On October 17, 2016, the Gabhawalas moved to dismiss all of the claims against them pursuant to section 2-615 of the Code. The motion was fully briefed and on February 22, 2017, the circuit court entered a written order granting the Gabhawalas’ motion and dismissing plaintiffs’ claims against the Gabhawalas in counts I and II with prejudice for lack of standing. The circuit court dismissed the fraud claims against the Gabhawalas in count III without

prejudice, but denied plaintiffs leave to amend “without a showing that facts exist to state a valid claim against [the Gabhawalas].”

¶ 11 Earlier, on February 6, 2017, Anvi moved to dismiss the claims against it in counts I and II of plaintiffs’ complaint pursuant to section 2-615 of the Code. The motion was fully briefed and on April 26, 2017, the circuit court entered a written order granting Anvi’s motion and dismissing counts I and II with prejudice finding that plaintiffs lacked standing under the agreement. The circuit court found that plaintiffs’ complaint “is now dismissed in its entirety.”

¶ 12 Plaintiffs filed a notice of appeal on May 23, 2017, identifying the circuit court’s February 22, 2017, and April 26, 2017, dismissal orders.

¶ 13 ANALYSIS

¶ 14 On appeal, plaintiffs argue that the circuit court erred by (1) dismissing their fraud claim against the Gabhawalas (count III), (2) dismissing their specific performance and breach of contract claims against Anvi (counts I and II, respectively),¹ and (3) dismissing all of their claims without leave to replead.

¶ 15 We review a circuit court’s ruling on a motion to dismiss brought pursuant to 2-615 of the Code *de novo*. *Edelman*, 338 Ill. App. 3d at 164. A motion to dismiss under section 2-615 attacks only the legal sufficiency of a complaint and does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). When ruling on a motion to dismiss, we accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Edelman*, 338 Ill. App. 3d at 164 (citing *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1998)).

¹On appeal, plaintiffs acknowledge that the circuit court’s dismissal of their specific performance and breach of contract claims against the Gabhawalas was correct, as the Gabhawalas were not parties to the agreement.

¶ 16 First, plaintiffs argue that they stated a claim for fraud against the Gabhawalas. 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. A plaintiff must plead with sufficient particularity facts that establish the elements of fraud, including “what misrepresentations were made, when they were made, who made the misrepresentations, and to whom they were made.” *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15.

¶ 17 Here, plaintiffs alleged that (1) Satish told plaintiffs that they needed to transfer control over SRS to the Gabhawalas before Anvi would complete the deed-in-lieu agreement, (2) Satish knew his statements were false, (3) he intended for plaintiffs to rely on his statements in order to obtain a majority ownership of SRS for him and his wife, (4) plaintiffs relied on Satish’s representation when they transferred control of SRS to the Gabhawalas, and (5) as a result of relying on Satish’s representations and transferring control of SRS, plaintiffs suffered damages of at least \$650,000 in the form of the amount allegedly owed to the USDA and for the lost proceeds of the sale of the vacant parcels.

¶ 18 We agree with the circuit court that the plaintiffs’ complaint did not state a claim for fraud against the Gabhawalas. Plaintiffs did not allege any facts tending to show the falsity of Satish’s statement that Anvi would only proceed with the agreement if plaintiffs transferred control of SRS to the Gabhawalas. Plaintiffs alleged no particular facts tending to show either that Anvi in fact did not condition its completion of the agreement on the transfer of SRS to the Gabhawalas, or that Satish misrepresented Anvi’s conditions for completing the deed-in-lieu

agreement. Furthermore, as the circuit court observed, plaintiffs failed to allege any facts showing that Anvi would have executed the agreement if plaintiffs refused to transfer control of SRS to the Gabhawalas. Plaintiffs' failure to allege any facts tending to show that Satish's representation was false is fatal to their fraud claim. The circuit court therefore properly dismissed plaintiffs' claims in count III against Satish.

¶ 19 Additionally, plaintiffs' complaint alleges no facts that Subhashini was involved in perpetrating any alleged fraud. On appeal, plaintiffs simply assert that Subhashini "is a direct beneficiary of the fraud perpetrated by her husband." The absence of any alleged facts showing that Subhashini made any false statement or participated in making a false statement dooms plaintiffs' fraud claim against Subhashini. The circuit court therefore properly dismissed plaintiffs' claims in count III against Subhashini.

¶ 20 Next, plaintiffs argue that their complaint sufficiently alleged claims for specific performance and breach of contract against Anvi. Plaintiffs correctly acknowledge that they were not parties to the agreement between Anvi and SRS. Instead, they contend that they are intended third party beneficiaries and thus have the right to seek specific performance of the agreement and the right to pursue a breach of contract claim. Specifically, plaintiffs assert that they can pursue a breach of contract claim or, in the alternative, a claim for specific performance of Anvi's promise to provide releases and indemnification from all debts related to the Huntington loan and to sell the vacant parcels. We agree that plaintiffs are third party beneficiaries of the agreement. We disagree that plaintiffs' complaint stated claims against Anvi for breach of contract and specific performance with respect to the guarantees, but find that plaintiffs should be allowed to replead. We also disagree that plaintiffs individually can state claims for breach of

contract and specific performance related to the sale of the vacant parcels, but find that they should be permitted to pursue derivative claims, if possible.

¶ 21 In order to state a claim for breach of contract, plaintiffs must allege (1) the existence of a valid and enforceable contract, (2) that plaintiffs performed all of its obligations under the contract, (3) that defendants breached the contract, and (4) that plaintiff suffered damages or an injury resulting from the breach. *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 13. In a third party beneficiary contract, the promisor promises to render performance not to the promisee but instead to a third-party beneficiary. *Id.*

¶ 22 “An intended beneficiary is intended by the parties to the contract to directly benefit [from] the performance of the agreement; under the contract an intended beneficiary has rights and may sue.” *Id.* ¶ 14 (citing *Hacker v. Shelter Insurance Co.*, 388 Ill. App. 3d 386, 394 (2009)). An incidental beneficiary has no rights under a contract and cannot sue to enforce the contract’s terms. *Id.* “Liability to a third-party must affirmatively appear from the contract’s language and from the circumstances surrounding the parties at the time of its execution, and cannot be expanded or enlarged simply because the situation and circumstances justify or demand further or other liability.” *Ball Corp. v. Bohlin Building Corp.*, 187 Ill. App. 3d 175, 177 (1989). An intended beneficiary must be expressly named in the contract and it must be clear that the parties to the contract intended to confer a direct benefit on the purported beneficiary. *Carlson*, 2016 IL App (1st) 143853, ¶ 14.

¶ 23 Additionally, specific performance is a remedy that grants equitable relief in the form of performance of the contract where monetary damages are inadequate. *Butler v. Kent*, 275 Ill. App. 3d 217, 227 (1995). A party seeking specific performance must establish (1) the existence of a valid and enforceable contract, (2) that the plaintiffs have complied with all of the terms of

the contract or that they stand ready, willing, and able to perform, and (3) that defendants have failed or refused to perform their part of the contract. *Schilling v. Stahl*, 395 Ill. App. 3d 882, 884 (2009). Therefore, if plaintiffs are intended third party beneficiaries of the agreement then they have a right to sue for breach of contract or alternatively to seek specific performance of the agreement. *Carlson*, 2016 IL App (1st) 143853, ¶ 14.

¶ 24 We first observe that the agreement, viewed as a whole, reflects an intent by SRS and the plaintiffs as guarantors to resolve Huntington's foreclosure action with Huntington's assignee, Anvi, by dismissal of the foreclosure action against SRS and through a release of plaintiffs' guarantees, in return for the transfer of the hotel and the vacant parcels to Anvi and an assignment of certain insurance proceeds. The only parties to the agreement were SRS and Anvi. However, the agreement expressly identifies the plaintiffs as "owner/members of SRS" and guarantors of the note, their guarantees of the Huntington loan, and the Indiana state court judgment against plaintiffs on the guarantees. The agreement clearly provides that Anvi would vacate or satisfy those judgments and provide plaintiffs with releases from or satisfaction of the guarantees. Vacating the judgments against plaintiffs and releasing them from the guarantees directly confers a benefit on plaintiffs. Furthermore, the agreement states:

"Third Party Beneficiary Provision. This Agreement is made solely and specifically among and for the benefit of the parties hereof and their respective heirs, personal representatives, successors and permitted assigns, *including the present and prior members, managers, agents, attorneys and equitable owners of SRS*. No other person or entity whatsoever shall have any rights, interest, or claims hereunder or be entitled to any benefits under or on account of this Agreement as a third party beneficiary or otherwise." (Emphasis added.)

Plaintiffs were expressly identified as third party beneficiaries of the agreement because they were specifically named in the agreement, promises were made expressly for their benefit, and they fall within the class of intended beneficiaries by virtue of being present members of SRS. The circuit court, therefore, was incorrect when it concluded that plaintiffs were not intended third party beneficiaries under the agreement and lacked standing to sue to enforce the agreement. We find that dismissal under section 2-615 for lack of standing was in error.

¶ 25 Plaintiffs' complaint alleged that Anvi failed to provide plaintiffs with releases and indemnification from the Huntington loan. As intended third party beneficiaries of the agreement, plaintiffs have a right to pursue either a claim for damages based on a breach of contract or specific performance of Anvi's promise to provide a release from the guarantee. Admittedly, the complaint is not artfully drawn and generates questions as to the nature and extent of the alleged breach by Anvi. For example, the complaint alleges that plaintiffs "were to receive releases and indemnification from all debt related to the Huntington loans," and that they "have received personal dunning letters and related correspondence from the [USDA] related to a guarantee of the Huntington loan by that agency." The complaint, however, fails to identify any provision in the agreement in which Anvi agreed to indemnify plaintiffs for the USDA guarantee, and is devoid of any details as to the nature of the USDA guarantee, the terms of that guarantee, or its actual connection to the Anvi and the Huntington loan. Furthermore, in their prayer for relief, plaintiffs do not request that Anvi provide them with the agreed-upon releases but instead request indemnification from Anvi "from the Huntington indebtedness," without having alleged sufficient facts to establish a connection between the USDA guarantee and the Huntington loan. Therefore, we find that the plaintiffs have failed to allege sufficient facts that might demonstrate any right to relief under a specific performance or breach of contract theory

as it relates to the USDA guarantee. But, at this stage of the proceedings, this is a pleading defect that may potentially be cured by amending the complaint to allege additional facts. As stated above, plaintiffs have standing to bring their breach of contract claim and claim for specific performance against Anvi for failure to provide releases, and this claim is sufficiently pled. On remand, after an answer is filed, discovery should proceed and, if warranted, plaintiffs should be given leave to file an amended complaint setting forth any claim they can properly plead related to indemnification or any claim made by the USDA that may have been within the scope of the deed-in-lieu agreement.

¶ 26 We do agree with the circuit court, however, that plaintiffs cannot individually pursue claims for breach of contract or specific performance based on Anvi's promise to sell the vacant parcels. The agreement provides that Anvi "intends to sell the [vacant parcels] in arms-length market-priced transactions within two years of this [a]greement or as soon as market conditions permit." Anvi was to receive the first \$473,264, and "all further and additional proceeds shall be distributed and paid to SRS." The agreement does not expressly identify plaintiffs in connection with the sale of the vacant parcels and does not demonstrate that Anvi and SRS intended to confer any benefit on plaintiffs individually in connection with the future sales. It is clear from the agreement that SRS—not plaintiffs—is entitled to the proceeds of the sale of the vacant parcels. Any right that plaintiffs have to any proceeds from the sales (by way of a distribution from SRS) is derivative of SRS's right to receive the excess sale proceeds. Plaintiffs therefore have not established that they have a right to sue individually to enforce provisions of the agreement with respect to the sale of the vacant parcels and cannot sue to recover breach of contract damages or for specific performance with respect to this aspect of the agreement. Plaintiffs contend, however, that "it is quite possible that [they] should be allowed, as minority

members of SRS, to proceed directly on SRS's claims in a derivative capacity." Because we are remanding for additional proceedings and the dispute is in its early stage, plaintiffs should have the opportunity to either replead a properly-pleaded derivative claim or be allowed to take discovery to determine whether any other viable cause of action exists. We believe that plaintiffs should have the opportunity to pursue such a claim.

¶ 27 Finally, although we have found that plaintiffs failed to allege sufficient facts to support their claims of fraud against the individual defendants, if, during the course of discovery plaintiffs develop adequate facts to support a fraud claim against the individual defendants, plaintiffs should be granted leave to replead their fraud claims. We note that the foregoing findings are for the purpose of allowing plaintiffs the opportunity to pursue claims that may exist under the agreement and we express no opinion on whether plaintiffs can ultimately recover on such claims.

¶ 28 **CONCLUSION**

¶ 29 The circuit court properly dismissed plaintiffs' fraud claims where plaintiffs failed to allege sufficient facts against the individual defendants. The circuit court erred in dismissing plaintiffs' claims for breach of contract and specific performance for lack of standing. A claim for breach of the agreement for failure to provide a release has been sufficiently pleaded and an answer is required. Finally, in the event that plaintiffs, after discovery has been completed, develop sufficient facts to state a claim for fraud against the individual defendants, they should have the opportunity to file an amended complaint. The circuit court's judgment is therefore affirmed in part and reversed in part, and we remand for further proceedings consistent with this order.

¶ 30 Affirmed in part; reversed in part; remanded.