

2019 IL App (2d) 180757-U
No. 2-18-0757
Order filed July 2, 2019
Modified upon denial of rehearing August 2, 2019

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

WILLIAM F. MURPHY, Executor of the)	Appeal from the Circuit Court
Estate of WILLIAM C. MURPHY, Deceased,)	of Kane County.
)	
Plaintiff-Appellant,)	
v.)	Nos. 18-L-143
)	17-MR-1142
KINNALLY FLAHERTY KRENTZ LORAN)	
HODGE and MASUR, P.C., f/k/a Kinnally)	
Krentz Loran Hodge and Herman,)	
P.C.; PATRICK M. KINNALLY, Individ.;)	
MARK MASUR, Individ.; PATRICK M.)	
FLAHERTY, Individ.; PAUL G. KRENTZ,)	
Indiv.; JOSEPH C. LORAN, Individ.; and)	
GERALD K. HODGE, Individ.,)	Honorable
)	David R. Akemann,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Birkett and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in entering judgment on the pleadings in favor of the defendant law firm. The trial court did not err in granting the individual defendants' motion to dismiss.

¶ 2 This appeal involves an agreement entered into by the decedent, William C. Murphy, and the defendant law firm (firm), Kinnally Flaherty Krentz Loran Hodge & Masur, P.C.. The plaintiff, William F. Murphy, as executor of the decedent's estate, filed a claim for breach of

contract against the firm and the individual members of the firm, alleging that the defendants breached the agreement by failing to pay certain fees that were due to the estate under the agreement. The trial court entered judgment on the pleadings in favor of the firm and granted the individual defendants' motion to dismiss. The plaintiff appeals from those orders. We affirm in part and reverse in part.

¶ 3

BACKGROUND

¶ 4 On January 4, 2004, the decedent entered into an "Of Counsel Agreement" (the Agreement) with the firm. Paragraph 4 related to compensation and stated as follows:

"4. *Compensation.*

- A. WCM [the decedent] shall receive Thirty-Three and one-third (33-1/3%) Percent of the net fee to KKLHH [the defendant law firm] when actually collected for all probated estates or trusts which he generates, regardless of whether the estate work was performed by KKLH [*sic*] or WCM.
- B. For all contingent fee personal injury cases and for worker's compensation cases, will contests, condemnation, or commercial contingent fee cases brought to KKLHH by WCM, the latter shall received the following compensation when the fee is collected by KKLHH:
 - (1) One-third (1/3rd) of any contingent fee case resulting in a net fee to KKLHH unless a referral fee to another attorney or professional corporation is owed;
 - (2) If a referral fee is owed to another attorney or professional corporation, then WCM shall received one-fourth (1/4th) of the net contingent fee.

Net contingent fee means the fee to KKLHH before the payment of any referral fees or a portion of the fees to WCM.

- C. To the extent that WCM bills work for his own time, he shall receive Thirty-three and one-third (33-1/3%) Percent of his personal time billed when it is collected.
- D. WCM and KKLHH agree that any matter not covered by this agreement which results in income from the practice of law shall be referred to KKLHH exclusively unless the latter shall consent to a referral to another attorney/law firm.
- E. In the event this agreement is terminated for any reason, KKLHH's payment obligations are limited to paying WCM any amounts collected for which it owes WCM fees for a period of two months following the month in which the termination becomes effective.”

Paragraph 5 stated that all the obligations of the firm were the sole responsibility of the firm and that “[n]o individual employee of [the firm] shall have any personal liability in connection” with the Agreement. Paragraph 6, entitled “Termination,” provided in subparagraph 6(C) that the Agreement terminated upon the decedent’s death. Paragraph 7 indicated that the Agreement contained the “entire agreement between [the parties].”

¶ 5 In 2012, the decedent referred Terry and Amy Seyller to the firm. In October 2012, the firm filed a personal injury lawsuit on behalf of the Seyllers (the Seyller case) in the circuit court of Cook County. The decedent died on November 25, 2016, while the Seyller case was still pending. In July 2017, the firm settled the Seyller case for a significant confidential amount.

¶ 6 The record indicates that, on February 29, 2016, the decedent wrote a letter to his son, the plaintiff, that stated in relevant part as follows:

“[I]n the event of my death, however, there are two cases in which I have an interest:

1. *Seyller v. BNSF et al.*: This is the case which Marie Ann Snider got for me and which I referred to [the firm]. They have proceeded with it in the Circuit Court of Cook County *** and it is set for trial in March 2017. No settlement offers have been made. In the event of a recovery, *I am entitled to 1/3 of the total fee as a forwarder.*”
(Emphasis in original).

Attached to the letter was a copy of the Agreement.

¶ 7 On June 30, 2017, one of the individual defendants, Mark Masur, wrote a letter to the plaintiff, informing him that the Seyller case had tentatively settled. Masur also wrote that:

“Upon final resolution and funding, we will distribute \$150,000.00 for your Dad’s interest in this case. We did not have a written agreement with [the decedent] related to compensation. *** In the absence of a written agreement, your father’s estate is entitled to *quantum meruit* as the means of calculating any compensation.”

Masur also wrote that, while *quantum meruit* would warrant a fee of less than \$20,000 because the decedent did very little work on the case, the firm was paying a fee of \$150,000 to the decedent out of respect and admiration.

¶ 8 In August 2017, the plaintiff moved to intervene in the Seyller case in Cook County to recover the forwarding fee. On September 11, 2017, the circuit court of Cook County denied the plaintiff’s motion to intervene, finding that an equitable lien did not exist and that the plaintiff could pursue a separate cause of action for breach of the Agreement.

¶ 9 On September 13, 2017, the firm filed a declaratory judgment action in the circuit court of Kane County. The firm asked the trial court to declare that the Agreement terminated upon the decedent’s death and that the firm had no obligation to pay any amounts collected in the

Seyller case to the decedent's estate. The firm attached a copy of the Agreement to its complaint.

¶ 10 On March 13, 2018, the plaintiff filed a complaint for breach of the Agreement against the firm and against the partners of the firm individually. The plaintiff argued that, under the Agreement, the estate was entitled to a one-third referral fee for the Seyller case. By agreed order, the case for declaratory judgment (No. 17-MR-1142) was consolidated with the case for breach of the Agreement (No. 18-L-143).

¶ 11 On April 4, 2018, the plaintiff attempted to electronically file a motion to voluntarily dismiss the individual defendants from the case pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2016)). The plaintiff emailed a copy of the motion to opposing counsel. On April 11, 2018, the Kane County clerk's office notified the plaintiff's counsel via email that the April 4, 2018, filing was not accepted because it was filed with case No. 18-L-143 and not with the lead case, No. 17-MR-1142.

¶ 12 On April 16, 2018, the individual defendants filed a section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2016)) the complaint. The individual defendants argued that the Agreement was between the decedent and the firm, and there was nothing in the document that indicated the firm's partners were individually liable. Accordingly, the individual defendants argued that they were improperly joined and that the complaint failed to state a cause of action against them. At an April 24, 2018, hearing on the plaintiff's motion to voluntarily dismiss and the individual defendants' motion to dismiss, the plaintiff was ordered to file a memorandum in support of its motion for voluntary dismissal.

¶ 13 Also on April 16, 2018, the firm filed a motion for judgment on the pleadings, pursuant to section 2-615(e) of the Code (735 ILCS 5/2-615(e) (West 2016)), arguing that the Agreement precluded the estate from recovering fees from the Seyller case. The firm argued that the

Agreement was unambiguous, that it terminated upon the decedent's death, and that it was only required to pay fees on amounts collected for a period of two months after the decedent's death. It noted that the fees in the Seyller case were not collected until well after the two-month time period.

¶ 14 On April 17, 2018, the plaintiff re-filed his motion to voluntarily dismiss the individual defendants, this time with the proper case number.

¶ 15 On June 7, 2018, the plaintiff filed a memorandum in support of his motion to voluntarily dismiss the individual defendants. The plaintiff argued that his right to voluntarily dismiss was absolute and that the trial court did not have the discretion to deny the motion. The plaintiff stated that he had substantially and in good faith complied with all the requirements for a voluntary dismissal under section 2-1009(a) of the Code. The plaintiff noted that he filed his motion to voluntarily dismiss on April 4th, 12 days before the individual defendants filed their motion to dismiss and prior to any hearing or trial. The plaintiff also stated that he sent notice of the attempted filing to the individual defendants and he offered to tender costs in open court on April 24, 2018.

¶ 16 The plaintiff acknowledged that, under section 2-1009(b) of the Code, a trial court has discretion to rule on a motion that is filed prior to a motion to voluntarily dismiss. He also acknowledged that his filing of the motion to voluntarily dismiss was not officially accepted by the clerk's office until April 17, 2018, which was after the individual defendants filed their motion to dismiss. The plaintiff noted that the purpose of section 2-1009(b) was to prevent plaintiffs from filing motions to voluntarily dismiss in order to avoid a potential decision on the merits. The plaintiff argued he was not using section 2-1009 to avoid a potential decision on the merits, as he had attempted to file his motion to voluntarily dismiss 12 days before the individual

defendants filed their motion. The plaintiff thus argued that the trial court should not use the discretion granted by section 2-1009(b) to avoid an abuse that had not occurred.

¶ 17 On July 17, 2018, following a hearing, the trial court entered a written order finding that the Agreement was not ambiguous. The trial court found that the Agreement terminated upon the decedent's death and that the firm had no obligation to pay the decedent's estate any amounts collected from the Seyller case or any other matter, in which fees were collected after two months following the decedent's death. The trial court thus granted the firm's motion for judgment on the pleadings. The trial court deferred ruling on the plaintiff's motion to voluntarily dismiss until after the disposition of the pending potentially dispositive motion to dismiss filed by the individual defendants. The trial court found that there was no just cause for delaying either enforcement or appeal of its order.

¶ 18 The trial court also entered judgment in favor of the firm and against the plaintiff "on the Plaintiff's sole Count in his Complaint for Declaratory Judgment." However, on July 26, 2018, the trial court entered another order, correcting the foregoing quote to state that it was entering judgment in favor of the firm and against the plaintiff "on the Plaintiff's sole Count in his Complaint for Breach of Contract."

¶ 19 On August 16, 2018, the plaintiff filed a motion to reconsider the July 17, 2018, order. The plaintiff argued that the trial court erred in interpreting the Agreement. The plaintiff argued that the decedent's February 2016 letter to the plaintiff and the firm's June 2017 letter to the plaintiff demonstrated both parties' intent that the decedent was to receive the fees at issue. Additionally, the plaintiff argued that the trial court erred in not allowing him to conduct discovery to ascertain whether the Agreement was the last and final agreement between the parties and to depose individuals with knowledge of the drafting of the Agreement.

¶ 20 On August 23, 2018, following a hearing, the trial court entered a written order granting the individual defendants' motion to dismiss. The trial court found that paragraph 5 of the Agreement was unambiguous and provided that the individual defendants had no liability related to the Agreement. The trial court also found that there was no just reason to delay enforcement or appeal of its order.

¶ 21 On August 29, 2018, following a hearing, the trial court denied the plaintiff's motion to reconsider the July 17 order. The trial court reiterated that it found the Agreement unambiguous and that it could not turn to extrinsic evidence to interpret the Agreement. The plaintiff filed a timely notice of appeal.

¶ 22 ANALYSIS

¶ 23 The plaintiff raises three contentions on appeal. First, the plaintiff argues that the trial court erred in granting the firm's motion for judgment on the pleadings. Second, the plaintiff argues that the trial court erred in not allowing him to conduct limited discovery before entering judgment on the pleadings. Third, the plaintiff claims that the trial court erred in granting the individual defendants' motion to dismiss before hearing the plaintiff's motion to voluntarily dismiss.

¶ 24 We first address whether the trial court properly granted judgment on the pleadings. Section 2-615(e) of the Code provides that "[a]ny party may seasonably move for judgment on the pleadings." 735 ILCS 5/2-615(e) (West 2016). In general, a pleading motion claims that, even if all of the facts alleged by the opponent were true, movant is entitled to judgment. *Christensen v. Wick Building Systems, Inc.*, 64 Ill. App. 3d 908, 912 (1978). A motion for judgment on the pleadings requires the trial court to examine the pleadings to determine whether an issue of fact exists, or conversely, whether the controversy can be resolved as a matter of law. *Crestview Builders, Inc. v. Noggle Family Limited Partnership*, 352 Ill. App. 3d 1182, 1184-85

(2004). Whether the language of a contract is ambiguous is a question of law, and thus a proper issue for judgment on the pleadings. *1000 Condominium Association v. Carrier Corp.*, 180 Ill. App. 3d 467, 469 (1989). We review *de novo* a decision to grant a motion on the pleadings. *Egan v. Steel*, 137 Ill. App. 3d 539, 543 (1985).

¶ 25 A contract is ambiguous where there is doubt as to the true sense or meaning of the words themselves or an indefiniteness in the words' expression, resulting in a difficulty in the application of the words under the circumstances of the dispute that the contract is supposed to govern. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). An ambiguity is not created merely because the parties disagree. *Thompson v. Gordon*, 241 Ill. 2d 428, 443 (2011). If no ambiguity exists in the language of the contract, the parties' intent must be derived from the writing itself as a matter of law. *Farm Credit Bank v. Whitlock*, 144 Ill. 2d 440, 447 (1991). If the terms of a contract are ambiguous, or capable of more than one interpretation, its construction is a question of fact and parol evidence is admissible to ascertain the parties' intent. *Id.* A contract should be examined as a whole and each provision should be given meaning and effect. *Thompson*, 241 Ill. 2d at 441.

¶ 26 The plaintiff argues that the trial court erred in granting the firm's motion for judgment on the pleadings because the plain language of paragraph 4E of the Agreement applied only to retrospective fees that were already owed to the decedent but did not apply to prospective fees that the decedent earned but were not yet owed to him within the two months after his death. In other words, the plaintiff is arguing that the decedent was not yet owed any fees from the Seyller case at the time the Agreement terminated and that the Agreement did not limit payment for amounts that would be owed in the future. The plaintiff further argues that the purpose of paragraph 4E was to limit the efforts of the firm in tracking down fees that were owed to the decedent and that it would defy logic to presume that the decedent's intent was to forgo a

forwarding fee that he earned simply because the case did not lead to a recovery within two months of his death. The plaintiff thus contends that the trial court's interpretation of the Agreement leads to an absurd result.

¶ 27 The firm argues that paragraph 4E of the Agreement is positioned at the end of the compensation section, after delineation of specific payment obligations set forth in sections 4A (probated estates or trusts), 4B (contingent fee cases), and 4C (billable hours). The firm contends that 4E applies to the payment obligations in all three of those subsections. Specifically, 4E limits payment obligations in the event of contract termination to any amounts that are collected within the two months following termination. The firm asserts that "finality" clauses such as 4E are commonly used in professional compensation agreements to avoid long term entanglements between parties once the business relationship has ended. The firm thus argues that the Agreement is only susceptible to one reasonable interpretation and that it is unambiguous as a matter of law.

¶ 28 While both parties contend that the Agreement is unambiguous and should be construed in their favor, that is not binding on us. *Pietrzak v. Rush-Presbyterian-St. Luke's Medical Center*, 284 Ill. App. 3d 244, 252 (1996) (contract interpretation is a question of law for the court). We find that the Agreement is ambiguous. The language of paragraph 4E could be interpreted to require only the payment of fees to the decedent for amounts that were subject to collection within the two months following his death, serving the purpose of requiring prompt payment of outstanding fees. Alternatively, paragraph 4E could be interpreted to mean that the decedent would forfeit the payment of any and all fees after two months, whether they were subject to collection or not. Under the former interpretation, the decedent would still be entitled to compensation from the contingent fees for the Seyller case because those fees were unable to be collected within two months of the decedent's death since the case did not settle until about

seven months later. Under the latter interpretation, the decedent would not be entitled to any compensation from the Seyller matter.

¶ 29 Our determination that the Agreement is ambiguous is supported by looking at other provisions of the Agreement. See *Thompson*, 241 Ill. 2d at 441 (a contract should be examined as a whole). Under section 6C, the Agreement would have terminated if one of the principals of the firm died. In the firm's interpretation of the Agreement, Attorney Murphy would not have been entitled to compensation from the Seyller case if the case did not settle and the contingency fee was not collected within two months of the principal's death. Under the plaintiff's reading of the Agreement, Attorney Murphy would still be entitled to the compensation from the Seyller matter provided under the Agreement. Both interpretations of the Agreement are reasonable. Likewise, under section 6B, the Agreement would have terminated if the firm "ceased to exist" as a corporation or law partnership. By this provision would Attorney Murphy forfeit fees that could not be collected within two months? Or would the former firm accept such payments at a later time and disburse the appropriate compensation? For these reasons, the intended effect of paragraph 4E at the time the parties entered the Agreement is unclear.

¶ 30 Since paragraph 4E is susceptible to more than one reasonable interpretation, it is ambiguous and the determination of its meaning is a question of fact. As such, the trial court erred in granting judgment on the pleadings. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010) (judgments on the pleadings are appropriate only if the pleadings do not raise genuine issues of material fact). Because we are reversing the grant of judgment on the pleadings, we need not address the plaintiff's argument on discovery as the plaintiff will have the opportunity to pursue discovery on remand.

¶ 31 The plaintiff's final contention is that the trial court erred in granting the individual defendants' section 2-615 motion to dismiss rather than granting his motion to voluntarily

dismiss. The plaintiff continues to argue, as he did below, that the trial court should not have exercised its discretion to rule on the individual defendants' motion to dismiss because the plaintiff had attempted to file its motion to voluntarily dismiss prior to the filing of the individual defendants' motion. The plaintiff contends that this demonstrates that he was not attempting to evade an adverse ruling.

¶ 32 The plaintiff also argues, for the first time on appeal, that his motion to voluntarily dismiss should have been considered filed as of April 4, 2018, the first day he attempted to file the motion. In support, the plaintiff cites to federal law, where an electronic filing is still considered filed even if the filing was rejected based on a technical error. See *Farley v. Koepp*, 788 F. 3d 681, 686 (7th Cir. 2015). The plaintiff also notes that Illinois Supreme Court Rule 9(d)(2) (eff. Dec. 12, 2018), allows a trial court to grant effective relief when an electronically filed document is rejected by a clerk and is thus rendered untimely. Further, the plaintiff cites to Kane County local Rule 2A.13 (16th Judicial Cir. Ct. R. 2A.13), which allows a trial court to enter an order permitting a subsequently filed document to be filed effective as of the date the filing was first attempted if there was an error in the transmission of the document, a failure to process the electronic filing, or rejection by the clerk.

¶ 33 A section 2-615 motion to dismiss attacks the sufficiency of the plaintiff's complaint; the defendant assumes that the plaintiff's allegations are true, but argues that they do not state a cause of action that would entitle the plaintiff to relief. 735 ILCS 5/2-615 (West 2016); *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 23. We review dismissals under section 2-615 *de novo*. *Glasgow v. Associated Banc-Corp*, 2012 IL App (2d) 111303, ¶ 11.

¶ 34 Section 2-1009(a) of the Code, by its terms, confers on plaintiffs an unfettered right to voluntarily dismiss their claims without prejudice, upon proper notice and payment of costs, "at any time before trial or hearing begins." 735 ILCS 5/2-1009(a) (West 2018). This provision is

subject to two qualifications. First, where a previously filed defense motion could result in a final disposition of the cause of action if ruled upon favorably by the court, the court has the discretion to hear and decide that motion before ruling on the plaintiff's motion for voluntary dismissal. See 735 ILCS 5/2-1009(b) (West 2018). Second, where the circumstances of the case are such that dismissal under section 2-1009 would directly conflict with a specific rule of our supreme court, the terms of the rule take precedence. *Catlett v. Novak*, 116 Ill. 2d 63, 69 (1987).

¶ 35 In the present case, the plaintiff has forfeited his argument that the motion to voluntarily dismiss should be considered filed as of April 4, 2018. The plaintiff did not make this argument before the trial court and thus it is forfeited on appeal. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010). Further, the plaintiff did not cite to Rule 9(d), to Kane County local Rule 2A.13, or to any federal case law in the trial court and did not file a request seeking to have the filing date of his motion to dismiss be made effective as of April 4, 2018.

¶ 36 The plaintiff did argue below that the trial court should not exercise its discretion under section 2-1009(b) to rule on the motion to dismiss because it had attempted to file the motion to voluntarily dismiss on April 4, 2018, and was thus not attempting to evade an adverse ruling. The plaintiff concedes that section 2-1009(b) gives the trial court discretion to hear and decide a dispositive motion before deciding a voluntary dismissal motion if the dispositive motion is filed first. We cannot say that the trial court abused its discretion. Under Illinois law, officers and directors of a corporation are not liable for the obligations of the corporation unless they are expressly made liable by statute or they contract on their individual behalf. *Carollo v. Irwin*, 2011 IL App (1st) 102765, ¶ 51. Further, “a contract may be enforced only against the parties who have agreed to its terms.” *Wehde v. Regional Transportation Authority*, 237 Ill. App. 3d 664, 687 (1992). Paragraph 5 of the Agreement specifically stated that it was between the defendant law firm and the decedent, and that “[n]o individual employee of [the law firm] shall

have any personal liability in connection with this agreement.” Since the individual defendants did not have liability under the Agreement, the trial court did not abuse its discretion in ruling on the motion to dismiss and did not err in granting that motion.

¶ 37 We note that the firm filed a petition for rehearing. In that petition, the firm claims that we acted in an “injurious” manner and undermined “confidence in judicial neutrality” by *sua sponte* finding an ambiguity in the Agreement. The allegation that we *sua sponte* found an ambiguity and ascribed “a meaning to the contract neither party asserted, but which is beneficial to only one” party is specious. A court acts *sua sponte* when it initiates the action or raises the issue. See *People v. Ross*, 367 Ill. App. 3d 890, 892 (2006). The parties raised the issue of ambiguity, not us. Further, as we noted above, even if both parties contend that an agreement is unambiguous, that is not binding on this court. *Pietrzak*, 284 Ill. App. 3d at 252. We are not required to accept either party’s interpretation of the Agreement’s language. We are well aware of our obligation to refrain from searching the record “for unargued and unbriefed reasons to reverse a trial court judgment.” (Emphasis in original.) *People v. Givens*, 237 Ill. 2d 311, 323 (2010) (quoting *Saldana v. Wirtz Cartage Co.*, 74 Ill. 2d 379, 386 (1978)).

¶ 38 The petition for rehearing in this case challenges the integrity of this court and is grossly inappropriate. Moreover, it potentially violates Rule 8.2 of the Illinois Rules of Professional Conduct of 2010 (eff. Jan. 1, 2010), which prohibits attorneys from “mak[ing] a statement the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.” The firm is strongly urged to refrain from making such allegations in the future.

¶ 39

CONCLUSION

¶ 40 For the foregoing reasons, we reverse the trial court's order granting the firm's motion for judgment on the pleadings and we affirm the trial court's order granting the individual defendants' motion to dismiss.

¶ 41 Affirmed in part and reversed in part; cause remanded.