

FIRST DIVISION
March 31, 2011

No. 1-09-1055

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
FIRST JUDICIAL DISTRICT

RAYMOND J. COSTELLO,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 07 L 10694
)	
UNICOUS MARKETING, INC., ALEX SUK)	
and PHILIP KIM,)	Honorable
)	Dennis J. Burke,
Defendants-Appellees.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hall and Justice Hoffman concurred in the judgment.

ORDER

Held: The section 2-619(a)(7) dismissal of plaintiff's verified second-amended complaint was reversed and remanded where plaintiff adequately pleaded that his causes of action were based on an underlying at-will employment contract that fell outside the Frauds Act.

Plaintiff, Raymond J. Costello, filed a three-count, verified second-amended complaint against defendants, Unicus Marketing, Inc. (Unicus), Alex Suk, and Philip Kim, alleging breach of contract and violations of the Wage Payment and Collection Act (Wage Act) (820 ILCS 115/1 *et seq.* (West 2008)), and seeking specific performance for the issuance and delivery of Unicus stock. The circuit court dismissed all three counts on the basis that plaintiff's claims therein were based on

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an oral employment contract that was unenforceable under the Frauds Act (740 ILCS 80/1 (West 2008)). Plaintiff appeals, contending the Frauds Act does not apply here because the oral employment contract was "at will" and without a specific durational term. We reverse and remand.

The dismissal of plaintiff's verified second-amended complaint was predicated on a certain alleged judicial admission made in his verified first-amended complaint. Accordingly, we begin our recitation of the facts by briefly setting forth the allegations of plaintiff's verified first-amended complaint.

Plaintiff alleged in his verified first-amended complaint that he entered into an employment agreement with Unicous on December 7, 2005, and began working for Unicous on December 14, 2005. Unicous terminated his employment on June 5, 2007. Plaintiff sought damages for breach of contract and violations of the Wage Act. Plaintiff attached to his verified first-amended complaint an exhibit consisting of an unsigned document labeled: "Raymond Costello Employment Offer Summary Terms" (the summary terms document). The summary terms document set forth plaintiff's title, start date, job responsibilities, stock option, entitlement to life insurance, health insurance, and three weeks vacation. The summary terms document also stated in pertinent part:

"Compensation:	<u>Base Salary</u>	
	2005 and 2006	\$90,000"

Plaintiff alleged that the parties orally modified the summary terms document to provide a one-week delay in his start date and to provide for a bonus payment by July 1, 2006. Plaintiff alleged that subject to those two modifications, the summary terms document was "understood between [the parties] to be the terms of" the employment agreement.

The circuit court determined from the well-pleaded facts in the verified first-amended

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complaint that plaintiff's oral employment agreement could not be performed within one year of its making. The court found that, under the Frauds Act, any agreement (such as plaintiff's employment agreement) that cannot be performed within one year of its making must be in writing and signed by the party to be charged. See 740 ILCS 80/1 (West 2008). The court found plaintiff's employment agreement was unenforceable under the Frauds Act because the summary terms document memorializing the employment agreement was not signed by Unicous. The circuit court dismissed plaintiff's verified first-amended complaint without prejudice pursuant to section 2-619(a)(7) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(7) (West 2008)) and granted plaintiff leave to replead.

Plaintiff subsequently filed a verified second-amended complaint, in which he alleged that, on or about December 7, 2005, Unicous, through its chief executive officer Jay Kemper, made an oral employment offer to him. The terms of the employment agreement were as follows: plaintiff would report to work on December 14, 2005, as the director of information technology, reporting to the chief executive officer and providing management and oversight of the Unicous information technology systems, projects and developments; plaintiff's employment would be "at will" such that either party could terminate the employment relationship at any time without cause or notice; Unicous would pay plaintiff a minimum base salary of \$7,500 per month until July 1, 2006; as of July 1, 2006, plaintiff's salary would increase to \$10,125 per month; Unicous would provide plaintiff with life insurance, three weeks paid vacation, an employee health insurance plan, a 401(k) plan, and a stock option for 25,000 shares of Unicous stock.

Plaintiff did not attach the summary terms document to his verified second-amended

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complaint.

Plaintiff alleged that, on or about December 7, 2005, he accepted the offer of employment and reported to work on December 14, 2005. In May 2006, Unicous offered to modify plaintiff's job title from the director of information technology to chief technology officer, giving plaintiff additional managerial authority. In consideration for plaintiff's acceptance of the position of chief technology officer, Unicous offered to provide plaintiff with additional compensation of 69,500 shares of its common stock. In May 2006, plaintiff accepted the offer and became the chief technology officer. However, Unicous failed to deliver to plaintiff a stock certificate for the 69,500 shares of Unicous common stock.

Plaintiff alleged that, in mid-2006, the board of directors of Unicous resolved that each member of Unicous management would receive a share of Unicous common stock for each stock option held. As a result, plaintiff, who was then a member of the Unicous management and who was holding 25,000 stock options, became entitled to 25,000 shares of Unicous common stock. However, Unicous never delivered the 25,000 shares of common stock to plaintiff.

Plaintiff alleged that Unicous terminated his employment on or about June 8, 2007. Plaintiff further alleged that he had performed all conditions precedent that he was required to perform pursuant to his oral employment agreement. In count I, plaintiff alleged Unicous breached his employment agreement by: failing to pay him the agreed-upon salary of \$10,125 per month from July 1, 2006, through June 8, 2007; failing to establish a 401(k) plan; failing to provide him with any life insurance or pay him his earned and accrued vacation pay from January 1, 2006, through June 8, 2007; failing to provide him a certificate for 25,000 shares of common stock in exchange for his

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25,000 stock options; and failing to provide him with the stock certificate for 69,500 shares of common stock offered to and accepted by plaintiff when he agreed to perform the role of chief technology officer.

In count II, plaintiff alleged that Unicous and its president and chairman of the board, Alex Suk, and its chief operations officer, Philip Kim, violated the Wage Act by failing to pay him all the compensation due and owing to him.

In count III, plaintiff sought an order of specific performance requiring Unicous to issue and deliver to him the two stock certificates for 25,000 shares of common stock and 69,500 shares of common stock.

Defendants filed a combined motion pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2008)) to dismiss plaintiff's verified second-amended complaint under sections 2-619(a)(7) and 2-615 of the Code (735 ILCS 5/2-619(a)(7), 2-615 (West 2008)). Specifically, defendants contended that, pursuant to section 2-619(a)(7), the court should dismiss the count I claim for breach of contract and the count II claim for violations of the Wage Act because the oral employment agreement upon which those claims were based violated the Frauds Act. In support, defendants argued plaintiff made a judicial admission in his verified first-amended complaint that the summary terms document contained the relevant terms of the employment agreement. Defendants argued that the summary terms document indicated plaintiff would be employed for a term over one year and, as such, plaintiff's employment agreement was unenforceable under the Frauds Act because the summary terms document was not signed by Unicous. The circuit court agreed and dismissed counts I and II pursuant to section 2-619(a)(7) of the Code with prejudice.

Defendants argued that count III of plaintiff's verified second-amended complaint, which sought an order of specific performance requiring Unicous to issue and deliver to him the two stock certificates for 25,000 shares of common stock and 69,500 shares of common stock, failed to state a cause of action and should be dismissed pursuant to section 2-615 of the Code. The circuit court did not rule on defendants' section 2-615 motion; rather, the court dismissed count III pursuant to section 2-619(a)(7) of the Code with prejudice for the same reasons it dismissed counts I and II, that the cause of action was premised on the employment agreement that was unenforceable under the Frauds Act.

Plaintiff filed this appeal.

The circuit court's dismissal order was made pursuant to section 2-619(a)(7) (735 ILCS 5/2-619(a)(7) (West 2008)) ("That the claim asserted is unenforceable under the provisions of the Statute of Frauds"). When reviewing a dismissal pursuant to section 2-619, we accept all well-pleaded facts in the complaint as true, along with all reasonable inferences gleaned from those facts. *Dopkeen v. Whitaker*, 399 Ill. App. 3d 682, 684 (2010). Review is *de novo*. *Wackrow v. Niemi*, 231 Ill. 2d 418, 422 (2008).

The Frauds Act provides in pertinent part:

"No action shall be brought *** upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." 740 ILCS 80/1 (West 2008).

The Frauds Act "prohibits oral contracts that cannot be performed within one year of their making. [Citation.] The test for determining whether [the Frauds Act] applies to a contract is whether the contract is capable of being performed within one year of its formation, not whether such occurrence is likely." *Robinson v. BDO Seidman, LLP*, 367 Ill. App. 3d 366, 370 (2006).

Plaintiff argues he adequately pleaded in his verified second-amended complaint that he was an at-will employee of Unicous with no set durational term of employment and, as such, he contends his oral employment contract was capable of being performed within one year and, therefore, need not be memorialized in a signed writing under the Frauds Act. Plaintiff cites *Czapla v. Commerz Futures, LLC*, 114 F. Supp. 2d 715, 720 (N.D. Ill. 2000), which held that, in Illinois, "[o]ral contracts for at will employment are outside the statute of frauds." The rationale is that an at-will employment contract is terminable at will by either party. Either or both parties could terminate the contract within one year of its formation. "This being so, the contract could be performed in one year and so [is] not within [the Frauds Act]." *Balstad v. Solem Machine Co.*, 26 Ill. App. 2d 419, 423 (1960).

Defendants counter plaintiff made a judicial admission in his verified first-amended complaint that the summary terms document set forth the terms and conditions of his employment; that an examination of those terms reveals his employment contract was for a term of more than one year and, therefore, must be memorialized in a signed writing pursuant to the Frauds Act. "A fact admitted in a verified pleading is 'a formal, conclusive judicial admission which is binding on the pleader and which dispenses wholly with proof of that fact.'" *People ex rel. Department of Public Health v. Wiley*, 348 Ill. App. 3d 809, 819 (2004), quoting *Winnetka Bank v. Mandas*, 202 Ill. App. 3d 373, 396 (1990). "[O]riginal *verified* pleadings will remain binding as judicial admissions even

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after the filing of an amended pleading which supersedes the original unless the amended pleading discloses that the original pleading was made through mistake or inadvertence." (Emphasis in original.) *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 558 (2005). A court may consider judicial admissions contained in the record when ruling on a motion to dismiss. *Jordan v. Knafel*, 355 Ill. App. 3d 534, 544 (2005).

Plaintiff does not contest that he made a judicial admission in his verified first-amended complaint that the summary terms document set forth the terms and conditions of his employment subject to the oral modification of his start date and the timing of his bonus, nor does he contend the circuit court erred in therefore considering the summary terms document when ruling on the motion to dismiss the verified second-amended complaint. Rather, plaintiff contends, even considering the summary terms document, his employment contract is presumed to be at will. *Robinson*, 367 Ill. App. 3d at 368. To overcome this presumption, the terms for employment for a specific duration must be "clear and definite." *Robinson*, 367 Ill. App. 3d at 368. Plaintiff argues that the summary terms document contained no clear, definite, specific durational term overcoming the presumption that his employment contract was at will and not subject to the Frauds Act.

Thus, we must examine the summary terms document to determine whether it contained a clear and definite statement as to the duration of plaintiff's employment. Our examination indicates that the summary terms document provided an express "Start Date" of December 7, 2005, which was orally modified to December 14, 2005, but it contained no reference to any ending date. The summary terms document also provided a compensation provision setting forth plaintiff's base salary and bonus. The base salary compensation provision stated in pertinent part:

"Compensation: Base Salary
 2005 and 2006 \$90,000"

Defendants argue that this base salary compensation provision clearly provided a guaranteed term of employment from the start date of December 14, 2005, through December 31, 2006. As such, defendants contend the employment agreement was required under the Frauds Act to be memorialized in a signed writing because it could not be performed within one year of its making.

However, plaintiff argues that the base salary compensation provision did not clearly and definitely indicate he was guaranteed employment from December 14, 2005, through December 31, 2006. Plaintiff argues: "[a] fair and reasonable interpretation of the [s]ummary [t]erms document *** is that [d]efendants set [his] salary for a period of time **if** [he] was employed during 2006. Nothing within the [s]ummary [t]erms document provides a guarantee of employment and [plaintiff] has never alleged that he was guaranteed employment for any durational term." (Emphasis in original.)

When reviewing an order granting a section 2-619 motion to dismiss, we must interpret all pleadings and supporting documents including, in this case, the summary terms document that is properly before us pursuant to plaintiff's judicial admission, in the light most favorable to plaintiff. *Shirley v. Harmon*, 405 Ill. App. 3d 86, 90 (2010). Viewed in this light, the summary terms document may be interpreted as having provided a base salary but no guarantee of employment for any specific durational term. Under this interpretation (which we are required to incorporate when reviewing the section 2-619(a)(7) dismissal order because it is the one most favorable to plaintiff), the summary terms document failed to contain a clear and definite durational term sufficient to overcome the presumption that plaintiff's employment contract was at will and, therefore, not subject

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to the Frauds Act.

Defendants contend the base salary compensation provision of the summary terms document contained a durational term ending in 2006. However, we note plaintiff worked for Unicous until June 2007, which lends further support to our conclusion (for purposes of reviewing the section 2-619(a)(7) dismissal order only) that the base salary compensation provision of the summary terms document did not clearly and definitely indicate a set durational term of employment. Rather, as plaintiff pleaded in his verified second-amended complaint and that we take as true for purposes of reviewing the section 2-619(a)(7) dismissal order, plaintiff was an at-will employee with no set duration of employment, and, therefore, plaintiff has adequately pleaded that his employment agreement was outside the Frauds Act and not required to be memorialized in a signed writing. Accordingly, we reverse the order dismissing all three counts of plaintiff's verified second-amended complaint pursuant to section 2-619(a)(7) of the Code and remand for further proceedings.

Defendants contend count III of plaintiff's verified second-amended complaint, which requested an order of specific performance, failed to state a cause of action pursuant to section 2-615 of the Code. The circuit court never ruled on defendants' section 2-615 motion. We remand for a hearing thereon.

As a result of our disposition of this case, we need not address the other arguments on appeal.

Reversed and remanded.