

No. 1-10-1801

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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KAPLAN ENTERPRISES, LLC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 09 L 12371
	)	
MB FINANCIAL BANK, N.A.,	)	Honorable Charles R.
	)	Winkler,
Defendant-Appellee.	)	Judge Presiding.

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JUSTICE KARNEZIS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

*HELD:* Plaintiff's complaint failed to state a cause of action for breach of contract and fraud where plaintiff could not establish that defendant assigned plaintiff a security interest in collateral that defendant knew either did not exist or was valueless.

ORDER

Plaintiff Kaplan Enterprises, LLC., appeals from an order of the circuit court granting the motion of defendant MB Financial Bank, N.A., to dismiss Kaplan's complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615

(West 2008)) (Code). On appeal, Kaplan contends that its complaint sufficiently stated a cause of action for breach of contract and fraud and should not have been dismissed. For the following reasons, we affirm.

This appeal arises out of an assignment MB Financial Bank made to Kaplan. The interest MB Financial Bank assigned to Kaplan arose out of a loan MB Financial Bank made to Spalter Finance Company. In 2004, MB Financial Bank entered into a revolving line of credit agreement with Spalter in the amount of up to \$5,500,000. The line of credit was secured by granting MB Financial Bank a security interest in Spalter's assets. In 2006, MB Financial Bank and Spalter entered into a Fourth Loan Modification Agreement. Pursuant to the modification, Spalter provided additional collateral, which consisted of three mortgage agreements; the Simpson mortgage, the Fullerton-Kedzie mortgage and, the Seng mortgage. Subsequently, MB Financial Bank learned that Spalter may have executed releases of the mortgages or sold their interests in the mortgages prior to pledging the mortgages as collateral for the modification agreement. As a result, on June 18, 2007, MB Financial Bank sued Spalter. Shortly thereafter, on June 28, 2007, MB Financial Bank entered into an Assignment and Acceptance Agreement (Assignment Agreement) with Kaplan. The Assignment Agreement acknowledged that Spalter owed MB Financial Bank about \$3.1 million, and MB Financial Bank would sell and assign its "interests" in the Spalter loan to Kaplan for \$2.85 million.

Subsequently, more than two years later, on October 19, 2009, Kaplan filed a

two-count complaint against MB Financial Bank alleging breach of contract and fraud. Kaplan alleged in the complaint that MB Financial Bank breached the Assignment Agreement and committed fraud by assigning Kaplan a security interest in the three mortgages despite knowing that its interests in the mortgages did not exist due to Spalter's actions.

MB Financial Bank filed a motion to dismiss pursuant to section 2-615 of the Code. The motion alleged that contrary to Kaplan's allegations in the complaint, MB Financial Bank did not assign Kaplan security interests in the mortgages, rather, MB Financial Bank only assigned Kaplan its interest in the loan documents, which did not include the collateral for the loan (i.e. the mortgages). The trial court granted the motion to dismiss. Kaplan now appeals.

On appeal, Kaplan argues that its complaint sufficiently stated a cause of action for breach of contract and fraud and should not have been dismissed.

A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint. When ruling on a motion to dismiss, the trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. Carver v. Nall, 186 Ill. 2d 554, 557 (1999). The court should grant the motion only if the plaintiff can prove no set of facts that would support a cause of action. Carver, 186 Ill. 2d at 557. On appeal, our review is *de novo*. Beacham v. Walker, 231 Ill. 2d 51, 57 (2008).

To establish a breach of contract, a plaintiff must show the existence of a valid and enforceable contract, performance of the contract by the plaintiff, breach of the

contract by the defendant, and resulting injury to the plaintiff. Sherman v. Ryan, 392 Ill. App. 3d 712, 732 (2009).

To state a cause of action for fraud, the plaintiff must establish: (1) a false statement of material fact; (2) the defendant's knowledge that the statement was false; (3) the defendant's intent that the statement induce the plaintiff to act; (4) the plaintiff's reliance on the truthfulness of the statement; and (5) damages that result from relying on the statement. Gehrett v. Chrysler Corp., 379 Ill. App. 3d 162, 172 (2008).

The controversy in this case centers around the parties disagreement as to what "interest" MB Financial Bank assigned to Kaplan. Therefore, we set forth in some detail the language in the Assignment Agreement. The Assignment Agreement provides in relevant part:

"Assignor and Assignee agree as follows:

1. Assignor hereby sells and assigns to Assignee, and Assignee hereby purchases and assumes from Assignor, all of the Assignor's right, title, and interest in and to the Agreement and the loan documents set forth on Schedule 1 hereto (collectively, the "Loan Documents") as of the Effective Date (as defined below). Such purchase and sale is made without recourse, representation or warranty except as expressly set forth herein.
2. Assignor (i) represents that as of the date hereof, it is the legal and beneficial owner of the interests assigned hereunder free and clear of any adverse claim or security interest and that the interests assigned hereunder are not subject to any

prior sale, transfer, assignment or participation by Assignor or any agreement to assign, convey, transfer or participate, in whole or in part; (ii) makes no other representation or warranty and assumes no responsibility with respect to any statement, warranties or representations made in or in connection with the Agreement or the execution, legality, validity, enforceability, genuineness, sufficiency or value of the Agreement, any Loan Documents or any other instrument or document furnished pursuant thereto; and (iii) makes no representation or warranty and assumes no responsibility with respect to the financial condition of [Spalter], Jeffrey S. Dietrich or any other person or entity or the performance or observance by any person or entity of its obligations under the Agreement or the Loan Documents or any other instrument or document furnished pursuant thereto."

On appeal, the parties argue as they did before the trial court. Kaplan argues that the "interest" transferred includes the collateral for the loan modification agreement (i.e. the three mortgages.) MB Financial Bank maintains that the "interest" referred only to the loan documents and not to the collateral for the loan modification agreement.

Here, we note that the Assignment Agreement provided that MB Financial Bank assigned all of its "right, title, and interest in and to the \* \* \* loan documents." The Assignment Agreement further provided that MB Financial Bank was the legal owner of the interest it was assigning but was making no other representation or warranty regarding any other instrument or document.

We find that when MB Financial Bank transferred its "interest" in the Spalter loan to Kaplan, that interest was the interest in the loan MB Financial Bank made to Spalter, and not a security interest in the collateral for the loan modification agreement.

Pursuant to the Assignment Agreement, MB Financial Bank assigned its right, title and interest in and to the loan documents. At the time of the assignment, MB Financial Bank was the legal owner of the loan to Spalter. As the assignee, Kaplan stepped into MB Financial Bank's shoes with respect to its rights in the loan. The collateral for the loan modification agreement, was simply that, collateral. The fact that the collateral turned out to be non-existent or valueless due to Spalter's actions, does not mean that MB Financial Bank did not transfer its valid interest in the loan to Kaplan. Moreover, MB Financial Bank specifically disclaimed any warranty or representation in the value of the loan documents or any other instrument or document.

Since we find that MB Financial Bank assigned its legal interest in the Spalter loan to Kaplan, and that MB Financial Bank specifically disclaimed any warranty as to the value of the documents, we conclude that Kaplan failed to state a claim for breach of contract and fraud. Specifically, Kaplan could not state a claim for breach of contract because Kaplan could not establish, as Kaplan alleged, that MB Financial Bank failed to sell an existing security interest in the three mortgages. Additionally, Kaplan could not state a claim for fraud because Kaplan could not establish that MB Financial Bank made a false statement of material fact. The circuit court's order dismissing Kaplan's complaint was proper.

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Accordingly, we affirm the judgment of the circuit court.

Affirmed.