FOURTH DIVISION
May 15, 2014

No. 1-13-3473

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANIEL FOREMAN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 L 6587
	)	
CARDINAL GROWTH II, LP, 221 PARTNERS	)	
FUND, LP, and 221 PARTNERS, LLC,	)	
	)	
Defendants-Appellees	)	
	)	
(CARDINAL GROWTH CORPORATION,	)	
and CARDINAL GROWTH II, LLC,	)	Honorable
	)	Margaret Ann Brennan,
Defendants).	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment granting defendants' motion to dismiss plaintiff's third amended complaint with prejudice is reversed. The allegations in the complaint are sufficient to state a cause of action because the complaint adequately alleges

consideration for the alleged contract; the complaint adequately alleges successor liability for certain defendants; and defendants failed to produce affirmative matters defeating plaintiff's claims.

¶ 2 Plaintiff, Daniel Foreman, filed a third amended verified complaint (third amended complaint or complaint) seeking damages for breach of contract, violation of the Wage Payment and Collection Act (Wage Act) (820 ILCS 115/1 *et seq*. (West 2012)), and violation of the Attorneys Fees in Wage Actions Act (Attorney Fee Act) (705 ILCS 225/1 (West 2012)). Plaintiff's breach of contract counts allege breach of a contract related to plaintiff's termination from employment from one or more defendants. Defendants filed a combined motion to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). Following arguments, the circuit court of Cook County granted defendants' motion to dismiss with prejudice.

¶ 3 For the following reasons, we reverse.

¶ 4 BACKGROUND

¶ 5 Plaintiff filed his first complaint in June 2012. The circuit court of Cook County dismissed plaintiff's first, amended, and second amended verified complaints without prejudice. In April 2013, plaintiff filed the third amended complaint that is the subject of this appeal. The third amended complaint alleges breach of a contract, attached to the complaint as Exhibit A, allegedly between plaintiff and Cardinal Corp., Cardinal LP, and Cardinal LLC (referred to collectively by plaintiff in the third amended complaint as "the Cardinal Defendants"). The complaint also alleges claims for unpaid wages, penalties, and attorney fees arising out of plaintiff's employment with one or more defendants.

¶ 6 Plaintiff's complaint alleges that Cardinal Corp., Cardinal LP, and Cardinal LLC were a group of related businesses conducted under common ownership and control. Cardinal LP, plaintiff alleges, employed Cardinal LLC to control its business affairs, and Cardinal LP and Cardinal LLC (the partnership) employed Cardinal Corp. to manage the day-to-day affairs of Cardinal LP, an investment partnership doing business in Illinois with Cardinal LLC as its general partner. Plaintiff alleges that Cardinal Corp., Cardinal LP, and Cardinal LLC operated under the trade name "Cardinal Growth." Robert Bobb and Joseph McInerney formed Cardinal LP. The complaint alleges Bobb and McInerney approached plaintiff, an experienced private equity professional, regarding employment "with Cardinal LP" before the partnership came into being but while they were in the process of raising the capital to establish Cardinal LP. The complaint alleges that in June 2008, plaintiff became employed "by Cardinal LP" and plaintiff is a former employee of each of "the Cardinal Defendants." Plaintiff's compensation included a base salary and a percentage of "origination, management and transaction fees Cardinal LP received." Plaintiff was also eligible for an incentive payment based on a calculation using the profit an investment earns when it is sold. Plaintiff's job was to locate and evaluate companies for Cardinal LP to acquire, then to manage the acquisition. The complaint alleges that Bobb and McInerney, on behalf of Cardinal LP, had authority under the Cardinal LP limited partnership agreement to make all investment and investment related decisions. Plaintiff alleges that, exercising that authority, they provided plaintiff with guidelines to follow and named specific companies for plaintiff to target. Specifically, Bobb and McInerney dictated plaintiff's priorities, required plaintiff to attend weekly meetings, appointed individuals to advise plaintiff, and

appointed those people with whom plaintiff worked. Plaintiff worked from Cardinal LP's offices most of the time.

¶ 7 In July 2008, plaintiff alleges that Bobb and McInerney, again "exercising their authority under the Cardinal LP Limited Partnership Agreement to control all investment or investment related decisions on behalf of the Partnership," directed plaintiff to focus on the evaluation and potential acquisition of a particular company, Malabar International (Malabar). Plaintiff evaluated Malabar pursuant to the parameters Bobb and McInerney set with regard to finding other companies. Bobb and McInerney, acting under the partnership agreement, made the decision and directed plaintiff to acquire Malabar.

¶ 8 Plaintiff's complaint alleges that in June 2009 McInerney, "acting on behalf of all Cardinal Defendants, approached [plaintiff] to renegotiate his earned compensation and *** separation from employment." Plaintiff alleges McInerney, through an exchange of documents, made it clear that he was acting on behalf of all "Cardinal Defendants" and that they were jointly responsible for the terms plaintiff and McInerney were negotiating. The items of compensation plaintiff and McInerney negotiated included plaintiff's salary and fees, and a potential incentive payment resulting from the Malabar transaction. In July 2009, plaintiff and McInerney reached an agreement which was reduced to writing (the July 9 agreement). Plaintiff's complaint alleges the July 9 agreement "identified the responsible parties as" Cardinal Corp., Cardinal LLC, and Cardinal LP, and all affiliated entities ('Cardinal')."

¶ 9 By virtue of the foregoing language, plaintiff alleges, the parties to the agreement were Cardinal Corp., Cardinal LP, and Cardinal LLC. Plaintiff specifically alleges that the "Cardinal

Defendants" were the "responsible parties" and that "[a]ll Cardinal Defendants also agreed" on plaintiff's termination date. Plaintiff alleges the "Cardinal Defendants" made the first installment payment required under the agreement.

¶ 10 The third amended complaint alleges that McInerney approached plaintiff to renegotiate the July 9 agreement. On or about August 6, 2009, McInerney and plaintiff agreed to a modification under which plaintiff would receive less compensation but would receive it sooner. They also modified the date of plaintiff's termination of employment so that the date was earlier. Plaintiff alleges the parties also reduced the new agreement to writing (the August 6, 2009 agreement).

¶ 11 The August 6, 2009 agreement is the sole agreement which forms the basis of plaintiff's claims for breach of contract. Plaintiff's complaint distinguishes the "separation payment," representing his employment compensation and fees, from the "incentive payment," resulting from the Malabar transaction. The August 6, 2009 agreement, which plaintiff attached to the third amended complaint, reads, in part, as follows: "This letter is to document our agreement regarding your compensation for the Malabar *** transaction and transition support from [Cardinal Corp., Cardinal LLC, Cardinal LP] and all affiliated entities ('Cardinal')." The August 6, 2009 agreement lists the incentive payment from the Malabar transaction as a component of "compensation to be paid to you by Cardinal."

¶ 12 The copy of the August 6, 2009 agreement attached to plaintiff's third amended

complaint is not signed.[1] Plaintiff alleges McInerney signed the August 6, 2009 agreement "on behalf of all Cardinal Defendants" but McInerney refused to provide plaintiff a signed copy of the agreement. Plaintiff alleges Bobb and McInerney had the authority to bind Cardinal LLC and Cardinal LP by virtue of being "the sole managing members" of Cardinal LLC and the sole owners of Cardinal Corp., as well as under the Cardinal LP limited partnership agreement. That agreement, plaintiff alleges, gave Bobb and McInerney the authority to enter into any contracts on behalf of the partnership that the general partner (which plaintiff alleges is Bobb and McInerney) deems necessary.

¶ 13 The complaint alleges that Cardinal Corp. paid half of the separation payment "on behalf of all Cardinal Defendants." Plaintiff terminated his employment as agreed and subsequently wrote to McInerney asking for the balance of the separation payment. Plaintiff alleges "the Cardinal Defendants" made another payment toward the separation payment but that a balance remained due. Plaintiff demanded payment under the August 6, 2009 agreement.

¶ 14 Subsequent to the failure to pay pursuant to the August 6, 2009 agreement, Cardinal LP changed its name to 221 LP. After the name change, 221 LP named 221 LLC its general partner and changed the name of the general partnership. Although defendants 221 LP and 221 LLC were not parties to the transaction until after the August 6, 2009 agreement, plaintiff alleges in his complaint they are responsible to pay plaintiff's damages as successors to the liabilities of the Cardinal defendants. Plaintiff alleges 221 LLC is liable to him under the August 6, 2009

[1] "It is well settled that a party named in a contract may, by his acts and conduct, indicate his assent to its terms and become bound by its provisions even though he has not signed it." *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 64.

agreement by virtue of being the general partner of 221 LP and because the proceeds of the Malabar transaction flowed into 221 LP and 221 LLC, "making these entities the source of funds to meet the Incentive Payment." Plaintiff's complaint alleges the name change does not affect its liability to plaintiff for the compensation he is due under the August 6, 2009 agreement made by Cardinal LP.

¶ 15 In November 2011, 221 LP, formerly Cardinal LP, sold Malabar which, plaintiff alleges, "triggered Defendants' joint and several obligation to pay [plaintiff] the Incentive Payment provided for in the August 2009" agreement. Plaintiff demanded payment from 221 LP and 221 LLC and they refused.

¶ 16 For his complaint for breach of contract against Cardinal LP, plaintiff specifically alleges that the August 6, 2009 agreement "is a valid and enforceable contract," that plaintiff performed under the contract, and that Cardinal LP "has failed to pay [plaintiff] the amounts due and owing to him under the August 6, 2009" agreement.

¶ 17 In support of his claims under the Wage Act and Attorney Fee Act, plaintiff's third amended complaint alleges Cardinal LP was part of a common enterprise with Cardinal Corp. and Cardinal LLC which jointly employed him. Plaintiff alleges that Bobb and McInerney controlled the day-to-day activities of each entity. Cardinal LP, through Bobb and McInerney, controlled plaintiff's daily activities, which involved evaluating, acquiring, and managing investments for Cardinal LP. Plaintiff's third amended complaint alleges that the facts demonstrate Bobb and McInerney's control over him, and also that the limited partnership agreement provides that the Cardinal LP investment committee, consisting solely of Bobb and

McInerney, makes all investment or investment related decisions for the partnership. On behalf of Cardinal LP, they interviewed and hired plaintiff, set his wages and terms and conditions of employment, provided daily supervision, made the decision to terminate his employment, and negotiated the terms of his termination and final compensation.

¶ 18 Plaintiff alleges the amounts due under the August 6, 2009 agreement are wages and final compensation as those terms are defined in the Wage Act. Plaintiff alleges 221 LP's failure to make the incentive payment when it came due, when 221 LP sold Malabar, is an independent violation of the Wage Act, in addition to 221 LP's liability for Cardinal LP's violation of the Wage Act. The complaint alleges that 221 LLC, in addition to its liability for 221 LP and Cardinal LP's violations of the Wage Act before it became general partner, as the current general partner to 221 LP is liable for violation of the Wage Act because those violations occurred after 221 LLC became the general partner.

¶ 19 Defendants 221 LP, Cardinal LP, and 221 LLC filed a combined motion to dismiss plaintiff's third amended complaint pursuant to sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2012)). In support of its section 2-615 motion to dismiss, defendants argued that plaintiff failed to plead how Bobb and McInerney's conduct can be attributed to Cardinal LP. In support of their section 2-619 motion, defendants argued that the materials submitted in support of the motion show that Bobb and McInerney were never authorized to act on behalf of Cardinal LP to employ plaintiff, and that defendants never employed plaintiff.

¶ 20 Defendants' attachments included, among others, partnership documents showing the registration, designation of general partner and name changes for the entities, an affidavit from

Raymond Siegel, manager of 221 LLC, and the Agreement of Limited Partnership of Cardinal Growth II, LP. Mr. Siegel averred that he conducted a diligent search of the records of 221 LP and of 221 LLC and found no record that plaintiff was an employee of or entered into any contract with 221 LP or 221 LLC, and no record of any payment to plaintiff from either entity. Siegel averred he found no record of 221 LP ever having an employee.

¶ 21 Following arguments by the parties, the trial court, without specifying the reasons, granted defendants' motion to dismiss counts I through IX of plaintiff's third amended complaint with prejudice. Plaintiff voluntarily dismissed counts X through XV of the third amended complaint with prejudice, and those counts are not a part of this appeal.

¶ 22 ANALYSIS

¶ 23 This appeal arises from the trial court's judgment dismissing plaintiff's complaint based on the pleadings. The trial court did not specify its grounds for dismissal. That fact does not preclude our review. *Hastings Mutual Insurance Co. v. Ultimate Backyard*, *LLC*, 2012 IL App (1st) 101751, ¶ 13 (reviewing motions to dismiss despite fact lower court never specifically stated on which grounds it granted motions); *Giles v. General Motors Corp.*, 344 Ill. App. 3d 1191, 1196 (2003) (where trial court does not specify the grounds for its order dismissing the plaintiff's complaint, we will presume it was upon one of the grounds properly urged and address the merits of each).

¶ 24 1. Section 2-615 Motion to Dismiss

¶ 25 Defendants moved to dismiss plaintiff's complaint pursuant to section 2-615 of the Code. We review a dismissal under section 2-615 *de novo*. *Avon Hardware Co. v. Ace Hardware Co.*,

2013 IL App (1st) 130750, ¶ 14.

> "A section 2-615 motion to dismiss [citation] challenges the legal sufficiency of a complaint based on defects apparent on its face. [Citation.] In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts, and we construe the allegations in the complaint in the light most favorable to the plaintiff. [Citation.] Illinois is a fact-pleading jurisdiction, and a plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action. [Citation.] However, a cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. [Citation.]" *Flores v. Santiago*, 2013 IL App (1st) 122454, ¶ 10.

¶ 26 A. Breach of Contract Claims

¶ 27 Defendants' motion to dismiss plaintiff's breach of contract claims pursuant to section 2-615 argued that plaintiff "failed to allege even the scantest outline of a breach of contract action--offer, acceptance, and consideration--against the [defendants]." Defendants argued none of plaintiff's allegations support any cause of action against 221 LLC because 221 LLC did not become general partner until after the execution of the August 6, 2009 agreement and because plaintiff's allegations against 221 LLC are conclusory and not supported by factual allegations.

¶ 28 "To prevail on a breach of contract claim, a plaintiff must plead and prove: (1) that a contract existed, (2) that the plaintiff performed his obligations under the contract, (3) that the defendant breached the contract, and (4) that the plaintiff sustained damages as a result of the defendant's breach." *Matthews v. Chicago Transit Authority*, 2014 IL App (1st) 123348, ¶ 130. "In alleging a breach of contract by a defendant, a plaintiff should also allege the factual circumstances surrounding the formation of the agreement, specifically, the offer, acceptance and existence of valuable consideration." *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 199 (1999). "The law is clear in Illinois that it is essential in pleading the existence of a valid contract for the pleader to allege facts sufficient to indicate the terms of the contract." (Internal quotation marks omitted.) *Sherman v. Ryan*, 392 Ill. App. 3d 712, 732 (2009). The complaint must allege the specifics of the contract for each defendant. *Id*.

¶ 29 Plaintiff argues the third amended complaint alleges all of the elements of a breach of contract claim. Plaintiff argues that the offer alleged in the third amended complaint is McInerney's offer for plaintiff to receive less compensation, the consideration for which would be that plaintiff would receive the compensation sooner than the parties initially agreed, and that the complaint alleges that plaintiff accepted McInerney's offer. On appeal, defendants argue that without an employment relationship between plaintiff and defendants, "there is no consideration and the alleged contract fails." Defendants argue that plaintiff's position with regard to what constitutes the consideration for the August 6, 2009 agreement "pre-supposes that [Cardinal LP] owed an initial duty or obligation to pay *** under the July 9 Agreement." Defendants argue that in the absence of an employment relationship, defendants had no such obligation under the July 9

agreement and, therefore, plaintiff's relinquishment of certain rights under the July 9 agreement cannot be consideration for the August 6, 2009 agreement. Defendants further complain that plaintiff is relying on the terms of the July 9 agreement to demonstrate the consideration for the August 6, 2009 agreement, but failed to attach a copy of the July 9 agreement to his pleading. Therefore, defendants argue, dismissal under section 2-606 of the Code (735 ILCS 5/2-606 (West 2012)) is proper.

¶ 30 Initially we will address defendants' argument that because plaintiff failed to attach the July 9 agreement to his pleading section 2-606 of the Code requires dismissal of plaintiff's complaint. We disagree. Section 2-606 provides that "[i]f a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein." 735 ILCS 5/2-606 (West 2012). "Section 2-606 generally applies to instruments being sued upon, such as contracts or agreements." *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 32. Plaintiff's cause of action is not based on the July 9 agreement. Plaintiff's breach of contract counts in the third amended complaint allege that "[t]he August 6, 2009 Separation Agreement is a valid and enforceable contract." The August 6, 2009 agreement does not reference the July 9 agreement. Plaintiff attached a copy of the August 6, 2009 agreement to the third amended complaint. The July 9 agreement is merely evidentiary. Even if the July 9 agreement becomes evidence in this case, plaintiff was not required to attach the July 9 agreement to his pleading. *Claude Southern Corp. v. Henry's Drive-In, Inc.*, 51 Ill. App. 2d 289, 297 (1964) (option to purchase letter not required to be affixed as an exhibit because the cause of action was founded

upon a written guaranty, not upon the option to purchase letter).

¶ 31 Defendants do not dispute that plaintiff plead that a contract existed, that plaintiff performed his obligations under the contract, that defendants breached the contract, or that plaintiff sustained damages. Defendants argue there was no consideration for the August 6, 2009 agreement. We find that plaintiff's third amended complaint adequately pleads the existence of a valid contract, including the element of valuable consideration. Defendants' argument presents "a question as to whether any consideration was intended to pass between the parties as distinguished from the question of the failure of contemplated consideration to materialize." *Cohen v. Wood Bros. Steel Stamping Co.*, 175 Ill. App. 3d 511, 515 (1988). The existence of consideration is a question of law. *Id*. "Generally, the exchange of mutual and concurrent promises between parties constitutes the requisite consideration to support an enforceable contract." *Id*. Plaintiff's complaint alleges the exchange of mutual and concurrent promises between the parties.

¶ 32 Plaintiff alleges defendants, through McInerney, promised certain payments to plaintiff, and plaintiff promised to forego certain rights he alleges existed under a separate agreement. If defendants do prove that they had no obligation under that agreement, or that no such agreement ever existed, defendants may succeed in proving a want of consideration. However, at this stage of proceedings, defendants' assertion that they had no obligation under the July 9 agreement and, therefore, did not receive consideration for the August 6, 2009 agreement, is merely a defense to the alleged contract that is not apparent from the face of pleadings. "An affirmative defense is properly asserted in a section 2-615 motion only if the defense is apparent from the face of the

complaint." *R and B Kapital Development, LLC v. North Shore Community Bank and Trust Co.*, 358 Ill. App. 3d 912, 921 (2005). Defendants themselves resort to matters outside the complaint to support their claim they had no prior obligations to plaintiff and, therefore, there is a want of consideration for the August 6, 2009 agreement. "The burden of proving the validity of the affirmative defense of want of consideration is clearly upon the party asserting it." *Hamilton Bancshares, Inc. v. Leroy*, 131 Ill. App. 3d 907, 911 (1985). Plaintiff has stated facts supporting consideration for the August 6, 2009 agreement and, therefore, states a cause of action for breach of the agreement. Compare *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 223 (1984) (despite issue being waived, court found that plaintiff failed to state a cause of action where plaintiff made "no serious argument that it states any facts supporting consideration.").

¶ 33 When presented with a motion to dismiss under section 2-615 of the Code, "we are asked to decide whether, on the facts alleged in the complaint, any possibility of recovery exists." *Empire Home Services, Inc. v. Carpet America, Inc.*, 274 Ill. App. 3d 666, 670 (1995). A possibility of recovery exists if plaintiff can prove the allegations in the complaint; *i.e.*, that McInerney and plaintiff intended to enter a binding contract, the terms of which are expressed in the written August 6, 2009 agreement, and that McInerney could and did bind defendants to that agreement. Plaintiff has alleged specific facts in his complaint in support of those findings. The terms of the alleged contract are clear from the allegations in the pleading. Accordingly, we hold that plaintiff's breach of contract claims are sufficient to survive dismissal under section 2-615. The trial court's judgment granting defendants' motion to dismiss plaintiff's breach of contract claims, to the extent such judgment is based on section 2-615 of the Code, is reversed.

¶ 34 B. Employment Claims

¶ 35 Defendants moved to dismiss plaintiff's employment claims pursuant to section 2-615 of the Code on the grounds plaintiff's third amended complaint failed to plead defendants acted as a joint employer because "simply alleging that separate companies share common officers or directors is not sufficient under 2-615 to plead liability as to each corporate Defendant." Defendants also argued that the "allegation that Bobb and McInerney conducted those business under the trade name of 'Cardinal Growth' does not meet the pleading requirements of 2-615 necessary to impose enterprise liability" on the partnership. Defendants argued plaintiff failed to plead any of the relevant factors in the determination of whether a putative employer is a joint employer.

¶ 36 Our supreme court has enunciated the following test to be used when undertaking a joint employer assessment:

> "The test for the existence of joint employers is whether two or more employers exert significant control over the same employees--where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment. [Citations.] Relevant factors to consider in making this determination include the putative joint employer's role in hiring and firing; promotions and demotions; setting wages, work hours, and other terms and conditions of employment; discipline; and actual day-to-day supervision and

> direction of employees on the job. [Citations.]" *American Federation of State, County and Municipal Employees, Council 31 v. State Labor Relations Board*, 216 Ill. 2d 569, 578-79 (2005).

¶ 37 Plaintiff's third amended complaint alleges several of the relevant factors to consider in making the determination of whether Cardinal LP was his joint employer. Plaintiff alleges Cardinal LP had a role in hiring him in that Bobb and McInerney approached him regarding employment with Cardinal LP. Plaintiff alleges Bobb and McInerney, on behalf of Cardinal LP, gave him day-to-day direction with regard to his work and imposed requirements such as attendance at weekly meetings. Plaintiff alleges Bobb and McInerney, on behalf of "all Cardinal Defendants" (although 221 LLC was not yet the general partner its liability is premised on responsibility for its partner's liabilities--a proposition defendants do not refute) approved plaintiff's acquisitions and required attendance at meetings. Plaintiff alleges that McInerney was acting on behalf of "all Cardinal Defendants" when McInerney approached plaintiff regarding his separation from employment and thus that defendants had a role in firing. The complaint alleges that Bobb and McInerney, acting as "founding principals, key persons, and investment committee" of Cardinal LP, and on behalf of Cardinal LP, hired plaintiff, set his wages and terms and conditions of employment, provided day-to-day supervision and direction, and terminated his employment.

¶ 38 The fact that Bobb and McInerney were members of the Cardinal LP investment committee is, contrary to defendants' argument, highly relevant, but not dispositive for purposes of defendants' motion to dismiss under section 2-615. That fact could make it more or less likely

that Bobb and McInerney were acting on behalf of Cardinal LP when they hired plaintiff, set his priorities, required him to attend meetings, and terminated his employment, all of which may establish joint employer status. The fact Cardinal LP may not have been formed when Bobb and McInerney hired plaintiff is irrelevant for purposes of plaintiff's pleadings. Plaintiff alleges Bobb and McInerney informed him they were in the process of forming Cardinal LP when they approached him regarding employment. It is reasonable to infer that they hired plaintiff for the soon-to-be-formed partnership.

¶ 39 "A plaintiff need not prove his or her case at the pleading stage; however, he or she must allege specific facts supporting each element of the cause of action." *Rajterowski v. City of Sycamore*, 405 Ill. App. 3d 1086, 1092 (2010). Plaintiff has alleged specific facts relevant to the joint employer determination. Defendants argue that plaintiff's third amended complaint is fatally inconsistent in that plaintiff alleges he was a third party dealing with Cardinal LP and its employee when he entered the August 6, 2009 agreement. Defendants argue that this and other inconsistencies in plaintiff's verified pleadings warrant dismissal. We disagree.

> "A factual admission in a verified pleading constitutes a judicial admission, which has the effect of withdrawing a fact from issue and makes it unnecessary for the opposing party to introduce evidence in support thereof. [Citation.] A sworn statement of fact in a verified pleading remains binding on the party even after an amendment, and the party cannot subsequently contradict the factual allegation. [Citations.]" *L.D.S., LLC v. Southern Cross*

Food, *Ltd.*, 2011 IL App (1st) 102379, ¶ 35.

¶ 40 Thus, if the factual allegations in the third amended complaint contradict those in the second amended verified complaint[2], the allegations in the second amended verified complaint would remain binding and the trial court's decision to dismiss the second amended verified complaint would be proper. *Southern Cross Food, Ltd.*, 2011 IL App (1st) 102379, ¶ 35. But if the allegations in an earlier verified complaint can be read consistently with the allegations in the subsequent amended verified complaint, the latter verified complaint should be considered in determining whether the plaintiff has stated a cause of action. *Id.* at ¶ 41. The inconsistencies about which defendants complain relate to the identification of the parties, plaintiff's employment, and who compensated plaintiff. We again note that in an appeal from a judgment granting a motion to dismiss pursuant to section 2-615, the allegations in the complaint are to be liberally construed, taken as true, and viewed in the light most favorable to the plaintiff. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008).

¶ 41 The third amended complaint alleges that plaintiff accepted the offer to become employed by Cardinal LP. Later in the same complaint, plaintiff alleges Cardinal LP, Cardinal LLC, and Cardinal Corp. employed him as joint employers. Plaintiff's second amended verified complaint alleges that plaintiff accepted an offer to become employed by "all Cardinal Growth entities"

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[2] Despite defendants' arguments that plaintiff's verified third amended complaint contradicts, to some degree, all of plaintiff's earlier complaints, we limit our analysis to the second amended verified complaint because by failing to raise the issue sooner, defendants have forfeit consideration of any inconsistencies in all but the complaint preceding the third amended verified complaint. *Chimerofsky v. School District No. 63*, 121 Ill. App. 2d 371, 374 (1970) ("As a general rule objections to a pleading may be waived by failure to urge the objection at the proper time and in the proper manner or by any act which, in legal contemplation, implies an intention to overlook it.").

which, according to that complaint, meant Cardinal Corp., Cardinal LLC, and Cardinal LP. The verified second amended complaint alleges that during employment discussions, the emphasis was always on Cardinal LP. Later in that same complaint, plaintiff alleges that Cardinal LP was part of a common enterprise with Cardinal Corp. and Cardinal LLC, and jointly employed plaintiff "with those other Cardinal Growth entities." Based on our reading of the second and third amended complaints, we find the allegations as to the nature of plaintiff's employment to be consistent. It is possible to read the two complaints consistently to allege that Cardinal LP was plaintiff's named employer but that from the outset of his employment, all of the entities involved acted as his joint employer. We note this finding is only for purposes of determining whether plaintiff's allegations are inconsistent. We make no judgment as to the proof of those allegations.

¶ 42 We also find no inconsistency in plaintiff's allegations as to the source of any payments he received after he left his employment. Defendants complain that the second amended verified complaint states that "Cardinal Growth entities" wired funds to plaintiff, while the third amended complaint states that Cardinal Corp. wired the funds on behalf of "all Cardinal Defendants." We find no inconsistency in pleading that the payment was made alternatively "by" or "on behalf of" Cardinal Corp., Cardinal LP, and Cardinal LLC, or that these allegations include, for purposes of the liability claimed, 221 LLC, which defendants do not dispute would be liable for the obligations of its general partner. Nor do we find plaintiff's identification of the parties involved to conflict with his second amended verified complaint. Rather, we find plaintiff's identifications entirely consistent in light of plaintiff's allegation that Bobb and McInerney

operated Cardinal Corp., Cardinal LP, and Cardinal LLC collectively under the trade name "Cardinal Growth."

¶ 43 We do not read plaintiff's complaint to simultaneously allege that plaintiff was an employee and a third party doing business with Cardinal LP, as defendants suggest as an inconsistency in plaintiff's pleadings. Plaintiff's complaint does not allege that plaintiff relied on McInerney's certification or signature for his belief that defendants are bound by the August 6, 2009 agreement as would a "third party." Rather, plaintiff alleges McInerney's representations during their negations and the written agreement itself, indicate an intent to bind the partnership entities. We construe plaintiff's third amended complaint to allege that third parties could conclusively rely on the general partner's authority as *evidence* that McInerney could, or plaintiff could reasonably believe that he could, bind the partnership to the August 6, 2009 agreement.

¶ 44 Based on the allegations in the third amended complaint, we agree with defendants that the actions of Bobb and McInerney are the basis of plaintiff's claims that defendants herein are liable for plaintiff's employment based claims. We disagree with defendants' characterization of plaintiff's allegations or their import. Plaintiff does more than allege that the separate companies share common officers. Plaintiff has alleged facts from which it can reasonably be inferred that McInerney was authorized to act on behalf of each defendant named herein with regard to plaintiff's hiring, direction, and termination.

¶ 45 Because there is a set of facts on which plaintiff could obtain relief, his verified third amended complaint survives defendants' motion to dismiss pursuant to section 2-615 of the Code. *Santiago*, 2013 IL App (1st) 122454, ¶ 10. The trial court's judgment granting

defendants' motion to dismiss plaintiff's employment claims, to the extent such judgment is based on section 2-615 of the Code, is reversed.

¶ 46 2. Section 2-619 Motion to Dismiss

¶ 47 Defendants also argued that plaintiff's third amended complaint should be dismissed pursuant to section 2-619 of the Code. We review the dismissal of a complaint pursuant to section 2-619 *de novo*. *Betts v. City of Chicago*, 2013 IL App (1st) 123653, ¶ 13.

> "A motion for involuntary dismissal pursuant to section 2-619(a) admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matter which avoids the legal effect or defeats a plaintiff's claim. [Citation.] An 'affirmative matter' under section 2-619(a)(9) is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. [Citation.] Once a defendant satisfies the initial burden of presenting affirmative matter, the burden then shifts to the plaintiff to establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven." (Internal quotation marks omitted.) *Id.* ¶ 14.

¶ 48 A. Breach of Contract Claims

¶ 49 Defendants argued that the affirmative matter defeating plaintiff's contract claims was the

absence of any record in defendants' possession of a contract between plaintiff and defendants. Defendants also argued in their motion to dismiss that defendants have no record of the basis for the incentive payment. They did not, however, dispute that Cardinal LP sold Malabar. Defendants also argued Cardinal LP "cannot enter contracts on its own--either the general partner or the management company must be the contracting party." In response to plaintiff's allegation he received a partial payment in support of his breach of contract claim, defendants argue that plaintiff's financial account statements affirmatively demonstrate that defendants did not pay him any money.

¶ 50 Plaintiff's complaint does not expressly allege a consequence of defendants' alleged payment pursuant to the July 9 agreement. To the extent plaintiff relies on partial payment to prove the existence of a contract or defendants' acknowledgment of liability, if that was plaintiff's intent, the payment is merely evidence in support of his claim, it is not the basis of any cause of action. Defendants attack on plaintiff's evidence to prove his claims in this manner is inappropriate and does not defeat the legal sufficiency of the complaint. Defendants essentially argue that it is "not true" that defendants paid him any money under the July 9 agreement.

> "A section 2-619(a)(9) motion is not a substitute for a summary judgment motion. [Citation.] A section 2–619(a)(9) motion to dismiss is the proper vehicle to assert [p]laintiff's complaint states a legally sufficient claim, but an affirmative matter defeats plaintiff's claim. [Citation.] Section 2-619(a)(9) does not authorize motions asserting plaintiff's essential allegations are 'not

> true'--the motion accepts all well-pleaded facts as true--and is not a shortcut to resolve factual issues about the veracity of plaintiff's essential allegations. When the defendant submits a 'Not true' motion, defendant's burden of production has not been met--there is no affirmative matter--and the burden does not shift to the plaintiff to refute the defendant's factual allegations contained in the motion." (Internal quotation marks omitted.) *Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 53.

¶ 51 Defendants' claim that the limited partnership agreement prohibits Cardinal LP from entering into contracts because "the general partner or the management company must be the contracting party" suffers the same infirmity. Nonetheless, that the general partner was the contracting party for the partnership in this transaction with plaintiff is exactly what the complaint alleges.

¶ 52 In this case, plaintiff's allegation of a contract is supported by allegations of specific fact contained in or inferred from the complaint. Defendants simply argue it is "not true" that plaintiff entered a contract with the partnership. If defendants became bound to the August 6, 2009 agreement through McInerney's conduct, the existence or nonexistence of an employment relationship between plaintiff and defendants is irrelevant. Plaintiff's complaint alleges defendants did become so bound, and the absence of an employment relationship--if that fact can be proved--is not an affirmative matter defeating that claim. At best, as previously discussed, defendants might use the lack of such a relationship as evidence of want of consideration for the

August 6, 2009 agreement.

¶ 53 Plaintiff alleges the terms of the parties' agreement, the consideration provided by each party to the agreement, and that the agreement was reduced to writing. The consideration given the partnership under the August 6, 2009 agreement was plaintiff's relinquishing compensation he believed the partnership owed him, regardless whether the partnership agreed. The complaint contains allegations from which it may be inferred that McInerney both could and intended to bind defendants to the agreement. Plaintiff's complaint alleges facts to prove that McInerney created a reasonable impression he was acting on behalf of the partnership and not just Cardinal Corp., and the written instrument supports that claim. Such allegations include his position in the various entities and their relationship to each other.

¶ 54 Defendants have not met their burden of production with regard to their claim the absence of a payment to plaintiff, or McInerney's alleged lack of authority to contract for the partnership defeats his claim. Defendants also attack the copy of the August 6, 2009 agreement plaintiff attached to the third amended complaint as evidence that defendants owe plaintiff the incentive payment. Defendants argue the document is of no weight to prove that allegation because it identifies Bobb and McInerney as Chairman and President and CEO, respectively, which, defendants argue, "are the titles [they] *possibly* hold in Cardinal Growth Corp." (Emphasis added.)

¶ 55 A portion of the limited partnership agreement reads as follows:

> "(2) third parties dealing with Cardinal Growth II, LP (the 'Partnership') can rely conclusively upon the General Partner's

> certification that it is acting on behalf of the Partnership and that its acts are authorized; (3) the General Partner's signature is sufficient to bind the Partnership for all purposes."

¶ 56 Defendants' motion asserts that certification in that context means verification pursuant to 735 ILCS 5/1-109 (West 2012), or a notarized document. Defendants argued that the August 6, 2009 agreement is not signed and, therefore, *under the terms of the limited partnership agreement*, the right of third parties to rely conclusively on the general partner's certification that its acts are authorized on behalf of the partnership, and the general partner's authority to bind the partnership for all purposes, were not triggered. To the extent plaintiff relies on the authority granted the general partner by the limited partnership agreement, defendants argue it is inconsistent for plaintiff to argue he is a third party dealing with the partnership (and may rely on the general partner's certification or signature as binding Cardinal LP) and simultaneously argue he was an employee of Cardinal LP.

¶ 57 Defendants included this argument in the section 2-619 portion of their combined motion to dismiss, but pointed to no affirmative evidence that the titles listed on the August 6, 2009 agreement were Bobb and McInerney's titles in Cardinal Corp. or that they intended to sign solely in those capacities. To the extent defendants intended this argument to attack the face of plaintiff's pleadings under section 2-615, their argument merely goes to the weight of plaintiff's evidence, not the sufficiency of plaintiff's allegations. Plaintiff's complaint alleges McInerney did sign the August 6, 2009 agreement. The language in the August 6, 2009 agreement can reasonably be interpreted to state that the agreement is between Cardinal Corp, Cardinal LLC,

and Cardinal LP. The capacity in which McInerney executed or signed the document, or both, and whether he could bind Cardinal LP, are material questions of fact; they are not affirmative matters defeating plaintiff's claim. Plaintiff's third amended complaint may not be dismissed on this basis. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 660 (2006) ("Where language in the document conflicts with the apparent representation by the officer's signature, an issue of fact is created. [Citation.] *** The trial court, therefore, should not have granted dismissal based on the language of the agreements.") (Internal quotation marks omitted.).

¶ 58 The trial court's judgment granting defendants' motion to dismiss plaintiff's breach of contract claims, to the extent such judgment is based on section 2-619 of the Code, is reversed.

¶ 59 B. Employment Claims

¶ 60 Defendants argue the affirmative matter defeating plaintiff's employment claims is documentary evidence demonstrating that neither Cardinal LP or 221 LLC employed plaintiff. Defendants argue they have no record of plaintiff's employment, and under their limited partnership agreement, Cardinal Corp., as the management company, was responsible for employing the necessary personnel to manage the fund. Finally, defendants argue that the limited partnership agreement "affirmatively prevents individuals like Bobb and McInerney from incurring liability or pledging the [partnership's] assets in the manner in which [plaintiff] alleges gives rise to his claims." Specifically, defendants argued that the terms "principals," "key persons," and "investment committee" (which is how plaintiff described Bobb and McInerney when alleging they acted on behalf of Cardinal LP), when read in context in the limited partnership agreement, "confirm that neither *** were empowered to hire individuals as

employees directly for [Cardinal LP]." Defendants argued that pursuant to the limited partnership agreement, Cardinal LP paid a management fee to the general partner (Cardinal LLC) or to the investment manager (Cardinal Corp.), which is then "responsible for paying all employees it needs to manage the fund." Cardinal LP never had employees, as evidenced by a document titled "Private Placement Memorandum" attached to defendants' motion. This document allegedly identifies plaintiff as an employee of Cardinal Corp. Defendants argued that since plaintiff's employment predates the limited partnership agreement, "there can be no doubt that Plaintiff accepted employment with Cardinal Growth Corp. *** through Bobb and McInerney."

¶ 61 Plaintiff's allegations in support of his employment claims do not rely on a formal employment relationship. Therefore, defendants' affidavit stating that it has no record of plaintiff's employment is completely inapposite. Defendants' argument that "[t]here can be no reasonable inference that from the facts alleged by Plaintiff that Bobb and McInerney acted on behalf of [Cardinal LP]" is belied by the verified third amended complaint. Plaintiff specifically alleges that "Bobb and McInerney approached [plaintiff] regarding employment with Cardinal LP. Bobb and McInerney then informed [plaintiff] that they were in the process of rasing capital in order to establish Cardinal LP." The complaint alleges facts from which it is reasonable to infer that McInerney hired plaintiff for the soon-to-be-formed partnership, or defendants' exercise of joint employment arose after the formation of the partnership, or both. For that reason, defendants' argument that Bobb and McInerney hired plaintiff before the partnership existed is also unpersuasive. Regardless, to the extent defendants' documents refute those

assertions, defendants' affidavit and the limited partnership agreement are "nothing more than evidence upon which defendant[s] expected to contest a vital fact stated in the complaint." *House of Realty, Inc. v. Ziff*, 9 Ill. App. 3d 419, 423 (1972). In that circumstance, defendants' motion to dismiss was improperly granted. *Id*.

¶ 62 The trial court's judgment granting defendants' motion to dismiss plaintiff's employment claims, to the extent such judgment is based on section 2-619 of the Code, is reversed.

¶ 63 CONCLUSION

¶ 64 For all of the foregoing reasons, the trial court's judgment granting defendants' motion to dismiss with prejudice is reversed, and the cause remanded for further proceedings.

¶ 65 Reversed and remanded.