2017 IL App (1st) 160194-U

FOURTH DIVISION
May 11, 2017

No. 1-16-0194

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RRRR, INC., d/b/a BLUE FROG'S LOCAL 22, Plaintiff-Appellant, v. PLAZA 440 PRIVATE RESIDENCES CONDOMINIUM ASSOCIATION, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 06492 Honorable Kathleen M. Pantle, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiff's amended complaint with prejudice when plaintiff lacked standing to raise a breach of contract claim, and failed to state a cause of action for breach of contract, tortious interference with a businsess expectancy, and intentional interference with a contract. The trial court did not err in dismissing the complaint with prejudice where plaintiff failed to file a motion or corrective pleading.

¶ 2 Plaintiff, RRRR, Inc., d/b/a Blue Frog's Local 22, filed an amended complaint alleging a breach of contract, tortious interference with business, and intentional interference with contract

against defendant, Plaza 440 Private Residences Condominium Association, based on defendant's action in performing repair work on the façade of the parties' building starting in April 2015, which required the erection of a protective canopy on the sidewalk in front of plaintiff's business and prevented plaintiff from offering sidewalk café seating at its restaurant. Defendant filed a motion to dismiss under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2014)), which the trial court granted.

¶ 3 Plaintiff appeals, arguing that the trial court erred in finding that (1) plaintiff lacks standing to assert a breach of contract claim; (2) plaintiff failed to state a claim for breach of contract; (3) plaintiff failed to state a claim for tortious interference with business expectancy; (4) plaintiff failed to state a claim for intentional interference with a contract; (5) defendant's defense of privilege and justification were proper when plaintiff's pleadings did not raise a defense and failed to consider competing interests of the parties; (7) plaintiff failed to plead malice by defendant's actions; (8) plaintiff failed to allege facts to recover exemplary damages and attorney fees; and (9) plaintiff's amended complaint should be dismissed with prejudice.

¶ 4 Plaintiff operates a restaurant and bar, and leases the street-level commercial space located at 22 East Hubbard Street/440 North Wabash Avenue in Chicago. Plaintiff's business occupies space as part of a mixed-use high-rise building. Defendant is a not-for-profit corporation condominium association affiliated with the condominium and garage space in the same building. Plaintiff's leased space is not part of the condominium property.

¶ 5 On or about October 2009, plaintiff entered into its lease for its restaurant space with 440 Northbridge Group, LLC (Landlord). Under the lease, the premises was described as "approximately 4,500 square feet *** located at 22 East Hubbard, Chicago, IL. Premises shall also be deemed to include such outdoor seating area as shall be permitted pursuant to this

Lease." Article One, Section O stated that the Landlord consented to plaintiff's intention to replace the existing signage and have outdoor seating on a seasonal basis, but the parties "acknowledge" that outdoor seating was subject to "applicable codes and laws," and "the terms of that certain Reciprocal Easement Agreement [REA] dated as of November 22, 1989 (as supplemented by that certain Subdeclaration dated as of January 13, 2005) ***, and Landlord can make no representation regarding" plaintiff's compliance "with applicable codes and laws and/or the requirements or restrictions of the [REA.]" Since its opening in 2010, plaintiff has operated a seasonal outdoor seating area on the sidewalk along Hubbard Street from April to November. The sidewalk for the outdoor seating area is not owned by the Landlord nor is it part of the building. The sidewalk is owned by the City of Chicago, and plaintiff's operation of the sidewalk seating area is subject to the Municipal Code of Chicago.

¶ 6 Under the recitals in the subject Subdeclaration, the existing REA provided that "in the event the Apartment Owner [owner in fee simple of the residential, retail and garage portions of the property] desires to divide the Apartment Building into separate parcels, the Apartment Owner shall enter into a subdeclaration which delineates the relationship of the new owners of the separated property." The Apartment Owner divided the property into three parcels: Basement Retail Property, First Floor Retail Property, and Residential/Garage Property. In January 2005, the Apartment Owner made and entered into the "Subdeclaration Pertaining to the Residential, Retail and Garage Portions of the Property Commonly Known As 440 North Wabash, Chicago, Illinois" (Subdeclaration), which was recorded with Cook County Recorder of Deeds as Document No. 0501339141. Defendant and the Landlord are owners of parcels of the separated property, and are subject to the Subdeclaration.

¶ 7 The Subdeclaration stated in its recitals,

> "The Retail Properties and the Residential/Garage Property are structurally and functionally dependent upon each other and depend upon each other, to some extent, for structural support, enclosure, ingress and egress, utility services and certain other facilities and components necessary for the operation and use of the Residential/Garage Property and the Retail Properties.
>
> Apartment Owner, as the Owner of the Apartment Building, desires, by execution of this Agreement, to provide for the efficient operation of the Residential/Garage Property , the Basement Retail Property and the First Floor Retail Property as three separate parcels and to address the issues that exist solely between the three New Parcels."

¶ 8 Under the Subdeclaration, defendant has the rights of the party defined as "Owner of the Residential/Garage Property," and the Landlord has the rights of the party defined as "Owner of the First Floor Retail Property." Plaintiff does not own any of the parcels of the property and is not a party to the Subdeclaration.

¶ 9 On March 12, 2015, plaintiff was notified by defendant that defendant intended to begin construction on the building to replace windows the following week. Defendant informed plaintiff that construction would begin on the Hubbard side of the building, which would prevent plaintiff from opening its sidewalk seating until the completion of construction, approximately two to five months. Plaintiff contacted the contractor, who told plaintiff that defendant had not informed them of plaintiff's outdoor seating until March 13, and therefore, the seating area was not factored into the cost of its bid.

¶ 10 On March 20, 2015, plaintiff sent a letter to defendant, advising it that any delay or impediment to plaintiff's patio season will "cause irreparable harm to the business," and put plaintiff "at risk of permanently closing its doors." The letter stated that defendant was in violation of provisions of the Subdeclaration. Specifically, defendant was "intentionally encroaching" upon plaintiff, in that, it was interfering with plaintiff's guests' and invitees' use of the property. The letter further stated that defendant failed to consult with plaintiff or the Landlord to set reasonable limitations to prevent the unreasonable interference, and failed to give reasonable advance notice to plaintiff and the Landlord. Defendant did not respond to plaintiff's letter. On April 3, 2015, plaintiff sent a letter to defendant asking to cease and desist all construction on Hubbard Street. Defendant did not respond.

¶ 11 On April 20, 2015, plaintiff filed its complaint against defendant, alleging claims of breach of contract (easement and Subdeclaration), trespass, and tortious interference with business. Plaintiff also filed an emergency motion for preliminary injunction, or in the alternative, a temporary restraining order. On April 22, 2015, the trial court conducted a hearing and denied plaintiff's motion for a temporary restraining order. On April 28, 2015, defendant moved to dismiss plaintiff's complaint. On April 30, 2015, the trial court entered a status order, allowing plaintiff leave to file a motion to amend its complaint. Defendant's motion to dismiss was entered and continued.

¶ 12 On May 7, 2015, plaintiff filed a motion for leave to file an amended complaint. The amended complaint alleged breach of contract (easement and Subdeclaration), tortious interference with business, and intentional interference with a contract. The trial court set a briefing schedule on plaintiff's motion to amend its complaint. Following briefing, on July 9, 2015, the trial court granted plaintiff's motion for leave to file an amended complaint and

deemed the amended complaint filed that day. The court also granted defendant leave to file an amended motion to dismiss, set a briefing schedule on said motion, and stayed discovery.

¶ 13 On July 23, 2015, defendant filed a motion to dismiss plaintiff's amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure. Defendant argued that (1) plaintiff's request for injunctive relief was moot because construction was complete and the scaffolding removed, (2) plaintiff lacked standing to assert claims under the Subdeclaration because it was not a party to the contract, and (3) plaintiff failed to state a claim of breach of contract, tortious interference with business, and intentional interference with a contract. Following briefing and argument, the court took the matter under advisement. In December 2015, the trial court entered a written order granting defendant's motion to dismiss plaintiff's complaint with prejudice.

¶ 14 This appeal followed.

¶ 15 Section 2-619.1 is a combined motion that incorporates sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-619.1, 2-615, 2-619 (West 2010). We review a trial court's dismissal of a complaint under section 2-619.1 of the Code *de novo*. *Morris v. Harvey Cycle and Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009). A motion to dismiss pursuant to section 2-615 of the Code attacks the legal sufficiency of the complaint by alleging defects on its face. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10. In contrast, a motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the complaint, but raises an affirmative defense or another basis to defeat the claims alleged. *Id.* Section 2-619(a)(9) permits involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014). Lack of standing qualifies as an "affirmative matter" under section 2-619(a)(9) and may properly be challenged

through a motion to dismiss under that statute. *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004).

¶ 16 Plaintiff first argues that the trial court erred in finding that it lacked standing to raise a breach of contract claim because it was not a party to the Subdeclaration. Plaintiff contends that it has standing to pursue a breach of contract claim because it has a leasehold estate in the first floor retail property and is in privity of contract and estate with the Landlord. Defendant maintains that plaintiff, as a tenant of the first floor retail property, lacks standing to assert a claim against defendant under the Subdeclaration.

¶ 17 " 'The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit,' and 'assures that issues are raised only by those parties with a real interest in the outcome of the controversy.' " *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (2010) (quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999)). " '[S]tanding requires some injury in fact to a legally cognizable interest ***.' " *Barnes*, 406 Ill. App. 3d at 6 (quoting *Glisson*, 188 Ill. 2d at 221). "Under Illinois law, lack of standing is an affirmative defense, which is the defendant's burden to plead and prove." *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010) (citing *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22-23 (2004); *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004); *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 494 (1988)).

¶ 18 "The claimed injury may be actual or threatened, and it must be (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). Generally, only a party to a contract, one in privity with a party, or a third-party beneficiary of a contract made for his benefit has standing to sue on a contract. *Law Offices of*

Colleen M. McLaughlin v. First Star Financial Corp., 2011 IL App (1st) 101849, ¶ 18; *Wilde v. First Federal Savings & Loan Association*, 134 Ill. App. 3d 722, 731 (1985).

¶ 19 It is uncontested that plaintiff was not a party to the Subdeclaration. However, plaintiff asserts that its leasehold interest in the first floor retail property allows for the rights and interests granted in the Subdeclaration to the "owner of the first floor retail property" to be enforceable by it.

¶ 20 The Subdeclaration allocated the property into three portions: owner of the residential/garage property, owner of the basement retail property, and owner of the first floor retail property. Section 1.19 defines "owner of the first floor retail property" as "the person or persons or entity or entities whose estates of interests, individually or collectively, aggregate, at any point in time, to fee simple ownership of the First Floor Retail Property."

¶ 21 " 'Fee simple' means absolute perfect title." *Baker v. Forest Preserve District of Cook County*, 2015 IL App (1st) 141157, ¶ 41 (citing *Frink v. Darst*, 14 Ill. 304, 309 (1853)). "The term is one that defines 'the quantity of the estate.' " *Id.* (quoting *Frink*, 14 Ill. at 309). Black's Law Dictionary defines "fee simple" as "An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs; esp., a fee simple absolute." Black's Law Dictionary (10th ed. 2014). In contrast, "tenant" is defined as "Someone who holds or possesses lands or tenements by any kind of right or title." Black's Law Dictionary (10th ed. 2014). Additionally, "leasehold" is defined as "A tenant's possessory estate in land or premises, the four types being the tenancy for years, the periodic tenancy, the tenancy at will, and the tenancy at sufferance." Black's Law Dictionary (10th ed. 2014). "[A] lease confers the right to exclusively possess and control property." *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

¶ 22 Plaintiff admits that it does not hold fee simple ownership of the first floor retail property, but argues that its leasehold interest as a tenant grants him an interest under the Subdeclaration because when combined with the Landlord's interest it combines to equal a fee simple ownership. Plaintiff's argument lacks support under Illinois case law and the language of the Subdeclaration.

¶ 23 "A lease also is a conveyance of an interest in real estate, although it conveys a lesser interest than does a deed executed to consummate a sale." *8930 S. Harlem, Ltd. v. Moore*, 77 Ill. 2d 212, 220 (1979). "The leasehold interest conveyed consisted of the right of the use and possession of the premises for the full term of the lease." *Id.* According to plaintiff, after entering into the lease agreement, the Landlord held a "reversion in fee simple," while it held possession rights, such that these interests "aggregate" into fee simple. In support, plaintiff cites several cases which challenged the right of possession by lessee over the realty owner. See *Pierce v. Pierce*, 351 Ill. App 336, 342 (1953); *Ball v. Chadwick*, 46 Ill. 28, 33 (1867); *Mann v. Mann*, 283 Ill. App. 3d 915, 920 (1996). Significantly, none of these cases considered whether a lessee acquired partial ownership rights, the issue here, but rather, all related to the right of possession of the property covered by the lease, which is not at issue in this case. No case cited by plaintiff establishes that a lessee holds any portion of the title as an owner of real estate in fee simple.

¶ 24 A tenant leasehold interest does not equal a fee simple, or any portion thereof. Under its lease with the Landlord, plaintiff acquired the exclusive right to possession. However, plaintiff has offered no support for its contention that possession of the property divested the Landlord of his rights as holder of a fee simple. The Subdeclaration specifically defines owner as those with interests equivalent to "fee simple ownership." Plaintiff has no such ownership interest, and does not fall under the definition of "owner of first floor retail property."

¶ 25 Further, the Subdeclaration includes a provision supporting our conclusion that plaintiff was not granted any rights under the document. Section 14.9 states:

> "This Agreement is not intended to give or confer any benefits, rights, privileges, claims, actions or remedies to any person or entity as a third party beneficiary (except the holders of the First Mortgages) under any statutes, laws, codes, ordinances, rules, regulations, orders, decrees or otherwise."

Thus, the Subdeclaration explicitly stated that it was not intended to benefit nonparties, such as plaintiff. Since plaintiff was not the "owner of the first floor retail property," plaintiff was not a party to the Subdeclaration and lacked standing to pursue a breach of contract claim under the Subdeclaration.

¶ 26 Plaintiff also argues that it has standing to pursue its breach of contract claim because it was in privity of contract with the Landlord. However, as defendant points out, plaintiff failed to raise this argument in the trial court. An appellant may not raise a new argument for the first time on appeal; arguments not raised in the trial court are considered forfeited. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 413 (2002). Accordingly, plaintiff forfeited this argument that it was in privity with the Landlord, and we will not consider it on appeal. Accordingly, we find that the trial court properly dismissed plaintiff's breach of contract count under section 2-619 for lack of standing.

¶ 27 Plaintiff further contends that defendant exceeded the scope of the easements set forth in the Subdeclaration and interfered with plaintiff's reasonable use and enjoyment of the first floor retail property. Plaintiff makes a lengthy argument regarding the easements in the Subdeclaration and how defendant intentionally encroached the first floor retail property, so as to have

unreasonably interfered with plaintiff's use and enjoyment of the premises. However, plaintiff fails to explain how any encroachment under the Subdeclaration gave plaintiff standing to pursue its breach of contract claim. Specifically, plaintiff refers to the following portion of section 3.2(c) of the Subdeclaration.

> "In no event shall an Easement for any encroachment upon the First Floor Retail Property be created in favor of the Residential/Garage Property or the Basement Retail Property if such encroachment is intentionally made by such Owner in connection with the reconstruction, repair or alteration of the Apartment Building subsequent to the execution of this Agreement or if such encroachment unreasonably interferes with the reasonable use and enjoyment of the First Floor Retail Property by the Owner of the First Floor Retail Property or *its tenants, guests, or invitees*." (Emphasis added.)

¶ 28 Plaintiff seems to be using this language as a means to gain standing to pursue its breach of contract claim, but notably, plaintiff does not refer to its standing in this argument. At best we can discern, plaintiff appears to be seeking a third party beneficiary status under the easement language. However, as we already discussed, the Subdeclaration explicitly stated that it "is not intended to give or confer any benefits, rights, privileges, claims, actions or remedies" to third party beneficiaries, and therefore, plaintiff cannot seek third party beneficiary status to raise this argument. Plaintiff's argument fails to directly address how it has standing to raise this argument under its breach of contract claim when it was not a party to the contract and was not a third party beneficiary. Rather, plaintiff's argument obfuscates the question before us, how does the

tenant of the first floor retail property have standing to raise a breach of contract claim against the owner of the residential/garage property, which we have already answered in the negative. "A third party has no rights to damages from a breach of a contract entered into by others unless the agreed-to provision was intentionally included for the direct benefit of the third party." *Estate of Willis v. Kiferbaum Construction Corp.*, 357 Ill. App. 3d 1002, 1008 (2005). "Liability to a third party must appear affirmatively in the contract language and the circumstances of the parties at the time of execution; it cannot be expanded simply because the circumstances justify or demand further liability." *Id.*

¶ 29 Moreover, plaintiff fails to recognize that the Landlord has no rights over the public sidewalk under the Subdeclaration. Even if plaintiff could be considered a third-party beneficiary, which it is not, third-party beneficiaries of a contract have no greater rights than the party they wish to claim under." *Kessler, Merci, & Lochner, Inc. v. Pioneer Bank & Trust Co.*, 101 Ill. App. 3d 502, 508-09 (1981) (citing *Mark v. New York Stock Exchange*, 58 Ill. App. 3d 657, 659 (1978)). Since the Landlord has no rights to the public sidewalk, plaintiff cannot assume any such right under the Subdeclaration. Thus, plaintiff's assertion that defendant exceeded the easement fails.

¶ 30 Next, we consider the dismissal of plaintiff's complaint under section 2-615. A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). 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 light most favorable to the plaintiff. *Marshall*, 222 Ill. 2d at 429. "Thus, 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." *Marshall*, 222 Ill. 2d at 429. A plaintiff is not required to set forth evidence in his complaint, but he must allege sufficient facts to bring a claim within a legally cognizable cause of action. *Marshall*, 222 Ill. 2d at 429.

¶ 31 Count I of plaintiff's amended complaint claims a breach of contract, specifically the Subdeclaration, by defendant. "To establish a breach of contract claim, a plaintiff must prove the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and damages or injury to the plaintiff resulting from the breach." *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 13. "Illinois is a fact-pleading jurisdiction; 'a plaintiff must allege facts,' not merely conclusions, 'that are sufficient to bring his claim within the scope of a legally recognized cause of action.' " *Babbitt Municipalities, Inc. v. Health Care Service Corp.*, 2016 IL App (1st) 152662, ¶ 29 (quoting *Teter v. Clemens*, 112 Ill. 2d 252, 256 (1986)).

¶ 32 Here, plaintiff's breach of contract claim fails for the same reason it lacked standing, plaintiff was not a party to the contract, and thus, had no obligation to perform under the Subdeclaration. In its response to defendant's motion to dismiss, plaintiff reiterated its contention that it was an owner under the Subdeclaration, and a contractual relationship existed between plaintiff and defendant. We have already rejected plaintiff's argument that it was an owner under the Subdeclaration.

¶ 33 However, on appeal, plaintiff presents two new arguments to support its breach of contract claim: it was in privity with Landlord, and thus may sue for breach of contract, and that it was required to perform under the Subdeclaration by complying with the requirements and restrictions in the Subdeclaration, by allowing the easement to burden its property, and that a portion of its rent to the Landlord included taxes and operating expenses under the

Subdeclaration. As we have already observed, an appellant may not raise new arguments for the first time on appeal and are forfeited. *Robinson*, 201 Ill. 2d at 413. Accordingly, we will not consider these newly-raised arguments for the first time on appeal. Since plaintiff was not a party to the Subdeclaration and had no obligations under the contract, it cannot state a claim for breach of contract based on the Subdeclaration. Therefore, the trial court properly dismissed plaintiff's claim for breach of contract for failure to state a cause of action.

¶ 34 Plaintiff next argues that it stated a cause of action for tortious interference with a business expectancy. Plaintiff bases its claim against defendant on "the loss of customers and sale[s] caused by the installation of the scaffolding and construction work."

¶ 35 "The elements of the tort of intentional interference with a business expectancy include (1) a reasonable expectancy of entering into a valid business relationship; (2) the defendant's knowledge of the expectancy; (3) the defendant's intentional and unjustified interference that prevents the realization of the business expectancy; and (4) damages resulting from the interference." *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 862 (2008). "A cause of action for intentional interference with a business expectancy need not be based on an enforceable contract that is interfered with; rather, it is the interference with the relationship that creates the actionable tort." *Id.* "This tort recognizes that a person's business relationships constitute a property interest and, as such, are entitled to protection from unjustified tampering by another." *Id.*

¶ 36 "Plaintiff states a cause of action only if he alleges a business expectancy with a specific third party." *Schuler v. Abbott Laboratories*, 265 Ill. App. 3d 991, 994 (1993). "To prevail on a claim, it is insufficient for plaintiff to merely show that defendant interfered with a business expectancy." *Fidelity National Title Insurance Co. of N.Y. v. Westhaven Properties Partnership*,

386 Ill. App. 3d 201, 219 (2007). "Instead, plaintiff must show 'purposeful' or 'intentional' interference, which refers to some impropriety committed by the defendant in interfering with plaintiff's business expectancy." *Id.* (quoting *Romanek v. Connelly*, 324 Ill. App. 3d 393, 406 (2001)); see also Restatement (Second) of Torts § 766B, Comment a, at 20 (1979) ("In order for the actor to held liable, this Section requires that his interference be improper"). "In other words, plaintiff must show that defendant acted intentionally with the purpose of injuring the plaintiff's expectancy." *Id.* "As this court has stated, '[t]o the extent that a party acts to enhance its own business interests, it has a privilege to act in a way that may harm the business expectancy of others and that privilege is greater [ ] where *** no contract exists between the plaintiff and the entity with which the business relationship is anticipated.' " *Id.* (quoting *Curt Bullock Builders, Inc. v. H.S.S. Development, Inc.*, 225 Ill. App. 3d 9, 16 (1992)).

¶ 37 Plaintiff contends that it has set forth sufficient facts to allege a cause of action for tortious interference with a business expectancy. According to plaintiff, it alleged that it had an expectancy of continuing or entering into business relationships with an identifiable class of third persons, *i.e.*, existing or new customers that frequent plaintiff's restaurant and bar, including those wishing to dine in the sidewalk seating area. However, defendant's actions in performing building repair work requiring scaffolding on the sidewalk were justified based on the Subdeclaration. Plaintiff alleged in its complaint that defendant's construction was to replace windows. When justification appears on the face of the complaint, it can be properly considered on the motion to dismiss. *Philip I. Mappa Interests, Ltd. v. Kendle*, 196 Ill. App. 3d 703, 709 (1990) (citing *Zamouski v. Gerrard*, 1 Ill. App. 3d 890, 897 (1971)); see also *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 20 (finding that an attorney litigation privilege appeared

on the face of the complaint, thus making consideration appropriate under a section 2-615 motion to dismiss).

¶ 38 Section 8.1 of the Subdeclaration provides, in relevant part:

> "**Service and Maintenance.** The Owner of the Residential/Garage Property [defendant] shall furnish, or cause to be furnished, as and when necessary, the following services to the Owner of the Retail Properties to the extent required and on the same basis as such services are provided to residents of the Residential/Garage Property, to the extent such services are the responsibility of the Owner of the Apartment Building under the Existing REA [Reciprocal Easement Agreement dated as of November 22, 1989]
>
> (A) Façade. Maintenance, repair and replacement of the Apartment Building Façade, excluding the plate glass located in the First Floor Retail Property, which shall be the responsibility of the Owner of the First Floor Retail Property."

¶ 39 Further, the Subdeclaration set forth easements burdening the first floor retail property, as follows.

> "The Owner of the First Floor Retail Property hereby grants, declares and creates the following perpetual Easements burdening the First Floor Retail Property, and, except to the extent the grant of any Easement is specifically made the exclusive use and enjoyment of one or more, but not all, specific portion(s) of the

Apartment Building, all such Easements shall be for the mutual, non-exclusive benefit of the Residential/Garage Property and the Basement Retail Property:

***

(C) An exclusive Easement to maintain encroachments in the event and to the extent that, by reason of the original construction of the Apartment Building, any reconstruction thereof, minor surveying errors, or the subsequent settlement or shifting of any part of the Apartment Building, any part of any of the Residential/Garage Property or the Basement Retail Property encroaches or shall hereafter encroach upon any part of the First Floor Retail Property. Such Easement to maintain encroachments shall exist only as long as the encroaching portion of the Apartment Building continues to exist. In no event shall an Easement for any encroachment upon the First Floor Retail Property be created in favor of the Residential/Garage Property or the Basement Retail Property if such encroachment is intentionally made by such Owner in connection with the reconstruction, repair or alteration of the Apartment Building subsequent to the execution of this Agreement or if such encroachment unreasonably interferes with the reasonable use and enjoyment of the First Floor Retail Property by the Owner of the First Floor Retail Property or its tenants, guests, or invitees.

***

(F) A non-exclusive Easement over, on, across and through the First Floor Retail Property to the extent reasonably necessary (i) to permit the maintenance, repair, replacement, restoration or reconstruction of the Residential/Garage Property or the Basement Retail Property, as required or permitted pursuant to this Agreement, (ii) to exercise the Easement set forth in this Section 3.1, (iii) for ingress and egress by persons, materials and equipment during an Emergency Situation, or (iv) to construct and maintain substitute or additional structural support required by the Existing REA."

¶ 40 Thus, under the Subdeclaration, defendant was obligated to perform repair work on the façade and had an easement that burdened the first floor retail property. Plaintiff asserts that its amended complaint did not raise privilege or justification, nor did defendant "purport" to raise privilege or justification. However, in its motion to dismiss, defendant referred to its obligation to make façade repairs under section 8.1 of the Subdeclaration. This reference sufficiently raised the issue of privilege and justification since the Subdeclaration is attached to plaintiff's amended complaint.

¶ 41 "[J]ustification can be raised by either plaintiff or by defendant." *Kendle*, 196 Ill. App. 3d at 709. "Courts recognize justified conduct when the defendant was acting to protect an interest which the law considers to be of equal or greater value than plaintiff's interest." *Id.* "It is well-established that actions to protect rights under a contract and actions necessary to protect rights in real estate are equally necessary and equally substantial." *Id.* Where the conduct of a

defendant in an interference action was privileged, it is the plaintiff's burden to plead and prove that the defendant's conduct was unjustified or malicious. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 156 (1989). In this context, "malicious" means that the "interference must have been intentional and without justification." *Id.* at 156-57.

¶ 42 Since defendant was justified in making repair work on the façade, plaintiff was required to allege malicious conduct by defendant. Plaintiff contends that it did allege malicious intent on the part of defendant by failing to give reasonable notice and failing to minimize the effect on plaintiff's use and enjoyment of the first floor retail property. We disagree with plaintiff. Defendant notified plaintiff a week prior to the repair work began and prior to the beginning of plaintiff's seasonal sidewalk seating, and we find nothing malicious in this notice. We also fail to find malicious intent by not minimizing the effect on plaintiff. As the Subdeclaration states, defendant had an easement to burden the first floor retail property for its repair work. Defendant's actions were in accordance with the Subdeclaration and plaintiff's complaint does not allege or demonstrate any malicious conduct.

¶ 43 Further, as defendant points out, its permit for the repair work issued by the City of Chicago required a protective canopy, which resulted in a partial closure of the sidewalk. Defendant's adherence with the City permit was not indicative of malicious intent. Rather, defendant was obligated to adhere to the requirements of its permits to perform its repair work safely. The interference with plaintiff's business interest was justified. Thus, plaintiff cannot state a claim of intentional interference with a business expectancy and this count was properly dismissed by the trial court.

¶ 44 Plaintiff next asserts that it alleged all necessary elements to state a cause of action of intentional interference with a contract. Specifically, plaintiff contends that its amended

complaint claimed intentional interference against defendant due to the Landlord's breach of the lease with plaintiff. According to plaintiff, the scaffolding and construction work caused the Landlord to breach the lease terms granting plaintiff use of the sidewalk for an outside seating area.

¶ 45 "A claim for tortious interference with a contractual relationship consists of the following elements: '(1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of the contract; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's conduct; and (5) damages.' " *Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d 434, 444 (2011) (quoting *Complete Conference Coordinators, Inc. v. Kumon North America, Inc.*, 394 Ill. App. 3d 105, 109 (2009)). While plaintiff did have an enforceable contract with the Landlord, and defendant was aware of the contract, plaintiff has failed to allege facts showing that the Landlord breached the contract.

¶ 46 Article One, Section D defined the premises, which also was "deemed to include such outdoor seating area as shall be permitted pursuant to this Lease." Article One, Section O of the lease stated that the Landlord consented to plaintiff's intention to have outdoor seating on a seasonal basis, but the parties "acknowledge" that outdoor seating was subject to "applicable codes and laws," and "the terms of that certain Reciprocal Easement Agreement dated as of November 22, 1989 (as supplemented by that certain Subdeclaration dated as of January 13, 2005) ***, and Landlord can make no representation regarding" plaintiff's ability to complete and/or compliance "with applicable codes and laws and/or the requirements or restrictions of the [Reciprocal Easement Agreement.]"

¶ 47 The plain language of this contact cannot support an allegation that the Landlord breached the lease. Under the lease, the Landlord consented to plaintiff's use of the sidewalk for an outdoor seating area, but made "no representation" regarding plaintiff's ability to operate such outdoor seating, noting that such operation was subject to the Subdeclaration and applicable codes and laws. This language did not provide plaintiff a clear right to operate the sidewalk seating area, but rather, clarified that the use of the sidewalk was subject to restrictions.

¶ 48 Moreover, we point out that the outdoor seating area at issue was on the public sidewalk, which is uncontested by the parties. The public sidewalk was not owned by the Landlord, and as such, a property lease could not convey property not owned by the Landlord. As plaintiff acknowledges, the operation of its sidewalk seating area was subject to a permit issued by the City of Chicago. As the trial court stated in its order, "plaintiff has not cited language in the lease promising continuous, unfettered access to the patio. Instead, the lease shows that Landlord avoided making any such representation." Since the Landlord did not breach the lease due to defendant's repair work and scaffolding, plaintiff cannot allege intentional interference with a contract. Accordingly, the trial court properly dismissed this count for failure to state a cause of action.

¶ 49 Next, plaintiff argues that it alleged sufficient facts to recover exemplary damages and attorney fees. In its order granting defendant's motion to dismiss, the trial court found that even if plaintiff's amended complaint were to survive the motion to dismiss, plaintiff was not entitled to exemplary damages or attorney fees. However, since we have already concluded that plaintiff lacked standing to pursue a breach of contract claim and that plaintiff cannot state a cause of action for each of the counts in its complaint, we need not reach the question of whether plaintiff would be able to recover exemplary damages and/or attorney fees. Because plaintiff's complaint

was properly dismissed, the issue of exemplary damages and/or attorney fees is moot. Consequently, we need not consider this claim further.

¶ 50 Finally, plaintiff contends that the trial court erred in dismissing its complaint with prejudice. Plaintiff notes that at oral argument on the motion to dismiss, it requested leave to amend the complaint if the trial court granted defendant's motion, but the trial court's order dismissed its amended complaint with prejudice. No motion seeking leave to file an amended complaint or a proposed second amended complaint was filed in the trial court.

¶ 51 Plaintiffs do not have an absolute and unlimited right to amend and whether the trial court grants leave to amend is at the court's sound discretion. *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 6-7 (2004). "The relevant factors considered in determining whether the circuit court abused its discretion are: '(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.' " *Id.* at 7 (quoting *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992)).

¶ 52 Here, plaintiff offered no proposed amendments to cure the defective pleading. The only request for leave to amend was at the oral argument on defendant's motion in which plaintiff's counsel stated that,

> "of course we would seek leave to amend. There's no basis for a dismissal with prejudice on a first amended complaint in a case that is less than six months old, your Honor. We haven't had multiple opportunities. We came in on an emergency motion and we amended. And as we discussed earlier, the injunctive

> component of this case is going to be stricken with regards to the wherefore clause. So there is a high probability that we will be seeking to amend again prior to this case going to trial."

¶ 53 Plaintiff did not submit a proposed second amended complaint with this oral request. Absent a proposed amended complaint, we are unable to determine whether the amendment would cure the defective pleading. Thus, the first factor has not been satisfied, and the trial court did not abuse its discretion in denying plaintiff leave to amend because it never filed a proper motion. See *In re Huron*, 2012 IL App (1st) 103519, ¶ 68 (holding that a proper motion to amend was not submitted where, in his response to the motion to dismiss, the plaintiff wrote, "[i]f the court is inclined to grant any portion of Defendants' Motions, Plaintiffs respectfully request 45 days leave to replead.").

¶ 54 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 55 Affirmed.