No. 2—09—1296
Order filed April 5, 2011

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

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RALPH E. REGNER,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 08—AR—750
	)	
GARY LANG CHEVROLET,	)	Honorable
	)	John D. Bolger,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: (1) By assuming, without record support, that the trial court dismissed his complaint on the basis of *res judicata* and not on the basis of the complaint's legal insufficiency, and by failing to develop any argument in response to defendant's assertion that legal insufficiency was a proper basis, plaintiff forfeited any argument that the complaint was sufficient; (2) plaintiff's complaint for breach of contract was legally insufficient, as the contract did not impose on defendant the duty that defendant allegedly breached.

The plaintiff, Ralph E. Regner, sued Gary Lang Chevrolet,[1] for breach of contract. Gary Lang moved for the action's dismissal, citing three bases: (1) bar of the claim by *res judicata*, (2) time bar, and (3) failure to state a claim on which relief could be granted. The court dismissed, but the record does not show the basis. Regner's appellate brief addressed only Gary Lang's *res judicata* defense, and Gary Lang has responded by arguing that all of the bases that it asserted below are sufficient to support the dismissal. We hold that Regner, by failing to make a proper argument, has forfeited any claim of error based on dismissal for failure to state a claim. Moreover, the complaint indeed was fatally and irreparably defective. We therefore affirm the dismissal.

BACKGROUND

On November 19, 2008, Regner filed a breach-of-contract complaint against Gary Lang. According to the complaint, on June 10, 1997, Regner bought a new pickup from Gary Lang. A written installment sales contract stated the terms of the purchase. Regner asserted that "one of the terms [of] that contract, was the furnishing of disability insurance by LANG or its agents or affiliates which would pay the [installment] payments and finance charges in the event REGNER was unable to work or died unexpectedly." Regner paid for the insurance at the time of purchase. He completed his payments on the pickup in the year 2000. "[D]uring the time of [the installment] payments [he] became disabled and attempted to utilize the disability insurance he had purchased from LANG but said claim was rejected with LANG'S agent, the insurance company, refusing to make the payments required on behalf of REGNER."

Regner included the installment sales contract as an exhibit to the complaint. It states:

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[1]The defendant is properly known as Gary Lang Chevrolet, Inc. "Gary Lang Chevrolet" is the way Regner stated the name in the complaint.

> "Credit Insurance is not required by Seller nor is it a factor in approval of the extension of credit. No credit insurance is to be provided unless the Buyer signs the appropriate authorization below. Group Credit Insurance is available for the term of the credit upon acceptance by insurer at the following costs: Credit Life Insurance $1225.27[;] Credit Disability Insurance $1406.56."

Regner signed the line saying that he "desire[d]" credit life and disability insurance.

The contract also included a box with the caption "Notice of Proposed Group Credit Life Insurance." The text in that box further provides:

> "If a charge is made above for credit life insurance and if such insurance is to be procured by assignee, the undersigned takes notice that the decreasing term insurance written under a Group Credit Life Insurance Policy is to be purchased on the life of the Buyer or Buyers who signed above requesting it, subject to acceptance by the insurer and issuance of a certificate by UNION FIDELITY INSURANCE CO. CHICAGO, IL[.]"

Gary Lang appeared and filed a two-part motion to dismiss. The first part cited section 2—615 of the Code of Civil Procedure (Code) (735 ILCS 5/2—615 (West 2008)); in this part, Gary Lang argued that Union Fidelity, and not it, was a party to the contract, so that the complaint failed to state a claim on which relief could be granted.

Along with the installment sales contract, Gary Lang attached a document headed "Union Fidelity Life Insurance Company." The first section is captioned "CERTIFICATE OF INSURANCE CREDIT LIFE—CREDIT DISABILITY." The next section, boxed, is captioned "APPLICATION FOR INSURANCE." This document also has Regner's certification that he is in good health and

a provision that "any untruthful answer or misrepresentation may be a basis for a denial of benefits or the voiding of this certificate of insurance."

A further exhibit to Gary Lang's motion was a copy of a letter from Union Fidelity to the financing bank, with a copy to Gary Lang, in which Union Fidelity stated that it had rescinded Regner's insurance.

The second part of Gary Lang's motion cited section 2—619 of the Code (735 ILCS 5/2—619 (West 2008)). In this part, Gary Lang asserted two affirmative defenses: (1) that the action came too late, so that the statute of limitations barred it, and (2) that, because Regner had filed a nearly identical suit in a different county and the court had dismissed it, *res judicata* barred the claim.

Regner filed a response that argued, among other things, that the court had to accept his interpretation of the contract documents for the purposes of the motion. He specifically asserted that his complaint was one for breach of contract and not one asserting a fraud or other tort claim. He did not dispute the authenticity of the documents provided by Gary Lang, nor did he contest their relevance.

The court later gave Regner more time to "file a brief addressing the applicability of Supreme Court Rule 273 to defendant's motion." Rule 273 states that "[u]nless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." Ill. S. Ct. R. 273 (eff. Jan. 1, 1967). No such brief appears in the record.

The court granted the motion to dismiss. The dismissal order did not specify which of Gary Lang's arguments it had accepted. Regner timely appealed. The record on appeal lacks any transcripts of the court hearings and any transcript substitutes, such as a bystander's report or an agreed statement of facts. See Ill. Sup. Ct. R. 329 (eff. Jan. 1, 2006).

On appeal, Regner has submitted a primary brief that argues only that dismissal based on *res judicata* was improper, without explaining why, based on the record, we should conclude that *res judicata* was the basis for the dismissal. Further, his statement of facts fails completely to describe the procedural history of the case. Allegations in support of his claim, which he states as fact, make up the larger part of the statement. For instance, Regner states that "[a]s part of [his] agreement [with Gary Lang], the Plaintiff-Appellant believed he was also getting disability insurance which was provided by Defendant-Appellee or its agents or affiliates."

Gary Lang has filed a response brief that includes a statement of facts that is also without any description of the procedural history of the case. This statement also contains contentions of Gary Lang's stated as if they were facts. Gary Lang argues that *res judicata*, statute of limitations, and failure to state a claim *all* were proper bases for the dismissal.

In reply to Gary Lang's argument that failure to state a cause of action was a proper basis for dismissal, Regner argues only that the "Defendant-Appellee never told the Plaintiff-Appellant that his medical history would affect his ability to get disability insurance. The failure to inform the Plaintiff-Appellant that he may not get the disability insurance was a breach of the contract." The reply brief does not explain why Regner did not address all three bases in his primary brief.

ANALYSIS

Initially, we point out to the parties that, under Illinois Supreme Court Rule 341(h)(6) (eff. Sept. 1, 2006), a statement of facts is to be without argument or comment. Statements of facts should tell us what we will find in the record and where we will find it. To state allegations and contentions as fact is argumentative. Worse, it is misleading. Moreover, for a statement of facts to "contain the facts necessary to an understanding of the case" (Ill. S. Ct. R. 341(h)(6) (eff. Sept. 1, 2006)) it must describe the procedural history of the case, something that the briefs of both parties fail to do.

Turning to the merits of the matter, we must confront the inadequacy of Regner's argument. Nothing in the record supports his implication that the sole basis on which the trial court dismissed was *res judicata*. The record might hint that this was the case in that it shows that Regner failed to file a brief discussing Rule 273, a rule that was relevant only to the *res judicata* issue. This, however, is not clear enough for us simply to assume that the court dismissed based on a *res judicata* bar.[2] Even if it did, Gary Lang was entitled to proffer the other two grounds as alternative bases to affirm. See *Cwik v. Giannoulias*, 237 Ill. 2d 409, 424 (2010) (the court may affirm on *any* basis supported by the record). Thus, to show that the dismissal was error, Regner had to show that *none* of the three bases was sufficient. In his primary brief, Regner did not address the sufficiency of the

[2]If Regner has based his assumption that *res judicata* was the reason for the dismissal on some oral statement of the trial court's, for us to consider that statement he needed to make it a matter of record. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984) ("an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error"). If he could not persuade the court to issue a written order that stated the reason for dismissal, he should have provided a transcript of the relevant hearing or a transcript substitute.

complaint or his compliance with the statute of limitations. Indeed, he did not even mention the other bases that Gary Lang had asserted. Further, the part of his reply brief that is responsive to Gary Lang's argument that the complaint was insufficient; Regner provides nothing but a bare assertion that Gary Lang's failure to tell him that his health history could affect his insurability was a breach of contract. Thus, he has forfeited any argument on that basis. See *Vancura v. Katris,* 238 Ill. 2d 352, 369-70 (2010) (holding that a party forfeits arguments when he or she fails to develop them and support them by citation to relevant authority).

Forfeiture aside, Regner's complaint is effectively self-defeating. In outline, the problem with his complaint is as follows. We consider the installment sales contract as part of the complaint. See 735 ILCS 5/2—606 (West 2008) (when a claim is founded on a written instrument, the plaintiff must include that instrument with the complaint and it is a part of the complaint). The installment sales agreement was not itself a contract for insurance, as it lacks specifics of the coverage intended. However, the agreement did contemplate that Union Fidelity would provide insurance to Regner, something that would necessarily require an additional agreement between Union Fidelity and Regner, between Union Fidelity and Gary Lang, or among all three. The complaint implies that such an agreement was made, in that it discusses Regner's attempts to get compensation from an insurance company, but says nothing of what the terms of that agreement were. Nothing in the installment agreement suggests that Gary Lang had any duty regarding insurance other than acting as an intermediary with Union Fidelity. Nothing in the complaint suggests that Gary Lang breached that duty. If Regner intended to allege that Gary Lang had duties under the *insurance* contract, he failed to put those allegations in the complaint. He also failed to seek leave to amend his complaint to add such allegations—this, despite obvious signs that such pleading was necessary for the viability

of the complaint. As it stands, the complaint implies that Gary Lang fulfilled the only duty that the complaint properly alleged it to have.

Regner's reply to Gary Lang's argument regarding the adequacy of the complaint helps not at all. He replied only that the "Defendant-Appellee never told the Plaintiff-Appellant that his medical history would affect his ability to get disability insurance. The failure to inform the Plaintiff-Appellant that he may not get the disability insurance was a breach of the contract." We are at a loss to explain what this argument has to do with any contract whose existence Regner has previously alleged. Nothing in the installment agreement required Gary Lang to explain the terms of the disability insurance to him. Regner seems to be asserting a fraud theory, something that he disavowed in the trial court when responding to Gary Lang's assertion of a statute-of-limitations defense.

CONCLUSION

For the reasons we have stated, we affirm the judgment of the circuit court of McHenry County.

Affirmed.