

2013 IL App (2d) 121174-U
No. 2-12-1174
Order filed November 7, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

AMERICAN CONSUMER PRODUCTS CORPORATION, ROBIN ZAHRAN, and KAREN ZAHRAN,)	Appeal from the Circuit Court of Du Page County.
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 09-L-1111
)	
INLAND REAL ESTATE AUCTIONS, INC., FRANK DILIBERTO, PAUL L. ROGERS, and THE INLAND REAL ESTATE GROUP OF COMPANIES, INC.,)	
)	Honorable
)	Patrick J. Leston,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting defendants' motion to dismiss Robin and Karen Zahran as plaintiffs for lack of standing. However, the trial court abused its discretion in denying the motion by American Consumer Products Corporation (ACPC) to vacate the order dismissing ACPC's action for want of prosecution, because the trial court incorrectly believed that ACPC lacked standing to maintain the action following its bankruptcy, and defendants did not meet their burden of showing that ACPC could not sue because it was a foreign company transacting business in Illinois without authority. Therefore, we affirmed in part, reversed in part, and remanded the cause.

¶ 2 Plaintiffs, American Consumer Products Corporation (ACPC), Robin Zahran, and Karen Zahran, brought suit against defendants, Inland Real Estate Auctions, Inc. (Inland Auctions), Frank Diliberto, Paul L. Rogers, and The Inland Real Estate Group of Companies, Inc. (Inland Group), alleging that defendants failed to properly market and auction a property owned by ACPC. The trial court granted defendants' motion to dismiss Robin and Karen Zahran as plaintiffs for lack of standing. Subsequently, plaintiffs' counsel withdrew, and the trial court granted defendants' motion to dismiss the action for want of prosecution. ACPC later moved to vacate the dismissal, but the trial court denied the motion. On appeal, plaintiffs argue that the trial court abused its discretion in denying the motion to vacate, because the trial court incorrectly determined that ACPC lacked standing because it was dissolved in bankruptcy and because it was a foreign corporation transacting business in this state without authority. Plaintiffs also argue that the trial court erred in dismissing Robin and Karen Zahran as plaintiffs based on lack of standing. We agree with plaintiffs' former argument and disagree with their latter argument. We therefore affirm in part, reverse in part, and remand the cause.

¶ 3

I. BACKGROUND

¶ 4 Plaintiffs filed their initial complaint against defendants on September 1, 2009, and they filed an 11-count, second amended complaint on May 3, 2010. Plaintiffs alleged as follows. ACPC was a corporation incorporated in Georgia, with its principal office located in Oak Brook, Illinois. Robin and Karen Zahran owned ACPC. Inland Auctions was engaged in the business of real estate auctions, and defendant The Inland Group was its parent company. Diliberto was Inland Auction's chief executive officer, and Rogers was its senior vice president. On December 31, 2007, plaintiffs entered into a forbearance agreement with Suntrust Bank. Pursuant to the

agreement, Suntrust Bank agreed to restrain collection efforts on defaulted loans personally guaranteed by the Zahrans and to forgo foreclosure on commercial property at 14 Downing Drive, Phenix City, Alabama. That property was owned by plaintiffs, financed and mortgaged through Suntrust Bank, secured by personal guarantees by the Zahrans, and cross-collateralized by other real properties that the Zahrans owned. Forbearance was conditioned in part on plaintiffs entering an agreement to auction the subject property by April 30, 2008. Inland Group and Inland Auctions (collectively the Inland Companies) represented, through Diliberto and Rogers, that they had real estate brokers who were licensed in Alabama and that they could lawfully list the subject property for sale. With the approval of Suntrust Bank, and in reliance upon defendants' representations, plaintiffs agreed on January 7, 2008, to retain the services of Inland Auctions to auction the Alabama property. The letter of retention required the payment of a \$20,000 retainer/commission fee, and Inland Auctions agreed to provide a marketing report.

¶ 5 Plaintiffs further alleged on follows. On January 14, 2008, Karen Zahran paid the \$20,000 retainer fee to Inland Auctions. On February 3, 2008, a marketing agreement was prepared by Robin Zahran, and Diliberto and Rogers on behalf of the Inland Companies, setting forth various representations pertaining to marketing and the auction. On February 14, 2008, Robin Zahran, "individually and on behalf of ACPC," entered into an auction listing agreement that authorized Inland Auctions to conduct the auction and gave Inland Auctions the exclusive right to sell the Alabama property.

¶ 6 Counts I through IV of the second amended complaint were directed at Inland Auctions. Count I alleged breach of contract for failing to properly market the Alabama property and conduct an auction; count II alleged deceptive trade practices based on misrepresentations; count III alleged, as an alternative to count II, violations of the Illinois Consumer Fraud and Deceptive

Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2008)); and count IV alleged common law fraud. Counts V through VII were directed at Diliberto and Rogers and alleged deceptive trade practices, violations of the Consumer Fraud Act (plead in the alternative), and common law fraud. Counts VIII through X were directed at the Inland Group and similarly alleged deceptive trade practices, violations of the Consumer Fraud Act (plead in the alternative), and common law fraud. Count XI was directed against the Inland Companies and alleged conspiracy to commit fraud.

¶ 7 On July 26, 2010, the Inland Companies and Rogers filed a motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (725 ILCS 5/2-619.1 (West 2010)). In addition to arguing that the complaint should be dismissed, the Inland Companies and Rogers argued that the Zahrans should be dismissed as plaintiffs for lack of standing. Diliberto, represented by separate counsel, also filed a section 2-619.1 motion to dismiss on the same day. On October 1, 2010, the trial court: denied the motions as to count I; granted the motions, without prejudice, as to counts III, IV, VI, VII, VIII, IX, and XI; and granted the motions, with prejudice, as to counts II, V, and X. The trial court further granted, with prejudice, the Inland Companies' and Rogers' request to dismiss the Zahrans as plaintiffs for lack of standing.

¶ 8 ACPC was given leave to replead, and it filed a third amended complaint on October 29, 2010. Based on largely the same factual allegations raised in previous complaints, ACPC alleged breach of contract, violations of the Consumer Fraud Act, common law fraud, negligent misrepresentation, fraudulent concealment, and conspiracy to commit fraud.

¶ 9 On December 1, 2010, the Inland Companies and Rogers filed a motion to dismiss or stay the action. They alleged that the only entity named ACPC registered with the Illinois Secretary of State was a domestic corporation which was involuntarily dissolved on November 12, 2010.

They reasoned that, therefore, plaintiff ACPC, a Georgia corporation, was not registered to transact business in Illinois, but it was still transacting business in Illinois out of its principal office. According to defendants, under section 13.70 of the Illinois Business Corporation Act of 1983 (Business Act) (805 ILCS 5/13.70 (West 2010)), a foreign corporation transacting business in Illinois without authority may not maintain a civil action in Illinois, and such a corporation must pay license fees and franchise taxes before maintaining such an action. Defendants alleged that ACPC had neglected to pay these taxes and fees for the previous five years, and that as a result, the action should be stayed or dismissed. Diliberto subsequently moved to join in the motion to stay or dismiss.

¶ 10 On December 15, 2010, ACPC's counsel, Eric Sdrenka, moved to withdraw, stating that ACPC was currently a debtor in a Chapter 7 bankruptcy proceeding, and he could no longer represent it. On January 7, 2011, the trial court granted Sdrenka's motion to withdraw as counsel and gave ACPC 21 days in which to obtain substitute counsel. The court set the matter for status on February 16, 2011. On that day, it dismissed the action for want of prosecution.

¶ 11 Just short of one year later, on February 15, 2012, attorney Douglas A. Cipriano filed his appearance on behalf of ACPC. He also filed a motion to vacate the order dismissing the action for want of prosecution. The parties filed various pleadings pursuant to a briefing schedule, with defendants again arguing that ACPC could not maintain a suit under section 13.70 because it was an unregistered foreign corporation transacting business in Illinois. Defendants additionally argued that ACPC ceased to exist as an entity following its Chapter 7 bankruptcy proceeding, and a non-entity could not maintain a lawsuit.

¶ 12 Following a hearing on September 27, 2012, the trial court denied the motion to vacate. It stated that whether to allow the refiling of the case was within its discretion. The trial court agreed with defendants' arguments, stating:

“[I]t appears from the documentation filed that the plaintiff, ACPC, was liquidated and therefore does not exist and cannot file a lawsuit and cannot come before this Court and attempt to reinstate a case because it doesn't exist.

And, secondly, ACPC of Georgia never registered to do business in Illinois, and therefore it can't sue under Chapter 805 ILCS 5/13.7[0].

So for those two reasons I don't think it has standing to come back before the Court and allow me – and require me to reinstate the lawsuit.”

The trial court stated that “based on the pleadings filed in regard to the dissolution and the non-registration, [it did not] think there was standing to bring the petition.”

¶ 13 Plaintiffs timely appealed.

¶ 14 II. ANALYSIS

¶ 15 A. Motion to Dismiss Robin and Karen Zahran for Lack of Standing

¶ 16 We first address plaintiffs' argument that the trial court erred in granting defendants' motion to dismiss the Zahrans as plaintiffs for lack of standing. Plaintiffs argue that it is unclear under which section of the Code defendants were making their argument, as defendants brought their motion to dismiss under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)), which allows for combined motions. Defendants¹ respond that they included section 2-619 (735

¹ Diliberto did not file an appellee's brief in this case. Therefore, we use the term “defendants” in our analysis section to refer only to Rogers and the Inland Companies.

ILCS 5/2-619 (West 2010)) in the heading of the portion of their motion to dismiss related to the Zahrans' alleged lack of standing. We note that defendants cite their motion to dismiss plaintiffs' amended complaint, whereas the relief was granted on defendants' motion to dismiss plaintiffs' second amended complaint, which motion does not include such a heading. In any event, it can be inferred from the history of the case and the relevant motion to dismiss that defendants sought relief for this issue under section 2-619.

¶ 17 A section 2-619 motion to dismiss admits a complaint's legal sufficiency but asserts an affirmative matter outside the complaint that defeats the claim. *Patrick Engineering, Inc., v. City of Naperville*, 2012 IL 113148, ¶ 31. A section 2-619 dismissal resembles the grant of a motion for summary judgment; we must determine whether a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal was proper as a matter of law. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004). In Illinois, it is the defendant's burden to plead and prove lack of standing. *International Union of Operating Engineers, Local 148, AFL-CIO v. Department of Employment Security*, 215 Ill. 2d 37, 45 (2005). We review *de novo* the grant of a motion to dismiss for lack of standing under section 2-619. *Id.*

¶ 18 Plaintiffs argue that the trial court's dismissal of the Zahrans as plaintiffs was premature because lack of standing is an affirmative defense that defendants had the burden to plead and prove, which defendants failed to do. Plaintiffs argue that although appellate courts have suggested that the issue of standing may be resolved through a section 2-619 motion to dismiss, our supreme court stated in *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 494 (1988), that "it has been noted that controversies regarding standing are best resolved by motions for summary judgment rather than motions for judgment on the pleadings."

¶ 19 Plaintiffs' argument is devoid of merit. A 2-619 motion is not a judgment on the pleadings, but rather asserts an affirmative matter outside the complaint that defeats a claim. See *Patrick Engineering, Inc.*, 2012 IL 113148, ¶ 31; cf. *Parkway Bank & Trust Co. v. Meseljevic*, 406 Ill. App. 3d 435, 442 (2010) (in determining whether to grant a motion for judgment on the pleadings, the trial court must consider only the facts apparent from the pleadings' face, matters subject to judicial notice, and judicial admissions in the record). Lack of standing is an affirmative defense that may properly be raised in a motion to dismiss under section 2-619. *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004). Therefore, defendants did not prematurely raise the issue of standing.

¶ 20 Plaintiffs further argue that if we do not reverse and remand at least one of the orders at issue, they will be left with no cause of action, even though many of their counts were never ruled upon. However, our resolution of the order denying ACPC's motion to vacate has no bearing on whether the trial court properly granted defendants' 2-619 motion almost two years before.

¶ 21 Defendants argued in their motion to dismiss that the Zahrans lacked standing because only ACPC entered into the listing agreement on which the action was based, and the Zahrans were not parties to the agreement. Defendants further argued that the Zahrans were not, nor did they allege to be, third party beneficiaries of the agreement. Plaintiffs do not present any legal arguments asserting that the Zahrans actually had standing, so we affirm the trial court's grant of defendants' motion to dismiss the Zahrans for lack of standing.

¶ 22 B. Motion to Vacate

¶ 23 We now turn to whether the trial court erred in denying ACPC's motion to vacate the order dismissing its action for want of prosecution. As background, we note that if a plaintiff's

action is dismissed for want of prosecution, the plaintiff may refile the action within the greater of one year of the entry of the order or the remaining limitations period. 735 ILCS 5/13-217 (West 1994)²; *S.C. Vaughan Oil Co. v. Caldwell, Trout & Alexander*, 181 Ill. 2d 489, 497 (1998). A dismissal for want of prosecution remains interlocutory, and not final, until the time for refiling under section 13-217 expires. *Id.* at 501-02; *Progressive Universal Insurance Co. v. Hallman*, 331 Ill. App. 3d 64 (2002). During the time for refiling, a plaintiff may move to vacate the dismissal under section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2012)), as plaintiffs did here. *Jackson v. Hooker*, 397 Ill. App. 3d 614, 618, 621 (2010).

¶ 24 Under section 2-1301(e), a trial court may set aside an order “upon any terms and conditions that shall be reasonable.” 735 ILCS 5/2-1301(e) (West 2012). Such a decision is discretionary. *In re Haley D.*, 2011 IL 110886, ¶ 69. In exercising its discretion, the trial court should be mindful that: the entry of default is a drastic remedy that should be used only as a last resort; the law prefers that controversies be decided according to the parties’ substantive rights; and the provisions of the Code governing relief from defaults are to be liberally construed toward that end. *Id.*³ The “overriding consideration *** is simply whether or not substantial justice is

² The version of section 13-217 now on the books no longer provides for refiling after a dismissal for want of prosecution, but our supreme court has held that the amendments changing this statute were unconstitutional. *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). Therefore, the version of section 13-217 currently in effect is the preamended version, which allows for the refiling of actions dismissed for want of prosecution. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n.1 (1998); *Jain v. Johnson*, 398 Ill. App. 3d 135, 137, 144 (2010).

³ We recognize that this case involves a dismissal for want of prosecution rather than a

being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits.” *Id.* In making this determination, the trial court should consider all events leading up to the judgment and the case’s particular facts. *Id.*

¶ 25 Here, the trial court denied ACPC’s motion to vacate on the basis that: (1) it ceased to exist after its bankruptcy and therefore could not maintain the lawsuit, and, alternatively, (2) it was barred from suing under section 13.70 because it was a foreign corporation that never registered to do business in Illinois. The trial court’s rationale implicates the interpretation of statutes, which is a question of law that we review *de novo*. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 69.

¶ 26 Plaintiffs argue, as they did for the prior issue, that defendants prematurely raised the issue of ACPC’s standing in response to plaintiffs’ motion to vacate. Plaintiffs argue that defendants had not filed a pleading in response to the third amended complaint and had not yet filed any affirmative defenses to that pleading. Plaintiffs maintain that the issue of standing requires a factual investigation by the court only after the defendant has raised the issue as an affirmative defense, citing *Sense v. Climatemp, Inc.*, 222 Ill. App. 3d 302 (1991). There, the court held that raising the affirmative defense of lack of standing in a section 2-615 motion was improper and that the plaintiff did not need to allege facts to establish standing until lack of standing was properly raised as a defense. *Id.* at 317.

default, but the appellate court has found that section 2-1301(e) applies to dismissals for want of prosecution in addition to defaults. *Progressive Universal Insurance Co.*, 331 Ill. App. 3d at 68; *Jackson*, 397 Ill. App. 3d at 621.

¶ 27 Plaintiffs further argue that ACPC's corporate dissolution following its Chapter 7 bankruptcy did not deprive ACPC of the authority to maintain a cause of action in the Illinois courts, and that ACPC had sought only to resume a claim abandoned by the bankruptcy trustee. Plaintiffs cite section 12.30(c)(4) of the of the Business Act (805 ILCS 5/12.30(c)(4) (West 2010)), which states that a corporation's dissolution does not "[p]revent suit by or against the corporation in its corporate name." Plaintiffs also cite section 12.80 of the Business Act (805 ILCS 5/12.80 (West 2010)), which states that a corporation's dissolution:

"shall not take away nor impair any civil remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within five years after the date of such dissolution."

Plaintiffs maintain that these statutes show that a discharged and dissolved corporation can proceed with litigation within a prescribed time.

¶ 28 Defendants argue that they disagree with plaintiffs for the reasons stated in their response to the motion to vacate and related documents. Defendants decline to restate their arguments in their brief but rather "incorporate by reference their Response and exhibits."

¶ 29 We note that, contrary to plaintiffs' assertion, defendants did file a pleading in response to ACPC's third amended complaint. Specifically, on December 1, 2010, they filed a motion to dismiss or stay the action, arguing that ACPC could not maintain an action in Illinois because it was a foreign corporation not registered to transact business in Illinois. Such a motion would have to be construed as under 2-619 of the Code, rather than 2-615, because it asserts an affirmative matter outside of the complaint to defeat the claim. See *Patrick Engineering, Inc.*, 2012 IL 113148, ¶ 31. Regardless, we agree with plaintiffs that the sections they cite from the

Business Act show that ACPC could maintain its suit following its dissolution, contrary to the trial court's statements.

¶ 30 Although defendants attempt to counter plaintiffs' argument through referring to their prior pleading, under Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), points not argued on appeal are forfeited, including when a party attempts to incorporate by reference arguments it made in the trial court. *People v. Hernandez*, 2012 IL App (2d) 110266, ¶ 4 n.1. Even otherwise, defendants' response to the motion to vacate does not cite any Illinois laws or statutes in support of their argument that ACPC could not maintain its suit following its bankruptcy and dissolution. Accordingly, we find their argument without merit.

¶ 31 Plaintiffs next argue that the trial court also erred in stating that section 13.70 barred ACPC from proceeding with its suit. That section provides, in relevant part: "No foreign corporation transacting business in this State without authority to do so is permitted to maintain a civil action in any court of this State, until the corporation obtains that authority." 805 ILCS 5/13.70(a) (West 2012). Plaintiffs argue that although ACPC is a foreign corporation, defendants never established that it transacted business in Illinois. Instead, defendants cited an allegation that ACPC maintained a principal place of business in Illinois and then asked that the trial court conclude that this was tantamount to transacting business in this state. Plaintiffs contend that, even otherwise, ACPC could have cured the alleged infirmity by executing the proper filing and paying the appropriate fees to the Secretary of State. See 805 ILCS 5/13.70(c) (West 2012). Finally, plaintiffs argue that the equities also do not favor defendants because they had ample opportunity to raise this objection to ACPC's standing much earlier in the case, before multiple amended pleadings had been filed.

¶ 32 For this issue, defendants also refer to their response to ACPC's motion to vacate, thereby forfeiting their argument on review. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Notwithstanding forfeiture, defendants' response shows that, as plaintiffs assert, they relied on plaintiffs' allegation that ACPC's principal office was located in Illinois as their sole support for their argument that ACPC was transacting business in Illinois.

¶ 33 Section 13.70 requires that a foreign corporation "transacting business" in Illinois have a certificate of authority in order to maintain a civil action in Illinois. 805 ILCS 5/13.70(a) (West 2012). The Act does not define "transacting business" but instead lists activities that do not constitute transacting business, such as holding meetings, selling through independent contractors, and owning real or personal property. 805 ILCS 5/13.75 (West 2012); see also *Young America's Foundation v. Doris A. Pistole Revocable Living Trust*, 2013 IL App (2d) 121122, ¶ 30 (discussing statute). Other exceptions include if the corporation is engaged in only occasional transactions in this state or if it is conducting interstate commerce. See *Bank of American, N.A. v. Ebro Foods, Inc.*, 409 Ill. App. 3d 704, 710 (2011). A defendant bears the burden of proving that a plaintiff company was transacting business in the state without a certification, in violation of section 13.70. See *id.* at 710.

¶ 34 Here, whether ACPC was "transacting business" under section 13.70 was a disputed question of fact that was arguably inappropriate to determine in the context of a motion to vacate, especially considering that there was a genuine issue of material fact and that the trial court did not conduct an evidentiary hearing on this issue. Further, as plaintiffs point out, defendants could be found to have forfeited this argument by failing to raise it earlier in the proceedings. See *Cox v. Doctor's Associates, Inc.*, 245 Ill. App. 3d 186, 195 (1993) (defense

that corporation failed to obtain a certificate of authority was forfeited because it was not raised at the earliest opportunity).

¶ 35 Even if defendants could properly raise an alleged violation of section 13.70 in a response to the motion to vacate, defendants essentially argued that the fact that ACPC had a principal office in the state meant that ACPC was transacting business here. By not providing any evidence as to what ACPC was actually doing through its principal office, defendants could not be said to have satisfied their burden of proving that ACPC violated the Business Act. *Cf. Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 403 (2007) (the defendant did not satisfy its burden that the plaintiff violated the Act through evidence that: (1) it was not listed as a foreign corporation authorized to conduct business in Illinois, and (2) its owner and president testified that the company regularly assisted Illinois residents in finding jobs in Illinois, and he had attended industry meetings in Illinois to solicit business a couple of times); see also *Mass Transfer Inc. v. Vincent Construction Co.*, 223 Ill. App. 3d 746, 752 (1992) (“Absent proof to the contrary, the trial court erred in assuming that the plaintiff was transacting business in Illinois in violation of the statute.”). Therefore, the trial court erred in accepting defendants’ assertion that ACPC violated section 13.70.

¶ 36 As stated, the trial court denied ACPC’s motion to vacate solely on the basis that ACPC could not maintain the suit because: (1) it had dissolved after its bankruptcy, and (2) it was a foreign corporation transacting business in Illinois without registering in this state, in violation of section 13.70 of the Business Act. The trial court was incorrect as a matter of law regarding the first point, and defendants did not meet their burden of proof regarding the second point. The trial court did not articulate any other bases for its ruling, and given the liberal construction given to section 2-1301(e), the history of the case does not indicate that it would be unreasonable to

compel defendants to go to trial on the merits. Therefore, we conclude that the trial court abused its discretion in denying the motion to vacate.

¶ 37

III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's grant of defendants' motion to dismiss the Zahrans as plaintiffs, but we reverse its denial of ACPC's motion to vacate the dismissal for want of prosecution, and we remand the cause for further proceedings.

¶ 39 Affirmed in part and reversed in part; cause remanded.