

2014 IL App (2d) 131162-U
No. 2-13-1162
Order filed November 21, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

SCOTT ROSENBACH,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 12-L-0867
)	
NORSTATES BANK,)	Honorable
)	Jorge L. Ortiz,
Defendant-Appellee.)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

- ¶ 1 *Held:* Because plaintiff guarantor did not suffer direct injury from lender's alleged misconduct, the trial court did not err in dismissing claims for breach of guaranty and breach of loan agreement; and plaintiff did not state of claim for a declaratory judgment based on allegation that guaranty was unconscionable and unenforceable.
- ¶ 2 Plaintiff, Scott Rosenbach, and his business partners formed Pistakee Lake Development, LLC (Pistakee), which entered into a series of agreements with defendant, NorStates Bank (NorStates), for the purpose of purchasing and developing land in Fox Lake. The agreements between Pistakee and NorStates included a construction loan, a promissory note in favor of

NorStates, and a commercial guaranty. Plaintiff executed a commercial guaranty in favor of NorStates.

¶ 3 Pistakee hired one of its members, Terra Development Services, Inc., to manage the project. Plaintiff's second-amended complaint alleges that NorStates made advances of the loan proceeds at the sole request of William Schneider, the president of Terra Development, without receiving additional authorization from other members of Pistakee. Plaintiff alleges that Schneider wrongfully paid himself and Terra Development the entire construction management fee before the project was completed, which depleted the loan proceeds and prompted NorStates to demand an additional guaranty from plaintiff, which he provided. The second-amended complaint against NorStates alleges claims for breach of the guaranty, breach of the loan agreement, and for a declaratory judgment that the guaranty and loan agreement are unenforceable contracts of adhesion.

¶ 4 The trial court granted NorStates' motion to dismiss under sections 2-615 and 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619(a)(9), 2-619.1 (West 2012)). We conclude that plaintiff failed to state a claim for breach of the guaranty and breach of the loan agreement because his alleged injury is a derivative injury, not a direct injury. We further conclude that plaintiff failed to state a claim for declaratory judgment because the undisputed facts establish that the guaranty is not a contract of adhesion, and even if it were, the terms are not unconscionable. We affirm the dismissal of the second-amended complaint with prejudice.

¶ 5 I. BACKGROUND

¶ 6 Plaintiff alleges the following facts in the second-amended complaint. On September 20, 2006, Pistakee was organized as an Illinois limited liability company (LLC). The five members of Pistakee were plaintiff, Anastasios (Taso) Maravelas, Elliot Wiczer, William Dam, and Terra

Development. Pistakee was formed for the purpose of purchasing and developing land commonly known as 125-135 Manor Lane in Fox Lake. The purchase price was more than \$1.6 million, and the purpose of the project was to build townhomes.

¶ 7 On July 27, 2007, NorStates and Pistakee entered into a series of agreements, including a construction loan agreement and a promissory note in favor of NorStates with a maximum loan amount of \$3,636,750. NorStates required all of the members of Pistakee to execute commercial guarantees contemporaneously with the execution of the loan agreement and promissory note. Accordingly, on July 27, 2007, plaintiff executed a commercial guaranty. The guaranty provides that plaintiff “absolutely and unconditionally guarantees full and punctual payment and satisfaction of the indebtedness of [Pistakee] to [NorStates], and the performance and discharge of all [Pistakee’s] obligations under the Note and the Related Documents.” The document defines plaintiff’s obligation as “a ‘continuing guaranty’ under which [plaintiff] agrees to guarantee the full and punctual payment, performance and satisfaction of the indebtedness of [Pistakee] to [NorStates], now existing or hereafter arising or acquired, on an open and continuing basis. Accordingly, any payments made on the indebtedness will not discharge or diminish [plaintiff’s] obligations and liability under this guaranty for any remaining and succeeding indebtedness even when all or part of the outstanding indebtedness may be a zero balance from time to time.”

¶ 8 The second-amended complaint alleges that the loan agreement allowed NorStates to advance construction loan proceeds to Pistakee only after any three of Pistakee’s members provided written authorization. Specifically, the loan agreement provides that “[t]he following persons are authorized, except as provided in this paragraph, to request advances and authorize payments under the line of credit until [NorStates] receives from [Pistakee] *** written notice of

revocation of such authority: [plaintiff], William Schneider, Dr. William C. Dam, Elliot Wiczer, and Anastasios D. Maravelas. *Any three (3) individuals may authorize an advance.*” (Emphasis added.) Plaintiff alleges that “the obvious purpose of requiring three of Pistakee’s members to authorize draws of the construction loan proceeds was to allow the members of Pistakee to agree among themselves that the disbursement of the loan proceeds was for a proper purpose.”

¶ 9 Plaintiff alleges that Schneider, in his capacity as the owner of Terra Development, managed the construction project, and NorStates advanced more than \$1 million of the loan proceeds at the sole request of Schneider, without the required authorization from at least two more members of Pistakee. Although Pistakee was to pay Terra Development the construction management fee over the course of the project, Schneider wrongfully paid himself and Terra Development the entire fee before the work was completed. Schneider and Terra Development also made unauthorized and excessive payments to various subcontractors. As a result, Pistakee became “out of balance on the loan” within only six months.

¶ 10 The loan agreement and guaranty vested NorStates with discretion in performing under the contract. First, NorStates had the discretion to require additional collateral before making any advances and to decline to make any disbursements. Second, NorStates had the discretion to declare a default of the loan agreement and guaranty. Accordingly, NorStates declared the loan “out of balance” and required Pistakee and its members to provide additional collateral and borrow \$500,000 more from NorStates to fund the project. NorStates refused to advance more money until plaintiff provided additional adequate security. The second-amended complaint alleges that, “[t]hough NorStates breached the terms of the loan agreement and therefore, [plaintiff’s] guaranty, NorStates nonetheless, using the discretion it had pursuant to the loan documents, declared a default of the loan agreement [and] the guaranty and seized monies

[plaintiff] personally pledged in excess of \$200,000.” Plaintiff alleges damages of at least \$1 million, including “NorStates’ requirement that [plaintiff] guaranty another loan made to Pistakee in the amount of \$500,000, NorStates’ unilateral seizure of [plaintiff’s] additional cash collateral, [plaintiff’s] loss of his entire investment in Pistakee and demand that [plaintiff] pay the outstanding loan balance in the sum exceeding \$3.5 million, which included funds advanced by NorStates without Pistakee’s authorization.”

¶ 11 Count I of the second-amended complaint alleges breach of the guaranty in that NorStates breached the implied covenant of good faith and fair dealing in (1) exercising its discretion in funding draws with only one authorized signature when the loan agreement required three; (2) exercising its discretion to breach the loan agreement by funding draws without the proper authorization and then declaring a breach of the loan agreement; and (3) exercising its discretion in declaring a default, declaring the loan out of balance, and refusing to further fund the loan until plaintiff posted additional collateral. Count I alleges that NorStates acted arbitrarily, capriciously, and against the reasonable expectation of the parties by (1) intentionally making advances in violation of the loan agreement; (2) requiring Pistakee to post additional collateral and to borrow more money from NorStates; (3) refusing to advance more money until plaintiff funded and guaranteed the new loan; (4) declaring a default of the original loan agreement; and (5) seizing money pledged by plaintiff. Count I concludes that NorStates’ violation of the implied covenant of good faith and fair dealing wrongfully extended plaintiff’s liability beyond the terms of the loan agreement and plaintiff’s guaranty.

¶ 12 Count II alleges breach of the loan agreement in that NorStates made advances without the required authorization of at least three of Pistakee’s members. Plaintiff alleges that he was directly injured as a guarantor and that his injury is independent from any injury to Pistakee or its

other members. Plaintiff alleged that, when NorStates declared the loan “out of balance,” NorStates required plaintiff to pledge an additional \$200,000 in collateral. NorStates later seized plaintiff’s collateral in an amount exceeding \$200,000.

¶ 13 Count III seeks a declaratory judgment that the guaranty is a contract of adhesion that is unconscionable and unenforceable. Plaintiff alleges that NorStates prepared the guaranty from a form, the terms were non-negotiable, and NorStates had superior bargaining power. Plaintiff also alleges that, because the guaranty was executed by fewer than all of Pistakee’s members, NorStates could not make the loan to Pistakee. Plaintiff alleges that the guaranty is “completely one-sided and provides NorStates with complete discretion and control over the amount of funds [plaintiff] is ultimately liable for.” Plaintiff specifically identifies the guaranty’s broad definition of “indebtedness” as an “overbearing” provision. Count III alleges that NorStates enforced plaintiff’s guaranty while breaching the loan agreement by making wrongful advances. Plaintiff alleges that such conduct was not authorized by the guarantor’s waiver provision, under which plaintiff “waives any right to require [NorStates] to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever.” Plaintiff concludes that the guarantor’s waiver provision is unenforceable because it purports to absolve NorStates from performing according to the loan agreement.

¶ 14 On July 3, 2013, NorStates moved to dismiss the second-amended complaint under section 2-619.1 of the Code of Civil Procedure (Code). 735 ILCS 5/2-619.1 (West 2012). The combined motion to dismiss asserted that plaintiff’s claims should be dismissed under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) for failing to state a claim because (1) plaintiff’s alleged injury is merely derivative of the direct injury to Pistakee; (2) plaintiff did not adequately allege a violation of the implied covenant of good faith and fair dealing or any

provision of the guaranty; (3) plaintiff has no claim for breach of the loan agreement because he is not a party to the agreement; and (4) the loan agreement is not a contract of adhesion, and even if it were, it is not illegal. NorStates also argued that counts I and II should be dismissed under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)) because the parties' modification and extension of the loan agreement on May 18, 2010, is affirmative defeating the all the claims because the modification includes Pistakee's acknowledgment that NorStates had not breached any of the loan documents.

¶ 15 On October 23, 2013, the trial court entered a thorough 10-page written order dismissing the second-amended complaint with prejudice under sections 2-615 and 2-619(a)(9). The trial court concluded that plaintiff had failed to state a claim upon which relief could be granted because (1) plaintiff did not allege a direct injury, but rather a derivative injury based on Pistakee's rights under the loan agreement, and therefore plaintiff lacked standing to bring claims for breach of the guaranty and breach of the loan agreement; (2) plaintiff's allegation of a breach of the implied covenant of good faith and fair dealing is not available to him as an independent cause of action on the guaranty or the loan agreement and does not even come into play because the loan documents are unambiguous; (3) even if NorStates' disbursements of the loan proceeds were unauthorized and unenforceable against Pistakee, plaintiff still was obligated to pay the indebtedness under the terms of the guaranty; (4) plaintiff signed the loan agreement only in his capacity as a manager of Pistakee and lacked privity of contract; and (5) plaintiff did not state a claim for a declaratory judgment because, even if the guaranty were a contract of adhesion, such agreements are generally lawful, a mere disparity in bargaining power is not grounds for invalidating them, and plaintiff did not allege that he did not freely and voluntarily enter into the guaranty. The trial court further concluded that the loan modification and extension agreement

between NorStates and Pistakee contained a confirmation by Pistakee that it had no claims against NorStates, and without a breach of the loan agreement, plaintiff has no basis for counts I or II. This timely appeal followed.

¶ 16

II. ANALYSIS

¶ 17 Plaintiff appeals the dismissal of the second-amended complaint under sections 2-615 and 2-619 of the Code. Section 2-619.1 of the Code provides that motions with respect to pleadings pursuant to sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2012)) may be filed together as a single motion. 735 ILCS 5/2-619.1 (West 2012). A motion to dismiss pursuant to section 2-615 tests the legal sufficiency of the complaint, whereas a motion to dismiss under section 2-619 admits the legal sufficiency of the complaint but asserts an affirmative defense that defeats the claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 578-79 (2006). In considering a combined motion to dismiss pursuant to section 2-619.1, we accept all well-pleaded facts in the complaint as true, drawing all reasonable inferences from those facts in favor of the nonmoving party. *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009). When reviewing a decision to grant a motion pursuant to section 2-615, our inquiry is whether the allegations of the complaint, construed in the light most favorable to the nonmoving party, are sufficient to establish a cause of action upon which relief may be granted. *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1086 (2010). Under section 2-619(a)(9), our inquiry is whether affirmative matter, *i.e.*, “some kind of defense ‘other than a negation of the essential allegations of the plaintiff’s cause of action,’ ” defeats the claim. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120-21 (2008) (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993)). Our review under either section 2-615 or 2-619(a)(9) is *de novo* (*King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 12 (2005)),

and we can affirm the dismissal on any basis in the record (*Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004)).

¶ 18 A. Guaranty and Loan Agreement

¶ 19 The trial court concluded that plaintiff failed to state claims for breach of the guaranty and breach of the loan agreement. Among the various reasons given for the dismissal, the trial court determined that plaintiff had alleged a derivative injury rather than a direct injury, and therefore he lacks standing to bring the claims. We agree with the trial court and NorStates that counts I and II must be dismissed under section 2-615 because plaintiff lacks standing, and our analysis of the issue obviates the need to address the alternate grounds on which the trial court dismissed those claims.

¶ 20 To assert an affirmative claim against a lender, a guarantor must establish that he suffered a direct injury as a result of the lender's alleged breach against the principal, which is independent from and not merely derivative of the resulting injury suffered by the principal. *Performance Electric, Inc. v. CIB Bank*, 371 Ill. App. 3d 1037, 1040 (2007). For example, the loss of investment in a principal is a derivative injury and will not provide standing for a guarantor principal. *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 363 (1995). Because a guarantor stands in the shoes of a contingent creditor, the guarantor, like a creditor, cannot recover separately for an indirect injury. *United Air Lines, Inc. v. ALG, Inc.*, 916 F. Supp. 793, 796 (N.D. Ill. 1996).

¶ 21 On appeal, plaintiff asserts that he has standing to assert claims under his guaranty and Pistakee's loan agreement with NorStates because he incurred personal damages beyond those experienced by Pistakee as a result of NorStates' misconduct. Plaintiff argues that he pleaded a direct injury in that "NorStates seized [plaintiff's] personal funds, a sum in excess of \$200,000."

NorStates responds that plaintiff lacks standing to assert his claims because any injury he incurred was merely derivative to the losses experienced by Pistakee. We agree with NorStates.

¶ 22 The central allegation of the second-amended complaint is that NorStates breached the loan agreement by disbursing loan proceeds without the authority to do so and then relied on the disbursements to declare that Pistakee had defaulted on the loan. NorStates then allegedly declared a default in plaintiff's guaranty and required plaintiff to guaranty the repayment of additional loan proceeds to complete the project, which increased his risk as a guarantor.

¶ 23 Plaintiff's alleged injuries are derivative of the injuries allegedly sustained by Pistakee. Plaintiff's liability is defined by the guaranty, which states that he agreed to a continuing guarantee of Pistakee's liability to NorStates in an "unlimited" amount. Plaintiff agreed to pay whatever Pistakee owed to NorStates such that his liability is derived from Pistakee's liability. Because plaintiff's liability is derivative, so are his alleged damages.

¶ 24 Although plaintiff alleges that NorStates' conduct extended and increased his liability by declaring the loan out of balance and demanding additional collateral, plaintiff's liability increased only to the extent that Pistakee's liability increased. Therefore, any increase in plaintiff's alleged damages is derived from a corresponding increase in Pistakee's damages.

¶ 25 Plaintiff contends that he suffered a direct injury because only he, and not Pistakee, could bring an action against NorStates to recover that amount based on NorStates' conduct that caused the injury. Even if this were true to the extent that Pistakee could not bring a claim for money taken from plaintiff's account, plaintiff's alleged injury is derivative and not direct. The offset was not an injury to plaintiff, but rather a liability he already had incurred resulting from Pistakee's liability on the loan. Plaintiff pledged this amount as additional collateral on the guaranty, and loss of the investment is a derivative injury and not a direct injury.

¶ 26 Also, plaintiff's reliance on authority relating to corporate shareholder derivative suits is misplaced in that the cases have nothing in common with this matter except the word "derivative." Furthermore, plaintiff may not invoke certain guarantor defenses because those defenses might potentially apply only if his pleading states a claim upon which relief may be granted.

¶ 27 Specifically, count I of the second-amended complaint alleges breach of the guaranty in that NorStates breached the implied covenant of good faith and fair dealing in exercising its discretion under the loan agreement. NorStates' alleged breach of the guaranty is based on alleged breaches of the loan agreement between NorStates and Pistakee. Plaintiff attempts to bootstrap these allegations relating to the loan agreement into allegations of a breach of the guaranty by referring to the implied covenant of good faith and fair dealing, which might relate to whether a breach occurred but has nothing to do with whether plaintiff's alleged damages are direct or derivative. The allegation in count I that NorStates wrongfully "seized monies pledged by [plaintiff]" is a derivative injury because NorStates' alleged seizure of money from plaintiff's account was made under the lender's right of offset based on Pistakee's liability.

¶ 28 Count II alleges breach of the loan agreement in that NorStates made advances without the required authorization of at least three of Pistakee's members. Plaintiff alleges that he was directly injured as a guarantor and that his injury is independent from any injury to Pistakee or its other members. However, the loan agreement was between NorStates and Pistakee, not plaintiff. Plaintiff signed the loan agreement, but he did so only in his capacity as a manager of Pistakee. Any damages plaintiff suffered due to NorStates' alleged breach of the loan agreement are derivative, not direct. Plaintiff lacks standing to state claims for breach of the loan agreement or

breach of the guaranty, and the trial court properly dismissed counts I and II under section 2-615 of the Code for failing to state a claim.

¶ 29

B. Declaratory Judgment

¶ 30 An action for declaratory judgment is brought under section 2-701(a) of the Code, which provides that the trial court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, including a declaration of the rights of the parties. 735 ILCS 5/2-701(a) (West 2012). A declaratory judgment may be obtained by means of a pleading seeking that relief alone, or as incident to or part of a complaint, counterclaim or other pleading seeking other relief as well. 735 ILCS 5/2-701(b) (West 2012). The essential requirements of a declaratory judgment action are: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an actual controversy between the parties concerning such interests. *Beahringer v. Page*, 204 Ill. 2d 363, 372 (2003). A declaratory judgment action is strictly remedial. The statute does not create substantive rights or duties, but merely affords a new, additional, and cumulative procedural method for the judicial determination of the parties' rights. *Beahringer*, 204 Ill. 2d at 373.

¶ 31 Plaintiff seeks a declaratory judgment that the guaranty is a contract of adhesion that is unconscionable and unenforceable. The primary goal of interpreting a contract is to give effect to the intent of the parties. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999). Our supreme court has described the traits of a contract of adhesion: “[t]he terms *** are nonnegotiable and presented in fine print in language that the average consumer might not fully understand. Such contracts, however, are a fact of modern life. Consumers routinely sign such agreements to obtain credit cards, rental cars, land and cellular telephone service, home furnishings and appliances, loans, and other products and services. It cannot reasonably be said

that all such contracts are so procedurally unconscionable as to be unenforceable.” *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 26 (2006)). Thus, even accepting as true plaintiff’s allegation that the guaranty is a contract of adhesion, such a determination does not necessarily render the contract unconscionable and unenforceable.

¶ 32 Unconscionability generally takes two forms: an agreement may be unenforceable if it is procedurally or substantively unconscionable. *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 60 (2011) (citing *Kinkel*, 223 Ill. 2d at 22). Procedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of meaningful choice. Factors to be considered in determining whether an agreement is procedurally unconscionable include whether each party had the opportunity to understand the terms of the contract, whether important terms were hidden in a maze of fine print, and all of the circumstances surrounding the formation of the contract. *Rosen*, 242 Ill. 2d at 60. Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed, asking whether the terms are so one-sided as to oppress or unfairly surprise an innocent party. *Rosen*, 242 Ill. 2d at 60.

¶ 33 In *Kinkel*, the supreme court determined that the contract at issue was a contract of adhesion, representing a “degree of procedural unconscionability,” but the court’s determination was based on the “additional fact” that key information was incorporated only by reference. *Kinkel*, 223 Ill. 2d at 26-27. The combined effect of these facts in *Kinkel* still created a degree of procedural unconscionability insufficient to render the contract unenforceable; it was a “factor to be considered” in conjunction with the claim of substantive unconscionability. *Kinkel*, 223 Ill. 2d at 26-27. Other than alleging that NorStates prepared the guaranty from a form, the terms were non-negotiable, and NorStates had superior bargaining power, the second-amended

complaint contains no additional assertion of procedural unconscionability. As the trial court observed, plaintiff does not allege that he did not freely and voluntarily enter into the guaranty or that he could not have taken his business to another bank. Plaintiff's conclusory allegations of procedural unconscionability are not supported by any other factual allegations or exhibits.

¶ 34 One could argue that the guaranty is not a contract of adhesion. However, even if it were, plaintiff still must establish substantive unconscionability that is, when taken with the adhesive character of the contract, sufficient to state a claim that the guaranty is so unconscionable that it should not be enforced. *Rosen*, 242 Ill. 2d at 73.

¶ 35 Substantive unconscionability is concerned with the relative fairness of the obligations assumed under the agreement, and indicators of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity. *Kinkel*, 223 Ill. 2d at 28. Plaintiff argues that the guaranty is "completely one-sided and provides NorStates with complete discretion and control over the amount of funds [plaintiff] is ultimately liable for." Plaintiff specifically identifies the guaranty's broad definition of "indebtedness" as an "overbearing" provision, especially viewed in light of the guarantor's waiver provision in which he "waives any right to require [NorStates] to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever." Plaintiff concludes that the guarantor's waiver provision is unenforceable because, under his interpretation, it purports to absolve NorStates from performing according to the loan agreement.

¶ 36 Applying the definition of substantive unconscionability to the guaranty, we acknowledge that there is an imbalance in the rights and obligations of plaintiff and NorStates. However, the terms are not so inordinately one-sided in favor of NorStates that we must refrain

from enforcing them. Plaintiff has not suggested that the terms of the guaranty were unclear or hidden from him. On the contrary, he alleges that he fully complied with the terms of the guaranty. He was thus not unfairly surprised when NorStates declared the loan out of balance and demanded additional collateral to continue funding the project.

¶ 37 Taking the allegations of the second-amended complaint as true, we conclude that the guaranty is not improvident, oppressive, or totally one-sided. See *Kinkel*, 223 Ill. 2d at 28. We therefore reject plaintiff's argument that the guaranty's provisions are unconscionable and cannot be enforced and agree with the trial court that the declaratory judgment claim must be dismissed under section 2-615 for failing to state a claim.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, the dismissal of the second-amended complaint with prejudice is affirmed.

¶ 40 Affirmed.