

No. 1-11-2161

**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).

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IN THE APPELLATE  
COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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TRIPLE L LAWN MAINTENANCE	)	
& LANDSCAPER CONTRACTORS, INC.,	)	
An Illinois Corporation,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2010L00528
	)	
T-MOBILE USA, INC. AND NEXTEL	)	The Honorable
COMMUNICATIONS OF THE	)	Sanjay Tailor,
MID-ATLANTIC, INC.,	)	Judge Presiding.
	)	
Defendants-Appellees.	)	

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Howse and Justice Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* In complaint based on agency relationship, where plaintiff failed to adequately plead agency, trial court properly dismissed complaint. Trial court affirmed.

¶ 2 Plaintiff Triple L Lawn Maintenance and Landscape Contractors, Inc., appeals from an order of the circuit court dismissing with prejudice its third amended complaint against

1-11-2161

defendants T-Mobile, USA, and Nextel Communications of the Mid-Atlantic, Inc.<sup>1</sup> For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This cause stems from an alleged breach of contract. Site Development Solutions, Inc. (SDSI) is a general contractor engaged in the construction of cellular towers for the use of wireless telephone transmissions. Plaintiff is a subcontractor providing construction work relating to cell towers that SDSI was constructing for T-Mobile and Nextel. Prompted by an alleged breach of contract, plaintiff filed suit against defendants, arguing that defendants were liable for contracts purportedly entered into by SDSI on a theory that SDSI was acting as defendants' agent. A series of amended complaints followed.

¶ 5 After the first amended complaint was filed, T-Mobile filed a motion to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)) (section 2-615), arguing that the complaint should be dismissed because the allegations were both factually and legally insufficient, that is, the complaint offered mere conclusions rather than facts to establish the breach of contract claims, and a subcontractor such as Triple L cannot maintain a breach of contract claim against an owner. The trial court granted the motion to dismiss, but allowed plaintiff to file an amended complaint. Plaintiff did so.

¶ 6 T-Mobile again filed a motion to dismiss pursuant to section 2-615 of the Code. By that motion, T-Mobile argued that the second amended complaint should be dismissed because it

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<sup>1</sup> Defendant Nextel Communications of the Mid-Atlantic was dismissed from this cause with prejudice on May 3, 2012.

1-11-2161

failed to "correct the flaws that resulted in the dismissal" of the previous complaint and that Triple L failed to properly allege an agency relationship.<sup>2</sup> Nextel also filed a motion to dismiss pursuant to, in pertinent part, section 2-615, whereby it "incorporate[d] all allegations and conclusions of law made by T-Mobile" in its motion to dismiss. The trial court granted the motion to dismiss, but gave plaintiff opportunity to "file an amended complaint to include allegations supporting its agency theory" and specified that the court would "review any such amended complaint for sufficiency of agency allegations prior to any further motion practice."

¶ 7 In June 2011, plaintiff filed a third amended complaint, again alleging that SDSI was authorized to enter into contracts with Triple L on behalf of T-Mobile and Nextel, and alleging that SDSI, as an "agent for and acting on the behalf of the Defendant T-Mobile USA, Inc.," as well as Nextel, failed to pay it for construction work it had completed on the cell towers. The allegations in the third amended complaint are as follows:

"COUNT I

1. That all times [*sic*] relevant hereto Plaintiff was an Illinois corporation engaged in the business of the providing labor and materials in the installation of cellular towers for the use of wireless phone transmissions.

2. That at all times relevant hereto Defendant, SITE DEVELOPMENT SOLUTIONS, INC., (SDSI), was a Georgia

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<sup>2</sup> The record on appeal includes only the common law record; no transcripts of arguments made or hearings on the motion are included.

corporation engaged in the business of a general contractor for the construction of cellular towers for the use of wireless phone transmissions.

3. That at all times relevant hereto T-MOBILE USA, INC., a Delaware corporation, was engaged in the business of cellular telephone transmissions. Further, T-MOBILE USA, INC. maintains offices and conducts business in the County of Cook, State of Illinois.

4. That at all times relevant hereto, NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC., a Delaware Corporation, hereinafter referred to as NEXTEL, was engaged in the business of cellular telephone transmissions. Further, Nextel maintains offices and conducts business in the County of Cook, State of Illinois.

5. That on and before January 8, 2009 Defendant, T-Mobile USA, Inc. was the Construction Manager for certain improvements to a cellular transmission device located on real property commonly known as 1400 Main Street, Batavia, Illinois. Attached hereto, incorporated herein and marked Exhibit #1 please find the cover page of T-Mobile USA, Inc.'s construction plans for this project entitled CH 77-33- A.

6. That on or about January 8, 2009 the Defendant, SDSI, as agent for and acting on the behalf of the Defendant T-MOBILE USA, Inc., entered into a contract with Plaintiff whereby Plaintiff agreed to provide labor and materials concerning project CH 77-330 in return for payment from Defendants of \$39,800. Attached hereto, incorporated herein and marked as Exhibit #2 please find the purchase order sent from SDSI to Plaintiff for project CH 77-330A.

7. That on or about January 8, 2009 the Defendant, SDSI, as agent for and acting on the behalf of the Defendant T-Mobile USA, Inc., provided plaintiff with T-Mobile USA, Inc.'s construction plans for project CH 77-330A.

8. That at numerous times during Plaintiff's work on this project Plaintiff was contacted by various employees of Defendant T-Mobile USA, Inc. including Luis Morales, T-Mobile USA Inc.'s project manager, and Tim Michalek, concerning aspects of this project.

9. That on or about January 13, 2009 Plaintiff completed the agreed upon work and submitted its invoice to SDSI for \$39,800. Attached hereto, incorporated herein an marked as Exhibit #3 please find a copy of said invoice.

10. That despite repeated demands by Plaintiff, the Defendants, SDSI and T-Mobile USA, Inc., have failed to pay Plaintiff any of the amount agreed upon for the above-described labor and materials.

11. That there remains due and owing Plaintiff the sum of Thirty Nine Thousand Eight Hundred Dollars, \$39,800, from the Defendants."

¶ 8 The remaining counts were in regards to additional, similar work allegedly performed in Bolingbrook, Illinois, on June 16, 2009, costing \$31,291 (Count II, against T-Mobile), work allegedly performed in Lake Geneva, Wisconsin, on June 16, 2009, costing \$5,575 (Count III, against T-Mobile), and work allegedly performed in Tinley Park, Illinois, on September 12, 2008, costing \$5,900 (Count IV, against Nextel).

¶ 9 On June 21, 2011, the trial court dismissed with prejudice Counts I, II, and III as they related to defendant T-Mobile USA, Inc., and Count IV as it related to defendant Nextel Communications.<sup>3 4</sup>

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<sup>3</sup> Although no transcript of the hearing is included in the record on appeal, the court noted in its written order that Count IV against Nextel was dismissed with prejudice "for the same reasons the Court dismissed Counts I, II and III" against T-Mobile.

<sup>4</sup> The court also ordered that "Counts I, II, III and IV remain pending as to Defendant Site Development Solutions, Inc. Defendant Site Development Solutions, Inc. is hereby found to be in default for failure to appear and/or answer the allegations in the complaint."

1-11-2161

¶ 10 Plaintiff timely appealed.

¶ 11 II. ANALYSIS

¶ 12 In this appeal, plaintiff contends that the trial court erred in dismissing its complaint pursuant to section 2-615 of the Code. Specifically, plaintiff argues that defendants are liable for contracts purportedly entered into by SDSI on a theory that SDSI was acting as defendants' agent. Plaintiff argues that it performed the work in question because of the apparent authority vested by T-Mobile and Nextel in SDSI, explaining, for example, that "Triple L was confronted by SDSI who had been armed by T-Mobile's plans soliciting them to provide work on T-Mobile's projects and was contacted by T-Mobile's employees concerning specifics of these projects. These circumstances would lead a reasonable prudent person to believe that SDSI was acting on the

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Eventually, after prove-up, the court found SDSI in default and ordered:

"IT IS HEREBY ORDERED THAT THIS COURT finds the issues in favor of the Plaintiff, Triple L Maintenance and Landscape Contractors, Inc., and against the Defendant, Site Development Solutions, Inc.

IT IS FURTHER ORDERED THAT THE COURT ENTERS JUDGMENT on the findings in favor of the Plaintiff, Triple L Maintenance and Landscape Contractors, Inc. and against the Defendant, Site Development Solutions, Inc., in the amount of \$82,566, plus costs."

1-11-2161

authority and as the agent of T-Mobile. It was the reasonable belief of Plaintiff that T-Mobile was [] SDSI's principal that persuade Plaintiff to spend its time and money on these projects." We disagree and find that the trial court properly dismissed plaintiff's complaint pursuant to section 2-615 of the Code.

¶ 13 "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 complaint in the light most favorable to the plaintiff." *Marshall*, 222 Ill. 2d at 429. "[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." *Canel v. Topinka*, 212 Ill. 2d 311, 318 (2004); *Marshall*, 222 Ill. 2d at 429. We review an order granting or denying a section 2-615 motion *de novo*. *Marshall*, 222 Ill. 2d at 429.

¶ 14 "An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf. *Zara v. Krupa*, 365 Ill. App. 3d 653, 661 (2006). The agent's authority may be actual or apparent. *Zara*, 365 Ill. App. 3d at 661. To state a claim for apparent agency, plaintiff must allege: (1) that the principal held the agent out as possessing the authority to act on its behalf, or knowingly acquiesced in the agent's exercise of authority; (2) based on these actions, the third person reasonably concluded that an agency relationship existed; and (3) the third person relied on the agent's apparent agency to her detriment. *Oliveira-Brooks v. Re/Max Intern., Inc.*, 372 Ill. App. 3d 127, 137 (2007).



1-11-2161

"Only the alleged principal's words or conduct, not those of the alleged agent, establish the agent's authority." *Kaporovskiy v. Grecian Delight Foods, Inc.*, 338 Ill. App. 3d 206, 210 (2003).

¶ 15 Here, we find the pleadings in the case at bar failed to sufficiently allege an apparent agency relationship between Triple L and T-Mobile or between Triple L and Nextel. See *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 498 (1996) (A complaint relying on agency must plead facts which, if proved, could establish the existence of an agency relationship). Plaintiff recognizes that T-Mobile did not expressly authorize SDSI to enter into and bind T-Mobile and Nextel to contracts. It argues, however, that SDSI had the apparent authority to enter into contracts on behalf of T-Mobile and Nextel.

¶ 16 The breach of contract claims are based on purchase orders issued by SDSI to Triple L. These purchase orders were attached to plaintiff's complaints and are a part of the record on appeal. The purchase orders neither name nor reference defendants T-Mobile or Nextel. Nonetheless, Triple L insists that defendants are responsible for SDSI's alleged failure to pay for Triple L's services based on the assertion that SDSI acted as defendants' agent when it entered into contracts with Triple L. Triple L's allegations that: (1) T-Mobile was the construction manager at the three properties at issue and Nextel was the construction manager for one property at issue; (2) SDSI transmitted both T-Mobile's and Nextel's construction plans to Triple L; and (3) Triple L was in communication with various employees of T-Mobile and Nextel are insufficient to show an agency relationship.

¶ 17 Plaintiff has failed to allege any facts to establish that defendants manifested an intent to hold SDSI out as its agent. Rather, from the record before us, it appears simply that the general

1-11-2161

contractor, SDSI, entered into a contract with the subcontractor, Triple L, to perform particular work pursuant to construction plans. Plaintiff has failed to allege anything beyond this basic contract that shows a statement or act by defendants that would transform the relationship into anything beyond that of a general contractor and its subcontractor. That Triple L says it is so does not make it so; mere allegations of agency are insufficient in this state, where fact-pleading is required. See, *e.g.*, *Connick*, 174 Ill. 2d at 499 ("It is insufficient to merely conclude the legal conclusion of agency.").

¶ 18 Plaintiff has failed to allege that defendants expressly authorized SDSI to enter into and bind them to contracts. We find no error in the trial court's dismissal of plaintiff's complaint.

¶ 19 For the foregoing reasons, we affirm the circuit court of Cook County.

¶ 20 Affirmed.