2024 IL App (1st) 231188-U

SECOND DIVISION
June 28, 2024

No. 1-23-1188

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RUSSELL DANN, Plaintiff-Appellant, v. ADAM M. OCHSTEIN, Defendant-Appellee, (Ahmad Abualsamid and Strategy Executive Partners, LLC, Defendants.)	)	Appeal from the Circuit Court Cook County. No. 19CH10153 Honorable Alison C. Conlon, Judge Presiding.

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

ORDER

¶ 1 *Held*: (1) The trial court erred in dismissing plaintiff's breach of contract claim and denying partial summary judgment in favor of plaintiff; (2) plaintiff's claim of reformation is moot; and (3) the trial court did not abuse its discretion in denying plaintiff leave to file his fifth amended complaint.

¶ 2 This appeal arises from a breach of contract action filed by plaintiff Russell Dann relating to a series of contracts following his divestment from defendant Strategy Executive Partners, LLC (Stratex), which he owned with defendants Adam M. Ochstein and Ahmad Abualsamid.[1]

¶ 3 In May 2011, Dann sold his interest in Stratex to Ochstein and Abualsamid pursuant to a Settlement and Loan Agreement (Settlement Agreement). At the same time, Dann and Ochstein entered into a separate agreement (Letter Agreement), in which the parties made the following agreements. First, in the event that Stratex was sold, an additional payment made to Dann equal to 10% of Ochstein's gross proceeds, as well as $12,500 payment related to a personal loan Dann provided Ochstein to buyout a former member of Stratex (Additional Payment) would be satisfied. Second, a personal loan of $13,500, secured by a junior mortgage on Ochstein's residence, was to be paid pursuant to an amortization schedule with no prepayment penalty (Personal Loan).

¶ 4 In 2013, Ochstein, through counsel, sought to prepay the remaining balance of the Personal Loan in the Letter Agreement. His counsel drafted a letter serving to memorialize the release of the personal loan (Payoff Letter[2]) and was signed by both Dann and Ochstein. In 2019, Stratex was sold, and Dann sought the Additional Payment provided in the Letter Agreement. Ochstein denied his request and asserted that the Payoff Letter terminated the entire Letter Agreement, and the Additional Payment was no longer due.

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[1] Defendants Stratex and Abualsamid were later dismissed from the action and since Dann has not appealed their dismissal, they are not a party to this appeal. These defendants will be discussed as necessary to detail the issues arising between Dann and Ochstein. We also note that Abualsamid's last name is spelled multiple ways in the record, we will refer to him as spelled in the parties' Settlement Agreement.

[2] We note that Ochstein refers to the Payoff Letter as the "Termination Agreement", but this court will reference this agreement as set forth in the complaint.

¶ 5 In response, Dann filed a complaint against the defendants alleging a breach of contract, breach of fiduciary duty, and conversion. Ochstein moved to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2018)). Dann moved for a partial summary judgment asking the court to find that the Payoff Letter only applied to the Personal Loan and that Ochstein's obligations regarding the Additional Payment were not released. The trial court subsequently granted Ochstein's motion to dismiss and denied Dann's motion for partial summary judgment. Dann later filed an amended complaint alleging a claim for reformation based on mutual mistake, on which Ochstein subsequently moved for summary judgment. Dann further sought leave to file a fifth amended complaint. The trial court granted summary judgment in favor of Ochstein on the reformation count and denied Dann leave to file an amended complaint finding the amendments to be futile.

¶ 6 On appeal, Dann argues that the trial court erred in: (1) finding the Payoff Letter terminated all obligations under the Letter Agreement and dismissing his claim for breach of contract; (2) denying his motion for a partial summary judgment on the breach of contract claim; (3) granting summary judgment on his claim for reformation; and (4) denying him leave to file his fifth amended complaint.

¶ 7 In September 2019, Dann filed his initial complaint against the defendants and attached all of the relevant contracts as exhibits. An amended complaint was filed in October 2019, and alleged the following.

¶ 8 Dann, Ochstein, and Abualsamid were members and managers of Stratex. Ochstein was the chief executive officer (CEO) and Abualsamid was the president. Stratex "engages in the payroll and [human resources] service business to the restaurant industry and provides services and obtains revenues from businesses throughout the metropolitan Chicago area." While Dann

was a member and manager at Stratex, he loaned significant funds for its operations and as of May 6, 2011, he was owed approximately $1,840,000. During this same time frame, he also made a personal loan to Ochstein in the amount of $12,500.

¶ 9 On May 6, 2011, Dann, Ochstein, and Abualsamid entered into the Settlement Agreement which terminated Dann's association with Stratex. The Settlement Agreement provided that Stratex was a wholly owned subsidiary of Arga Holdings, LLC (Arga). Dann, Ochstein, and Abualsamid each owned a third of Arga. Under the Settlement Agreement, Dann sold his interests to Arga and in exchange, Dann would receive $99,000, within 30 days of the closing of the transaction and the remaining $1,740,000, was to be repaid under a promissory note attached to the Settlement Agreement.

¶ 10 Also on May 6, 2011, Dann and Ochstein entered into the Letter Agreement, which was drafted in the first person by Ochstein and provided, in relevant part, as follows.

> "Dear Russell:
>
> This Letter Agreement (the 'Agreement') will confirm the agreement among you and me. Reference is made to (a) that certain Settlement and Loan Agreement, dated May 6, 2011 between the Companies and you ('Settlement Agreement'), and (b) that certain Promissory Note, dated May 6, 2011, between the Companies and you ('Note'). Terms not otherwise defined in this Agreement shall have the meanings given in the Settlement Agreement or Note. In consideration of the mutual covenants and agreements contained herein, in the Settlement Agreement, in the Note, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

> 1. Additional Payment. Within five days of the closing of any transaction qualifying as a Sale Event (or such longer period until I receive the cash proceeds related to the closing of the Sale Event), I will pay to you from such cash proceeds (a) an amount equal to 10% of the of [*sic*] gross proceeds actually received by me pursuant to a Sale Event, (subject to pro rata adjustment for any withholdings or other deductions to me (such as purchase price adjustments, indemnity escrow amounts, but such 10% of any such adjustments shall be paid to you when and if available for distribution to me) [*sic*], plus (b) $12,500 related to a personal loan you provided me that enabled the buyout of a former member of Stratex.
>
> 2. Personal Loan. I agree to pay you $13,500 plus 5% interest related to a personal loan you provided me, commencing June 1, 2011 and on the first day of each month thereafter until paid in full and pursuant to the amortization schedule attached as Exhibit A and made a part hereof. I shall have the right to prepay this obligation in whole or in part without prepayment penalty. All amounts due and owing pursuant to this Section 2 shall be secured by a junior mortgage on [Ochstein's residence]."

¶ 11 The Letter Agreement contained additional provisions concerning a potential default and attorney fees. Ochstein agreed that in the event that he failed to pay any amount due and owing within 30 days of the due date, he would be in default with the full unpaid balance then due and owing. Dann then had the right to pursue any default remedies as set forth in the mortgage. Additionally, in regard to attorney fees, Ochstein agreed to pay Dann "all costs of collection including, without limitation, attorneys' fees, whether or not a suit is filed." The amortization

schedule detailed that the Personal Loan would be repaid in 29 monthly payments from June 1, 2011, to October 1, 2013.

¶ 12 The promissory note defined a "Sale Event," in relevant part as: "A 'Sale Event' shall mean (1) the sale of all, or substantially all, of [Stratex and Arga's] assets in any single transaction or series of related transactions (which occur within a 12-month period) ***."

¶ 13 On or about April 22, 2013, Ochstein's attorney, Scott Weiss, emailed Ken Brown, one of Dann's attorneys, to inform Dann that Ochstein was in the process of refinancing his residence and was going to prepay the remaining balance of $2812.01 on the $13,500 loan in exchange for a release. Weiss indicated that time was of the essence to complete the refinancing. Brown responded to the payoff request and asked Weiss to prepare a release. The Payoff Letter was drafted to inform Ochstein's new lender that it was in a second secured position, not a third position, and allowed Ochstein to proceed with the refinancing before the payoff check cleared.

¶ 14 The Payoff Letter, dated April 25, 2013, was addressed to Dann by Ochstein and stated as follows:

> "Reference is made to that certain Letter Agreement, dated May 6, 2011, between you ('Lender') and me ('Borrower) (the 'Loan Agreement') regarding a personal loan in the principal amount of $13,500. All terms capitalized but not defined herein shall have the meanings given to such terms in the Loan Agreement.
>
> Lender acknowledges that upon payment from Borrower to Lender of $2,812.01 ('Payoff Amount'), the remaining amount outstanding under the Loan Agreement as of April 25, 2013 ('Payoff Date'), Borrower has paid in full and satisfied all of its obligations under the Loan Agreement (the 'Obligations').
>
> Lender agrees that upon payment of the Payoff Amount as of the Payoff

> Date (i) the Loan Agreement shall have terminated and (ii) any liens or security interests granted to Lender in the assets of Borrower pursuant to the Loan Agreement shall have terminated. Lender further agrees that Borrower or its designees may file, in all appropriate filing offices, any and all appropriate UCC terminations and/or other releases to evidence Lender's release of security interests or liens in or to any assets of Borrower. In addition, upon reasonable request by Borrower, from time to time, Lender will, at Borrower's expense, execute and deliver such additional similar lien releases as may be necessary to effectively terminate any and all of the security interests and liens on the assets and properties of the Borrower on any public record as set forth herein."

Both parties signed the Payoff Letter.

¶ 15 The next contact occurred in late 2015 when Weiss contacted Brown regarding a payoff on an outstanding loan Dann had made to Stratex. Weiss and Brown exchanged emails regarding this early payoff for a few months in 2016. Brown sought a reaffirmation of the Additional Payment from the Letter Agreement, but Weiss avoided discussing the Letter Agreement and neither reaffirmed any remaining obligation nor asserted that the Letter Agreement had been terminated. No payoff letter for the Stratex loan was signed by the parties.

¶ 16 On or about July 24, 2019, an alleged Sale Event occurred when Stratex was acquired by Toast, Inc., a human resources firm in the restaurant industry. On July 25, 2019, one of Dann's attorneys sent a letter to Ochstein and Abualsamid requesting information regarding the Sale Event to confirm the Additional Payment under the Letter Agreement. A follow up email was sent on August 2, 2019. Dann further sought an accounting of the funds payable to Ochstein from the Sale Event, but did not receive a response. Dann alleged, upon information and belief,

that Ochstein received in excess of $500,000 from the Sale Event. Ochstein refused to pay the Additional Payment. Dann alleged that the Letter Agreement established his right to the Additional Payment and sought relief against all of the defendants for breach of contract, including a judgment in excess of $50,000, as well as a preliminary and permanent injunction on the distributions from the Sale Event to be placed in an escrow trust.

¶ 17 Dann further alleged a claim of breach of fiduciary duty against all of the defendants. According to Dann, Ochstein and Abualsamid became fiduciaries of Dann by agreeing to take control of the Sale Event distributions and establish an escrow trust to ensure Dann received his Additional Payment. They breached this duty by refusing to follow the Letter Agreement, disclose the amount of the Stratex sale, the distributions, or Additional Payment, and failing to pay Dann the Additional Payment. Finally, Dann alleged a claim of conversion against all of the defendants by wrongfully taking control of all or some of the Additional Payment, which was Dann's property.

¶ 18 In December 2019, Ochstein moved to dismiss the complaint under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2018)). First, he argued that the breach of contract claim was barred because the Payoff Letter terminated the entire Letter Agreement. In the alternative, Ochstein contended that Dann failed to state a cause of action for breach of contract. Second, Ochstein asserted that Dann failed to plead an actionable claim of breach of fiduciary duty and could not state a claim for conversion. Dann responded that he successfully pled each of his counts in the complaint.

¶ 19 Also in December 2019, Dann filed a motion for partial summary judgment, seeking a finding that

> "Ochstein's obligation to pay the Additional Payment was not released because:

> (1) the Payoff Letter is unambiguous and the $2,812.01 payment did not release Ochstein's obligation to make the Additional Payment; and (2) Ochstein was already obligated to make the $2,812.01 payment on the mortgage loan, therefore that payment could not have been consideration for any release of the Additional Payment."

¶ 20 In September 2020, the trial entered an order granting Ochstein's motion to dismiss and denying Dann's motion for partial summary judgment. The court dismissed all of the claims with prejudice. In the written order, the court concluded that the Payoff Letter

> "expressly and unambiguously releases Ochstein from his obligations, plural, under the Letter Agreement. Those obligations included the Sale Event Percentage Obligation. The captioning of the letter as a 'pay-off release' is not a material term and not sufficient to undermine the plain language in the body of the letter. Likewise, the 'regarding a personal loan' statement in the first paragraph does not change the fact that the [Payoff Letter] expressly and unambiguously defines the full Letter Agreement as the 'Loan Agreement' that is being terminated because all of the obligations under it have been satisfied."

¶ 21 The trial court further found that there was consideration for Dann's release of Ochstein from the Additional Payment obligation because Ochstein "did not have a duty to pay off the entire loan early at the time when he chose to do so." The court found this prepayment gave "some benefit to Dann to receiving early full payment because he avoided the risk that Ochstein might default on remaining payments." Additionally, the court dismissed Dann's claims for breach of fiduciary duty and conversion, with prejudice.

¶ 22 Dann filed a motion to reconsider the court's dismissal order and sought leave to file an

amended complaint for reformation based on mutual mistake. The trial court denied Dann's motion for reconsideration, but vacated the portion of its order dismissing Dann's complaint with prejudice and allowed Dann leave to file an amended complaint.

¶ 23 In March 2021, Dann filed his second amended complaint alleging the new reformation claim against Ochstein. Dann alleged that he and Ochstein, through their respective attorneys,

> "agreed to prepare and issue the Payoff Letter for the sole purpose of confirming to Ochstein's new lender that all obligations to [Dann] under the $13,500 Personal Loan had been satisfied by payment of the Payoff Amount and that [Dann] would release the Mortgage securing the Personal Loan so that Ochstein could complete the refinancing before the Release was recorded."

¶ 24 The Payoff Letter was prepared by Ochstein's attorney Weiss and set forth the payment arrangements and the release of the mortgage. The parties "never agreed that the Payoff Letter released any of the obligations that Ochstein *** had to [Dann] under the Letter Agreement beyond the $13,500 Personal Loan obligations." The parties "never agreed to release the Additional Payment obligations" under the Letter Agreement. Reformation of the Payoff Letter was "necessary to correct the mutual mistake and/or scrivener's error in the Payoff Letter" to reflect the parties' agreement. Dann also sought a declaratory judgment asking the court to declare that the Payoff Letter only released Ochstein's obligations under the Personal Loan, and not the Additional Payment obligations in the Letter Agreement.

¶ 25 In May 2021, defendants moved to dismiss the second amended complaint for failure to state a cause of action under section 2-615 of the Code (735 ILCS 5/2-615 (West 2018)), which the trial court granted in part and denied in part. The court granted the motions to dismiss as to Abualsamid and Stratex and dismissed these defendants. The court also dismissed Dann's

declaratory judgment claim, but denied Ochstein's motion to dismiss the reformation claim.

¶ 26 In July 2022, Ochstein moved for summary judgment on the reformation claim and argued that no genuine issue of material fact exists because Dann could not establish by clear and convincing evidence that a mutual mistake or scrivener's error occurred in the Payoff Letter. Ochstein maintained that the Payoff Letter was drafted as intended and there was no mutual mistake to support the reformation claim.

¶ 27 Ochstein attached an affidavit from his attorney Weiss in support. Weiss stated in his affidavit that he "purposefully included broad language in the draft to clarify that all contractual obligations between the parties were released and terminated upon final payment of the personal loan by Ochstein." According to Weiss, he "drafted the instrument to effectuate a termination of all obligations existing under the prior 2011 letter agreement." Weiss also stated that he defined the "entire 2011 letter agreement as 'Loan Agreement' " and that Ochstein satisfied all of his "obligations under the Loan Agreement." Weiss admitted that in his emails with Dann's attorney, they "never discussed the scope of the [Payoff Letter] or any of its terms."

¶ 28 In December 2022, Dann sought leave to file a fifth amended complaint alleging new claims of rescission, reformation for unilateral mistake, and fraud. Dann argued that the new claims arose following the depositions of Ochstein and Weiss. According to the motion, Weiss admitted in his deposition that he falsely maintained that time was of the essence for the release in the refinancing. He also admitted that he did not represent Ochstein in the refinancing and never communicated with the lender. Weiss prepared the Payoff Letter in less than 30 minutes and he "inserted the purported release of the Additional Payment obligation in the Payoff Letter without any request, discussion, or agreement concerning such a release with Brown." In his deposition, tellingly Ochstein admitted that Dann was not obligated to release the entire Letter

Agreement when he paid off the Personal Loan but was hopeful that Dann would do so.

¶ 29 In June 2023, during a videoconference with the parties, the trial court granted Ochstein's summary judgment motion and denied Dann leave to file a fifth amended complaint. The court found that Dann lacked evidence to support his claim for reformation based on mutual mistake. Regarding the amended complaint, the court observed that despite the label as the fifth amended complaint, it was only the second time that Dann sought to add new claims. However, the court concluded that the proposed amended complaint was futile. The court subsequently entered an order in line with its findings on the record and stated that the case was "hereby disposed."

¶ 30 This appeal followed.

¶ 31 Dann first argues that the trial court erred in dismissing his breach of contract claim and denying his motion for partial summary judgment. Specifically, he asserts that the trial court erroneously found that the Payoff Letter released all provisions in the Letter Agreement, including the Additional Payment obligation upon a Sale Event. Dann has not challenged the trial court's dismissal of his breach of fiduciary duty and conversion claims, as a result those claims are not before us. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) ("[p]oints not argued are waived").

¶ 32 In his motion to dismiss, Ochstein argued that the breach of contract claim was barred under section 2-619 because the Payoff Letter had released all obligations under the Letter Agreement. His motion was filed under section 2-619.1 of the Code. 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 2018). 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 an 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 2018).

¶ 33 Dann also asks this court to reverse the trial court's denial of partial summary judgment. Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2018). We review cases involving summary judgment *de novo. Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998).

¶ 34 For the purposes of this appeal, we accept as true all the well-pleaded facts in Dann's amended complaint and draw all reasonable inferences in his favor. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). We are also mindful of the principle that "exhibits attached to a complaint become a part of a complaint, and if there is any conflict between the factual matters in the exhibits and those alleged in the complaint, the factual matters in the exhibit control." *Coghlan v. Beck*, 2013 IL App (1st) 120891 ¶ 24.

¶ 35 Both parties agree that the Payoff Letter is unambiguous, they simply disagree about what the unambiguous language means. Dann asserts that the Payoff Letter confirmed that he was only releasing the Personal Loan obligations, including the junior mortgage, upon his receipt of the payoff amount from Ochstein. He maintains that the Payoff Letter did not release the

Additional Payment obligation from the Letter Agreement. In contrast, Ochstein contends that the Payoff Letter released all obligations and terminated the Letter Agreement in its entirety, including the Additional Payment.

¶ 36 A release is a contract and, as such, is governed by contract law. *Construction Systems, Inc. v. FagelHaber,* LLC, 2015 IL App (1st) 141700, ¶ 25. "A release 'is the abandonment of a claim to the person against whom the claim exists and is a contract to be construed under traditional contract law.' " *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 21 (2003) (quoting *Hurd v. Wildman, Harrold, Allen & Dixon*, 303 Ill. App. 3d 84, 88 (1999)). "General words of release are restrained in effect by the specific recitals contained in the document." *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 614 (2007). "Releases are strictly construed against the benefitting party and must spell out the intention of the parties with great particularity." *Id.* A release will not be construed to include claims that were not within the contemplation of the parties. *Miller v. Lawrence*, 2016 IL App (1st) 142051, ¶ 26 (citing *Carlile v. Snap-On Tools*, 271 Ill. App. 3d 833, 838 (1995)). "The intention of the parties controls the scope and effect of the release, and this intent is discerned from the release's express language as well as the circumstances surrounding the agreement." *Fuller Family Holdings*, 371 Ill. App. 3d at 614 (citing *Adams v. American International Group, Inc.,* 339 Ill. App. 3d 669, 676 (2003); *Doctor's Assoc., Inc., v. Duree*, 319 Ill. App. 3d 1032, 1045 (2001)).

¶ 37 "The construction of a contract presents a question of law." *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). "A contract must be construed as a whole, viewing particular terms or provisions in the context of the entire agreement." *Matthews v. Chicago Transit Auth.*, 2016 IL 117638, ¶ 77. "[T]he parties' intent will not be ascertained by viewing a clause or provision in isolation." *Id*. "If the words in the contract are clear and unambiguous, they must be given their

plain, ordinary and popular meaning." *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). "However, if the language of the contract is susceptible to more than one meaning, it is ambiguous." *Id*. "[A]n ambiguity will be found if the language of the contract is 'obscure in meaning through indefiniteness of expression.' " *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004) (quoting *Platt v. Gateway International Motorsports Corp.*, 351 Ill. App. 3d 326, 330 (2004)). "If the contract language is ambiguous, a court can consider extrinsic evidence to determine the parties' intent." *Thompson*, 241 Ill. 2d at 441. "A contract is not rendered ambiguous merely because the parties disagree on its meaning." *Central Illinois Light*, 213 Ill. 2d at 153. "On the other hand, a contract is not necessarily unambiguous when, as here, each party insists that the language unambiguously supports its position. Rather, whether a contract is ambiguous is a question of law." *Id.* at 153-54.

¶ 38 As previously stated, the Payoff Letter provides, in relevant part:

> "Reference is made to that certain Letter Agreement, dated May 6, 2011, between you ('Lender') and me ('Borrower) (the 'Loan Agreement') regarding a personal loan in the principal amount of $13,500. All terms capitalized but not defined herein shall have the meanings given to such terms in the Loan Agreement.
>
> Lender acknowledges that upon payment from Borrower to Lender of $2,812.01 ('Payoff Amount'), the remaining amount outstanding under the Loan Agreement as of April 25, 2013 ('Payoff Date'), Borrower has paid in full and satisfied all of its obligations under the Loan Agreement (the 'Obligations').
>
> Lender agrees that upon payment of the Payoff Amount as of the Payoff Date (i) the Loan Agreement shall have terminated and (ii) any liens or security interests granted to Lender in the assets of Borrower pursuant to the Loan

Agreement shall have terminated."

¶ 39 The referenced Letter Agreement, as previously discussed, sets forth two provisions: the Additional Payment and the Personal Loan. The Additional Payment provision required Ochstein to pay Dann 10% of the gross proceeds received by Ochstein from a qualifying Sale Event for Stratex, as well as $12,500 from a personal loan related to Ochstein's buyout of a former member of Stratex. The Personal Loan provision set forth a new loan for $13,500 from Dann to Ochstein, to be paid in accordance with an amortization schedule with no prepayment penalty. This Personal Loan was secured by a junior mortgage on Ochstein's residence.

¶ 40 In reviewing the Payoff Letter, we must strictly construe it against Ochstein, the benefitting party, and it must detail the parties' intentions with "great particularity." See *Fuller Family Holdings*, 371 Ill. App. 3d at 614. Dann interprets the Payoff Letter narrowly based on the language referring only to the Personal Loan details. In contrast, Ochstein reads the Payoff Letter broadly to release and terminate all obligations under the Letter Agreement. For the reasons that follow, we agree with Dann's interpretation that the specific language in the Payoff Letter limits its application to the Personal Loan.

¶ 41 When the Payoff Letter is read in its entirety, the unambiguous intent of the parties was to release only the obligations for the Personal Loan. The clear and plain text of the Payoff Letter supports this conclusion. In the first paragraph, while the Payoff Letter refers to the Letter Agreement, the parties are defined in terms related to the Personal Loan as "Lender" and "Borrower." Further, the second phrase of that sentence specifically limits the Payoff Letter as "regarding a personal loan in the principal amount of $13,500."

¶ 42 The second paragraph details the amount of the payoff outstanding on the loan as $2,812.01. Under the Personal Loan provision in the referenced Letter Agreement, an

amortization schedule was attached, which stated that after the April 1, 2013, payment was made, the remaining balance on the Personal Loan was $2,812.01. The Payoff Letter then provides that "Borrower has paid in full and satisfied all of its obligations under the Loan Agreement." The only obligations paid by Ochstein as detailed in the Payoff Letter was the prepayment of the remaining balance under the amortization schedule for the Personal Loan. No reference was made to the Additional Payment provision and no Sale Event was alleged to have occurred at that time.

¶ 43 The final paragraph details that upon payment of the payoff amount, "the Loan Agreement shall have terminated" and any liens or security interests granted to "Lender in the assets of Borrower pursuant to the Loan Agreement shall have terminated." The only lien granted to Dann was the junior mortgage on Ochstein's residence as collateral for the Personal Loan. This paragraph again refers only to obligations related to the Personal Loan, *i.e.*, the payoff amount and the lien. No reference or suggestion is made to any obligations set forth under the Additional Payment provision of the Letter Agreement. As previously observed, general words of release are restrained in effect by the specific recitals contained in the document. *Fuller Family Holdings*, 371 Ill. App. 3d at 614. The specific recitals in the Payoff Letter only reference the Personal Loan and the obligations under that provision.

¶ 44 In his broad interpretation, Ochstein focuses on the opening phrase, "Reference is made to that certain Letter Agreement, dated May 6, 2011, between you ('Lender') and me ('Borrower) (the 'Loan Agreement')" defining the entire Letter Agreement as the Loan Agreement. However, the rest of that introductory sentence is relevant to its interpretation, and it states: "regarding a personal loan in the principal amount of $13,500." When the entire sentence is considered, the Payoff Letter unambiguously references only the Personal Loan portion of the

Letter Agreement. Ochstein's interpretation renders the phrase limiting the Payoff Letter to the Personal Loan superfluous. "A court will not interpret a contract in a way that will render any provision meaningless." *Wolfensberger v. Eastwood*, 382 Ill. App. 3d 924, 934 (2008). Ochstein attempts to avoid this interpretation by contending that the "phrase is given effect insofar as it accurately describes the subject of the parties' prior contract, which undeniably concerned the $13,500 'personal loan.' " If the phrase "accurately describes the subject of the parties' prior contract," then the Payoff Letter necessarily relates to that specific subject. The Payoff Letter does not discuss or describe the Additional Payment provision from the Letter Agreement. No reference is made to Stratex or the occurrence of a Sale Event.

¶ 45 We also reject Ochstein's interpretation of the term "obligations" in the Payoff Letter. When the term is read in context of the entire Payoff Letter, the only obligations detailed were Ochstein's payment of the payoff amount outstanding due under the Personal Loan to Dann as of April 25, 2013. According to Ochstein, the use of the plural "obligations" necessarily included the Additional Payment provision because his only obligation under the Personal Loan provision was to make the payment. Again, Ochstein focuses on the general term rather than "specific recitals contained in the document." See *Fuller Family Holdings*, 371 Ill. App. 3d at 614. A reading of the plain and ordinary language of the Payoff Letter illustrates that the specific recitals are releasing the Personal Loan. The release terms detail the amortized payoff amount from the Personal Loan provision, the termination of the Personal Loan, and the subsequent termination of the lien on Ochstein's residence.

¶ 46 Moreover, when we review the terms related to the Personal Loan provision in the Letter Agreement, it is clear that the parties were subject to additional obligations other than making timely payments. First, under the Letter Agreement, if Ochstein had failed to pay "any amount

due and owing" within 30 days of the due date, then he would have been in default and the entire balance would have been due and owing to Dann. Dann would then have the right to pursue the applicable remedies set forth in the mortgage on Ochstein's residence. Dann would also have the right to all costs of collection, including attorney fees, "whether or not a suit is filed." A full reading of the Letter Agreement explicitly detailed multiple obligations related to the Personal Loan provision, which were subsequently released under the Payoff Letter.

¶ 47 After strictly construing the Payoff Letter against Ochstein, we conclude that the intention of the parties was to release only the Personal Loan provision of the Letter Agreement. The Payoff Letter detailed the terms of the release for that specific provision "with great particularity." *Id.* Accordingly, we find that the trial court erred in dismissing Dann's breach of contract claim and in denying Dann's motion for a partial summary judgment that the Payoff Letter only applied to the Personal Loan and Ochstein's obligations regarding the Additional Payment had not been released. We reverse those orders and remand the case for the trial court to reinstate the breach of contract claim and enter partial summary judgment in Dann's favor.

¶ 48 Since we have already concluded that the Payoff Letter did not release the Additional Payment provision in the Letter Agreement and remanded for further proceedings, we need not reach Dann's alternative argument that there was no consideration to support a release of the Additional Payment provision.

¶ 49 Next, Dann contends that the trial court erred in granting summary judgment on his claim for reformation. Assuming that the Payoff Letter can be construed to release the entire Letter Agreement, he asserts that there was ample evidence in the record to demonstrate that the Payoff Letter was written in such a manner due to a mutual mistake or scrivener's error. Ochstein responds that the evidence does not support Dann's claim of mutual mistake or scrivener's error

and the trial court properly granted summary judgment.

¶ 50 However, having concluded that Dann was entitled to summary judgment on the breach of contract claim, any issue regarding whether the trial court erred in granting summary judgment on the reformation count is moot. "Reviewing courts 'will not decide moot or abstract questions, will not review cases merely to establish precedent, and will not render advisory opinions.' " *Greater Pleasant Valley Church in Christ v. Pappas*, 2012 IL App (1st) 111853, ¶ 43 (quoting *Condon v. American Telephone & Telegraph Co.*, 136 Ill.2d 95, 99 (1990)). Dann is barred under the election of remedies doctrine from pursuing two or more inconsistent remedies for the same cause action: breach of contract and reformation. See *Lempa v. Finkel*, 278 Ill. App. 3d 417, 423 (1996); see also *Douglas Theater Corp. v. Chicago Title & Trust Co.*, 288 Ill. App. 3d 880, 886-87 (1997) ("While a plaintiff may pursue a remedy at law for damages and alternatively seek specific performance of the contract, plaintiff cannot have it both ways. Plaintiff cannot affirm the contract, obtain specific performance and, in essence, erase the breach, yet also seek damages at law for breach of contract."). Since we have already concluded that Dann was entitled to partial summary judgment on the breach of contract, his reformation claim is now moot.

¶ 51 Finally, Dann asserts that the trial court erred in denying him leave to file his fifth amended complaint alleging three new claims for recission, reformation based on a unilateral mistake, and fraud. According to Dann, the additional claims were added in response to new facts disclosed in affidavits and depositions regarding the intent and actions of Ochstein and Weiss. The trial court denied leave to file and found these new claims were futile.

¶ 52 For the same reasons that Dann's reformation claim based on mutual mistake has been rendered moot, his counts for rescission and reformation by unilateral mistake are likewise moot.

Again, we will not decide moot questions, review cases to establish precedent, or render advisory opinions. See *Pappas*, 2012 IL App (1st) 111853, ¶ 43; see also *Newton v. Aitken*, 260 Ill. App. 3d 717, 720 (1994) (the equitable remedy of rescission "is not available where there is an adequate remedy at law.").

¶ 53 Because two of the newly alleged claims are moot, we need only consider whether the trial court abused its discretion in denying Dann leave to file a claim of fraud.

¶ 54 Section 2-616(a) provides that "[a]t any time before final judgment amendments may be allowed on just and reasonable terms," which includes changing the cause of action or adding new causes of action in any pleading "which may enable the plaintiff to sustain the claim for which it was intended." 735 ILCS 5/2-616(a) (West 2018). "Although courts in Illinois are encouraged to freely and liberally allow the amendment of pleadings, the right to amend is not absolute and unlimited." *In re Marriage of Lyman*, 2015 IL App (1st) 132832, ¶ 51 (citing *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992)). "Leave to amend may be denied where the proposed amendment would be futile." *Butler v. BRG Sports, LLC*, 2019 IL App (1st) 180362, ¶ 71. "The circuit court retains broad discretion in allowing or denying amendment to pleadings prior to the entry of final judgment, and a reviewing court will not reverse the trial court's decision absent a manifest abuse of such discretion." *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 35.

¶ 55 In considering whether the trial court abused its discretion in denying leave to amend, Illinois courts must determine whether "(1) the proposed amendment would cure the defective pleading; (2) the proposed amendment would surprise or prejudice the opposing party; (3) the proposed amendment was timely filed; and (4) the moving party had previous opportunities to amend." *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 69; see *Loyola Academy v. S*

& S Roof Maintenance, Inc., 146 Ill. 2d 263, 273 (1992) (setting forth the required factors for filing an amended pleading). "The plaintiff must meet all four factors ***.' " *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 220 (2010) (quoting *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill.App.3d 1, 7 (2004)).

¶ 56 We find the trial court did not abuse its discretion for denying Dann leave to file his fraud claim. "The stage of litigation at which a proposed amendment is brought is certainly a relevant consideration." *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 525-26 (2007). Dann filed his initial complaint in September 2019, but he failed to allege fraud until December 2022, more than three years after the action commenced and after multiple counts had already been dismissed. Further, Dann had previous opportunities to amend his complaint and raise new causes of action. See *United Conveyor Corporation*, 2017 IL App (1st) 162314, ¶ 37 (finding the plaintiff had prior opportunities to amend its complaint when the proposed amendment was sought after the litigation had been pending for more than three years); *Seitz-Partridge v. Loyola University of Chicago*, 409 Ill. App. 3d 76, 87 (2011) (no abuse of discretion where the plaintiff sought to file a proposed sixth amended complaint after the multiple amendments had been allowed over six years). Since Dann cannot satisfy all four of *Loyola* factors, no abuse of discretion occurred in denying him leave to amend.

¶ 57 Based upon all of the above, we affirm the trial court's order denying Dann leave to file a fifth amended complaint. We reverse the trial court's orders dismissing the breach of contract count and denying Dann's motion for partial summary judgment. We dismiss the order granting summary judgment in favor of Ochstein on the reformation count as moot. We remand for further proceedings in accordance with this decision.

¶ 58 Affirmed in part, dismissed in part, and reversed in part.

¶ 59 Cause remanded.