00682886
8734/0093 28 001 Page 1 of 21
2000-09-01 15:33:40
Cook County Recorder 61.50

No. 1-00-0115

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CERMAK PARTNERS III LIMITED PARTNERSHIP,	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division,
Plaintiff-Appellee,	No. 99 CH 8653
vs.	
BAUM BROTHERS, L.L.C.,	The Honorable Ellis E. Reid, Judge Presiding
Defendant-Appellant.	

NOTICE OF LIS PENDENS

The undersigned, pursuant to 735 ILCS 5/2-1901, certifies that the Appellate Court of Illinois, First Judicial District entered an Order on August 24, 2000, reversing the trial court's December 17, 1999 order and remanding this matter to the trial court for further proceeding with respect to the property commonly knows as 500 West Cermak, Chicago,

Illinois (the "Property"). A copy of the Property's legal description is attached hereto as Exhibit A. A copy of the Appellate Court's August 24, 2000 Order is attached hereto as Exhibit B. The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

Dated: September 1, 2000

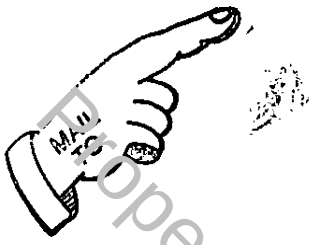
BAUM BROTHERS, L.L.C.

BY: _____
One of Its Attorneys

Kenneth S. Ulrich
Everett J. Cygal
GOLDBERG, KOHN, BELL, BLACK,
ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street, Suite 3700
Chicago, Illinois 60603
(312) 201-4000
Attorney No. 24139

THIS DOCUMENT PREPARED BY AND AFTER RECORDING RETURN TO

Everett J. Cygal
GOLDBERG, KOHN, BELL, BLACK,
ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street
Suite 3700
Chicago, Illinois 60603



PARCEL 1:

LOT 9 IN BLOCK 35 (EXCEPTING FROM SAID LOT 9 THAT PORTION THEREOF CONVEYED TO THE CITY OF CHICAGO BY DEED RECORDED MAY 2, 1871 AS DOCUMENT 95032 IN BOOK 647, PAGE 467, AND EXCEPTING THEREFROM THAT PORTION THEREOF CONVEYED TO THE SANITARY DISTRICT OF CHICAGO BY DEED RECORDED FEBRUARY 25, 1903 AS DOCUMENT 3356067 IN BOOK 7968, PAGE 528) IN THE CANAL TRUSTEE'S SUBDIVISION OF THE WEST 1/2 AND THAT PORTION WEST OF THE RIVER OF THE SOUTH EAST 1/4 OF SECTION 21, TOWNSHIP 39 NORTH, RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

PARCEL 2:

THAT PART OF LOT 10 IN BLOCK 35 IN THE CANAL TRUSTEES' SUBDIVISION AFORESAID COMMENCING AT THE NORTHWEST CORNER OF SAID LOTS; THENCE EASTERLY ALONG THE NORTHERLY LINE THEREOF 184 FEET; THENCE SOUTHERLY TO A POINT IN THE SOUTH LINE OF SAID LOT WHICH IS 150 FEET DISTANT FROM THE SOUTHWEST CORNER THEREOF; THENCE WESTERLY ALONG SAID SOUTH LINE TO SAID SOUTHWEST CORNER; THENCE NORTHERLY ALONG THE WEST LINE OF SAID LOT TO THE POINT OF BEGINNING, EXCEPTING THEREFROM THAT PART LYING EASTERLY OF A LINE DESCRIBED AS BEGINNING AT A POINT ON THE NORTH LINE OF 22ND STREET 153.94 FEET EAST OF THE NORTHEAST CORNER OF LUMBER AND 22ND STREETS MEASURED ALONG SAID NORTH LINE; RUNNING THENCE NORTHEASTERLY TO A POINT IN THE NORTH LINE OF SAID LOT 10, 152.31 FEET EASTERLY OF THE NORTHWEST CORNER OF SAID LOT CONVEYED BY DEED TO THE SANITARY DISTRICT OF CHICAGO RECORDED AS DOCUMENT 5167309; ALSO EXCEPTING THEREFROM THAT PART LYING SOUTH OF A LINE 14 FEET NORTH OF AND PARALLEL TO THE NORTH LINE OF 22ND STREET CONVEYED BY DEED TO THE CITY OF CHICAGO RECORDED AS DOCUMENT 3728622, ALL IN COOK COUNTY, ILLINOIS.

Tax Identification Number: 17-21-332-012-0000
Real Property Address: 500 West Cermak, Chicago, Illinois

EXHIBIT
tabbies
A

FOURTH DIVISION
FILED: 8/24/00

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-00-0115

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CERMAK PARTNERS III LIMITED PARTNERSHIP,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 94 L 04209
	)	
BAUM BROTHERS, L.L.C.,	)	Honorable
	)	Ellis E. Reid,
Defendant-Appellant.	)	Judge Presiding.

ORDER

This case involves a dispute stemming from an attempt by the plaintiff, Cermak Partners III Limited Partnership (Cermak), to exercise an option to purchase property owned by the defendant, Baum Brothers, L.L.C. (Baum). The defendant appeals from a trial court order extending the term of the option and dictating the amount of certain elements of the compensation to which Baum would be entitled if Cermak exercised the option. For the reasons which follow, we reverse the trial court's order and remand for further proceedings.

The plaintiff, Cermak, is a limited partnership of which Liskor International, Inc. is a general partner. David and Liska Blodgett are officers of Liskor. In April 1999, the Blodgetts sold a piece of property located at 500 West Cermak in Chicago (the Property) to Baum. Baum granted Cermak

EXHIBIT
tabbies
B

a six month option to purchase the Property. The parties executed four documents in connection with this transaction: 1) a Real Estate Sales Contract; 2) an Addendum to Real Estate Sales Contract (Addendum); 3) a Bonus Agreement; and 4) an Option Agreement.

Under the terms of the Real Estate Contract, Baum was to pay a total purchase price of $2,468,750 for the Property, a portion of which was to be paid via a promissory note. If Cermak later exercised its option to purchase the Property, the promissory note was to be considered void, but if Cermak did not exercise the option, the note would be paid. The Option Agreement provided that, in the event that Cermak chose to exercise its option, the purchase price for the Property was to be $2,468,750, less the amount of the promissory note Baum had issued, plus Baum's expenditures for expenses and taxes during a specified period, less the Property's rent receipts during a specified time period. "Expenses" was defined to include all capital and ordinary expenses and liabilities incurred during the option term for managing, owning, leasing, maintaining, operating, insuring, replacing, and repairing the Property, as well as"[a]ll legal and loan related charges".

The Option Agreement and Addendum each contained provisions regarding compensation which Cermak would owe to Baum, if it exercised the option, for Baum's management of the Property, and the Bonus Agreement set forth bonuses to which Baum would be entitled if certain leasing objectives were met during its management of the Property. The Option Agreement also contained a provision requiring that Baum provide the Blodgetts with periodic income and expense statements.

Under the terms of the Option Agreement, if Cermak chose to exercise its option, it was required to give Baum written notice "provided that the closing shall not be: (i) sooner than 7 days

after the date on which the Closing Notice is delivered ***, nor (ii) later than October 6, 1999." The Addendum, however, provides that the "Blodgetts can exercise their option with 60 days written notice." On May 7, 1999, Cermak sent Baum a closing notice, designating May 27, 1999, as the closing date. Baum responded via a May 11, 1999, letter, informing Cermak that it had failed to comply with the Addendum provision requiring 60 days written notice for the exercise of the option. Subsequently, on May 17 and May 21, Cermak sent closing notices designating July 6 and July 9, respectively, as closing dates. Baum again responded by informing Cermak that it had not complied with the applicable notice provision.

On June 11, 1999, Cermak initiated the instant action by filing a two count complaint. Cermak alleged that it had given Baum the notice required under the Option Agreement and that Baum had refused to honor the notice. Cermak also alleged that the promissory notice which Baum had issued in connection with its purchase of the Property was for the wrong amount and that it had refused to issue a corrected note. In count I, Cermak sought a declaration that it had properly exercised its option, that the July 9 closing date was valid, and that Baum was required to provide it with a corrected promissory note. In count II, Cermak sought an order directing Baum to specifically perform the option contract and honor the July 9 closing date and to deliver to Cermak a corrected promissory note.

On the same date it filed the complaint, Cermak filed an emergency motion, seeking a preliminary injunction "enjoining defendant, Baum Brothers, from refusing to sell the Premises to plaintiff [Cermak] on July 9, 1999 and specifically ordering defendant to sell the Premises to plaintiff on July 9, 1999". On June 21, 1999, Baum filed its answer to Cermak's complaint and a

memorandum in opposition to Cermak's emergency motion for a preliminary injunction. The trial court entered and continued Cermak's motion for a preliminary injunction to July 8. It also ordered that Cermak's pleadings would be treated as a motion for summary judgment, allowed Baum time to file a motion for summary judgment, and scheduled the cross-motions for a hearing on July 8. On June 23, Baum filed its motion for summary judgment.

At the July 8 hearing on the parties' cross-motions for summary judgment, the parties' arguments focused only on whether the notice given by Cermak met the notice requirements contained in the Addendum and the Option Contract. After hearing arguments, the trial court entered an order, which provides in relevant part:

> "The Court grant's [sic] Cermak's Motion for Summary Judgment with respect [to] the notice of the exercise of the Option, the Court finding that the notice provision was triggered and the 60 days provision was complied with; Baum's Cross-Motion for Summary Judgment is denied.
>
> It is further ordered that a closing on the property will not occur before July 30, 1999."

The trial court did not make any ruling with regard to Cermak's contention that the promissory note issued by Baum was for an incorrect amount.

On July 21, 1999, Cermak sent Baum a closing notice designating July 30 as the closing date, along with a letter requesting certain documents and the purchase price under the Option Agreement. Baum responded by letter dated July 26, informing Cermak that "the purchase price cannot be finally ascertained until closer to closing" but that the net difference between expenses and rent receipts had

been "preliminarily calculated, as of June 30, 1999," as being $156,406.73. Baum further informed Cermak that it would be charging construction fees in the amounts of: $111,365 for roof repairs and $190,000 for tuckpointing. The closing did not take place on July 30. During the months of August and September, Cermak sent Baum numerous letters requesting various information and sent four closing notices, respectively designating September 17, September 24, October 1, and October 6 as the closing dates. The closing, however, never took place.

On September 29, 1999, Cermak filed an Emergency Motion to Compel Defendant to Comply. Cermak alleged that Baum had violated its obligation to cooperate with its attempt to obtain financing by providing necessary information, such as rent rolls, income and expense statements, and copies of all leases. Cermak requested that Baum be ordered to immediately provide all necessary information and that the termination date of the option be extended. On September 30, the trial court entered an order requiring Baum to provide certain information to Cermak and entering and continuing Cermak's motion to October 4. On October 4, Baum informed the trial court that it had complied fully with the September 30 order and had given Cermak a purchase price. Cermak did not contest this but did inform the court that it took issue with the purchase price which had been provided, believing it to contain figures which were "not called for *** under the contract." The trial court entered an order providing that "[t]he closing of the purchase of 500 W. Cermak will take place on October 6, 1999" and that "[t]he full amount of any disputed funds shall be deposited with the Clerk of the Circuit Court to be held in escrow pending further order of the Court".

On October 5, Cermak filed an emergency motion seeking to extend the closing date. In its motion, Cermak alleged that Baum had not provided it with required documentation or a closing

statement until October 1 and that the closing statement Baum provided at that time "deviated from all prior purported closing statements by more than $500,000". Cermak alleged that Baum's "concerted efforts to thwart [Cermak]'s refinancing efforts" had made it "commercially impossible" for Cermak to exercise its option by the October 6 expiration date. Cermak alleged that it had found a purchaser for the Property who could close within 14 days and attached to its motion an unsigned copy of a real estate sales contract. Accordingly, Cermak requested that the trial court extend the option for 14 days.

On October 5, the trial court entered an order stating that Cermak's motion to extend the closing date was denied and that the "October 6, 1999 closing date is not extended". In that same order, however, the trial court temporarily restrained Baum from selling or encumbering the Property pending an evidentiary hearing, scheduled for November 1, on the issue of whether Baum frustrated Cermak's efforts to obtain financing. The trial court further ordered that the parties were to "conduct expedited discovery". On October 8, the trial court continued the matter to October 12, on which date the trial court, at the request of the parties, continued the hearing date from November 1 to November 8 to allow more time for discovery. Also on October 12, Baum's counsel stated:

> "[W]hat I would ask is, because there were a lot of claims thrown back and forth in open court and in discussions, Plaintiff should file a very straight forward pleading in which they allege under penalties imposed by the Supreme Court Rules that our client frustrated and prevented them from closing a specific deal.
>
> We can answer that pleading and take discovery based upon those parameters as opposed to not knowing what the parameters are of this hearing. Are they talking

about a deal in April, a deal in July, are they talking about Mr. Ordower or not?

We and the Court are entitled to know what deal they say we frustrated."

The trial court responded by stating that Baum's concern could be addressed through discovery and by a court order barring from evidence any document or the testimony of any witness not disclosed during discovery. The trial court also reviewed and entered, with slight modification, an order prepared by counsel. The order set the evidentiary hearing for November 8, set a discovery schedule, and provided that any witnesses or documents not disclosed by October 19, would be "barred from use at [the] hearing on preliminary injunction." The record reflects that the order as proposed provided that undisclosed witnesses or documents would be "barred from use at trial" and that the trial judge struck the word "trial", replacing it with "hearing on preliminary injunction."

On November 8, prior to the commencement of the hearing, there was a discussion on the record regarding the scope of the hearing. The parties entered into a stipulation that the purpose of the hearing was to determine whether Baum had frustrated Cermak's right to exercise the option. Baum's counsel, however, noted his continuing objection to the hearing in light of the fact that Cermak had not filed a pleading and expressed his belief that, if the court found frustration, the only relief it could grant was a 14-day extension of the closing date, as that was all that was requested in Cermak's emergency motion. Cermak's counsel stated that if the evidence established that Baum had frustrated Cermak's efforts to close through the use of "inflated or fraudulent numbers given in a closing statement", then the court should grant appropriate relief, such as an adjustment to the purchase price.

Following the hearing, which took place on November 8th, 9th, 17th, and 19th, and December

7th, 9th, 10th, 15th, 16th, and 17th, the trial court entered an order, dated December 17, in which it found that Baum had frustrated Cermak's attempt to exercise the option on July 30. The trial court ordered that: 1) Cermak's option be extended 120 days to April 17, 2000, at which time it would expire if not yet exercised; and 2) Baum provide Cermak with copies of all leases for the Property and with a firm payoff amount within 28 days. The order further provided that the "court declare[d] the rights of the parties as follows", that Baum was not entitled to a $75,000 bonus or to any general contracting fees, and that Baum was entitled to fee of $50,000 per month only through July 30. The trial court's order contained Supreme Court Rule 304(a) language. The order also continued the matter to January 21, 2000, for status.

On January 10, 2000, Baum filed a notice of interlocutory appeal, which it twice amended. In its "Second Amended Notice of Interlocutory Appeal," Baum stated that it was appealing, pursuant to Supreme Court Rules 304(a) (155 Ill. 2d R. 304(a)) and 307(a)(1) (166 Ill. 2d R. 307(a)(1)): the trial court's December 17, 1999, order; its October 12, 1999, order denying Baum's request that the court require Cermak to file a pleading; and various evidentiary rulings made during the course of the evidentiary hearing.

Before considering the merits of Baum's appeal, we are obliged to examine the matter of our jurisdiction. Cermak has filed a motion to dismiss the appeal to the extent that it is filed pursuant to Supreme Court Rule 307(a)(1), and the motion has been taken with the case. Further, in the jurisdictional statement in its brief, Cermak contends that this court lacks jurisdiction under Rule 304(a), an assertion not contained in its motion to dismiss and for which it provides no authority.

We need not address Cermak's contention that we lack jurisdiction pursuant to Rule

307(a)(1), governing appeals from orders granting injunctions, because we conclude that we do have jurisdiction over this appeal pursuant to Rule 304(a). Rule 304(a) provides that, where a case involves multiple parties or multiple claims, "an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." 155 Ill. 2d R. 304(a). Although the trial court's December 17, 1999, order contains the requisite Rule 304(a) language, it is well-settled that the presence of Rule 304(a) language does not make a nonfinal order final and appealable. Elkins v. Huckelberry, 276 Ill. App. 3d 1073, 1075 (1995).

As the instant case does not involve multiple parties, the trial court's December 17 order is only appealable under Rule 304(a) if it is a final judgment as to one or more but fewer than all of the claims involved in the instant case. Our supreme court has defined the word claim, as used in Rule 304(a), as "any right, liability, or matter raised in an action." Marsh v. Evangelical Covenant Church of Hinsdale, 138 Ill. 2d 458, 465 (1990). The question of whether claims are stated in the same or different counts of a pleading is not determinative of whether they are considered separate claims for Rule 304(a) purposes. The statement of a single claim in multiple counts does not warrant a separate appeal upon the dismissal of one count. Rice v. Burnley, 230 Ill. App. 3d 987, 992 (1992). Claims are considered to be separate for Rule 304(a) purposes, however, where they are based on legal theories having differing elements. Freeman v. White Way Sign & Maintenance Co., 82 Ill. App. 3d 884, 890 (1980). Even claims based upon the same legal theory of relief, however, have been found to constitute separate claims for Rule 304(a) purposes, where the factual basis for the claims was sufficiently distinct. See St. Joseph Data Service, Inc. v. Thomas Jefferson Life Insurance Co. of

America, 73 Ill. App. 3d 935, 939-40 (1979). It has been stated that the test for determining whether the order from which a party attempts to appeal constitutes a final order on a claim is "whether the order appealed from constitutes a final determination of the parties' rights with respect to a definite and separable portion of the subject matter." Krivitskie v. Cramlett, 301 Ill. App. 3d 705, 707 (1998).

In order to determine whether the trial court's December 17, 1999, order constituted a final judgment as to one or more but fewer than all of Cermak's claims, we begin by examining the claims raised in the instant case. The sole complaint filed by Cermak contained two counts. By way of count I, Cermak sought two declaratory judgments, one that its closing notice was valid and one that the promissory note Baum had issued was for the wrong amount. Although contained in the same count and based on the same legal theory of relief, declaratory judgment, we believe Cermak's two requests for declaratory judgment are sufficiently distinct factually to be considered separate claims for purposes of Rule 304(a). See St. Joseph Data Services, 73 Ill. App. 3d at 939-40. By way of count II, Cermak sought two orders of specific performance, one ordering Baum to close on the Property on July 9 and one ordering Baum to issue a new promissory note. Again, we think the two matters were sufficiently distinct factually that they constitute separate claims as contemplated by Rule 304(a).

On July 8, 1999, the trial court entered an order granting Cermak's motion for summary judgment "with respect [to] the notice of the exercise of the Option". The trial court did not rule on Cermak's claim for declaratory judgment with regard to the promissory note issue and did not rule on either of Cermak's claims for specific performance. It is clear that the trial court's December 17

order did not dispose of any of these claims, either. Therefore, it is clear that, when the trial court issued that order, there remained pending before it unresolved claims. The question we must answer is whether the December 17 order disposed of in its entirety a claim separate and distinct from those already pending. In order to do so, we must first attempt to define the claim upon which the trial court ruled in its December 17 order.

On October 5, Cermak filed an emergency motion seeking to have the termination date of the option extended by 14 days. In its motion, Cermak alleged that Baum had made "concerted efforts to thwart [Cermak]'s refinancing efforts" and thus had made it "commercially impossible" for Cermak to exercise its option by the expiration date. The trial court entered an order denying the motion but setting a hearing on the issue of whether Baum frustrated Cermak's efforts to obtain financing. As will be discussed below, it is unclear upon what legal theory Cermak's claim for relief was based. It is, however, apparent to us that the claim was based on a set of facts separate and distinct from those upon which Cermak's already pending claims for declaratory relief and specific performance were based and that an order disposing of Cermak's "frustration" claim would have no bearing on the other issues pending. See Trizzino v. Kline Brothers Co., 106 Ill. App. 3d 230, 232-33 (1982). Accordingly, we find that the claim introduced by way of Cermak's October 5 motion constituted a separate claim for purposes of Rule 304(a). We further find that the trial court's December 17 order was a final order with respect to that claim as it completely disposed of the rights of the parties with respect to that claim. We note that the trial court commented, during the January 21 status date: "I retained jurisdiction to make sure that the sandbox is guarded so that the children playing in the sandbox play by my rules and not your rules." The trial court's retention of jurisdiction to enforce

its own order, however, does not render an otherwise final order nonfinal. Anest v. Bailey, 265 Ill. App. 3d 58, 66 (1994).

Having concluded, for the reasons stated above, that the trial court's December 17 order was a final order with respect to one but fewer than all claims, we conclude that we have jurisdiction over the instant appeal pursuant to Rule 304(a). Accordingly, we now turn to the substance of the appeal. On appeal, Baum contends that the trial court improperly denied its request that it require Cermak to file a pleading, asserting that, as a result, it "found itself stuck in a proceeding without structure, definition or rules." Baum does not, however, cite any authority in support of its assertion and does not request a reversal on this basis. Rather, Baum argues that the trial court's order should be reversed because: 1) the trial court erred in ruling that certain letters written to Cermak by its attorney were subject to the attorney-client privilege and thus inadmissible at the hearing in the instant case; 2) the trial court's determination that Baum frustrated Cermak's attempt to exercise its option was against the manifest weight of the evidence; 3) the trial court exceeded its equitable powers and abused its discretion by allowing Cermak an additional 120 days to exercise the option and ordering that Baum was not entitled to certain compensation where the only relief Cermak had requested was a 14-day extension of the option; and 4) the trial court, through its construction of certain contractual provisions regarding the compensation to which Baum was entitled for managing the property in question, improperly changed the contract terms upon which the parties had agreed.

We need not address the substance of these contentions, however, because we find that the manner in which the proceedings below were conducted was so procedurally improper as to deny Baum due process of law. In a civil case, the essential elements of due process are notice and an

opportunity to be heard in an orderly proceeding. Diamond Mortgage Corp. of Illinois v. Armstrong, 176 Ill. App. 3d 64, 69 (1988); see U.S. Const., amend XIV, Ill. Const. 1970, art. I, §2. In Pettigrew v. National Accounts System, Inc., 67 Ill. App. 2d 344, 351 (1966), this court stated that:

> "What is, or is not, a denial of due process does not readily lend itself to any refined definition, but it can be rendered progressively more clear by the course of litigation. Where, however, the procedure followed by a court is so lacking in a principle or principles so basic to our system of justice that it offends the system, that procedure must be condemned as a denial of due process."

In the instant case, on October 5, the day before its option to purchase the Property was to expire, Cermak filed an emergency motion to extend the option term, arguing that Baum's "concerted efforts to thwart" Cermak's refinancing attempts had made it "commercially impossible" for Cermak to close on the Property by the October 6 deadline. As discussed above, the subject matter of the motion was distinct from that of any of the claims which remained pending at that time before the trial court, and Cermak made no attempt to amend its complaint by adding a new count. The trial court denied the motion but scheduled the matter for a hearing on the issue of whether Baum frustrated Cermak's efforts for a hearing. We must assume that what the trial court intended was not to deny the motion entirely but merely to decline to hear the matter as an emergency and to continue the motion. Nonetheless, the matter was scheduled for a hearing on November 8. When, on October 12, Baum's counsel asked that the trial court require Cermak to file "a very straight forward pleading", the trial court denied the request, expressing its belief that Baum's questions regarding the parameters of the hearing could be answered through discovery. The trial court then entered an order

in which it referred to the hearing scheduled for November 8 as a "hearing on preliminary injunction." On November 8, prior to the commencement of the hearing, Baum's counsel noted his continuing objection to the fact that Cermak had not filed a pleading. At the conclusion of the hearing, the trial court entered the order in question.

We find that the trial court erred by not requiring Cermak to file a pleading as requested by Baum. A plaintiff is required to have a legal theory for the relief it seeks. Semmler v. Accettura, 31 Ill. App. 2d 249, 252 (1961). Pleadings are intended to inform the court and the parties of the factual issues to be tried and the legal theories relied upon. People v. $1,124,905 U.S. Currency, 177 Ill. 2d 314, 335 (1997). Cermak's emergency motion contained only vague factual allegations that Baum had made "concerted efforts" to thwart its refinancing efforts and did not specify the legal theory upon which Cermak's request for relief was based, stating only that Baum had made it "commercially impossible" for it to close. The trial court believed that pleadings were unnecessary and that Baum could discover the factual basis for Cermak's claim through discovery. It does appear that, by the time of the hearing, Baum was aware that Cermak's claim of frustration was with regard to a particular closing, that which was supposed to take place on July 30. Baum, however, was also entitled to know the legal theory upon which Cermak based its claim. As Baum correctly notes, commercial frustration is an affirmative defense to a breach of contract action, not an action in itself. See American National Bank v. Richoz, 189 Ill. App. 3d 775, 780 (1989).

We further note that the trial court itself contributed to the confusion as to the nature and purpose of the hearing which led to the entry of its December 17 order. Prior to its commencement, the trial court termed the hearing one regarding the issuance of a preliminary injunction. After the

trial court entered its December 17 order, though, Baum moved for the entry of a bond. On January 21, after Baum had filed its notice of appeal, the parties appeared before the court for status and on Baum's motion for bond. The trial court, in denying the motion, rejected Baum's characterization of the December 17 order as one entering a preliminary injunction. The trial court stated that:

> "[I]n chancery, things get a little strange up here. We don't exalt form over substance. The substance of this and the essence of this without regard to the pleadings filed by the lawyers without regard to what I thought I was getting into when I might have inadvertently stated on the record because I thought we were going to go into a hearing on preliminary injunction. But after hearing everything, I am saying it is in the nature of - - without regard to the pleadings, a declaratory judgment situation where I declare the rights of the parties post filing of the complaint based on a circumstance that came up in the transaction between the parties *** And as a chancellor in equity, I said I will give you a hearing on your argument with respect to frustration; and after I hear you, I'll declare the rights of the parties. *** Now, if that is a mandatory injunction - - And it could be. It could be viewed - - I'm not saying it can't be viewed as a mandatory injunction. I'm saying it is hybrid. But it's more akin to a declaration of rights than it is to a mandatory injunction because the actual drafting of the order post hearing did not contain injunctive language."

In Pettigrew, the parties appeared before the trial court for a hearing on the defendants' motion for a temporary injunction. Despite being informed by counsel for both parties of the limited purpose of the hearing, the trial court, after hearing evidence, ruled on the merits of the underlying

consolidated cases. Pettigrew, 67 Ill. App. 2d at 348-49. This court found that the plaintiffs had been denied the due process of law to which they were entitled. In reaching its conclusion, this court noted, among other things, that when the hearing proceeded the plaintiffs had not yet had an opportunity to review the defendants' answer to their complaint, which answer had been filed the morning of the hearing, and had not yet had an opportunity to file their answer to the defendants' complaint. Pettigrew, 67 Ill. App. 2d at 350-52. The court held that:

> "Under this posture of the case, it was not proper to proceed with a hearing on the merits prior to issues having been formed by the pleadings. The right to plead, according to the general law and established rules, is implicit in any concept of ordered liberty and fairness and is required by a right sense of justice." Pettigrew, 67 Ill. App. 2d at 352.

Thus, in Pettigrew, this court found a violation of due process where the plaintiffs were forced to a trial on the merits before having an opportunity to file an answer to the defendants' complaint. Even more fundamental than the right to file a responsive pleading, however, is the defendant's right to have the issues defined in a pleading, a right which Baum was denied in the proceedings below. For the foregoing reasons, we conclude that Baum was denied due process of law by being forced to proceed to a hearing in the absence of pleadings defining the factual and legal issues it was required to defend against. Cermak will no doubt contest our resolution of the case upon these grounds in light of the fact that Baum, although having made a general reference to the impropriety of the proceedings in its brief, did not present argument and authority urging reversal on that basis. It is well-settled, however, that waiver is a restriction on the parties, not upon this court. Herzog v.

Lexington Township, 167 Ill. 2d 288, 300 (1995). Further, we rule on the instant case in the aforesaid manner as a matter of necessity. It is a well-established principle that a plaintiff may not recover on a legal theory not set forth in his complaint. Schulz v. Schulz, 297 Ill. App. 3d 102, 106 (1998). Rather, " 'a party must recover, if at all, on and according to the case he has made for himself by his pleadings.' " Schulz, 297 Ill. App. 3d at 106, quoting Lempa v. Finkel, 278 Ill. App. 3d 417, 424 (1996). Not knowing the legal theory upon which Cermak relied for its relief, we are unable to determine whether the evidence produced at the hearing justified a ruling in its favor.

For the foregoing reasons, we reverse the trial court's December 17 order and remand this matter to the trial court for further proceedings.

Reversed and remanded.

HOFFMAN, P.J., with SOUTH and BARTH, JJ., concurring.