THIRD DIVISION
September 25, 2019

No. 1-18-1880

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NAPERVILLE AUTOHAUS, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 17 L 50823
	)	
MANHEIM REMARKETING, INC.,	)	Honorable
	)	James M. McGing,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County dated February 15, 2018 granting defendant's motion to dismiss and the July 30, 2018 order denying plaintiff's motion to reconsider are reversed; the forum selection clause contained in the "Terms and Conditions" document is inapplicable to this replevin action and does not control venue and there was no basis for dismissal of plaintiff's action pursuant to section 2-619(a)(9) of the Code of Civil Procedure.

¶ 2 Plaintiff, a motor vehicle dealer located in Illinois filed a replevin action against defendant, a corporation with headquarters in Atlanta, Fulton County, Georgia seeking possession of a Bentley automobile which is the subject of this case and damages. Defendant conducts wholesale and commercial automobile auctions around the country including Matteson, Illinois. This action revolves around a series of sales of a Bentley automobile. The Bentley at

issue was originally sold by defendant to a third party who took possession of the vehicle but never paid defendant. The Bentley was sold two more times before it was purchased by plaintiff. Plaintiff used defendant's online sales channel to sell the Bentley to yet another party.

Prior to using defendant's services, plaintiff agreed to the Manheim Terms and Conditions which contained a forum shifting provision. After plaintiff's buyer took possession of the vehicle the sale was ultimately cancelled and the buyer returned the Bentley to defendant's lot. Thereafter, defendant discovered that the vehicle was the Bentley it had originally sold for which it had never received payment and refused to return the vehicle to plaintiff. Plaintiff filed this replevin action seeking possession of the Bentley. Defendant filed a motion to dismiss arguing (1) the forum shifting provision contained in a "Terms and Conditions" document stemming from plaintiff's use of defendant's online sales channel to sell the Bentley was controlling such that the replevin action could only be brought in Georgia and (2) that plaintiff failed to establish that it had a superior right to possession of the Bentley. The trial court initially granted defendant's motion to dismiss on both grounds; however, on reconsideration found the forum selection clause applied. Therefore, the replevin action could only be brought in Georgia and the issue of superior right to possession would be properly before the Georgia court. We reverse the trial court's rulings and find that the forum selection clause is not controlling and that there was no basis for dismissal of plaintiff's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure.

¶ 3 BACKGROUND

¶ 4 Factual History

¶ 5 Plaintiff, Naperville Autohaus, Inc., is an Illinois licensed motor vehicle dealer located in Naperville, Illinois. Defendant, Manheim Remarketing, Inc., is a Delaware corporation with headquarters in Fulton County, Georgia. Defendant operates wholesale and commercial

automobile auctions around the country to include Matteson, Illinois. Defendant also provides a variety of remarketing services physically and online.

¶ 6 On April 22, 2016, defendant sold a 2008 Bentley Continental with vehicle identification number SCBCP73W78C055608 (Bentley) to Integrity of Chicago (Integrity), and allowed Integrity to take possession of the Bentley without paying for the vehicle, but defendant never received payment for the vehicle from Integrity or anyone else. On May 12, 2016, Integrity sold the Bentley to Daniel Kuzmicki who financed this purchase through Wells Fargo Bank.

¶ 7 On August 9, 2016, defendant caused the Secretary of State to issue a certificate of title listing Integrity as the owner of the Bentley and defendant as the lienholder.

¶ 8 On January 24, 2017, Kuzmicki traded the Bentley to Gold Coast Exotic Imports, LLC doing business as Bentley Downers Grove (Gold Coast). On February 23, 2017, Gold Coast sold the Bentley to plaintiff for $50,000 which plaintiff paid in full.

¶ 9 On March 16, 2017, plaintiff agreed to sell the Bentley to Chicago Cars Direct, LLC (CCD). The transaction between plaintiff and CCD was facilitated through defendant's online sales channel. However, when plaintiff could not timely deliver the certificate of title, the sale was cancelled and CCD returned the vehicle to plaintiff by delivering it to defendant's lot located in Cook County, Illinois.

¶ 10 Thereafter, defendant discovered the Bentley returned by CCD was the same vehicle defendant sold to Integrity on April 22, 2016 for which defendant was never paid. When plaintiff requested defendant turn over the Bentley, defendant refused stating it had superior right to possession of the vehicle.

¶ 11 Procedural History

¶ 12 On September 8, 2017, plaintiff filed a complaint in replevin against defendant in the Circuit Court of Cook County seeking a judgment against defendant for possession of the Bentley, the value of the Bentley, and damages for detention.

¶ 13 A hearing for the issuance of an order of replevin was scheduled for October 16, 2017. On October 11, 2017, defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code), 735 ILCS 5/2-619 (West 2016), arguing that any claims against defendant must be brought in Fulton County, Georgia pursuant to the "Manheim Terms and Conditions" document's ("Terms and Conditions") forum selection clause which defendant argued controlled venue. The "Terms and Conditions" contains a forum selection clause which states in relevant part as follows:

> "Choice of Law and Consent to Jurisdiction: *** In the event that any claim or dispute between Manheim and you is not arbitrated under section 26 hereof, you agree that non-exclusive jurisdiction and venue for such claims and disputes shall exist in the federal and state courts located in Fulton County, Georgia. You further agree and acknowledge that you may not sue Manheim in any jurisdiction or venue except Fulton County, Georgia."

¶ 14 In its motion to dismiss, defendant also argued that plaintiff did not satisfy all conditions precedent necessary to file a replevin action because plaintiff was not entitled to immediate possession of the property where defendant claimed to have a perfected, first-priority security interest in the Bentley.

¶ 15 Plaintiff responded to defendant's motion to dismiss arguing that venue was proper in Illinois pursuant to section 19-103 of the Illinois Replevin Statute, 735 ILCS 5/19-103 (West 2016), because the Bentley was located in Cook County, Illinois at the time the action was commenced. Plaintiff also argued that the "Terms and Conditions" was unrelated to plaintiff's

claim and thus its forum selection clause was also inapplicable. Plaintiff also argued that defendant's motion to dismiss was procedurally deficient and prematurely raised the issue of superior right of possession to the Bentley, but that plaintiff nevertheless had superior right of possession. Defendant filed a reply on November 30, 2017 reiterating its previously stated position.

¶ 16 Defendant's motion to dismiss was heard on January 16, 2018. Thereafter, on February 15, 2018, the trial court issued a written order wherein it concluded that "Plaintiff cannot establish a *prima facie* case to a superior right to possession of the Bentley, and that any claims Plaintiff has against Defendant must be brought in Fulton County, Georgia" and granted defendant's motion to dismiss with prejudice.

¶ 17 On February 26, 2018, plaintiff filed its motion to reconsider and vacate the trial court's February 15, 2018 order. Plaintiff argued that defendant failed to timely perfect its security interest in the Bentley pursuant to the Illinois Vehicle Code (IVC), 625 ILCS 5/3-202(b) (West 2016), and the Uniform Commercial Code (UCC), 810 ILCS 5/9-203, 308 (West 2016), and defendant failed to show that plaintiff agreed to the forum selection clause in the "Terms and Conditions." Defendant filed its response to the motion to reconsider on April 4, 2018 disputing plaintiff's arguments stating that the sections of the IVC and UCC cited by plaintiff did not apply to defendant as a commercial automobile dealer holding a motor vehicle as inventory for sale and that its security interest was perfected under the UCC when defendant filed and subsequently, on November 20, 2015, renewed its UCC Financing Statement with the Illinois Secretary of State naming Integrity as the debtor and describing the collateral as "motor vehicle inventory now or hereafter acquired by [Integrity] from [defendant]." Defendant also argued that plaintiff accepted the "Terms and Conditions" with the forum selection clause because (1) it had to accept the document as a condition of doing business with defendant and (2) when plaintiff

logged into defendant's online sales channel to sell the Bentley to CCD it accepted the "Terms and Conditions" where the login screen stated that by using the site it agreed to defendant's "Marketplace Policies" which included a hyperlink to the "Terms and Conditions." The response also attached a number of exhibits to include two Manheim employees' affidavits. Thereafter, plaintiff filed a reply to defendant's response in which it argued, among other things, that the "Terms and Conditions" did not apply to the dispute at issue in this replevin action dealing with ownership rights as opposed to transactions between parties stemming from plaintiff's use of defendant's services.

¶ 18 On April 18, 2018, plaintiff filed a motion to take discovery on the affidavits attached to defendant's response pursuant to Illinois Supreme Court Rule 191(b), Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013). Defendant filed its response to the discovery motion on May 8, 2018. On June 26, 2018, the trial court issued a written order striking the new affidavits and documents and denying plaintiff's request for discovery on the documents.

¶ 19 On July 30, 2018, the trial court entered a written order denying plaintiff's motion to reconsider stating that "Plaintiff agreed to be bound by a legally valid forum selection clause agreeing to resolve disputes with Defendant in Fulton County, Georgia. Therefore, if Plaintiff wishes to establish a right to possess the Bentley superior to Defendant, it should do so in Georgia." As to the trial court's earlier contention that plaintiff could not establish a *prima facie* case to a superior right to possession of the Bentley, the trial court stated that "while Plaintiff makes some interesting points regarding its security interest in the Bentley, these points are ultimately inapposite" and must be addressed in Georgia pursuant to the forum selection clause.

¶ 20 Plaintiff timely filed its appeal. This appeal follows.

¶ 21 ANALYSIS

¶ 22 Plaintiff raises three issues on appeal (1) whether the trial court erred in applying the "Terms and Conditions'" forum selection clause to the replevin dispute at issue in this matter; (2) whether the trial court erred in denying plaintiff's motion to take discovery on the new affidavits and documents attached by defendant to its response to plaintiff's motion to reconsider in addition to striking and disregarding the affidavits and documents; and (3) whether the trial court erred in denying plaintiff's motion to reconsider where "(a) the court's initial ruling on the merits was based upon a mistake of fact and (b) there were unresolved factual issues on whether the Terms and Conditions, and therefore the venue clause, was actually offered and accepted by Plaintiff." Defendant disputes that the trial court erred and further argues that plaintiff's appeal is moot.

¶ 23 Plaintiff's Appeal is Not Moot

¶ 24 We first address defendant's potentially dispositive argument that plaintiff's appeal is moot. Defendant argues the appeal is moot because defendant moved the Bentley from Illinois thus depriving Illinois courts of jurisdiction and making Cook County an improper venue. As defendant concedes in its own brief, this argument is without merit. Our determination of whether plaintiff's appeal should be dismissed as moot is entirely a question of law and is reviewed *de novo*. *In re Alfred H.H.*, 233 Ill. 2d 345, 350 (2009).

¶ 25 Section 19-103 of the Code provides for venue in a replevin action and states as follows:

> "The venue provisions applicable to other civil cases shall apply to actions of replevin; and in addition an action of replevin may be brought in any county in which the goods or chattels or any part of them are located." 735 ILCS 5/19-103 (West 2016).

¶ 26 Accordingly, while the location of the goods is one basis for venue, the Code further provides that venue is also appropriate when consistent with "provisions applicable to other civil cases." *Id.*

¶ 27 Furthermore, section 2-101 of the Code provides for venue generally and states in relevant part as follows:

> "Except as otherwise provided in this Act, every action must be commenced (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose. ***
>
> If all defendants are nonresidents of the State, an action may be commenced in any county." 735 ILCS 5/2-101 (West 2016).

¶ 28 Section 2-102(a) of the Code address "residency" as applied to a corporation and states as follows:

> "Any private corporation ***, organized under the laws of this State, and any foreign corporation authorized to transact business in this State is a resident of any county in which it has its registered office or other office or is doing business. A foreign corporation not authorized to transact business in this State is a nonresident of this State." 735 ILCS 5/2-102(a) (West 2016).

¶ 29 Defendant owns and operates a lot in Matteson, Illinois, Cook County and thus is a resident of Cook County. See *Melliere v. Luhr Bros., Inc.*, 302 Ill. App. 3d 794, 800 (1999) (holding "the phrase *other office* as used in our venue statute means a fixed place of business at which the affairs of the corporation are conducted in furtherance of a corporate activity *** [,]

need not be, a traditional office in which clerical activities are conducted[,] *** [and] includes any fixed location purposely selected to carry on an activity in furtherance of the corporation's business activities [which] *** may be open to the public or may be a strictly private corporate operation."). Accordingly, this matter is not moot on the basis that jurisdiction and venue could not be in Cook County, Illinois because the Bentley was moved to another state. Having determined that this appeal is not moot, we next turn to the merits of this appeal.

¶ 30 Dismissal Pursuant to Section 2-619(a)(9) of the Code

¶ 31 Whether the Forum Shifting Provision In the "Terms and Conditions" is Applicable to this Dispute

¶ 32 Plaintiff argues on appeal that the trial court erred when it granted defendants 2-619(a)(9) motion dismissing the replevin action finding that venue should be in Fulton County, Georgia pursuant to the forum shifting provision contained in the "Terms and Conditions." Among its various reasons for this assertion, plaintiff argues that its "replevin dispute here does not arise from or depend upon the interpretation of the terms and conditions[.]" It argues defendant essentially confiscated the automobile plaintiff owned which had nothing to do with the interpretation of the terms and conditions of the online sale to which it was admittedly a party.

¶ 33 Defendant argues that the "Terms and Conditions" "broadly cover[s] virtually all aspects of business with Manheim *** [a]nd the forum-selection clause specifically at issue provides that Naperville 'may not sue Manheim in any jurisdiction or venue except Fulton County, Georgia' " which "restriction is not limited in any way by its terms." Defendant further argues that while it is not required, here there is a close tie between this dispute and Manheim's services such that the "Terms and Conditions" and its forum shifting provision should control. Defendant argues that the "tie exists here – where Naperville consigned the specific Bentley at issue to

Manheim for sale, used Manheim's services to auction the vehicle, and where the vehicle was then returned to Manheim for lack of valid title in violation of Manheim sale terms."

¶ 34 The parties agree that the standard of review on the granting of a motion to dismiss pursuant to section 2-619 of the Code is *de novo*. *Osler Institute, Inc. v. Miller*, 2015 IL App (1st) 133899, ¶ 24; *Dace International, Inc. v. Apple Computer, Inc.*, 275 Ill. App. 3d 234, 236 (1995); *IFC Credit Corp. v. Rieker Shoe Corp.*, 278 Ill. App. 3d 77, 85 (2007). Additionally, the interpretation of a contract is a question of law also reviewed *de novo*. *Storino, Ramello and Durkin v. Rackow*, 2015 IL App (1st) 142961, ¶ 18.

¶ 35 Defendant cites *Solargenix Energy, LLC v. Acciona, S.A.*, 2014 IL App (1st) 123403, to support its contention that the "Terms and Conditions" and its forum selection clause control venue in this litigation. We do not find this case controlling. *Solargenix* involved Spanish corporations, Acciona and Acciona Energia, with subsidiaries operating in the United States that entered into joint venture agreements to include a cooperation agreement and letter of adhesion with a United States corporation, Solargenix. *Id*. at ¶ 4. One of the agreements contained a forum shifting clause providing Chicago, Illinois with exclusive jurisdiction over any "any actions, claims, disputes or proceedings relating to this Agreement, or any document delivered hereunder or in connection herewith, or any transaction arising from or connecting to any of the foregoing." *Id*. at ¶ 15. Solargenix filed suit in Chicago, Illinois against the Spanish defendants raising claims related to breach of the cooperation agreement and letter of adhesion, fraudulent inducement, tortuous interference, and unjust enrichment. *Id*. at ¶¶ 43, 45. The Spanish defendants filed a motion to dismiss. *Id*. ¶ 38. The issue in *Solargenix* was whether the Illinois court had personal jurisdiction over the Spanish defendants because, unlike its subsidiaries, they did not have sufficient minimum contacts with Illinois and were not signatories to the joint venture agreements. *Id*. at ¶ 19. This court, ruled that Solargenix's claims related to obligations

under the cooperation agreement which included the letter of adhesion and incorporated the forum selection clause and further held that the Spanish defendants were closely related to the dispute such that it was foreseeable they would be bound by the forum selection clause incorporated into documents signed by its subsidiaries though the defendants were not themselves signatories. *Id*. ¶¶ 45-50.

¶ 36 *Solargenix* can be distinguished. In *Solargenix*, the motion to dismiss was based on a lack of personal jurisdiction, not the applicability of the forum shifting provision as is the case here. *Id*. at ¶ 19. Moreover, the main issue in *Solargenix* was whether a non-signatory foreign corporation could be bound by the terms of an agreement signed by its subsidiary. *Id*. To answer this question, this court analyzed the joint venture agreements at issue and found that the forum selection clause was incorporated. *Id*. ¶¶ 45-50. There was no question as to whether the claims came within the scope of the agreements at issue, only whether the forum shifting clause was incorporated into those agreements. *Id*.

¶ 37 In contrast, here it is undisputed that the "Terms and Conditions" contains a forum selection clause. What is at issue; however, is whether the "Terms and Conditions" have any bearing on the claims at all such that the forum selection provision contained in the document would govern venue over this replevin action.

¶ 38 While we do not find the facts of the case controlling, we do find *Solargenix*'s discussion of Illinois case law helpful. In *Solargenix* this court noted that where the claim is not a contract claim on the contract containing the forum selection clause, the claim must be connected to the contract or arise from the contract in order for the forum selection clause to apply. *Id*. at ¶ 34. The Seventh Circuit in *Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F. 3d 600 (7th Cir. 1994), cited in *Solargenix* reasoned that:

> "But-for causation is an unsatisfactory understanding of the language referring to 'disputes arising out of' an agreement. *** 'Arising out of' and 'arising under' are familiar phrases, and courts have resisted the siren call of collapsing them to but-for causation." *Omron Healthcare, Inc.*, 28 F. 3d at 602.

Instead the phrase "arise out of" in this context refers to all disputes whose resolution arguably depends on the construction of the contract containing the forum selection clause. *Id.*

¶ 39 Although the "Terms and Conditions'" forum selection clause does not expressly state that the forum selection clause relates to disputes or claims arising out of the contract, we do not believe the agreement can be read any other way. We interpret contracts with the primary goal of giving effect to the intent of the parties. *Storino, Ramello and Durkin*, 2015 IL App (1st) 142961, ¶ 18. When presented with clear and unambiguous language, the intent of the parties must be determined from the language of the contract itself and given its plain and ordinary meaning and the court considers contract terms within the context of the whole. *Id.* The "Terms and Conditions" is specific and relates entirely to plaintiff's use of defendant's services facilitating the sale of motor vehicles. While the forum selection clause provides that defendant may not "sue Manheim in any jurisdiction or venue except Fulton County, Georgia" defendant's overly broad and unreasonable reading of this term to apply to any litigation whatsoever against defendant into perpetuity would require this court to ignore the whole of the contract which deals exclusively with the use of defendant's services to sell vehicles. Such a reading of the contract is impermissible as we must view the contract as a whole. *Id.* Instead, we find the clause applicable only to a claim on the contract or a claim that is connected to the contract or arises from the contract. *Solargenix Energy, LLC*, 2014 IL App (1st) 123403, ¶ 34.

¶ 40 We also cannot say that this dispute depends on the construction of the "Terms and Conditions" nor is it connected to the contract. Here there is no dispute regarding the conduct of

the auction. The issue in this case is whether plaintiff is entitled to replevin where defendant exercised self-help and withheld possession of a vehicle from a plaintiff who allegedly has a superior right to possession. See *Korner v. Nielsen*, 2014 IL App (1st) 122980, ¶ 12 ("The primary purpose of this statutory [replevin] proceeding is to test the right of possession of personal property and to place the successful party in possession of that property."). While there is dispute as to whether the "Terms and Conditions" was presented and accepted, even if we assume that it was, the document has nothing to do with either party's right of possession to the Bentley and furthermore would not have been accepted until plaintiff decided to sell the Bentley to a third party, CCD, using defendant's online services to do so – well after the events dictating superior right to possession occurred.

¶ 41 The "Terms and Conditions" document is not the basic source of any duty by either party to the other sought to be enforced or alleged to be violated in this action. More specifically, the "Terms and Conditions" document has no bearing on the determination of which party has a superior right to possession which hinges on the actions of the parties well before plaintiff decided to utilize defendant's online sales channel which defendant argues resulted in plaintiff's agreement to the "Terms and Conditions." That plaintiff coincidentally used defendant's online sales channel to facilitate the sale of the Bentley to a third party who then also coincidentally returned the vehicle to plaintiff at defendant's lot as opposed to plaintiff's dealership whereupon defendant seized the vehicle, is extraneous to the replevin action as neither party's possessory rights to the Bentley stem from the "Terms and Conditions" or plaintiff's use of any of defendant's services.

¶ 42 Therefore, we find the "Terms and Conditions" document is inapplicable and, as such, we need not address plaintiff's other claims related to this issue.

¶ 43 Dismissal on the Merits

¶ 44 Plaintiff also argues that the trial court erred in its February 15, 2018 order granting defendant's motion to dismiss on the merits of the replevin claim. We agree.

¶ 45 We first note in its initial February 15, 2018 order granting defendant's motion to dismiss, the trial court concluded that "Plaintiff cannot demonstrate the probability that it will ultimately prevail on the underlying claim to possession." However, in its July 30, 2018 order on reconsideration, the trial court backs up from this position stating "while Plaintiff makes some interesting points regarding its security interest in the Bentley, these points are ultimately inapposite *** because *** the Circuit Court of Cook County was not the appropriate venue for the resolution of this dispute" which it said was the work of the Georgia court.

¶ 46 A section 2-619 motion to dismiss

> "admits the legal sufficiency of the complaint and raises defects, defenses, or other 'affirmative matter' which appear on the face of the complaint or are established by external submissions which act to defeat the plaintiff's claim. [Citation.] In ruling on the motion, the trial court must take all properly pleaded facts as true, and the complaint should not be dismissed unless it appears that no set of facts under the pleadings can be proved that would entitle the plaintiff to recover. [Citation.] If a cause of action is dismissed under section 2-619 motion, the questions on appeal are whether a genuine issue of material fact exists and whether the defendant is entitled to a judgment as a matter of law. [Citation.]." *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 12.

¶ 47 Defendant filed a motion to dismiss under section 2-619 of the Code, citing affirmative matters defeating plaintiffs claim. The "affirmative matter" alleged by defendant is its claim to a superior right of possession over the Bentley based on certain actions it took to perfect title. Plaintiff argues that defendant's section 2-619 motion is improper to address the issue of which

party has superior ownership rights to the Bentley because this question goes "to the ultimate controversy and essential element in the case[.]"

¶ 48 This point has been addressed by Illinois courts:

> "In our analysis, our court recognized that a section 2–619 motion 'admits the legal sufficiency of the plaintiff's complaint but asserts affirmative defenses or other matters that avoids or defeats the plaintiff's claim.' [Citation.]
>
> We recognized: 'The phrase "affirmative matter" encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action' and 'is something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint.' [Internal quotation marks omitted.] [Citation.]." *Fayezi v. Illinois Casualty Co.*, 2016 IL App (1st) 150873, ¶ 40.

¶ 49 An "affirmative matter" is not merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 121 (2008).

¶ 50 An action of replevin may be brought "[w]henever any goods or chattels have been wrongfully distrained, or otherwise wrongfully taken or are wrongfully detained" in an action for replevin "brought for the recovery of such goods or chattels, by the owner or person entitled to their possession." 735 ILCS 5/19-101 (West 2016). The right of possession is essential to maintain an action of replevin and it is necessary that the plaintiff be entitled to the property at the time that the writ was sued out. *Ogrodnik v. Capron*, 332 Ill. App. 138 (1947) (abstract of opinion).

> "The primary purpose of the replevin statute is to test the right of possession of personal property and place the successful party in possession of the property.

> [Citation.] *** A plaintiff commences an action in replevin by filing a verified complaint 'which describes the property to be replevied and states that the plaintiff in such action is the owner of the property so described, or that he or she is then lawfully entitled to its possession thereof, and that the property is wrongfully detained by the defendant.' [Citation.] The trial court then conducts a hearing to review the basis for the plaintiff's alleged claim to possession. [Citation.] Following the hearing, an order of replevin shall issue '[i]f the Plaintiff establishes a prima facie case to a superior right of possession of the disputed property, and if the plaintiff also demonstrates to the court the probability that the plaintiff will ultimately prevail on the underlying claim to possession.' [Citation.] Thus, in a replevin action, the plaintiff bears the burden to 'allege and prove that he [or she] is lawfully entitled to possession of the property, that the defendant wrongfully detains the property and refuses to deliver the possession of the property to the plaintiff.' " *Carroll v. Curry*, 392 Ill. App. 3d 511, 514 (2009).

¶ 51 "To prevail in replevin, a plaintiff must be entitled to immediate possession of the property; thus, in turn, replevin is defeated when a plaintiff has no right to possession of the property." *Malek v. Gold Coast Exotic Imports, LLC*, 2018 IL App (1st) 171459, ¶ 26.

¶ 52 Here, the "affirmative matter" alleged by defendant is its claim to a superior right of possession over the Bentley based on certain actions it took to perfect title. However, because defendant's section 2-619 motion did not present an affirmative matter, but a defense that consists of negations of the essential elements of plaintiff's replevin complaint, and it is thus improperly raised in a section 2-619 motion to dismiss and we find the statute requires an evidentiary hearing to resolve this dispute. See *Fayezi*, 2016 IL App (1st) 150873, ¶ 40.

¶ 53 Having determined (1) the trial court erred in applying the "Terms and Conditions" document's forum selection clause and (2) having also concluded there was no basis for dismissal of plaintiff's replevin claim under section 2-619 of the Code, we remand this case for further proceedings consistent with this order.

¶ 54 CONCLUSION

¶ 55 For the foregoing reasons, the judgment of the circuit court of Cook County dated February 15, 2018 and order of July 30, 2018 are reversed and this cause is remanded for further proceedings.

¶ 56 Reversed and remanded.