FIFTH DIVISION
August 10, 2012

No. 1-11-0376

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHASE BANK USA, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 10 M1 134987
	)	
RITA GALARZA, *Pro Se*,	)	Honorable
	)	Pamela E. Hill Veal,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court correctly denied defendant's motion to dismiss verified complaint which adequately alleged a cause of action for account stated. Trial court abused its discretion in denying defendant's request for a continuance where plaintiff failed to: (1) fully comply with Rule 222's disclosure requirements; (2) respond to defendant's Rule 214 production request for documents; and (3) "provide all account agreements, changes in terms to said agreements, and monthly statements to defendant in advance of trial date" as ordered by the court. Vacated and remanded with directions.

¶ 2 Plaintiff, Chase Bank USA, N.A. (Chase), filed an action against defendant, Rita Galarza, to recover $15,651.44 in unpaid credit card bills. On November 23, 2010, the circuit court

entered judgment in favor of Chase. We vacate and remand with directions.

¶ 3 BACKGROUND

¶ 4 On April 22, 2010, Chase filed a verified complaint against Galarza, alleging that: (1) Chase is a national banking association; (2) Galarza was a resident of Illinois with an address of 1035 Ash Street in Winnetka; (3) Galarza entered into credit card installment agreements with Chase whereby Galarza would pay for any indebtedness incurred by advancing monies upon written order or request and through the use of the credit cards issued to her; (4) Galarza had defaulted in making payments on one account [number stated in verified complaint] and owed Chase $11,234.74; (5) Galarza had defaulted in making payments on a second account [number stated in verified complaint] and owed Chase $4,416.70; and (6) Chase had demanded payment by Galarza and she had failed to pay. Chase attached a group exhibit (Exhibit A) to its verified complaint: two facsimile copies of the relevant billing statements containing Galarza's name, her address, the account numbers, and the balances due as alleged in the verified complaint.

¶ 5 On May 20, 2010, a copy of the summons and complaint was served on a member of the household at the address listed in the verified complaint. Galarza filed her appearance on May 24, 2010. On June 7, 2010, Galarza filed an unverified response to Chase's verified complaint. Galarza admitted she was a resident of Illinois with an address of 1035 Ash Street in Winnetka but otherwise responded to the remaining allegations by stating she lacked knowledge or information sufficient to admit or deny the allegations and demanded strict proof thereof.

¶ 6 On August 23, 2010, according to Galarza, she informed the circuit court judge “that she did not recognize [Chase's] claims or the attached documents as belonging to her and asked for

discovery and copies of all account agreements, changes in terms to said agreements and monthly statements." The judge set a trial date of November 23, 2010, and ordered Chase to "provide all account agreements, changes in terms to said agreements, and monthly statements to [Galarza] in advance of trial date."

¶ 7 Also on August 23, 2010, Galarza filed a "Request for Production of Documents" pursuant to Supreme Court Rules 201 (eff. July 1, 2002) and 214 (eff. Jan. 1, 1996). On October 26, 2010, Chase filed its "Rule 222 Disclosure" pursuant to Supreme Court Rule 222 (eff. July 1, 2006).

¶ 8 On November 3, 2010, Galarza filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)), claiming that the complaint failed to set forth a cause of action for breach of contract because: (1) in violation of section 2-606 of the Code of Civil Procedure (735 ILCS 5/2-606 (West 2008)), Chase failed to attach a copy of the written contract; and (2) the complaint was "devoid" of the requirements of the federal Truth in Lending Act, 15 U.S.C. § 1642. Galarza additionally argued that the complaint failed to state a cause of action for an "account stated" because Chase "failed to plead: (a) that there was any agreement between the parties regarding accounts representing previous transactions; (b) that there was an agreement that the items in an account were true; (c) that there was an agreement that the balance struck was correct; and (d) that there was a promise to pay such a balance."

¶ 9 On November 23, 2010, the trial date, the court denied Galarza's motion to dismiss. According to Galarza, she then informed the trial judge that Chase had never responded to her request for production of documents and that Chase's "Rule 222 disclosure was not in

compliance and was void of information as required per Illinois Supreme Court Rule 222." Galarza concedes that Chase's attorney then handed over the documents to Galarza and that the trial judge gave Galarza 10 minutes to review the documents before calling the parties back for trial. According to Galarza, however, she "told the trial judge that she did not recognize any of the documents as belonging to her and would like more time and continuance to review them" and the trial court denied her request. On November 23, 2010, after trial, the trial court entered judgment in favor of Chase. On January 6, 2011, the trial court denied Galarza's motion to reconsider. Galarza filed this timely appeal on February 9, 2011.

¶ 10 ANALYSIS

¶ 11 Although no appellee brief has been filed, we may consider this appeal on its merits pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131 (1976). As noted, Chase filed a *verified* complaint and Galarza filed an unverified response. "Under section 2-605 of the Civil Practice Law [citation], when a pleading is verified, every subsequent pleading must also be verified unless verification is excused by the court." *Pinnacle Corp. v. Village of Lake in the Hills*, 258 Ill. App. 3d 205, 209 (1994). Nonetheless, there is no indication in the record that Chase objected to the unverified response. This court has explained that the failure to object to an unverified answer results in waiver. In *Application of County Collector*, 295 Ill. App. 3d 711 (1998). Thus, Chase forfeited any objection to Galarza's failure to file a verified answer.

¶ 12 On appeal, Galarza argues that the trial court wrongly denied her motion to dismiss because Chase's claims were not in compliance with Illinois Rules. Generally, the denial of a

motion to dismiss is not a final and appealable order. *Cabinet Service Tile, Inc. v. Schroeder*, 255 Ill. App. 3d 865, 868 (1993). However, "[a]n appeal from a final judgment draws into issue all previous interlocutory orders that produced the final judgment." *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1023 (2009). "Consequently, a court of review has jurisdiction to review an interlocutory order that constitutes a procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken." *Id.*; see also *Hampton v. Cashmore*, 265 Ill. App. 3d 23, 25 (1994) ("Once a final order has been entered, all prior nonfinal orders become appealable."). Although interlocutory orders rendered in a case typically are not reviewable following an evidentiary trial because they merge with the judgment, this court may review issues "where the fact finder did not assess the issues addressed in the motion." *Toftoy v. Rosenwinkel*, 2011 IL App (2d) 100565, ¶ 28. For example, an exception to the doctrine of merger exists where this court is presented with a question of law that we may decide *de novo*, particularly where, as here, the party raised the issue anew in her posttrial motion. *Walters v. Yellow Cab Co.*, 273 Ill. App. 3d 729, 736 (1995). This court has previously determined that, even after final judgment, we may review the denial of a section 2-615 motion to dismiss. See *People ex rel. Alvarez v. Price*, 408 Ill. App. 3d 457, 465 (2011).

¶ 13 Although Galarza filed her motion to dismiss after having already filed an answer, this court has explained that the failure of a complaint to state a legally cognizable cause of action is such a fundamental defect that it may be raised at any time and cannot be waived, even by the filing of an answer. *Cullotta v. Cullotta*, 287 Ill. App. 3d 967, 971 (1997), citing *Foley v. Santa Fe Pacific Corp.*, 267 Ill. App. 3d 555, 561 (1994). Moreover, there is no indication that Chase

objected to the filing of the motion to dismiss while an answer was on file, and the trial court apparently ruled on the merits of the motion to dismiss. Thus, we shall address Galarza's argument that the trial court should have granted her motion to dismiss Chase's verified complaint.

¶ 14 This court reviews *de novo* a trial court's ruling on a defendant's section 2-615 motion to dismiss. *Gonzalzles v. American Express Credit Corp.*, 315 Ill. App. 3d 199, 206 (2000). "A section 2-615 motion to dismiss a complaint challenges only the legal sufficiency of a complaint and alleges only defects on the face of the complaint." *Id.* "The critical inquiry in deciding a section 2-615 motion to dismiss is whether the allegations of the complaint, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Id.* "A cause of action will not be dismissed on the pleadings unless it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief." *Id.* A reviewing court must take all well-pleaded facts in the challenged complaint as true. *Id.*

¶ 15 Galarza contends that Chase's verified complaint did not adequately allege a cause of action for breach of contract. To state a cause of action for breach of contract, a plaintiff must allege: (1) the existence of a valid, enforceable contract; (2) performance of the contract by the plaintiff; (3) a breach by the defendant; and (4) damages resulting from the breach. *Gore v. Indiana Insurance Co.*, 376 Ill. App. 3d 282, 286 (2007).

¶ 16 Galarza argues, however, that Chase was required to attach the credit card contract to the complaint. Section 2-606 of the Code of Civil Procedure provides:

"If a claim or defense is founded upon a written instrument, a copy thereof, or of

> so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her. In pleading any written instrument a copy thereof may be attached to the pleading as an exhibit. In either case the exhibit constitutes a part of the pleading for all purposes." (Emphasis added.) 735 ILCS 5/2-606 (West 2008).

Although Chase alleged the existence of a credit card retail installment credit agreement between the parties, it failed to attach the agreement or recite the relevant terms of the written contract. Chase's verified complaint did not specify whether the parties entered into an oral or a written agreement. Also, Chase attached only an account summary to its verified complaint and did not attach a copy of any written agreement. Thus, we agree with Galarza that Chase did not adequately allege a cause of action for breach of contract.

¶ 17 We next address whether Chase's verified complaint adequately stated a cause of action for account stated. An account stated is an agreement between parties who previously engaged in transactions that the account representing those transactions is true and the balance stated is correct, together with a promise, express or implied, for the payment of such balance." *W.E. Erickson Const., Inc. v. Congress-Kenilworth Corp.*, 132 Ill. App. 3d 260, 267 (1985); see also 227 Ill. App. 3d 221, 226 (1992) (same). "An account stated is a method of proving damages for the breach of a promise to pay on a contract." *Patrick Engineering, Inc. v. City of Naperville*, 2011 IL App (2d) 100695, ¶ 52.

¶ 18 "A claim for account stated requires a plaintiff to allege that: the parties had an agreement

under which one party was regularly billed for services provided by the other party; the party providing the services billed the other (or provided other statements of the amounts due on the account); and the party owing the money did not dispute the correctness of the bills but also did not pay." *Id.*, ¶ 54. Chase's verified complaint contained these allegations. Chase alleged that Galarza "entered into credit card retail installment agreements with [Chase] whereby [she] would pay for any indebtedness incurred by advancing monies upon written order or request and through the use of credit cards issued to [Galarza]" and that she had "defaulted in making payments on [certain accounts]" and owed Chase monies as set forth in the attached exhibits. Thus, Chase's verified complaint adequately stated a cause of action for account stated. Moreover, the attachments constituted sufficient compliance with section 2-606. Chase's complaint was premised upon Galarza's failure to make payments as set forth in her statements which *were* attached to the verified complaint. We conclude that the verified complaint adequately stated a cause of action for an account stated.

¶ 19 Galarza also argues that the trial court wrongly denied her discovery request. She asserts that Chase did not adequately comply with Rule 222, failed to respond to her Rule 214 production request, and did not comply with the court order of August 23, 2010 that required Chase to produce certain documents.

¶ 20 As noted earlier, Galarza argued below that Chase's "Rule 222 disclosure was not in compliance and was void of information as required per Illinois Supreme Court Rule 222." Although the trial court allowed Galarza an opportunity to review the documents before trial, Galarza requested additional time and a continuance to review the documents because she did not

recognize them as belonging to her.

¶ 21 Rule 222 provides, in relevant part:

"(c) Time for Disclosure; Continuing Duty. The parties shall make the initial disclosure required by this rule as fully as then possible in accordance with the time lines set by local rule, provided however that if no local rule has been established pursuant to Rule 89 then within 120 days after the filing of a responsive pleading to the complaint ***, unless the parties otherwise agree, or for good cause shown, if the court shortens or extends the time.

* * *

All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

(d) Prompt Disclosure of Information. Within the times set forth in section (c) above, each party shall disclose in writing to every other party:

* * *

(8) The existence, location, custodian, and general description of any tangible evidence or documents that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, known by a party to exist whether or not in the party's possession, custody or control and which that party

> believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the dates(s) upon which those documents will be made, or have been made, available for inspection and copying. *Unless good cause is stated for not doing so, a copy of each document listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the document shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.*
>
> *(e) Affidavit re Disclosure. Each disclosure shall be made in writing, accompanied by the affidavit of an attorney or a party which affirmatively states that the disclosure is complete and correct as of the date of the disclosure and that all reasonable attempts to comply with the provisions of this rule have been made.* (Emphasis added.)

Chase failed to adequately comply with Rule 222. Its response to item number eight was merely "[d]ocuments in the possession of [Chase]." Its response to item number nine was "Credit Card Statements, Cardmember Agreement and Changes in Terms, and Investigation continues." None of these documents was served with the disclosure and no affidavit was provided.

¶ 22 Regarding Chase's failure to respond to Galarza's Rule 214 production request, Rule 222 provides that "(4) Requests pursuant to Rules 214 and 215 are permitted[.]" Chase did not respond to Galarza's Rule 214 production request.

¶ 23 Chase also failed to comply with the court order entered on August 23, 2010 to "provide

all account agreements, changes in terms to said agreements, and monthly statements to [Galarza] *in advance of trial date*." (Emphasis added.) Thus, the trial court should have addressed Galarza's arguments regarding Chase's failure to comply with discovery.

¶ 24 In sum, we agree that the ten minutes allowed Galarza to review the documents was unreasonable under the circumstances. The trial court should have considered Galarza's arguments regarding Chase's lack of compliance with: (1) Rule 222; (2) Galarza's Rule 214 production request; and (3) the court order of August 23, 2010. We conclude that the trial abused its discretion in failing to allow Galarza the requested continuance.

¶ 25 As a result of this disposition, we need not address Galarza's argument that Chase failed to meet its burden of proof at trial. Nonetheless, we note that Galarza has failed to include a transcript of proceedings or a bystander's report in the record. The record indicates that no transcript of proceedings exists because no court reporter was present, and that the trial court refused to certify Galarza's version of a bystander's report of proceedings. Nevertheless, the appellant has the burden of providing a sufficient record to support a claim of error, and in the absence of such a record, the reviewing court will presume that the trial court's order was in conformity with established legal principles and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). This principle applies in appeals from judgments in small claims cases. *Landau & Associates, P.C. v. Kennedy*, 262 Ill. App. 3d 89, 92 (1994).

¶ 26 In her prayer for relief, Galarza requests, if this court remands the case back to the trial court, that we "direct this case to a new circuit court judge as [Galarza] considers the trial judge's nature to be highly prejudiced against [Galarza]." There are two bases for obtaining a

substitution of judge in the trial court. First, a party is entitled to one substitution of judge as a matter of right. Second, a party may also move for a substitution of judge for cause.

¶ 27 Here, it is too late for Galarza to file a motion for substitution of judge as of right. Section 2-1001(a)(2) of the Code of Civil Procedure states "[a]n application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and *before the judge to whom it is presented has ruled on any substantial issue in the case*, or if it is presented by consent of the parties." (Emphasis added.) 735 ILCS 5/2–1001(a)(2) (West 2006). No motion for substitution as of right was filed prior to a substantive ruling, which precludes relief on this basis.

¶ 28 Galarza could have filed a motion for substitution of judge for cause pursuant to section 2–1001(a)(3) of the Code (735 ILCS 5/2–1001(a)(3) (West 2006)), had Galarza believed that the trial judge was prejudiced and that she could not receive a fair trial before her. By statute, a motion for substitution of judge for cause requires a "petition, setting forth the specific cause for substitution and praying a substitution of judge." (735 ILCS 5/2–1001(a)(3)(ii)). The petition "shall be verified by the affidavit of the applicant." *Id.* Galarza, however, has never filed such a motion. Thus, we decline her request to remand this matter to a new judge. See *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 41 (explaining that where defendant failed to file a motion for substitution of judge in the trial court, defendant forfeited the issue on appeal).

¶ 29 Illinois Supreme Court Rule 366(a)(5) permits a reviewing court, in its discretion, to make any order or grant any relief that a particular case may require. This authority includes the power to remand a case to a different judge. See, *e.g.*, *Raintree Homes, Inc. v. Village of Long*

Grove, 209 Ill. 2d 248, 263(2004); *Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002); *In re Marriage of Smoller*, 218 Ill. App. 3d 340, 346-47 (1991). Moreover, even where it was not requested by the parties, this court has remanded cases to a different judge after the court determined that reassignment was warranted based on the original trial judge's conduct. See, *e.g.*, *People v. Rowjee*, 308 Ill. App. 3d 179 (1999). This is not such a case. Although the trial court denied Galarza's request for a continuance, "[a] judge's previous rulings almost never constitute a valid basis for a claim of judicial bias or partiality." *In re Estate of Wilson*, 238 Ill. 2d 519, 554 (2010). Here, Galarza has failed to provide a factual basis, or set forth the specific cause, for substitution of judge.

¶ 30 CONCLUSION

¶ 31 In accordance with the foregoing, we vacate the judgment of the circuit court of Cook County entered in favor of Chase on November 23, 2010, and remand for a new trial. Having found that Chase failed to state a cause of action for breach of contract, remand shall be limited to Chase's claim for account stated. Prior to trial, the circuit court shall consider whether plaintiff adequately complied with discovery.

¶ 32 Vacated and remanded with directions.