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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ROUND LAKE BEACH LAND ASSOCIATES, LLC,)	Appeal from the Circuit Court of Cook County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 2012 L 9183
)	
ASHLAND PROPERTIES OF ILLINOIS, INC.,)	The Honorable
)	Margaret A. Brennan,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in refusing to strike damages affidavit or in considering amended affidavit filed without leave. Nor did the trial court abuse its discretion in entering judgment after denying the motion to strike the damages affidavit. Appellant forfeited remaining issue.

¶ 2 This appeal involves whether the trial court erred: (i) by denying a motion to strike an affidavit under Supreme Court Rule 191 (Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013)); and (ii) by entering judgment without the opposing side having had an opportunity to file counter affidavits.

¶ 3 We affirm, holding the trial court did not err in denying Ashland's motion to strike Round Lake's affidavit for failing to comply with Rule 191 and in allowing Round Lake to file an amended affidavit without leave. We also affirm the trial court award of damages and attorney fees without a counteraffidavit or fee petition, as Ashland forfeited both issues.

¶ 4 Background

¶ 5 Plaintiff Round Lake Beach Land Associates, LLC, owns property containing a strip mall that includes an Office Max. Defendant Ashland Properties of Illinois, Inc. manages the Office Max portion of the property. An Easement and Operation Agreement governs Round Lake and Ashland's relationship. Under this agreement, Round Lake agreed to maintain a portion of the land, and Ashland agreed to share a part of those costs.

¶ 6 In August 2012, Round Lake filed a two-count complaint against Ashland. Round Lake alleged that Ashland breached the agreement by failing to pay its share of the maintenance expenses. Round Lake also sought appointment of a receiver. Ashland did not dispute that it owed Round Lake money, but contested the amount owed.

¶ 7 Round Lake moved for summary judgment on its breach of contract claim and attached the affidavit of Doug Vitale, who "manage[d] the affairs of Round Lake" and was "familiar with the bills and taxes" on the land. His affidavit included as an exhibit "a recapitulation of the expenses and income billed by Round Lake *** pursuant [to the] agreement," totaling \$153,163.94, of which \$52,419.33 was for attorney fees. Vitale stated that the agreement and the "expenses charged to Ashland Properties" were consistent, and that Ashland annually received notice and proof of the charges. The trial court granted summary judgment to Round Lake as to liability, and set a prove-up of damages. Before the date of the prove-up hearing, Ashland moved to strike Vitale's affidavit for lack of personal knowledge, lack of particularity, and irrelevancy.

After briefing, the court granted Ashland's motion, and gave Round Lake time to file a second affidavit in support of its damages.

¶ 8 Round Lake filed the affidavit of Doruk Borekci. The court ordered Ashland to respond to Borekci's affidavit, and set the case "for hearing on prove up." Again before prove up, Ashland moved to strike Round Lake's affidavit for lack of personal knowledge, lack of particularity, and relevancy. In its response to the motion, Round Lake amended Borekci's affidavit. It now stated, in part:

"1. I am the managing member of Round Lake ***. I am personally knowledgeable regarding the receipt and payment of all of the bills effecting [sic] the property. Those bills include: taxes, electric, snow plowing, landscaping, parking lot maintenance and cleaning. I have personal knowledge of the purpose of the bills and the fact that they have been paid for the benefit of the two parcels which comprise the property covered by the Easement and Operating Agreement.

2. Attached to my Affidavit is a recapitulation of the expenses and income billed by Round Lake *** pursuant to the Easement and Operating Agreement between Round Lake *** and *** Ashland ***. I have made all of these bills available to Ashland. All of the bills have been paid. I have personal knowledge of these facts as my role as the managing member of Round Lake *** require[s] me to have such knowledge, and I do." (Emphasis omitted.)

Borekci went on to explain that Ashland's portion of the total expenses under the agreement amounts to 38%.

¶ 9 In its reply, Ashland argued that both the original and amended affidavits failed to comply with Rule 191, and the amended affidavit was filed without leave of court. Ill. S. Ct. R.

191(a) (eff. Jan. 4, 2013). The trial court denied Ashland's second motion to strike, and entered judgment. The record does not reflect that Ashland objected to the entry of judgment. The court continued the matter for status on appointment of a receiver.

¶ 10 Ashland filed a timely motion for reconsideration, arguing that the court erred in denying its motion to strike and should have given Ashland a chance to file counteraffidavits before entering judgment. It also argued that the court should not have granted attorney fees without a proper petition. The court denied the motion for reconsideration without comment. This appeal followed.

¶ 11 ANALYSIS

¶ 12 Ashland appeals, arguing that the trial court erred by (i) denying Ashland's motion to strike Borekci's affidavit; (ii) entering judgment without giving Ashland the opportunity to file counter affidavits; and (iii) awarding attorney fees in the judgment without a petition for attorney fees or a determination on whether the fees were reasonable. We affirm.

¶ 13 Motion to Strike Borekci's Affidavit

¶ 14 Ashland urges that the court erred in denying its motion to strike Borekci's affidavit because: (i) Borekci lacked personal knowledge of Round Lake's damages; (ii) the referenced agreement was not attached; (iii) Borekci did not explain who prepared the attached summary of damages, how it was prepared, or whether it was prepared in the ordinary course of business; and (iv) Round Lake filed an amended affidavit without leave.

¶ 15 There is a split in authority whether the standard of review for a motion to strike an affidavit is *de novo* or abuse of discretion. See *Xeniotis v. Cynthia Satko, D.D.S., M.S., P.C.*, 2014 IL App (1st) 131068, ¶ 68. Even under the more lenient *de novo* standard, however, the trial court properly refused to strike Borekci's affidavit.

¶ 16 Illinois Supreme Court Rule 191 governs affidavits on motions for summary judgment, and requires the affidavit (i) be made on the personal knowledge of the affiant; (ii) describe with particularity the facts on which the affiant relied; (iii) attached sworn or certified copies of documents on which the affiant relies; (iv) consist of facts admissible in evidence as would live testimony, and not conclusions ; and (v) affirmatively show that the affiant, if sworn as a witness, can so testify competently. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013); *US Bank, N.A. v. Avdic*, 2014 IL App (1st) 121759, ¶ 22.

¶ 17 As a threshold issue, Ashland argues that the trial court erred in allowing Round Lake to file Borekci's amended affidavit without leave. We review this issue under the abuse of discretion standard. See *In re Village of Wadsworth*, 154 Ill. App. 3d 54, 58 (1987) (trial court decision disallowing amended affidavit reviewed for abuse of discretion); *Krilich v. Millikin Mortgage Co.*, 196 Ill. App. 3d 554, 559-60 (1990) (same).

¶ 18 There are minor changes between Borekci's original and amended affidavits. In the amended version, he adds, "I have personal knowledge of these facts as my role as the managing member *** require[s] me to have such knowledge, and I do. A true and correct copy of the Easement and Operating Agreement is attached to my Affidavit." Another addition states, "Attached to my Affidavit is a true and correct copy of the tax bill received and paid regarding the subject property." Also, he attaches the missing exhibits.

¶ 19 The trial court was well within its discretion to permit the amendment without leave. The amendment cures deficiencies raised by Ashland in its motion to strike. While a trial court might have stricken the amended version and required Round Lake to seek leave, we should not interfere in the level of formality with which a judge conducts his or her call. See *People v. Anderson*, 367 Ill. App. 3d 653, 664 (2006) (" 'Abuse of discretion' is the most deferential

standard of review—next to no review at all—and is therefore traditionally reserved for decisions made by a trial judge in overseeing his or her courtroom or in maintaining the progress of a trial.").

¶ 20 Ashland further argues that it was prejudiced by the amendment because its original motion no longer applied to the amended affidavit. Ashland could have, but did not, file a motion to strike the amended affidavit, or could have sought leave to file an amended motion to strike. Instead, Ashland prepared and filed a reply brief addressing the admissibility of Borekci's amended affidavit. Thus, the trial court did not prejudice Ashland by permitting the amendment.

¶ 21 Ashland next argues that Borekci lacked personal knowledge of Round Lake's damages. Borekci's amended affidavit satisfies Rule 191's personal knowledge requirement because, taking the affidavit as a whole, it is based on Borekci's personal knowledge and there is a reasonable inference that Borekci could competently testify to its contents at trial. *Avdic*, 2014 IL App (1st) 121759, ¶ 22 ("If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied." (Internal quotation marks omitted)). Borecki states his position as the managing member of Round Lake and attests that as managing member he had the responsibility for the receipt and payment of all the company's bills. It follows that Borekci possessed personal knowledge of whether Ashland paid its portion of the expenses under the agreement. See 805 ILCS 180/15-1(a)(1) (West 2012) (defining managing member as having "rights in the management and conduct of the company's business").

¶ 22 Ashland next argues that the summary of damages is inadmissible hearsay. The business records exception to the hearsay rule, codified in Illinois Supreme Court Rule 236, permits the

admission of any business records of "any act, transaction, occurrence, or event" if those records are made: (i) in the regular course of business; and (ii) at the time or within a reasonable time of the transaction. Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992); *Avdic*, 2014 IL App (1st) 121759, ¶ 23. The rule further states that "[a]ll other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992).

¶ 23 This rule parallels Illinois Rule of Evidence 803(6) (eff. Apr. 26, 2012), which admits any "memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses" that are: (i) made at or near the time of the transaction; (ii) made using information transmitted by a person with knowledge of the transaction; (iii) kept as part of the course of a regularly conducted business; and (iv) created as part of the business's regular practice. *Id.* A custodian or "other qualified witness" may lay the foundation for admission under this exception. *Id.* The theory behind this exception is that a business has no motive to falsify records it relies on because doing so would only hurt the business. *Avdic*, 2014 IL App (1st) 121759, ¶ 24.

¶ 24 We agree that the summary exhibit does not comply with the business records exception. Borekci does not testify to the summary being kept in the regular course of Round Lake's business, or when and how the summary was made. But the exhibit does qualify as a summary exhibit. See *Malinski v. Grayslake Community High School District 127*, 2014 IL App (2d) 130685, ¶ 6 (under *de novo* review, we may affirm on any basis in the record). Where the trial court cannot conveniently examine voluminous documents, it may admit summary exhibits to aid in reaching a verdict or ruling; *In re Estate of Burren*, 2013 IL App (1st) 120996, ¶ 32. The party introducing a summary exhibit must give the opposing party an opportunity to inspect the

summarized documents and verify the summary's accuracy before trial. *Id.* Provided the documents are capable of summary, any competent witness who has seen them may testify to the accuracy of the summary. *Landmark Structures, Inc. v. F.E. Holmes & Sons Construction Co., Inc.*, 195 Ill. App. 3d 1036, 1051 (1990).

¶ 25 Borekci affirmed that Round Lake produced to Ashland the documents supporting damages and he verified the summary's accuracy. Accordingly, the trial court did not err in relying on the summary exhibit.

¶ 26 Ashland further argues that Round Lake did not attach the easement and operation agreement to Borekci's original affidavit. But the agreement was attached to Borekci's amended affidavit, and as noted, the trial court did not abuse its discretion in relying on the amended affidavit.

¶ 27 Entry of Judgment

¶ 28 Ashland next maintains that the trial court erred when it entered judgment before giving Ashland an opportunity to file counteraffidavits. We disagree. We review the denial of an opportunity to file counteraffidavits for an abuse of discretion. *Amaral v. Woodfield Ford Sales, Inc.*, 220 Ill. App. 3d 357, 361 (1991).

¶ 29 Ashland's sole authority in support of its contention of error is *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441 (2006), from which it quotes the court's holding regarding the procedural expediency of class actions. See *Smith*, 223 Ill. 2d at 451 (citing *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 437-38 (Tex. 2000)). But the issue of a motion for class certification has no relevance to the issue at hand. Neither the quoted passage nor anything in *Smith* supports Ashland's contention that the trial court erred when it entered judgment after

denying Ashland's second motion to strike. Ashland fails to cite any facts or law that indicate the trial court abused its discretion when it entered judgment. Thus, the argument is not well taken.

¶ 30 Attorney Fees

¶ 31 Finally, Ashland complains that the trial court should have insisted on a fee petition before awarding Round Lake's attorney fees. We find this issue forfeited.

¶ 32 We will not consider issues raised for the first time on appeal even in summary judgment cases. *Chandler v. Doherty*, 299 Ill. App. 3d 797, 806 (1998); see *Wogelius v. Dallas*, 152 Ill. App. 3d 614, 623 (1987) ("The sufficiency of an affidavit cannot be tested for the first time on appeal where no objection was made either by a motion to strike or otherwise, in the trial court.").

¶ 33 In Ashland's second motion to strike, it moved only to strike Borekci's affidavit for failure to comply with Rule 191. It makes no mention of the lack of a motion for attorney fees or even to the amount of the fees. Moreover, when the trial court denied Ashland's second motion to strike and entered judgment, Ashland did not object. Rather, the initial appearance of Ashland's objection is in its motion for reconsideration. This is insufficient to preserve the issue for appeal. It is improper to raise a new issue in a motion for reconsideration. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36. The issue, therefore, is forfeited.

¶ 34 CONCLUSION

¶ 35 Affirmed.