2016 IL App (5th) 150406-U

NO. 5-15-0406

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

BILL RUSSELL, d/b/a FRANK RUSSELL & SON TRUCKING COMPANY,	)	Appeal from the Circuit Court of Franklin County.
Plaintiff-Appellant,	)	
v.	)	No. 93-L-122
JIM RUSSELL Individually and JIM RUSSELL SERVICE, INC., a Corporation,	)	Honorable Thomas J. Foster,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The order of the circuit court dismissing plaintiff's second amended complaint with prejudice is affirmed.

¶ 2 The issue to be decided in this appeal is whether the circuit court properly dismissed plaintiff's second amended complaint, with prejudice, because section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 2010)) precluded him from alleging violations of a noncompete clause where he had already voluntarily dismissed his complaint twice. For the reasons that follow, we affirm.

¶ 3 I. FACTS AND PROCEDURAL HISTORY

¶ 4 This case has a long history, stemming over 30 years, that is now before this court for a third time, and concerns alleged violations of a noncompete clause. Only those facts necessary for dispostion of this appeal are set forth hereafter. Bill Russell (Bill) and his brother Jim Russell (Jim) were partners in a business known as Frank Russell & Son Trucking Company (FRS). FRS was in the trucking business, and hauled a variety of items for different customers. One of the items they transported on a regular basis was a mineral known as magnetite, a dry, powdered iron ore used to clean coal. FRS transported this substance to various coal mines throughout southern Illinois.

¶ 5 In June 1985, Bill and Jim mutually decided to dissolve their partnership, and Bill offered to purchase Jim's 50% share in the business. On July 15, 1985, Bill and Jim executed a sales agreement wherein Bill agreed to purchase 50% of Jim's interest in FRS. The sales agreement contained a noncompete clause, which stated the following:

> "Seller [Jim Russell] hereby agrees that he will not engage in the business of trucking, hauling, general moving and storage anywhere within a radius of One Hundred miles of the City of West Frankfort, Illinois, in any capacity whatsoever, directly or indirectly, for a period of ten (10) years from the date of the execution of this agreement."

¶ 6 In 1986, Bill, doing business as FRS, filed a complaint for injunctive relief (cause No. 86-CH-38) against Jim, his brother's wife, Donna Russell (Donna), and their business, Jim Russell Supply, Inc. (Supply), in the circuit court of Franklin County. Bill alleged that the defendants had breached the noncompete provision in that Jim, acting in

concert with Donna, formed Supply, and in June 1986, began to transport magnetite to a former customer of FRS located within a 100-mile radius of West Frankfort, Illinois. On January 4, 1987, Bill moved to voluntarily dismiss his action without prejudice. The circuit court granted his motion, and dismissed the action without prejudice.

¶ 7 Shortly after having dismissed his lawsuit, on January 22, 1987, Bill refiled his claim for injunctive relief (cause No. 87-L-15) against the same defendants in Williamson County. The complaint alleged that the defendants violated the same noncompete clause in the same ways as previously claimed in 86-CH-38. In June 1987, the case was transferred to Franklin County (cause No. 87-L-76).

¶ 8 Thereafter, the trial court entered summary judgment in favor of defendants, finding that the July 1985 noncompete clause was unenforceable. Bill filed a timely appeal. We reviewed the trial court's decision, and made several findings. See *Russell v. Jim Russell Supply, Inc.*, 200 Ill. App. 3d 855 (1990). First, this court held that the trial court erred as a matter of law when it determined that the noncompete clause was unreasonable and, therefore, unenforceable. *Russell*, 200 Ill. App. 3d at 866. Additionally, we looked at the language of the restrictive covenant and considered the meaning of the term "trucking business" to determine whether this phrase created an ambiguity that allowed for the introduction of extrinsic facts and circumstances to determine the true intent of the parties. *Russell*, 200 Ill. App. 3d at 866. We found that the term was ambiguous such that extrinsic evidence was admissible to aid the court in determining whether Jim was directly, or indirectly, engaged in the trucking business. *Russell*, 200 Ill. App. 3d at 867. We noted that Jim's argument, that he did not compete

with Bill because Supply was in the business of sales, as opposed to hauling, was an argument of "form over substance." *Russell*, 200 Ill. App. 3d at 867. We concluded that the trial court had erred when it entered a judgment for the defendants, and that Bill had established a *prima facie* case that the defendants were in the trucking business. *Russell*, 200 Ill. App. 3d at 870. Thus, we reversed the lower court's decision, and remanded the case for trial. *Russell*, 200 Ill. App. 3d at 870.

¶ 9 Instead of moving forward to trial, in July 1993, Bill filed another motion to voluntarily dismiss his complaint, without prejudice. The circuit court granted this motion. Subsequently, in November 1993, Bill brought a third action (No. 93-L-122) against Jim, Donna, and Supply, in Franklin County. He alleged that the defendants violated the same noncompete clause in essentially the same ways as previously claimed in 86-CH-38, 87-L-15, and 87-L-76. This time, however, Bill did not seek injunctive relief. Rather, Bill sought money damages, claiming that the breach of the July 1985 noncompete clause resulted in the loss of long-standing customers, as well as the loss of goodwill, profits, and revenue.

¶ 10 In February 1994, Bill amended his complaint, adding a count that alleged that Supply and Donna intentionally, and unjustifiably, induced Jim to breach the noncompete clause in the sales agreement. Bill filed a second amended complaint in March 1998. In the 1998 amended complaint, Bill added as defendants, Jim Russell Service, Inc. (Service), and Jim Russell Sales, Inc. (Sales). The second amended complaint alleged that Jim, Donna, and Service violated the noncompete clause in May 1989, and for some

period thereafter. Bill also alleged that Jim, Donna, and Sales violated the noncompete clause for a period sometime after 1991.

¶ 11 On May 20, 1998, the circuit court of Franklin County granted partial summary judgment in favor of Bill, and against Jim and Service, on the issue of liability for breach of the noncompete clause in the July 1985 sales agreement. The court did not address damages as a part of the judgment, and left that question open for trial. That order was never challenged on appeal.

¶ 12 Subsequently, the defendants asked that Bill's cause of action be dismissed pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 2010)). The trial court denied the motion. Thereafter, the defendants requested that the trial court certify two questions regarding the impact of section 13-217 on this case, where Bill had twice voluntarily dismissed his lawsuit. See *Russell v. Jim Russell Supply Co.*, 2013 IL App (5th) 120229-U. In our Rule 23 Order, we held that section 13-217 precludes the adjudication of a cause of action which has previously been voluntarily dismissed twice. We were then asked to consider whether a single group of operative facts formed the basis for Bill's original action for injunctive relief (86-CH-38), the subsequent action for injunctive relief (87-L-15/87-L-76), and the action for money damages (93-L-122). We answered that question in the affirmative. We declined, however, the defendants' request to enter judgment on their behalf, and against Bill. Instead, we determined that factual issues remained for the trial court's consideration related to Bill's second amended complaint, wherein he alleged two additional periods during which the defendants violated the noncompete clause. *Jim Russell Supply Co.*, 2013 IL App (5th) 120229-U,

¶ 20. Specifically, based upon the record before us, we were unable to determine whether the two additional violations of the noncompete clause alleged breaches that were separate and distinct, or whether they were part of an ongoing breach that began in June 1986. *Jim Russell Supply Co.*, 2013 IL App (5th) 120229-U, ¶ 20. Accordingly, we remanded the case back to the circuit court for further proceedings to make a determination on this issue. *Jim Russell Supply Co.*, 2013 IL App (5th) 120229-U, ¶ 21.

¶ 13 On April 6, 2015, just prior to the circuit court hearing regarding the alleged additional violations of the noncompete clause, the defendants filed a motion *in limine*. In their motion, the defendants argued, among other things, that the record clearly demonstrated that they had satisfied their initial burden of proving that the claimed violations, as alleged by Bill, were part of an ongoing and continuous breach of the noncompete clause, and were not separate and distinct violations. As such, the defendants posited that in light of their proof, the burden shifted to Bill to establish that the alleged violations of the noncompete clause were separate and distinct.

¶ 14 The following day, on April 7, 2015, Bill filed his response to the defendants' motion *in limine*. He argued that the case should be set for a hearing on the issue of damages because of the prior entry of partial summary judgment against Jim and Service on May 20, 1998, for breach of the noncompete clause. Unfortunately, the record does not contain a transcript of what occurred. A docket entry, however, reflects that the court heard the motion *in limine*, and both parties argued their respective positions. The docket entry also reflects that the circuit court agreed with the defendants, and assigned the burden of proof to Bill to show that the two additional violations of the noncompete

clause, as alleged in the second amended complaint, were separate and distinct from those breaches previously alleged. The docket entry further indicates that both parties agreed that an evidentiary hearing should be held to determine whether the alleged violations of the noncompete clause were separate and distinct.

¶ 15 On June 23, 2015, an evidentiary hearing was held to resolve the issue regarding the two supplemental time frames wherein Bill had alleged breaches of the noncompete clause. During the hearing, Bill voluntarily dismissed Donna and Sales, leaving Jim and Service as the only remaining defendants. Due to time constraints, the hearing was continued, but not before the court admitted several exhibits that the defendants offered into evidence.

¶ 16 Approximately one month later, the circuit court recalled the matter for hearing. Before calling his first witness, Bill objected to bearing the burden of proving that the alleged violations of the noncompete clause were separate and distinct. He argued that the defendants had raised an affirmative defense, and, as such, they should bear the burden of proof. The circuit court overruled Bill's objection. Bill then called Jim as his only witness. A summary of Jim's testimony is as follows.

¶ 17 Jim testified that while working with Bill at FRS, they never owned the magnetite that was delivered to coal mines throughout southern Illinois. A third party paid FRS to deliver magnetite to the coal mines. Jim then started Supply after he sold his half interest in FRS to Bill. In contrast to FRS, Jim, through Supply, owned the magnetite that he delivered to coal mines in Illinois. Thus, the coal mines would pay Jim directly through Supply. According to Jim, he never breached the noncompete clause through his

activities with Supply because he owned the magnetite that he hauled or trucked to various mining operations. Jim also testified that in 1989, he formed Service, and began hauling magnetite to the same coal mines as Supply, but did so on behalf of suppliers. Jim did not own the magnetite that Service delivered to coal mines. As such, like FRS, Jim, through Service, received compensation from a supplier, as opposed to being paid directly by the coal mines. Jim further testified that he hauled magnetite through Supply and Service to the same coal mines where FRS also delivered magnetite. Jim stated that the day Service was granted authority to haul, Supply stopped transporting magnetite. After further questioning, Bill rested. The defendants did not call any witnesses and rested. The trial court then heard closing arguments, and took the matter under advisement.

¶ 18 On September 1, 2015, the trial court issued its ruling finding that the evidence demonstrated that Jim, through Supply, and later through Service, violated the noncompete clause in that he hauled magnetite within 100 miles of the City of West Frankfort, Illinois. The circuit court further found that the nature of Jim's violation of the noncompete clause was ongoing and continuous. Therefore, the circuit court dismissed Bill's second amended complaint in its entirety, with prejudice. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, Bill's argument that the trial court committed reversible error is twofold. First, he claims that the trial court committed error by improperly shifting the burden of proof. In particular, Bill contends that the defendants had the burden of proving their affirmative defense, that section 13-217 of the Code precluded Bill from

continuing to pursue his cause of action. Similarly, Bill also argues that the defendants failed to prove their affirmative defense. According to Bill, Jim testified against his interest, claiming that he and Supply never violated the noncompete clause because it was in the business of sales, and not in the business of trucking. As such, Bill maintains that Jim and Service's breaches of the noncompete clause were separate and distinct as opposed to ongoing and continuous violations because Supply never violated the restrictive covenant. Our review of the issues raised is *de novo*. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 307 Ill. App. 3d 92, 105-06 (1999).

¶ 21 We first consider whether the trial court improperly shifted the burden of proof to Bill to show that the alleged breaches by Jim and Service were either separate and distinct or one, ongoing and continuous violation of the noncompete clause. The party who raises an affirmative defense bears the burden of proof. See, *e.g.*, *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 366 (2008). If the burden is satisfied by the defendant, then the burden is shifted to the plaintiff to establish that the defense is "unfounded or requires the resolution of an essential element of material fact before it is proven." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). Additionally, this court has long held that in order to support a claim of error on appeal, the appellant has the burden to present a sufficiently complete record. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001). Where the issue on appeal relates to the conduct of a hearing or proceeding, the issue is not subject to review absent a report or record of the proceeding. *Hartman*, 195 Ill. 2d at 432. In the absence of a report or record on

appeal, it is presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 22 In the instant case, the defendants, through their motion *in limine*, contended that the record clearly established that they had met their initial burden of proving their affirmative defense, that Service's breach of the noncompete clause was part of an ongoing violation that first occurred in 1986 by Supply. The April 7, 2015, docket entry reflects that the trial court ruled in favor of the defendants on this issue.

¶ 23 As previously noted, there is no transcript of the April 7, 2015, proceeding wherein the circuit court determined that the defendants met their initial burden of proving their affirmative defense. Nor is there a bystander's report which is authorized under Rule 323(c), or an agreed-upon statement of facts filed by the appellant, which is authorized under Rule 323(d). Put simply, there is no record of the evidence and argument that was heard at the April 7, 2015, hearing regarding the burden of proof. As the appellant, Bill had the burden of providing this court with a sufficiently complete record to enable review of his contention of error. He failed to do so. Therefore, it must be assumed that the order entered by the trial court was in conformity with the law, and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. Even if we were not to assume so, our review of the record leads us to conclude that there was sufficient evidence, developed throughout the course of this protracted litigation, for the defendants to have satisfied their initial burden of establishing their affirmative defense. Accordingly, we reject Bill's argument that the trial court improperly shifted the burden of proof to him.

¶ 24 Bill's next argument is that the trial court erred in dismissing his complaint because the defendants failed to prove their affirmative defense, that section 13-217 of the Code bars his cause of action. According to Bill, the defendants had to prove that Service's breach was part of an ongoing and continuous breach of the noncompete clause that started with Supply. Bill contends that the defendants failed to prove that Jim competed with FRS through Supply, and as a result, Service's violation of the restrictive covenant could not have been an ongoing breach. In support of this argument, Bill relies on Jim's testimony that Supply was not in the trucking business.

¶ 25 Section 13-217 provides a plaintiff with an absolute right to refile a cause of action within one year of an order of voluntary dismissal or the remaining period of limitations, whichever is greater. 735 ILCS 5/13-217 (West 2010). Section 13-217 has been interpreted by the Illinois Supreme Court which has held that it expressly authorizes only one refiling of a claim, even where the statute of limitations has not expired. *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 254 (1991). Thus, section 13-217 precludes the adjudication of a cause of action that has been voluntarily dismissed twice.

¶ 26 Under section 13-217, a complaint is considered to be a refiling of a previously filed complaint if it amounts to the same cause of action under principles of *res judicata*. *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 220 (1997). The doctrine of *res judicata* states that a final judgment on the merits rendered by a court of competent jurisdiction constitutes an absolute bar to a subsequent suit between the parties involving the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). To determine whether there is an identity of causes of action, Illinois courts use the

transactional test. *River Park*, 184 Ill. 2d at 310. The transactional test provides that separate claims will be considered the same cause of action for purposes of *res judicata* if both claims arise from a single group of operative facts, regardless of whether they assert different theories of relief. *River Park*, 184 Ill. 2d at 311.

¶ 27 We find that Bill's argument is not supported by the record. The hearing started with the defendants in the lead as the trial court previously determined that they had satisfied their initial burden of proving that Jim and Service's breach of the noncompete clause was ongoing and continuous. As such, section 13-217 of the Code served as a bar to Bill's cause of action unless he could show that the violations were separate and distinct. Thus, the burden then shifted to Bill, who had to rebut this presumption. During the hearing, Jim opined that Supply was not in the trucking business, but he also testified that he trucked magnetite through both Supply and Service to the same coal mines. The only difference was that Supply owned the magnetite that it trucked or hauled to the mines, whereas Service transported magnetite on behalf of third parties. Regardless of who owned the magnetite, Jim, through Supply and Service, hauled this product to coal mines. Thus, the trial court's finding that Supply breached the noncompete clause because it engaged in the trucking business is supported by the record.

¶ 28 Additionally, Jim's testimony did not rebut the presumption that Bill's cause of action was barred by section 13-217 of the Code. In fact, his testimony supported the trial court's finding that the breach of the noncompete clause, first by Supply, and later by Service, was ongoing and continuous. Jim testified that he hauled magnetite through Supply and Service to the same coal mines where FRS also delivered magnetite. Supply

began transporting magnetite to coal mines in 1986, and stopped in 1989. However, in 1989, Service was formed and began hauling and trucking magnetite to the same coal mines as Supply. There was no evidence of any break or cessation in the transport of magnetite by Jim, whether it was through Supply or Service. The name of the company may have changed, but Jim's course of conduct did not. He transported magnetite starting in 1986, and continued to do so through the term of the noncompete clause. Jim's conduct of transporting magnetite through Supply was essentially the same as his conduct through Service where he also transported magnetite. As such, the evidence supports the trial court's finding that the breach of the noncompete clause by Jim and Service was ongoing and continuous. Thus, we find that Jim's conduct of trucking magnetite, whether through Supply or Service, was ongoing and continuous, and arose from a single group of operative facts. Therefore, the trial court correctly decided that section 13-217 of the Code barred Bill's cause of action for breach of the noncompete clause. Accordingly, we affirm the decision of the trial court to dismiss Bill's complaint in its entirety, with prejudice.

¶ 29 Affirmed.