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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WESTFIELD INSURANCE and SWERBS)	Appeal from the
MOTORS, INC. – MUSKEGON)	Circuit Court of
)	Cook County.
Plaintiffs-Appellees,)	
)	No. 14 CH 02008, 12 L 012909,
v.)	cons.
)	
JASON PIEPENBRINK, RYAN)	Honorable
PIEPENBRINK, and STANLEY)	David B. Atkins,
BRANKLYN)	Judge, presiding.
)	
Defendants.)	
)	
(Stanley Branklyn, Defendant-Appellant.))	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

- ¶ 1 *Held:* Party could not attack the sufficiency of an affidavit supporting a motion for summary judgment for the first time on appeal. No issue of material fact existed where defendant party failed to file a counter-affidavit contradicting assertions set forth in plaintiff's affidavit.
- ¶ 2 Defendant Stanley Branklyn appeals from the trial court's order granting summary judgment to plaintiffs Swerbs Motors, Inc–Muskegon ("Swerbs Motors") and Westfield

Insurance ("Westfield") in a declaratory judgment action. On appeal, Branklyn contends that an affidavit supporting the motion for summary judgment must be stricken and that a genuine issue of material fact exists. We affirm.

¶ 3

BACKGROUND

¶ 4

On July 21, 2012, an automobile accident occurred involving a car driven by Jason Piepenbrink and a car driven by Stanley Branklyn. Branklyn was injured in the accident. The car driven by Jason had been purchased from Swerbs Motors by Jason's father, Ryan Piepenbrink.

¶ 5

On November 14, 2012, Branklyn filed a complaint against Jason, Ryan, and Swerb's Financial, Inc. ("Swerb's Financial"), under various business names. Swerb's Financial is a sister company to Swerbs Motors to which Swerbs Motors had assigned its contract rights regarding Ryan's car. In his complaint, Branklyn alleged three alternative counts. The first alleged that Jason had negligently caused the accident while acting as an agent of Ryan, who owned the car Jason was driving. The second alleged that Swerb's Financial owned the car in question, and that Jason was an agent of the company. The final count alleged that Swerb's Financial had repossessed the car, but negligently entrusted the car to Jason.

¶ 6

Branklyn subsequently filed four amended complaints in response to multiple motions to dismiss filed by Swerb's Financial. In the fourth amended complaint, filed on October 21, 2013, Branklyn alleged that Jason had negligently caused the accident in a car owned by Swerb's Financial. Jason was the only defendant named in the amended complaint. The trial court entered a default judgment against Jason on February 5, 2014. Following a prove-up hearing, the court awarded Branklyn \$403,105 in damages. He then filed a garnishment

action against Jason and Westfield as a supplementary proceeding within the law division action.

¶ 7 As the law division case was pending, Swerbs Motors and Westfield filed a verified complaint for declaratory judgment against Branklyn and both of the Piepenbrinks in the chancery court on February 4, 2014. The complaint asked the court to find that Jason and Ryan were not named individuals under Swerbs Motors' insurance policy and that Westfield had no duty to indemnify either individual. The Piepenbrinks did not respond and the chancery court subsequently entered a default judgment against them. Branklyn filed an unverified answer.

¶ 8 Swerbs Motors and Westfield filed a motion for summary judgment on October 16, 2014. Following briefing and arguments, the court in the chancery action granted the motion in part, finding that neither of the Piepenbrinks was a named insured on the Westfield policy. The court held, however, that the issue of whether Jason was covered by the policy was "not ripe for consideration."

¶ 9 In February 2015, the law division proceeding and the chancery proceeding were consolidated. On April 7, 2015, Westfield filed a motion for summary judgment regarding the garnishment action. Westfield and Swerbs Motors also renewed their motion for summary judgment regarding whether Jason was covered by the insurance policy. They attached certified copies of the vehicle's certificate of title and registration, which listed Ryan as the car's owner. Additional attachments to the motion included a November 5, 2011, contract indicating that Swerbs Motors had sold the car in question to Ryan. An affidavit from Don Taylor, the controller for both Swerbs Motors and Swerb's Financial, was also attached.

¶ 10 In the verified affidavit, Taylor averred that Ryan had taken possession of the car on November 25, 2011. At some time prior to July 20, 2012, Ryan became delinquent on payments for the car, and the car was repossessed. Ryan eventually made the payments necessary to "bring his account up to date" and "[p]rior to July 20, 2012, [Swerbs Motors] tendered possession of the vehicle back to" Ryan. Taylor averred that Swerbs Motors did not give permission or authority to Jason to use the car. The affidavit stated that Taylor had "personal knowledge of the facts and statements contained" within it.

¶ 11 Branklyn filed a response to the motions for summary judgment on August 25, 2015. He attached to the response an unsworn, handwritten document signed by Jason, which Branklyn referred to in his response as "Jason's statement." The statement indicated that following the car's repossession, Jason went to the office of Swerbs Motors and spoke to a woman named Gwen. He told her that he was not Ryan, but Ryan had sent him to make a payment and pick up the car. He gave the woman \$250 and she asked for proof of insurance. Jason told her that the proof of insurance was misplaced, but she gave him the keys nonetheless.

¶ 12 Following oral arguments, the trial court granted both motions for summary judgment in a memorandum opinion on December 15, 2015. The court noted that Jason's statement was neither verified nor sworn and declined to take its assertions into consideration. It also explained that Branklyn's answer to the declaratory action was unverified, and that once a pleading is verified, any subsequent pleading must also be verified or it will be disregarded.

¶ 13 ANALYSIS

¶ 14 We note initially that Branklyn makes no argument on appeal concerning the trial court's granting of Westfield's motion for summary judgment on his garnishment action. He refers

only to the court's granting of Swerbs Motors and Westfield's motion for summary judgment in their declaratory action. We therefore confine our analysis to the latter motion.

¶ 15 Branklyn first contends that Taylor's verified affidavit is insufficient under Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) because its assertions are conclusory and impermissibly vague. He argues that the affidavit must therefore be stricken. Westfield and Swerbs Motors respond that Branklyn did not object to the affidavit before the trial court and has therefore waived the issue.

¶ 16 A party may not challenge the sufficiency of an affidavit for the first time on appeal. *Arnett v. Snyder*, 331 Ill. App. 3d 518, 523 (2001). The party seeking to challenge an affidavit's sufficiency under Rule 191 bears the burden of both objecting before the trial court and obtaining a ruling on the issue. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 383 (2008). The failure to do so results in a waiver of the issue. *Id.* There is no indication in the record that Branklyn raised any objection to Taylor's affidavit before the trial court. Accordingly, he has waived the issue on appeal.

¶ 17 Branklyn also contends that a genuine issue of material fact existed as to whether Swerbs Motors owned the vehicle in question or whether the company gave Jason permission to use the vehicle. He argues that Swerbs Motors and Westfield's motion for summary judgment regarding any indemnity to Jason should therefore have been denied.

¶ 18 We review an order granting summary judgment *de novo*. *Sears, Roebuck & Company v. Acceptance Insurance Co.*, 342 Ill. App. 3d 167, 171 (2003). Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the non-movant, indicate there is no genuine issue of material fact and thus the moving party is entitled to judgment as a matter of

law. 735 ILCS 5/2-1005(c) (West 2014); *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 50 (1999). The party seeking summary judgment bears the initial burden of proof; however, this burden is met when the party either affirmatively proves an element of the case must be resolved in its favor or establishes an absence of evidence underlying the nonmoving party's case. *Bank Financial, FSB v. Brandwein*, 2015 IL App (1st) 143956, ¶ 40. Once this burden is met, the party opposing the motion "must present a *bona fide* factual issue." *Id.* A "mere suggestion that an issue of material fact exists," is insufficient without supporting evidence. *Frederick v. Professional Truck Driver Training School, Inc.*, 328 Ill. App. 3d 472, 480 (2002).

¶ 19 It is important to note, as the trial court did, that Branklyn filed an unverified answer in response to Swerbs Motors and Westfield's verified complaint. Once a verified pleading is filed by one party, all subsequent pleadings must be verified, unless excused. 735 ILCS 5/2-605(a) (West 2014) ("If any pleading is so verified, every subsequent pleading must also be verified, unless verification is excused by the court.") There is no indication that the trial court excused Branklyn from verification, accordingly his unverified answer is viewed as a nullity and the well-pled facts in the verified complaint are deemed admitted. See *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 39.

¶ 20 Additionally, Branklyn does not challenge the trial court's finding that the handwritten statement purportedly signed by Jason was neither verified nor sworn and thus must be disregarded. The unsworn document was not an affidavit and thus was not sufficient to raise a genuine issue of material fact. See *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 575 (2000); see also *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 497 (2002) ("An affidavit that is not sworn is a nullity.") Where an affidavit supporting

a motion for summary judgment is unchallenged by a counter-affidavit or other admissible evidence, the supporting affidavit must be taken as true. *Cordeck Sales, Inc.*, 382 Ill. App. 3d at 384. Accordingly, we must also take the assertions in Taylor's affidavit as true.

¶ 21 The title and registration of the vehicle in question provide a *prima facie* presumption that Ryan was its owner. See *Pekin Ins. Co. v. U.S. Credit Funding, Ltd.*, 212 Ill. App. 3d 673, 677 (1991). The verified complaint alleged that Swerbs Motors did not own the vehicle and that it had "tendered" the vehicle back to Ryan before the accident. Taylor alleged these same facts in his affidavit. He also alleged that Swerbs Motors did not give permission or authority to Jason to use the car. As already discussed, we must take these allegations as true. Accordingly, we find no genuine issue of fact regarding ownership of the vehicle or any permission granted by Swerbs Motors. Branklyn has offered no other argument supporting a duty of Westfield to indemnify Jason. Thus we hold that the trial court did not err in granting Swerbs Motors and Westfield's motion for summary judgment on the parties' declaratory complaint.

¶ 22 Branklyn asserts that both the complaint and affidavit state that Swerbs Motors "tendered possession" of the vehicle back to Ryan and he raises the purely semantic argument that "tender" only means to offer and not to actually give something. He argues the evidence therefore shows that the last possessor of the car before Jason was in the accident was Swerbs Motor and this raises a material issue of fact. Even if we set aside the fact that the affidavit and the complaint are clearly intended to indicate that Swerbs Motors actually gave possession back to Ryan, Branklyn's argument fails. He has merely suggested that an issue of fact exists, without providing any supporting evidence. Such a suggestion is insufficient to defeat summary judgment. *Frederick* 328 Ill. App. 3d at 480.

¶ 23

CONCLUSION

¶ 24

For the foregoing reasons we affirm the judgment of the circuit court of Cook County.

¶ 25

Affirmed.