

2017 IL App (1st) 161142-U

No. 1-16-1142

Order filed June 29, 2017

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THOMAS HERLIHY and LORI HERLIHY,)
)
 Plaintiffs-Appellees,) Appeal from the
) Circuit Court of
 v.) Cook County
)
 COLLINS CONSTRUCTION, INC., TIMOTHY)
 COLLINS, and HS CONSTRUCTION,) No. 10 L 10963
)
 Defendants,) Honorable
) Brigid Mary McGrath,
 (Collins Construction, Inc.,) Judge presiding.
)
 Defendant-Appellant.))

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

ORDER

¶ 1 *Held:* We affirm the judgment of the circuit court granting plaintiffs’ motion for summary judgment and granting judgment in the amount of \$206,348.06 based on plaintiffs’ affidavit of damages.

¶ 2 This appeal concerns the sufficiency of an affidavit to support damages incurred as a result of a construction project which caused damage to a home owned by plaintiffs Thomas

Herlihy and Lori Herlihy. The plaintiffs filed suit contending that the damages to their home occurred due to a breach of contract and breach of implied warranty by defendant Collins Construction, Inc. (Collins). Following the circuit court's grant of partial summary judgment in favor of the plaintiffs, the plaintiffs submitted an affidavit of damages. The court subsequently entered judgment in their favor for \$206,348.06. On appeal, Collins contends that the court erred in granting this judgment where the plaintiffs' affidavit of damages was insufficient to show that the damages sought were proximately caused by Collins' actions. For the reasons that follow, we affirm the circuit court's judgment.

¶ 3

I. BACKGROUND

¶ 4 Defendant Collins was a general contractor based in Chicago that built single-family houses and performed other construction projects, both residential and commercial. Plaintiffs owned a home located at 1432 West Melrose Street in Chicago. Collins had regularly performed construction and contractor work for the plaintiffs since they purchased their home in 2002. In 2008, the plaintiffs entered into a written contract with Collins for the excavation of their crawl space and to build a basement in their home. Collins subcontracted the excavation work to HS Construction. During the course of the construction project, the foundation of the plaintiffs' neighbor's house slid into the excavated portion of the plaintiffs' home and caused damages to the property. The plaintiffs' filed suit against Collins, its president, Timothy Collins, and the subcontractor, HS Construction.

¶ 5 The plaintiffs' second-amended complaint alleges causes of action against the defendants for negligence (Count I), breach of contract, (Count II), breach of implied warranty (Count III), violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Count IV), and common law fraud (Count V). Plaintiffs subsequently filed a motion for partial summary

judgment. The circuit court granted plaintiffs' motion with respect to Counts II and III against Collins, and ordered plaintiffs to submit affidavits of damages to Collins and for Collins to submit a response affidavit.

¶ 6 In accordance with the circuit court's order, Thomas filed an affidavit detailing the plaintiffs' damages. Thomas averred that he and Lorile owned the home that was damaged during the course of a construction project by Collins. Thomas further averred that "[a]s a result of the damage sustained to the property we incurred significant costs and expenses." As relevant here, Thomas averred that the plaintiffs incurred damages of \$5627.54 to Fitzgerald Earles Architects and Associates "for permits and architectural services as a direct result of the damages caused to our property by Collins." Plaintiffs attached to the affidavit a copy of the invoice from Fitzgerald (Fitzgerald Invoice). Thomas further averred that plaintiffs incurred damages of \$9162.02 to Perry & Associates, LLC "for professional engineering and structural engineering services required as a result of the damage sustained to the property." Plaintiffs attached copies of the invoices from Perry & Associates to their affidavit (Perry Invoices). Thomas also averred that the plaintiffs incurred damages of \$128,000 to Cobblestone Development, Inc. "as a result of the damage to the property." Plaintiffs attached copies of the invoices from Cobblestone to the affidavit (Cobblestone Invoices). The Fitzgerald Invoice shows charges for construction documents, permit acquisition, permits, printing, and travel. The Perry Invoices show charges for plotting, excavation design, structural calculations, site visits, and foundation drawings. The Cobblestone invoices show charges for removal of "old, damaged, or tie-in" construction, concrete framing and pouring, "Construction: Renovate, Remodel, and/or Repair," and equipment rentals.

¶ 7 The court held a hearing on plaintiffs’ affidavit, which was memorialized in a bystander’s report. The report shows that Collins “objected that the plaintiff’s [*sic*] affidavit of damages was insufficient and requested that any order indicate judgment was granted over its objection.” The court granted judgment in favor of the plaintiffs against Collins in the amount of \$206,348.06 “over the objection of Collins Construction.” Plaintiffs subsequently voluntarily dismissed their remaining claims. This appeal follows.

¶ 8 II. ANALYSIS

¶ 9 On appeal, Collins contends that Thomas’ affidavit was insufficient under Supreme Court Rule 191 (Ill. S. Ct. R. 191(a) (eff. Jan 4, 2013)) to support the amount the judgment. Collins asserts that the affidavit contained insufficient factual support where the affidavit merely listed amounts due and attributed the amounts to “damages to the property.” Collins maintains that these broad legal conclusions failed to show that the amounts claimed were proximately caused by Collins’ breach.

¶ 10 A. Waiver

¶ 11 Plaintiffs initially contend that Collins has waived this issue for review by failing to object to the sufficiency of the affidavit before the circuit court and obtain a ruling on its sufficiency. Plaintiffs assert that Collins’ general objection as noted in the bystander report is insufficient where it failed to raise any specific objection, which deprived the circuit court of an opportunity to rule on the objection.

¶ 12 Affidavits submitted in conjunction with summary judgment pleadings must comply with the requirements of Rule 191(a). *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 383 (2008). Rule 191(a) provides that affidavits in support of a motion for summary judgment “shall be made on the personal knowledge of the affiants; shall set forth with

particularity the facts upon which the claim” is based, “shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence” and “shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.” Ill. S. Ct. R. 191(a) (eff. Jan 4, 2013). Accordingly, affidavits that do not meet requirements of Rule 191(a) may be stricken. See *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). It is the burden of party objecting to the sufficiency of a Rule 191(a) affidavit, however, to challenge the affidavit in the trial court and obtain a ruling thereon. *Cordeck Sales*, 382 Ill. App. 3d at 383.

¶ 13 Here, the record shows that Collins did object to the sufficiency of Thomas’ affidavit. Although no explicit ruling on this objection is noted in the record, the fact that the court noted Collins’ objection to the sufficiency of the affidavit in the bystander’s report and in rendering its judgment shows that the court considered the objection and found the affidavit sufficient. Although Collins could have, and was, in fact, instructed to file a counter-affidavit, such a filing was not necessary to preserve the issue for appeal. Moreover, we find Collins’ objection sufficiently specific to preserve its argument regarding the sufficiency of the affidavit where it explicitly objected to the sufficiency of the affidavit. We therefore find no waiver.

¶ 14 B. Sufficiency of Plaintiffs’ Affidavit

¶ 15 We next address whether Thomas’ affidavit was sufficient to satisfy the requirements of Rule 191(a). As discussed, affidavits in support of a motion for summary judgment under Rule 191(a) must be based on the personal knowledge of the affiant and must set forth with particularity the facts upon which the claim is based. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). “Accordingly, a Rule 191(a) affidavit must not contain mere conclusions and must include the facts upon which the affiant relied.” *US Bank, National Ass’n v. Avdic*, 2014 IL App (1st)

121759, ¶ 22 (citing *Landeros v. Equity Property Development*, 321 Ill. App. 3d 57, 63 (2001)). “ ‘The affidavit serves as a substitute for testimony taken in open court and should meet the same requirements as competent testimony.’ ” *Avdic*, 2014 IL App (1st) 121759, ¶ 22 (quoting *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992)). “ ‘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.’ ” *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (quoting *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999)). We review *de novo* an order granting summary judgment in conjunction with the consideration of a prove-up affidavit. *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 18 (citing *Jackson v. Graham*, 323 Ill. App. 3d 766, 774 (2001)).

¶ 16 Collins contends that Thomas’ affidavit was insufficient to meet the requirements of Rule 191(a) because it did not describe with particularity the facts upon which the claimed damages from Fitzgerald, Perry, and Cobblestone are based. Collins further contends that the affidavit was not based on admissible facts, but was based on the conclusory statement that the amounts charged in the invoices were incurred as a result of “damage to the property.”

¶ 17 In support of this contention, Collins relies on *Steiner Electric Co. v. NuLine Technologies, Inc.*, 364 Ill. App. 3d 876 (2006). In *Steiner*, plaintiff Steiner filed a complaint against NuLine for nonpayment for goods received. *Id.* at 877. During discovery, Steiner took a deposition of NuLine’s accounts payable manager, Patricia Rauth. *Id.* at 878. In her deposition, Rauth testified that she was not involved in the purchasing, return, or pricing of materials NuLine purchased and admitted that she had no involvement with the approval of payments to Steiner. *Id.* She further testified that had no personal knowledge of NuLine’s claims for credits,

discounts, and offsets or any agreements between Steiner and NuLine. *Id.* After further discovery, Steiner filed a motion for summary judgment and attached an affidavit from its credit manager. *Id.* at 879. NuLine filed a response to Steiner's motion to which it attached an affidavit from Rauth. *Id.* In her affidavit, Rauth stated that NuLine was owed refunds for returned materials and overbillings. *Id.* Steiner filed a motion to strike Rauth's affidavit contending that it was insufficient under Rule 191 because it contained only general conclusions and did not set forth any facts to support her claims. *Id.* at 879-80. The circuit court granted Steiner's motion to strike Rauth's affidavit. *Id.* at 880.

¶ 18 On appeal, this court found that the trial court properly struck Rauth's affidavit for failing to comply with Rule 191. *Id.* at 881. The court observed that in her affidavit, Rauth cited specific amounts that she claimed Steiner owed NuLine for returned materials and overbilling, but failed to provide any facts or admissible evidence to support her conclusory statements. *Id.* The court noted that Rauth failed to identify the basis of NuLine's authority to claim these amounts or set forth with particularity any facts upon which her conclusions were based. *Id.* The court further observed that Rauth had no personal knowledge of the matters contained in her affidavit. *Id.* The court noted that Rauth's deposition testimony revealed that she had "an utter lack of knowledge regarding NuLine's claims for credits, discounts[,] and offsets." *Id.* at 882. Accordingly, the court found that the circuit court properly struck Rauth's affidavit and granted summary judgment in favor of Steiner. *Id.* at 882-83.

¶ 19 We find *Steiner* distinguishable from the case at bar. Here, in contrast to the affiant in *Steiner*, the amounts in Thomas' affidavit were supported by admissible evidence, namely, the invoices attached to the affidavit. Thomas did not merely claim amounts due without providing documentation to support the claimed amounts, as the affiant did in *Steiner*, but attached

competent admissible evidence to prove the amount of damages. Collins asserts, however, that Thomas' affidavit is inadmissible despite the attached invoices because of the conclusory language used in the affidavit that attributes the expenses to "damage to the property." Collins contends that the invoices themselves also fail to describe the specific work done and how that work was related to Collins' breach.

¶ 20 This court has found however, that "[i]f, 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." *Kugler*, 309 Ill. App. 3d at 795. Here, Thomas averred in his affidavit that he had personal knowledge of the facts in the affidavit, that he and his wife owned the home that was damaged, that during the course of a construction project at their home by Collins, they sustained damage to their property and "[a]s a result of the damage sustained to the property we incurred significant costs and expenses." The affidavit then goes on to list the costs and expenses incurred as a result of the damage caused by Collins. The affidavit at issue here is thus distinguishable from the affidavit in *Steiner* where the court observed that Rauth lacked personal knowledge of the information in the affidavit.

¶ 21 We also observe that Collins failed to contradict the claims in the affidavit in circuit court by filing a counteraffidavit. "[C]ourts must accept an affidavit as true if it is uncontradicted by counteraffidavit or other evidentiary materials." *Id.* (citing *Lindahl v. City of Des Plaines*, 210 Ill. App. 3d 281, 299 (1991)). Thus, at contrast with the affidavit in *Steiner*, the affidavit in this case contains facts, not in dispute, which reasonably appear to be within the personal knowledge of the affiant (*Kugler*, 309 Ill. App. 3d at 796 (citing *Cincinnati Cos. v. West American Insurance Co.*, 287 Ill. App. 3d 505, 514 (1997))) and are supported by admissible evidence

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(*Steiner*, 364 Ill. App. 3d at 881 (citing Ill. S. Ct. R. 191(a) (eff. Jan 4, 2013))). Accordingly, we cannot say that the circuit court erred in finding the affidavit sufficient under Rule 191 and granting judgment in plaintiffs' favor in the amount of \$206,348.06.

¶ 22

III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.