

FIRST DIVISION
September 18, 2017

No. 1-16-1388

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 JUDICIAL DISTRICT

PHYLLIS BATSON,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
)	
v.)	
)	
OAK TREE, LTD., n/k/a OAK TREE)	
RESTAURANT, LTD., HLD INVESTMENTS,)	No. 13 L 010257
LTD., HALE DEMAR, and HOWARD BURTON)	
PITRACK,)	
)	
Defendants,)	
)	
(Howard Burton Pitrack,)	Honorable
)	Raymond W. Mitchell,
Defendant-Appellee).)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in judgment.

ORDER

Held: We affirm the order of the trial court granting summary judgment in favor of defendant-appellee, Howard Burton Pitrack.

¶ 1 Plaintiff-appellant, Phyllis Batson, filed this successive action after she obtained a \$200,000 judgment against Oak Tree, Ltd., (hereinafter “Oak Tree”) owner of the Oak Tree Restaurant (hereinafter “the restaurant”) in Chicago, Illinois. *Batson v. The Oak Tree Ltd., et al.*, 2013 IL App (1st) 123071 (hereinafter “the original action”). In this successive action, plaintiff sought to recover from HLD Investments, Ltd. (hereinafter “HLD”) as the successor of Oak Tree. As part of this, plaintiff also sought to recover from defendant-appellee, Howard Burton Pitrack (hereinafter “Pitrack”), for aiding and abetting Hale Demar’s (hereinafter “Demar”), owner of Oak Tree and HLD, fraudulent conveyance of the restaurant from Oak Tree to HLD. Specifically, plaintiff alleged that after she obtained a \$200,000 judgment against Oak Tree, Demar transferred Oak Tree’s sole asset, the restaurant, to HLD in order to prevent satisfaction of the original judgment. After discovery closed in this case, Pitrack moved for summary judgment on the aiding and abetting count, the sole count against him. The trial court granted Pitrack’s motion after finding that the facts in the record “do not prove Pitrack had any involvement with the alleged fraudulent transfer and certainly do not constitute regular awareness and substantial assistance of the alleged wrongful conduct.”

¶ 2 Plaintiff proceeded to trial on the remaining counts against HLD and Demar. At the conclusion of the trial, the trial court ruled in favor of plaintiff after finding that Demar fraudulently conveyed the restaurant to HLD in order to avoid the original judgment. The trial court determined that HLD was the successor to Oak Tree and was therefore liable for the original judgment. Plaintiff then filed this timely appeal seeking reversal of the summary judgment granted in favor of Pitrack.

¶ 3 Plaintiff raises only one issue: the trial court erred in granting summary judgment in favor of Pitrack because a genuine issue of material fact exists as to the nature and extent of Pitrack’s

involvement in the transfer of the restaurant from Oak Tree to HLD. After a review of the record, we agree with the trial court that no genuine issue of material fact exists and affirm the grant of summary judgment in favor of Pitrack.

¶ 4

JURISDICTION

¶ 5 On August 6, 2015, the trial court granted Pitrack's motion for summary judgment on the aiding and abetting count, the sole count brought against him. However, the trial court denied a joint request to include Illinois Supreme Court Rule 304(a) language. Ill. S. Ct. R. 304(b)(4) (eff. Mar. 8, 2016). The plaintiff and remaining defendants then proceed to trial on the remaining counts. On December 22, 2015, the trial court ruled in favor of plaintiff on the successor liability and fraudulent transfer counts. Demar and HLD's motion to reconsider was denied on April 29, 2016. Plaintiff timely filed a notice of appeal on May 20, 2016. Accordingly, this court has jurisdiction over this matter pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 6

BACKGROUND

¶ 7 Plaintiff was fired from her employment at the restaurant in Chicago, Illinois on April 15, 2001. Plaintiff then sued the Oak Tree and its majority shareholder, Demar, alleging her termination was in retaliation for exercising her rights to benefits pursuant to the Illinois Workers' Compensation Act. 820 ILCS 305/1 *et al.* (West 2016). Plaintiff also alleged her termination resulted in a breach of a deferred compensation agreement. Plaintiff ultimately secured a \$200,000 judgment against Oak Tree. While attempting to collect the judgment, plaintiff discovered that Oak Tree no longer had any assets because ownership of its sole asset, the restaurant, had been transferred to HLD.

¶ 8 Upon learning of the transfer, plaintiff initiated this action. In her complaint, plaintiff alleged that HLD was the successor of Oak Tree and was therefore obligated to satisfy the judgment from the original action. She further alleged that Pitrack aided and abetted the fraudulent conveyance of the restaurant to HLD and was therefore liable for damages arising from the wrongful transfer. Plaintiff alleged that Pitrack knowingly assisted Demar in the transfer of the restaurant from Oak Tree to HLD despite knowing the transfer would leave Oak Tree unable to satisfy the judgment.

¶ 9 On June 26, 2015, Pitrack filed for summary judgment as to the aiding and abetting count arguing that he did not knowingly assist Demar and HLD in the transfer of the restaurant. After briefing from the parties, the trial court ruled in Pitrack's favor. Specifically, the trial court found the plaintiff had failed to produce any evidence demonstrating Pitrack participated in the transfer. Plaintiff then proceeded to trial against the remaining defendants.

¶ 10 Following a bench trial, the trial court entered judgment in favor of plaintiff and against Demar and HLD on Counts I (fraudulent transfer) and V (successor liability). Specifically, the trial court found Oak Tree's sole asset, the restaurant, had been transferred to HLD without any compensation. The trial court also ruled that Demar, the majority shareholder of Oak Tree and sole shareholder of HLD, was aware of the judgment against Oak Tree but transferred the restaurant anyway. The court concluded that HLD, as the successor of Oak Tree, was liable for the original \$200,000 judgment. The trial court denied the motion to reconsider brought by Demar and HLD.

¶ 11 This timely appeal followed.¹

¹ While Demar and HLD did initially appeal the trial court's verdict against them, no briefs were submitted and in plaintiff's brief in this appeal, she indicates the Demar/HLD appeal was settled. Accordingly, we review only the summary judgment entered in favor of Pitrack.

¶ 12

ANALYSIS

¶ 13 Initially, Pitrack asks this court to disregard the aspects of plaintiff's argument which relies on facts from the trial and were therefore not before the trial court when it entered summary judgment in his favor. In reply, plaintiff argues that Illinois Supreme Court Rule 329 (Ill. S. Ct. R. 329 (eff. Jan. 1, 2006)) permits supplementation of the record and cites to *City of Chicago v. Yellen*, 325 Ill. App. 3d 311, 313 (2001), in support of her argument. Rule 329 provides that "[t]he record on appeal shall be taken as true and correct unless shown to be otherwise and corrected in a manner permitted by this rule. Material omissions or inaccuracies or improper authentication may be corrected by stipulation of the parties or by the trial court, either before or after the record is transmitted to the reviewing court or a judge thereof." Ill. S. Ct. R. 329 (eff. Jan. 1, 2006). In *Jenkins v. Wu*, 102 Ill. 2d 468 (1984), the plaintiff sought to supplement the record with deposition testimony taken five months after the trial court granted summary judgment. *Id.* at 483. In rejecting its use on appeal, the Illinois supreme court stated "the material sought to be added to the record cannot be characterized as an 'omission' under Rule 329 since the deposition in question was not even in existence at the time the trial court entered its order." *Id.* at 484.

¶ 14 Based on *Jenkins*, we agree with Pitrack that we may only consider those facts before the trial court when it ruled on the summary judgment motion. Like the plaintiff in *Jenkins*, our plaintiff seeks to supplement the record with testimony not in existence when the trial court granted summary judgment in Pitrack's favor. Following the reasoning in *Jenkins*, such testimony cannot be characterized as an "omission or inaccuracy" under Rule 329. *Jenkins*, 102 Ill. 2d at 484. Accordingly, we will not consider the material which was not before the trial court when it granted summary judgment.

¶ 15 In reaching this conclusion, we find plaintiff's reliance on *Yellen* to be mistaken. In *Yellen* this court was confronted with the question as to whether the trial court had personal jurisdiction over one of the defendants. 325 Ill. App. 3d at 313. After a notice of appeal had been filed, the plaintiff sought to supplement the record with the summons and return of service and defendant objected. *Id.* at 313. The *Yellen* court acknowledged the general rule that an appellate court should resolve an issue based on the evidence actually before the trial court. *Id.* The court then noted an apparent exception to this rule when a court is confronted with a personal jurisdiction question. *Id.* at 314 citing *Marin v. Grimm*, 37 Ill. App. 3d 979, 981 (1976); *Marion Metal & Roofing Co. v. Wood*, 243 Ill. App. 3d 890, 893 (1993). Based on the exception, the appellate court considered the appeal based on the supplemented summons and return of service even though they had not been before the trial court. This case does not involve an issue of personal jurisdiction, thus the limited exception to the general rule discussed in *Yellen* does not apply.

¶ 16 In the sole issue before us, plaintiff argues the trial court erred in granting summary judgment in favor of Pitrack because a reasonable inference could be found in the evidence that Pitrack aided and abetted Demar in transferring the restaurant from Oak Tree to HLD in order to avoid the judgment obtained by plaintiff in the original action.

¶ 17 We review a summary judgment ruling *de novo*. *Gerasi v. Gilbane Building Co., Inc.*, 2017 IL App (1st) 133000, ¶ 39. Summary judgment is appropriate only where “the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2012). In determining whether a genuine issue of material fact exists, we construe the pleadings, depositions, admissions, and affidavits strictly against the

moving party and liberally in favor of the opponent. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. A genuine issue of material fact exists “where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts. *Id.* “If the party moving for summary judgment supplies facts which, if not contradicted, would entitle such a party to judgment as a matter of law, the opposing party cannot rely upon her complaint or answer alone to raise a genuine issue of material fact.” *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974).

¶ 18 In arguing that the trial court erred in granting summary judgment, plaintiff asserts that in viewing the evidence in a light most favorable to her, the evidence she presented creates an issue of fact as to Pitrack’s involvement in Demar’s fraudulent transfer of the restaurant. At his citation hearing, Demar testified that Pitrack had told him to keep Oak Tree operational even after the formation of HLD. Plaintiff points to Pitrack’s service as Oak Tree registered agent and, therefore, argues that Pitrack must have been aware of the original action and judgment obtained by plaintiff. Plaintiff also points to Pitrack’s involvement in a minority shareholder dispute from 1992 to show the depth of involvement Pitrack had in Oak Tree affairs. In his deposition testimony, Pitrack admitted that he represented Demar in the dispute. Finally, plaintiff points to Pitrack’s involvement in the formation of HLD. Pitrack admitted that at the direction of Demar, he assisted in the formation of HLD by filling out the articles of incorporation and submitting them to the Illinois Secretary of State. Pitrack then became HLD’s registered agent until he was replaced by another attorney, Robert Orman. Plaintiff concludes, based on the above facts, that it can be inferred Pitrack was aware Demar intended to transfer the restaurant from Oak Tree to HLD and that Pitrack provided substantial assistance in accomplishing it.

¶ 19 Under Illinois law, in order to recover damages based on a claim of aiding and abetting, a plaintiff must plead and prove facts which establish (1) the party whom the defendant aids must perform a wrongful act that causes an injury, (2) the defendant must be regularly aware of his role as part of the overall or tortuous activity at the time he provides the assistance, and (3) the defendant must knowingly and substantially assist the principal violation. *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 27-28 (2003) quoting *Wolf v. Liberis*, 153 Ill. App. 3d 488, 496 (1987).

¶ 20 Upon review, summary judgment in favor of Pitrack was properly granted because even when viewed in a light most favorable to plaintiff, the facts do not establish that Pitrack aided and abetted Demar. Specifically, we agree with the trial court that plaintiff has failed to put forth any evidence showing Pitrack was regularly aware of his role or that he knowingly and substantially assisted Demar in the fraudulent transfer of the restaurant.

¶ 21 There is no evidence that Pitrack counseled Demar to form HLD in order to avoid the judgment in the original action. Demar testified that in forming HLD, he did not discuss how its incorporation would affect the judgment against Oak Tree. He further stated that the pending judgment did not factor into his decision to form HLD. Demar testified that his most important concern was being 100% shareholder of HLD. Pitrack testified that he did not participate at all in the transfer of the restaurant from Oak Tree to HLD. Plaintiff presented no evidence disputing either Demar or Pitrack's testimony. While Demar testified that Pitrack advised him to keep Oak Tree in good standing with the state, plaintiff failed to elicit a reason for this action. Plaintiff has presented no evidence that Pitrack was aware that the restaurant was Oak Tree's sole asset or that the restaurant's transfer would leave it with nothing of value. Moreover, the shareholder dispute between Demar and a minority shareholder in 1992, along with Pitrack's alleged involvement, in

no way demonstrates that Pitrack must have been involved in Demar's fraudulent transfer. Finally, we reject plaintiff's assertion that in granting summary judgment the trial court engaged in a credibility analysis of Demar and Pitrack's testimony. In granting summary judgment, the trial court merely accepted their testimony at face value, and specifically noted that plaintiff had failed to produce any evidence to contradict it. It did not make any credibility findings. See *Merca v. Rhodes*, 2011 IL App (1st) 102234, ¶ 46 (noting that with a summary judgment motion, the court does not weigh the evidence or make credibility determinations, but, rather determines whether a question of facts exists).

¶ 22 Because plaintiff has failed to present any evidence which would demonstrate Pitrack's regular awareness of his role and his knowing and substantial assistance in the fraudulent transfer, the trial court did not err in granting summary judgment in his favor on the aiding and abetting count.

¶ 23 CONCLUSION

¶ 24 Based on the above, we affirm the order of the trial court granting summary judgment in favor of Pitrack.

¶ 25 Affirmed.