2017 IL App (1st) 161603-U

FOURTH DIVISION
August 10, 2017

No. 1-16-1603

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE NATIONAL REPUBLIC BANK OF CHICAGO, Plaintiff, v. DCR MANAGEMENT LLC; EL PATRON LIQUORS, INC.; ELPATRON SPORTS BAR, INC.; SUHAIL FAKHOURI; and JOMANA FAKHOURI; Defendants. (Phoenix REO, LLC, as assignee of Phoenix NPL, LLC, as assignee of the Federal Deposit Insurance Corporation, as receiver for The National Republic Bank of Chicago, Plaintiff-Appellee; DCR Management LLC, Suhail Fakhouri, and Jomana Fakhouri, Defendants-Appellants.)	)	Appeal from the Circuit Court of Cook County. No. 14 L 4444 Honorable Margaret Brennan, Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Defendants failed to show that trial court abused discretion in denying leave to file new counterclaims and defenses, as record did not disclose trial court's reasoning for denying leave to amend, defendants knew of basis for counterclaims and defenses from outset of litigation, and counterclaims and defenses lacked merit. Summary judgment for plaintiff affirmed, as defendants failed to create genuine issue of material fact concerning validity of signature on loan modification.

¶ 2 This case comes to us after the trial court awarded summary judgment for plaintiff Phoenix REO, LLC, on its breach-of-contract claims against defendants DCR Management, LLC (DCR), Suhail Fakhouri (Suhail), and Jomana Fakhouri (Jomana) (collectively, defendants), in which plaintiff sought to recover on loans its predecessor-in-interest, The National Republic Bank of Chicago (National Republic), had made to defendants. On appeal, defendants claim that the trial court erred in denying them leave to amend their answer to include new counterclaims and defenses after plaintiff had filed its motion for summary judgment, and that the court erred in awarding summary judgment to plaintiff, because a question of fact existed regarding the validity of Suhail's signature on one of the loan documents.

¶ 3 Finding no error in the trial court's judgment, we affirm.

¶ 4 I. BACKGROUND

¶ 5 This dispute centers on two loans that National Republic made to DCR. The first was a $10 million loan made on December 12, 2007. On the same day, Suhail and Jomana executed a personal guaranty securing that loan.

¶ 6 On March 10, 2010, Suhail signed a document titled, "First Loan Modification and Ratification Agreement," (First Modification), on behalf of DCR. The First Modification set the maturity date of the 2007 loan at December 12, 2012.

¶ 7 The second loan, made to defendants on June 7, 2012, was for $1.365 million. Defendants also executed a cross-guaranty, whereby DCR guaranteed the loan to Suhail and Jomana, and Suhail and Jomana personally guaranteed the loan to DCR.

¶ 8 A document dated November 29, 2012 labeled, "Second Loan Modification and Ratification Agreement" (Second Modification), purported to consolidate the two loans into a single, $10.84 million loan. The Second Modification said that the outstanding principal of the

two loans, prior to consolidation, was approximately $10.3 million. A notary acknowledged Suhail's and Jomana's signatures on the Second Modification. Suhail's signature appeared both in his individual capacity and as the sole member and manager of DCR.

¶ 9 On April 21, 2014, National Republic filed breach-of-contract claims against defendants, alleging that they had defaulted on the Second Modification. The complaint requested a judgment in the amount of $10,892,577.02, which reflected the outstanding principal, interest, and late fees on the second modification. The complaint also requested attorney fees and costs.

¶ 10 On July 7, 2014, defendants filed an answer. The answer did not include any counterclaims or defenses. In particular, defendants' answer *admitted* this allegation:

> "On November 29, 2012, the [second note] was modified and consolidated into the [first note] which increased the principal amount of the [first note] to $10,840,000 and *is evidenced by a Second Loan Modification and Ratification Agreement dated November 29,* 2012 *and executed by DCR Management, LLC, Suhail Fakhouri and Jomana Fakhouri* (Modification and together with the [first note] and the [second note], the "Final Note")." (Brackets added, emphasis added, parenthesis in original.).

¶ 11 Defendants admitted, in other words, that the two loans were consolidated and became subject to the Second Modification, which each of the three defendants had executed.

¶ 12 On August 6, 2014, National Republic filed its motion for summary judgment. Plaintiff argued that there was no question that the loans were enforceable contracts and that defendants had defaulted on those loans. National Republic also noted that the general denials in defendants' answer were insufficient to defeat summary judgment. National Republic also attached various internal records showing the amount of outstanding indebtedness.

¶ 13 National Republic attached an affidavit from its vice president and commercial lending officer, attesting that DCR had failed to make any payments after January 2014. He also said that the total amount due to National Republic as of August 13, 2014 was $11,283,597.03.

¶ 14 On September 10, 2014, defendants filed a response to the motion for summary judgment, which alleged that National Republic's vice president told Suhail that he should pay a different amount than what was stated in the loan documents. And they said that they had made payments in accordance with this different amount. Defendants also disputed the amounts that National Republic claimed were outstanding and alleged that "Jomana never signed the original promissory note."

¶ 15 Defendants attached an affidavit from Suhail, in which he said that National Republic's vice president had told him to pay an amount that "was different than what was stated in the promissory note," that he made those payments, and that he "owe[d] less than the amount claimed by National Republic."

¶ 16 In that affidavit, Suhail did *not* deny that he signed the Second Modification; he did not say that his wife signed his name but lacked authority to do so. Nor did defendants make that argument in the original motion for summary judgment.

¶ 17 On October 14, 2014, the Federal Deposit Insurance Corporation (FDIC) was appointed as the receiver for National Republic. The FDIC removed this case to federal court due to its status as a party.

¶ 18 The FDIC transferred its interest in the loans to Phoenix NPL, LLC, which in turn transferred its interest to plaintiff. Because the FDIC was no longer a party and federal jurisdiction was no longer present, the United States District Court remanded the case back to the circuit court of Cook County on May 19, 2015.

¶ 19 On September 21, 2015, defendants' counsel moved to withdraw, citing "irreconcilable differences." The court granted that motion, and defendants' new attorney filed an appearance on October 14, 2015.

¶ 20 Plaintiff revised its affidavits in support of the motion for summary judgment, and a new briefing schedule was ordered on the motion. The court gave defendants until November 24, 2015, to respond to plaintiff's motion for summary judgment.

¶ 21 On November 24, 2015, defendants moved for leave to amend their answer to include new counterclaims and affirmative defenses. Those proposed counterclaims and defenses all related to certain oral misrepresentations that National Republic employees had made to Suhail and Jomana about the terms of the loans. That pleading also alleged, for the first time, that Suhail had never signed the Second Modification—that Jomana signed his name but had no authority to do so.

¶ 22 In seeking leave to amend, defendants said that, since their new attorney filed his appearance, "a number of issues ha[d] come to [his] attention which were overlooked by prior counsel." Defendants' counsel added that he had not filed the new claims yet "because the attorney who was responsible for this matter ha[d] taken an unanticipated leave for personal reasons." The motion added that defendants were not proposing the new counterclaims and defenses "for delay."

¶ 23 Defendants also filed a memorandum in opposition to the motion for summary judgment, which denied "that the loan in question was ever signed" and that "the [Second Modification] was acquired by deceit." Defendants attached a new affidavit from Suhail, which said that he did not sign the Second Modification, "either in an individual capacity or in [his] capacity as DCR's

sole member and manager." Suhail added, "Indeed, the handwriting on the signature lines designated with my name is not my handwriting."

¶ 24 On March 16, 2016, the court denied defendants' motion for leave to amend their answer and granted plaintiff's motion for summary judgment. The only record memorializing the court's decision is a handwritten, single-page order that discloses none of the trial court's reasoning.

¶ 25 Defendants filed this appeal.

¶ 26 II. ANALYSIS

¶ 27 A. Leave to Amend Pleadings

¶ 28 Defendants first contend that the trial court erred in denying their leave to amend their answer to add new defenses and counterclaims after plaintiff had filed its motion for summary judgment.

¶ 29 Under section 2-616(a) of the Code of Civil Procedure (735 ILCS 5/2-616(a) (West 2014)), the trial court may allow a party to amend a pleading to add new defenses or claims "on just and reasonable terms." A trial court has "broad discretion to allow the addition of new defenses at any time before final judgment." *Hobart v. Shin*, 185 Ill. 2d 283, 292 (1998). Consequently, we will reverse a decision to grant or deny leave to amend only if the trial court abuses its discretion. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 35. A trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it. *People v. Lerma*, 2016 IL 118496, ¶ 23.

¶ 30 In this case, the record on appeal divulges little to no information regarding the court's exercise of its discretion. The order denying leave to amend says nothing except, "Motion for leave to file Affirmative Defense [and] Counterclaims is hereby denied." Defendants have not provided this court with a transcript of the hearing on their motion for leave to amend—or a

substitute such as a bystander's report or agreed statement of facts—so we cannot be certain if the trial court explained its decision in open court.

¶ 31 The appellant bears the burden of presenting a sufficiently complete record on appeal. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); see also Ill. S. Ct. R. 323 (eff. Dec. 13, 2005) (requiring appellant to provide appellate court with report of proceedings, bystander's report, or agreed statement of facts). "Where the issue on appeal relates to the conduct of a hearing or proceeding, this issue is not subject to review absent a report or record of the proceeding." *Webster*, 195 Ill. 2d at 432. In the absence of such report or record, we must presume "that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* Defendants, as the appellants in this case, bore this burden.

¶ 32 This court has held that the absence of a record, that explained the trial court's reasons for denying a section 2-616(a) motion for leave to amend, precluded review of that decision. *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 56. More generally, this court has repeatedly recognized the difficulty of reviewing a discretionary decision in the absence of a record of the trial court's reasoning. See, *e.g.*, *Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶¶ 14-15 (absent record of hearing on motion to vacate judgment, appellate court could not determine if trial court abused discretion because appellate court did "not know whether the trial court heard evidence on the motion, what the parties argued, or—most importantly—the basis for the court's decision"); *In re Marriage of Golden*, 358 Ill. App. 3d 464, 473 (2005) (affirming discretionary decision on review of maintenance payments because record lacked "a report of proceedings or a sufficient substitute," and thus court was

"unable to determine what evidence was presented to the trial court or how the trial court weighed the various relevant factors"); *In re Marriage of Vancura*, 356 Ill. App. 3d 200, 203 (2005) (finding no abuse of discretion in imposition of sanctions because "[t]he record *** include[d] the trial court's sanctions order ***, but *** not *** a transcript of the hearing at which sanctions were discussed").

¶ 33 Without a record of the trial court's reasoning in denying the motion for leave, we cannot say that the trial court abused its discretion. We cannot be sure what arguments the trial court found persuasive, how the court balanced the various factors in deciding to deny leave, or if the trial court heard any evidence supporting either party's position. Without knowing the manner in which the court exercised its discretion, it is impossible to say if the trial court abused that discretion. We construe the absence of a record of the trial court's reasoning against defendant, and presume that the trial court's denial of leave was correct. *Foutch*, 99 Ill. 2d at 392.

¶ 34 And the record, such as it is, suggests that the trial court did not abuse its discretion in denying the motion for leave. Defendants based their new counterclaims and defenses on alleged misrepresentations made by National Republic employees about the nature of the loan agreements, and on the fact that Suhail never signed the Second Modification on his own behalf or on behalf of DCR—that instead, his wife signed his name without authority to do so. Defendants would have known all this information from the outset of the litigation—and certainly by the time they answered the complaint more than sixteen months earlier. These facts show that denying leave to amend was not unreasonable. See *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 48 (1992) ("Ordinarily, amendment should not be allowed where the matters asserted were known by the moving party at the time the original pleading was drafted and for

which no excuse is offered in explanation of the initial failure."); *Trans World Airlines, Inc. v. Martin Automatic, Inc.*, 215 Ill. App. 3d 622, 628 (1991) (same).

¶ 35 While defendants alleged that they did not file their counterclaims and defenses earlier because their previous attorney had "overlooked" them and had "taken an unanticipated leave for personal reasons," defendants have cited no authority for the notion that their attorney's neglect is sufficient to show that leave to amend must be granted. Nor are defendants' allegations sufficient to show that their attorney acted negligently—defendants did not claim that they informed their first attorney of the basis for these claims or that their attorney lacked sufficient reason to raise the claims. And defendants failed to explain why their second attorney's leave of absence precluded them from raising their counterclaims and defenses earlier.

¶ 36 In particular, Suhail's new claim that he did not sign the Second Modification would not only have been known to him, but must have been apparent from the outset as a crucial piece of information. This lawsuit was based on a breach of that very document. This document was executed in November 2012, and Suhail's original affidavit, in the original response to the motion for summary judgment, attests that Suhail continued negotiations with the bank as late as 2014, the year the lawsuit was filed. The fact that he did not sign the document that was the cornerstone of the lawsuit is a fact he would have fully appreciated at the time the answer was filed. And if it were not, the Complaint specifically *alleged* that Suhail signed the document, and he *admitted* that fact. So there can be no question that this information was known to defendants from the outset of this litigation.

¶ 37 And to the extent the affirmative defenses and counterclaims relied on misrepresentations made by plaintiff, they lacked merit, anyway. The Illinois Credit Agreements Act (815 ILCS 160/0.01 *et seq.* (West 2012)) provides that a debtor may not bring "an action on or in any way

related to a credit agreement unless the credit agreement is in writing." 815 ILCS 160/2 (West 2012). Courts have held that this statute bars counterclaims and defenses based on alleged oral misrepresentations regarding the nature of credit agreements. See, *e.g.*, *Whirlpool Financial Corp. v. Sevaux*, 96 F.3d 216, 225-26 (7th Cir. 1996); *Teachers Insurance and Annuity Ass'n of America v. La Salle National Bank*, 295 Ill. App. 3d 61, 64-65, 70 (1998); *McAloon v. Northwest Bancorp*, 274 Ill. App. 3d 758, 762-63 (1995). In this case, defendants premised their counterclaims and defenses on alleged oral misrepresentations by National Republic representatives who, according to defendants, misled them regarding the terms of the credit agreements. These are precisely the type of claims the Illinois Credit Agreements Act bars.

¶ 38 Defendants say that the trial court erred in considering the merit of their proposed counterclaims and defenses. Citing *Bituminous Casualty Corp. v. Fulkerson*, 212 Ill. App. 3d 556 (1991), they argue that the appropriate vehicle for challenging the sufficiency of claims is through a motion to dismiss, not a challenge to a motion for leave to amend a pleading.

¶ 39 We recognize that the court in *Bituminous Casualty* rejected the notion that "defects in the way a proposed affirmative defense is pleaded constitute a sufficient basis for denying leave to amend a pleading to raise that defense." *Id.* at 567. But our supreme court has instructed that, when considering whether leave to amend should be granted, courts should consider "whether the proposed amendment would cure [a] defective pleading." *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). And, as part of that consideration, this court has looked to " 'the ultimate efficacy of a claim as stated in [the] proposed amended pleading.' " *Ahmed v. Pickwick Place Owners' Ass'n*, 385 Ill. App. 3d 874, 882 (2008) (quoting *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004)). Thus, this court has

looked to the possible merits of a proposed amendment when considering whether leave to amend was properly denied.

¶ 40 *Bituminous Casualty* is also distinct from this case. In *Bituminous Casualty*, the defendants "did not learn and could not reasonably have learned" of the basis for their proposed affirmative defense until the time that they filed their motion for leave to amend. *Bituminous Casualty*, 212 Ill. App. 3d at 566. By contrast, in this case, defendants should have known of the basis for their proposed counterclaims and defenses from the outset of the case. And the court in *Bituminous Casualty* concluded that the defendants' affirmative defense alleged sufficient facts to state a claim. *Id.* at 568-69. The same cannot be said here, where the Illinois Credit Agreements Act clearly bars defendants' claims. Thus, we reject defendants' reliance on *Bituminous Casualty* and find that defendants have failed to show that the trial court abused its discretion in denying defendants leave to amend their answer.

¶ 41 B. Summary Judgment

¶ 42 Defendants also claim that the trial court erred in awarding plaintiff summary judgment on its breach-of-contract claims. We review *de novo* a circuit court's ruling on a motion for summary judgment. *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 65. Summary judgment is proper 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 a judgment as a matter of law. *Id*.

¶ 43 In this case, defendants say that plaintiff failed to establish the existence of a binding contract, which was a necessary element of plaintiff's breach-of-contract action. See *Babbitt Municipalities, Inc. v. Health Care Services Corp.*, 2016 IL App (1st) 152662, ¶ 27 (existence of valid and enforceable contract is element of breach-of-contract cause of action). Specifically,

defendants claim that there was a question of material fact as to whether Suhail actually signed the Second Modification on his own behalf and on behalf of DCR; in his affidavit, Suhail swore he did not.

¶ 44 Before we go any further, we should note that defendants have never denied that Jomana, one of the defendants here, signed the Second Modification. To the contrary, defendants claim that Jomana signed for all three defendants—herself, Suhail, and DCR. Though defendants claim that those latter two signatures were unauthorized, there is no claim that Jomana did not or could not bind *herself* to the agreement. Thus, as to the count of the Complaint directed against Jomana, the evidence is undisputed that Jomana is liable on the Final Note—she signed the guaranties, and she signed the Second Modification. There being no disputed question of fact and no other argument regarding Jomana's liability, we affirm the grant of summary judgment on that count of the complaint without any further analysis.

¶ 45 We now focus on the counts regarding liability against DCR and Suhail, and defendants' claim that Suhail never executed the Second Modification.

¶ 46 Plaintiff claims that Suhail's denial was insufficient to create a genuine issue of material fact regarding the authenticity of his signature on the Second Modification, for several reasons.

¶ 47 First, a notary public attested that Suhail personally appeared before her and acknowledged that he had signed the Second Modification both on his own behalf and on behalf of DCR. In the face of that acknowledgement, plaintiff says, defendants had to present more than Suhail's mere denial.

¶ 48 Plaintiff is correct that, when an instrument has been acknowledged by a notary and is in substantial compliance with the Illinois Notary Public Act (5 ILCS 312/1-101 *et seq.* (West 2012)), it may not be impeached except for fraud and imposition. *Resolution Trust Corp. v.*

Hardisty, 269 Ill. App. 3d 613, 616 (1995). And a notary's acknowledgement of a party's signature "can be overcome only by proof which is clear, convincing and satisfactory, and by disinterested witnesses." *Witt v. Panek*, 408 Ill. 328, 333 (1951); see also *Hardisty*, 269 Ill. App. 3d at 616-17 (party seeking to impeach notary's acknowledgement may only do so "by providing clear and convincing evidence coming from a disinterested witness"); *U.S. Bank National Ass'n v. Cook*, 07 C 1544, 2009 WL 35286, at *3 (N.D. Ill. Jan. 6, 2009) ("Under Illinois law, a notary's certificate of acknowledgment of a signatory can only be overcome by clear and convincing evidence and by disinterested witnesses."); *Krueger v. Dorr*, 22 Ill.App.2d 513, 528, 161 N.E.2d 433 (1959) (notary public's certificate of acknowledgement "cannot be overcome by the unsupported testimony of an interested party to the instrument," and the party seeking to impeach the acknowledgement has the burden to produce clear, convincing, and satisfactory proof by disinterested witnesses).

¶ 49 Here, there is no dispute that the notary's acknowledgement met the requirements of the Illinois Notary Public Act. The notary acknowledged that the person signing the document was "personally known to [her] to be the same person whose name is subscribed to within the Document." See 5 ILCS 312/6-102(a) (West 2012) ("In taking an acknowledgment, the notary public must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the notary and making the acknowledgment is the person whose true signature is on the instrument.").

¶ 50 Nor is there any dispute that Suhail, one of the defendants, is an interested witness. Defendants did not attach the affidavit of a handwriting expert. Nor did defendants even attach an affidavit from Jomana, the very person whom Suhail claims signed Suhail's name on the

Second Modification, purportedly on Suhail's and DCR's behalf. Jomana, of course, would also be an interested witness.

¶ 51 Yet more compelling still is plaintiff's argument that defendants—DCR, Suhail, and Jomana—already admitted to signing the Second Modification in their answer to the complaint. That admission is binding as a judicial admission, a "deliberate, clear, unequivocal statement[] by a party about a concrete fact within that party's knowledge." *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998). "[A] statement of fact that has been admitted in a pleading is a judicial admission and is binding on the party making it," including admissions made in an answer to a complaint. (Quotation marks omitted.) *U.S. Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 38 (plaintiff's admission of fact in answer to complaint was binding judicial admission). See also *Meade v. City of Rockford*, 2015 IL App (2d) 140645, ¶ 32 ("Judicial admissions can include statements by parties or their attorneys made in open court, discovery answers, stipulations, and pleadings."); *Kovac v. Barron*, 2014 IL App (2d) 121100, ¶ 60 (same).

¶ 52 The allegation in the complaint could not have more clearly alleged that the Second Modification was executed along with the consolidation of the two loans at issue, *and* that DCR, Suhail, and Jomana all signed that Second Modification. Without qualification or equivocation, defendants admitted those allegations, facts that were obviously within their personal knowledge.

¶ 53 Once they did so, they could not repudiate or contradict that admission to defeat summary judgment. See *Rennick*, 181 Ill. 2d at 406 ("Where made, a judicial admission may not be contradicted in a motion for summary judgment."); *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 103 ("[A] party "cannot create a factual dispute by contradicting a previously made judicial admission in a motion for summary judgment") (quotation marks omitted); *James by James v. Ingalls Memorial Hospital*, 299 Ill.

App. 3d 627, 635 (1998) ("In cases involving summary judgment, a counteraffidavit does not place in issue material facts that were removed from contention by a party's deliberate, unequivocal admissions"); *Burns v. Michelotti*, 237 Ill.App.3d 923, 932 (1992) ("A party cannot create a factual dispute by contradicting a previously made judicial admission.").

¶ 54 There being no genuine issue of material fact sufficient to defeat summary judgment, the trial court did not err in granting summary judgment in favor of plaintiff and against defendants.

¶ 55 We affirm the trial court's judgment in its entirety.

¶ 56 Affirmed.