FIRST DIVISION
August 14, 2017

No. 1-17-0342
2017 IL App (1st) 170342-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

OTIS MCDONALD,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 4926
	)	
KENNETH TOPOLSKI,	)	Honorable
	)	John P. Callahan,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted defendant's section 2-619 motion to dismiss where the terms of the parties' settlement agreement and release were not so indefinite as to render the agreement invalid, thus an affirmative matter existed to defeat plaintiff's cause of action; affirmed.

¶ 2 Plaintiff, Otis McDonald, appeals the trial court's order that granted defendant Kenneth Topolski's motion to dismiss. Topolski's motion was based on his assertion that the parties had already settled this matter, and that McDonald had fully released Topolski from liability. McDonald argues that the court below erred in dismissing his complaint because he had sufficiently demonstrated that the settlement agreement was invalid and unenforceable. Our review of the record in this case shows that the trial court properly granted Topolski's motion to dismiss. As a result, we affirm the decision of the circuit court.

¶ 3 BACKGROUND

¶ 4 This case stems from a motor vehicle accident that occurred on December 5, 2015, in Alsip. On that date, the parties were involved in an accident when McDonald's vehicle, which was proceeding northbound on South Pulaski Road, was struck by Topolski's vehicle, as Topolski exited a parking lot located at 115th Street.

¶ 5 Prior to the filing of this lawsuit, McDonald submitted a claim to American Family Insurance, which had previously issued a policy for liability insurance coverage to Topolski. On December 11, 2015, McDonald was contacted by American Family Insurance's claims adjuster, Lynn Dahlgren[1]. During their conversation, McDonald told Dahlgren about his injuries, including that his side, neck, and back were hurting. McDonald stated that he went to the hospital, where they took x-rays and prescribed ibuprofen. McDonald also told Dahlgren that he was not aware of any previous injuries to his neck or back, and that his shoulder was still sore.

¶ 6 On December 21, 2015, McDonald was contacted by Matt Walsh from American Family Insurance[2]. At the outset of the conversation, Walsh stated that, "[t]he purpose of this recording is to confirm the settlement terms of Otis McDonald's injury claim against American Family [Insurance] and against Kenneth Topolski." Regarding settlement, the following exchange occurred:

¶ 7 "WALSH: We've been discussing settlement of your injury claim, and we've reached the following agreement in that regard. I have offered, and you have accepted the sum of $400. In addition, I have agreed to pay accident related medical expenses you have incurred prior to our settlement agreement, date of December 21st,

[1] The record on appeal contains a transcript from McDonald's phone call with Dahlgren. The transcript reflects that McDonald gave permission for the call to be recorded.
[2] The record also contains a transcript from this phone call, which McDonald also agreed to have recorded.

2015. And I have also agreed to pay for any accident related medical expenses you may incur between today, December 21st, 2015 through January 21st, 2016 up to $1,000.

MCDONALD: Uh-huh.

WALSH: Do you agree that the check I'm sending in the amount of $400 and the agreement to pay the accident related medical expenses you have incurred to date and future medical expenses you may incur as previously outlined, is the full, final and complete settlement of your injury claim resulting from the accident?

MCDONALD: Yes.

WALSH: Three more questions. I want to confirm that you've had the opportunity to consider this settlement agreement to the extent you wish to do so?

MCDONALD: Yeah, I guess so.

WALSH: All right, two more questions. Are you in agreement that this is a fair resolution of your injury claim, and that you're entering into the settlement of your own free will?

MCDONALD: Yes.

WALSH: Final question. Do you understand by accepting this payment and other consideration, you are releasing American Family Insurance and Kenneth Topolski, and will not be able to make any further injury claims against American Family Insurance or Kenneth Topolski as a result of the accident?

MCDONALD: Right, okay, I...

WALSH: Thank you.

MCDONALD: ...do agree."

¶ 8 Walsh sent McDonald a letter dated December 21, 2015, which outlined the settlement terms and that the $400 settlement payment was enclosed.

¶ 9 On May 16, 2016, McDonald filed a personal injury complaint in the circuit court of Cook county, alleging that Topolski caused him injury when Topolski negligently engaged in one or more of the following acts: operated his vehicle without keeping a proper lookout, proceeded at a greater speed than was reasonable, failed to decrease speed so as to avoid collision, failed to yield the right of way, and failed to sound his horn.

¶ 10 On August 11, 2016, Topolski filed his original motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)). Topolski's original motion to dismiss included the affidavit of Trisha Tevz, Walsh's supervisor. On September 6, 2016, Topolski filed an amended motion to dismiss that included an affidavit attested to by Walsh. In his affidavit, Walsh averred that the transcription and the audio recording of his December 5, 2015, conversation with McDonald that were attached to his affidavit were true and accurate.

¶ 11 Topolski also filed a memorandum in support of his motion to dismiss on November 9, 2016, that included a supplemental affidavit from Walsh. In relevant part, Walsh's supplemental affidavit stated:

> "5. That on December 21, 2015, I contacted Otis McDonald with regard to his December 5, 2015 accident and he advised me that he had gone to a doctor once and had sustained $60 in lost wages. During that call, Mr. McDonald also told me that he was "feeling pretty good" but would be going to the doctor again. During that conversation, I made an offer to settle Mr. McDonald's personal injury claim. In that offer I explained that American Family [Insurance] agreed to pay him $400 in addition to his accident-

related medical expenses incurred in the subsequent 30 days, up to $1,000. Mr. McDonald agreed to the terms of settlement. After that conversation, I recorded Mr. McDonald's confirmation of the settlement terms for his injury claim against American Family [Insurance] and Kenneth Topolski.

6. That on December 21, 2015 I sent a letter to Mr. McDonald enclosing a settlement check and outlines [*sic*] the terms of the settlement as agreed upon."

A copy of the letter and settlement check were attached to Walsh's affidavit. The check was in the amount of $500, not $400. However, at his deposition on October 17, 2016, Walsh testified that this was merely a clerical error. Walsh also gave the following relevant testimony in response to opposing counsel's questions at his deposition:

"Q. So are you saying that the letter of December 21, 2015, described, what the terms were with him?

A. Those were the terms of our settlement agreement.

Q. And so you were going to pay him $400 for what?

A. $400 for general damages.

Q. And what are general damages?

A. General damages would be considered the pain and suffering, discomfort, and inconvenience.

* * *

Q. And so -- if you got a bill that was incurred between December 5, 2015 and December 21, 2015, would you pay that bill without question?

A. We would make sure that it was accident-related.

* * *

Q. So you wouldn't automatically pay that bill without question, true?

A. I would not pay any medical bill without question. I would make sure that it was accident-related.

* * *

Q. []How long did Mr. McDonald have to submit bills that were incurred between December 21 and January 21, 2016?

A. Again, whenever he got the bills, he could submit them to us, but we had the dates of December 21, 2015, to January 21, 2016. So the service or accident-related expense would have to have been incurred between that timeframe.

Q. [] And would you pay those without question?

A. You would have to determine if they were accident related.

* * *

Q. And so we don't know the specific amount of money that were medical bills that were incurred between 12/5 and 12/21/2015, true?

A. True. We don't know of a specific dollar amount, but if they were accident-related, we would pay that. So it means that there is no dollar amount specified.

* * *

Q. [] And was Mr. McDonald given a time limit as to when he could turn the bills in to you that were incurred under either timeframe until -- there was no time limit?

A. There was no specific timeframe given to Mr. McDonald."

¶ 12 The crux of the argument contained in Topolski's motion to dismiss was that McDonald entered into a settlement and agreed to release all claims arising from the December 5, 2015, accident. Specifically, Topolski asserted that according to the terms of the release McDonald

had given up his right to sue, and that McDonald had confirmed he understood that by accepting payment he was releasing American Family Insurance and Topolski from liability. Topolski further contended that because he had established that the parties entered into a valid settlement agreement, it was then McDonald's burden to prove by clear and convincing evidence that the release should be set aside, but that because there is no evidence of fraud, duress, illegality, or mistake, McDonald could not meet his burden.

¶ 13 On November 22, 2016, McDonald filed his response to Topolski's motion to dismiss, arguing that American Family Insurance's purported settlement offer was so indefinite that there was not a meeting of the minds, rendering any alleged settlement invalid and unenforceable. Specifically, McDonald argued that the following essential terms were not definitively stated: the amount, in full, of the purported settlement (only the $400 amount was definitive); the timeframe by which McDonald would have to submit medical expenses incurred prior to December 21, 2015, and after that date up until January 21, 2016; and the nature of what the settlement was compensation for, *i.e.* pain and suffering, loss of a normal life, etc. McDonald acknowledged that in his deposition, Walsh testified that the $400 was for "general damages," but argued that no definition was ever given for general damages in the December 21, 2015, conversation or letter. The only two exhibits attached to McDonald's response were a copy of his complaint and a copy of the transcript from Walsh's October 17, 2016, deposition.

¶ 14 On December 7, 2016, Topolski filed his reply memorandum in support of his motion to dismiss, wherein he emphasized that Illinois law has long-recognized the enforceability of oral settlement contracts. Additionally, Topolski argued that contrary to McDonald's assertions, an open medical provision does not render a settlement agreement void on indefiniteness grounds.

¶ 15 According to Topolski's response brief in this appeal, "the court held a hearing where it granted Topolski's motion to dismiss" on January 13, 2017. However, the record on appeal does not contain any form of report of proceedings from that date[3]. The record only contains an order dated January 13, 2017, which in its entirety reads:

"1) Defendant's 2-619 motion to dismiss is granted.

2) The judgment of the court is final for the purposes of appeal.

3) Plaintiff's oral motion to file an affidavit in opposition to the motion is denied."

¶ 16 McDonald filed his timely notice of appeal on February 1, 2017.

¶ 17 ANALYSIS

¶ 18 Topolski presents one issue on appeal, namely, whether the purported settlement agreement and release was invalid due to a lack of meeting of the minds as a result of indefinite terms. After reviewing the parties' submissions and the record on appeal, we find that the settlement agreement and release was, in fact, valid, and as a result, we affirm the trial court's decision to dismiss McDonald's complaint.

¶ 19 The parties disagree as to the applicable standard of review. McDonald contends that because we are reviewing the trial court's decision to dismiss his complaint pursuant to section 2-619 of the Code, our review should be *de novo*. See *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003) (stating that "our review of a section 2-619 dismissal is *de novo*"). Conversely, Topolski argues that a manifest weight of the evidence standard applies because the only question before this court is whether the settlement agreement and release was valid and binding and "[t]he determination of whether a valid settlement occurred is in the trial court's

[3] In the statement of facts in McDonald's opening brief, he does not mention Topolski's motion to dismiss, his response, Topolski's reply, or the court's subsequent order that granted Topolski's motion to dismiss. Similarly, McDonald's reply brief on appeal is silent on these facts. Thus, we are unaware of any disagreement he may have with Topolski's statement that, "the court held a hearing" on his motion.

discretion and the court of appeals will not reverse that decision unless it is contrary to the manifest weight of evidence." *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657, 669 (2001).

¶ 20 We find that because we are ultimately determining whether the trial court's dismissal pursuant to section 2-619 of the Code was proper, our review should be *de novo*. We recognize that when reviewing a trial court's findings of fact, for example, whether a valid settlement agreement exists, our review must be under the deferential, manifest weight of the evidence standard. See *Joel R. by Salazar v. Board of Education of Mannheim School District 83, Cook County, Illinois*, 292 Ill. App. 3d 607, 613 (1997). Here, however, there is no evidence in the record of any findings of fact made by the trial court. The trial court's January 13, 2017, order merely stated that "defendant's 2-619 motion to dismiss is granted." Also, although Topolski stated in his response brief that a hearing was conducted, no transcript appears in the record. Thus, we are unaware of the basis upon which the trial court made its decision. We are similarly unaware if the trial court made any findings of fact in reaching its decision. As a result, our review of its decision to grant Topolski's section 2-619 motion to dismiss is *de novo*. See *Van Meter*, 207 Ill. 2d at 368.

¶ 21 Turning to the merits of McDonald's appeal, we address his contention that the circuit court erred in dismissing his complaint. Specifically, he argues that the purported settlement with American Family Insurance contained terms so indefinite as to render it unenforceable due to a lack of meeting of the minds. Topolski responds that McDonald has failed to meet his burden of demonstrating by clear and convincing evidence that the settlement agreement and release should be set aside due to fraud, duress, illegality, or mutual mistake. For reasons unknown to this court, the trial court granted Topolski's motion to dismiss.

¶ 22 "[S]ection 2-619(a)(9) of the Code of Civil Procedure permits involuntary dismissal where the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." (Internal quotation marks omitted.) *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). An affirmative matter has the nature of a defense and negates the cause of action entirely. *Id.* "The moving party thus admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim." *Id.* When ruling on a motion to dismiss under section 2-619, the trial court may examine pleadings, depositions, and affidavits. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). "When supporting affidavits have not been challenged or contradicted by counteraffidavits or other appropriate means, the facts stated therein are deemed admitted." *Id.*

¶ 23 In this case, Topolski's motion to dismiss raised the parties' prior settlement agreement and release as the affirmative matter that would defeat McDonald's complaint entirely. "Illinois encourages the settlement of claims and, to that end, settlement agreements may be oral." *Kim*, 322 Ill. App. 3d at 669. Enforcement and interpretation of settlement agreements is governed by the law of contracts, and as such there must be an offer, acceptance, and a meeting of the minds on terms. *Id.* An oral settlement agreement is enforceable absent fraud, mistake, or duress. *Id.* at 669-70. In order for a mistake to render a settlement agreement unenforceable, it must be a mutual mistake, not a unilateral one. *Id.* at 670.

¶ 24 To support his position that the settlement agreement entered into between McDonald and American Family Insurance was not enforceable due to indefiniteness of its terms, McDonald relies on *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24 (1991). In that case, our supreme court determined that an agreement between a widow and a publishing company regarding the publication of the widow's late husband's short stories was not enforceable due to

major unresolved uncertainties. *Id.* at 31. The court specifically found that the provisions of the publishing agreement did not provide a means of determining the intent of the parties because the agreement did not divulge the minimum or maximum number of stories or pages necessary for publication. *Id.* at 29. Further, the purported agreement did not state, *inter alia*, who would decide which short stories would be included in the publication, when the manuscript would be delivered, when publication would occur, what price the publication would be sold for, or the length of time publication would continue. *Id.* at 30. The court also recognized that, "[w]ithout setting forth adequate terms for compliance, the publishing agreement provides no basis for determining when breach has occurred, and therefore, is not a valid and enforceable contract." *Id.*

¶ 25 McDonald argues that the case at bar is similar to *Academy Chicago Publishers* because the material terms of the settlement agreement were not sufficiently definite so as to form a valid oral agreement. Specifically, McDonald asserts that the settlement agreement does not contain a definite dollar amount, as only the $400 amount was fixed. Also, McDonald contends that a specific time frame under which McDonald was to submit medical expenses was not defined. We do not believe the factual scenario before us mirrors that in *Academy Chicago Publishers*. In that case, there were many essential terms that were undefined. Here, we do not believe any of the terms of the agreement were so undefined as to render the settlement agreement and release unenforceable. We disagree with McDonald that the amount was not sufficiently fixed. It is clear from the transcript of McDonald's conversation with Walsh on December 21, 2015, that the amount was fixed at a one-time payment of $400, plus the medical expenses McDonald had incurred thus far, plus up to $1000 for medical expenses that McDonald may incur between December 21, 2015, and January 21, 2016. In Walsh's discovery deposition, he testified that

"[w]e don't know of a specific dollar amount, but if they were accident-related, we would pay that." Thus, although the exact amount of those expenses was not defined in the agreement, it was clear that any accident-related medical bills that fell within the specifically-defined timeframe would be paid pursuant to the settlement agreement. McDonald's payment for medical expenses was limited to a specific timeframe, thus it was a sufficiently fixed term that evidenced the parties' intent to settle the claim for $400 plus McDonald's accident-related medical bills up to December 21, 2015, and any additional bills he may incur for the following 30 days up to $1000. We find nothing vague about these well-defined terms.

¶ 26 Additionally, McDonald makes much of the fact that there was no specific timeframe given regarding the submission of his medical bills. In his deposition, Walsh recognized that there was no specific timeframe given to McDonald. However, we do not believe that this renders the settlement agreement terms so indefinite as to render it unenforceable. Presumably, McDonald would seek to be paid for his medical expenses within a reasonable timeframe. However, even if he did not, because a timeframe is not stated in the settlement agreement, it would appear that based on Walsh's testimony, American Family Insurance would pay McDonald's accident-related medical bills for the timeframe in question at any time. McDonald did not submit his own counteraffidavits or deposition testimony, or the affidavit or testimony from any witness, thus we are unaware of any knowledge he may have to refute Walsh's testimony. The last date upon which McDonald could have incurred medical expenses for which American Family Insurance agreed to pay was on January 21, 2016. Thus, it would be reasonable for McDonald to submit his expenses any time after that date. Ultimately, we fail to see how a lack of deadline on this issue would render the agreement unenforceable.

¶ 27 Topolski relies on *Simmons v. Blauw*, 263 Ill. App. 3d 829 (1994), and *Gassner v. Raynor Manufacturing Co.*, 409 Ill. App. 3d 995 (2011), for guidance. In *Simmons*, the trial court dismissed the plaintiff's complaint for personal injuries that resulted from an automobile accident due to the existence of a prior settlement agreement and release. *Simmons*, 263 Ill. App. 3d at 831. On appeal, the plaintiff argued that the trial court erred in dismissing the complaint because the settlement agreement and release resulted from a mutual mistake of fact, specifically, regarding the nature and extent of the plaintiff's injuries. *Id.* at 832. The release signed by the plaintiff provided that in consideration for $5,082, the plaintiff released the defendant from all claims for 'all injuries known and unknown, *** which [had] resulted or may in the future develop from [the] accident.' " *Id.* at 833. This court determined that the language of the release was "comprehensive, precise, and unambiguous." *Id.* "Although plaintiff did not know when she executed the release that she would require surgery for a herniated disc, this can only be characterized as a unilateral mistake on her part." *Id.* at 834. Thus, the court ultimately found that no mutual mistake existed because the language used in the release, namely the words "all injuries known and unknown," contemplated other injuries that the plaintiff may subsequently suffer. *Id.*

¶ 28 Topolski argues that this matter is like *Simmons*. Although we do not find *Simmons* to be completely instructive because McDonald has never argued that a mutual mistake occurred here, we find the court's analysis regarding the language of the release to be applicable. In this case, the oral release occurred in the December 21, 2015, conversation between Walsh and McDonald during which Walsh specifically asked, "Do you understand by accepting this payment and other consideration, you are releasing American Family Insurance and Kenneth Topolski, and will not be able to make any further injury claims against American Family Insurance or Kenneth

Topolski as a result of the accident?" McDonald responded that he agreed. This language, like the language used in *Simmons*, was comprehensive, precise, and unambiguous. Walsh's question to McDonald made clear that he could not pursue any further injury claims that resulted from the accident. Also, Walsh's question specifically used the word "releasing" when referencing both American Family Insurance and Topolski. We find the language used by Walsh to be sufficiently unambiguous as to render the release valid and enforceable.

¶ 29 Topolski also cites to *Gassner* as support for his argument that the trial court properly granted his motion to dismiss. In *Gassner*, the plaintiff sustained a work-related back injury and after the surgery for that injury, he also suffered a staph infection in his back area. *Gassner*, 409 Ill. App. 3d at 996. The plaintiff and the defendant, his employer, entered into a settlement agreement, which contained an "open medical provision" wherein, despite the general release of liability, the defendant agreed to pay for certain approved medical treatment for a year following approval of the settlement agreement. *Id.* Subsequent to the approval of the settlement agreement, the staph infection spread to the plaintiff's heart and he sustained approximately $190,000 in medical expenses, which the plaintiff believed would be covered by the open medical provision. *Id.* The defendant disagreed. *Id.* On the issue of the scope of the open medical provision, the court found that the settlement agreement was ambiguous because a question of fact existed as to whether the parties created the open medical provision to include or exclude the treatment of the subsequent staph infection. *Id.* at 1012. Thus, the court reversed the trial court's granting of summary judgment in the defendant's favor. *Id.*

¶ 30 Topolski relies on *Gassner* for the proposition that although the court there ultimately remanded the case for a determination of what expenses fell within the open medical provision, the court did not find the open medical provision invalid merely because it was indefinite. Thus,

Topolski argues that even if the settlement agreement here was viewed as an open medical provision like in *Gassner*, it is not invalid because it specifically provided that American Family Insurance agreed to pay all accident-related medical expenses incurred prior to the settlement, as well as any accident-related medical expenses McDonald may incur in the following 30 days up to $1000. We agree with Topolski's assertion. We find that although the oral settlement agreement here did not state exactly which medical bills were to be paid, it encompassed all accident-related medical expenses relative to the timeframes set forth therein. McDonald makes much of the fact that in his deposition Walsh stated that he would not pay any bill without first determining that it was accident-related. We fail to see how this testimony by Walsh renders the terms of the settlement agreement any less clear or indefinite. Walsh merely stated that prior to paying any of McDonald's bills, he would ensure the bill was for an accident-related injury, which is entirely reasonable given that the settlement agreement was specifically for the payment of medical expenses related to the accident. Certainly, it is common sense that an insurance adjuster would have to first make sure that a medical bill fell within the confines of the settlement agreement prior to making a payment. Similarly, it would be reasonable for Walsh to ensure that the date of the medical bill fell within the timeframe set forth in the settlement agreement. We see nothing wrong with taking these reasonable steps prior to payment. Additionally, unlike the scenario of *Gassner* that merited remand for further factual determinations, there is no evidence in the record before us that McDonald ever submitted an accident-related medical expense that was disputed by American Family Insurance. Thus, we find *Gassner* guiding for the proposition that an open medical provision, like the one here, may be valid and enforceable, even if it does not specifically define the exact medical expenses that are to be covered. We make the important distinction that in *Gassner*, the plaintiff had suffered

$190,000 of expenses related to a staph infection that had entered his heart. Thus, the question of fact that remained was whether this subsequent staph infection was contemplated by the parties at the time they entered into the settlement. Conversely, in this case, there is no evidence of any medical expenses that McDonald incurred and that American Family Insurance disputed. Thus, we find that no question of fact exists here as it did in *Gassner* but we nonetheless find *Gassner*'s recognition of the validity of open medical provisions to be guiding here.

¶ 31 "A release is the abandonment of a claim to the person against whom the claim exists" and "[o]nce the defendant establishes the existence of a release, legal and binding on its face, the burden shifts to the plaintiff to prove it invalid by clear and convincing evidence." *Simmons*, 263 Ill. App. 3d at 832. Here, we have found that the terms of the settlement agreement and release were definite enough to render them facially valid. As a result, the burden shifted to McDonald to prove it invalid by clear and convincing evidence. Because McDonald failed to present any evidence of illegality, fraud, duress, or mutual mistake (*Kim*, 322 Ill. App. 3d at 669-70), we affirm the decision of the trial court that dismissed McDonald's complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)).

¶ 32 CONCLUSION

¶ 33 Based on the foregoing, we find that the trial court properly granted Topolski's motion to dismiss.

¶ 34 Affirmed.