THIRD DIVISION
September 26, 2018

No. 1-17-2670

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MATT DINERSTEIN and ANGELA ADAMSON,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County
	)	
v.	)	16 L 12619
	)	
EVANSTON ATHLETIC CLUBS, INC.,	)	Honorable
	)	John P. Callahan, Jr.,
Defendant-Appellee.	)	Judge Presiding

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. After remand, trial court's findings that there was no agreement to waive a *res judicata*, claims-splitting defense is not against manifest weight of the evidence.

¶ 2 In a prior appeal, we reviewed the dismissal of a refiled complaint based on *res judicata*. We vacated the dismissal and remanded for an evidentiary hearing on whether two of the exceptions to *res judicata* might be applicable—namely, whether "the parties agreed in terms or in effect to [allow] claim-splitting." *Dinerstein v. Evanston Athletic Clubs, Inc.*, 2016 IL App (1st) 153388, ¶ 68. The trial court held that evidentiary hearing and determined that there was no agreement of either kind. Based on that finding, the court once again dismissed plaintiffs' refiled

case. Because we cannot say that the trial court's decision was against the manifest weight of the evidence, we affirm the trial court's judgment.

¶ 3 BACKGROUND

¶ 4 As this is the second time this case is before us, we recite only the facts necessary to understand the issues in this appeal. Matt Dinerstein and Angela Adamson (collectively plaintiffs) filed suit after Matt fell from a rock-climbing wall at Evanston Athletic Clubs (EAC). They claimed negligence, willful and wanton conduct, and loss of consortium. The negligence claim was dismissed due to an exculpatory agreement, but the other two counts survived.

¶ 5 The case was set for trial on April 13, 2015. On April 3, the parties filed a joint motion to continue trial. On April 10, the Friday before trial, the circuit court denied the continuance. After the motion was denied, the parties' attorneys spoke in the hallway outside the courtroom, and they communicated later by telephone and email. This appeal primarily revolves around those conversations; we will detail the differing accounts later.

¶ 6 Ultimately, on the date of trial, plaintiffs voluntarily dismissed their remaining claims. Just eighteen days later, plaintiffs refiled their claims. After some preliminary status hearings—including a dismissal for want of prosecution and subsequent motion to vacate—EAC filed a motion to dismiss, arguing that plaintiffs impermissibly split their claims, and the refiled complaint was thus barred by *res judicata*. The trial court agreed and dismissed the complaint.

¶ 7 Plaintiffs appealed. We vacated, agreeing with the trial court that the elements of *res judicata* were satisfied but finding a question of fact about whether the "agreement in terms" or "agreement in effect" exceptions applied. We remanded the case for an evidentiary hearing.

¶ 8 Three witnesses testified at the evidentiary hearing—two of plaintiffs' attorneys (Ryan Horace and Joseph Napoli) and one of EAC's attorneys (Camille Cribaro-Mello).

¶ 9 Ryan Horace

¶ 10 Ryan was a junior attorney who appeared at the courthouse on April 10, the day of the conversation. He works out of his firm's St. Louis office, splitting his practice between Illinois and Missouri, and was not primary counsel on plaintiffs' case.

¶ 11 He traveled from St. Louis to Chicago to argue the joint motion to continue. After the motion was denied, he spoke with defense counsel, Camille, in the hallway. Ryan claims the two talked about outstanding discovery issues and were trying to figure out their next steps. At this point, he testified that Camille "suggested that we could file a voluntary dismissal." They "just basically discussed what that would entail and that it would be basically a voluntary dismissal and refiling." According to Ryan, they were "going to pretend like this never happened, meaning our motion to continue was never denied and she said yes, and that *** the negligence claim was dead and basically willful and wanton was the only thing left." Ryan said they then discussed finishing expert discovery.

¶ 12 Ryan described their agreement as a "pretty simple understanding. It was that we would dismiss and refile and it would literally act like our motion to continue was not denied, but that it was actually granted, basically continuing the case, leaving—or picking up right where we left off with expert discovery." After the case was refiled, Ryan said he and Camille talked as though they were "picking up where it left off."

¶ 13 On cross, Ryan admitted that he never "explicitly" asked Camille to waive defenses to the refiled complaint. Nor did she, "in those words," say that she would allow plaintiffs to split their claims. While she did not say she would allow claim splitting, Ryan insisted that "she said yes" to their agreement to act as though the denial of the motion to continue never happened and

to continue where they left off. Ryan said he was "generally aware" of the issue of claim-splitting and *res judicata*.

¶ 14 Ryan did not believe Camille was trying to trap him, because the continuance was necessary for both of them to finish expert discovery.

¶ 15 Joseph Napoli

¶ 16 Joseph was the trial attorney on plaintiffs' case. He did not work on the "day to day" aspects of the case and was only "called in" for trial. On April 10, he was on vacation with his wife in Florida. Joseph explained that "they were now asking me to leave my vacation and to come to Chicago to try the case, which would have been Monday, which I was happy to do."

¶ 17 He spoke with Camille over the phone after the motion to continue was denied. Joseph testified that Camille "explained to me that there was an option where we didn't have to go to trial. She wasn't ready to try the case" and wanted a continuance. He said that "she thought there would be no problem getting an adjournment of the case, but the judge was insisting that we try the case so she suggested *** that we do a voluntary dismissal." He told Camille, "if you want the case adjourned, we'll adjourn the case and well, we have this voluntary dismissal process."

¶ 18 Joseph wanted a clarification about whether a voluntary dismissal was "on the merits or is it just a procedural thing." He claims Camille "said no, it's not on the merits and that the case would continue. So we discussed that the voluntary dismissal would allow us to proceed with the case, that we would just agree to the voluntary dismissal, go in on Monday, agree to the voluntary dismissal and then we can start the case all over again."

¶ 19 He and Camille then talked about continuing with discovery and a potential mediation. Though he had written an affidavit earlier that said mediation was Camille's suggestion, he clarified in testimony that "both of us suggested it."

¶ 20 On cross, Joseph admitted that he and Camille:

> "never had a conversation about splitting claims at all *** or that there was double jeopardy. I don't think—she didn't mention—I don't remember her mentioning it. All we talked about is what I said, that we thought we were proceeding with the case after we did the voluntary dismissal, that it wasn't on the merits and it wasn't going to prejudice plaintiffs in any way."

¶ 21 Further, he acknowledged that he was not aware that a claim-splitting problem could arise. He said, "If I was aware of it I would have never done the voluntary dismissal. If she would have told me that that was one of the consequences I would have definitely had just got on a plane and come to Chicago and tried the case." Not being aware of the issue, he did not ask her to waive a *res judicata* defense, and waiver was never discussed.

¶ 22 Camille Cribaro-Mello

¶ 23 Camille was the attorney handling EAC's defense. After the joint motion to continue was denied, she and Ryan were "stymied" by the prospect of having to go on trial the following Monday.

¶ 24 After Camille and Ryan stepped out into the hallway they each called their firms. During the call to her firm, she confirmed that the two options were proceeding to trial "or there was the option provided by the statute that plaintiffs always have, to take a voluntary dismissal." She did not suggest an option or express a preference for how to proceed. The only thing she "expressed was that I would like to know, you know, what [plaintiffs] decided to do so that I would know how to prepare going into the weekend."

¶ 25 Camille never agreed that plaintiffs could split their claims or that EAC would not object on *res judicata* grounds—nor did she have authority from her client to make such an agreement.

There was no discussion about *res judicata* at all. She testified that she was not even aware of a *res judicata* defense at the time.

¶ 26 Though Camille and Ryan did talk about voluntary dismissals, it was not part of a joint strategy and "she wasn't advocating one way or another." She claimed that Ryan was "very concerned about whether a voluntary dismissal would be with or without prejudice" and she kept referring him back to the statute. Camille sent Ryan a copy of the statute because he seemed unfamiliar with practicing in Illinois and Cook County. She and Ryan discussed generally what happens when a case is voluntarily dismissed and refiled, but there was no specific plan about what would happen in this case. Their discussion "wasn't an idea in terms of oh, why don't you do this. [They] weren't strategizing about what [plaintiffs'] firm should do to prosecute its case. We were talking about we have trial on Monday, we either go to trial or what else."

¶ 27 She left the court and returned to her office without knowing what plaintiffs were going to do. While at her office, she spoke with Joseph on the phone. Joseph was aware that the motion to continue had been denied and was aware of his right to voluntarily dismiss the case. Similar to Ryan, Camille had the impression that Joseph was unfamiliar with Illinois law regarding voluntary dismissals.

¶ 28 Contrary to Joseph's testimony, Camille said she did not tell him that she wanted the continuance because she needed an expert. Camille claims she didn't think she needed an expert and would have been ready to go to trial. Camille also stated that Joseph raised the topic of mediation. She testified that they did not get into specifics, just that she would consider the idea.

¶ 29 After speaking with Joseph, Camille still did not know what plaintiffs were going to do and continued to prepare for a trial on Monday. She continued to prepare until she received confirmation from Ryan that plaintiffs were going to voluntarily dismiss. Camille denied that she

ever agreed with Joseph or Ryan that, if plaintiffs refiled the case, the parties would pick up where they left off.

¶ 30 Court's Ruling

¶ 31 At the close of evidence, after argument, the court announced its findings that there was no agreement in terms or effect to allow plaintiffs to split their claims. The court was "convinced most strongly in the credibility and the recollection of Ms. Camille Cribaro-Mello as to what occurred. I think Mr. Napoli, while well versed in the law was down on vacation, quite frankly on a phone in a restaurant having some discussion with [Camille]." The court noted that Ryan "specifically testified he never asked if they were going to waive any objections. It never came up. I'm convinced that he had no idea about the case, about the use of the particular statute in question. I'm particularly convinced especially by [the fact that] they never discussed it. There was an admission that they never discussed it."

¶ 32 The court found it "obvious" that there was no agreement in terms. The court also did not believe that there was an agreement in effect because plaintiffs "didn't even know what they were doing in my observation. They wouldn't have been inquiring about claim-splitting because they weren't familiar with the statute and the rule that allowed the dismissal."

¶ 33 The court "[didn't] find fault with the defense in having general conversation with the plaintiffs' attorneys in the hallway after the motion for a new trial was denied. I don't think in any way they led the plaintiff on to think they were *** not going to object on a refiling." The conversation was "simply a sharing of what the information was and it's the plaintiffs' obligation to investigate it and to know the law and to prosecute the case on behalf of their client."

¶ 34 The trial court, again, dismissed the case. Plaintiffs timely appealed.

¶ 35 ANALYSIS

¶ 36 As we noted in the prior appeal, we review the court's findings after an evidentiary hearing under the manifest-weight-of-the-evidence standard. *Dinerstein*, 2016 IL App (1st) 153388, ¶ 32. Plaintiffs ask us to apply *de novo* review, claiming the facts are undisputed, but it is clear to us that the facts are very much in dispute. As just one example, the parties disagree sharply over whether Camille agreed with Ryan and Joseph that the case would "pick up where it left off" once plaintiffs refiled the action. The manifest-weight standard applies.

¶ 37 A decision is against the manifest weight of the evidence "only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). Under the manifest-weight standard, "the court of review must not substitute its judgment for that of the [finder] of fact." *Id*.

¶ 38 Agreement in Terms

¶ 39 An "agreement in terms" means that the parties expressly agreed that the defendant would not object to the plaintiff's refiled action on *res judicata* grounds. *Dinerstein*, 2016 IL App (1st) 153388, ¶ 53; accord *Kanter v. Waugh*, 2017 IL App (2d) 160848, ¶ 22. We agree with the trial court that it is "obvious" that no agreement in terms existed. The evidence at the hearing is consistent about one thing: the topic of *res judicata* was never raised during any of the relevant conversations. None of the three attorneys were aware that a potential *res judicata* bar to refiling even existed. Under no plausible review of this record could we find an agreement in terms to waive the bar on claims splitting. We uphold this finding by the trial court.

¶ 40 Agreement in Effect

¶ 41 The closer question is whether there was an agreement in effect, which is "conduct by defense counsel, before the plaintiff voluntarily dismisses the case, that implies that the defendant will not object to claim-splitting when the action is refiled." *Dinerstein*, 2016 IL App

(1st) 153388, ¶ 61; accord *Kanter*, 2017 IL App (2d) 160848, ¶ 23. But "mere silence alone" does not establish an agreement in effect. *Dinerstein*, 2016 IL App (1st) 153388, ¶ 59. A defendant has no obligation to stop a plaintiff from making a fatal mistake. *Id*. ¶ 60.

¶ 42 The evidence suggests one of two scenarios. First, according to Ryan and Joseph, both parties' attorneys believed that the case was not ready to go to trial. In order to get around the denial of the motion to continue, Camille suggested that the case be voluntarily dismissed, and they agreed pick up where they left off.

¶ 43 Second, Camille's account: The parties believed that the court would grant the motion to continue. When it didn't, they were caught off guard. Each counsel called their respective offices for guidance. The discussion turned towards plaintiffs' right to voluntarily dismiss and refile. Because Camille believed that Ryan was unfamiliar with Illinois law regarding voluntary dismissals and refiling, she tried to give him some baseline information—directing him to the statute, discussing the procedure of refiling, etc. Likewise, when she spoke with Joseph, he did not seem fully cognizant of what a voluntary dismissal entailed. She did not "advocate" and did not tell counsel she needed a continuance; she just wanted to know what plaintiffs chose to do.

¶ 44 It is clear that the court believed Camille—going so far as to say it was "convinced most strongly" of Camille's recollection. This credibility determination is not something we casually disregard. See *Best v. Best*, 223 Ill. 2d 342, 350 (2006) (under manifest-weight standard, "a reviewing court will not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn.")

¶ 45 Camille testified that she was not aware of a *res judicata* defense, and she did not agree that the parties would pick up where they left off once the case was refiled. She gave her

opposing counsel information about the option of voluntary dismissal, but she did not advocate for it or make or imply any promises about a refiling.

¶ 46 There was contrary evidence, to be sure. But the trial court believed Camille. The court found that Camille did not "in any way *** [lead] the plaintiff on to think [she was] not going to object on a refiling." Rather, the court found, Camille was simply sharing information with plaintiffs' counsel.

¶ 47 We cannot say that the opposite conclusion was clearly evident. We cannot say that the trial court should have adopted the testimony of Joseph and Ryan over that of Camille. The trial court found that Camille did nothing to imply to plaintiffs' counsel that she would not object to claim-splitting if the action were refiled. That finding was not against the manifest weight of the evidence. As we uphold the trial court's findings that no valid defense to *res judicata* applies, we affirm the dismissal of the complaint on *res judicata* grounds.

¶ 48 CONCLUSION

¶ 49 We affirm the trial court's judgment.

¶ 50 Affirmed.