

No. 1-17-2714

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

PROGRESSIVE PALOVERDE INSURANCE CO., as)	Appeal from the
subrogee of Anthony Kirkland,)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	
v.)	No. 2016 M1 014138
)	
HORATIU DRAGOS,)	Honorable
)	Marina E. Ammendola and
Defendant-Appellee.)	Dennis M. McGuire,
)	Judges, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed the circuit court's order deeming admitted the facts asserted in the Illinois Supreme Court Rule 216 (eff. July 1, 2014) request to admit served upon the plaintiff. Nevertheless, we reversed the summary judgment entered in favor of the defendant as a genuine issue of fact exists on his alleged negligence.

¶ 2 The plaintiff, Progressive Paloverde Insurance Co., as subrogee of Anthony Kirkland (Progressive), appeals from orders of the circuit court, which granted (1) the motion of the defendant, Horatiu Dragos, to deem admitted the facts asserted in the Illinois Supreme Court Rule 216 (eff. July 1, 2014) request to admit that was served upon it and (2) the defendant's

motion for summary judgment on its subrogation complaint seeking recovery for personal injury and property damage allegedly sustained by its insured, Anthony Kirkland (Kirkland). For the reasons that follow, we affirm the order of the circuit court deeming admitted the facts asserted in the Rule 216 request to admit that was served upon Progressive and reverse the summary judgment entered in favor of the defendant.

¶ 3 This subrogation action arose as the result of a motor vehicle collision that occurred at the intersection of Columbus Drive and Roosevelt Road, in Chicago. In its amended complaint, Progressive alleged that its insured, Kirkland, was injured and sustained property damage when his vehicle was struck by a vehicle negligently driven by the defendant.

¶ 4 After the defendant appeared, but prior to filing his answer to the amended complaint, he served written interrogatories, a document production request, and a notice to produce upon Progressive's attorneys. In addition, the defendant served a written request for the admission of facts pursuant to Illinois Supreme Court Rule 216(a) (eff. July 1, 2014). On January 12, 2017, Progressive filed a motion to strike the defendant's Rule 216 request for admission of facts, arguing that the request was directed to its subrogor, Kirkland, a non-party, and that the request was premature, having been served prior to the filing of the defendant's answer. On January 17, 2017, the circuit court entered an "Agreed Order" which, *inter alia*, granted the defendant leave to answer or otherwise plead to the amended complaint; ordered the defendant to respond to Progressive's motion to strike his Rule 216 request for admission of facts by February 7, 2017; directed Progressive to answer all written discovery propounded by the defendant by February 14, 2017; and continued the matter, including Progressive's motion to strike, to February 28, 2017. Thereafter, the defendant answered the amended complaint, denying the material allegations contained therein.

¶ 5 On February 14, 2017, Progressive filed an answer to the defendant's Rule 216 request to admit, objecting to each fact asserted on grounds that it was not an individual. On February 28, 2017, the circuit court entered an order granting the defendant leave to file a motion to deem the facts asserted in his Rule 216 request to admit facts, admitted, and continuing the matter to May 18, 2017. That order is devoid of any reference to Progressive's motion to strike the defendant's request to admit. On March 28, 2017, the defendant filed a motion seeking a finding that Progressive failed to either file its denial of the facts asserted in his request to admit or its written objections within the 28 day period provided in Illinois Supreme Court Rule 216(c) (eff. July 1, 2014), and as consequence, the facts asserted in the request are deemed admitted. Progressive responded to the motion on April 17, 2017, supported by the affidavit of one of its attorneys, arguing that "the effect of the January 17, 2017 order was to extend the time for [it] *** to answer the request to admit to February 14, 2017[,]" and that, in accordance with that order, it filed its objections to the request on February 14, 2017.

¶ 6 On May 18, 2017, the circuit court entered an order granting the defendant's motion to deem the facts asserted in his request to admit facts admitted. The record before this court does not contain a transcript of the proceedings held on May 18, 2017.

¶ 7 On September 5, 2017, the defendant filed a motion for summary judgment supported only by the facts that the circuit court deemed admitted in its order of May 18, 2017. Progressive responded to the defendant's motion supported by Kirkland's affidavit. On November 2, 2017, the circuit court granted summary judgment in favor of the defendant, and this appeal followed.

¶ 8 As its first issue on appeal, Progressive argues that the circuit court abused its discretion in granting the defendant's motion to deem admitted the facts set forth in his request to admit. It contends that it complied with the requirements of Rule 216 by filing its objections to the

defendant's request to admit on February 14, 2017. Progressive argues that a Rule 216 request to admit facts is a discovery tool (see *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 343 (2007)), and that, in its order of January 17, 2017, the circuit court granted it leave "to answer all written discovery propounded by the defendant by February 14, 2017." Submitted in support of Progressive's response to the defendant's motion to deem facts admitted was the affidavit of Claire Connelly, one of its attorneys. Ms. Connelly attested to her understanding that the paragraph in the January 17, 2017, order, granting Progressive leave "to answer all written discovery propounded by the defendant by February 14, 2017," included leave to answer the defendant's request to admit by that date. She admits in her affidavit, however, that the defendant's attorney disagreed with her understanding in that regard. Based upon its interpretation of the January 17, 2017, order, Progressive concludes that its objections to each of the facts asserted in the defendant's request to admit were timely, and the circuit court, therefore, abused its discretion in deeming the facts asserted in the request admitted.

¶ 9 In support of the circuit court's order of May 18, 2017, the defendant argues that the facts asserted in the request were properly deemed admitted by reason of Progressive's failure to either answer the request or object thereto within 28 days as required by Illinois Supreme Court Rule 216(c) (eff. July 1, 2014). He notes that the request to admit facts was served upon Progressive's attorneys on November 14, 2016, and that Progressive failed, within 28 days thereafter, to file either (1) a sworn statement denying the matters for which admission was requested or setting forth in detail the reasons why it could not admit or deny the matters or (2) written objections. The defendant also notes that Progressive failed to file a motion pursuant to Illinois Supreme Court Rule 183 (eff. Jan. 1, 1970), requesting an extension of the 28-day filing period. As to the order of January 17, 2017, upon which Progressive relies, the defendant asserts

that the portion of the order extending the time for Progressive to respond to discovery was not intended to apply to his outstanding request to admit facts.

¶ 10 There is clearly a dispute between the parties as to the meaning of the circuit court's order of January 17, 2017. We, however, do not construe that order as extending the time for Progressive to answer or object to the defendant's request to admit. There is nothing in the record before us suggesting that Progressive established good cause for such an extension. Further, that same order directed the defendant to respond to Progressive's pending motion to strike his request to admit by February 7, 2017, and continued that motion for hearing on February 28, 2017. Clearly there would be no purpose in granting Progressive an extension to answer the request to admit prior to resolving its motion to strike the request.

¶ 11 Illinois Supreme Court Rule 216(c) (eff. July 1, 2014) provides that the matters of fact of which admission is requested are admitted unless a sworn statement of denial or a written objection is filed to each asserted matter of fact within 28 days after service on a party. In this case, the defendant's request for admission of facts was served upon Progressive's attorneys on November 14, 2016. Progressive's first response was a motion to strike the request which it filed on January 12, 2017, 64 days after service. Progressive's objections to responding to the facts for which admission was sought were not filed until February 14, 2017, 92 days after service. Illinois Supreme Court Rule 183 (eff. Jan. 1, 1970) grants the circuit court discretion to extend the time for filing any pleading or doing any act that is required to be done within a limited period. The supreme court has construed that rule to allow the circuit court discretion to permit a party to file a late response to a Rule 216 request to admit. *Haas*, 226 Ill. 2d at 343. However, the circuit court's discretion to permit a late response "does not come into play under the rule unless the responding party can first show good cause for the extension." *Bright v. Dicke*, 166 Ill. 2d

204, 209 (1995); see also *Haas*, 226 Ill. 2d at 344. There is nothing in the record before us suggesting that Progressive ever moved for an extension of the 28-day filing period contained in Rule 216(c) or that it established good cause for not responding to the request within that period. On these facts alone, we are unable to conclude that the circuit court abused its discretion in granting the defendant's motion to deem admitted the facts asserted in his Rule 216 request to admit.

¶ 12 However, there is another reason to reject Progressive's claim of an abuse of discretion in the circuit court's entry of its May 18, 2017, order. The record before us does not contain a transcript of the proceedings held on May 18, 2017, nor does it contain a bystander's report as provided in Rules 321 and 323. Ill. S. Ct. R. 321 (eff. Feb. 1, 1994); R. 323 (eff. July 1, 2017). Consequently, we have no means to determine the circuit court's reasoning in granting the defendant's motion. As the appellant, it was Progressive's burden to provide this court with a record sufficient to support its claim of error. In the absence of a record sufficient to enable this court to review the circuit court's reasoning in granting the defendant's motion to deem admitted the facts asserted in his Rule 216 request to admit, we must presume that the circuit court entered its order of May 18, 2017, in conformity with established legal principles. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 13 Based on the foregoing analysis, we reject Progressive's argument that the circuit court abused its discretion in granting the defendant's motion to deem admitted the facts asserted in his Rule 216 request to admit. We note further that the record does not reflect the entry of an order disposing of Progressive's motion to strike the defendant's request to admit facts, and Progressive has not asserted the grounds raised in that motion in its brief before this court. As a consequence, any issue relating to the propriety of the defendant having propounded his request

to admit facts prior to the filing of his answer to the amended complaint has been forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017); *Meyers v. Kissner*, 149 Ill. 2d 1, 8 (1992).

¶ 14 We turn next to Progressive's argument that the circuit court erred in granting summary judgment in favor of the defendant. Our review of the issue is *de novo*. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008).

¶ 15 Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. In ruling on a motion for summary judgment, the court is required to strictly construe all evidentiary material submitted in support of the motion while liberally construing all evidentiary mater submitted in opposition. *Williams*, 228 Ill. 2d at 417.

¶ 16 On appeal, Progressive argues that, assuming *arguendo* the circuit court was correct in granting the defendant's motion to deem admitted the facts asserted in his request to admit, summary judgment was, nevertheless, inappropriate as the admitted facts do not address the defendant's alleged negligence as charged in the amended complaint. Progressive asserts that the admitted facts, at most, admit that Kirkland was contributorily negligent, but the admissions do not negate the allegation of negligence on the part of the defendant nor do they establish the absence of evidence from which a jury could determine that his negligence was a proximate cause of Kirkland's damages. We agree.

¶ 17 In its amended complaint, Progressive alleged that, on November 17, 2014, its insured, Kirkland, was driving his motor vehicle in a southerly direction on Columbus Drive when his vehicle was struck by a vehicle being driven by the defendant in an easterly direction on Roosevelt Road. Progressive charged that the defendant's negligence in the operation of his

vehicle resulted in Kirkland suffering both personal injuries and damage to his vehicle. Specifically, paragraph 8 of the amended complaint alleged that the defendant was guilty of one or more of the following acts or omissions:

“a. Failing to stop or yield the right of way in compliance with a traffic signal erected at said intersection [Columbus Drive and Roosevelt Road] in violation of Chapter 625, Section 5/11-305 of the Illinois Compiled Statutes;

b. Failing to drive at a speed that was reasonable and proper with regard to traffic conditions and the use of the highway, in violation of Chapter 625, Section 5/11-601(a) of the Illinois Compiled Statutes;

c. Failing to keep a proper lookout for other automobiles on the public streets;

d. Failing to maintain control of his vehicle;

e. Failing to keep his vehicle under proper control and to stop, slow down or otherwise alter speed, movement or direction of his vehicle when danger of collision was imminent.”

According to the amended complaint, Progressive paid Kirkland \$28,086.32 pursuant to the terms of its policy of insurance and brought this action in its capacity as subrogee.

¶ 18 The defendant answered the amended complaint, admitting that he was driving his vehicle in an easterly direction on Roosevelt Road when it made contact with a vehicle driven by Kirkland, but denying the allegations of negligence set forth in paragraph 8. The defendant filed his motion for summary judgment supported only by the facts deemed admitted by the circuit court’s order of May 18, 2017. The defendant’s request to admit sought the admission of the following facts:

“1. On November 17, 2014, I owned a 2000 Ford Expedition.

2. On November 17, 2014, I was involved in a car accident between the hours of 8:30 a.m. and 9:30 a.m., central standard time, while driving my 2000 Ford Expedition.

3. On November 17, 2014, I ran a red light at the intersection of Columbus Drive and Roosevelt Road in Chicago, Illinois.

4. On November 17, 2014, my vehicle was involved in a collision with a 2006 Volkswagen Passat, at or near the intersection of Columbus Drive and Roosevelt Road in Chicago, Illinois.

5. On November 17, 2014, my 2000 Ford Expedition collided with a 2006 Volkswagen Passat that was stationary.

6. On November 17, 2014, I failed to wear a seat belt while driving my 2000 Ford Expedition between 8:30 a.m. and 9:30 a.m. when I had an accident.

7. On November 17, 2014, I sustained injuries from a car accident.

8. On November 17, 2014, I was not wearing my seat belt immediately prior to the car accident.

9. On November 17, 2014, I failed to fill out an Illinois Traffic Crash Report.

10. My vision is not 20/20 without glasses, contacts, or other vision aids.”

The definitional section of the defendant’s request to admit facts provides that the words “I and/or Plaintiff” mean and refer to Kirkland and/or Progressive as subrogee of Kirkland.

¶ 19 In accordance with the circuit court’s order of May 18, 2017, Progressive is deemed to have admitted each of the 10 facts asserted in the defendant’s request to admit. In particular,

Progressive is deemed to have admitted that Kirkland ran a red light at the intersection of Columbus Drive and Roosevelt Road and that, at the time, he was not wearing a seat belt. However, in his affidavit submitted by Progressive in response to the motion for summary judgment, Kirkland asserts that, at the time of the collision, the traffic light controlling Columbus Drive, the road upon which he was traveling, was green.

¶ 20 Kirkland's affidavit as to the color of the traffic control signals contradicts Progressive's admission that Kirkland ran a red light at the intersection of Columbus Drive and Roosevelt Road. However, admissions pursuant to a request to admit constitute binding judicial admissions that cannot be contradicted at trial or in opposition to a motion for summary judgment. *Ellis v. American Family Mutual Insurance Co.*, 322 Ill. App. 3d 1006, 1011 (2001). Consequently, Kirkland's affidavit as to the color of the traffic light for Columbus Drive cannot be considered for purposes of the summary judgment in this case. Nevertheless, we agree with Progressive, summary judgment in favor of the defendant was inappropriate.

¶ 21 As the movant in a summary judgment proceeding, the defendant had the burden of producing evidentiary material which, if uncontradicted, entitled him to judgment as a matter of law. *South Side Trust and Savings Bank of Peoria v. Mitsubishi Heavy Industries, Ltd.*, 401 Ill. App. 3d 424, 435 (2010). The evidentiary material in the form of Progressive's admissions which the defendant relied upon in support of his motion for summary judgment, while going to the issue of Kirkland's contributory negligence, do not address the defendant's alleged negligence as asserted in paragraph 8 of the amended complaint. The defendant having failed to submit evidentiary material going to the issue of his alleged negligence, Progressive's amended complaint establishes a genuine issue of material fact on the issue. *Id.*; *Kielbasa v. St. Mary of Nazareth Hospital*, 209 Ill.App.3d 401, 406 (1991). It is for this reason that we reverse the

No. 1-17-2714

summary judgment in favor of the defendant, and remand this matter to the circuit court for further proceedings.

¶ 22 Affirmed in part and reversed in part.

¶ 23 Cause remanded.