2018 IL App (1st) 180135-U

SIXTH DIVISION
September 21, 2018

No. 1-18-0135

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DELSHEA EWING, Plaintiff-Appellant, v. STONY ISLAND CURRENCY EXCHANGE, INC.; SIXTY-SEVEN STONY ISLAND LLC (incorrectly sued herein as "Sixty Seven Property Management"); and EVEREST SNOW MANAGEMENT, INC. Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 16 M1 302753 Honorable Catherine A. Schneider, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm the judgment below because the record on appeal is insufficient to establish reversible error.

¶ 2 Plaintiff Delshea Ewing filed a complaint for personal injuries against defendants Stony Island Currency Exchange, Incorporated (the Currency Exchange); Sixty-Seven Stony Island LLC (Sixty-Seven); and Everest Snow Management, Incorporated (Everest). Following a hearing, the circuit court granted defendants' motions to dismiss pursuant to Supreme Court Rule

103(b) (Ill. S. Ct. R. 103(b) (eff. July 1, 2007), finding that plaintiff failed to exercise reasonable diligence to obtain service on defendants. Plaintiff now appeals the dismissal of her complaint with prejudice. We affirm.

¶ 3 Plaintiff filed her complaint on December 27, 2016, alleging that, due to an accumulation of snow and ice in front of the Currency Exchange's store, she slipped and fell, suffering various personal injuries. Plaintiff issued summonses on the same day as the filing date, but there is no evidence that the summonses were ever placed with the sheriff for service. Plaintiff issued another set of summonses on March 15, 2017, but the summons for the Currency Exchange was returned not served because its registered agent was out of town until after April 10, 2017, and it appears the summonses for Sixty-Seven and Everest were again not placed with the sheriff for service. The Currency Exchange, Sixty-Seven, and Everest were eventually served on June 5, June 1, and April 5, 2017, respectively.

¶ 4 On June 30, 2017, plaintiff's counsel failed to appear in court, so the circuit court dismissed the cause for want of prosecution. Plaintiff's counsel filed a motion to vacate the dismissal about two weeks later, but that motion was stricken. Plaintiff's counsel filed another motion to vacate on July 26, 2017, which the court granted on August 8, 2017. Defendants each filed a motion to dismiss under Rule 103(b), alleging that plaintiff failed to exercise reasonable diligence in the service of process. On December 18, 2017, following a hearing, the court granted defendants' motions and dismissed the complaint with prejudice. This appeal follows.

¶ 5 Plaintiff contends that the circuit court erred in granting defendants' Rule 103(b) motions to dismiss because, pursuant to *Segal v. Sacco*, 136 Ill. 2d 282 (1990), defendants could not establish a *prima facie* case for unreasonable lack of diligence, and that, even if a *prima facie* case were established, dismissal was unwarranted based upon the " 'totality of the

circumstances' " and various factors identified in *Segal*. We cannot reach the merits of plaintiff's claim, however, because she failed to provide a sufficient record.

¶ 6 The burden of providing a sufficient record on appeal rests with the appellant (here, plaintiff). *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of such a record, we must presume the trial court acted in conformity with the law and with a sufficient factual basis for its findings. *Id.* Furthermore, any doubts arising from an incomplete record will be resolved against the appellant. *Id.*

¶ 7 Supreme Court Rules 321 and 324 require an appellant to provide a complete record on appeal, including a certified copy of the report of proceedings. See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994); Ill. S. Ct. R. 324 (eff. July 1, 2017). If a verbatim transcript is unavailable, the appellant may file an acceptable substitute, such as bystander's report or an agreed statement of facts, as provided for in Rule 323. See Ill. S. Ct. R. 323 (eff. July 1, 2017).

¶ 8 In this case, plaintiff's claim depends upon what transpired at the hearing. It is well established that, in reviewing dismissals under Rule 103(b), "each case must be decided on its own particular facts and circumstances." *Gatto v. Nelson*, 142 Ill. App. 3d 284, 288 (1986); see also *Martinez v. Erickson*, 127 Ill. 2d 112, 122 (1989) ("The determination of diligence must be made in light of the totality of the circumstances."). In addition, since Rule 103(b) does not provide "a specific time limitation within which a defendant must be served" (*Segal*, 136 Ill. 2d at 285), a circuit court must consider various factors, which "include, but are not limited to," the plaintiff's activities, the plaintiff's knowledge of the defendant's location, the ease with which defendant's whereabouts could have been ascertained, the defendant's actual knowledge of the pendency of the action due to ineffective service, and other "special circumstances" affecting the

plaintiff's efforts (*id.* at 287). Thus, a section 103(b) motion cannot always be resolved on written submissions alone. It is the plaintiff's burden to show reasonable diligence in the service of process. *Id.* at 286. We review dismissals under Rule 103(b) for an abuse of discretion. *Id.* A court abuses its discretion only where its ruling is "arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view." *Certain Underwriters at Lloyd's, London v. Abbott Laboratories*, 2014 IL App (1st) 132020, ¶ 68.

¶ 9 Without a transcript or acceptable substitute, we are in the dark as to what took place at the hearing on defendants' motions. To determine whether the circuit court abused its discretion, we must examine whether its decision was arbitrary, fanciful, or unreasonable, but the absence of a report of proceedings prevents us from doing so. We cannot determine whether plaintiff met her burden to show reasonable diligence in the service of process, whether the court arbitrarily found a *prima facie* case for unreasonable delay, whether it considered the *Segal* factors, or whether it determined the matter on the particular facts and totality of the circumstances of this case. For example, plaintiff asserts in her brief that the circuit court dismissed the complaint without addressing the "18 pieces of correspondence" between her and defendants that established the date of the injury as January 10, 2015, and not January 2014. A transcript of the hearing would have provided evidence to support plaintiff's assertion, but she failed to provide one, so we must presume that the trial court *did* address this issue prior to dismissing the case. In addition, plaintiff further argues that there is no evidence of intentional delay, but in the absence of a transcript or acceptable substitute, it remains a mere unsupported assertion, which does not provide a basis for reversal. See *Foutch*, 99 Ill. 2d at 391-92.

¶ 10 Since we are unable to determine whether the granting of the motion was erroneous, we must presume the court acted in conformity with the law and with a sufficient factual basis for its

findings. See *id.*; see also *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985) (holding that, when the record is incomplete, a reviewing court must indulge "every reasonable presumption" in favor of the judgment that is appealed, "including that the trial court ruled or acted correctly").

¶ 11 In sum, without a complete record of the proceedings below, plaintiff's claim of error is merely speculative. In the absence of a record as to what took place at the hearing on defendants' motions, we cannot determine whether plaintiff established reasonable diligence in obtaining service of process on defendants or whether she conceded that she had failed to do so. Where, as here, the record is incomplete, we may not speculate as to what errors may have occurred below. *Foutch*, 99 Ill. 2d at 391-92; see also *People v. Edwards*, 74 Ill. 2d 1, 7 (1978) (holding that a reviewing court may not "guess" at the harm to an appellant where a record is incomplete; rather it must "refrain from supposition and decide accordingly"). Accordingly, we are compelled to affirm the court's judgment granting defendants' motions to dismiss based upon plaintiff's failure to effectuate service of process in a reasonably diligent manner.

¶ 12 Affirmed.