2018 IL App (2d) 170203-U
No. 2-17-0203
Order filed September 20, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KARI BRADFIELD, Plaintiff-Appellant, v. TARGET CORPORATION, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Du Page County. No. 14-L-1243 Honorable Robert G. Kleeman, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in closing discovery before plaintiff had taken the deposition of a witness, as plaintiff did not make reasonable efforts to serve the witness with a subpoena.

¶ 2 Plaintiff, Kari Bradfield, appeals from an order of the circuit court of Du Page County entering a summary judgment for defendant, Target Corporation, in her personal injury lawsuit. Plaintiff argues that the trial court abused its discretion when it denied her the opportunity to depose a witness whose testimony might have shown a genuine issue of material fact. We affirm.

¶ 3 On December 11, 2014, plaintiff filed a complaint against defendant, seeking recovery under a theory of negligence for injuries sustained when she slipped on liquid on the floor of defendant's store in Glendale Heights. On October 22, 2015, plaintiff served defendant with notice of the depositions of three individuals identified as defendant's employees. One of those individuals was James Reynolds. In interrogatory answers that were served on defendant on July 6, 2016, plaintiff identified Reynolds as a lay witness pursuant to Illinois Supreme Court Rule 213(f)(1) (eff. Jan. 1, 2007). On July 11, 2016, the court required the Reynolds's deposition to be taken on or before August 25, 2016.

¶ 4 On July 22, 2016, and on August 25, 2016, plaintiff served defendant with "Notice of the Subpoena Deposition of James Reynolds (Former Employee of Target Corporation)." On August 30, 2016, the trial court granted plaintiff 14 days to file "a motion for a rule to show cause against James Reynolds for refusal to comply with subpoena for deposition." On September 20, 2016, the trial court granted plaintiff an additional seven days to file her motion for a rule to show cause. Plaintiff filed her motion on September 26, 2016. The motion stated, in pertinent part, as follows:

> "1. *** [O]n July 21, 2016, a Subpoena for Deposition was filed with the [court], commanding James Reynolds, a former employee of Defendant *** to personally appear at [plaintiff's attorney's office] on September 7, 2016 ***. (SEE EXHIBIT A)
>
> 2. *** Notice of said Subpoena for Deposition was served on James Reynolds when a true and correct copy of same was deposited in the U.S. mail on July 22, 2016. (SEE EXHIBIT B)

> 3. *** [O]n August 25, 2016, a second Subpoena for Deposition was filed with the [court], commanding James Reynolds to personally appear at [plaintiff's attorney's office] on September 8, 2016, ***. (SEE EXHIBIT C)
>
> 4. *** Notice of said Subpoena for Deposition was served on James Reynolds when a true and correct copy of same was deposited in the U.S. mail on August 25, 2016. (SEE EXHIBIT D)"

Notably, exhibits B and D (the deposition notices) indicated only that they were served by mail "to all attorneys of record." Neither exhibit indicated that the subpoenas were mailed to Reynolds.

¶ 5 In her motion for a rule to show cause, plaintiff also stated that a private process server attempted to serve a deposition subpoena on Reynolds on August 27, 2006. The process server executed an affidavit stating that, when she attempted to serve Reynolds at his apartment building, no one answered the door. She left a note for Reynolds and, according to her affidavit, she "received a call back from a blocked number and the defendant [*sic*] identified himself to me." The caller indicated that he would not accept service and asked the process server not to return to his residence.

¶ 6 On October 4, 2016, the trial court entered an order indicating that plaintiff's motion for a rule to show cause had been withdrawn. The order further provided, "Plaintiff is to serve James Reynolds on or before [October 17, 2016] with subpoena for his deposition or provide additional information as to failed attempts to effectuate service upon James Reynolds." A certificate of mailing indicates that notice of Reynolds's deposition was mailed to "all attorneys of record" on October 12, 2016. On October 17, 2016, the trial court entered an order stating, "fact discovery is closed as of [October 13, 2016]."

¶ 7 On November 14, 2016, defendant filed a motion for summary judgment, contending that the record was devoid of evidence of negligence on defendant's part. Specifically, defendant contended that there was no evidence that defendant had caused the liquid to be spilled on the floor or that defendant knew or should have known of the presence of the liquid. That same day, the trial court entered an order stating, "Plaintiff's Emergency Motion to Re-open [Illinois Supreme Court Rule 213(f)(1)] discovery and for leave to issue a Rule to Show Cause against James Reynolds is denied." The record on appeal contains no such motion.[1] Plaintiff filed her response to defendant's motion for summary judgment on January 1, 2017. She claimed that defendant had constructive notice of the spill because Reynolds was in the vicinity of the spill.[2] The trial court granted defendant's motion for summary judgment, and this appeal followed.

¶ 8 Summary judgment is proper 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." 735 ILCS 5/2-1005(c) (West 2016). The trial court's ruling on a motion for summary judgment is subject to *de novo* review. *Peacock v. Waldeck*, 2016 IL App (2d) 151043, ¶ 3. Recovery for negligence requires proof of a duty owed by the defendant, a breach of that duty, and an injury proximately resulting from that breach. *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001). "Where a business invitee is injured by slipping on a foreign substance on the premises, liability may be imposed if

[1] We permitted defendant to supplement the record on appeal with several exhibits, including plaintiff's emergency motion. However, we subsequently granted defendant's motion to strike those exhibits from the record.

[2] Plaintiff cited deposition testimony that one of defendant's employees, whose name was James, was seen in the vicinity of the spill.

the substance was placed there by the negligence of the proprietor or his servants, or, if the substance was on the premises through acts of third persons or there is no showing how it got there, liability may be imposed if it appears that the proprietor or his servant knew of its presence, or that the substance was there a sufficient length of time so that in the exercise of ordinary care its presence should have been discovered." *Olinger v. Great Atlantic & Pacific Tea Co.*, 21 Ill. 2d 469, 474 (1961). Plaintiff contends that, in determining whether defendant knew or should have known of the spilled liquid, Reynolds's deposition testimony was vital. According to plaintiff, the trial court erred by closing discovery before she had taken Reynolds's deposition. Plaintiff seeks reversal of the summary judgment ruling because, by closing discovery, the trial court prevented her from establishing the existence of a genuine issue of material fact.

¶ 9 Rulings on discovery matters are reviewed under the abuse-of-discretion standard. *Bankers Life & Casualty Co. v. American Senior Benefits LLC*, 2017 IL App (1st) 160687, ¶ 29. "A trial court abuses its discretion only when 'no reasonable person would take the view adopted by the trial court.' *** [Citation]." *Id.* Plaintiff argues that closing discovery was an abuse of discretion because she "made diligent and reasonable attempts to assure that James Reynolds was served the subpoena of deposition." We disagree.

¶ 10 Illinois Supreme Court Rule 204(a)(2) (eff. July 1, 2014) provides:

> "A deponent shall respond to any lawful subpoena of which the deponent has actual knowledge, if payment of the fee and mileage has been tendered. Service of a subpoena by mail may be proved prima facie by a return receipt showing delivery to the deponent or his authorized agent by certified or registered mail at least seven days before the date on which appearance is required and an affidavit showing that the mailing was prepaid

> and was addressed to the deponent, restricted delivery, return receipt requested, showing to whom, date and address of delivery, with a check or money order for the fee and mileage enclosed."

Subpoenas for Reynolds's deposition testimony were issued on July 22, 2016, and August 15, 2016. Plaintiff contends that the *notices* of these subpoenas were served on Reynolds when true and correct copies were deposited in the U.S. mail. It is interesting that plaintiff states that the notices—not the subpoenas themselves—were served on Reynolds. More importantly, however, the record does not show that even the notices were served on Reynolds, let alone the subpoenas. The notices were accompanied by certificates of mailing stating only that the notices had been mailed to "all attorneys of record."

¶ 11 Although the trial court ordered that Reynolds's deposition be taken by August 25, 2016, the record discloses no valid efforts to serve a subpoena on Reynolds before that date. As far as the record shows, plaintiff's only valid attempt to serve a subpoena on Reynolds occurred after the August 25, 2016, deadline. On August 27, 2016, a private process server tried, without success, to personally serve a subpoena on Reynolds at his residence. Reynolds later conveyed his unwillingness to accept service, telling the process server not to return to his residence. Plaintiff argues that, by contacting the process server, Reynolds "inadvertently admitted actual knowledge of the subpoena for his deposition, as required under Rule 204(a)(2)." However, that alone would not obligate Reynolds to respond to the subpoena. Rule 204(a)(2) provides, "A deponent shall respond to any lawful subpoena of which the deponent has actual knowledge, *if payment of the fee and mileage has been tendered*." (Emphasis added.) Ill. S. Ct. R. 204(a)(2) (eff. July 1, 2014). Nothing in the record establishes that plaintiff tendered the fee and mileage for the deposition.

¶ 12 On August 30, 2016, the trial court granted plaintiff 14 days to file a motion for a rule to show cause against Reynolds. On September 20, 2016, the trial court afforded plaintiff an additional seven days to do so. On September 26, 2016, plaintiff filed a motion for a rule to show cause why Reynolds should not be held in contempt for failing to attend his deposition. There was no apparent basis for holding Reynolds in contempt inasmuch as the record does not establish that a deposition subpoena was properly served on Reynolds. Moreover, the record does not show that plaintiff made any attempt to serve the motion for a rule to show cause on Reynolds, and on October 4, 2016, the motion was withdrawn. Plaintiff was then ordered to serve Reynolds with a deposition subpoena on or before October 17, 2016, or to "provide additional information as to failed attempts" to serve Reynolds. Again, although plaintiff mailed notice of Reynolds's deposition to the attorneys of record, the record does not show any valid effort to serve a deposition subpoena on Reynolds. In addition, the record is silent as to what plaintiff told the court, if anything, about her attempts to serve Reynolds. The record contains neither a verbatim transcript of the proceedings on October 17, 2016, nor a permissible substitute for a verbatim transcript. It was plaintiff's burden, as the appellant, "to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed 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, 391-92 (1984). It is firmly established that "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392. Accordingly, we must assume that plaintiff was unable to satisfactorily explain why she had not served Reynolds.

¶ 13 Citing *Wausau Insurance Co. v. All Chicagoland Moving & Storage Co.*, 333 Ill. App. 3d 1116 (2002), plaintiff contends that "[a] trial court's decisions restricting discovery will be

reversed as abuse of discretion *if it* [*sic*] *prevents ascertainment of the truth concerning a substantial issue in* [*sic*] *case*." (Emphasis in original.) In *All Chicagoland Moving & Storage Co.*, it was the *scope* of discovery—not the timing—that was at issue. *All Chicagoland Moving & Storage Co.* does not stand for the proposition that the trial court must afford a party an unlimited amount of time to conduct discovery. Plaintiff also relies on *Dobbs v. Safeway Insurance Co.*, 66 Ill. App. 3d 400 (1978), in which the court reversed a summary judgment entered after the trial court refused to grant the plaintiff a continuance to conduct discovery. Unlike in this case, in *Dobbs* the plaintiff was diligent in his efforts to conduct discovery.

¶ 14 The record does not show that plaintiff made reasonable efforts to secure Reynolds's attendance at a deposition. Accordingly, we cannot say that the trial court abused its discretion by closing discovery.

¶ 15 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 16 Affirmed.