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2018 IL App (3d) 170251-U

Order filed February 16, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THORN M. SMITH, ATTORNEY AT LAW,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellant,)	Peoria County, Illinois.
)	
v.)	Appeal No. 3-17-0251
)	Circuit No. 16-SC-1120
JAMES M. KELLY, ATTORNEY AT LAW,)	
d/b/a/ JAMES KELLY LAW FIRM,)	Honorable
)	Jodi M. Hoos,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Trial court properly denied motion for reconsideration where plaintiff failed to plead or prove the existence of a constructive trust.
(2) Plaintiff's failure to make an offer of proof prevented review of evidentiary issue raised on appeal.
(3) Trial court did not abuse its discretion in denying plaintiff's request for sanctions.
- ¶ 2 Plaintiff, Thorn Smith, filed a small claims complaint against defendant, James Kelly, d/b/a James Kelly Law Firm, based on defendant's refusal to pay a bill. The trial court granted

judgment in favor of defendant and denied Smith's request for sanctions. Smith appeals, arguing that the trial court erred in denying his motion for reconsideration on the grounds that he failed to plead and prove a constructive trust. He also claims that the court abused its discretion in refusing to admit exhibits and denying his request for sanctions. We affirm.

¶ 3 In May of 2015, Kelly hired Thorn Smith as an associate attorney in the James Kelly Law Firm. As part of his immediate assignment, Kelly instructed Smith to draft a third-party insurance defense complaint in a case that Kelly had discussed with Smith in his job interview. Smith called his former employer, Attorney Mark Monroe, and asked him to provide an opinion about the case. After his conversation with Monroe, Smith drafted a letter on James Kelly Law Firm letter head and sent it to Monroe's office. The letter, signed by Smith, stated that Monroe was being hired as a non-testifying expert consultant to provide an insurance coverage opinion at \$175 per hour to determine whether the intended lawsuit against the insurance agency was well grounded.

¶ 4 Three weeks later, Monroe provided Smith with a 20-page opinion letter regarding the lawsuit and submitted an itemized bill for his professional services for 43.9 hours, totaling \$7,682.50. On the basis of Monroe's opinion, Smith filed suit against the agency in question as a James Kelly Law Firm associate.

¶ 5 On July 23, August 4, and August 10, 2015, Monroe sent emails to Smith seeking payment of his bill. According to Smith, he approached Kelly about paying the bill and Kelly told him he would take care of it. Smith further claimed that he was in Kelly's office on August 20, 2015, and Kelly gave his office manager, Julie Motherway, explicit directions to pay half of Monroe's bill.

¶ 6 On September 25, 2015, Monroe sent Smith another email inquiring about payment of his bill. Smith replied later that day that he would address the matter with Kelly. The next day, Smith sent Monroe an email stating that he would pay the bill in full no later than October 1, 2015. Smith then mailed Monroe a personal check in the amount of \$7,682.50. On October 1, Smith sent Monroe an email asking if he had received the check, and Monroe replied that he had.

¶ 7 Smith gave Kelly his monthly expense report for September and included half of Monroe's bill as an expense. He included the remaining half of the bill in his monthly expense report for December. Kelly paid Smith for his other expenses but refused to reimburse Smith for Monroe's bill. Smith gave his two-week notice and left the firm in May 2016.

¶ 8 On July 1, 2016, Smith filed a small claims complaint against Kelly seeking \$7,682.50 in damages plus costs. At trial, Smith testified that Kelly orally agreed to pay for Monroe's expert opinion as to the viability of a third-party lawsuit. Kelly testified that he never authorized Smith to hire Monroe, nor did he agree to pay the bill after he became aware of the charges. Motherway testified that she was Kelly's officer manager. She testified that she was present during a docket meeting in which Kelly spoke to Smith about the Monroe bill and informed him that the firm was not paying it. She stated that Kelly never instructed her to pay Monroe's bill.

¶ 9 In closing arguments, Smith argued that an implied contract existed and that Kelly had agreed to reimburse Smith for his monthly expenses, including the payment of Monroe's bill. In the alternative, Smith argued that, under a constructive trust theory, Kelly was an "involuntary trustee" who owed Smith reimbursement for the expense. The trial court found that Smith failed to prove that Kelly authorized him to hire Monroe and entered judgment in Kelly's favor.

¶ 10 Smith filed a motion for reconsideration or a new trial and a motion for sanctions against Kelly for false pleading and perjury. At the hearing on his postjudgment motions, Kelly argued

that “separate and aside from the contested fact of authority, there was evidence as to a constructive trust, and there was testimony to that.” The trial court responded that it had reviewed the complaint and the complaint did not mention a constructive trust or unjust enrichment. Specifically, the court stated:

“It was simply—it’s basically a breach of an oral contract that the defendant had *** given the authority to go ahead and hire this outside party and then had agreed to then repay for the costs of that. And there’s nothing else that would indicate a construct trust or otherwise.”

The court then noted that even if Smith had properly pled a constructive trust, the testimony and exhibits presented at trial did not satisfy the burden of proof. The court denied Smith’s motion to reconsider, finding that he failed to plead and prove a constructive trust, and denied his request for sanctions.

¶ 11 I. Denial of Motion to Reconsider

¶ 12 Smith argues that the trial court erred in denying his motion for reconsideration or a new trial by holding that he failed to plead and prove a constructive trust. He claims, as he did in his postjudgment motion, that his complaint satisfies the low threshold in small claims court and that the testimony, documentary evidence, and argument at trial support the elements of a constructive trust. Smith also claims that Kelly waived any objection to a constructive trust claim because Kelly failed to object to the sufficiency of the complaint before judgment was entered.

¶ 13 We first address Smith’s argument that Kelly waived any objection to a constructive trust cause of action. Illinois Supreme Court Rule 286(a) states that a defendant who enters his appearance in a small claims complaint does not need to file an answer to a complaint unless

ordered to do so by the court. Ill. S. Ct. R. 286(a) (eff. Aug. 1, 1992). When no answer is ordered, the allegations of the complaint are considered denied and “any defense may be proved as if it were specifically pleaded.” *Id.* Here, Kelly entered his appearance on July 29, 2016, and the court did not order him to file an answer. Thus, the allegations in the complaint are deemed denied and any defense may be proved. Kelly did not waive his objection to a constructive trust claim in response to Smith’s motion to reconsider.

¶ 14 Turning to the merits, under Illinois Supreme Court Rule 282, “[a]n action on a small claim may be commenced by paying to the clerk of the court the required filing fee and filing a short and simple complaint setting forth (1) plaintiff’s name, residence address, and telephone number, (2) defendant’s name and place of residence, or place of business *** and (3) the nature and amount of plaintiff’s claim ***.” Ill. S. Ct. R. 282(a) (eff. July 1, 1997). The nature of the claim must include the dates involved and “other relevant information.” *Id.* Although a plaintiff is not required to plead every element in a small claims complaint, the plaintiff must still clearly notify the defendant as to the nature of the claim to properly state a cause of action. *Miner v. Bray*, 160 Ill. App. 3d 241, 243 (1987).

¶ 15 “A constructive trust is an equitable remedy imposed against one who, by some form of wrongdoing such as actual or constructive fraud, breach of a fiduciary duty, duress, coercion, or mistake, has been unjustly enriched.” *Schultz v. Schultz*, 297 Ill. App. 3d 102, 106-07 (1998). Courts may impose a constructive trust where the parties (1) had an existing fiduciary relationship, and (2) a violation of that relationship results in a constructive fraud or unjust enrichment. *Kauzlarich v. Landrum*, 2 Ill. App. 3d 591, 595 (1971). The violation must be “some form of wrongful or unconscionable conduct.” *Charles Hester Enterprises, Inc. v. Illinois*

Founders Insurance Co., 114 Ill. 2d 278, 293 (1986). The main classes of constructive trusts are (a) actual fraud and (b) abuse of fiduciary relationship. *Id.*

¶ 16 Unless a fiduciary relationship can be shown to exist by operation of law, the party asserting abuse of fiduciary relationship must prove the relationship by clear and convincing evidence. *Gross v. University of Chicago*, 14 Ill. App. 3d 326, 338 (1973). A plaintiff must prove “confidence reposed by one side and domination and influence exercised by the other.” *Id.* Showing the existence of an employer-employee relationship is not enough to establish a fiduciary relationship. *Id.* at 339.

¶ 17 Smith maintains that he sufficiently pled a constructive trust by alleging that he was Kelly’s employee and that he hired Monroe with Kelly’s approval. Alleging the existence of an employer-employee relationship, without more, does not establish a fiduciary relationship. See *Gross*, 14 Ill. App. 3d at 339. Smith’s complaint states that he was hired by Kelly as an associate attorney, that he hired Monroe as an agent of the James Kelly Law Firm, that he paid Monroe with a personal check and that complaint is an attempt to collect a debt. None of the allegations in his complaint establish a fiduciary relationship or a violation of that relationship resulting in constructive fraud or unjust enrichment. See *Kauzlarich*, 2 Ill. App. 3d at 595.

¶ 18 Even if we assume, under the threshold requirements of Rule 282(a), that Smith’s small claims complaint sufficiently pled a cause of action for constructive trust, the trial court properly concluded that Smith failed to meet the burden of proof. At trial, Smith alleged that Kelly abused his fiduciary relationship with Smith as his employee by failing to reimburse him for the expense of Monroe as an expert consultant and, in equity, created a constructive trust. However, Smith failed to prove the elements of a constructive trust. He failed to present evidence of a fiduciary relationship, only the relationship of employee and employer. He also failed to

demonstrate that Kelly abused the fiduciary relationship. Smith further alleged that he relied on defendant's previous reimbursements of his monthly expenses and on Kelly's express directive to his office manager, Julie Motherway, to pay one half of Monroe's bill. These allegations were rebutted by other evidence at trial. Smith admitted that he drafted the engagement letter to Monroe, signed it and sent it to his former employer. He also testified that when he sent the letter to Monroe seeking assistance, he had not yet been reimbursed for any monthly expenses at the firm. No pattern of reliance had been established. Moreover, Smith did not produce any evidence to support his statement that Kelly instructed Motherway to pay Monroe's bill. By contrast, Kelly and Motherway testified that Kelly never agreed to pay the bill and informed Smith that the bill would not be paid by the firm. This evidence fails to demonstrate, by clear and convincing evidence, that Kelly "exercised domination and influence" on which Smith relied with confidence. See *Gross*, 14 Ill. App. 3d at 338.

¶ 19 In this case, Smith filed a complaint for the collection of debt based on breach of contract. The complaint did not allege a constructive trust between Smith and Kelly, nor did the evidence support the creation of an implied trust in equity. Thus, the trial court did not abuse its discretion in denying Smith's postjudgment motion seeking judgment or a new trial on that theory.

¶ 20 II. Admission of Exhibits

¶ 21 Smith argues that the trial court erred in refusing to admit plaintiff's exhibits No. 27 – No. 33.

¶ 22 To preserve an error for appeal regarding a trial court's exclusion of evidence, the moving party must make an offer of proof at trial. *People v. Jackson*, 180 Ill. App. 3d 78, 91 (1989). The offer of proof's purpose is to indicate to the judge and opposing party the offered

evidence's nature and to provide a record for the appellate court that enables it to evaluate the appropriateness of excluding that offered evidence. *Id.* However, if it is apparent the trial court "clearly understood the nature and character" of the offered evidence, an offer of proof is not necessary to preserve the exclusion ruling. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495 (2002); Illinois Rules of Evidence 103(a)(2).

¶ 23 Here, Smith failed to make an offer of proof to perfect his appeal, and he is unable to show that it is apparent that the trial court clearly understood the nature and character of the offered evidence. At trial, Smith offered exhibits No. 27 – No. 33 as the "legal work" he did on the insurance case in response to conversations he had with outside attorneys. He stated that the exhibits represented the work he did in response to legal advice he received from other attorneys. Smith did not mention impeaching Kelly's credibility when he offered them. When the trial court ruled to exclude the exhibits, the court stated, "the fact that you then used that advice to Kelly's benefit, that's neither here nor there, that's not in dispute." The court understood that Smith was using the exhibits to show that his legal work benefitted Kelly's law firm. It is not apparent that the trial court understood the exhibits were being offered for impeachment purposes, as Smith now argues on appeal. Thus, an offer of proof was necessary to preserve the issue, and Smith failed to make an offer of proof. Therefore, his appeal of the trial court's exclusion of the offered exhibits has been forfeited.

¶ 24 III. Sanctions

¶ 25 Smith claims that his motion for sanctions should have been granted because (1) Kelly's false testimony that "Smith was soliciting and contracting others to do his legal work unbeknownst to Kelly and the rest of the law firm" was perjury, and (2) Kelly refused to disclose

the docket meeting minutes from the August 20 meeting at which Kelly instructed Motherway to pay Monroe's bill.

¶ 26 When a party asks that Illinois Supreme Court Rule 137 sanctions be imposed, that party bears the burden of proof. *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458, 467 (1990). The party petitioning for sanctions must show the opposing party made untrue and false allegations without reasonable cause. *In re Estate of Wernick*, 127 Ill.2d 61, 77 (1989). The purpose of imposing sanctions under Rule 137 is to discourage attorney from making "frivolous filings, not to punish parties for making losing arguments." *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 15. If a party makes a claim that has no basis in law or fact, the trial court has discretion whether to impose a sanction. *Id.* Here, the trial court did not abuse its discretion in refusing Smith's request for sanctions. The record does not support Smith's contentions that Kelly committed perjury or that Kelly and Motherway intentionally concealed minutes from the August 20 meeting.

¶ 27 Smith's allegation that sanctions should be awarded because Kelly committed perjury is particularly troubling. To commit perjury, a party who testified must do so falsely and he must know that he is testifying falsely. See *People v. Davis*, 164 Ill. 2d 309, 310 (1995) (a person commits perjury when he makes a false statement under oath that is material to the issue and he does not believe the statement to be true). In this case, Smith testified to his version of the facts, and Kelly testified to his own. Although Kelly's version directly contradicted Smith's testimony, his conduct does not satisfy the elements of criminal perjury and it is not sanctionable. If defendant's testimony was sanctionable, every party in a civil complaint would have a viable claim for sanctions against the opposing party. As the trial court appropriately

noted, “just because you may not agree with the other version of the facts, doesn’t make it sanctionable.” The trial court properly denied Smith’s motion for sanctions.

¶ 28

CONCLUSION

¶ 29

The judgment of the circuit court of Peoria County is affirmed.

¶ 30

Affirmed.