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2018 IL App (3d) 170615-U

Order filed October 1, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

MARTA GLOD,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	
	)	Appeal No. 3-17-0615
BULLDOG EXPRESS, INC., and DANIEL	)	Circuit No. 14-L-720
McNAMARA, Individually and as	)	
President of Bulldog Express, Inc.,	)	Honorable
	)	John C. Anderson,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice Holdridge specially concurred.

ORDER

¶ 1 *Held*: The trial court erred when it granted summary judgment in favor of defendants because genuine issues of material fact existed at the time of the court's ruling.

¶ 2 In this case, Will County case No. 14-L-720, Marta Glod (Marta) filed a second amended complaint against Bulldog Express, Inc. and Daniel McNamara (defendants),[1] individually, and

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[1]For purposes of clarity, we note that Bulldog Express, Inc. and Daniel McNamara were not named together as defendants in certain filings and counts material to this appeal. Thus, where necessary, we refer to each defendant individually as defendant-Bulldog or defendant-McNamara.

in his capacity as president of Bulldog Express, Inc. Marta's second amended complaint requested monetary damages and alleged that defendants' failed to comply with the statutory mandates of the Illinois Income Withholding for Support Act (the Act). 750 ILCS 28/1 *et seq.* (West 2012). The trial court granted defendants' motion for summary judgment pertaining to Marta's second amended complaint. Marta assigns error to the trial court's ruling.

¶ 3 FACTS

¶ 4 Marta and Jacek Glod (Jacek) were married on February 25, 1995. During the course of the marriage the couple had four children. On April 19, 2012, Jacek filed a petition for dissolution of marriage in Cook County case No. 12-D-3897 (dissolution proceeding). On October 22, 2013, the trial court entered a pretrial order in the dissolution proceeding requiring Jacek to pay temporary support to Marta pending a final resolution of the dissolution proceeding. The temporary order required Jacek to pay unallocated support in the amount of $6000 per month, plus $3000 per month to reduce the accumulated arrearage.

¶ 5 In October 2013, Jacek was employed by defendants. On March 14, 2014, as part of the dissolution proceeding, Marta filed a petition for rule to show cause against defendant-Bulldog.[2] Marta's petition for rule to show cause alleged that defendant-Bulldog intentionally refused to provide information and/or begin withholding the proper amount of court-ordered temporary support from Jacek's paychecks as required by the Act. 750 ILCS 28/1 *et seq.* (West 2012). Marta's petition for rule to show cause requested the court to enter an order requiring defendant-Bulldog to pay Marta the amount that should have been withheld from Jacek's paychecks, and also requested the trial court to impose statutory penalties against defendants.[3]

[2]We note that Marta's petition for rule to show cause did not name defendant-McNamara.
[3]The record does not indicate whether Marta's rule to show cause ever went to hearing.

¶ 6 On February 18, 2015, the circuit court of Cook County entered a judgment of dissolution in the dissolution proceeding.[4] The trial court's judgment of dissolution contained the following sentence:

> "As [Jacek] did not make enough from [defendant-Bulldog] alone to enable the company to withhold the full ordered amount, [defendant-Bulldog] properly withheld 40% of [Jacek's] income, in accordance with federal law, and [Jacek] was required to pay the remainder."

¶ 7 On September 18, 2014, Marta filed a complaint in Will County case No. 14-L-720, which generally alleged that defendants did not withhold the proper amount from Jacek's paycheck as required by the Act. 750 ILCS 28/1 *et seq*. (West 2012). More than two years later, and after the dissolution, Marta filed a second amended complaint in Will County case No. 14-L-720. Count I of the second amended complaint in Will County case No. 14-L-720 alleged that defendant-Bulldog breached its duty to withhold income from Jacek's paycheck as required by the Act, and prayed for statutory damages in the amount of $1,540,000. Count II alleged that defendant-Bulldog breached its statutory duty to withhold income from Jacek's paychecks and requested the trial court to enter an order finding defendant-Bulldog liable for damages in the amount of $23,761.44, plus accrued interest, for the support that should have been withheld from Jacek's paychecks. In the alternative to count I, count III asserted that defendant-Bulldog should pay $120,000 in damages for failing to withhold any monies from Jacek's paychecks from November 1, 2013, through January 16, 2014.[5] Count III also alleged that when defendant-Bulldog finally began withholding support from Jacek's paychecks on January 23, 2014,

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[4]The trial court's decision in the dissolution proceeding was upheld by the First District in 2017 IL App (1st) 151768-U.

[5]Marta calculated these damages based on $10,000 for each of the 12 paychecks Jacek received from November 1, 2013, through January 16, 2014.

defendant-Bulldog failed to timely remit those withholdings to the Illinois State Disbursement Unit. Marta alleged she was personally entitled to receive an additional $35,600 in damages for Bulldog's untimely payments to the Illinois State Disbursement Unit. Count IV alleged that defendant-McNamara, in his individual capacity, was personally liable in the amount of $23,761.44 for willfully failing to withhold the full amount of support from Jacek's paychecks as president and owner of Bulldog Express.

¶ 8 On May 10, 2017, defendants filed a motion to dismiss Marta's second amended complaint in Will County case No. 14-L-720. The trial court denied defendants' motion to dismiss on May 19, 2017. The trial court reasoned that defendants' motion to dismiss could not be granted, in part, because the court could not make a finding of fact at the pretrial stage regarding whether defendants' conduct was knowing or willful in the context of a section 2-619 motion to dismiss.

¶ 9 On July 20, 2017, defendants filed a motion for summary judgment, a separate answer to Marta's second amended complaint in Will County case No. 14-L-720, and affirmative defenses to the second amended complaint. Defendants' answer denied, and/or denied in part, paragraphs: 1-7, 9-11, 21, 25-32, 34, 39-41, 43-44, 50-61, 65, 67-68, 70-72, 75-80, 82-90, 94, and 96-98.

¶ 10 On September 6, 2017, the trial court conducted a hearing on defendants' motion for summary judgment. During the hearing, defendants argued that they were entitled to summary judgment on *res judicata* grounds because another court made findings in the dissolution proceeding addressing defendants' compliance with the withholding order. Defendants also argued that the record failed to show a willful violation on behalf of defendants.

¶ 11 Marta resisted summary judgment on the grounds that defendants were not parties to the dissolution proceeding, Cook County case No. 12-D-3897, and that the withholding issues were not fully addressed or finally resolved in the dissolution proceeding.

¶ 12 The record contains a written order where the trial court granted defendants' motion for summary judgment "for the reasons stated in the motion." In addition, the written order dated September 6, 2017, contained a finding that "[Marta] has not established a question of material fact re the existence of a knowing/willing violation."

¶ 13 On September 18, 2017, Marta filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 On appeal, Marta assigns error to the trial court's decision granting summary judgment in favor of defendants on the grounds that many material facts were disputed by the parties. Defendants have not submitted an appellate brief for our consideration in this appeal. However, since the fairly simple record on appeal contains the relevant pleadings together with attached exhibits, and the purported errors are clear and readily decidable, we are able to address the merits of this appeal without the aid of defendants' brief. *Lynn v. Brown*, 2017 IL App (3d) 160070, ¶ 7.

¶ 16 Section 2-1005(c) of the Illinois Code of Civil Procedure provides that summary judgment shall be rendered when "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). Thus, summary judgment is inappropriate where "material facts are disputed." *Willie Pearl Burrell Trust v. City of Kankakee*, 2016 IL App (3d) 150398, ¶ 10. When determining whether a genuine issue of material fact exists so as to preclude summary judgment, "the pleadings,

depositions, admissions and affidavits must be construed strictly against the movant and liberally in favor of the opponent." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. Summary judgment is a drastic measure and must only be granted when "the right of the moving party is clear and free from doubt." *Id*. The trial court's ruling on a motion for summary judgment is reviewed *de novo*. *Willie Pearl Burrell Trust*, 2016 IL App (3d) 150398, ¶ 10.

¶ 17 Based on our careful review of the record, we conclude that defendants' answer to Marta's second amended complaint in Will County case No. 14-L-720, filed the same day as defendants' motion for summary judgment, denied and/or denied in part, paragraphs: 1-7, 9-11, 21, 25-32, 34, 39-41, 43-44, 50-61, 65, 67-68, 70-72, 75-80, 82-90, 94, and 96-98. In fact, regarding defendants' purported knowing failure to withhold income, section 35 of the Act provides that:

> "The failure of a payor, on more than one occasion, to pay amounts withheld to the State Disbursement Unit within 7 business days after the date the amount would have been paid or credited to the obligor creates a presumption that the payor knowingly failed to pay over the amounts." 750 ILCS 28/35(a) (West 2012).

¶ 18 Marta and defendants still dispute whether defendants received a copy of the uniform order for support or the notice of income withholding for support entered by another court in the Cook County dissolution proceeding. The parties also dispute the number of paychecks Jacek received during the relevant time frame. In addition, the parties dispute the percentage of income defendants actually withheld from some of Jacek's paychecks.

¶ 19 With respect to the affirmative defense of *res judicata*, the parties dispute whether either defendant became a party in the dissolution proceeding, participated in the dissolution proceeding, or had similar interests to the named respondent in that case. Nothing in this record

serves to conclusively establish answers to any of these questions, thus, a finding of *res judicata* would be improper. Consequently, based on our review of the record and the arguments presented, it appears multiple material facts were still in dispute, and defendants were not entitled to a judgment as a matter of law.

¶ 20 Therefore, we conclude the trial court erred by granting summary judgment in favor of defendants with respect to Marta's second amended complaint in Will County case No. 14-L-720.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Will County is reversed.

¶ 23 Reversed.

¶ 24 JUSTICE HOLDRIDGE, specially concurring.

¶ 25 I join in the majority's judgment. I write separately to share my analysis, which I believe governs the resolution of the defendants' motion for summary judgment, and to provide additional support for the majority's holding.

¶ 26 In support of its motion for summary judgment, the defendants submitted: (1) a copy of a February 18, 2015 judgment for the dissolution of Marta and Jacek Glod's marriage in which the trial court stated that defendant Bulldog Express, Inc. (Bulldog) had "properly" withheld 40% from Jacek's paychecks, which the court concluded was the maximum amount allowed by federal law because Jacek did not earn enough from Bulldog to enable Bulldog to withhold the entire amount previously ordered by the court; (2) a copy of our appellate court's order affirming the trial court's dissolution judgment (which Jacek had appealed); and (3) the affidavit of Jacek. In his affidavit, Jacek swore that: (1) from the time the trial court's support order was entered in October 2013 until January 13, 2014, he made support payments directly to Marta through his

attorney; and (2) Jacek discussed these payments with Tina Moreno, who "was employed in Office Operations with [Bulldog]," "so that she knew these payments had been made and did not make duplicate payments."

¶ 27 In her response to the defendants' motion for summary judgment, Marta did not submit any counter-affidavits rebutting the evidence presented by the defendants. Instead, Marta relied on: (1) the fact that Bulldog had denied certain allegations in Marta's second amended complaint its verified answer; and (2) unverified claims in her response brief that certain material facts were disputed.

¶ 28 Marta's response was inadequate. "To resist a motion for summary judgment, the opponent must provide some factual basis that would arguably entitle him to judgment." *Fields v. Schaumburg Firefighters' Pension Board*, 383 Ill. App. 3d 209, 224 (2008); see also *Ross v. Dae Julie, Inc.*, 341 Ill. App. 3d 1065, 1069 (2003) ("While a plaintiff [opposing summary judgment] need not prove his case during a summary judgment proceeding, he must present some evidence to support each element of his cause of action."). Facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion. *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986); *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 31. A verified answer to the complaint does not substitute for specific affidavits in a summary judgment proceeding. *Fryison v. McGee*, 106 Ill. App. 3d 537, 539 (1982). Accordingly, denials in a defendant's answer do not create a material issue of genuine fact to prevent summary judgment. *Purtill*, 111 Ill. 2d at 241; see also *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49 (holding that a party opposing summary judgment may not stand on his or her pleadings to create genuine issues of material fact). Nor do unsupported assertions in a party's

brief in opposition to summary judgment. See *Frederick v. Professional Truck Driver Training School, Inc.*, 328 Ill. App. 3d 472, 480 (2002) ("The mere suggestion that an issue of material fact exists, without supporting evidence, is insufficient to create one."). Accordingly, Martha failed to present evidence creating a genuine issue of material fact in opposition to the defendants' motion for summary judgment.

¶ 29 It appears that Marta might have declined to file any counteraffidavits or other admissible evidence because she did not believe that she was required to submit any such evidence in light of the statutory presumption contained in section 35(a) of the Illinois Income Withholding for Support Act (the Act) (750 ILCS 28/35(a) (West 2012)). That section provides that:

> "The failure of a payor, on more than one occasion, to pay amounts withheld to the State Disbursement Unit within 7 business days after the date the amount would have been paid or credited to the obligor creates a presumption that the payor knowingly failed to pay over the amounts." 750 ILCS 28/35(a) (West 2012).

Marta argues that, because she has alleged that Bulldog repeatedly failed to pay amounts withheld to the State Disbursement Unit within the time limit prescribed by section 35(a), there is a presumption that Bulldog's actions were "knowing," and the burden has shifted to the defendants to rebut this presumption.

¶ 30 However, Marta has not presented an affidavit or any other admissible evidence supporting her allegation that Bulldog made any such late payments. She made that allegation in her verified second amended complaint, but the defendants denied the allegation in their verified answer. As noted above, Marta may not rest on her pleadings to create a genuine issue of material fact sufficient to avoid summary judgment. *Korzen*, 2013 IL App (1st) 130380, ¶ 49; see also *Estate of Henderson v. W.R. Grace Co.*, 185 Ill. App. 3d 523, 528 (1989) ("Allegations

of a complaint alone are insufficient to contradict evidentiary facts supporting a motion for summary judgment[.]").

¶ 31 Moreover, even if it were undisputed that the section 35(a) presumption applied in this case, that presumption would not apply to all of the claims that Marta raised against the defendants. By its plain terms, the presumption applies only when a payor fails, on more than one occasion, to "*pay amounts withheld* to the State Disbursement Unit" in a timely manner. (Emphasis added.) 750 ILCS 28/35(a) (West 2012). When that occurs, the plaintiff is entitled to a presumption that the payor "knowingly failed to pay over" said late payments to the State Disbursement Unit. The presumption would not apply to Bulldog's alleged knowing and willful *failure to withhold* payments from Jacek's paycheck prior to January 23, 2014, as required by the trial court's notice of income withholding for support (Notice). Nor would it apply to Bulldog's alleged failure to make payments required by the Notice before Bulldog began to withhold such payments. As a matter of law, Marta was not entitled to a statutory presumption that Bulldog's alleged failure to withhold or pay any such payments was "knowing." Thus, Marta may not rely on the section 35(a) presumption to avoid summary judgment as to those claims.

¶ 32 However, despite the deficiencies in Marta's response to the defendants' motion for summary judgment, I agree with the majority that summary judgment was not warranted in this case. "Even if the party opposing the motion for summary judgment fails to file counteraffidavits, the moving party is not entitled to summary judgment unless the affidavits filed in support of the motion establish, as a matter of law, its right to the judgment. *Fryison*, 106 Ill. App. 3d at 539. The defendants' failed to satisfy this standard because the evidence they submitted did not entitle them to judgment as a matter of law.

¶ 33 As an initial matter, the defendants argued that the trial court's finding in the dissolution judgment order that Bulldog had "properly" withheld 40% of Jacek's income pursuant to federal

law was "*res judicata*" and that Marta was therefore barred from claiming that Bulldog had violated the Act by failing to withhold the amounts required by the Notice. I agree with the majority that the defendants' *res judicata* argument fails. The doctrine of *res judicata*, also known as claim preclusion, provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996); *Ross Advertising, Inc. v. Heartland Bank and Trust Co.*, 2012 IL App (3d) 110200, ¶ 29. *Res judicata* promotes judicial economy by preventing repetitive litigation and also protects parties from being forced to bear the unjust burden of relitigating essentially the same case. *Arvia v. Madigan*, 209 Ill. 2d 520, 533 (2004). *Res judicata* applies only if the following three requirements are met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008); *Ross Advertising*, 2012 IL App (3d) 110200, ¶ 31.

¶ 34 The defendants in this case (Bulldog and McNamara) were not parties to the dissolution action, and it is doubtful that Jacek (the sole defendant in the dissolution action) was in privity with either of the defendants in this case. In any event, the cause of action in the dissolution action is not identical to the cause of action asserted by Marta in this case. In this case, Marta alleges that the defendants violated the Act (and are thereby liable to pay compensatory damages and statutory penalties) because they failed to fulfil their duties as payors to withhold and pay over certain amounts from Jacek's paycheck. That claim was not litigated in the dissolution action. Nor should it have been. The dissolution proceeding determined Jacek's support obligations under the Illinois Marriage and Dissolution of Marriage Act (IMDMA) (750 ILCS 5/101 *et seq.* (West 2014), which are separate from and independent of the defendants'

obligations as payors under the Act. Accordingly, the trial court's dissolution judgment does not bar Marta's claims in this case.

¶ 35 In an event, even if dissolution judgment had *res judicata* effect here, it would not preclude all of Marta's claims. It is undisputed that Bulldog did not withhold *any* amounts from Jacek's paycheck prior to January 14, 2014. The trial court's finding in the dissolution action that Bulldog withheld the proper amount from that date forward would not preclude Marta's claim that Bulldog violated the Act by knowingly failing to withhold any amounts prior to January 14, 2014. Nor would the dissolution judgment bar Marta's claims relating to any late payments allegedly made by Bulldog after the dissolution judgment was entered on February 18, 2015.

¶ 36 Although the defendants' preclusion argument before the trial court was couched in terms of *res judicata*, at times the defendants appeared to suggest that the trial court's finding that Bulldog's withholdings were proper had collateral estoppel effect. The doctrine of collateral estoppel, also known as issue preclusion, bars relitigation of an issue that was already decided in a prior case. *Hurlbert v. Charles*, 238 Ill. 2d 248, 255 (2010); *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77 (2001). Collateral estoppel applies when the issue decided in the prior adjudication is identical with the one presented in the current action, there was a final judgment on the merits in the prior adjudication, and the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior adjudication. *Hurlbert*, 238 Ill. 2d at 255; *Du Page Forklift Service*, 195 Ill. 2d at 77. Additionally, the party sought to be bound must actually have litigated the issue in the first suit and a decision on the issue must have been necessary to the judgment in the first litigation. *American Family Mutual Insurance Co. v. Savickas*, 193 Ill. 2d 378, 387 (2000). Even when these threshold requirements for collateral estoppel are satisfied, the doctrine should not be applied unless it is clear that no

unfairness will result to the party sought to be estopped. *Id.* at 388. The court determining whether estoppel should apply "must balance the need to limit litigation against the right to an adversarial proceeding in which a party is accorded a full and fair opportunity to present his case." *Id.*; see also *Blair v. Bartelmay*, 151 Ill. App. 3d 17, 20 (1986) (ruling that collateral estoppel "will only apply where the party against whom it was asserted had a full and fair opportunity to litigate the issue in the prior proceeding, and it will not be applied if an injustice results to the party under the circumstances of the case"). Also potentially relevant is the party's incentive to litigate the issue in the prior action. *Savickas*, 193 Ill. 2d at 387.

¶ 37 The defendants cannot satisfy the requirements of collateral estoppel here. As noted, it is doubtful that the defendants were in privity with Jacek. Regardless, the issue of whether the defendants satisfied their obligations under the Act was not litigated in the dissolution action, let alone necessary to the dissolution judgment. Nor did the defendants have a full and fair opportunity to litigate that issue in the dissolution action. In any event, even if the dissolution action had some preclusive effect in this case, it would not bar Marta from litigating issues relating to: (1) Bulldog's failure to withhold amounts prior to January 14, 2014; or (2) any alleged late payments that Bulldog made after the trial court's dissolution order was issued in February 2015. Accordingly, the trial court's dissolution judgment does not require judgment for the defendants as a matter of law.

¶ 38 Nor does Jacek's unrebutted affidavit entitle the defendants to summary judgment. In his affidavit, Jacek swore that: (1) from the time the trial court's support order was entered in October 2013 until January 13, 2014, he made support payments directly to Marta through his attorney; and (2) Jacek discussed these payments with Tina Moreno, who "was employed in Office Operations with [Bulldog]," "so that she knew these payments had been made and did not make duplicate payments." If Jack paid Marta the entire amounts required by the Notice for all

pay periods from October 2013 through January 13, 2014 in a timely manner, Marta would not be entitled to collect duplicate payments or statutory penalties from the defendants for those pay periods.[6] However, although Jacek avers that he "made support payments" during those pay periods, he does not indicate the amount of any such payments he made. If Jacek failed to pay Marta the entire amount required by the Notice for any pay period, Bulldog would obligated to withhold and pay the deficiency to the State Disbursement Fund. In addition, Jacek's affidavit only covers the time period from the issuance of the trial court's support order in October 2013 until January 13, 2014. Jacek does not claim that he made any support payments directly to Marta thereafter. Thus, Jacek's affidavit does not preclude Marta from seeking damages or penalties for Bulldog's alleged failure to make timely payments after January 13, 2014.

¶ 39 In sum, although Marta failed to effectively oppose the defendants' summary judgment motion with admissible evidence, the evidence the defendants submitted in support of their motion did not entitle them to judgment as a matter of law. I therefore join the majority in reversing the circuit court's grant of summary judgment for the defendants.

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[6]Section 45(f) of the Act provides that the obligee (here, Marta) "shall provide notice to the payor and Clerk of the Circuit Court of any other support payment made." 750 ILCS 28/45(f) (West 2012). Moreover, section 35(a) of the Act provides, in pertinent part: "[i]t shall be the duty of any payor who has been served with an income withholding notice to deduct and pay over income as provided in this Section. The payor shall deduct the amount designated in the income withholding notice, *as supplemented by any notice provided pursuant to subsection (f) of Section 45*. (Emphasis added.) 750 ILCS 28/35(a) (West 2014). Section 35(a) arguably suggests that a payor's duty to deduct and withhold payments does not extend to support payments that were or should have been included in a section 45(f) notice (*i.e.*, to amounts that an obligee had already received from some other source). Because section 35(a) is penal in nature and creates a new liability on the part of payor, we must resolve any ambiguity on this issue in the defendants' favor. *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 12. Accordingly, in my view, Bulldog was not required to withhold and pay over any amounts that Jacek paid directly to Marta.