2019 IL App (2d) 180299-U
No. 2-18-0299
Order filed January 28, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EDITH REYES,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 17-SR-297
	)	
KNB MOTORS, INC.	)	Honorable
	)	Peter W. Ostling,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's section 2-1401 petition, as defendant did not state a meritorious defense: it did not make any allegation to defeat plaintiff's claim that the discovery rule tolled the limitations period, its allegation that the vehicle that it sold to plaintiff had not been deemed a "total loss" would not have averted the judgment, and the judgment reflected the proper measure of damages.

¶ 2 KNB Motors, Inc. (KNB), the defendant in a consumer fraud suit brought by Edith Reyes, appeals from the denial of its petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)) in which it sought to vacate a default judgment in favor of Reyes. It asserts that the court improperly weighed the strength of the defenses it raised

in its petition against the allegations that Reyes interposed to defeat those defenses. We hold that the court's treatment of KNB's defenses was proper; we thus affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 22, 2017, Reyes filed a four-count complaint against KNB. The core of the complaint was an allegation that, on August 11, 2012, KNB sold Reyes and her husband a used car without telling them that it had been declared a total loss for insurance purposes. They paid $12,983 for the car, a 2008 Honda Accord. In August 2015, Honda sent them correspondence saying that, because the piston rings in that model of vehicle might stick, the manufacturer's warranties for certain vehicles would be partially extended, but that the warranty extension would not apply to any vehicle that had been declared a total insurance loss. When Reyes took the car to a Honda dealer for the repair, she was told that the car had been declared a total loss. On researching the title history, Reyes learned that a company incorporated by KNB's president, Viktoriya Kitsutkin, had purchased the car from Progressive Insurance Company. Reyes asserted that KNB therefore should have been aware that the car was a total loss. She alleged that the difference in value between a car that had not been a total loss and her car was $5800. She also alleged that it would cost $2940 to repair the piston rings. Her complaint set out two theories of recovery: that the sale was a violation of the Consumer Fraud and Deceptive Business Practices Act (Act) (815 ILCS 505/1 *et seq.* (West 2016)), and that she had been wrongfully deprived of the benefit of the bargain.

¶ 5 The affidavit of a special process server filed with the court stated that the process server had served KNB on May 7, 2017, by leaving copies of the complaint with Kitsutkin at what he determined to be her home address. KNB did not appear and, on June 5, 2017, the court entered a default judgment against it for $5800.

¶ 6 Reyes filed a third-party citation to discover assets against Kitsutkin and KNB's bank on August 1, 2017.

¶ 7 KNB appeared on November 30, 2017, and filed a petition under section 2-1401 that day. It asserted that the judgment against it should be vacated because (1) it was never served with the complaint; (2) KNB had a meritorious defense in that the consumer fraud action was filed beyond the statute of limitations; (3) it had a second meritorious defense in that the vehicle was not a total loss; and (4) it had a third meritorious defense in that Reyes had signed an "as is—no warranty" acknowledgement in the purchase agreement and that KNB had made no representations as to the title history.

¶ 8 Reyes responded. She argued (1) that KNB did not deny that Kitsutkin lived at the address given in the server's affidavit or that the description of her in the affidavit was accurate; (2) that the "discovery rule" applied to her consumer fraud complaint, so that she had filed her complaint within the limitations period; (3) that she had documentary evidence that her vehicle had been declared a "total loss"; and (4) that under the Act the omission of a material fact is illegal, so that both the lack of a positive misrepresentation and the "as is" clause were irrelevant. Further, she attached a December 12, 2016, report assessing the damage to her car. It stated, "Based on the value of a comparable vehicle and the amount of damage repaired along with the condition of the repairs[,] our analysis has established the fair retail market value of and the Diminished Value of your vehicle." It estimated that the "Pre-collision Value" would have been $12,800 and that the "Post-repair value" was $7000, so that the vehicle's value was diminished by $5800, which was the amount of damages in the judgment.

¶ 9 KNB filed a reply; it asserted that the Wisconsin title documents that Reyes had attached to her complaint, which included the phrase "Claim Paid," implied that the cost to repair

collision damage had been between 30% and 70% of salvage value, so that the vehicle could not have been a total loss. It further asserted that Reyes's theory of the case assumed that it was required to get the car's title history before the sale.

¶ 10 At the hearing on the petition, Reyes asked to present the testimony of the process server. KNB offered to stipulate that he would testify that his affidavit was correct. The court then asked the parties, "[D]o we stipulate that the exhibits that [are] attached to the motion [*sic*], your response, and the reply constitutes [*sic*] the evidence that the Court will be considering for purposes of the motion hearing this morning[?]" Both parties agreed. After argument, the court denied the petition, in a written order that included the following findings:

> (1) Although a consumer fraud claim has a three-year limitations period, the discovery rule applied to toll it; Reyes discovered the defect no earlier than August 2015, so that the complaint was filed within the limitations period.
>
> (2) Reyes had nonhearsay evidence that the car had been declared a total loss.
>
> (3) Although no state's Secretary of State had noted that the vehicle was a total loss, the evidence as a whole, and particularly the presence of an insurance company, Progressive Insurance, in the chain of title, showed that it was.
>
> (4) The lack of any affirmative representation about the car's status by KNB to Reyes was not fatal to Reyes's claim, as information about a total loss or major collision damage is a material fact in a vehicle purchase. Further, because KNB's sister company bought the car from Progressive Insurance, KNB was at least on notice of the total loss or collision damage. Finally, an "as is" condition does not excuse a seller from disclosing material information known to it.

The court nevertheless ruled that KNB "did act with diligence in the presentation of [its]

petition." It did not make any finding concerning KNB's diligence in presenting its defenses to the trial court in the original action. KNB filed a timely notice of appeal.

¶ 11 II. ANALYSIS

¶ 12 On appeal, KNB argues that the court improperly weighed the strength of the defenses it raised in its petition against the allegations that Reyes interposed to defeat those defenses. That is, it argues that the court should have considered only whether its defenses were legally adequate, and not whether Reyes could defeat the defenses. Reyes, in response, contends that KNB's sole claim of error is that the court should have held an evidentiary hearing. In reply, KNB asserts that Reyes misreads its brief and that it in fact makes the argument just described.

¶ 13 Initially, we must decide what claims and arguments KNB has developed with sufficient clarity to permit us to address them on appeal. We originally read KNB's brief much as Reyes did—as a claim that the court improperly deprived it of an evidentiary hearing. However, rereading the original brief with the aid of KNB's reply brief, we are persuaded that KNB indeed argued that the court improperly looked beyond the legal sufficiency of KNB's defenses. Specifically, we determine that it has argued for the sufficiency of two defenses and outlined an argument for a third. One, it argues that its statute-of-limitations defense was sufficient and that the court should not have considered Reyes's allegations supporting the tolling of the limitations period by application of the discovery rule. Two, it argues that the court erred when it ruled against it on its second proposed defense: that it could show that the car was never declared a "total loss." Three, it also outlines, but fails to fully support, an argument that it had one more: that the underlying judgment was an unjust windfall to Reyes in that, until Honda refused to do the warranty work in 2015, her losses were merely "theoretical," and not out-of-pocket. We note two further claims that KNB asserts but forfeits by failing to develop them adequately: it asserts

that it had "the *** meritorious defenses, *** that the car salesman had made no representations to REYES about the history or condition of the used car and *** that REYES had signed a document acknowledging *** that the sale [was] 'as-is.' " See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (the appellant's brief must contain "the contentions of the appellant and the reasons therefor"); see also *Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001) ("Mere contentions, without argument or citation of authority, do not merit consideration on appeal."). Finally, to the extent that KNB intended to raise other specific claims, we hold that it did not develop them sufficiently and thus forfeited them as it did the final two claims.

¶ 14 We hold that the court did not improperly weigh the evidentiary strength of any of KNB's defenses against the case that Reyes made. Rather, it properly considered each defense on its merits, determining as a matter of law that none of them would defeat the judgment.

¶ 15 KNB's section 2-1401petition sought relief from the judgment in Reyes's favor on the basis that KNB had defenses that would have prevented the court's entry of that judgment; this is the kind of petition the supreme court discussed in *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986), the foundational case for the standards for this kind of section 2-1401 petition.[1] Under the *Airoom* standards:

[1] One "defense" that we address—that Reyes sought improper damages—is more a challenge to the sufficiency of the complaint than a defense as such. Therefore, it is not precisely an *Airoom*-type claim. However, because we can easily conclude that KNB has not set out a basis for reversal with respect to this "defense," without considering what sort of section 2-1401 claim it might be, that is what we do.

> "To be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Airoom*, 114 Ill. 2d at 220-21.

In this context, a meritorious defense is one that, were it credited by the relevant trier of fact, would *defeat* the plaintiff's claim in the underlying action. *Lyons Lumber & Building Center, Inc. v. 7722 N. Ashland, LLC*, 2016 IL App (3d) 140487, ¶ 22.

¶ 16 KNB suggests that uncertainty exists as to the standard of review applicable to the denial of an *Airoom*-type petition. Our supreme court resolved any such uncertainty in *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, a case that KNB fails to consider. In *Warren County*, the supreme court held that, contrary to some interpretations of its holding in *People v. Vincent*, 226 Ill. 2d 1 (2007), trial courts retain discretion to give weight to the equities of the matter when granting or denying *Airoom*-type petitions, so that the *overall* review of the disposition of such a petition is for an abuse of discretion. *Warren County*, 2015 IL 117783, ¶¶ 36-53. However, here and in most cases,[2] "the preliminary issue of whether a defendant has presented a meritorious defense is inherently a question of law and is, therefore, subject to *de novo* review." *Lyons Lumber*, 2016 IL App (3d) 140487, ¶ 22.

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[2] We do not here need to address what standard of review applies when a petitioner seeks relief from a judgment that was entered as a matter of the court's discretion; unlike the defenses at issue here, what facts could constitute a meritorious defense to a judgment of that type is not necessarily *inherently* a matter of law.

¶ 17 KNB argues first that the court should have ruled that its statute-of-limitations defense was meritorious because the basic three-year limitations period had run and that the issue of whether Reyes could defeat that defense by invoking the discovery rule should have been reserved for trial. KNB is incorrect. Although a statute of limitations is normally an affirmative defense, when a complaint concedes that the usual time for filing has passed, the plaintiff has the burden of pleading facts to overcome the limit. See *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 456 (2006) (stating this rule with a claim of fraudulent concealment potentially tolling the limitations period). Thus, Reyes's complaint properly included both facts amounting to an admission that she filed the complaint beyond the basic three-year limitations period *and* allegations that would toll the period through operation of the discovery rule. The allegations invoking the discovery rule were therefore integral to the complaint. Thus, to have a "meritorious defense" in the sense required by *Airoom*, KNB needed facts tending to defeat Reyes's allegations that the limitations period was tolled, not just a statute-of-limitations defense. KNB presented no such facts.

¶ 18 KNB next argues that it has a meritorious defense in that it has evidence that the car was legally not a "total loss." We are not persuaded that such evidence would have averted the judgment. We recognize that Reyes alleged, for instance, that "[t]he fact that the vehicle had been declared a total loss was material to Plaintiff's purchase of the vehicle from Defendant." However, although the phrase "total loss" appears repeatedly, the car's being a total loss was not a fact necessary to the judgment. In particular, Reyes also alleged, "The difference in value between a 2008 Honda Accord coupe with a clean title history, and the Honda [that] Plaintiff bought from Defendant is $5,800." But, given the unchallenged evidence that Honda declined to do warranty work on Reyes's car based on information of record, the car's title history was

evidently not "clean." Moreover, the report attached to Reyes's reply showed that the measure of damages in the judgment came from the report's estimate that, based on the degree of collision damage and the condition of the repairs, the car's value was diminished by $5800. In short, the judgment depended on KNB's having notice of the collision damage because its sister company bought the car from an insurance company and on the economic loss from the collision damage, but not on the car's being a "total loss" as such. Thus, evidence to defeat the allegation that the car was a "total loss" was not a meritorious defense to the judgment.

¶ 19 The last point of KNB's that we consider is its assertion that, because Reyes did not have out-of-pocket expenses from damage to the car, the damages were "theoretical" and the judgment was a windfall. We do not agree. As we noted, KNB does not support this assertion properly. It fails to cite any authority on the issue of what an appropriate measure of damages would be for a claim of this kind, so we may deem the argument forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (the appellant's brief must contain "the contentions of the appellant and the reasons therefor, with citation of the authorities"); see also *Elder*, 324 Ill. App. 3d at 533. In any event, diminution of the expected resale value, which was the measure of damages Reyes claimed, is a proper measure of damages in a consumer fraud action. *Dewan v. Ford Motor Co.*, 363 Ill. App. 3d 365, 369 (2005). Thus, the judgment is not a windfall.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the circuit court of Du Page County's denial of KNB's section 2-1401 petition.

¶ 22 Affirmed.