FIRST DIVISION
FILED: March 29, 2013

No. 1-11-3800

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RFJ INVESTMENTS, LLC, Plaintiff-Appellant, v. CHICAGO TITLE AND TRUST COMPANY, Defendant-Appellee. (Tomkar Development, LLC and Thomas Lieber, Defendants).	)	Appeal from the Circuit Court of Cook County. No. 08-L-013376 Honorable Bill Taylor, Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment affirmed where trial court did not err in denying the plaintiff's motion to strike an affidavit; motion for leave to file an amended complaint; and in granting summary judgment in favor of the defendant.

¶ 2 The plaintiff, RFJ Investments, LLC, appeals the circuit court order that (1) denied its motion to strike an affidavit offered by the defendant, Chicago Title and Trust Company (CT & T), in

support of CT & T's motion for summary judgment; (2) granted CT & T's motion for summary judgment as to count III of its amended complaint; and (3) denied its motion for leave to file an amended complaint. We initially dismissed this appeal for lack of jurisdiction because the order granting summary judgment as to count III failed to include language pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010); it appearing to us that counts I and II, directed at Tomkar Development, LLC and Thomas Lieber, remained pending. In its petition for rehearing, the plaintiff has directed us to a default judgment order relating to those two counts, establishing that we have jurisdiction over this appeal. We, therefore, grant the plaintiff's petition for rehearing and address the merits, which have been briefed by both parties.

¶ 3 On December 3, 2008, the plaintiff filed a three-count complaint, alleging that it assigned its contractual right to purchase property in Aurora from Aurora Christian Schools, Inc. to Tomkar Development, LLC (Tomkar). Thomas Lieber was the managing partner and sole shareholder of Tomkar. The plaintiff alleged that it was to be paid $150,000 for its assignment from the proceeds following the closing on the sale of the property. It alleged that it notified CT & T, the escrow agent, that it was to be paid this amount of money at the closing. The plaintiff was not paid and filed its complaint against the defendants. In count I, the plaintiff alleged that Tomkar breached the assignment by failing to pay the $150,000 upon the property closing. In count II, the plaintiff alleged that Leiber intentionally interfered with the plaintiff's right to be paid under the assignment contract with Tomkar. In count III, the plaintiff alleged that CT & T intentionally interfered with the plaintiff's right to be paid under the contract by refusing to send its payment from the sale proceeds at the closing. On October 23, 2009, default judgments in the amount of $150,000 were entered

against both Tomkar and Lieber on counts I and II, respectively.

¶ 4 On April 30, 2010, the plaintiff filed an amended complaint, re-alleging all three counts. The assignment letter between the plaintiff and Tomkar and Lieber was attached to the complaint. The letter states that the plaintiff agreed to assign its right to purchase the land from Aurora Christian School to Tomkar for $150,000, and that Tomkar was to deposit $15,000 in earnest money with CT & T. An invoice, dated May 10, 2007, was also attached. The invoice was billed to Tomkar by the plaintiff in the amount of $150,000 for "consulting services for: building; architecture; environmental; zoning; and permit process" for the property being purchased. The plaintiff alleged that it sent this invoice to CT & T in an e-mail, requesting the bill be paid through the proceeds at closing. The e-mail and the affidavit of the plaintiff's managing partner, Javier d'Escoto, are in the record supporting the assertion that the plaintiff e-mailed the invoice to Vaune Ploger at CT & T, who replied "will do."

¶ 5 On January 31, 2011, CT & T filed a motion for summary judgment, arguing that the plaintiff did not present any facts in support of its claim that it intentionally interfered with the plaintiff's contract with Tomkar. CT & T argued that it was undisputed that it had done nothing to induce Tomkar to breach its alleged agreement with the plaintiff; rather, CT & T had properly taken the closing instructions from the parties to the closing, to which the plaintiff was not a party.

¶ 6 CT & T included in its motion an affidavit of its closing agent, Jennifer LaCalamita. The affidavit sets forth that LaCalamita was a settlement closer for CT & T for eight years and familiar with the creation, review, and maintenance of closing documents. She was the closing agent for the property at issue. She explained that the settlement statement, sometimes referred to as the HUD-1

statement, was signed by all depositors to the closing and became the closing agent's authority to disburse funds and documents to "close" the transaction on behalf of the parties to the escrow. Lieber, on behalf of Tomkar, and Keith Gibson, on behalf of Aurora Christian Schools, signed the settlement statement and authorized the disbursements to be made on their behalf. LaCalamita was authorized to make only those disbursements listed on the settlement statement. She would testify that she did not receive any authorization from either Aurora Christian Schools or Tomkar to pay the plaintiff any funds from the closing proceeds.

¶ 7 The motion also contained the transcripts of LaCalamita's deposition, in which she testified to the same facts contained in her affidavit. She identified the settlement closing document during the deposition and testified that she was unaware of any instruction to pay the plaintiff out of any proceeds from the closing. The closing document, dated June 15, 2007, accurately represented the instructions LaCalamita was bound to follow. She explained that the June 15 closing was a "dry" closing, meaning no disbursements were made until certain documents were received. She identified a second closing document dated June 26, 2007, but LaCalamita was not the closing agent that signed that document. She denied directing anyone to make changes to the document.

¶ 8 The transcript of Alicia Ramos n/k/a Alicia Medina's deposition was also attached to the motion for summary judgment. Medina was the CT & T agent that signed the June 26 closing statement. She explained that the second closing statement was prepared to make corrections, including adding a water bill to be paid, and did not represent a second closing. She also testified that any changes to a settlement statement are made at the directions of the parties. She denied directing anyone to make changes to the statement in this case.

¶ 9 The settlement statement of June 15 shows the plaintiff listed as a payee to receive $50,000. The settlement statement of June 26 shows that that line was changed to make Tomkar the payee. Medina testified that the June 26 settlement statement was not a closing, but made corrections before the actual disbursement of funds. She did not know why the $50,000 was changed to a payout to Tomkar instead of the plaintiff, stating that "somebody told us to change that." Medina testified that the only persons that could have directed that change were Tomkar, his attorney, or the title insurance company. She denied directing Tomkar to make any changes to the settlement statement.

¶ 10 On April 7, the plaintiff moved the court to strike the affidavit of LaCalamita and deny the motion for summary judgment. On November 4, the plaintiff filed a motion for leave to file an amended complaint to add three additional counts. On November 30, the trial court granted CT & T's motion for summary judgment as to count III. On December 7, the plaintiff filed a motion to vacate the summary judgment order. The trial court denied the plaintiff's motion to strike the LaCalamita affidavit, denied the motion for leave to file an amended complaint, and denied the motion to vacate the order granting CT & T summary judgment as to count III. The plaintiff timely appealed.

¶ 11 First, the plaintiff argues that the trial court should have stricken the LaCalamita affidavit because it violated Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) in that (1) certified copies of documents upon which she relied upon were not attached; and (2) because it contained hearsay assertions and conclusions. The plaintiff argues that LaCalamita relied on the closing file, the settlement statement, the deed, and the title policy, none of which were attached to the affidavit. The plaintiff further argues that the affidavit contained hearsay assertions and conclusions of law and

fact. The plaintiff contends that LaCalamita's statement that the only parties involved in the closing were Tomkar and Aurora Christian Schools was unsupported by any documentation and constituted hearsay. We disagree.

¶ 12 We review *de novo* a trial court's ruling on a motion to strike an affidavit when such ruling is made in conjunction with the court's ruling on a motion for summary judgment. *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (2001). Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) provides that:

> "[a]ffidavits in support of and in opposition to a motion for summary judgment *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

¶ 13 A plain reading of the affidavit reveals that LaCalamita reviewed the closing files in preparation of her affidavit. As a closing agent, she had personal knowledge of the documents involved in property closings and knowledge of which document that gave her the authority to disburse funds upon the closing of the property. LaCalamita stated that "the settlement statement[,] sometimes referred to as the HUD-1 Statement[,] is signed by all depositors to the settlement closing and becomes the closer's direction and authority to disburse funds and deliver instruments to close the transaction on behalf of the parties to the escrow." She further stated that CT & T "would only have been authorized to pay Plaintiff if she received authorization from Tomkar to pay Plaintiff."

As the closer, LaCalamita was authorized to disburse funds only to the parties listed in the settlement statement. The statements of LaCalamita did not rely upon the documents that the plaintiff complains were not attached because the information in the affidavit was a general explanation of her duties as a closing agent. "If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied." *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999). Even if we strike those portions of the affidavit that reference any documents, the portions that are relevant and that were referenced by the trial court in its ruling on the motion for summary judgment pertained to LaCalamita's general duties, facts within her personal knowledge. *Federal Insurance Co. v. Turner Construction Co.*, 277 Ill. App. 3d 262, 270 (1995) ("The failure to strike unsupported opinions is harmless where there is a factual basis for the opinion"). Thus, the trial court did not err in denying the plaintiff's motion to strike the affidavit of LaCalamita.

¶ 14 Next, the plaintiff argues that the trial court erred in granting summary judgment in favor of CT & T. The plaintiff first argues that CT & T erroneously relied upon a previously vacated court order that dismissed count III pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) and on the insufficient LaCalamita affidavit supporting its motion for summary judgment. We already concluded that the LaCalamita affidavit was based on the affiant's personal knowledge. We further find that CT & T's motion for summary judgment did not "rely" on a previously vacated order dismissing count III; rather, the motion reflects that it discussed the trial court's reasoning in the initial dismissal order and acknowledged a later order, reconsidering the earlier ruling.

¶ 15 Next, the plaintiff argues that summary judgment was inappropriate where there was a question of fact regarding whether CT & T intentionally and unjustifiably induced Tomkar's breach of contract. The plaintiff argues, too, that there was a question of fact as to whether it was a party to the real estate contract. We disagree.

¶ 16 Summary judgment is proper if 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 judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). The purpose of summary judgment is not to try a question of a fact, but simply to determine whether a genuine issue of triable fact exists. *Ross Advertising Inc. v. Heartland Bank & Trust Co.*, 2012 IL App (3d) 110200, ¶ 27. "In determining whether a genuine issue of material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Id.* To withstand a defendant's motion for summary judgment, a plaintiff need not prove its case but must present a factual basis that would arguably entitle the plaintiff to a judgment. *Id.* ¶ 28. We review *de novo* a trial court's grant of summary judgment. *Id.*

¶ 17 To state a cause of action for tortious interference with a contractual relationship, a plaintiff must establish (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of the contract; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's wrongful conduct; and (5) damages. *Complete Conference Coordinators, Inc. v. Kumon North America, Inc.*, 394 Ill. App. 3d 105, 109 (2009). Here, the trial court determined that the plaintiff's own allegations in the complaint coupled with LaCalamita's affidavit in support of CT &

T's motion established that CT & T acted on directions of the parties to the escrow. It determined that Tomkar's president issued instructions for CT & T to remove the plaintiff's name as a payee on the settlement statement. Based on that allegation, CT & T's action in removing the plaintiff's name did not relieve Tomkar of any contractual obligations with the plaintiff. The trial court concluded that CT & T was bound to follow directions from the parties to the escrow, to which the plaintiff was not a party, and there was no wrongful inducement. We agree with the reasoning of the trial court.

¶ 18 There is simply no evidence in the record disputing the conclusion that CT & T did nothing to induce Tomkar to breach its contract with the plaintiff, nor is there any evidence that CT & T acted wrongfully. Nothing in the record suggests CT & T did anything to actively persuade, encourage, or incite Tomkar to breach its contract. In fact, CT & T's actions in removing the plaintiff as payee did not interfere or affect the contractual obligations that Tomkar owed to the plaintiff. CT & T's removal of the plaintiff from the settlement statement, with nothing more, does not establish that it caused Tomkar to subsequently breach his contract with the plaintiff. Further, while the plaintiff argues that "in plain terms, without [CT & T's] actions in closing the transaction, Tomkar would not have breached its contract with [it]," the record shows the opposite. Without Tomkar's instruciton, CT & T would not have removed the plaintiff's name from the settlement statement. LaCalamita's uncontroverted affidavit and her deposition, along with Medina's deposition, show that CT & T took its directions from the parties to the closing in determining the payees. See *McBride v. Commercial Bank*, 101 Ill. App. 3d 760, 765 (1981) (an escrowee is bound to follow the directions of the parties to the escrow).

¶ 19 Regarding the plaintiff's contention that it was a party to the real estate contract, the

assignment agreement clearly assigned all of the plaintiff's rights in the purchase agreement with Aurora Christian to Tomkar. Following the assignment, the plaintiff was neither the buyer nor the seller in the transaction; therefore, the plaintiff had no contractual relationship with CT & T at the closing. Further, LaCalamita testified that closing agents do not review real estate contracts, but only conveyance documents, deeds, liens, and transfer declarations. The trial court concluded that "in essence," the plaintiff was a "third party creditor," but not a party to the transaction. Having demonstrated that there was no genuine issue of triable fact on two necessary elements of the plaintiff's claim, those being intentional inducement and breach caused by wrongful conduct, we agree with the trial court that CT & T was entitled to summary judgment in its favor.

¶ 20 Finally, the plaintiff argues that the trial court erred in denying its motion for leave to amend the complaint. The decision to grant leave to amend a complaint rests within the sound discretion of the trial court, and we will not reverse such a decision absent an abuse of that discretion. *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill.App.3d 211, 219, (2010). The right to amend is neither absolute nor unlimited. *Id*. In determining whether a trial court has abused its discretion in granting or denying such leave, this court must consider the following factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment was timely; and (4) whether previous opportunities to amend the pleading could be identified. *Id*. at 220. The plaintiff must meet all four factors, and if the proposed amendment does not state a cognizable claim, thus failing the first factor, the reviewing court need not proceed with further analysis. *Id*. When ruling on a motion to amend, the court may consider the ultimate efficacy

of the proposed claim, and it is not necessary for the plaintiff to file the claim and the defendant to test its sufficiency through a motion to dismiss. *Id.*

¶ 21 The plaintiff sought to amend the complaint with three new claims: negligence, voluntary undertaking, and breach of a fiduciary duty. The trial court had already commented in its summary judgment ruling that "[i]n essence, the plaintiff is a third party creditor of the purchaser, Tomkar." We agree with that conclusion based on the facts, and therefore, the plaintiff's proposed negligence and breach of fiduciary duty claims would fail because CT & T owed duties only to the parties to the closing. Regarding the voluntary undertaking claim, the plaintiff alleged that CT & T voluntarily undertook a duty to the plaintiff by agreeing to register the invoice on the settlement statement. However, this claim, too, fails in light of the evidence that CT & T merely received an e-mail with the plaintiff's invoice and acknowledged receipt, stating "will do." Even if this response constituted a voluntary undertaking, a party may terminate or abandon an undertaking at any time unless he has put the other in a worse position. *Bell v. Hutsell*, 2011 IL 110724, ¶ 24. Here, the plaintiff was no worse off by CT & T's decision to follow the instructions of the parties to the closing and abandoning the plaintiff's request to add its invoice, because the plaintiff's contract with Tomkar was still intact. Therefore, because the proposed amended counts did not state cognizable claims, the trial court did not abuse its discretion in denying the plaintiff's motion for leave to file an amended complaint.

¶ 22 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.