FOURTH DIVISION
June 2, 2016

No. 1-15-0259

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MAHMOUD FAISAL ELKHATIB and, DENA ELKHATIB,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	No. 12 L 1191
AHMAD SULAIMAN, LAW OFFICES OF SULAIMAN & ASSOCIATES, LLC, and SULAIMAN LAW GROUP, LTD,	)	Honorable Raymond W. Mitchell
Defendants-Appellees.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's entry of summary judgment for defendant vacated and cause remanded. Genuine issue of material fact existed as to whether plaintiffs signed settlement agreement releasing their claims for fraud and unpaid wages. Though defendants' affiants swore that plaintiffs signed settlement agreement and plaintiffs did not file counteraffidavits, defendants' affidavits were contradicted by plaintiffs' deposition testimony that they did not sign settlement agreement.

¶ 2 In this action for fraud and unpaid wages, defendants moved for summary judgment on the ground that plaintiffs released these claims when they signed a settlement agreement with

defendants. A signed copy of that settlement agreement was never produced. But defendants submitted affidavits of three witnesses who swore that plaintiffs signed the settlement agreement in their presence, and one of which claimed that one of the plaintiffs had admitted doing so. Plaintiffs did not file any counter-affidavits in response. But each plaintiff, in his or her deposition, denied ever signing that settlement agreement. We hold that plaintiffs' sworn deposition testimony was sufficient to create a disputed issue of material fact on the question of whether plaintiffs ever released their claims, and summary judgment in favor of defendants was improper. We vacate the grant of summary judgment and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs Mahmoud Faisal Elkhatib (Faisal) and Dena Elkhatib (Dena), who are brother and sister, were employees of defendant The Law Offices of Sulaiman & Associates, LLC, which was succeeded by defendant Sulaiman Law Group, Ltd. (collectively, the law firm). After working at the law firm for approximately two years, plaintiffs were terminated. They filed this action against defendant Ahmad Sulaiman (Sulaiman) and the law firm, alleging that defendants failed to pay them the agreed-upon wages as set forth in the parties' employment agreement. Plaintiffs alleged breach of contract, fraud, and violations of the Illinois Wage Payment and Collection Act. 820 ILCS 115/9 (West 2012).

¶ 5 Defendants moved to dismiss each count. The trial court dismissed the contract claim, a dismissal plaintiffs do not challenge and which we will not discuss further.

¶ 6 As to the fraud and wage claims, defendants argued that plaintiffs had released their claims in a settlement agreement executed on November 6, 2009, and thus dismissal was proper. Defendants attached an unsigned version of the purported settlement agreement, entitled: "Full Accord and Satisfaction: Settlement and Indemnity Agreement." Defendants conceded that they

had no signed copies of the settlement agreement but claimed that there had been four fully-executed originals of the document, and that each plaintiff had received an original. According to defendants, the other two originals belonged to Sulaiman and Gina M. Noto-Vasaitis, a notary public who worked for the law firm, but both copies were removed from the office. Defendants insinuated that plaintiffs had stolen the originals, noting that they "each had the key to the office." Defendants attached Sulaiman's affidavit, as well as affidavits from the notary public and Majdi Y. Hijazin, an attorney who worked in the office. All of these witnesses swore that they had witnessed plaintiffs sign the settlement agreement.

¶ 7 In response, plaintiffs submitted counteraffidavits stating that they did not "discuss or agree to sign a general release of all claims between Sulaiman and [themselves]." Plaintiffs further attacked the credibility of the notary public and Ms. Hijazin, noting that they were financially dependent on Sulaiman. Plaintiffs raised other arguments regarding the settlement agreement that are not germane to this appeal.

¶ 8 The trial court denied the motion to dismiss plaintiffs' fraud and wage claims, finding a disputed question of material fact as to whether plaintiffs ever, in fact, signed a settlement agreement releasing those claims.

¶ 9 In discovery, each plaintiff was deposed. Faisal denied signing the settlement agreement. Dena testified that she did not recall signing it, and she agreed with the statement that the three individuals who said that they personally witnessed Faisal and Dena signing it were "all lying."

¶ 10 The parties eventually filed cross-motions for summary judgment. The only ruling under review here is the motion for summary judgment filed by defendants. In that motion, defendants once again claimed that the fraud and wage claims had been released by plaintiffs in the settlement agreement; they once again submitted the three affidavits of Sulaiman, the notary

public, and Ms. Hijazin; and they once again were unable to produce an executed version of that settlement agreement.

¶ 11 This time, however, defendants attached a second affidavit from Sulaiman. In that affidavit, Sulaiman, among other things, stated that Faisal "admitted" that he had taken the settlement document from Sulaiman's office on November 6, 2009 (thus, in defendants' view, explaining why an executed copy could never be produced).

¶ 12 In response to defendants' motion for summary judgment, plaintiffs attacked Sulaiman's "self-serving" affidavit. Plaintiffs wrote that, “[a]t the outset, it is confusing why [Faisal] would, under oath at his deposition, deny that he had executed the settlement agreement, then only moments later tell Mr. Sulaiman that he had. Even if [Faisal] were to make such an absurd admission, *** there is a question of fact as to whether his statement in his deposition or his alleged statement to [Sulaiman] in his car was correct.”

¶ 13 Plaintiffs did not, however, move to strike the affidavit or submit their own counteraffidavits in opposition to defendant's motion for summary judgment.

¶ 14 The trial court granted defendants' motion for summary judgment. The court did not provide a written explanation, and there is no transcript of the hearing. But in its subsequent written order denying plaintiffs' motion for reconsideration, the court explained that it had granted defendants' motion based on Sulaiman's affidavit and the affidavits from the two "law firm employees." The court also explained that plaintiffs "did not submit an affidavit rebutting Sulaiman's sworn statement." The court explained that it had "granted Defendants' motion for summary judgment because there were no genuine issues of material fact: the parties had entered into a settlement agreement, and Plaintiffs had released the claims on which they purported to sue."

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 A. Motion to Strike Taken With the Case

¶ 18 We first address a motion filed by plaintiffs that we took with the case. Plaintiffs moved, pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) to strike various "paragraphs " of defendants' response brief, claiming they contained either no citation to any authority (as to sections 2.b, 2.d, 3.b, 3.c, and 4) or no citation to any facts in the record (as to sections 2.c., 2.d, 3.b., 3.c, and 4). Our review of these sections in defendants' brief shows that they either did contain the requisite citations, did not require any additional citation, or were not relevant to our analysis. We deny plaintiffs' motion to strike.

¶ 19 B. Standard of Review

¶ 20 Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal 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. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003). Our standard of review for the trial court's order granting summary judgment is *de novo*. *Id.*

¶ 21 Although summary judgment is to be encouraged as an expeditious method of disposing of a lawsuit, it is a drastic measure and should be allowed only when the right of the moving party to judgment is free and clear from doubt. *Olson v. Etheridge*, 177 Ill. 2d 396, 404 (1997). The purpose of a summary judgment proceeding is not to try an issue of fact but, instead, to determine whether one exists. *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 311 (2007). A triable issue of fact exists where there is a dispute as to a material fact or where, although the

facts are not disputed, reasonable minds could differ in drawing inferences from those facts. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999).

¶ 22 C. Existence of Settlement Agreement

¶ 23 The trial court granted summary judgment to defendants after concluding that plaintiffs' claims for fraud and unpaid wages were released by the parties' settlement agreement in 2009. The court's decision was based on the four affidavits submitted by defendants, most notably the second Sulaiman affidavit, coupled with plaintiffs' failure to file counteraffidavits to rebut those affidavits. This reasoning is the principal basis on which defendants defend the grant of summary judgment—that plaintiffs failed to file a counteraffidavit or move to strike Sulaiman's second affidavit in the trial court, and thus plaintiff cannot now come before this court and complain about any of those affidavits.

¶ 24 It is true that "the sufficiency of an affidavit cannot be tested for the first time on appeal where no objection was made either by motion to strike, *or otherwise*, in the trial court." (Emphasis added.) *Fooden v. Board of Governors of State Colleges & Universities*, 48 Ill. 2d 580, 587 (1971). Or as defendants put it, an affidavit's sufficiency must be tested in the trial court by "a motion to strike it, or by a motion to strike the [dispositive] motion" that "set[s] forth objections to the affidavit." *Stone v. McCarthy*, 206 Ill. App. 3d 893, 899-900 (1990).

¶ 25 But there are other ways to challenge the moving party's reliance on an affidavit besides moving to strike it for noncompliance with a supreme court rule, or because it contains inadmissible information. One way—the simplest way—is to argue that the affidavit merely contradicts other competent evidence in the record, and thus a disputed question of fact remains, notwithstanding the affidavit. That argument would not be a basis for striking the affidavit; it would merely be an argument that the information contained in the affidavit was not enough to

counter the contrary deposition testimony in the record. See, *e.g.*, *Carollo v. Al Warren Oil Co.*, 355 Ill. App. 3d 172, 183 (2004) (summary judgment for defendant inappropriate, despite defendant's submission of supporting affidavit, where "the statements contained [in the affidavit] were sufficiently countered by the plaintiff, in his response, with the contradictory deposition testimony" of same witness).

¶ 26 And that is one of the arguments plaintiffs made before the trial court. As we have already detailed (see ¶ 12), in their papers before the trial court, plaintiffs referenced the sworn deposition testimony in the record by each plaintiff, in which Faisal denied signing the settlement agreement and Dena testified, initially, that she did not remember signing it and later agreed that the three affiants were "all lying" when they claimed she did. Plaintiffs argued that, even if the second Sulaiman affidavit were properly before the court (for various reasons, plaintiffs claimed it was not), that second affidavit would simply contradict plaintiffs' sworn deposition testimony, leaving the court with a disputed question of material fact unsuitable for summary judgment. This is not an argument plaintiffs are raising for the first time on appeal. And it did not require a motion to strike Sulaiman's second affidavit or any of the other three affidavits.

¶ 27 Aside from not being forfeited, plaintiffs' argument had the added benefit of being correct. The second Sulaiman affidavit did not defeat Faisal's claims. The only thing relevant to this appeal that was new in the second Sulaiman affidavit was his claim that, as Sulaiman drove Faisal home one evening, "Faisal admitted to [Sulaiman] that he took the Settlement Agreement [and other documents] from [Sulaiman's] office on or about November 6, 2009."

¶ 28 That assertion is insufficient. Assuming that this statement referred to an admission that Faisal stole a *fully executed* copy of the settlement agreement—which the affidavit, we note, did

not say—and thus could be read as a tacit admission by Faisal that he signed the settlement agreement, it would still constitute only an additional brick stacked on one side of the scale. On that one side, defendants now had three witnesses swearing that Faisal signed the agreement releasing these claims, plus a supposed, tacit admission by Faisal himself that he signed it, versus the sworn deposition testimony of Faisal, on the other side, that he did not sign it. Summary judgment is not a game of numbers. There was competent, sworn testimony by each side on the question of whether Faisal signed a document releasing these claims, and thus summary judgment was inappropriate. See *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (2008) (summary judgment is not forum for making credibility determinations or weighing evidence); *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 31 (2005) (same).[1]

¶ 29 And the second Sulaiman affidavit did absolutely nothing to contradict *Dena's* sworn deposition testimony. There is no alleged admission by Dena in the second Sulaiman affidavit. Even if we took everything in the second Sulaiman affidavit as true—even if we read it as an admission by Faisal that he signed the settlement agreement, and even if we took it as a

[1] And as we have just noted, Sulaiman's second affidavit did *not* state that the settlement agreement Faisal allegedly stole was one that had been signed by all the parties, as opposed to an unsigned or partially-executed settlement agreement. One would think that Sulaiman was referring to a fully-executed original; his statement would have little relevance otherwise. On the other hand, on summary judgment we draw all reasonable inferences in favor of the non-movant—Faisal in this case—and we require that the right to judgment as a matter of law be free and clear from doubt. *Hall*, 208 Ill. 2d at 328; *Olson*, 177 Ill. 2d at 404. If defendants wanted to base a summary disposition of the case on a supposed admission by Faisal, that admission had to be sufficiently specific to clearly entitle defendants to judgment. This statement was not. While this point is not the basis for our ruling, it is an additional reason why summary judgment was inappropriate in this case.

statement by Faisal that Dena did, too—it would not defeat Dena's claims, because she denied signing it and did so under oath.

¶ 30 While it may have been preferable, and the more cautious approach, for plaintiffs to draft counteraffidavits to contradict the second Sulaiman affidavit—as plaintiffs tried to do belatedly in their motion to reconsider—the deposition testimony was sufficient to contradict that affidavit and thus sufficient to defeat summary judgment. As our supreme court has explained, "the moving party has the burden of production on a summary judgment motion, and the moving party's affidavits may be contradicted *by deposition testimony or other evidence*." (Emphasis added.) *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49; accord *Carollo*, 355 Ill. App. 3d at 183 ("assuming *arguendo* that defendants had met their initial burden with this affidavit, the statements contained therein were sufficiently countered by the plaintiff, in his response, with the contradictory deposition testimony"); *Barnes v. Rakow*, 78 Ill. App. 3d 404, 408 (1979) ("Statements in an affidavit presented in support of a motion for summary judgment are taken as true when not contradicted by counteraffidavits *or depositions*.") (Emphasis added.).

¶ 31 In fairness to the able trial judge, plaintiffs did not make this easy. They could have been more specific in their discussion of the relevant deposition testimony when responding to the motion for summary judgment, or, as we have noted, they could have filed counteraffidavits affirmatively contradicting the second Sulaiman affidavit. But in the end, they did reference the contradictory deposition testimony, and it was contained within the record on summary judgment. A question of fact remained as to whether plaintiffs signed the settlement agreement and thereby released their claims against defendants, and summary judgment was inappropriate.

¶ 32 We find it unnecessary to consider any other arguments raised by plaintiff regarding the contents of the second Sulaiman affidavit or any statements made by the trial court.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we vacate the judgment of the circuit court of Cook County and remand the matter for further proceedings consistent with this order.

¶ 35 Plaintiffs' motion to strike denied.

¶ 36 Vacated and remanded.