2018 IL App (1st) 171951-U

THIRD DIVISION
December 28, 2018

No. 1-17-1951

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ORIGINAL PIZZA SERIES BEVERLY, LLC,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
	)	
v.	)	
	)	No. 15 M1 723549
WALDO COONEY, INC. d/b/a WALDO COONEY'S PIZZA,	)	
	)	Honorable David A. Skyrd, Judge Presiding.
Defendant-Appellee,	)	
	)	
(Unknown Occupants, defendants).	)	

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

ORDER

¶ 1 *Held*: Affirmed. Trial court did not err in denying motion for voluntary dismissal and in granting summary judgment to defendant.

¶ 2 Original Pizza Series Beverly, LLC, sued Waldo Cooney, Inc., a competing pizzeria, to recover possession of a parking lot. The case soon unraveled; discovery revealed that Original Pizza never owned the parking lot in question. Waldo Cooney informed the court that it would thus be moving for summary judgment, and the court set a briefing schedule for that motion.

Faced with that reality, Original Pizza tried to voluntarily dismiss the case three days before the motion for summary judgment was due to be filed. Ultimately, the trial court denied the motion for voluntary dismissal and entered summary judgment for Waldo Cooney.

¶ 3 We affirm that ruling. Because Original Pizza never alleged the payment or tender of costs of suit to Waldo Cooney in its motion for voluntary dismissal, the trial court could properly deny the motion. As such, the court's decision to deny Original Pizza's motion to voluntarily dismiss was not erroneous. Nor do we find any merit in Original Pizza's argument that the entry of summary judgment violated due process.

¶ 4 BACKGROUND

¶ 5 This case began in November 2015, when Original Pizza filed a two-paragraph complaint against Waldo Cooney. The complaint alleged that Original Pizza was "entitled to the possession" of a "Parking Lot located at 2416 W. 111th Street, Chicago, Illinois 60643" and that Waldo Cooney "unlawfully withholds possession thereof from Plaintiff." In January 2016, Waldo Cooney filed an answer denying both allegations.

¶ 6 In April 2016, Waldo Cooney's attorney sent a letter to Original Pizza's attorney. The letter stated that on September 7, 2015, Gary and Karyn Cooney, in their capacity as co-trustees of the Gary D. Cooney Living Trust, purchased the parking lot from Toia Building Properties Limited. The letter further stated that according to Toia's attorney, "Original Pizza once possessed an unrecorded option to purchase the [parking lot] that expired sometime prior to September 2, 2014." The letter concluded by stating that Waldo Cooney intended to file a motion for sanctions pursuant to Illinois Supreme Court Rule 137 unless Original Pizza dismissed the case "with prejudice and with an award of costs to our client."

¶ 7 Original Pizza ignored the letter, so in May 2016, Waldo Cooney filed a motion for sanctions. In July 2016, the circuit court denied Waldo Cooney's motion for sanctions without prejudice.

¶ 8 On February 2, 2017, the circuit court entered an order granting Waldo Cooney until March 2, 2017 to file a motion for summary judgment. That order included deadlines for Original Pizza's response to that motion and a reply for Waldo Cooney.

¶ 9 On March 14, 2017, the trial court revised the time for filing and briefing the motion for summary judgment, granting Waldo Cooney until April 18 to file the motion and, again, providing for deadlines for filing a response and reply brief.

¶ 10 In April 2017, the trial court extended the deadline for filing the motion for summary judgment to May 18, 2017. This time, the order was silent on a briefing schedule.

¶ 11 Three days before the motion for summary judgment was due, on May 15, 2017, Original Pizza filed a motion for voluntary dismissal pursuant to section 2-1009(a) of the Code of Civil Procedure. See 735 ILCS 5/2-1009(a) (West 2016). The motion's substantive allegations consisted entirely as follows:

> "1.) 735 ILCS 5/2-1009(a) provides: The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.
>
> 2.) Plaintiff requests leave to voluntarily dismiss this case without prejudice."

¶ 12 On May 18, 2017, Waldo Cooney timely filed its summary judgment motion. In that motion, as we previewed above, Waldo Cooney argued that the parking lot to which Original Pizza claimed possession was never in Original Pizza's possession, that its option to purchase the

parking lot had expired, and that the property had been validly sold to another, *bona fide* buyer. The motion attached documentary evidence to that effect, including documents of conveyance, warranty deeds, and numerous affidavits swearing to these facts.

¶ 13 On May 24, 2017, the circuit court entered an order granting (1) Waldo Cooney 14 days to respond to Original Pizza's motion to voluntarily dismiss and (2) Original Pizza 14 days to reply to Waldo Cooney's response. The order did not set a briefing schedule for Waldo Cooney's motion for summary judgment.

¶ 14 On July 6, 2017, the circuit court denied Original Pizza's motion to voluntarily dismiss and granted Waldo Cooney's motion for summary judgment. This appeal followed.

¶ 15 ANALYSIS

¶ 16 Original Pizza raises two issues on appeal. First, it claims the circuit court erred by granting summary judgment in Waldo Cooney's favor, as Original Pizza's motion for voluntary dismissal was filed first, and thus the court was required to grant the motion for voluntary dismissal and deny summary judgment. Second, it maintains that the circuit court violated its right to due process of law by granting Waldo Cooney's motion for summary judgment without allowing it to file a written response.

¶ 17 I. Voluntary Dismissal

¶ 18 Voluntary dismissals are governed by section 2-1009 of the Code, which provides:

> "(a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.

> (b) The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause." 735 ILCS 5/2-1009 (West 2016).

¶ 19 Original Pizza argues that under subsection (a), it had an absolute, unqualified right to voluntarily dismiss its case. Waldo Cooney says that the right is not absolute; it is qualified by three criteria, one of which Original Pizza did not satisfy—the payment or tender of costs of suit to the defendant.

¶ 20 Resolving these arguments requires us to construe and interpret section 2-1009. "The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent." *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12. "The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning." *Id*. Thus, if we determine that the language of the statute is clear and unambiguous, our inquiry ends and we will apply the statute "as written, without resort to extrinsic aids of statutory construction." *People v. Larson*, 379 Ill. App. 3d 642, 650 (2008).

¶ 21 We agree with Waldo Cooney that Original Pizza did not have an "absolute" right to voluntarily dismiss its case. Section 2-1009's plain language reveals that, far from fashioning a general and unqualified right to take a voluntary dismissal, the General Assembly intended to enable plaintiffs to voluntarily dismiss their cases if three criteria—all of which are enumerated plainly and directly in the statute's text—are satisfied. The first criterion is temporal: the motion to dismiss must be filed "before trial or hearing begins." 735 ILCS 5/2-1009(a). The second is procedural: the movant must provide notice of the motion "to each party who has appeared or each such party's attorney." *Id*. The third criterion—which, we again emphasize comes straight

from the statute—is substantive: a party is not entitled to voluntarily dismiss his case except "upon payment of costs." *Id*.

¶ 22 That final criterion, says Waldo Cooney, is where Original Pizza's motion for voluntary dismissal fell short. We agree. The isolated language provides: "The plaintiff may *** upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause." *Id*. The payment of costs or at least tender of costs, upon their presentment by the defendant, is a "necessary precondition" to voluntary dismissal. *Dolido v. Zenith Radio Corp.*, 194 Ill. App. 3d 268, 272 (1990) (*pro se* litigant's motion for voluntary dismissal properly denied for failure to pay or agree to pay costs); accord *Farrar v. Jacobazzi*, 245 Ill. App. 3d 26, 31 (1993) (affirming denial of motion for voluntary dismissal for failure to allege payment or tender of costs).

¶ 23 As noted above (see *supra*, ¶ 11), the motion for voluntary dismissal did not allege the payment or an offer to pay Waldo Cooney's costs. We thus cannot find that the trial court erred in denying that motion. The record does not tell us why the trial court denied the motion, but we may affirm a dismissal on any basis in the record (*CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 31), and that reason, alone, sustains the trial court's ruling.

¶ 24 We recognize that it is not uncommon for a defendant to waive costs of suit, obviating the need for payment or tender of payment. But Original Pizza does not claim that Waldo Cooney agreed to do so and has cited nothing in the record to so indicate. Indeed, in earlier correspondence, Waldo Cooney had made it clear that it would demand costs for litigating what it deemed to be a frivolous lawsuit. (See *supra*, ¶ 6.)

¶ 25 Other times, the trial court will dispose of the costs question on its own, in its order granting voluntary dismissal, ordering the plaintiff to pay the defendant's costs upon their

presentment. See, *e.g.*, *Mizell v. Passo*, 147 Ill. 2d 420, 423, 428-29 (1992). But nothing requires the circuit court to cure a problem with the motion for voluntary dismissal. As the cases above demonstrate, a trial court may deny a motion for voluntary dismissal in this context. *Dolido*, 194 Ill. App. 3d at 272; *Farrar*, 245 Ill. App. 3d at 31.

¶ 26 So we reject Original Pizza's principal argument on appeal—that the motion for summary judgment should not have been considered, much less granted, because the motion for voluntary dismissal was filed first. Because the two motions were considered and ruled upon at the same hearing, one could say that the trial court *did* consider voluntary dismissal first, and denied it—properly so, as it was not in proper form. Or one could say that the motion for voluntary dismissal was never properly filed in the first instance, given its defect, so Original Pizza's first-filed argument is misplaced. Either way, we find no error here.

¶ 27 II. Due Process

¶ 28 Finally, we consider Original Pizza's argument that the circuit court violated its right to due process of law by granting Waldo Cooney's motion for summary judgment without giving Original Pizza an opportunity to respond to the motion.

¶ 29 The essential requirements of due process are notice and an opportunity to respond. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). Here, Original Pizza maintains that it was denied the opportunity to respond because the circuit court did not grant it leave to file a written response to Waldo Cooney's motion for summary judgment.

¶ 30 The record indicates that the motion for summary judgment was denied after a "hearing." It thus appears, at a bare minimum, that Original Pizza had the opportunity to orally argue its position. It is well-established that "[d]ue process is a flexible concept, and 'not all situations calling for procedural safeguards call for the same kind of procedure.' " *People v. Cardona*, 2013

IL 114076, ¶ 15 (quoting *Lyon v. Department of Children & Family Services*, 209 Ill. 2d 264, 272 (2004)); see *Grimm v. Calica*, 2017 IL 120105, ¶ 38 ("Due process is a flexible concept, and what satisfies the right depends upon the circumstances.").

¶ 31 Nor does Original Pizza claim that it *requested* the right to respond in writing to the summary judgment motion. It's not as if this motion came out of the blue. In February 2017, Waldo Cooney first indicated its intent to file the motion, and the trial court first entered the deadline for doing so. On that February date and at a later March date, as detailed above (see *supra*, ¶¶ 8-9), the trial court did enter briefing schedules on the motion for summary judgment in anticipation of its filing. The April order, re-setting the deadline for the motion for summary judgment, did *not* contain a briefing schedule. We don't know why, because we lack a transcript of proceedings. Nor did the May 24 order, when the motion for summary judgment was first presented, set a briefing schedule. Again, we don't know why.

¶ 32 We do know, however, that Original Pizza had two opportunities—at the April hearing and the May 24 hearing—to request the chance to respond in writing to the motion for summary judgment, or to object to the lack of that opportunity. The record reflects no such request or objection. Nor, as far as the record indicates, did Original Pizza request (or object to the lack of) an opportunity to respond in writing when it appeared at the final hearing on the motions for voluntary dismissal and summary judgment in July. Original Pizza has the burden to make any such argument on appeal and to create a record that would support it; it has done neither of those things. See *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 39 (quoting *Foutch v. O'Bryant*, 99 Ill.2d 389, 392 (1984)) (" 'Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.' ").

¶ 33 Thus, as far as the record discloses, Original Pizza forfeited any perceived due process violation. Constitutional rights, like any others, can be forfeited if not asserted in a timely manner. *People v. Cosby*, 231 Ill. 2d 262, 272–73 (2008). It would be unfair to both Waldo Cooney and the trial court to allow Original Pizza to sit silently, not requesting the right to respond in writing to the motion for summary judgment, and then argue on appeal that reversible error occurred because it was denied that very opportunity. So far as we can discern from the record, that is exactly what happened here.

¶ 34 For these reasons, Original Pizza has not carried its burden of establishing a due process violation.

¶ 35 CONCLUSION

¶ 36 We affirm the judgment of the circuit court.

¶ 37 Affirmed.