

No. 1-10-1298

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
June 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

REAL ESTATE RESOURCE MANAGEMENT, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 2006 CH 7033
)	
1000 SOUTH MICHIGAN, LLC, and)	
GUY GARDNER,)	Honorable
)	Richard J. Elrod,
Defendants-Appellants.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon
concurred in the judgment.

O R D E R

HELD: The trial court did not abuse its discretion by allowing plaintiff to amend its complaint to add claims of piercing the corporate veil and punitive damages. The court also did not abuse its discretion by allowing plaintiff to amend its Supreme Court Rule 213(f) disclosure in order to call additional witnesses at trial.

1-10-1298

Plaintiff Real Estate Resource Management, LLC filed its original five-count complaint against defendants 1000 South Michigan, LLC and Guy Gardner on April 7, 2006, alleging causes of action for breach of contract, foreclosure of original broker's claim for lien, detrimental reliance, unjust enrichment and promissory estoppel. Plaintiff filed a third amended complaint on February 22, 2008, alleging a single cause of action for fraud. Following a bench trial, the trial court found in plaintiff's favor and awarded \$956,000 in damages.

On appeal, defendants contend the trial court erred by: (1) improperly allowing plaintiff to amend its complaint during the trial to add claims of piercing the corporate veil and punitive damages for the first time; (2) entering judgment based on a finding of a material omission when no such allegation was pled in the complaint; and (3) improperly granting plaintiff's motion to amend its Supreme Court Rule 213 (Ill. S. Ct. R. 213 (eff. Jan. 1, 2007)) interrogatories during the trial in order to allow plaintiff to call previously undisclosed witnesses. For the reasons that follow, we affirm the trial court's judgment.

BACKGROUND

Plaintiff filed his initial complaint against defendants on April 7, 2006, alleging breach of contract, foreclosure of original broker's claim for lien, detrimental reliance, unjust

1-10-1298

enrichment and promissory estoppel. The lawsuit stemmed from a contract between plaintiff and defendants for plaintiff to provide sales and marketing services for condominiums and commercial space defendants were developing as part of a land development project located at 1000 South Michigan Avenue. Plaintiff filed an amended complaint on February 7, 2007, and a second amended complaint on October 11, 2007.

In its third amended complaint filed on February 22, 2008, plaintiff raised a single cause of action for fraud. Specifically, the third amended complaint alleged defendants never actually intended to develop the building project outlined in the contract plaintiff entered into with defendants. Plaintiff's alleged defendants perpetrated a "scheme" in order to sell the vacant parcel of land for a profit that "resulted in material misrepresentations of the project and the ultimate goal of the development and as a result of all of [defendants'] material misrepresentations, [plaintiff] performed duties, expended monies and suffered losses as described above and did so in reliance upon the fraudulent misrepresentations of [defendants]."

Defendants filed an answer to the third amended complaint denying the existence of any material misrepresentations on their part while forming the agreement between the parties. During

1-10-1298

discovery, plaintiff's filed a response to defendants' first set of interrogatories on November 10, 2008. Defendants' interrogatory number 21 asked plaintiff to identify each witness that would testify at trial, and, with respect to each witness, to provide all of the information required by Supreme Court Rule 213(f). In its answer to the interrogatory, plaintiff identified the following individuals as potential witnesses: Laura Rube, Rena Hales, Fummi Kale, Alejandro Hernandez and Suhail Al Dhaheri.

A bench trial began on April 6, 2010, and concluded on April 13, 2010. The record also does not contain a transcript of any of the pre-trial proceedings conducted in this case, or a transcript of the bench trial itself.

Defendants allege that on the first day of the trial, plaintiff filed a motion to amend its complaint to add claims of piercing the corporate veil and punitive damages for the first time, and a motion to amend its response to the Rule 213(f) interrogatory in order to add certain trial witnesses. Copies of the respective motions are not found in the record before us. However, the trial court's order entered on April 12, 2010, indicates the court did grant plaintiff leave to amend the complaint to add the piercing the corporate veil and punitive damages claims, and leave to amend its Rule 213(f) response in

1-10-1298

order to call "V. Sava, L. Rube, B. Kothari and G. Gardner" as witnesses at trial. It is unclear from the record whether any of the previously undisclosed witnesses actually testified at trial, and, if so, what the witnesses testified to.

On April 13, 2010, the trial court found in plaintiff's favor on the fraud and piercing the corporate veil counts, and awarded \$956,000 in damages. Defendants appeal.

ANALYSIS

I. Motion to Amend Complaint

Defendants contend the trial court abused its discretion by allowing plaintiff to amend its complaint on the first day of trial to add piercing the corporate veil and punitive damages claims.

Although Illinois courts embrace a liberal policy of allowing amendments to pleadings, the right is not unlimited. *1515 North Wells, L.P. v. 1513 North Wells, L.L.C.*, 392 Ill. App. 3d 863, 870 (2009). "A trial court is free to exercise its discretion in granting motions to amend and its decision will not be reversed absent an abuse of discretion." *1515 North Wells, L.P.*, 392 Ill. App. 3d at 870, citing *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). Moreover, section 2-616(c) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-616(c) (West 2008)) provides "[a] pleading may be amended at

1-10-1298

any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and contumacances that may be just."

An abuse of discretion occurs when no reasonable person would agree with the court's decision. *1515 North Wells, L.P.*, 392 Ill. App. 3d at 870. In determining whether a court abused its discretion in granting a motion to amend a pleading, we consider: "(1) whether the amendment would cure a defect in the pleading; (2) whether the proposed amendment was timely; (3) whether the opposition would be prejudiced or surprised by the amendment; and (4) whether there were earlier opportunities to amend the pleading." *1515 North Wells, L.P.*, 392 Ill. App. 3d at 870, citing *Lee*, 152 Ill. 2d at 467.

Initially, we note the deficiencies in the record before us are numerous enough that the entire appeal could be dismissed based on defendants failure to provide this court with an adequate record of the proceedings below. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Insufficiency of the record aside, we find even the limited record before us indicates the trial court did not abuse its discretion in allowing the amendment to plaintiff's complaint before final judgment was entered in the case.

Applying the relevant factors in this case, we note the

1-10-1298

first factor is irrelevant here because there is no contention that the amendment was allowed by the court to cure a defect in the pleading. With regards to the second factor, we find the proposed amendment was timely because both section 2-616(a) and 2-616(c) of the Code specifically permitted the court to allow an amendment to the pleadings at any time before final judgment. See 735 ILCS 5/2-616(a), 2-616(c) (West 2008); *Lee*, 152 Ill. 2d at 468.

Turning to the prejudice factor, we note defendants do not suggest, and we do not find, that either the amended punitive damages claim or the piercing the corporate veil claim required defendants to present additional evidence other than that which it would have already had to present in order to defend against plaintiff's fraud allegation. See *Lee*, 152 Ill. 2d at 468-69. Instead, defendants simply suggest, without a detailed explanation, that they were surprised and prejudiced by having no time to prepare for and defend against the additional claims prior to trial.

With regard to any prejudice that may have stemmed from adding the piercing the corporate veil claim, we note: "[w]here there is no evidence of any misrepresentation, no attempt to conceal any facts, and the parties possess a total understanding of all the transactions involved, Illinois courts will not pierce

1-10-1298

the corporate veil in a breach of contract situation.” *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1033 (2007). This court has also recognized “[e]fforts to pierce the corporate veil will be unsuccessful when the evidence shows the complaining party entered into the situation with full knowledge of the relationships among the players and no injustice occurred.” *Tower Investors, LLC*, 371 Ill. App. 3d at 1033. Because the proof necessary to defend against plaintiff’s piercing the corporate veil claim was substantially similar to the nature and quality of the proof required to defend against plaintiff’s already-pending fraud claim--namely that no material misrepresentation or omission occurred--we fail to see how defendants were prejudiced by the court’s decision to allow the amendment. See *Lee*, 152 Ill. 2d at 469.

Likewise, the proof required to defend against the availability of punitive damages would have been substantially similar to the nature and quality of proof required to defend against the already-pending fraud claim--namely that plaintiff could not establish fraud because no material misrepresentation or omission had occurred. See *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1088 (2010) (“Below, the trial court indicated it was not concerned with the parties’ arguments regarding the

1-10-1298

availability of punitive damages because the plaintiff had not pled sufficient facts to establish a fraud claim against the defendants. We agree.") Moreover, we note nothing in the record before us indicates the trial court actually awarded punitive damages against the defendants when it entered a judgment in plaintiff's favor.

Therefore, we find defendants have failed to show they were actually prejudiced here by the court's decision to allow the amendments to plaintiff's complaint. See *Lee*, 152 Ill. 2d at 469 ("Because plaintiff's amendment did not alter the nature and quality of the proof required for the CTA to defend, we fail to see how the CTA was thereby prejudiced.")

Turning to the last factor, we recognize plaintiff certainly may have had other opportunities to amend its complaint prior to the start of the trial. Because defendants have not established they were ultimately prejudiced by the amendments, however, we are unable to conclude based on this factor alone that the trial court abused its discretion in allowing the amendments. See *Lee*, 152 Ill. 2d at 469.

Accordingly, we find the trial court did not abuse its discretion in allowing plaintiff to amend its complaint after the start of the trial.

II. Failure to Allege a Material Omission

Defendants contend the trial court erred by entering a judgment in plaintiff's favor based on a finding of a material omission on defendants' part during the underlying transaction. Specifically, defendants contend plaintiff's complaint failed to properly allege any such "material omission" ever occurred.

In civil proceedings, it is well settled that a party may not succeed on a theory that is not contained in the party's complaint. *Schultz v. Schultz*, 297 Ill. App. 3d 102, 106 (1998). " 'Proof without pleadings is as defective as pleadings without proof.' " *Schultz*, 297 Ill. App. 3d at 106, quoting *Keno & Sons Construction Co. v. La Salle National Bank*, 214 Ill. App. 3d 310, 312 (1991). Therefore, "a party can only win the case according to the case the party has presented in the pleadings." *In re J.B.*, 312 Ill. App. 3d 1140, 1143 (1999).

In this case, the trial court specifically found:

"1) The Court enters judgment on Count One and Count Two as against both Defendants, Guy Gardner and 1000 South Michigan LLC, jointly and severally; 2) The court bases this ruling on its finding that Plaintiff has established all elements of fraud as alleged in its complaint at Count One."

Although defendants contend on appeal that the trial court's

1-10-1298

findings were based on the existence of a "material omission" beyond the scope of what was pled in plaintiff's complaint, absolutely nothing in the record supports defendants' contention. In fact, we note the record before us is devoid of either a transcript or bystanders report regarding any specific findings the court may have made outside of its written order. The record also does not contain a transcript of the trial itself.

Defendants, as the appellants, bear the burden of providing a sufficiently complete record on appeal in order to support their claims; and, in the absence of such a record, we must presume the court's order was in conformity with the law and had a sufficient factual basis. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Moreover, any doubt arising from the incompleteness of the record will be resolved against the appellants. *Foutch*, 99 Ill. 2d at 392. Based on the record before us, we must find defendants' claim that the trial court improperly entered judgment based on a finding outside the scope of plaintiff's pleadings is without merit.

III. Motion to Amend Rule 213 Interrogatories

Defendants contend the trial court abused its discretion by allowing plaintiff to amend its Rule 213(f) disclosures after the start of the trial in order to add Sava, Khotari and Gardner as witnesses.

1-10-1298

Supreme Court Rule 213(f) provides, in relevant part, that "upon written interrogatory, a party must furnish the identity and location of witnesses who will testify at trial, together with the subject of their testimony." Ill. S. Ct. R. 213(f) (eff. Jan. I, 2007).

The supreme court rules on discovery are mandatory, and both counsel and courts must follow the rules of procedure. *American Services Insurance Co. v. Olszewski*, 324 Ill. App. 3d 743, 746 (2001). "[A] party should be allowed to rely on an opposing party's answer to Rule 213(f) interrogatories and expect that only those witnesses disclosed pursuant to Rule 213(f) will in fact be called to testify at trial regarding the subject disclosed." *American Services Insurance Co.*, 324 Ill. App. 3d at 747-48. However, admission of evidence under Rule 213 is within the trial court's discretion, and the court's decision will not be disturbed absent an abuse of that discretion. *Thornhill v. Midwest Physician Center of Orland Park*, 337 Ill. App. 3d 1034, 1046 (2003).

" 'An abuse of discretion may be found only where no reasonable man would take the view adopted by the circuit court.' " *Garden View, LLC v. Fletcher*, 394 Ill. App. 3d 577, 588 (2009), quoting *Pancoe v. Singh*, 376 Ill. App. 3d 900, 913 (2007). In order to determine whether a trial court abused its

1-10-1298

discretion in allowing a previously undisclosed witness to testify at trial, we consider the following factors: (1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness. *Pancoe*, 376 Ill. App. 3d at 913.

Besides the order granting plaintiff's motion to amend its Rule 213 disclosure to add Sava, Khotari and Gardner as witnesses, nothing in the record addresses the court's decision to allow the witnesses to testify or any objections defendants may have raised at trial to allowing their testimony. In fact, nothing in the record indicates if the undisclosed witnesses were even called to testify at trial, and, if so, what they actually testified to. Without such basic information, we fail to see how we can properly analyze the court's decision here for an abuse of discretion.

As previously noted, defendants, as the appellants, bear the burden of providing a sufficiently complete record on appeal in order to support their claims; and, in the absence of such a record, we must presume the court's order was in conformity with the law and had a sufficient factual basis. See *Foutch*, 99 Ill. 2d at 391-92. Moreover, any doubt arising from the

1-10-1298

incompleteness of the record will be resolved against the appellants. *Foutch*, 99 Ill. 2d at 392.

Based on the insufficiency of the record before us, we must find defendants' claim that the trial court abused its discretion in allowing plaintiff to amend its Rule 213(f) disclosure in order to call certain previously-undisclosed witnesses to testify at trial is without merit.

CONCLUSION

We affirm the trial court's judgment.

Affirmed.