

No. 1-10-1697

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL J. O'BRIEN and TAMARA DE SILVA,)	Appeal from the
)	Circuit Court of
)	Cook County.
Defendants-Counterclaim)	
Plaintiffs-Appellants,)	
)	
v.)	
)	No. 08 L 7115
SHARON COLE,)	
)	
Plaintiff-Counterclaim)	
Defendant-Appellee,)	
)	
WILLIAM STAMDS,)	Honorable
)	Brigid Mary McGrath,
Counterclaim Defendant-)	Judge Presiding.
Appellee.)	

JUSTICE SALONE delivered the judgment of the court. Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

HELD: Plaintiff's omissions from her original verified complaint were the result of mistake, and the circuit court correctly allowed plaintiff to amend the complaint;

for similar reasons, the circuit court correctly denied defendants' motion to strike plaintiff's supplemental answers to interrogatories; the loan at issue was for business purposes, and the usury statute did not apply; defendants failed to prove their counterclaim for intentional infliction of emotional distress.

In September 2006 plaintiff Sharon Cole entered into a written agreement to loan defendants Michael O'Brien and Tamara De Silva \$165,000 at an annual interest rate of 36%. Plaintiff subsequently filed a verified complaint for breach of contract alleging defendants failed to repay the \$165,000 principal, and paid only a portion of the interest. Defendants filed a counterclaim against plaintiff and a third party, William Stamps, alleging battery and intentional infliction of emotional distress. Following a bench trial, the circuit court entered judgment in favor of plaintiff on her claim for breach of contract, and in favor of plaintiff and Stamps on defendants' counterclaim. On appeal, defendants argue the circuit court erred in: (1) granting plaintiff leave to amend her verified complaint; (2) denying defendants' motion to strike plaintiff's supplemental answers to interrogatories; (3) finding that the loan was for business purposes and the usury statute therefore did not apply; and (4) entering judgment in favor of plaintiff and Stamps on defendants' counterclaim for intentional infliction of emotional distress. For the reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

Plaintiff and defendants met in August 2006 at a Chicago restaurant to discuss the possibility of defendants' borrowing money from plaintiff. Topics discussed included Chartwell Risk Management, LLC (Chartwell), a trading recommendation system that defendants were developing for application in the stock market. The meeting ended without agreement on a loan.

On September 13, 2006, the parties signed a promissory note in which plaintiff agreed to

1-10-1697

lend defendants \$165,000. Plaintiff delivered a check in that amount payable to De Silva, who deposited it in Chartwell's bank account. De Silva was the only signer on the Chartwell account, which listed Chartwell's address as De Silva's residence.

Under the terms of the promissory note, defendants were to repay the \$165,000 principal within 18 months, and were to make monthly interest payments of \$5,000 each during that same period, for a total of \$255,000 (\$165,000 principal plus \$90,000 interest). The note required the full \$90,000 in interest to be paid "regardless of any early repayment of principal."

In November 2007, a Chartwell check made payable to plaintiff for \$10,000 was delivered to plaintiff. The check, which was signed by De Silva, was from the same Chartwell account in which De Silva deposited the \$165,000. The check included a notation: "Interest November 2007 & October 2007."

In June 2008 plaintiff filed a two-count verified complaint against defendants. Count I, for breach of contract, alleged the November 2007 check for \$10,000 was the only payment defendants had made on the note. "[O]n November 16, 2007, the Defendants paid plaintiff the amount of \$10,000.00 as interest due on the Note for the months of October and November[] 2007, but have otherwise failed to pay the Note or any interest due thereunder and are in default thereof." Defendants allegedly owed plaintiff more than \$260,000, including the \$165,000 principal, \$80,000 in unpaid interest (16 months), and nearly \$16,000 in additional, per diem interest "due through 6/19/08." Count II of the complaint, for fraud, was dismissed pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)).

In their answer, defendants admitted the \$10,000 payment but denied they made no

1-10-1697

additional payments. Defendants also filed: (1) an affirmative defense alleging the interest rate on the loan was usurious and against public policy, and (2) a counterclaim for battery and intentional infliction of emotional distress against plaintiff and Stamps for threats allegedly made to defendants.

Defendants also propounded interrogatories, one of which stated:

"Did either of the Defendants, personally or through another person[,], ever[] make any payments towards the loan alleged in the complaint? If yes, provide for each such payment the date and time, the names, address and phone numbers of all persons present, the type of payment (cash, check, certified check), and the location of every such meeting."

In her answer to this interrogatory, plaintiff stated: "Yes; I recall being given a check *** on or about November 16, 2007[,], in the amount of \$10,000.00. The check was signed by Defendant DeSilva and issued by Chartwell Risk Management Group, LLC; investigation continues."

Plaintiff mentioned no other payments.

However, in her subsequent deposition, which took place in June 2009, plaintiff testified that, prior to the November 2007 check for \$10,000, defendants made five cash payments of \$5,000 each. Plaintiff acknowledged that the allegation in her complaint that defendants made no payments other than the \$10,000 check was incorrect. Plaintiff conceded she did not read the complaint carefully before signing it. She stated: "I saw the \$10,000. I knew I had received that. And I didn't do any calculations. I just read it, skimmed it and signed it." Plaintiff also acknowledged that, in answering defendants' interrogatory regarding payments made by defendants, she incorrectly failed to mention any cash payments. Defendants filed a motion for

1-10-1697

sanctions alleging plaintiff's complaint and her answers to interrogatories were false and perjured, and seeking dismissal of the complaint.

Plaintiff sought leave to file a first amended complaint to include the five cash payments she testified to at her deposition. According to plaintiff, it was at defendants' depositions, which plaintiff attended, that she first learned the cash payments were "inadvertently omitted " from her complaint. Plaintiff also served defendants with supplemental answers to interrogatories which mentioned the five additional cash payments. Defendants filed an objection to the motion for leave to file an amended complaint, and a motion to strike the supplemental answers to interrogatories.

On September 25, 2009, the circuit court entered an order (1) granting, on the basis of "mistake," plaintiff's motion for leave to file a first amended complaint; (2) granting defendants' motion for sanctions in the form of "reasonable attorneys fees for filing an answer to plaintiff's initial complaint"; and (3) denying defendants' motion to strike plaintiff's supplemental answers to interrogatories.

At trial, which took place in April 2010, plaintiff acknowledged, consistent with her deposition testimony, that (1) the allegation in her original complaint that defendants paid nothing in addition to the November 2007 check for \$10,000 was false, as was the allegation that defendants still owed \$80,000 in interest; and (2) her answers to interrogatories incorrectly omitted five cash payments of \$5,000 each from defendants. Plaintiff testified she received \$35,000 from defendants—the five cash payments plus the \$10,000 check. No payments were received after November 2007.

De Silva, who is an attorney, testified that defendants paid plaintiff a total of more than

1-10-1697

\$108,000, all of which came from checks drawn on the Chartwell account. There were "about 16" such checks, and De Silva, who was a manager of Chartwell, signed each of them. The only check made payable directly to plaintiff was the November 2007 check for \$10,000. All but one of the other checks¹ were made payable to De Silva, O'Brien, or cash. The checks were then cashed, and the cash was put in an envelope and delivered to plaintiff.

De Silva acknowledged that since November 2007 she had made no payments to plaintiff. De Silva testified that during the time she was making payments she had "several unpleasant conversations" with plaintiff about requesting plaintiff's tax identification number or social security number so that De Silva could report the interest she was paying. According to De Silva, plaintiff never provided this information. De Silva indicated she was concerned about possible illegality on plaintiff's part, and about her own possible complicity. If plaintiff had provided her social security number, defendants would have continued making payments after November 2007.

With regard to defendants' counterclaim, O'Brien testified that in February 2008 he received a telephone call from Stamps², who stated, without identifying himself: "[Y]ou owe my baby money. *** This note [is] due in March, and we expect it to be paid. There will be no renegotiation. I'm not playing. You know who this is. I'm not playing."³ O'Brien testified this conversation made him afraid, and his heartbeat became "quite irregular." O'Brien reported this conversation to the police.

¹The exception was a check made payable to a currency exchange in Chicago.

²During trial, Stamps was excused from testifying by mutual agreement of the parties.

³This testimony was allowed over plaintiff's hearsay objection.

1-10-1697

De Silva testified that plaintiff at one point threatened to have someone "cut [her] face." De Silva reported this to the police. De Silva added that she had security cameras installed at her home. According to De Silva, she was "afraid of the consequences" of testifying at trial.

Plaintiff denied ever making threats of physical violence to De Silva.

In May 2010 the circuit court entered judgment in favor of plaintiff on her claim for breach of contract. The court found the note was enforceable. The loan was for business purposes, and the usury statute did not apply. The court further found that "plaintiff's failure to account for the partial payments that had been made under the note in this litigation were a result of miscommunication and inadvertence." Judgment was entered in the amount of \$175,000, which reflected payments by defendants of \$80,000. The court also awarded plaintiff statutory interest of 5% per annum from the time the note was due, March 13, 2008, and entered a total judgment of \$198,958.16.

The court also entered judgment in favor of plaintiff and Stamps on defendants' counterclaims for battery and intentional infliction of emotional distress. The court found there was insufficient evidence to support either claim. The court noted, in addition, that Stamps "was excused from testifying by both parties."

Defendants timely filed a notice of appeal pursuant to Supreme Court Rules 301 (eff. February 1, 1994) and 303 (eff. June 4, 2008).

ANALYSIS

Plaintiff's first amended complaint

Defendants first contend the circuit court committed reversible error in allowing plaintiff to amend her original verified complaint, which defendants claim was perjured. Defendants

1-10-1697

emphasize that plaintiff's complaint was verified, and assert that "deliberate, clear, unequivocal statements by a party about concrete facts made in a verified Complaint constitute judicial admissions that *cannot be amended*." In defendants' view, plaintiff's original allegations that defendants made only a single payment of \$10,000 by check, and nothing in cash, are binding judicial admissions. Plaintiff should be held to these allegations, which can never be proved, and she should obtain no relief.

Defendants rely on *Fidelity Financial Services, Inc. v. Hicks*, 214 Ill. App. 3d 398, 406-07 (1991), *overruled on other grounds*, 216 Ill. 2d 334 (2005), for the proposition that verified pleadings that were *not the product of mistake or inadvertence* become binding judicial admissions. Here, as noted, the circuit court cited "mistake" as the basis for allowing plaintiff to file her first amended complaint.

A trial court has discretion in deciding a motion to amend pleadings, and a reviewing court will not reverse the trial court's decision absent abuse of that discretion. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 351 (2002). This discretion must be exercised within the bounds of the law. *Id.* However, within these bounds, a trial court's power to allow amendments should be freely exercised in order that litigants may fully present their causes of action. *Ryan v. Mobil Oil Corp.*, 157 Ill. App. 3d 1069, 1074. "The greatest liberality should be applied in allowing amendments and the most important question is whether the amendment will be in the furtherance of justice." *Id.*

In the case at bar, plaintiff stated, in her motion for leave to file an amended complaint, that it was at defendants' depositions, which plaintiff attended, that she first learned the additional cash payments were omitted from her original complaint. Plaintiff stated the omission

1-10-1697

of the cash payments was inadvertent and an oversight by her, and she therefore had a good faith basis for seeking to amend her pleadings.

Moreover, plaintiff's first amended complaint was consistent with her testimony at her discovery deposition and at trial. At her deposition, plaintiff testified she skimmed her original complaint and did not catch the omission of the additional cash payments.

Notwithstanding the foregoing, defendants maintain the circuit court erred in concluding the omissions resulted from mistake. Defendants point to several appellate court decisions, including, *e.g.*, *DiBenedetto v. County of Du Page*, 141 Ill. App. 3d 675 (1986); and *Burdin v. Jefferson Trust & Savings Bank of Peoria*, 133 Ill. App. 2d 703 (1971). We find these cases inapposite and unpersuasive.

In *DiBenedetto*, a wrongful death case, a central issue was whether the road where the accident occurred was closed, and thus required large, Type III barricades, rather than the Type I (sawhorse) barricades which were actually used. In their answer to the plaintiff's complaint, the defendants admitted that the road in question was closed. However, during trial, the defendants asserted they were confused and had been mistaken in their answer, and sought to amend it to state that the road was open. The trial court allowed the amendment, and the appellate court reversed, holding the trial court abused its discretion. The appellate court stated: "It is difficult to understand how defendants could remain uncertain whether the road in question was closed, or closed to through traffic, for four years after the accident and until after plaintiff had rested her case." *DiBenedetto*, 141 Ill. App. 3d at 682.

In *Burdin*, the plaintiff's original verified complaint alleged the defendant hotel owner breached a lease agreement relating to the operation of a cocktail lounge in the defendant's hotel.

1-10-1697

Under the lease agreement, the defendant agreed to provide the plaintiff with a liquor license, which would violate the law that no one can own and conduct a saloon under a license issued to and in the name of another. The defendant filed a motion to dismiss, alleging the lease agreement was illegal and void on its face, and the trial court allowed the motion. The plaintiff subsequently abandoned the "breach of lease" theory and, in a second amended complaint, alleged the defendant failed to acquire a partnership liquor license. Thus the plaintiff now called the defendant a partner when previously he was the landlord. On motion of the defendant, the trial court dismissed the second amended complaint with prejudice, and the appellate court affirmed. Rejecting any notion that the plaintiff's earlier allegations were the result of misapprehension or mistake, the appellate court stated: "The plaintiff most certainly would have known whether he was operating under a lease agreement or a partnership agreement." *Burdin*, 133 Ill. App. 3d at 708.

In the case at bar, plaintiff's mistake is simply not of the magnitude of the allegations in *DiBenedetto* and *Burdin*. Contrary to defendants, it is not "impossible" to comprehend that plaintiff might have scanned her complaint and answers to interrogatories and failed to note the omission of the cash payments. Indeed, in its May 2010 judgment order the circuit court found that "both parties were impeached and made incorrect statements under oath and in the pleadings."

In sum, the circuit court did not abuse its discretion in allowing plaintiff to file her first amended complaint. The court was within its discretion in finding that the omission of the cash payments was inadvertent and a mistake.

Plaintiff's supplemental answers to interrogatories

Defendants make essentially the same argument regarding plaintiff's supplemental answers to interrogatories as they do regarding plaintiff's first amended complaint. According to defendants, it is simply not plausible that the cash payments were omitted from plaintiff's original answers to interrogatories through mistake or inadvertence. We reject this argument for the same reasons we rejected it with regard to the first amended complaint. The circuit court did not err in denying defendants' motion to strike plaintiff's supplemental answers to interrogatories.

Defendants' usury defense

In answer to plaintiff's complaint, defendants filed an affirmative defense that the promissory note called for a usurious interest rate of 36% and the note was unenforceable. In its judgment order of May 17, 2010, the circuit court specifically found that the note was enforceable. According to the court, "the evidence showed that the loan was made for business purposes," and "there were no usury violations." Under the Illinois Interest Act, any rate of interest may be charged on loans made for business purposes. 815 ILCS 205/4(1)(c) (West 2006). Defendants contend the circuit court erred in finding the loan was for business purposes.

Here, it is undisputed that Chartwell was discussed when the parties first met in August 2006 to discuss the possibility of defendants' borrowing money from plaintiff. As noted, Chartwell was a trading recommendation system that defendants were developing for application in the stock market. In addition, the \$165,000 loan principal received by defendants was deposited in Chartwell's bank account, which listed Chartwell's address as De Silva's residence. Moreover, all of the funds used to repay plaintiff came from the Chartwell account, including a Chartwell check for \$10,000 made payable to plaintiff.

The circuit court correctly found that the loan was for business purposes, and the usury

defense therefore did not apply.

Intentional infliction of emotional distress

Finally, defendants argue the circuit court erred in finding they failed to prove their counterclaim for intentional infliction of emotional distress.⁴ The elements of intentional infliction of emotional distress are: the defendant's conduct is extreme and outrageous, causing the plaintiff severe emotional distress such that the defendant knew that his acts would be substantially certain to cause severe emotional distress. *Grey v. First National Bank of Chicago*, 169 Ill. App. 3d 936, 943 (1988). "This standard is so stringent that it is met only if the distress inflicted is so severe that no reasonable person could be expected to endure it." *Id.*

In the case at bar, the circuit court concluded there was insufficient evidence of intentional infliction of emotional distress, and no prima facie case was established. In its judgment order of May 17, 2010, the court specifically found "there was insufficient evidence that Defendants/Counter-Plaintiffs met the standard of proof as set forth in *Grey v. First National Bank of Chicago*, 169 Ill. App. 3d 936 (1st Dist. 1988)."

Here, O'Brien alleged he was threatened by Stamps in a telephone call, and De Silva alleged plaintiff threatened to have someone cut her face. Stamps did not testify at trial. As the circuit court noted, he "was excused from testifying by both parties." With regard to De Silva's allegations, plaintiff denied ever making threats of physical violence to De Silva.

The only injury O'Brien claimed was an irregular heartbeat. De Silva testified she installed security cameras at her home, and that she was afraid.

⁴Defendants do not appeal the circuit court's rejection of their counterclaim for battery, which is not before us.

1-10-1697

Defendants failed to present sufficient evidence that they suffered severe emotional distress. See *Grey*, 169 Ill. App. 3d at 943 (the distress inflicted must be "so severe that no reasonable person could be expected to endure it"). The circuit court did not err in rejecting defendants' counterclaim for intentional infliction of emotional distress.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.