2011 IL App (2d) 101065-U
No. 2-10-1065
Order filed December 12, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BRET A. BROADDUS,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-L-0314
	)	
CENTERPOINT REALTY SERVICES	)	
CORPORATION,	)	Honorable
	)	Hollis L. Webster,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: The trial court erred when it granted defendant's motion for judgment on the pleadings because the pleadings, matters subject to judicial notice, and the judicial admissions reflect that an issue of fact existed. We further held that, if the trial court granted defendant's motion for judgment on the pleadings as a discovery sanction, such a sanction would be too harsh. Therefore, we reversed the trial court's judgment and remanded for further proceedings.

¶ 1 Plaintiff, Bret A. Broaddus, brought the current action alleging breach of contract and *quantum meruit* against defendant, Centerpoint Realty Services Corporation. Plaintiff's complaint alleged that defendant retained him as a broker but failed to pay him a commission he earned after procuring a tenant for a commercial property owned by defendant. Defendant filed an answer

asserting four affirmative defenses, and thereafter, tendered plaintiff a discovery request regarding those defenses. When plaintiff failed to answer the discovery requests or defendant's affirmative defenses, the trial court granted defendant's motion for a judgment on the pleadings pursuant to section 2-615(e) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615(e) (West 2008)). The trial court subsequently denied plaintiff's motion to reconsider and for leave to answer defendant's affirmative defenses *instanter*. Plaintiff now timely appeals, contending (1) the trial court erred in granting defendant's motion for judgment on the pleadings; (2) the trial court abused its discretion by not permitting plaintiff leave to answer defendant's affirmative defenses *instanter*; (3) the trial court erred in denying his motion to reconsider; and (4) the trial court erred in requiring him to appear in person because he resides in Florida and is paraplegic. Because we conclude that the trial court erred in granting defendant's motion for judgment on the pleadings, we reverse and remand for further proceedings.

¶ 2 I. Background

¶ 3 The record reflects that, on January 4, 2008, plaintiff filed his complaint against defendants alleging breach of contract and *quantum meruit*. Plaintiff alleged that he was agent of Alliance Commercial Real Estate Group, Inc. (Alliance) or KOLL Real Estate Service Company (KOLL). Plaintiff alleged the Champion Transportation, Inc. (Champion) retained him to procure a warehouse and office facility in the Chicago area. Plaintiff further alleged that in 1997, defendant retained him to procure a commercial tenant for a 242,000 square foot commercial facility defendant owned in Northlake. Plaintiff alleged that he and defendant agreed that he would receive a commission of 8% of the annual rent for the first year and 3% of the annual rent for the following nine years if he found a tenant for the facility. Plaintiff alleged that he introduced defendant to Champion, and thereafter, those entities entered into a 10-year lease agreement for the Northlake facility. Plaintiff further

alleged that defendant and Champion later agreed to expand the leased premises in excess of 75,000 feet, increasing Champion's annual rent obligations. As a result, plaintiff alleged that defendant failed to pay him $356,000 in commission fees. In the alternative, plaintiff alleged a *quantum meruit* claim, alleging defendant received a value from its relationship with him.

¶ 4 On July 28, 2009, defendant filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code. Defendant argued that plaintiff's complaint should be dismissed because plaintiff was never a licensed real estate broker; the lease between defendant and Champion did not require defendant to pay a commission if Champion exercised its option to expand; Champion did not exercise its option to expand the leased premises within the time frame required by the lease; plaintiff could not establish that he was a lawful assignee of any commission owed to KOLL; and the complaint did not allege that there was an agreement between defendant and Alliance.

¶ 5 On November 25, 2009, the trial court denied defendant's motion to dismiss. The trial court's written order expressly provided that "there are questions of fact related to whether [plaintiff] or his assignors were the procuring cause of the lease expansion." The trial court gave defendant until December 23, 2009, to answer the complaint.

¶ 6 On December 21, 2009, defendant filed its answer and asserted four affirmative defenses: (1) plaintiff was barred by section 4(21) of the Real Estate License Act of 1983 (225 ILCS 455/1 *et seq.* (West 2008)) and the Real Estate License Act of 2000 (225 ILCS 454/1-1 *et seq.* (West 2008)) because plaintiff was not a licensed real estate broker during the relevant period; (2) plaintiff's lawsuit was barred by the applicable statute of limitations; (3) plaintiff lacked standing because plaintiff alleged he was an assignee of KOLL, which dissolved on October 21, 1999; and (4) Champion abandoned its plan to lease additional space from defendant, and as a result, plaintiff

was not the procuring cause of the lease expansion. Defendant served plaintiff with a discovery request pertaining to its affirmative defenses.

¶ 7 On February 10, 2010, the trial court granted plaintiff's motion for his counsel to withdraw and gave plaintiff until February 24, 2010, to file a supplemental appearance. The trial court also gave plaintiff until March 3, 2010, to respond to defendant's written discovery request and to reply to defendant's affirmative defenses. On March 1, 2010, pursuant to a motion brought by plaintiff, the trial court allowed plaintiff to respond to defendant's written discovery and reply to defendant's affirmative defenses by March 15, 2010. On March 24, 2010, the trial court extended plaintiff's time to respond to written discovery and answer defendant's affirmative defense until March 29, 2010. On April 1, 2010, plaintiff filed a motion for an extension of time to respond to discovery and to reply to defendant's affirmative defenses.

¶ 8 On April 5, 2010, defendant filed a motion for judgment on the pleadings and for other relief. Defendant argued that, because plaintiff failed to respond to discovery or reply to its affirmative defenses, the affirmative defenses were deemed admitted and defendant was entitled to a judgment on the pleadings. Alternatively, defendant's motion asked the trial court to dismiss the complaint with prejudice as a result of plaintiff "repeatedly failing to comply with [the trial court's] orders directing him to respond to [defendant's] discovery."

¶ 9 On April 8, 2010, the trial court granted plaintiff's motion for extension of time and gave plaintiff until April 27, 2010, to respond to defendant's written discovery and reply to defendant's affirmative defenses. The trial court entered and continued defendant's motion for judgment on the pleadings until April 27, 2010. The trial court further continued plaintiff's motion to withdraw until April 27, 2010 and prohibited plaintiff from contacting defendant's agents, employees, and officers. The trial court also ordered plaintiff to personally appear in court on April 27, 2010.

¶ 10 On April 27, 2010, the trial court permitted plaintiff's counsel to withdraw and gave plaintiff until May 18, 2010, to file his own appearance or the appearance of new counsel. The trial court further continued the matter, including defendant's motion for judgment on the pleadings, until May 25, 2010. The trial court ordered plaintiff's current attorney to serve a copy of the order on plaintiff.

¶ 11 On May 25, 2010, the trial court granted defendant's motion for judgment on the pleadings and dismissed the complaint with prejudice. On June 23, 2010, plaintiff filed a motion seeking the trial court to reconsider its May 25, 2010, order and seeking leave to file an answer to the affirmative defenses *instanter*. On September 15, 2010, the trial court conducted a hearing and stated:

> "I have reviewed all of the pleadings that were provided to me. And this is an extraordinary case in light of its procedural history, both [the previous lawsuit between the parties and the current one].
>
> And in considering the totality of the circumstances here, specifically with respect to this case, the second filed case of [plaintiff] and the exercise of this [c]ourt's discretion, I do not find that there has been any violation of [plaintiff's] right to fundamental justice."

Plaintiff timely appealed.

¶ 12 II. Analysis

¶ 13 The first issue on appeal is whether the trial court erred in granting defendant's motion for judgment on the pleadings. Plaintiff argues that the trial court previously determined on November 25, 2009, that this matter contained a factual question when it denied defendant's motion to dismiss pursuant to section 2-619 of the Code. Therefore, he contends the trial court erred in granting defendant's motion for judgment on the pleadings. Defendant counters that the trial court's judgment should be affirmed because plaintiff admitted the affirmative defenses it asserted by failing

to reply to those defenses or to answer discovery. Defendant further argues that dismissal of the complaint was warranted as a sanction for plaintiff's "continuing failure to comply with discovery."

¶ 14 Section 2-615(e) of the Code provides that "[a]ny party may seasonably move for judgment on the pleadings." 735 ILCS 5/2-615(e)(West 2010). A motion for judgment on the pleadings requires the trial court to examine the pleadings to determine whether an issue of fact exists, or conversely, whether the controversy can be resolved as a matter of law. *Crestview Builders, Inc. v. Noggle Family Limited Partnership*, 352 Ill. App. 3d 1182, 1184-85 (2004). In ruling on such a motion, the trial court can only consider facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions. *M.A.K. v. Rush-Presbyterian-St. Luke's Medical Center*, 198 Ill. 2d 249, 255 (2001). A trial court must construe the evidence strictly against the moving party and liberally in favor of the nonmoving party. *McCall v. Devine*, 334 Ill. App. 3d 192, 198 (2002). Our review of a decision to grant a motion on the pleadings is *de novo*. *Id.*

¶ 15 In the current matter, the pleadings, matters subject to judicial notice, and judicial admissions reflect that an issue of fact exists, and therefore, judgment on the pleadings was inappropriate. The premise of the complaint is that defendant owed plaintiff a commission after plaintiff allegedly procured an expansion of the lease between defendant and Champion. The trial court denied defendant's initial section 2-619 motion to dismiss, expressly finding that "there are questions of fact related to whether [plaintiff] or his assignors were the procuring cause of the lease expansion." The trial court then granted defendant's motion for judgment on the pleadings only after plaintiff failed to answer defendant's affirmative defenses or respond to defendant's first request for production or interrogatories. However, the trial court previously held that the pleadings raised a factual question regarding whether plaintiff procured the lease expansion between defendant and

Champion. Therefore, because the trial court previously concluded that the matter involved a question of fact, judgment on the pleadings was not warranted.

¶ 16 Defendant's argument that the trial court correctly granted its motion for judgment on the pleadings because its affirmative defenses were admitted when defendant failed to reply to those defenses is unavailing. Initially, we note that the record is devoid of any indication that the trial court deemed defendant's affirmative defenses admitted. Nonetheless, we recognize that "[u]nder Illinois law, a party's failure to reply to an affirmative defense constitutes an admission of the facts alleged therein." *Pancoe v. Singh*, 376 Ill. App. 3d 900, 908 (2007). However, Illinois law also provides that, if the complaint itself negates the affirmative defense, a reply is not necessary; further, courts should liberally construe the rule excusing the filing of a reply to an affirmative defense. *State Farm Mutual Auto Insurance Co v. Haskins*, 215 Ill. App. 242, 246 (1991). Finally, even if an affirmative defense is admitted, only the facts alleged in the defense are admitted, not the legal conclusions. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769-70 (1993).

¶ 17 Here, even if the facts alleged in defendant's affirmative defenses were admitted, those facts are insufficient to warrant a judgment on the pleadings. Specifically, defendant's first affirmative defense is premised on the theory that plaintiff was a real estate salesperson, not a broker, and pursuant to the Real Estate License Acts of 1983 and 2000, respectively, he can recover a commission only from a broker by whom he was employed or sponsored. Further, defendant asserted that KOLL's real estate license lapsed in 1998 and that there was no an agreement between defendant and Champion to expand the lease prior to October 31, 1998. However, because only facts are admitted by failing to respond to an affirmative defense, plaintiff's failure to reply to this defense would not result in an admission that the Real Estate License Acts only permit plaintiff to recover a commission from a broker by whom he was employed or sponsored. See *id.* Rather, the

facts that would be admitted are only that plaintiff was a real estate salesperson, not a broker, KOLL's real estate license lapsed on October 31, 1998, and defendant and Champion did not enter into a lease agreement before October 31, 1998. These factual admissions, however, would not defeat plaintiff's allegation that he procured a lease expansion between defendant and Champion within the time frame permitted by the lease, which allegedly extended beyond October 31, 1998, while working for another sponsoring broker.

¶ 18 Defendant's second affirmative defense is that "to the extent" plaintiff's involvement in the lease expansion was concluded prior to January 4, 2003, the claim was barred by the statute of limitations. This affirmative defense does not assert a fact, but merely states a legal conclusion "in the event that" plaintiff's involvement with the lease expansion occurred prior to a certain date. Because this affirmative defense does not admit any factual allegations, it does not defeat plaintiff's factual claim that he procured a lease expansion between defendant and Champion. See *id.*

¶ 19 Defendant's third affirmative defense is that plaintiff lacked standing because KOLL dissolved on October 21, 1999, and pursuant to section 12.80 of the Business Corporation Act (805 ILCS 5/12.80 (West 2008)), KOLL could bring a civil lawsuit only within five years of its dissolution. Therefore, as an assignee of KOLL, plaintiff's right to bring this lawsuit could not exceed KOLL's right, and as a result, plaintiff lacked standing. As noted above, only facts asserted in a affirmative defense are deemed admitted, not legal conclusions. Therefore, the only fact that would be admitted is that KOLL dissolved on October 21, 1999, and plaintiff's failure to reply would not result in an admission that he lacks standing. See *id.*

¶ 20 Defendant's fourth affirmative defense asserts that Champion abandoned its option to expand the premises pursuant to its lease with defendant; Champion did not retain plaintiff to act as a broker with respect to leasing additional space at the Northlake facility; Champion contacted defendant

directly regarding a potential lease expansion; Champion did not initiate any communications with plaintiff after it signed the lease in May 2002; and plaintiff did not procure the lease expansion. These statements, while factual in nature, are in direct contradiction to the allegations in the complaint. Therefore, the complaint directly negates this affirmative defense See *Haskins*, 215 Ill. App. at 246.

¶ 21 We also reject defendant's argument that plaintiff's complaint could have also been properly dismissed as a sanction for failing to respond to discovery pursuant to Supreme Court Rule 219(c) (eff. July 1, 2002). Initially, we note that the trial court's May 25, 2010, order did not specify whether it dismissed plaintiff's complaint as a sanction resulting from his failure to comply with the trial court's discovery orders. Nonetheless, even if the trial court did dismiss plaintiff's complaint as a sanction, its determination would also warrant reversal. Rule 219(c) permits a trial court to sanction a party for failing to respond to discovery by, among other sanctions, striking the offending party's pleading and entering judgment on that issue. A trial court is vested with wide discretionary powers relating to pretrial discovery orders, but nonetheless, even if a court determines that a party has reasonably failed to comply with discovery orders and that sanctions were appropriate, the sanctions must be just and proportionate to the offense. *Gonzalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460, 464 (2006). Moreover, Illinois law is well settled that dismissal with prejudice is a drastic punishment that courts are reluctant to impose, and therefore, should be employed only as a last resort when all other enforcement measures have failed. *Id.* at 465. Thus, the purpose of imposing sanctions pursuant to Rule 219(c) is to " 'compel litigation rather than dispose of litigation as a means of punishing a noncomplying party *** .' " *Id.* (quoting *Cedric Springs & Associates, Inc. v. N.E.I. Corp.*, 81 Ill. App. 3d 1031, 1035 (1980)).

¶ 22 Here, the record reflects that, even if the trial court dismissed plaintiff's complaint with prejudice as a sanction pursuant to Rule 219(c), such a determination would have constituted an abuse of discretion. The trial court dismissed the complaint when, after allowing plaintiff a number of extensions, plaintiff failed to respond to defendant's outstanding requests for production and written interrogatories. Plaintiff's current counsel then filed a motion to vacate and to file an answer to defendant's affirmative defenses *instanter*. Based on the foregoing, dismissal of plaintiff's complaint would be too harsh of a sanction, particularly because the record does not reflect that lesser sanctions were ineffective or that the trial court dismissed plaintiff's complaint only as a last resort. See *Gonzalez*, 369 Ill. App. 3d at 469 (holding that a trial court's determination to dismiss an action pursuant to Rule 219(c) was too harsh, and therefore an abuse of discretion, because the record did not indicate that a lesser sanction was ineffective or that the sanction was entered as a last resort). Such a conclusion is consistent with this State's public policy of resolving complaints on their merits. See *Id.* at 471 (citing *Smith v. City of Chicago*, 299 Ill. App. 3d 1048, 1054-55 (1998)).

¶ 23 In sum, a judgment on the pleadings was inappropriate in this case because, as the trial court previously concluded, plaintiff's complaint raised a question of fact regarding whether plaintiff procured the lease expansion between defendant and Champion. Moreover, plaintiff's failure to reply to the affirmative defenses would result only in the admission of the factual allegations contained in those defenses and not the legal conclusions those defenses put forth. Although it is not clear from the record whether the factual statements asserted in plaintiff's affirmative defenses were admitted, those facts would not defeat plaintiff's allegation that he procured the lease expansion between defendant and Champion and was entitled to a commission. Further, although it is likewise unclear whether the trial court granted defendant's motion for judgment on the pleadings as a discovery sanction, such a sanction would be too harsh, and therefore, would

constitute an abuse of discretion. Finally, we note that our resolution of this issue obviates the need to address plaintiff's remaining arguments. See *Siegel v. Lake County Officers Electoral Board*, 385 Ill. App. 3d 452, 457 (2008).

¶ 24 III. Conclusion

¶ 25 For the foregoing reasons, we reverse the judgment of the circuit court of Du Page County and remand for further proceedings consistent with this order.

¶ 26 Reversed and remanded.