

No. 1-11-1970

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

JP MORGAN CHASE BANK,)	
)	
Plaintiff-Appellee,)	Appeal from the Circuit
)	Court of Cook County.
)	
v.)	
)	No. 09-L-1574
)	
MAHER APPRAISAL SERVICES INC. and JEROME)	
MAHER JR.,)	
)	Honorable
Defendants-Appellants,)	Allen S. Goldberg,
)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly granted summary judgment in favor of the plaintiff in a breach of contract action where plaintiff provided an affidavit pertaining to the terms of the contract and breach thereof, and defendants did not provide a counteraffidavit that contradicted the facts established by the plaintiff.\

¶ 2 Defendants, Maher Appraisal Services, Inc. ("MAS") and Jerome Maher, Jr., appeal from an order from the circuit court of Cook County granting summary judgment in favor of plaintiff, JP Morgan Chase Bank ("Chase"), in an action for breach of a loan agreement.

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¶ 3 BACKGROUND

¶ 4 Initially, we note that defendant has only provided us with a common law record, and has not included a transcript of the proceedings below. Moreover, the common law record is replete with multiple gaps. Nevertheless, based on this limited record, we are able to glean what appears to be the following facts and procedural history.

¶ 5 On December 15, 2009, plaintiff filed a complaint against defendants for MAS' breach of a credit agreement (count I) and Maher's breach of guaranty of the loan (count II), and sought to recover damages in the amount of \$99,706.03. The complaint alleged, in count I, that Chase entered into a business credit agreement with defendant MAS, and that while Chase fully performed under that agreement, MAS breached the contract by failing to make payments to Chase as set forth in the agreement. Plaintiff further alleged, in count II, that defendant Maher, who signed the agreement as the president of MAS, also agreed to guarantee the loan from Chase. According to the complaint, Maher, like MAS, breached his own agreement by failing to make the payments as required under the agreement. Attached to that complaint is a copy of a document titled "business credit application" to a company named Washington Mutual ("WAMU"). The document lists MAS as the applicant for a business line of credit in the amount of \$100,000, and lists Maher as the "president/owner" of MAS, who, as stated above, signed the contract on behalf of MAS. This document does not purport to indicate any connection between Washington Mutual and plaintiff, and does not contain any language with regard to Maher's guarantee of the loan.

¶ 6 On March 25, 2010, defendants filed a motion to dismiss plaintiff's complaint, in which

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they claimed that plaintiff lack the capacity to sue defendants on that loan agreement because Chase was not the party who entered into that contract with defendants. According to the motion, plaintiff failed to comply with section 2-403 of the Illinois Code of Civil Procedure ("Code") (735 ILCS 5/2-403 (West 2008)), which provides, in relevant part, that the assignee and owner of a chose in action "shall, in his or her pleading on oath allege that he or she is the actual bona fide owner thereof, and set forth and when he or she acquired title." On April 15, 2010, the court struck defendants' motion to dismiss, and it struck plaintiff's complaint without prejudice.

¶ 7 Plaintiff subsequently filed its first amended complaint on May 13, 2010, in which it alleged, for the first time, that Chase was "the successor in interest" to WAMU by virtue of a 2008 merger with that bank. Further, it now stated that defendants entered into a business credit agreement with WAMU, rather than Chase. The complaint further alleged that Chase now owns that agreement and is entitled to enforce it. Aside from these new allegations, plaintiff's first amended complaint was virtually identical to its prior complaint in every respect. As it had done before, plaintiff attached to its first amended complaint a copy of MAS' credit application signed by Maher. Defendants subsequently filed an answer to plaintiff's first amended complaint, in which they denied plaintiff's allegations that they entered into a credit agreement with WAMU and that they breached that agreement. They also denied plaintiff's allegation that it was a successor in interest to WAMU, and stated that plaintiff, again, failed to comply with section 2-403 of the Code. Defendants admitted, however, that neither of them ever made any payments to Chase.

¶ 8 On August 24, 2010, defendants filed answers to written interrogatories, in which they

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stated, consistently with their answer, that MAS did not have a line of credit with WAMU, and that Maher did not sign for such a line of credit, nor did he personally guarantee the repayment of that line of credit. They further stated that MAS did not have a balance on any line of credit with WAMU, and that no documents existed relating to payments made under a line of credit from WAMU to MAS. On that same day, defendants also filed a document titled "defendants' response to requests to admit," which purported to respond to a "request to admit" supposedly filed by plaintiff, but which is not contained in the common law record before us. While defendants' "response" appears to deny five of the plaintiff's seven purported allegations, and admit the remaining two, it bears no indication of what plaintiff's allegations in its "request to admit" may have been.

¶ 9 On December 2, 2010, plaintiff filed a motion to file a second amended complaint, which more precisely explains the manner in which Chase obtained the credit agreement at issue, and attached to it is an allegedly newly discovered copy of the credit agreement containing language of Maher's personal guarantee. The circuit court allowed plaintiff to file this second amended complaint, which alleged, for the first time, that in 2008, Chase acquired "certain assets" of WAMU from the Federal Deposit Insurance Company ("FDIC"), which was "acting as receiver for WAMU." As noted above, attached to plaintiff's second amended complaint was a document titled "streamlined business credit application and agreement," which, similarly to the document attached to previous complaints, appears to be a credit line agreement between MAS and WAMU, signed by Maher, for a line of credit of \$100,000. Unlike the previously attached document, however, this agreement contained a provision where Maher "unconditionally

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guarantees payment of, and agrees to pay to the Bank's order on demand, all present and future obligations at any time outstanding under the loan provided pursuant to the Streamlined Business Credit Application and Agreement."

¶ 10 Defendants filed an answer to plaintiff's second amended complaint, in which they, again, denied all allegations that they entered into, or breached, any such credit agreement with WAMU. They again denied the allegation that Chase acquired WAMU's assets from the FDIC and stated that plaintiff failed to comply with section 2-403 of the Code. As in their answer to the prior complaint, defendants admitted that Maher had not made any payments to Chase.

¶ 11 On April 12, 2011, plaintiff filed a motion for summary judgment, claiming that there was no genuine issue of material fact with respect to any of its allegations in the second amended complaint, namely: (1) that MAS entered into a credit line agreement with WAMU, under which Maher personally guaranteed MAS' repayment; (2) that MAS breached the agreement by failing to make the required payments Maher breached his agreement to guarantee MAS' payment obligations; and (3) that Chase was the successor of WAMU and was entitled to enforce the agreement. Attached to plaintiff's motion was copy of the same "streamlined credit application and agreement," signed by Maher, that had been submitted with its second amended complaint. Further, plaintiff attached defendants' answer to that complaint, in which they admitted to not making any payments to Chase.

¶ 12 In addition, plaintiff attached to that motion a document titled "declaration of Angelica Aviles in support of motion for summary judgment," in which Aviles avers that she is a recovery officer of plaintiff and competent to testify to the matters therein. In that affidavit, Aviles states

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that in her capacity, she has access to Chase's business records, maintained in the ordinary course of regularly conducted business activity, which include the documents relating to the loan agreement with MAS. Aviles averred that the "loan records" for MAS are maintained by Chase in the course of its regularly conducted business activities and are made at or near the time of the event, by or from information transmitted by a person with knowledge. She further states that, with respect to Chase's business records that consist of documents created by third parties, plaintiff relies on the accuracy of such records in conducting its business of both servicing and collecting loans. Based on review of those records, Aviles stated that on November 25, 2006, MAS executed a business credit agreement with WAMU in the amount of \$100,000, and that on or about that same date, Maher executed a personal guaranty, pursuant to which he guaranteed repayment of the loan. Most notably, Aviles averred that Chase is the acquirer of certain assets of WAMU from the FDIC acting as a receiver, and that Chase is the holder of the aforementioned credit agreement.

¶ 13 With respect to the amount owed by defendants, Aviles stated that MAS had failed to pay under the terms of the agreement and as of March 31, 2011, it was in default in the amount of \$113,007.39. That amount includes a principal balance of \$99,706.03, interest in the amount of \$12,612.47, and late fees and costs of \$803.52. She further stated that Maher had failed to cure the default of MAS under the guaranty, and was, therefore, in default as well.

¶ 14 In addition to the above attachments, plaintiff submitted a copy of a letter from Chase to MAS, dated August 4, 2009. The letter stated that MAS had failed to make payments as required under their agreement, which is why Chase has accelerated the note, and that the unpaid principal

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and accrued interest was due at that time.

¶ 15 On May 2, 2011, defendants filed their response to plaintiff's motion for summary judgment, in which they argue that plaintiff failed to show that there were no genuinely contested issues of material fact, and plaintiff was not, therefore, entitled to summary judgment. According to defendants, Aviles' affidavit violates Illinois Supreme Court Rule 191(a), and cannot be considered in evaluating plaintiff's motion, because she did not have personal knowledge as to whether defendants entered into, or breached, the alleged credit agreement with WAMU. Defendants further argued that Aviles' affidavit failed to establish the manner in which Chase became entitled to collect on the credit agreement between defendants and WAMU as required under section 2-403 of the Code.

¶ 16 Attached to defendants' response was Maher's affidavit. Maher avers in that affidavit that he did not enter into any credit agreements or sign any personal guaranties on behalf of MAS with plaintiff, Chase. He further stated that has never met, or in any way communicated with Aviles, who is a person "completely unknown" to Maher. Lastly, he attested that he was not aware of any obligation on his part to pay attorney's fees in connection with the alleged credit agreement and guaranty.

¶ 17 On May 24, 2011, plaintiff filed its reply in support of its motion for summary judgment, in which it claims that Maher's affidavit does not create any issues of material facts because it is undisputed that defendants entered into a credit agreement with WAMU, which Chase acquired from the FDIC, acting as a receiver for WAMU. Plaintiff further argued that it is irrelevant whether Maher met Aviles, because she is the recovery officer for Chase, and has access to

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plaintiff's business records to determine the amount due and owing on the agreement, and the circumstances under which Chase became the holder of that agreement.

¶ 18 On June 14, 2011, the circuit court granted summary judgment in favor of plaintiff in the amount of \$113,007.29. In its written order, the court reiterated each party's arguments and concluded, after considering the parties' written submissions and oral argument, that "based on the pleadings and evidence reviewed by the Court we find that there is no 'genuine' issue of material fact that the Defendants loaned the money, executed the Note and Personal Guaranty, failed to repay the monies, and that said amounts remain due and owing to the Plaintiff."

¶ 19 On appeal from that order, defendants now contend that the circuit court erred in granting summary judgment in favor of plaintiff because plaintiff failed to meet its burden to show that there were no genuine issues of material fact. Defendants further argue that even assuming, *arguendo*, that plaintiff introduced sufficient evidence in support of its breach of contract claim, summary judgment was improper because Maher's affidavit and defendants' denials that they entered into any credit agreements contradicted Aviles' affidavit and thus created a genuine issue of material fact.

¶ 20 ANALYSIS

¶ 21 As a preliminary matter, before turning to the merits of defendants' appeal, we observe that the record on appeal is incomplete. Specifically, transcripts of the hearing on plaintiff's motion for summary judgment do not appear in the record, and only the common law record containing the parties' pleadings and the circuit court's written order are present. Moreover, the plaintiff's request to admit is missing from the record, and while we have defendants' responses

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to that request, they do not indicate what allegations they admitted in response to that request.

We note that it is the burden of the appealing party to provide a sufficiently complete record of the proceedings in the trial court to allow for meaningful appellate review. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984); *Lewandowski v. Jelenski*, 401 Ill. App. 3d 893, 902 (2010).

Accordingly, in the absence of a sufficiently complete record on appeal, a reviewing court will resolve all insufficiencies apparent therein against the appellant and will presume that the order entered by the trial court was in conformity with the law and had a sufficient legal and factual basis. *Foutch*, 99 Ill. 2d at 392.

¶ 22 The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact actually exists. *Northern Illinois Emergency Physicians et al. v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). Summary judgment is appropriate when "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2011). A trial court's ruling on a motion for summary judgment is reviewed *de novo*. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009).

¶ 23 To succeed on a breach of contract action, a plaintiff must show the existence of a valid and enforceable contract, performance of that contract by the plaintiff, breach of the contract by the defendant, and resulting injury to the plaintiff. *Carlton at the Lake, Inc. v. Barber*, 401 Ill. App. 3d 528, 521 (2011). While a plaintiff does not need to prove its entire case at the summary judgment stage, it must at least present a factual basis that could arguably entitle it to judgment in

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its favor. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1086 (2009). Further, although summary judgment has been considered "a drastic means of disposing of litigation" (*Purtill v. Hess*, 111 Ill. 2d 229, 240 (1989)), it is nevertheless an appropriate mechanism to expeditiously dispose of a lawsuit when the moving party's right to a judgment in its favor is clear and free from doubt (*Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001)). See *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, **690, ¶23 (March 22, 2012). In fact, while the pleadings, depositions, admissions and affidavits on file must be construed against the movant and in favor of the opponent, the opponent of a motion cannot simply rely on his complaint or answer to raise an issue of fact when the movant " 'supplies facts, which if not contradicted, would entitle such a party to judgment as a matter of law.' " *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988) (quoting *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974)).

¶ 24 Moreover, Illinois Supreme Court Rule 191 provides that affidavits offered in support of, or in opposition to, a motion for summary judgment, must be based on personal knowledge and shall not consist of legal conclusions, but of facts admissible in evidence. S. Ct. R. 191 (eff. July 1, 2002). Thus, unsupported assertions, opinions, and self-serving or conclusory statements made in depositions are not admissible on review of a motion for summary judgment. See, e.g. *Davis v. Times Mirror Magazines, Inc.*, 297 Ill. App. 3d 488, 495 (1998).

¶ 25 In this case, plaintiff introduced, in support of its summary judgment motion, a copy of the credit agreement between MAS and WAMU, as well as the guaranty of payment, both signed by Maher. In addition, plaintiff attached Aviles' affidavit, in which she stated, based on her own

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personal knowledge as plaintiff's recovery officer, that plaintiff had acquired certain assets of WAMU from the FDIC acting as receiver, and is now the holder of the agreement between MAS and WAMU. Aviles further attests that MAS has failed to make payments under the agreement and that Maher failed to cure the default. She also states the amount owed by defendants as of that date and explains how that amount was calculated. Further, plaintiff attached to its motion a letter sent to defendants demanding payment, and defendants' own answer to plaintiff's second amended complaint, in which they at least admit that Maher had not made any payments to plaintiff, Chase. Thus, plaintiff met its burden of presenting sufficient evidence to show defendants' breach of a contract which plaintiff was entitled to enforce, and therefore, it was entitled to judgment as a matter of law. See, e.g. *Peoples Gas Light & Coke Co. v. Flisk*, 97 Ill. App. 3d 1123, 1125-26 (1981) (plaintiff entitled to summary judgment where it presented the contract and guaranty between plaintiff and defendant, an affidavit explaining how the debt was calculated and an order requiring defendant to pay arrearages).

¶ 26 While Maher states in his affidavit that he had never met Aviles, that fact is irrelevant, since the terms of that agreement had already been established by the copy of the contract itself, and Aviles' affidavit was introduced as evidence that Chase acquired the agreement from WAMU and that MAS had not made payments to Chase. Further, although Maher denies, in that same affidavit, that neither of the defendants had ever entered into an agreement with Chase, he does not dispute that they entered into such an agreement with WAMU. In addition, while Maher avers that he is not aware of any obligation on his part to pay plaintiff's attorney's fees in connection to this matter, that assertion is a mere conclusion and does not raise an issue of

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material fact. Moreover, as noted above, defendants cannot rely on their pleadings, in which they denied entering into any agreement with WAMU, to raise an issue of fact. Thus, neither Maher's affidavit, nor defendants' pleadings, sufficiently raised a genuine issue of material fact so as to preclude summary judgment in plaintiff's favor.

¶ 27 Defendants, nevertheless, contend that summary judgment was improper because the plaintiff did not sufficiently plead and prove that it acquired the right to enforce the agreement between defendants and WAMU, as required by section 2-403 of the Code. According to defendants, the burden of proof never shifted to them because plaintiff failed to provide evidence of the terms of the alleged assignment and the consideration paid.

¶ 28 As noted above, section 2-403 of the Code merely requires that a plaintiff who is the assignee or owner of a chose in action allege in its complaint that it is the bona fide owner thereof, and set forth how and when it acquired title. 734 ILCS 5/2-403 (West 2011). The record in this case shows that plaintiff has complied with that requirement by stating in its second amended complaint that in 2008, it acquired certain assets from the FDIC, acting as a receiver of WAMU, and had title to that agreement.

¶ 29 Furthermore, facts contained in an affidavit offered in support of a motion for summary judgment which are not contradicted by a counteraffidavit are thereby admitted and must be taken as true for purposes of the motion. *Purtill*, 111 Ill. 2d at 241; *Malone v. American Cyanamid Co.*, 271 Ill. App. 3d 843, 846 (1995). As explained above, Aviles' affidavit stated that, as a result of acquiring assets from WAMU, it is now the holder of the agreement between WAMU and defendants. Although defendants provided Maher's affidavit, denying any

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agreement with plaintiff, they provided no counteraffidavit which denies their agreement with WAMU. In fact, nothing in Maher's affidavit denies that defendants entered into the agreement with WAMU, or that they failed to make payments under that agreement. Neither have they provided any evidence which contradicts Aviles' statement that plaintiff has acquired the agreement in question. Thus, Aviles' statement with respect to plaintiff's acquisition of the agreement, like her statement as to defendants' default and the amount owed under that agreement, were, therefore admitted for purposes of plaintiff's summary judgment motion.

¶ 30 Moreover, the circuit court's order granting summary judgment states only that based on the pleadings and evidence before the court, there was no issue of material fact that defendants loaned the money, executed the note and guaranty, failed to repay their debt, which is now due and owing to the plaintiff. The court does not indicate its reasoning for concluding that the evidence before it sufficiently established that the plaintiff was entitled to enforce the agreement. While the court acknowledged plaintiff's argument that Aviles' affidavit explains the circumstances under which plaintiff became the holder of the note, it does not indicate whether any additional evidence was presented at the hearing. Additionally, the common law record is not complete, and although it contains defendants' response to a request to admit, the record does not contain the purported request to admit, without which we cannot determine which allegations in that request defendants admitted and which they denied. Since it appears that the defendants' sole counteraffidavit merely denies entering into an agreement with Chase, they circuit court may have reasonably inferred that defendants no longer denied that they entered an agreement with WAMU, or that Chase later acquired it. As such, we must resolve all doubts against the

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appellant and presume that the circuit court's ruling had a sufficient factual basis and was in conformity with the law. See *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); see also *Foutch*, 99 Ill. 2d at 392; *Coleman*, 160 Ill. App. 3d at 419.

¶ 31 In a related argument, defendants next contend, for the first time on appeal, that plaintiff was not entitled to summary judgment as a matter of law because they did not present copies of the written assignments from WAMU to the FDIC and from the FDIC to Chase as required by section 8b(e) of the Collection Agency Act (225 ILCS 425/8b (2010)). However, questions not raised at the trial court cannot be argued for the first time on appeal. *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000). Since defendants did not raise this issue in their response to plaintiff's motion for summary judgment or any other pleadings before the trial court, that argument is waived.

¶ 32 Lastly, defendants contend that Aviles' affidavit should not have been considered by the circuit court because she did not have personal knowledge as to whether defendants entered into a credit agreement with WAMU, and because, according to defendants, her statement that Chase acquired certain assets from WAMU was a conclusion. That argument is unpersuasive.

¶ 33 Even if Aviles did not have personal knowledge of whether defendants entered into the credit agreement with WAMU, that part of her affidavit was not relevant to the outcome of the trial court's decision, because the terms of the credit agreement were established by the submitted copy of the contract itself. The more significant portion of her affidavit was that Chase had acquired the credit agreement, and that its records were maintained in the regular course of business, so as to satisfy Illinois Rule of Evidence 803(6), which allows the introduction of

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records kept in the course of regularly conducted business activity. Ill. R. Evid. 803(6) (eff. April 26, 2012). Her affidavit indicates, and defendants do not dispute, that Aviles did, in fact, have personal knowledge of those facts. Moreover, contrary to defendants' contention, Aviles' statement relating to Chase's acquisition of the agreement was not a mere conclusion. She did not simply conclude that Chase was the holder of the agreement, but, as previously noted, she explained that plaintiff had acquired certain assets of WAMU from the FDIC as receiver.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.