

1-11-2397

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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CITIBANK SOUTH DAKOTA, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 M1 178781
	)	
RITA GALARZA,	)	Honorable
	)	Pamela E. Hill-Veal,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Rochford and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* Judgment affirmed on presumption that court's decision was based on sufficient evidence where defendant failed to file complete record; defendant also waived any objections to the sufficiency of the complaint by answering.

¶ 2 This is a collections action, in which plaintiff Citibank South Dakota (Citibank) filed a complaint against defendant Rita Galarza (Galarza), alleging that she failed to pay the debt incurred through her use of a credit card issued by Citibank. Following a bench trial in the circuit court of Cook County, the court entered judgment for \$16,579.46 plus costs in favor of Citibank. Galarza now challenges that judgment, *pro se*, and also claims trial court errors in the proceedings that led to its decision.

¶ 3 The pleadings in the common law record show that on August 24, 2010, Citibank filed a complaint against Galarza alleging that she obtained a credit card from Citibank, and subsequently defaulted by failing to pay the \$16,579.46 balance. In support of its claim, Citibank attached the

affidavit of Cheryl Preston (Preston), an employee of Citicorp Credit Services, Inc., a subsidiary of Citibank, who services credit card accounts owned by Citibank including maintaining and recording information in Citibank's records.

¶ 4 Preston attested that she is a custodian of records, and has access to records concerning Citibank's account number ending in 8017, which is the subject of the lawsuit. Preston attested that Citibank's records reflected that Galarza used the account for the purpose of obtaining extensions of credit to purchase goods and services or cash advances. She also attested that Galarza agreed to the terms and conditions of the account by her use of it, and failed to make timely payments on the account according to the terms of the credit card agreement. The last payment received on the account was August 20, 2009.

¶ 5 Preston further attested that a true and correct copy of the statement sent to Galarza was attached to the complaint, and that it was a true and correct business record created and maintained by Citibank in the course of regularly-conducted business activity. That statement showed a balance in Galarza's account of \$16,579.46, which was due on April 21, 2010.

¶ 6 On December 13, 2010, Galarza filed a *pro se* appearance and a week later, filed an answer denying the allegations in Citibank's complaint. Two months later, on February 14, 2011, Galarza filed a *pro se* motion to dismiss Citibank's complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)), alleging that she first learned of the credit card account through Citibank's summons. Galarza further alleged that Citibank failed to set forth a cause of action, and violated section 2-606 of the Code (735 ILCS 5/2-606 (West 2010)) by failing to attach a written contract or an affidavit stating facts to show that this instrument was not accessible to it. She further alleged that Citibank failed to allege a cause of action under an "account stated" theory, and concluded that Citibank's complaint "does not even come close to establishing a breach of contract." In support of the motion to dismiss, Galarza attached her own affidavit in which she averred that she first learned of the alleged credit card account through Citibank's summons, that she

never received a credit card or made any verbal agreement with Citibank or its affiant.

¶ 7 On February 15, 2011, Galarza's motion to dismiss was denied, and trial was set for April 28, 2011. The record filed on appeal does not contain a report of the proceedings that led to the denial of the motion to dismiss or the order entered by the court.

¶ 8 On February 28, 2011, Galarza filed a request for the production of documents and interrogatories. On April 21, 2011, Citibank's attorney mailed Citibank's response to Galarza's production and interrogatories request, as indicated on the certificate of service contained in the record. On April 28, 2011, a bench trial was held, wherein the court entered judgment in favor of Citibank for \$16,579.46, plus costs.

¶ 9 On May 27, 2011, Galarza filed a motion to reconsider in which she reiterated the allegations in her motion to dismiss. She also alleged, *inter alia*, that Citibank violated the federal Truth in Lending Act (15 U.S.C. § 1601 *et seq.* (1982)), and that Citibank could not "amend its complaint at a whim from a breach of written contract theory, to the theory of 'Account Stated; Breach of unwritten Contract.'" <sup>1</sup> Galarza further alleged that it was impossible to lawfully establish a credit card account without a written document setting forth the material elements of the account, and that Citibank failed to provide any documents proving she had applied for a credit card. She also alleged that Citibank violated the Illinois statute of frauds, which requires the contract to be in writing, and alleged that the affidavit of Preston was hearsay.

¶ 10 Galarza further claimed that she filed her discovery request on February 28, 2011, but that Citibank did not respond until the trial date, and that the trial court did not grant her request for a continuance to review the documents. She noted that the additional documents provided by Citibank at trial exhibited an account number ending in 8511, with no explanation of the discrepancy of this number with the account number mentioned in the complaint, *i.e.*, 8017. Galarza further claimed

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<sup>1</sup>A copy of this alleged amended complaint was not included in the record filed on appeal.

that Citibank failed to comply with Supreme Court Rule 222 (eff. Jan. 1, 2011), which required an affidavit regarding the money sought.

¶ 11 Galarza finally alleged that Citibank failed to satisfy the elements of the "account stated" theory in the complaint, and that an allegation that an account was in default with a balance due did not adequately plead an "account stated" claim. In support of her motion to reconsider, Galarza attached her affidavit in which she essentially reiterated the claims in her motion.

¶ 12 The motion call order entered on July 28, 2011, reflects that the parties appeared before the court, which, was "fully advised," and denied Galarza's motion to reconsider. Although the motion call order also indicates that the order denying the motion to reconsider was attached, that order has not been included in the record on appeal. On August 18, 2011, Galarza filed a motion to have her bank account unfrozen, which was granted, and on August 25, 2011, Galarza filed a notice of appeal before this court.

¶ 13 As an initial matter, we observe that while this appeal was pending, Galarza requested and was granted an opportunity to file a supplemental record. When she failed to do so, we granted Citibank's subsequent motion to file a supplemental record, which contains copies of personal checks written by Galarza to Citibank, numerous statements for accounts ending in numbers 8511 and 8017, and the terms and conditions for having a credit card account with Citibank. On May 8, 2012, the circuit court entered an order finding that the documents in the record were provided by Citibank as part of its Rule 222 disclosures and/or were trial exhibits. The order also indicates that Galarza failed to appear at the hearing on Citibank's motion to supplement the record.

¶ 14 After the record was supplemented, Galarza filed a reply brief claiming that some of the documents in the supplemental record were not presented at trial, *i.e.*, checks written by her to Citibank, and that "the record before this reviewing [c]ourt is complete and consists solely of documents." In addition, she claimed that "no testimony was heard and no witness(es) were present during any of the court proceedings."

¶ 15 Although a trial was held and the circuit court had entered orders denying Galarza's motion to dismiss and motion to reconsider, it is clear that Galarza did not supplement the record with the transcripts from these proceedings or the court's orders denying her motions. As appellant, Galarza has the responsibility to provide this court with a complete record on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts arising from an incomplete record will be resolved against the appellant and those issues which depend for resolution upon facts not in the record mandate affirmance. *Foutch*, 99 Ill. 2d at 391-92.

¶ 16 Galarza first maintains that the trial court erroneously denied her motion to dismiss Citibank's complaint pursuant to sections 2-615 and 2-606 of the Code (735 ILCS 5/2-615, 606 (West 2010)) because Citibank's claim was defective and insufficient under Illinois law. She specifically claims that Citibank failed to attach a written contract to its complaint or an affidavit stating facts to show that the instrument was inaccessible to it; that the complaint was "devoid of anything manifesting [her] actual agreement to any terms or amount due"; and that the affidavit of Preston was hearsay and referenced only the account ending in 8017, but that at trial, an additional account with a different number was brought into the dispute.

¶ 17 Citibank responds that Galarza waived any technical defects in the complaint where she filed an answer two months before she filed her motion to dismiss, and the complaint stated a recognized cause of action. Citibank maintains that its complaint was not defective where it presented an "account stated" theory which required no written contract but, rather, was based on the parties' conduct which implied a promise for payment of the outstanding statement balance. Citibank further maintains that pursuant to the doctrine of *aider by verdict*, the verdict entered in its favor cured any defects in the complaint.

¶ 18 We observe that when a trial court denies a motion to dismiss a complaint, and a defendant then files an answer, the defendant generally waives any objection to defects in the complaint. *Diaz v. Home Federal Sav. and Loan Ass'n of Elgin*, 337 Ill. App. 3d 722, 726 (2002). In this case,

Galarza filed an answer, denying the allegations of the complaint and raising no affirmative defenses. Two months later, she filed a motion to dismiss without any apparent request for leave of court to withdraw her answer.

¶ 19 Theoretically, a trial court should not have before it both a motion to dismiss and an answer to a complaint, as the two forms of pleading are inapposite--*i.e.*, in a motion to dismiss, the party attacks the sufficiency of a complaint, while in an answer, the party either admits or denies the allegations in the complaint, thereby framing the issue to be later resolved by litigation. See *e.g.*, *Tyler v. J.C. Penney Co., Inc.*, 145 Ill. App. 3d 967 (1986). That said, where a defendant first files an answer, the trial court has discretion to permit defendant to withdraw the answer and then file a motion to dismiss, as long as no prejudice would result to plaintiff. *Premo v. Falcone*, 197 Ill. App. 3d 625, 629 (1990). In addition, an important exception to these rules allows defendant to challenge a complaint for failure to state a cause of action at any time; however, the exception does not apply where the complaint states a recognized cause of action, but contains an incomplete or otherwise insufficient statement of that cause of action. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 61-62 (1994).

¶ 20 In this case there is no indication in the record that Galarza sought to withdraw her answer before filing the motion to dismiss, and no copy of the order denying the motion to dismiss has been included on appeal. The memorandum of orders indicates that the motion to dismiss was denied without further explanation. With no orders, report of proceedings, or an acceptable substitute, we resolve any doubts arising from the record against Galarza, and find that by answering Citibank's complaint initially, and not withdrawing her answer before filing her motion to dismiss, Galarza waived any objections regarding the sufficiency of the complaint. See *Diaz*, 337 Ill. App. 3d at 726.

¶ 21 Moreover, under the doctrine of *aider by verdict*, where a defendant allows the action to proceed to verdict, that verdict cures not only all formal and purely technical defects and clerical errors in the complaint, but also any defect in failing to allege or in alleging defectively or

imperfectly any substantial facts which are essential to a right of action. *Adcock*, 164 Ill. 2d at 60-61. In this case, the record reflects that the action proceeded to trial, and that the court entered a judgment in Citibank's favor. Based on the authority cited and the posture of this case, we find that the judgment against Galarza cured any formal or purely technical defects in the complaint. See *Adcock*, 164 Ill. 2d at 61.

¶ 22 Galarza next claims that the trial court erred in entering judgment for Citibank because it did not prove its case based on an "account stated" theory, and that the allegation that an account is in default with a balance due did not adequately plead an account stated claim. Galarza further claims that the trial court wrongly assumed that Citibank's evidence was proof that she "owned the debt," that credit statements are not evidence of indebtedness, that Citibank failed to prove an offer, acceptance or consideration to establish a contract, and that the complaint was contrary to the federal Truth in Lending Act and Illinois Statute of Frauds, where the alleged contract was required to be in writing and no written contract was provided by Citibank.

¶ 23 Citibank responds that Galarza has failed to provide a complete record of the bench trial, and as a result, this court must presume that sufficient evidence was presented to support the trial court's judgment. It also maintains that its exhibits in the record, which include account statements in Galarza's name and checks written by Galarza to Citibank, provide ample evidence to support the judgment entered. Galarza replies that no testimony was presented at the trial, which lasted less than one minute, and, therefore, the record is "as complete as can be."

¶ 24 The written order in the record shows that a judgment was entered in Citibank's favor, "after trial." Galarza, however, has not provided a transcript or acceptable substitute of the trial proceeding or the evidence presented. Although she claims that no witnesses testified at the trial and that the record is complete, she has not provided a certified report of proceedings or acceptable substitute affirmatively showing that no evidence other than what is in the record was presented at the trial.

¶ 25 As noted, defendant, as appellant, has the responsibility of providing a transcript of the trial,

or an acceptable substitute. *Foutch*, 99 Ill. 2d at 391-92; Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). In the absence of such, the reviewing court must presume that the trier of fact had ample grounds to support its judgment. *Rock Island County v. Boalbey*, 242 Ill. App. 3d 461, 462 (1993). Since Galarza failed to provide the record necessary to review her claims, we invoke the presumption that the judgment entered after the trial, was in conformity with the law and was supported by a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392.

¶ 26 Galarza finally maintains that the trial court erred in denying her request for a continuance on the date of the trial, in violation of Supreme Court Rules 214, 219 and 201 (eff. Jan. 1, 1996, July 1, 2002, and July 1, 2002, respectively). She maintains that Citibank answered her discovery request on the trial date, that she needed time to review the documentation provided, but that the court only allowed her a half an hour to do so. She further maintains that Citibank objected to and was evasive in responding to almost all of her requests for production of documents, and that the trial court failed to require it to comply with the Illinois discovery rules. Citibank responds that it answered Citibank's discovery requests by sending its response via mail in advance of trial.

¶ 27 As noted above, Galarza has neither provided the transcript or acceptable substitute regarding her oral request for a continuance, nor any objection to the discovery provided. The record filed on appeal does not show whether Galarza raised these issues at trial, thereby preserving them for review (*Somers v. Quinn*, 373 Ill. App. 3d 87, 99 (2007)), or if she is raising them for the first time in this court. The record filed in this court contains Citibank's certificate of service which shows that it mailed Galarza its response to her discovery requests on April 21, 2011, a week before trial. Accordingly, in the absence of a complete record, or evidence to the contrary, we invoke the presumption in honor of the regularity of the proceedings (*Foutch*, 99 Ill. 2d at 392), and reject Galarza's claim.

¶ 28 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.

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