FIRST DIVISION
FILED: July 23, 2012

No. 1-11-3485

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

ARTHUR BAXTER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 L 8147
	)	
PNC BANK, NATIONAL ASSOCIATION,	)	
as successor to National City Bank,	)	Honorable
	)	Raymond W. Mitchell,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶1 *Held*: The dismissal of the plaintiff's complaint is affirmed.

¶2 The plaintiff, Arthur Baxter, appeals the dismissal of his claim for breach of contract against the defendant, PNC Bank, National Association (PNC Bank), pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2010)). For the reasons that follow, we affirm.

¶3 The record reflects that the plaintiff initiated this action by filing a two-count complaint, asserting claims for negligence and breach of contract. In particular, the complaint alleged that, on July 3, 2006, the plaintiff and Lucy Baxter entered into a contract with National City (the corporate predecessor of PNC Bank) for the rental of a safe deposit box and that the rental contract was revised on July 1, 2009. The complaint also alleged that Lucy Baxter died on April 4, 2010, and that, on the following day or at some time thereafter, PNC Bank personnel permitted an unauthorized individual to access the safe deposit box. The complaint further alleged, on information and belief, that unauthorized individual withdrew the contents of the safe deposit box, which had stored certain valuable property.

¶4 On PNC Bank's motion, the trial court dismissed the negligence claim under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) on the ground that purely economic damages are not recoverable under the tort theory of negligence.[1]

¶5 Thereafter, PNC Bank moved to dismiss the breach-of-contract claim, pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)), asserting that only authorized individuals had accessed the subject safe deposit box. The motion was supported by the affidavits of Amira David and Iwona Rafalowski, both of whom are financial sales consultants for PNC Bank; a copy of the revised rental contract, executed on July 1, 2009; the access record for the subject safe deposit box; and the safe deposit box agreement defining the terms for all safe deposit box rentals.

¶6 David's affidavit attested, in relevant part, as follows:

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[1] The plaintiff has not challenged the dismissal of his negligence claim, and the propriety of that order is not at issue in this appeal.

"6. In July 2006 Lucy Baxter rented a safe deposit box *** and at all times from July 2006 until the termination of the rental agreement April 15, 2010 Lucy Baxter's daughter, Sylvia Tarnowski, was identified as a co-owner of the safe deposit box.

7. In July 2009 I assisted Lucy Baxter in changing the ownership of the safe deposit box. On July 1, 2009 I prepared a new rental agreement for the safe deposit box and witnessed Lucy Baxter and Arthur Baxter sign the rental agreement. I asked Arthur Baxter for photo identification in compliance with the Bank's customer identification protocol (CIP) and he produced his Illinois driver's license. I input Arthur's driver's license number and expiration date on the new rental agreement as evidence of CIP compliance. There was no need to obtain identification for Lucy Baxter or Sylvia Tarnowski since their CIP information was already on file at the Bank.

8. On July 1, 2009 I prepared a second page to the box rental agreement to show Lucy Baxter where Sylvia Tarnowski was to sign. I highlighted the signature block and told Lucy Baxter the rental agreement was to be signed by Sylvia Tarnowski and returned to the Branch. A day or two later Lucy Baxter brought me the second page of the box rental agreement signed by Sylvia Tarnowski. The revised two-page box rental agreement from July 1, 2009 is attached hereto as Exhibit A.

* * *

12. Since Lucy Baxter changed her safe deposit box ownership July 1, 2009 the Access Agreement for that box depicts no instances of unauthorized access to that

safe deposit box. To the contrary, during that entire time only Lucy Baxter, Arthur Baxter or Sylvia Tarnowski, each authorized to access the box, accessed that safe deposit box.

* * *

14. On April 15, 2010 Sylvia Tarnowski presented at the Golf Mill Branch. I verified her identity via proper identification. I verified her authorization as owner pursuant to the amended rental agreement. I personally witnessed Ms. Tarnowski sign the surrender and she gave me one (1) key to the safe deposit box. Ms. Tarnowski was charged $10.00 April 15, 2010 for failing to return the second safe deposit box key upon surrender of the account."

¶7 Rafalowski's affidavit attested, *inter alia*, that

"6. On April 5, 2010 I allowed Sylvia Tarnowski access to the safe deposit box after (a) verifying her identification; and (b) verifying her authorization to access the box from the Safe Deposit Box Rental Contract attached hereto as Exhibit A. After watching Ms. Tarnowski sign and date the Safe Deposit Box Access Record and write the time I initialed the right column as Attendant."

¶8 The second page of the July 1, 2009, rental agreement, submitted by PNC Bank, bears the signature of Sylvia Tarnowski on the line designated as "Renter #1." That page also bears Tarnowski's signature on the portion of the form memorializing the date and circumstances of the closure of the account and surrender of the safe deposit box key. The safe deposit box access record reflects that "Lucy Baxter (or) Sylvia Tarnowski" having title to the box and also reflects that the box

was accessed by Tarnowski on April 5, 2010, by Arthur Baxter on April 7, 2010, and by Tarnowski on April 15, 2010.

¶9 The plaintiff moved to strike paragraphs 6, 8, and 12 of David's affidavit on the ground that they violated the requirements set forth in Supreme Court Rule 191 (eff. July 1, 2002). In particular, the plaintiff claimed that paragraphs 6 and 12 of David's affidavit should be stricken because they constituted conclusions and were not supported by the written safe deposit box rental contract. The plaintiff also sought to strike paragraph 8 of David's affidavit on the ground that it contained a hearsay statement by David and an allegation regarding conduct by Lucy Baxter that constituted a nonverbal assertion that also constituted hearsay.

¶10 The circuit court denied the plaintiff's motion to strike the challenged portions of David's affidavit and granted PNC Bank's motion to dismiss the breach-of-contract claim. This appeal followed.

¶11 We initially address the plaintiff's argument that the dismissal of his breach-of-contract claim under section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)) was improper because PNC Bank failed to raise affirmative matter defeating that claim. This argument is without merit.

¶12 A dismissal under section 2–619(a)(9) resembles the grant of a motion for summary judgment. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 377, 799 N.E.2d 273 (2003). In reviewing such a dismissal, the court considers whether the existence of a genuine issue of material fact should have precluded the dismissal or whether, absent an issue of material fact, dismissal was proper as a matter of law. *Van Meter*, 207 Ill. 2d at 377–78. An appeal from a dismissal under section 2-619 is reviewed *de novo*. *Van Meter*, 207 Ill. 2d at 377.

¶13 In general, section 2-619 of the Code provides a " 'means of obtaining * * * a summary disposition of issues of law or of easily proved issues of fact, with a reservation of jury trial as to disputed questions of fact.' " *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115, 619 N.E.2d 732 (1993) (quoting Ill. Ann. Stat., ch. 110, par. 2-619 (now codified at 735 ILCS 5/2-619), Historical & Practice Notes, at 662 (Smith-Hurd 1983), and citing *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1071, 603 N.E.2d 1215 (1992)). Subsection (a)(9) of that statute allows dismissal where the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619(a)(9) (West 2008).

¶14 Where the "affirmative matter" raised is not apparent on the face of the complaint, the motion must be supported by affidavit or other evidentiary material. See *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. The phrase "affirmative matter" includes any defense other than a contradiction of the essential allegations of the plaintiff's cause of action. See *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 115 (citing *Barber-Colman Co.*, 236 Ill. App. 3d at 1073). Though the well-pled facts that form the basis of the claim are deemed to be admitted, a defendant does not admit the truth of any allegations in the plaintiff's complaint that may touch on the affirmative matters raised in the section 2-619 motion to dismiss. *Barber-Colman Co.*, 236 Ill. App. 3d at 1073-74. A defendant who presents affidavits or other evidentiary matter supporting the asserted defense satisfies the initial burden of going forward on the motion, and the burden then shifts to the plaintiff. See *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. The plaintiff is obligated to establish that the defense is unfounded or requires the resolution of an

essential element of material fact before it is proven. *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116.

¶15 If the plaintiff responds with affidavits or other proof that deny the facts alleged by the defendant or establish facts obviating the grounds of the defense, the court may weigh the evidence and decide the motion based upon the affidavits and evidence, as long as a jury demand has not been timely filed. See *Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885, 892, 823 N.E.2d 1062 (2005) (citing 4 R. Michael, Illinois Practice § 38.3, at 224 (1989)); see also 735 ILCS 5/2-619(c) (West 2008). If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed. *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116.

¶16 In this case, the plaintiff has challenged the dismissal of his breach-of-contract claim by arguing only that Sylvia Tarnowski was not an individual who was authorized to access the safe deposit box. PNC Bank's motion to dismiss asserted that each of the three persons who had accessed the box after July 2009 were authorized to do so. Specifically, PNC Bank asserted that the plaintiff, Lucy Baxter, and Sylvia Tarnowski, the plaintiff's sister, were joint owners of the safe deposit box and that no one other than those three designated individuals had accessed the box. PNC Bank's motion was supported by the affidavits of David and Rafalowski, a copy of the July 2009 revised rental contract, the access record for the subject safe deposit box, and the safe deposit box agreement defining the terms for all safe deposit box rentals.

¶17 Contrary to the plaintiff's argument on appeal, these assertions and supporting documents consist of affirmative matter indicating that Sylvia Tarnowski was a joint owner of the safe deposit

box and that only authorized individuals accessed the box. The plaintiff's affidavit attests that, on July 1, 2009, neither he nor Lucy Baxter ever told a bank employee that Tarnowski was to be named as an owner of the box. However, he has not attested that the second contract page submitted by PNC Bank, bearing Tarnowski's signature on the line designated for the owner of the box, is a forgery or that this second signature page was not delivered to David by Lucy. Because PNC Bank raised affirmative matter that was not contradicted by the plaintiff's affidavit, we find no procedural error in the circuit court's consideration of the defendant's section 2-619 motion to dismiss.

¶18 We next consider the plaintiff's argument that the circuit court erred in dismissing his claim for breach of contract because paragraphs 6, 8, and 12 of David's affidavit failed to comply with the requirements of Supreme Court Rule 191. We cannot agree.

¶19 A circuit court's ruling on a motion to dismiss pursuant to section 2-619 of the Code is reviewed *de novo*. *Van Meter*, 207 Ill. 2d at 377. In addition, although a decision on an evidentiary question is generally reviewed for abuse of discretion (*Simmons v. Garces*, 198 Ill. 2d 541, 570, 763 N.E.2d 720 (2002)), where a trial court rules on a motion to strike an affidavit and the motion to strike has been filed in conjunction with a dispositive motion, that ruling is subject to *de novo* review (*Collins v. St. Paul Mercury Ins. Co.*, 381 Ill. App.3d 41, 46, 886 N.E.2d 1035 (2008); *Jackson v. Graham*, 323 Ill. App. 3d 766, 773-74, 753 N.E.2d 525 (2001)).

¶20 Supreme Court Rule 191(a) provides, in relevant part, as follows:

> "Affidavits *** submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon

> which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

Thus, unsupported assertions, opinions, and conclusions do not comply with the rule and may be stricken. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 336, 775 N.E.2d 987 (2002); *Collins*, 381 Ill. App. 3d at 46.

¶21 In this case, paragraph 6 of David's affidavit states that at "all times from July 2006 until the termination of the rental agreement April 15, 2010 Lucy Baxter's daughter, Sylvia Tarnowski, was identified as a co-owner of the safe deposit box." This statement of fact is supported by the second page of the revised rental agreement, which bears the signature of Sylvia Tarnowski on the line designated for "Renter #1," signifying that she was a co-owner of the safe deposit box as of July 1, 2009. This document was attached, along with the first page of the amended rental contract, as Exhibit A to David's affidavit, in compliance with Supreme Court Rule 191. Additionally, the safety deposit box access record states that the box is titled to "Lucy Baxter (or) Sylvia Tarnowski." This document also was attached as Exhibit B to David's affidavit. Although these documents do not provide support for David's factual assertion that Tarnowski was identified as a co-owner of the safe deposit box since July 2006, we note that this deficiency is of no consequence here since the time period prior to July 1, 2009, is not relevant for disposition of the issues on appeal. Because both of these documents support David's statement that Sylvia was identified as a co-owner of the safe

deposit box in July 2009, paragraph 6 is admissible under Supreme Court Rule 191.

¶22 Paragraph 12 of David's affidavit states that "the Access Agreement for that box depicts no instances of unauthorized access to that safe deposit box. To the contrary, during that time only Lucy Baxter, Arthur Baxter or Sylvia Tarnowski, each authorized access to the box, accessed the safe deposit box." The safety deposit box access record supports this statement as well. That document states that title to the box was held by "Lucy Baxter (or) Sylvia Tarnowski," and the access log contains only the signatures of Tarnowski, Lucy Baxter, and Arthur Baxter, indicating that they were the only people who had accessed the box. Coupled with the second page of the revised rental agreement, showing that Tarnowski was a co-owner as of July 1, 2009, these documents support David's statement that there were no instances of unauthorized access to the safety deposit box. Therefore, paragraph 12 is in compliance with Supreme Court Rule 191.

¶ 23 Finally, Paragraph 8 of David's affidavit states as follows:

> "On July 1, 2009 I prepared a second page to the box rental agreement to show Lucy Baxter where Sylvia Tarnowski was to sign. I highlighted the signature block and told Lucy Baxter the rental agreement was to be signed by Sylvia and returned to the Branch. A day or two later Lucy Baxter brought me the second page of the box rental agreement signed by Sylvia Tarnowski."

¶ 24 The plaintiff sought to strike this portion of David's affidavit on the ground that it contained hearsay. "Hearsay" is a statement, other than a statement made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). Consequently, an out-of-court statement offered into evidence for some

purpose other than to prove the truth of the matter asserted is not hearsay. *People v. Kliner*, 185 Ill. 2d 81, 150, 705 N.E.2d 850 (1998). Nonverbal conduct intended as an assertion, such as nodding, pointing, and sign language, may be classified as hearsay, if it was done for the purpose of deliberate communication. Ill. R. Evid. 801(a) (eff. Jan. 1, 2011); *People v. Jackson*, 203 Ill. App. 3d 1, 13, 560 N.E.2d 1019 (1990); see also Cleary and Graham's Handbook of Illinois Evidence § 801.2, at 721 (7th ed. 1999). However, when a person acts without intending to communicate a belief, veracity is not involved, and conduct that is not intended as an assertion is not classified as hearsay. *Jackson*, 203 Ill. App. 3d at 13; see also Cleary and Graham's Handbook of Illinois Evidence § 801.3, at 722 (7th ed. 1999).

¶ 25 Here, David's statements as to her own conduct clearly are not hearsay and are admissible. In addition, the statement that Lucy Baxter returned the second page of the box rental agreement, signed by Tarnowski, to David merely recounts the physical act of delivery and how the second signature page came to be in the bank's possession. Lucy Baxter's actions amount to simple conduct, and there is no indication in the record that she intended that conduct to constitute a nonverbal assertion. As such, David's statement describing that conduct is not hearsay. We conclude, therefore, that the trial court did not err in denying the plaintiff's motion to strike the challenged portions of David's affidavit, nor did it err in granting PNC Bank's motion to dismiss under section 2-619(a)(9) of the Code.

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

¶27 Affirmed.