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SECOND DIVISION
April 30, 2013

No. 1-12-0144
2012 IL App (1st) 120144-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALI ALKHAZALEH and MAHMOUD)	Appeal from the
ALKHAZALEH,)	Circuit Court of
)	Cook County
Plaintiffs-Appellees,)	
)	
v.)	No. 2010 M1 101026
)	
IBRAHIM YOUSUF,)	Honorable
)	Anthony Burrell and Joseph D.
)	Panarese,
Defendant-Appellant.)	Judges Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

Held: Where amended complaint alleged that inconsistent allegations in previous verified complaints were the result of a mistake, allegations were not judicial admissions that barred amended cause of action.

¶1 Plaintiffs Ali Alkhazaleh and Mahmoud Alkhazaleh sued defendant Ibrahim Yousuf over defendant's alleged failure to pay a \$10,000 debt. Plaintiffs eventually prevailed at a small-claims trial. We affirm.

¶2 Before beginning, we note that plaintiffs have not filed a brief on appeal, so we analyze this case under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Co.*, 63 Ill. 2d 128 (1976). Additionally, because we lack any record of the trial itself, we draw the following facts from the various pleadings that were filed during the course of this case.

¶3 Plaintiffs initially brought this action in 2008. In their original verified complaint plaintiffs alleged that Mahmoud gave defendant \$13,500, but the complaint gives inconsistent reasons for the payment. According to one part of the complaint, the conditions of the transaction were that the money had to be repaid within a year and that defendant would allow Ali, Mahmoud's son, to work at defendant's hair salon. Other parts of the complaint, however, indicate that plaintiffs paid the money in order to buy into the business as partners. Regardless, about two months after making the agreement, Ali and defendant had an argument and defendant banned Ali from the hair salon and changed the locks. Plaintiffs pled causes of action for breach of contract and for an injunction. Plaintiffs attached what they alleged was the written contract to the complaint, but the document that was actually attached was not between plaintiffs and defendant. Instead, the document was a promissory note for a one-year loan of \$10,000 between defendant and someone named Louis Demos, who was not a party to the case.

¶4 Defendant moved to dismiss, but before the motion was heard plaintiffs asked for leave to amend the complaint. In their first amended verified complaint, plaintiffs claimed that plaintiffs and defendant owned the hair salon as partners. According to the complaint, prior to entering the partnership with plaintiffs, defendant had amassed a \$10,000 debt to Demos. When plaintiffs asked to join the partnership, defendant conditioned the deal on plaintiffs loaning him enough money to pay off his debt to Demos. The complaint alleged that plaintiffs paid off defendant's debt and Demos assigned the note on the debt to plaintiffs. The remainder of the complaint contained the same allegations regarding the argument and subsequent lockout. In the amended complaint, plaintiffs pled counts for breach of contract, injunctive relief, and negligence.

¶5 Defendant once again filed a motion to dismiss, which the trial court granted. The trial court dismissed the negligence count with prejudice but allowed plaintiffs to amend the breach of contract count. (The order did not mention the count for injunctive relief.) Rather than filing a new amended complaint, however, plaintiffs voluntarily dismissed the case on June 24, 2009.

¶6 About six months later, plaintiffs refiled their case against defendant, this time also naming Demos as a defendant. In the new complaint, plaintiffs alleged most of the same facts as in their previous first amended complaint, adding only new details about how defendant had come to be indebted to Demos. Importantly, plaintiffs conceded that there were no written contracts that memorialized either the assignment of the note from Demos to plaintiffs or the partnership agreement. Instead, they alleged that Demos, defendant, and plaintiffs had all agreed to the deal orally. Defendant again moved to dismiss, but this time the motion was denied. Plaintiffs then voluntarily amended their complaint. This new first amended complaint was in turn dismissed without prejudice.

¶7 Plaintiffs amended their complaint yet again, and in their third¹ amended complaint, plaintiffs retained the majority of their factual allegations but now pled counts for breach of the promissory note and for unjust enrichment. Defendant again moved to dismiss, arguing among other things that the verified allegations in defendant's previous complaints, particularly in the original complaint, constituted judicial admissions that were factually incompatible with the allegations of the current complaint. Defendant contended that "the written instrument attached to Plaintiffs' Original Complaint (the promissory note) trumped all new allegations as this contract was sworn under oath to be the instrument of the partnership agreement."

¹

It was actually only the second amended complaint, but plaintiffs styled it as their third. There is no pleading entitled "Second Amended Complaint" in the record, so to avoid confusion we will refer to the pleadings as they are named in the record.

¶8 After defendant filed the motion but before it was fully briefed, the case was transferred to a new judge. The new judge granted the motion, dismissing Demos from the case with prejudice but dismissing the counts against defendant without prejudice. The judge then ordered plaintiffs to file a new, one-count complaint on the breach of contract issue and set the case for trial.

¶9 We do not have a record of the trial, so all we know of what transpired at trial is that the court found in favor of plaintiffs in the amount of \$10,000. After trial, defendant filed a posttrial motion raising numerous issues. The trial court denied the motion and defendant appealed.

¶10 Defendant's primary contention on appeal is that the trial court erred by dismissing the third amended complaint without prejudice. Defendant again argues, as he did before the trial court, that judicial admissions contained in plaintiffs' original complaint "barred" the causes of action that they raised in the third amended complaint. Because the claims were barred, defendant argues, the trial court should have dismissed the complaint with prejudice.

¶11 When a complaint is dismissed, the decision whether to grant leave to amend is within the sound discretion of the trial court. See *Hayes Mechanical, Inc. v. First Industries, L.P.*, 351 Ill. App. 3d 1, 7 (2004). There are four relevant factors that we consider in determining whether the trial court abused its discretion: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Id.* "An abuse of discretion may be found only where the trial court's decision is arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the trial court." *People ex rel. Department of Transportation v. Kotara, L.L.C.*, 379 Ill. App. 3d 276, 286 (2008).

¶12 Defendant's argument implicates only the first factor of the test, and it rests on the specious proposition that by alleging in the original verified complaint that the promissory note between Demos and defendant was actually a partnership agreement between plaintiffs and defendant, plaintiffs is prohibited from ever proving otherwise. Thus, according to defendant, no amendment could possibly cure the defect in the complaint.

¶13 Although defendant is correct that verified allegations in a complaint are generally considered to be binding judicial admissions even after the complaint is amended, there is an exception when a later pleading alleges that "the admissions contained in the prior verified pleading were made through mistake or inadvertence." *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 558 (2005). That is precisely what happened in this case. In their third amended complaint, plaintiffs alleged that the unclear theories and contradictory allegations in previous pleadings were the result of communication problems between plaintiffs, who are Middle Eastern immigrants, and their attorney. Because plaintiffs alleged in a subsequent pleading that the allegations in the original verified complaint were a mistake, those allegations are not judicial admissions. They are instead merely evidentiary admissions, which "must be offered into evidence and are always subject to contradiction or explanation." *Id.* Defendant's argument that the trial court was required to dismiss the third amended complaint with prejudice because the allegations in the original complaint "trumped" later inconsistent allegations is therefore baseless.

¶14 Defendant raises three more issues on appeal, but they are all forfeit. First, defendant contends that the trial court erred by ordering the case to trial without allowing defendant to file a motion to dismiss plaintiffs' fourth amended complaint or allowing defendant to conduct discovery. Yet there is nothing in the record that shows defendant asked the trial court for leave

to do so and was denied. Defendant thus never raised the issue with the trial court, and it is well settled that “[q]uestions not raised in the trial court cannot be argued for the first time on appeal.” *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000). This issue is accordingly forfeit.

¶ 15 Second, defendant argues that the trial court should have granted his posttrial motion. In his motion, defendant argued that he was entitled to judgment as a matter of law because plaintiffs’ claims were barred by *res judicata*. According to defendant, by voluntarily dismissing their complaint in 2009 and then refileing another complaint that alleged essentially the same theory, plaintiffs engaged in impermissible claim splitting and their refiled action was therefore barred by *res judicata*. (For a detailed discussion of claim splitting and its *res judicata* effect, see generally *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008)). Defendant did not, however, raise this issue during any of his motions to dismiss prior to trial. The issue first appeared in defendant’s posttrial motion. *Res judicata* is an affirmative defense that is forfeit if it is raised for the first time after trial. See, e.g., *Seaway National Bank v. Cain*, 257 Ill. App. 3d 856, 862 (1994); see also *Caporale v. Shannon Plumbing Co., Inc.*, 20 Ill. App. 3d 511, 513 (1974) (“*Res judicata* is invoked to prevent the re-litigating of matters which have gone to judgment on the merits. Participation in such re-litigation through judgment on the merits, with no reason given for the failure to raise it,² must be deemed a waiver of [*res judicata*]. Such a participation cannot after judgment be heard to complain that [*res judicata*] would have barred the litigation of a part of it.”). Defendant did not raise this issue until it appeared in his posttrial motion, so any argument that this case is barred by *res judicata* is forfeit.

²

Defendant does attempt to provide a reason for failing to raise *res judicata* earlier in the case, claiming that he was only able to do so under *Hudson* once Demos had been dismissed from the lawsuit. As we have already noted, however, defendant never filed a motion to dismiss at that point in the case, much less one based on *res judicata*.

¶16 Finally, defendant argues that the trial court erroneously allowed plaintiffs to use hearsay evidence at trial to prove that Demos assigned the note to plaintiffs. As we noted above, however, the record does not contain a transcript or other report of proceedings from the trial. As the appellant, it is defendant's burden to provide an adequate record of the proceedings in order for us to fully review his claims on appeal (*Altaf v. Hanover Square Condominium Association No. 1*, 188 Ill.App.3d 533, 539 (1989)), so we must resolve any doubts that may arise due to the incompleteness of the record against him (*Foutch v. O'Bryant*, 99 Ill.2d 389, 392 (1984)). Absent a sufficient record for us to review, we must presume that the trial court's rulings on these matters "had a sufficient factual basis and * * * conform[ed] with the law." *In re Marriage of Gulla*, 234 Ill.2d 414, 422 (2009).

¶17 Affirmed.