SIXTH DIVISION
June 5, 2015

No. 1-13-3867

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AEL FINANCIAL, LLC, Plaintiff, v. RONALD G. SHEPPARD, Individually and d/b/a Castleton Chiropractic Clinic, Defendant and Third-Party Plaintiff-Appellant, (North American Medical Corporation, Third-Party Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County. No. 09 L 4202 Honorable Sanjay T. Taylor, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment granted in favor of third-party defendant is affirmed, where circuit court correctly concluded that third-party defendant was improperly joined to this action.

¶ 2 Plaintiff, AEL Financial, LLC (AEL), filed the instant suit against defendant and third-party plaintiff-appellant, Dr. Ronald G. Sheppard, individually and d/b/a Castleton Chiropractic Clinic (Dr. Sheppard), seeking to recover for Dr. Sheppard's alleged failure to make payments required by a lease agreement involving an "Accu-Spina Machine," a chiropractic decompression table, and Dr. Sheppard's alleged failure to make payments pursuant to a related personal

guaranty. In turn, Dr. Sheppard filed a third-party complaint against third-party defendant-appellee, North American Medical Corporation (NAMC), contending that while NAMC was to be the supplier of the chiropractic decompression table at issue in the lease agreement, that table was never delivered. Dr. Sheppard, therefore, contended that NAMC was liable to Dr. Sheppard for the payments that had been made to AEL, as well as any damages AEL might recover in its suit against Dr. Sheppard.

¶ 3 The circuit court ultimately granted summary judgment in favor of both AEL and NAMC, with the motion for summary judgment filed by NAMC asserting that it was not a proper third-party defendant to this action. Dr. Sheppard appealed from both underlying awards of summary judgment, although the appeal with respect to AEL has since been dismissed pursuant to settlement. For the reasons that follow, we affirm the circuit court's award of summary judgment in favor of NAMC with respect to Dr. Sheppard's third-party complaint.

¶ 4 I. BACKGROUND[1]

¶ 5 On April 8, 2009, AEL filed its initial two-count complaint against Dr. Sheppard. In count I, AEL alleged that Dr. Sheppard was in default of an "Equipment Lease Agreement," and that AEL was, therefore, entitled to recover $106,305.43 in past due principal payments as well as late fees, costs and expenses. Attached to the complaint was a copy of the lease agreement, executed by AEL on October 16, 2007, and by Dr. Sheppard (d/b/a Castleton Chiropractic Clinic) on October 9, 2007. The agreement specified that Dr. Sheppard was leasing an "Accu-Spina Machine," with that decompression table to be supplied by "Patriot Capital Corporation." AEL would fund the initial purchase of the table, Dr. Sheppard would make an initial payment and monthly payments of $1756.16 for 60 months, and Dr. Sheppard would have the option to

[1] This matter proceeded in the circuit court over the course of more than four years, and we restate here only those facts necessary to our resolution of this appeal.

purchase the decompression table for $1 at the end of the lease. The lease was to commence when the decompression table was accepted by Dr. Sheppard. The lease agreement also included a personal guaranty of the lease obligations executed by Dr. Sheppard, and count II of AEL's complaint sought to recover for the default pursuant to that guaranty.

¶ 6 In response, Dr. Sheppard filed a motion to dismiss in which he contended that no default of the lease agreement could have occurred because the decompression table was never delivered. While Dr. Sheppard acknowledged that a "release" for the decompression table had been signed, that acknowledgment was incorrect. Attached to the motion was the affidavit of one of the employees at Castleton Chiropractic Clinic, Ms. Kathy Leatherman, averring that no decompression table was ever delivered.

¶ 7 In its written response to the motion to dismiss, AEL contended that Dr. Sheppard had indeed received the table, as evidenced by a "Certificate of Acceptance." In that document—which specifically referenced the October 9, 2007, lease agreement, was signed by Dr. Sheppard on October 10, 2007, and was attached to AEL's response—Dr. Sheppard acknowledged that "all of the Property set forth on the Agreement was delivered in good order and condition and acceptable to us, [and] is ready for its intended use as of the date hereof." In the certificate of acceptance, Dr. Sheppard further agreed that the "payment obligation under the Agreement has commenced" and that AEL was to be held "harmless for any failure on the part of the Supplier(s) to perform to [Dr. Sheppard's] satisfaction." In addition, AEL contended that Dr. Sheppard had made a number of payments on the lease, and had also agreed to an "Extension and Modification Agreement" to the lease—a copy of which was also attached to the response—in the summer of 2008. AEL contended that Dr. Sheppard's execution of these documents "clearly evidences

Defendant's acceptance and his 'irrevocable and independent' obligation" to make the payments required under the lease agreement.

¶ 8 In making this contention, AEL asserted: (1) the lease agreement between it and Dr. Sheppard was a "finance lease" under section 2A-103(g) of the Uniform Commercial Code (UCC) (810 ILCS 5/2A-103(g) (West 2008)); (2) Dr. Sheppard's execution and return of the certificate of acceptance to AEL constituted "acceptance" of the decompression table, regardless of whether the decompression table had actually been delivered and pursuant to section 2A-515 of the UCC (810 ILCS 5/2A-515 (West 2008)); (3) Dr. Sheppard's "acceptance" of the decompression table made his obligations under the lease agreement "irrevocable and independent," pursuant to section 2A-407(1) of the UCC (810 ILCS 5/2A-407(1) (West 2008)); and (4) Dr. Sheppard's admitted default by failing to make required lease payments, therefore, entitled AEL to recover $106,305.43 in past due principal payments as well as late fees, costs and expenses, pursuant to the terms of the lease agreement.

¶ 9 In his reply in support of his motion to dismiss, Dr. Sheppard contended that this matter did not involve a finance lease under the UCC, and that even if it did there was no acceptance of the decompression table because it was never delivered. In support of these arguments, Dr. Sheppard attached copies of prior correspondence between his attorney and AEL in which Dr. Sheppard asserted that while payments on the lease were made, no decompression table was ever delivered. In that correspondence, AEL indicated its position that Dr. Sheppard had signed a document indicating that the decompression table had been delivered, AEL had relied upon that assurance to complete the lease agreement, any issues Dr. Sheppard had with respect to the decompression table were between him and the supplier, and Dr. Sheppard's obligation to make payments under the lease was "absolutely unconditional."

¶ 10 On November 17, 2009, the circuit court entered an order converting Dr. Sheppard's motion to dismiss into a motion for summary judgment, granting Dr. Sheppard time to supplement that motion and/or add additional parties, and granting AEL leave to file a cross-motion for summary judgment. On December 17, 2009, Dr. Sheppard filed a supplemental motion for summary judgment which essentially reiterated his previous assertion that the decompression table was never delivered and, therefore, the lease agreement—including Dr. Sheppard's obligation to make payments—was unenforceable. In support of this argument, Dr. Sheppard now also included his own affidavit as an attachment. Therein, Dr. Sheppard averred that he and NAMC had an ongoing business relationship by which Dr. Sheppard had sold over 200 of NAMC's decompression tables, such as the one at issue in this litigation. As a result of this longstanding business relationship, his busy work schedule, and his use of pain medication for an injury, Dr. Sheppard averred that he signed both the certificate of acceptance and lease extension in error and out of confusion. However, Dr. Sheppard believed the decompression table would eventually be delivered and, therefore, made a number of payments on the lease. When the decompression table at issue here had not been delivered after several months, Dr. Sheppard stopped making those payments. Dr. Sheppard also reiterated his assertion that this matter did not involve a finance lease under the UCC.

¶ 11 Also on December 17, 2009, Dr. Sheppard filed a third-party complaint against NAMC. In the complaint, Dr. Sheppard alleged that although the lease agreement discussed above improperly named Patriot Capital Corporation, NAMC was actually the supplier for the decompression table at issue here. Indeed, Dr. Sheppard alleged that NAMC knew that he had leased the decompression table through AEL. Dr. Sheppard further alleged that NAMC has specifically informed him that the decompression table would be delivered, and while payments

to AEL were made in reliance upon this information, the decompression table was never delivered by NAMC. Dr. Sheppard, therefore, sought to recover for NAMC's "breach of agreement," which had allegedly damaged Dr. Sheppard "in the amount of $30,000.00 in payments already made [to AEL], plus the amount claimed by AEL[,] which is $106,305.43, to be determined at trial."

¶ 12 On January 19, 2010, AEL filed its own motion for summary judgment, in which it reiterated the arguments it presented in its response to Dr. Sheppard's original motion to dismiss. The motion was denied, AEL was granted leave to file an amended complaint, and AEL ultimately filed the operative first-amended complaint on February 4, 2011.

¶ 13 In the first two counts of the amended complaint, AEL restated the allegations contained in its original complaint, although it now specifically asserted that the lease agreement was a "finance lease." In addition, the amended complaint asserted additional claims of fraudulent and negligent misrepresentation against Dr. Sheppard, as well as claims for unjust enrichment and conversion against NAMC. On July 5, 2011, the additional misrepresentation claims against Dr. Sheppard were dismissed with prejudice and AEL's claims against NAMC were voluntarily dismissed.

¶ 14 Thereafter, this matter came before the circuit court on AEL's motion for summary judgment on its amended complaint. In its motion, AEL restated its position that the lease agreement was a finance lease under the UCC, Dr. Sheppard had defaulted on his obligations under the lease agreement and, therefore, AEL was entitled to recover all Dr. Sheppard's unpaid lease payments, as well as late fees, costs and expenses. AEL also cited authority for its position that due to Dr. Sheppard's "acceptance" of the decompression table, under the UCC it was irrelevant whether that table was ever actually delivered by NAMC. In response to AEL's

motion for summary judgment, Dr. Sheppard again contended that the lease agreement was not a finance lease and, even if it was, the decompression table was never delivered and there was, therefore, no acceptance under the UCC. The circuit court entered an order granting AEL's motion for summary judgment on August 13, 2013, but that order did not include a specific monetary judgment.

¶ 15 On August 27, 2013, NAMC filed its own motion for summary judgment with respect to Dr. Sheppard's third-party complaint, which remained pending following the amendment of AEL's complaint. In its motion, NAMC asserted that it was not a proper third-party defendant to this action. In so arguing, NAMC relied upon the decision in *Bellik v. Bank of America*, 373 Ill. App. 3d 1059 (2007), which interpreted the requirements of section 2-406(b) of the Code of Civil Procedure (Code) (735 ILCS 5/2-406(b) (West 2010)). That section provides that "a defendant may by third-party complaint bring in as a defendant a person not a party to the action who is or may be liable to him or her for all or part of the plaintiff's claim against him or her." *Id*. NAMC asserted that this section did not support Dr. Sheppard's third-party complaint against it because NAMC's purported liability to Dr. Sheppard for not delivering the decompression table was not "derivative" of Dr. Sheppard's liability to AEL for breach of the lease agreement. In response to NAMC's motion for summary judgment, Dr. Sheppard argued that NAMC's argument ignored the fact that he sought to be indemnified for his liability to AEL.

¶ 16 On November 8, 2013, the circuit court entered a written order that awarded AEL a $111,252.89 judgment against Dr. Sheppard and granted NAMC's motion for summary judgment. On December 6, 2013, Dr. Sheppard appealed from both underlying awards of summary judgment. However, on January 15, 2015, Dr. Sheppard filed an agreed motion to dismiss his appeal as to AEL, with prejudice, pursuant to a settlement agreement reached

between Dr. Sheppard and AEL. This court granted that motion in an order entered on January 22, 2015, and the mandate for that order was issued on February 26, 2015.

¶ 17 II. ANALYSIS

¶ 18 With its appeal of the summary judgment granted in favor of AEL having been dismissed pursuant to settlement, the only issue remaining before this court is the propriety of the circuit court's award of summary judgment in favor of NAMC on Dr. Sheppard's third-party complaint.

¶ 19 We initially note that NAMC contends on appeal that the circuit court actually dismissed the third-party complaint, and that we should, therefore, review that decision for an abuse of discretion. Both assertions are incorrect. First, the record completely belies NAMC's argument that the circuit court simply dismissed the third-party complaint. The briefs and the orders filed below all indicate that the third-party complaint was resolved pursuant to a motion for summary judgment. Furthermore, even if that complaint was resolved on a motion to dismiss, our review would be *de novo*. *Sheffler v. Commonwealth Edison Co*., 2011 IL 110166, ¶ 23. The cases NAMC cites in support of applying an abuse of discretion standard involve the entirely different question of the appellate standard for reviewing a circuit court's decision whether or not to allow the *filing* of a third-party complaint. See *Winter v. Henry Service Co*., 143 Ill. 2d 289, 293-94 (1991); *Heritage Pullman Bank & Trust Co. v. Carr*, 283 Ill. App. 3d 472, 482 (1996). We, therefore, move on to consider the propriety of the circuit court's award of summary judgment in favor of NAMC.

¶ 20 Summary judgment is appropriate only where the pleadings, depositions, admissions and affidavits, viewed in the light most favorable to the nonmovant, show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). The "defendant moving for summary judgment bears the initial

burden of production." *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The defendant may satisfy this "burden of production in two ways: (1) by affirmatively showing that some element of the case must be resolved in his favor, [citation omitted]; or (2) by establishing 'that there is an absence of evidence to support the nonmoving party's case.' " *Id*. When the defendant has met this initial burden, the burden shifts to "the plaintiff to present a factual basis which would arguably entitle her to a favorable judgment." *Id*. An order granting a motion for summary judgment is subject to a *de novo* standard of review. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

¶ 21 NAMC's motion for summary judgment was premised upon the contention that it was not a proper third-party defendant, pursuant to the requirements of section 2-406(b) of the Code. That section provides, in relevant part, that "a defendant may by third-party complaint bring in as a defendant a person not a party to the action who is or may be liable to him or her for all or part of the plaintiff's claim against him or her." 735 ILCS 5/2-406(b) (West 2010). In interpreting this provision, our supreme court has recognized that it "has as its purpose the avoidance of a multiplicity of litigation, and provides a means of disposing of an entire matter arising from a single set of facts in one action. [Citation.] Although its purpose is the reduction of litigation, third-party actions cannot be used to maintain an entirely separate and independent claim against a third party, even if it arises out of the same general set of facts as the main claim." *People v. Brockman*, 143 Ill. 2d 351, 364-65 (1991).

¶ 22 Thus, it is well understood that a proper third-party action "require[s] that the party seeking relief assert a claim of derivative liability." *Guzman v. C.R. Epperson Construction, Inc.*, 196 Ill. 2d 391, 399 (2001). That is to say, the liability of the third-party defendant must be dependent on the liability of the third-party plaintiff to the original plaintiff. *Bellik*, 373 Ill. App.

3d at 1063; *Perry v. Minor*, 319 Ill. App. 3d 703, 709 (2001). As such, "the majority of third-party complaints are based on claims for indemnification or contribution." *Guzman*, 196 Ill. 2d at 399. "However, where other legal theories, such as subrogation or breach of warranty, support derivative liability third-party actions are proper." *Brockman*, 143 Ill. 2d at 365.

¶ 23 In light of the above discussion, it is apparent that the circuit court properly granted summary judgment in favor of NAMC on that portion of Dr. Sheppard's third-party complaint seeking to recover "payments already made." As this claim represented payments Dr. Sheppard had already made to AEL, it obviously was not a part of AEL's underlying claim for damages against Dr. Sheppard; that claim was for past-due, *unpaid* principal payments, and related late fees, costs and expenses. Rather, this portion of Dr. Sheppard's third-party complaint sought to recover Dr. Sheppard's own damages allegedly resulting from NAMC's failure to deliver the table. This was not a proper application of section 2-406(b), as NAMC's liability to Dr. Sheppard for any amounts already *paid* to AEL was in no way dependent on the liability of Dr. Sheppard for amounts *not paid* to AEL. *Bellik*, 373 Ill. App. 3d at 1063.

¶ 24 However, Dr. Sheppard's third-party complaint also sought to recover damages from NAMC for "the amount claimed by AEL[,] which is $106,305.43, to be determined at trial." The amount ultimately awarded to AEL by the circuit court was $111,252.89, and while we come to a similar conclusion with respect to this claim, the question of whether summary judgment was properly granted in favor of NAMC with respect to this claim for damages in the third-party complaint is slightly more complicated.

¶ 25 We first address NAMC's contention that, because Dr. Sheppard's third-party complaint asserted a claim for NAMC's alleged "breach of agreement" rather that a specific claim for contribution or express or implied indemnity with respect to Dr. Sheppard's lease agreement with

AEL, the third-party complaint was improper because there was no assertion of derivative liability. We reject this argument. As noted above, while the majority of third-party complaints are based upon theories of indemnification or contribution (*Guzman*, 196 Ill. 2d at 399), other legal theories that support derivative liability may be properly brought as a third-party action (*Brockman*, 143 Ill. 2d at 365). As such, Dr. Sheppard's third-party complaint was not improper simply because it was not specifically pleaded as a cause of action for indemnification or contribution.

¶ 26 We next acknowledge that Dr. Sheppard's third-party complaint clearly bears a significant factual relationship to AEL's suit, and it clearly arises out of the same general set of facts as that suit. The decompression table that was the subject of the lease agreement between AEL and Dr. Sheppard, and for which Dr. Sheppard failed to make required lease payments, was the very same decompression table that Dr. Sheppard complains NAMC improperly failed to deliver, thus causing Dr. Sheppard to cease making those very lease payments. However, this factual relationship was insufficient to support Dr. Sheppard's third-party claim against NAMC. *Id*.

¶ 27 Rather, to defeat NAMC's motion for summary judgment, Dr. Sheppard was required to establish that NAMC was liable to him for all or part of the judgment granted in favor of AEL. 735 ILCS 5/2-406(b) (West 2010). As discussed above, this statutory requirement required Dr. Sheppard to establish a claim of derivative liability (*Guzman*, 196 Ill. 2d at 399), such that any liability of NAMC to Dr. Sheppard would be dependent on Dr. Sheppard's liability to AEL (*Bellik*, 373 Ill. App. 3d at 1063). This is something that Dr. Sheppard did not and cannot do.

¶ 28 Dr. Sheppard's liability to AEL was established after the circuit court granted AEL's motion for summary judgment. As discussed above, the basis of that motion was AEL's

argument that: (1) the lease agreement between it and Dr. Sheppard was a "finance lease" under the UCC; (2) Dr. Sheppard's execution and return of the certificate of acceptance to AEL constituted "acceptance" of the table under the UCC, regardless of whether the decompression table had actually been delivered; (3) Dr. Sheppard's "acceptance" of the decompression table made his obligations under the lease agreement "irrevocable and independent" and "not subject to cancellation, termination, modification, repudiation, excuse, or substitution"; and (4) Dr. Sheppard's admitted default by failing to make required lease payments, therefore, entitled AEL to recover due principal payments as well as late fees, costs and expenses.

¶ 29 While the parties' debated these and other issues below, the circuit court ultimately ruled in favor of AEL by granting its motion for summary judgment. Moreover, while Dr. Sheppard originally appealed from the summary judgment awarded to AEL, that portion of this appeal has since been dismissed and our mandate with respect to that dismissal has been issued. As our supreme court has recognized, "dismissing an appeal effectively leaves the lower court's ruling on the merits undisturbed and intact." *People v. Bailey*, 2014 IL 115459, ¶ 28; see also, Ill. S. Ct. R. 369(b) (eff. July 1, 1982) ("When the reviewing court dismisses the appeal or affirms the judgment and the mandate is filed in the circuit court, enforcement of the judgment may be had and other proceedings may be conducted as if no appeal had been taken."), and *Deprizio v. MacNeal Memorial Hospital Ass'n*, 2014 IL App (1st) 123206, ¶ 19 (under the law of the case doctrine, a court's unreversed decision on a question of law or fact settles that question for all subsequent stages of the suit).

¶ 30 Any attempt to establish NAMC's derivative liability, therefore, had to address the fact that Dr. Sheppard was found liable to AEL for the breach of a finance lease following Dr. Sheppard's acceptance of the table, and that Dr. Sheppard was, thus, found liable to AEL because

his obligations under that finance lease were "irrevocable and independent" and "not subject to cancellation, termination, modification, repudiation, excuse, or substitution" pursuant to sections 2A-407(1) and 2A-407(2)(b) of the UCC. 810 ILCS 5/2A-407(1), 407(2)(b) (West 2008). Therefore, Dr. Sheppard was found liable to AEL without regard to whether or not NAMC ever delivered the decompression table to Dr. Sheppard or breached any other agreement or duty to Dr. Sheppard. See 3 Hawkland UCC Series § 2A-407:2 (2014) (recognizing that, under the UCC, a finance lessee's obligation to lessor for accepted goods is independent and absolute and "recourse, if any, of the finance lessee for deficient goods is against the supplier"). This fact proves fatal to Dr. Sheppard's third-party complaint, as the "irrevocable and independent" nature of the liability to AEL and the structure of the UCC lead us to conclude that Dr. Sheppard's claim against NAMC violates the prohibition that "third-party actions cannot be used to maintain an entirely separate and independent claim against a third party, even if it arises out of the same general set of facts as the main claim." *Brockman*, 143 Ill. 2d at 364-65.

¶ 31 To make this point clear we turn, as did our supreme court in *Guzman*, to the section on third-party actions contained in the Illinois Practice Series. 3 R. Michael, Illinois Practice § 25:5 (2011). *Guzman*, 196 Ill. 2d at 399. As discussed therein, it is understood that a third-party complaint must "establish that the outcome of the third-party action *will be determined by the result of the original action*" and that "the third-party defendant's liability must be derived from the liability of the defendant to the plaintiff and *must be dependent on the outcome of the main claim*." (Emphasis added.) *Id*. This requirement cannot be met here, where NAMC's liability to Dr. Sheppard's was not determined in any way by the circuit court's determination that Dr. Sheppard had an "irrevocable and independent" liability to AEL.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, we affirm the circuit court's award of summary judgment in favor of NAMC with respect to Sheppard's third-party complaint.

¶ 34 Affirmed.