

2015 IL App (2d) 140534-U
No. 2-14-0534
Order filed October 2, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

KAREN STRUMILLO,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 07-CH-3193
)	
REALLY NEAT STUFF, INC.,)	
LLC,)	Honorable,
)	Robert G. Gibson,
Defendant-Appellee.)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted the defendant summary judgment.

¶ 2 The plaintiff, Karen Strumillo, appeals from two orders of the circuit court of Du Page County granting the defendant, Really Neat Stuff, Inc., LLC., summary judgment in its favor. For the reasons that follow, we affirm.

¶ 3 **BACKGROUND**

¶ 4 The plaintiff worked for the defendant as a sales representative. On March 26, 2007, and April 11, 2007, the plaintiff and the defendant entered into a series of contracts. The contracts

provided that the defendant would pay the plaintiff 3.5% of net royalties received from PCA, Inc., Ceaco Co. and Mattel, Inc., for those companies' purchase of the defendant's products. The contracts further provided that, if the plaintiff was terminated without cause, she would receive commissions on net royalties received from the customers during the six months following her termination.

¶ 5 In December 2007, the plaintiff was terminated from her position with the defendant. The plaintiff shortly thereafter filed a complaint against the defendant. The complaint alleged that the plaintiff had not received the commissions that she was entitled to pursuant to the parties' contracts.

¶ 6 On August 6, 2010, the defendant filed a motion for partial summary judgment on count III of the plaintiff's amended complaint. In its motion, the defendant argued that count III should be dismissed because the plaintiff had been paid all the commissions that she was entitled to pursuant to the parties' contracts. In support of its motion, the defendant attached the affidavit of its president, Michael Uzuanis. Uzuanis stated that, during the relevant period, the defendant had received \$80,000 from Ceaco in advances on royalties and \$25,000 from Mattel in advances on royalties. It had not received any royalties from PCA. Uzanis further stated that although the defendant had only received advances on royalties and not actual royalties, it had nonetheless paid the plaintiff a 3.5% commission on the advances received from both Ceaco and Mattel. Uzanis therefore asserted that the plaintiff had been paid all the commissions that she was entitled to.

¶ 7 On September 3, 2010, the plaintiff filed her response to the motion for summary judgment and a motion to strike. The plaintiff's sole argument in response to the motion for summary judgment was that the affidavit did not have any supporting exhibits attached to it. The

plaintiff reiterated the same argument in her motion to strike. Upon receiving the plaintiff's response, defense counsel e-mailed to the plaintiff's counsel the missing exhibits.

¶ 8 On September 27, 2010, the defendant filed its reply in support of the motion for summary judgment. The defendant attached the missing exhibits to its reply brief. The exhibits consisted of royalty reports for Ceaco and Mattel, and copies of commission checks to the plaintiff.

¶ 9 On October 28, 2010, the plaintiff filed a second amended complaint.

¶ 10 On December 1, 2010, the trial court conducted a hearing on the defendant's motion for summary judgment. The only argument that the plaintiff's counsel raised was that the defendant was not entitled to summary judgment because Uzuanis' affidavit did not comply with Illinois Supreme Court Rule 191 (eff. July 1, 2002). Following the hearing, the trial court granted the defendant's motion for summary judgment on count III of the amended complaint, as well as count VIII of the second amended complaint, which had incorporated count III of the amended complaint. The trial court explained that there was no issue of material fact based on Uzuanis's affidavit which was unrebutted and demonstrated that the defendant had not yet earned the full advances and, as such, the plaintiff had been paid more than she was entitled to. The trial court further explained that, even if there were no exhibits attached to Uzuanis's affidavit, Uzuanis had competently testified that the defendant had not received any royalties from PCA, and the defendant had not fully earned the advance on royalties from Ceaco and Mattel.

¶ 11 On November 18, 2013, the defendant filed a motion for summary judgment on the remaining claims in the plaintiff's second amended complaint. The motion was scheduled for a hearing on March 19, 2014.

¶ 12 On March 17, 2014, the plaintiff's counsel sent an e-mail to defense counsel indicating that the plaintiff would be filing a motion for voluntary dismissal and would seek a hearing on that motion on March 19.

¶ 13 On March 19, 2014, the trial court conducted a hearing. The trial court found that the plaintiff had not filed a written motion to voluntarily dismiss the complaint, and she had not given the defendant proper notice of her intent to do so. The trial court then granted the defendant's motion for summary judgment as to the remaining counts of the plaintiff's second amended complaint.

¶ 14 On April 17, 2014, the plaintiff filed a motion to reconsider. On May 2, 2014, the trial court conducted a hearing on the plaintiff's motion. The plaintiff argued that because the trial court considered her motion for voluntary dismissal before it considered the defendant's motion for summary judgment, the trial court was required to grant her motion for voluntary dismissal. The trial court rejected her argument. The trial court first explained that her motion had not been properly filed because it had not been "properly noticed under either the Illinois Code of Civil Procedure or the local rules." The trial court then explained that even if her motion had been properly filed, her argument did not "make any sense" because whether it denied her motion before or after it considered the motion for summary judgment, it still would have denied her motion. Following the trial court's ruling, the plaintiff filed a timely notice of appeal.

¶ 15 ANALYSIS

¶ 16 The plaintiff's first argument on appeal is that the trial court erred in granting the defendant's motion for summary judgment as to count III of its amended complaint. The plaintiff argues that summary judgment was improper because the affidavit that the defendant filed in support of it was insufficient. Specifically, the plaintiff argues that the affidavit was not

proper because (1) it did not have documents attached to it and (2) it did not lay a proper foundation.

¶ 17 Affidavits submitted in conjunction with a motion for summary judgment are governed by Illinois Supreme Court Rule 191(a) (eff. July 1, 2002). Rule 191(a) provides, in pertinent part:

“Affidavits * * * 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 documents 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).

If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 349 (2010). The requirement for attachment of “sworn or certified copies” of all papers upon which the affiant relies is a technical affidavit requirement which should be disregarded when it appears that the affiant would be competent to testify at trial. *In re Estate of Hanley*, 2013 IL App (3d) 110264, ¶ 51.

¶ 18 Here, Uzuanis testified in his affidavit that he had personal knowledge that the defendant (1) had not received any payments from PCA; (2) had not earned the full advances from Ceaco and Mattel; and (3) had paid the plaintiff commissions based on the full advances that it had received from Ceaco and Mattel. Based on Uzuanis’s status as the defendant’s president, there is a reasonable inference that he could testify competently to all of the matters that pertained to the

defendant's commission agreement with the plaintiff as well as the payments it had received from PCA, Ceaco, and Mattel. See *Piser*, 405 Ill. App. 3d at 407. Thus, Uzuanis's affidavit was supported by a sufficient foundation. *Id.*

¶ 19 Further, even if Uzuanis' affidavit should have been supported with exhibits, we note that the defendant did file such supporting exhibits two months before the trial court conducted a hearing on the defendant's motion for partial summary judgment. The defendant's filing of those exhibits gave the plaintiff ample time to respond to the merits of Uzuanis' affidavit. As such, the plaintiff was not prejudiced by the defendant's failure to file the exhibits simultaneously with Uzuanis's affidavit. See *Otis Elevator Co. v. American Surety Co. of New York*, 314 Ill. App. 479, 484 (1942) (purpose of rules requiring attachment of copies of papers on which plaintiff relies to affidavits supporting his motion for summary judgment is to enable defendant to prepare affidavits on merits, if he desires to dispute under oath any material facts in such supporting affidavits). Absent any prejudice, the plaintiff would not be entitled to any relief. *Id.*

¶ 20 The plaintiff's second contention on appeal is that the trial court erred in denying her motion to voluntarily dismiss the remainder of her complaint. The plaintiff argues that once the trial court opted to consider her motion to voluntarily dismiss before it considered the defendant's motion for summary judgment, it was required to grant her motion.

¶ 21 The plaintiff's argument is premised on the assertion that she actually filed a motion for voluntary dismissal before the trial court ruled on the defendant's motion for summary judgment. However, the record reveals that she did not. At the hearing on the motion for summary judgment, the trial court specifically found that the plaintiff had not filed a motion to voluntarily dismiss her complaint. At the hearing on the motion to reconsider, the trial court reiterated that

the plaintiff's motion had not been properly filed because it had not complied with the applicable rules. Accordingly, as no motion for a voluntary dismissal had been filed at the time the trial court considered the defendant's motion for summary judgment, the plaintiff's argument is without merit.

¶ 22

CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 24 Affirmed.