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FIRST DIVISION
March 7, 2016

No. 1-15-2132
2016 IL App (1st) 152132-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MONDHER SMIDA,)	Appeal from the
)	Circuit Court of
Plaintiff/Counter-Defendant-Appellant,)	Cook County.
)	
v.)	
)	No. 14 M3 442
LAKE RIDGE BUILDING COMPANY and)	
ED NOLAN,)	Honorable
)	Sandra Tristano
Defendants/Counter-Plaintiffs-Appellees.)	Judge Presiding.
)	

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when it allowed a third-party citation to discover assets to remain in full force and effect after judgment debtor asserted objections thereto and the court found that the citation complied with statutory requirements.

¶ 2 This appeal stems from an order that allowed a third-party citation to remain in effect after plaintiff Mondher Smida (plaintiff), made objections to the citation and asserted his personal property exemption pursuant to section 12-1001 of the Code of Civil Procedure (Code) (735 ILCS 5/12-1001(b) (West 2012)). We affirm.

¶ 3 **BACKGROUND**

¶ 4 This case involves a third-party citation to discover assets that was issued to Citibank, N.A. (Citibank), the bank where plaintiff had a checking account, as a result of a judgment that was obtained by defendants, Lake Ridge Building Company and Ed Nolan (defendants), against plaintiff. Plaintiff originally filed a complaint for breach of contract against defendants regarding the repair and remodeling of plaintiff's property. Thereafter, defendants filed a small claims counterclaim against plaintiff for breach of contract alleging that plaintiff owed them \$10,000 for work performed on plaintiff's property. The trial court dismissed plaintiff's complaint and granted judgment in favor of defendants on their counterclaim in the amount of \$7,000. Plaintiff appealed and the trial court's decision was affirmed by this court in *Smida v. Lake Ridge Building Co.*, 2015 IL App (1st) 142283-U.

¶ 5 Defendants subsequently began efforts to collect their judgment. On June 11, 2015, defendants filed a third-party citation to discover assets that was issued to Citibank and had a return date of July 8, 2015. Also on June 11, 2015, defendants filed a citation notice that was directed to plaintiff at his home address. The certificate of mailing on the citation notice was signed by defendants' counsel pursuant to section 1-109 of the Code (735 ILCS 5/109 (West 2012)) and represented that she mailed a copy of the citation notice to plaintiff "upon filing of the citation or within three business days of service if served upon [t]hird [p]arty [r]espondent." According to the sheriff's affidavit of service that was filed on June 22, 2015, the third-party citation was served on Citibank on June 17, 2015. Citibank's answer to the citation that was filed on June 25, 2015, showed that it was holding \$3,148.71 in plaintiff's checking account. On July 6, 2015, defendants filed their motion for turnover order and a notice of motion that set the motion for hearing on July 8, 2015. According to the notice's certificate of service that was signed by defendants' counsel pursuant to section 1-109 of the Code (735 ILCS 5/109 (West

2012)), a copy of the motion for turnover order and the notice of motion were addressed to plaintiff at his home address and deposited in the mail on July 1, 2015.

¶ 6 On July 8, 2015, plaintiff, acting *pro se*, appeared in court and read part of a five-page statement he prepared. Plaintiff read some of his statement into the record and the court read the rest of it outside the presence of the court reporter. A copy of plaintiff's statement does not appear in record on appeal. After reading plaintiff's statement, the court characterized plaintiff's statements as "objections to the citation." Thereafter, the court heard argument from the parties. Plaintiff argued the following: the judgment was not enforceable; the court should dismiss the citation because "counsel is seeking to use this proceeding to circumvent [the] provision[s] of both the Code of Civil Procedure and the Illinois Mechanics Lien Act designed to accommodate the interests of multiple claimants"; and the citation proceedings "disregard the prescribed statutory procedure for resolving the interests of claimants in supplemental proceeding[s]."

¶ 7 Regarding plaintiff's argument that the judgment was not enforceable, the court stated that it would not revisit the judgment, defendants' judgment was valid, and defendants were entitled to collect. The trial court addressed plaintiff's argument involving a mechanics lien and stated that, "[T]his courtroom is not a courtroom for prosecution of a mechanics [*sic*] liens. This courtroom *** primarily deals with breach of contract cases and collection thereon supplemental proceedings." Further, the court noted that a party can pursue a breach of contract case even if it has rights under the mechanics lien statute. Addressing plaintiff's argument that defendants had not followed the statutory citation procedure, namely that he had never been served with the citation, the court determined that defendants had properly served the citation upon Citibank and gave plaintiff the requisite notice of the citation. At the end of the hearing, plaintiff orally asserted an exemption for personal property up to \$4,000 pursuant to section 12-1001 of the

Code. See 735 ILCS 5/12-1001(b) (West 2012) (stating that the debtor's equity interest, not to exceed \$4,000 in value, in any property not specified in section 12-1001(a) of the Code is exempt from judgment, attachment, or distress for rent). Because Citibank was only holding \$3,148.71 in plaintiff's checking account, the court ordered Citibank to "unfreeze and release funds belonging to [plaintiff]." The court's July 8, 2015, order further stated, "Any and all funds in excess of \$4,000 shall continue to be withheld. The [third]-party citation as to Citibank, N.A. shall remain in full force and effect. [Defendants] shall be allowed to recover court costs pertaining to this supplementary and future supplementary proceedings."

¶ 8 On July 24, 2015, plaintiff, acting *pro se*, filed his notice of appeal. On February 8, 2016, having received no response from defendants, this court ordered this appeal to be taken for consideration on the record and plaintiff's brief only.

¶ 9 ANALYSIS

¶ 10 The supreme court has set forth three distinct options a reviewing court may exercise in the absence of an appellee's brief: (1) it may serve as an advocate for the appellee and decide the case when the court determines justice so requires, (2) it may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of the appellee's brief, or (3) it may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). Here, we opt to decide the merits of the case because the two-volume record is simple and the issues can easily be decided without the aid of a response brief.

¶ 11 On appeal, plaintiff makes the following arguments: defendants' citation proceedings were not based on an enforceable judgment; defendants did not properly establish their rights to recovery and dismissal of the citation is proper; defendants' failure to follow the procedure for

resolving the interests of multiple claimants in supplementary proceedings supports dismissal of the citation; defendants' counsel acted in bad faith and against the ethics of the profession and should be permanently removed from this case; and extreme prejudice against plaintiff affected the outcome of the proceedings, the trial, and all motions presented.

¶ 12 For the reasons set forth below, we are only able to address one of the arguments made by plaintiff.

¶ 13 First, although plaintiff asserts that the citation proceedings are not based on an enforceable judgment, we agree with the trial court's statement that the judgment in this case was already challenged and upheld by this court in plaintiff's first appeal, which settles that issue. See *Smida*, 2015 IL App (1st) 142283-U; *Martin v. Federal Life Insurance Co.*, 268 Ill. App. 3d 698, 701 (1994) (holding that pursuant to the law of the case doctrine, questions of law decided on a previous appeal are binding on the trial court on remand as well as on the appellate court on a subsequent appeal). We, therefore, do not examine plaintiff's contentions regarding enforceability of the judgment.

¶ 14 Similarly, we cannot address plaintiff's argument that "[defendants] did not properly establish their rights to recovery, [and] dismissal of the citation is proper." To support this contention, plaintiff cites to the Illinois Mechanics Lien Act (Act) (770 ILCS 60 *et seq.* (West 2012)) and various cases that involve the Act, and argues that this case violates the Act's policy that the interests of all claimants be resolved in one suit. Plaintiff asserts that "[neither of the defendants] have established proper rights to judgment funds and the single judgment of \$7,000 in favor of both [defendants] and against [p]laintiff [*sic*] can not be enforced." The appeal before us solely involves the court's July 8, 2015, order that adjudicated the third-party citation to discover assets issued to Citibank. It is unclear how the Act is relevant to the supplemental

proceeding at issue here and it seems that plaintiff is again attempting to attack the underlying judgment. As previously stated, the enforceability of the judgment is not properly at issue in this appeal. See *Martin*, 268 Ill. App. 3d at 701.

¶ 15 Next, we determine that plaintiff's arguments regarding defendants' counsel's "acting in bad faith" and any "extreme prejudice" that resulted from the proceedings throughout this case are waived on appeal. Illinois courts have consistently recognized that issues not raised in the trial court are waived and may not be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). After review of the record, we find no evidence that plaintiff ever raised these arguments before the trial court. There is no mention of these assertions in the transcript of the July 8, 2015, hearing. It is possible that plaintiff's five-page statement contained these arguments. However, his statement was not included in the record on appeal and such an omission is construed against him. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984) (holding that "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant").

¶ 16 As a result of the foregoing, we are left with only one of plaintiff's arguments to address, namely, that defendants' failure to follow the proper procedure for supplementary proceedings requires that the citation be dismissed. Contrary to plaintiff's assertion that our review is *de novo*, we review this issue for an abuse of discretion because the court below conducted an evidentiary hearing and made factual findings. See *Gonzalez v. Profile Sanding Equipment, Inc.*, 333 Ill. App. 3d 680, 692-93 (2002). Compare *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007) (stating that *de novo* review was appropriate where the trial court heard no testimony and based its decision on documentary evidence).

¶ 17 Turning to plaintiff's contention that defendants did not follow proper procedures, we note that in order to compel a third-party citation respondent to turn over assets belonging to the judgment debtor, there must be some evidence in the record that the respondent is holding assets of the judgment debtor and that the judgment debtor would have the right to recover those assets from the third party. *Schak v. Blom*, 334 Ill. App. 3d 129, 133 (2002). Thus, the only relevant inquiries in a supplementary proceeding are: (1) whether the judgment debtor is holding assets that should be applied to the judgment; and (2) whether a third-party citation respondent is holding assets of the judgment debtor that should be applied to the judgment. *Id.* As to proper service for a third-party citation, Illinois Supreme Court Rule 277 provides that "[t]he supplementary proceeding shall be commenced by the service of a citation on the party against whom it is brought." Ill. S. Ct. R. 277(b) (eff. Jan. 4, 2013).

¶ 18 We find that the court here did not err in determining that the citation was proper and allowed to remain in effect because it is clear from the record that Citibank's answer to the citation showed that it was holding \$3,148.71 of plaintiff's assets. Further, we agree with the trial court's determination that the citation was properly served. According to Rule 277 (eff. Jan. 4, 2013), the citation is only required to be served on the party against whom it is brought. In this case, the citation was brought against Citibank, and thus was only required to be served upon Citibank. The sheriff's affidavit of service contained in the record clearly shows that the citation was served upon Citibank on June 17, 2015. Further, although not required by Rule 277, the certificates of service that were included with the notice of citation and notice of motion for turnover and signed by defendants' counsel are adequate evidence to show that plaintiff was given notice of the third-party citation and the motion for turnover. See Ill. S. Ct. R. 12(b)(3) (eff. Sept. 19, 2014) (stating that service is proved "in case of service by mail ***, by certificate

of the attorney, *** who deposited the document in the mail ***, stating the time and place of mailing ***, the complete address which appeared on the envelope or package, and the fact that proper postage *** was prepaid"). The certificates here contained all of the information required by Rule 12. Additionally, as the court mentioned, plaintiff was present in court on July 8, 2015, and was able to present his written statement and arguments to the court. Ultimately, we find that the court did not abuse its discretion when it overruled plaintiff's objections to the citation and allowed it to remain in full force and effect.

¶ 19

CONCLUSION

¶ 20 Based on the foregoing, we affirm the judgment of the circuit court.

¶ 21 Affirmed.