2017 IL App (1st) 160206-U
Filed: March 24, 2017

SIXTH DIVISION

No. 1-16-0206

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SELECT SURGICAL SOLUTIONS, a Division of Integrated Healthcare Services, LLC, Plaintiff-Appellee, v. ILLINOIS NEUROSPINE INSTITUTE, P.C., an Illinois Professional Corporation, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 11 L 10407 Honorable James E. Snyder, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment entered in favor of plaintiff-appellee after a bench trial is affirmed, where the limited record on appeal does not support defendant's assertions of error.

¶ 2 Following a bench trial, the trial court entered a $74,587.84 judgment against defendant-appellant, Illinois Neurospine Institute, P.C., an Illinois professional corporation, and in favor of plaintiff-appellee, Select Surgical Solutions, a division of Integrated Healthcare Services, LLC. Defendant has now appealed from that judgment, and for the following reasons we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed its initial complaint on October 5, 2011, and the operative amended complaint was filed on March 20, 2012. Therein, plaintiff generally alleged that it was a "cost containment company" and was responsible for paying manufacturers and hospitals for various medical devices provided to patients on behalf of an insurer, Accident Fund. On April 18, 2011, plaintiff made such a payment to defendant in the amount of $74,587.84. However, this payment was made in error, as it should have been made to Hind General Hospital. The error allegedly resulted from "an erroneous purchase order vendor address."

¶ 5 Plaintiff became aware of the mistake when the hospital notified plaintiff that it had not received payment for services. By letters sent to defendant and dated May 18, 2011, and July 7, 2011, plaintiff explained the situation and demanded a refund of the improper payment. Defendant did not respond or issue a refund. Count I of the complaint sought to recover the payment under a theory of mistake of fact, while Count II sought recovery for "monies had and received."

¶ 6 After its motion to dismiss the amended complaint was denied, defendant filed an answer admitting that it had received the alleged payment from plaintiff and had not refunded that payment, but otherwise denying the material allegations of the complaint. Defendant also filed an affirmative defense contending that plaintiff was responsible for the payment of certain medical services received by a patient of defendant. It further contended that, even if it was made unintentionally, the payment plaintiff made to defendant was properly made to and retained by defendant as partial satisfaction of a balance due with respect to that patient.

¶ 7 The parties thereafter engaged in discovery and filed various dispositive motions. Attached to a motion for summary judgment filed by defendant was an affidavit attesting to the

veracity of the assertions contained in defendant's affirmative defense, executed by Dr. Ronald Michael. After initially granting a motion for summary judgment in favor of plaintiff and then granting a motion to reconsider filed by defendant, the trial court ultimately denied a motion for partial summary judgment filed by plaintiff. The trial court concluded that genuine issues of material fact remained with respect to defendant's affirmative defense.

¶ 8 A bench trial was held in December of 2015. The record on appeal does not contain a report of any of the proceedings in the court below, including the bench trial. What the record does contain is a written stipulation, dated June 16, 2015, whereby the parties stipulated to the admissibility at trial, as evidence, the following: (1) an affidavit executed by plaintiff's former chief operating officer, Tricia Ruggles, attesting to the truthfulness of the factual allegations in plaintiff's complaint, together with copies of the check and the two letters sent to defendant attached as exhibits thereto, (2) plaintiff's answers to a number of interrogatories, in which plaintiff—*inter alia*—denies having any relationship with the patient identified in defendant's affirmative defense, and (3) the factual averments in plaintiff's amended complaint. In addition, an order entered on December 9, 2015, indicates that the parties stipulated to the admissibility of an affidavit completed by plaintiff's expert witness, Charles Benda. In that affidavit, Mr. Benda opined that, after review of the pleadings, affidavits and exhibits, "[i]t is my opinion based upon my experiences, education and knowledge that Select mistakenly paid INI $74,5878.84. No value was given for the funds. The mistake was clearly made known to INI before any posting. Demand for a refund was made in a reasonable fashion." Mr. Benda also opined that the records did not support defendant's contention that the payment was credited to a balance owed by plaintiff with respect to the patient identified in the affirmative defense.

¶ 9 In an order entered on December 22, 2015, the trial court entered a $74,587.84 judgment against defendant and in favor of plaintiff. The order indicates that it was entered only after "the parties having presented stipulated evidence and the Court having heard argument of respective counsels."

¶ 10 Defendant timely appealed. On October 18, 2016, this court entered an order denying plaintiff's motion to dismiss this appeal for defendant's failure to file a report of any of the proceedings in the court below, including the bench trial, or a bystander's report or agreed statement of facts. We nevertheless noted that this denial was without prejudice to plaintiff's ability to raise the issue in its brief.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant asks this court to reverse the judgment entered in favor of plaintiff. For the following reasons, we decline to do so.

¶ 13 The trial court reached its decision after a bench trial and, thus, the standard of review is whether the judgment is against the manifest weight of the evidence. *Casey v. American Family Brokerage, Inc*., 391 Ill. App. 3d 273, 277 (2009).[1] A judgment is against the manifest weight of the evidence only where the opposite conclusion is apparent, or where the findings are arbitrary, unreasonable, or not based upon evidence. *International Capital Corp. v. Moyer*, 347 Ill. App. 3d 116, 122 (2004). "If the record contains any evidence to support the trial court's judgment, the

[1] On appeal, defendant contends that because "the trial court based its ruling on stipulated facts, and therefore made no factual findings that must be considered by this Court in resolving the issues before it, this Court's review of the Circuit Court's decision should be *de novo*." The only support defendant cites for this suggestion is *Compton v. Country Mutual Insurance Co*., 382 Ill. App. 3d 323, 325 (2008), in which this court expressed the general understanding that "[t] he granting of a motion to dismiss pursuant to section 2–615 of the Code [of Civil Procedure] is reviewed under the *de novo* standard of review." Obviously, *Compton* does not support defendant's contention, and we reject its request that we apply a *de novo* standard to our review of a judgment entered following a bench trial.

judgment should be affirmed." *In re Estate of Wilson*, 238 Ill. 2d 519, 570 (2010). As the appellant, defendant has the burden of establishing any error. *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008).

¶ 14 As appellant, defendant also has "the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error." *Midstate Siding & Window Co., Inc. v. Rogers*, 204 Ill. 2d 314, 319 (2003) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). However, as plaintiff noted in its prior motion to dismiss this appeal and notes again in its appellate brief, the record on appeal does not contain a report of any of the proceedings in the court below, including the bench trial. Nor has defendant filed, in the absence of such reports, bystander's reports or agreed statements of facts, pursuant to Illinois Supreme Court Rule 323(c), (d). Ill. S. Ct. R. 323(c), (d) (eff. Dec. 13, 2005). We therefore do not know, with any true specificity, the exact nature of both the evidence presented and arguments adduced at trial.

¶ 15 When the record on appeal is incomplete, the reviewing court must apply every possible presumption favoring the trial court's judgment (*Wakrow v. Niemi*, 231 Ill. 2d 418, 428 n. 4 (2008)), including that the proceedings were regular and fair, and that the trial court ruled correctly in accordance with the law and with a sufficient factual basis (*Smolinsky v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006); *Lisowski v. MacNeal Memorial Hospital Ass'n*, 381 Ill. App. 3d 275, 282 (2008)). Due to the limited nature of the record before us, we find it difficult to determine if the trial court's decision was arbitrary, unreasonable, or not based upon evidence. *Moyer*, 347 Ill. App. 3d at 122. Therefore, we should arguably presume the trial court's judgment was in "conformity with the law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 391-92.

¶ 16 However, it is also true that the record before us indicates that the parties entered into a stipulation regarding the admissibility of certain evidence proposed by plaintiff, and the trial

court's judgment order clearly indicates that the bench trial proceeded upon the presentation of "stipulated evidence." It is also the case that, despite some equivocation in the appellate briefs filed by the parties, the parties ultimately agree that the evidence introduced at trial consisted solely of: (1) the facts contained in a number of the paragraphs of plaintiff's amended complaint; (2) plaintiff's answers to a number of interrogatories; and (3) two affidavits, and accompanying exhibits, prepared and presented by plaintiff. Those items are contained in the record on appeal, and the parties further agree that defendant presented no additional evidence at trial.

¶ 17 Putting aside the fact that we still do not know the nature of the arguments presented at trial, and assuming that the record before us is nevertheless sufficient, we still conclude that defendant has failed to present a valid basis for reversing the trial court's judgment in favor of plaintiff.

¶ 18 First, and contrary to defendant's contention, we note that Illinois has long recognized the legal theory pursued by plaintiff in this case; *i.e.*, that it may recover payments voluntarily made under a mistake of fact. See *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 29-32 (2005); *Ramirez v. Smart Corp*., 371 Ill. App. 3d 797, 805 (2007); *Allstate Life Insurance Co. v. Yurgil*, 259 Ill. App. 3d 375, 379 (1994) ("As a general rule, where money is paid due to a mistake of fact, and payment would not have been made had the facts been known to the payor, such money may be recovered."); *Kerr Steamship Co. v. Chicago Title & Trust Co*., 120 Ill. App. 3d 998, 1008 (1983) ("It is well established that money paid under a mistake of fact, which would not have been paid had the facts been known, may be recovered."). Moreover, the stipulated facts presented at trial by plaintiff contained evidence that the money it paid to defendant was, in fact, made under such a mistake of fact. Because the record therefore contains

some evidence to support the trial court's judgment, that judgment should be affirmed. *In re Estate of Wilson*, 238 Ill. 2d at 570.

¶ 19 Second, all of the additional arguments raised by defendant on appeal rely upon factual assertions for which no evidence was presented at trial. Defendant specifically relies upon the factual averments contained in the affidavit of Dr. Michael, a document that was attached to its motion for summary judgment. Once again, however, it is undisputed that defendant presented no evidence of its own at trial, and defendant has made no contention that this affidavit was allowed into evidence or otherwise considered at trial. See also, *Brandel Realty Co. v. Olson*, 159 Ill. App. 3d 230, 236 (1987) ("The general rule is that affidavits are not competent evidence and should not be considered by the court as trier of fact."). " '[I]t is axiomatic that where evidence was not offered during the trial of a matter, it cannot be introduced for the first time on appeal.' " *Sylvester v. Chicago Park District*, 179 Ill. 2d 500, 507 (1997) (quoting *H.J. Tobler Trucking Co. v. Industrial Comm'n*, 37 Ill. 2d 341, 344 (1967)). Because defendant's additional arguments rely upon evidence we may not consider, we necessarily reject them.

¶ 20 III. CONCLUSION

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 22 Affirmed.