2018 IL App (1st) 172078-U

SIXTH DIVISION
March 30, 2018

No. 1-17-2078

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

GLYNN BERG and SHARON BERG, Plaintiff-Appellants, v. FCA US, LLC, and MANCARI'S CHRYSLER PLYMOUTH, INC., Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 15 M5 3857 The Honorable Thomas W. Murphy, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** In this case involving an allegedly damaged new vehicle, the circuit court properly granted summary judgment in favor of defendants. Plaintiffs' affidavit was grounded in inadmissible evidence, and so did not create a genuine issue of material fact as to whether the vehicle was already damaged when defendants delivered it to plaintiffs.

¶ 2 BACKGROUND

¶ 3 On October 13, 2014, the plaintiffs, Glynn and Sharon Berg, purchased a minivan from defendant Mancari's Chrysler Plymouth, Inc. (Mancari). The minivan had been delivered to

Mancari three days earlier by defendant FCA US, LLC (FCA), the American subsidiary of Fiat Chrysler Automobiles N.V., the manufacturer. Over three months after the purchase, on January 16, 2015, plaintiffs discovered that the front edge of the minivan roof was dented and scratched. They contacted Mancari and demanded that it pay for the repairs. Mancari refused. Plaintiffs then contacted FCA, which told plaintiffs to seek payment from Mancari.

¶ 4 On July 30, 2015, plaintiffs filed a lawsuit alleging defendants caused the damage to the roof of the minivan before it was delivered to plaintiffs, and that defendants represented the automobile as being "new" despite the damage. The first amended complaint now before us is pleaded in a rather unorthodox manner, despite being drafted by an attorney. It is essentially a series of "bullet points" and run-on paragraphs composed of unnumbered sentences, some of which are missing punctuation.

¶ 5 The amended complaint begins with two sentences headed "Constitutional Claim." The first sentence states that section 1005(b) of the Code of Civil Procedure (735 ILCS 5/2-1005(b) (West 2016)), providing for a jury of six in civil cases is unconstitutional, or alternatively, that plaintiffs are entitled to a 12-member jury under Illinois Supreme Court Rule 285 (Ill. Sup. Ct. R. 285 (eff. Jan. 1, 1964)). In the second sentence, plaintiffs claim that section 5 of the Illinois Motor Vehicle Franchise Act (815 ILCS 710/5) (West 2016)) (Franchise Act), characterized as the "6% rule," is unconstitutional special legislation under section 13 of the Illinois constitution (Ill. Const. (1970) Art. IV, § 13). This opening section of the amended complaint does not specify the factual basis for these claims and contains no prayers for relief. The record contains a letter from the Attorney General acknowledging notification of the claim of unconstitutionality and declining to intervene in the case.

¶ 6 The amended complaint then sets forth five counts, none of which parallel or reference the two prefacing "constitutional claims." Counts I and II are claims for breach of express warranty and breach of the implied warranty of merchantability under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. § 2301 *et seq.*) (Magnuson-Moss Act) directed against FCA. Counts III, IV, and V are directed against Mancari, as follows: Count III, breach of implied warranty under the Magnuson-Moss Act; count IV, common law fraud; and count V, unspecified "consumer fraud". The amended complaint contains a single prayer for relief requesting damages for the diminished value of the minivan, various other forms of damages, and attorney fees, all limited in the aggregate to $10,000, ostensibly to keep the case within the small claims limits of Supreme Court Rule 281 (eff. Jan. 1, 2006). We note, in passing, that while a court hearing a small claims case may relax the rules of procedure and evidence (Ill. Sup. Ct. R. 286(b) (eff. Aug. 1, 1992)), the small claims rules only apply to cases "based on either tort or contract for money not in excess of $10,000." Ill. S. Ct. R. 281 (eff. Jan. 1, 2006). Among other things, plaintiffs raised constitutional challenges to two state laws, so the case is clearly not one merely sounding in "tort or contract". Appropriate pleading was required.

¶ 7 Attached to the amended complaint is an appraisal report upon which plaintiffs relied to establish the timing and cause of the damage to the minivan. The appraiser concluded that the damage to the minivan was not caused by a chain during transport, as he had stated in an earlier report, but simply that the damage to the minivan had occurred while it was in the possession of Mancari, before plaintiffs' purchase. He did not assert any personal knowledge for this conclusion but rather based it on "simple logic," simply asserting without foundation that the minivan was undamaged when it was delivered to Mancari but damaged when delivered to the plaintiffs. He stated that the total cost to repair the minivan would be $6,962.08. He also

determined that when it was delivered to the plaintiffs, the damaged minivan was worth only $12,888.94, or 50% less than the purchase price of $25,777.88.

¶ 8 On November 14, 2015, the circuit court granted plaintiffs' motion to declare the six-person jury law unconstitutional, "w/o objection," and ordered a 12-person jury upon payment of the additional required jury fee. The Illinois Supreme Court has since itself declared the law unconstitutional. See *Kakos v. Butler*, 2016 IL 120377. On May 2, 2016, the circuit court denied plaintiffs' motion to declare the 6% rule unconstitutional, finding that they had failed to meet the required burden.

¶ 9 In January 2017, both defendants moved for summary judgment. FCA argued that it could not be held liable for plaintiffs' claims because if any damage to the minivan had occurred pre-delivery, it could not have occurred while the minivan was in FCA's control. Mancari argued that the minivan was fit for its ordinary purpose, and that pursuant to section 5 of the Franchise Act, it could not be held liable for a failure to disclose the alleged damage to the minivan, even if it knew about it. Mancari relied on an affidavit of its shop manager, Russ Tucker, who stated that Mancari did not detect any damage to the minivan before delivery to plaintiffs, but that if such damage existed, it would not have exceeded $1,388, less than six percent of the minivan's manufacturer's suggested retail price (MSRP) of $26,580.

¶ 10 Defendants also relied upon the affidavit of Terrence Rockwood, the FCA delivery driver who transported the minivan to Mancari. Rockwood's affidavit stated that no chains were used while transporting the minivan, that neither he nor the Mancari representative who signed for the minivan detected any damage at the time it was delivered, and that the delivery receipt did not identify any damage to the minivan.

¶ 11 In response, plaintiffs offered the affidavit of plaintiff Sharon Berg, who stated that after discovering the damage to the roof of the minivan, she took it to Mancari, where an unidentified service center employee inspected the damage. Her affidavit states that this unidentified employee told her, with respect to the damage, that "this is definitely not something you did." Plaintiffs argued that the affidavit created a genuine issue of material fact as to whether defendants caused the damage to the minivan before delivering it to plaintiffs. Neither Sharon Berg's affidavit, nor that of plaintiff Glynn Berg, specifically addresses the condition of the car when it was delivered. Their affidavits, in substance, merely attest to the manner in which they kept the vehicle safe from hazards.

¶ 12 On May 25, 2017, the circuit court granted summary judgment in favor of both defendants. On August 16, 2017, it denied plaintiffs' motion to reconsider. This appeal followed.

¶ 13 ANALYSIS

¶ 14 On appeal, plaintiffs raise but a single assignment of error in support of reversal. They claim that the statement of the unidentified Mancari's employee that "this is definitely not something you did," proffered in Berg's affidavit, raised a genuine issue of material fact as to whether defendants damaged the minivan. Plaintiffs also argue that if summary judgment was improper, that we should proceed, in the interest of judicial economy, to consider whether the 6% rule contained in section 5 of the Franchise Act is unconstitutional.

¶ 15 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). To determine whether there is a genuine issue of material fact, we construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of

the opponent. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 131-32 (1992). Unsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact. *Id.* at 132. Rather, a party opposing summary judgment must present some evidence that arguably would entitle them to recovery at trial. *Ross v. Dae Julie, Inc.*, 341 Ill. App. 3d 1065, 1069 (2003). Summary judgment requires the responding party "to come forward with the evidence that it has—it is the 'put up or shut up moment in a lawsuit.' " *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14 (cleaned up). We review a trial court's entry of summary judgment *de novo*. *Outboard Marine Corp.*, 154 Ill. 2d at 102. Moreover, we review the judgment, not the reasoning, of the trial court, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 16 An affidavit submitted in the summary judgment context is a substitute for in-person testimony at trial. *Fooden v. Board of Governors of State Colleges & Universities*, 48 Ill. 2d 580, 587 (1971). Thus, the affidavit must meet the same requisites as competent testimony. *Skipper Marine Electronics, Inc. v. United Parcel Service, Inc.*, 210 Ill. App. 3d 231, 236 (1991). In other words, when assessing an affidavit in opposition to a motion for summary judgment, a trial court may not consider evidence that would be inadmissible at trial. *Safeway Insurance Co. v. Hister*, 304 Ill. App. 3d 687, 691 (1999). Importantly, the affidavit must be in strict compliance with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), which "[ensures] that trial judges are presented with valid evidentiary facts upon which to base a decision." *Solon v. Godbole*, 163 Ill. App. 3d 845, 851 (1987). Rule 191(a) states in pertinent part as follows:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil

> Procedure, *** 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 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. Jan. 4, 2013).

¶ 17 Because a Rule 191 affidavit must consist of facts that would be admissible in evidence at trial, an affidavit in opposition to a motion for summary judgment that is based on hearsay is insufficient to warrant relief. *State ex rel. Beeler, Schad & Diamond, P.C. v. Target Corp.*, 367 Ill. App. 3d 860, 874 (2006). Likewise, a grant of summary judgment cannot be avoided by a Rule 191 affidavit that is grounded in speculation, surmise, or conjecture, because such an affidavit does not make the existence of a genuine issue of material fact more or less probable. *See Dyback v. Weber*, 114 Ill. 2d 232, 244-45 (1986). Indeed, when ruling on a motion for summary judgment, courts should not consider affidavits, or parts of affidavits, grounded in speculation. *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶¶ 28-29 (parts of expert witness affidavits concluding that because plaintiff's fall was not the result of a medical condition, it necessarily caused a tripping hazard on defendant's property, were speculative and properly stricken by the trial court on summary judgment).

¶ 18 In this case, Berg's affidavit does not create a genuine issue of material fact. Notably, the affidavit is not in compliance with Rule 191(a). The statement of the unidentified Mancari's employee that "this is definitely not something you did" was made by someone other than Berg and offered to prove that plaintiffs did not damage the minivan. It is hearsay upon hearsay, and thus would be inadmissible at trial. See Ill. R. Evid. 801 (eff. Jan. 1, 2011) (hearsay is a

statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted); see also Ill. R. Evid. 802 (eff. Jan. 1, 2011). Because Sharon Berg's affidavit rests on inadmissible hearsay evidence, it does not comport with the requirements of Rule 191(a) and is insufficient to warrant relief. Ill. S. Ct. R. 191 (eff. Jan. 4, 2013).

¶ 19 Even if Sharon Berg's affidavit did not rely on inadmissible hearsay, it still would not establish the evidence necessary to survive summary judgment considering defendants' supporting evidence. Plaintiffs needed to offer specific facts that demonstrated that the minivan was damaged while in defendants' control. However, the statement of the unnamed Mancari's employee to Berg that "this is definitely not something you did," was an unsupported and speculative conclusion which did not make it any more or less probable that defendants damaged the minivan.

¶ 20 Berg's affidavit also does not sufficiently contradict the affidavits submitted by defendants. Rockwood's affidavit stated that a chain was not used when FCA transported the minivan and that the delivery receipt shows no damage to the minivan was detected by FCA or Mancari at the time of delivery. Further, Tucker stated in his affidavit that, even if the minivan was damaged at the time plaintiffs took possession, the damage did not exceed six percent of the minivan's MSRP. Berg's affidavit does not contradict these facts, which must be taken as true for purposes of defendants' motions for summary judgment. See *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986) ("[F]acts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counter-affidavit are admitted and must be taken as true for purposes of the motion.").

¶ 21 Because we hold that the circuit court properly granted summary judgments to defendants, we need not consider whether section 5 of the Franchise Act is constitutional. See *In re E.H.*, 224 Ill. 2d 172, 178 (2006) ("We have repeatedly stated that cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort.").

¶ 22 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.