THIRD DIVISION
June 29, 2018

No. 1-17-2398

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH CAMPBELL and SABRINA WILSON-CAMPBELL,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	14 L 7695
MARK GONZALEZ, M.D.; NANCY BURK, M.D.; DEBORAH BUTLER, CRNA; FRANK BOHENKAMP, M.D.; MATTHEW SIMONS, M.D.; and ANNE-MARIE MARRS, R.N.,	)	
Defendants	)	
(MARK GONZALEZ, M.D., FRANK BOHENKAMP, M.D., and MATTHEW SIMONS, M.D.	)	Honorable William Edward Gomolinski,
Defendants-Appellants).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County granting plaintiffs' oral motion to voluntarily dismiss Counts III and IV of their complaint without prejudice is affirmed. The trial court had discretion to grant the motion to voluntarily dismiss prior to ruling on defendants' motion for summary judgment. Defendants forfeited their argument plaintiffs failed to give notice of the motion to voluntarily dismiss by failing to raise it before the trial court. Defendants were not prejudiced by the failure to tender costs at the time of the motion for voluntary dismissal.

¶ 2 Plaintiffs, Joseph Campbell and Sabrina Wilson-Campbell, filed a first amended complaint ("complaint") containing four counts against defendants, Drs. Mark Gonzalez, Frank Bohenkamp, and Matthew Simons, and others, to recover for injuries Joseph Campbell sustained to his left side during the surgical fusion of his right knee. Defendants moved for summary judgment on all counts of plaintiffs' complaint. The trial court granted summary judgment in favor of defendants on Counts I and II. Following discussion of whether plaintiffs could proceed on Counts III and IV, plaintiffs made an oral motion to voluntarily dismiss Counts III and IV. The trial court granted the motion to voluntarily dismiss prior to ruling on the still pending summary judgment motion on those counts. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On April 25, 2013 Dr. Mark Gonzalez performed a surgical fusion of John Campbell's right knee at the University of Illinois Medical Center with the assistance of medical residents Drs. Bohenkamp and Simons, anesthesiologist Dr. Nancy Burk, and members of the nursing staff Deborah Butler and Anne-Marie Marrs. After the surgery, Joseph suffered a focal compression nerve injury on his left side and acute compartment syndrome of the left buttock. On July 23, 2014 plaintiffs filed a complaint naming all of the above-named participants in the surgery as defendants. The complaint alleged that plaintiffs' injuries resulted from improper positioning or insufficient padding on the operating table. The complaint contained Counts I and II on the

theory of direct negligence and Counts III and IV under the doctrine of *res ipsa loquitur*. Plaintiffs later dismissed Burk, Butler, and Marrs as defendants.

¶ 5 After the close of discovery, defendants filed a motion for summary judgment on all counts in the complaint. During the hearing on defendants' motion, the trial court granted summary judgment for defendants on Counts I and II. That ruling is the subject of a separate appeal. Concerning Counts III and IV, defendants argued that the *res ipsa loquitur* claims failed as a matter of law because plaintiffs cannot meet the burden of proof that plaintiffs' injury resulted from an instrumentality under defendants' exclusive control. The trial court ruled that plaintiffs had made a *prima facie* case for the application of *res ipsa loquitur* in accordance with *Kolakowski v. Voris*, 83 Ill. 2d 388 (1980). When defendants disagreed, the trial court discussed the application of *Kolakowski* in the specific context of finding exclusive control. Defendants then argued that plaintiffs could not succeed on the *res ipsa loquitur* claims as a matter of law because not all potentially responsible parties are included as defendants. Plaintiffs relied on the testimony of their expert witness and contended that defendant Gonzalez was the doctor in control of the final positioning of the patient, regardless of whether the preliminary positioning was performed by other medical staff. Plaintiffs insisted that as the surgical team the remaining defendants were exclusively responsible for the positioning of the lower extremities, and defendants responded that the remaining defendants had relied on the assistance of healthcare providers who are not parties in this suit. The trial court noted that plaintiff's expert credited the previously dismissed anesthesiologist with shared responsibility for preoperative padding and positioning as well.

¶ 6 After further extensive arguments on the question of whether plaintiffs could proceed on the *res ipsa loquitur* claims with only the remaining defendants, the trial court stated to plaintiffs' counsel:

> "THE COURT: I'm going to grant the motion unless have you a motion prior to me granting the motion. I think you don't have the proper entities in this case.
>
> Tell me what you want to do."

Plaintiffs first suggested bringing the previously dismissed defendants back into the suit but the trial court expressed concern about the proximity of trial date. The court briefly recessed the summary judgment hearing. After the recess and additional discussion of the issue of the proper defendants for the *res ipsa loquitur* claims, plaintiffs made an oral motion to voluntarily dismiss Counts III and IV of the complaint. Defendants objected and the trial court responded:

> "THE COURT: You agree it's solely within my discretion to either allow 1009 or to proceed on the motion?
>
> MS. O'BRIEN DALY [DEFENDANTS' ATTORNEY]: I would have to check the law on that, Your Honor, but I believe if Your Honor --
>
> THE COURT: I will tell you it is solely within my discretion.
>
> MS. O'BRIEN DALY: All right. Well, I would yield to your discretion, Your Honor ***."

Defendants then proceeded to argue that granting the voluntary dismissal would be futile because the statute of limitations had run and thus plaintiffs would be unable to refile and properly plead a *res ipsa loquitur* claim. The trial court stated it was "not sure about" defendants' statute of limitations argument. The trial court granted plaintiffs' oral motion for voluntary dismissal of

Counts III and IV without prejudice and did not rule on defendants' motion for summary judgment on those counts.

¶ 7 This appeal followed.

¶ 8 ANALYSIS

¶ 9 Defendants raise two arguments on appeal. First, defendants argue the trial court abused its discretion by granting plaintiffs' later oral motion for voluntary dismissal before deciding defendants' earlier dispositive motion for the sole purpose of avoiding an adverse ruling on the dispositive motion. Second, defendants argue that plaintiffs' failure to provide notice and pay costs precluded the trial court's grant of the section 2-1009 motion for voluntary dismissal. Section 2-1009 of the Code of Civil Procedure ("Code") reads as follows:

> "(a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.
>
> (b) The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause." 735 ILCS 5/2-1009 (West 2016).

Plaintiffs argue on appeal that the trial court properly granted their section 2-1009 motion for voluntary dismissal and that immediate tender of costs is not required at the time of the motion.

¶ 10 The standard of review is abuse of discretion. *Mizell v. Passo*, 147 Ill. 2d 420, 425-26 (1992). An abuse of discretion occurs where the court's decision is such that no reasonable person could take the view adopted by the trial court, regardless of whether or not this court

might have ruled differently. *Id.*; *Bochantin v. Petroff*, 145 Ill. 2d 1, 7 (1991); *Hernandez v. Power Construction Co.*, 73 Ill. 2d 90, 95 (1978); *Johnson v. Sabben*, 7 Ill. App. 3d 238, 241 (1972). This court will not presume an abuse of discretion by the trial court; rather, the burden of showing that the trial court abused its discretion is on the party raising the argument. *Smith v. Smith*, 36 Ill. App. 2d 55, 59 (1962).

¶ 11 A. Whether the granting of the later oral motion for voluntary dismissal before deciding the earlier dispositive motion was an abuse of discretion.

¶ 12 This issue is controlled by *Gibellina v. Handley*, 127 Ill. 2d 122 (1989), *Gibrick v. Skolnick*, 254 Ill. App. 3d 970 (1993), *Mizell*, and *Bochantin*. *Gibellina* was an appeal of three cases wherein the trial court had granted a defendant's previously filed pretrial motion for summary judgment and denied the plaintiff's subsequently filed motion for voluntary dismissal. *Gibellina*, 127 Ill. 2d at 124. In each case, the appellate court reversed "holding that, because the trial courts did not have the discretion to hear the [defendant's] motions in advance of [the plaintiff's] motions for voluntary dismissal, they therefore erred in denying the motions for voluntary dismissal." *Id.* at 125. The Illinois Supreme Court affirmed the appellate court but, responding to the rising abuse of 2-1009 motions, announced a modification of the previously unrestricted right to voluntarily dismiss. *Id*. The court authorized trial courts to exercise their discretion in whether to decide a previously filed potentially dispositive motion before deciding a motion to voluntarily dismiss. *Id.* at 138.

¶ 13 In *Gibrick*, the trial court granted the plaintiff's motion to voluntarily dismiss without prejudice after trial began and the defendant appealed. *Gibrick*, 254 Ill. App. 3d at 971. The appellate court interpreted *Gibellina* in light of the legislative intent of the 1932 amendment to the statute and purported to restrict the trial court's discretion to rule on a motion to voluntarily

dismiss filed after a potentially dispositive motion where its only purpose is to avoid an unfavorable decision on the merits. *Id.* at 975. The court then ruled that the trial court abused its discretion in that case, vacated the dismissal order, and remanded for the case to be retried without delay. *Id.* at 978-79.

¶ 14 In *Mizell*, after the plaintiff filed a series of motions for continuances during discovery, the defendant filed a motion for judgment based on the plaintiff's failure to comply with section 2-622 of the Code. *Mizell*, 147 Ill. 2d at 422. During the hearing on the motion, the plaintiff reminded the trial court the plaintiff had previously filed a motion for a continuance to obtain a written report to attach to his 2-622 affidavit and asked that the motion for continuance be decided first. After this motion was denied, the plaintiff moved for voluntary dismissal. *Id.* at 423-24. The defendant argued lack of notice, no tender of costs, and that *Gibellina* requires that the defendant's earlier motion for judgment be decided before the plaintiff's motion for voluntary dismissal. *Id.* The trial court recognized that a motion for judgment differs from the motion for summary judgment at issue in *Gibellina* but reasoned that *Gibellina* placed this decision within the trial court's discretion. *Id.* at 427. The trial court then granted plaintiff's motion to voluntarily dismiss upon payment of costs, and the defendant appealed. *Id.* at 424. The Illinois Supreme Court reasoned that *Gibellina* did not create a set of guidelines to compel trial court decisions but instead preserved the trial court's discretion to decide a previously filed motion. *Id.* at 425. The court found that there were reasonable explanations for the trial court's ruling and that the trial court had not abused its discretion to the prejudice of the defendants. *Id.* at 426. Our supreme court also ruled that the lack of notice and payment of costs did not prejudice the defendant because the plaintiff had agreed to pay upon presentation of the costs and, although the plaintiff should have provided notice, the defendant did not request a

continuance to respond to the motion and was allowed to present his argument against the motion. *Id.* at 428-29. Thus, the court affirmed the trial court's grant of the motion to voluntarily dismiss. *Id.*

¶ 15 Finally, in *Bochantin*, after numerous delays and motions to compel the plaintiff to comply with the rules of discovery, the defendant filed his third motion to dismiss. *Bochantin*, 145 Ill. 2d at 3-4. After further delays and before the court ruled on that motion, the plaintiff filed a motion to voluntarily dismiss without prejudice, which the trial court granted. *Id.* at 4. The Illinois Supreme Court rejected the defendant's arguments that *Gibellina* requires the trial court to decide the defendant's motion first and held that *Gibellina* leaves the decision to consider a potentially dispositive motion before a motion to voluntarily dismiss filed after the potentially dispositive motion within the trial court's discretion. *Id.* at 7.

¶ 16 In this case, defendants' sole argument on appeal is that the trial court was bound to decide defendants' earlier dispositive motion prior to plaintiffs' later motion to voluntarily dismiss. In support of their argument, defendants assert that *Gibellina* and *Gibrick* condemn voluntary dismissals used to avoid a ruling on the merits. Defendants further insist that *Bochantin* does not apply because in that case the trial court had not yet considered the defendant's motion whereas in this case the trial court had already considered how it might rule.

¶ 17 In order to be entitled to relief, defendants had to show that no reasonable person could have taken the view that the trial court took. *Mizell*, 147 Ill. 2d at 425-26. The defendants' assertion that the trial court was bound to decide its motion before ruling on plaintiffs' motion to voluntarily dismiss is an incorrect statement of the law and contrary to the plainly permissive text of the statute. 735 ILCS 5/2-1009(b) ("The court *may* hear and decide a motion that has been filed prior to a motion filed under subsection (a)." (Emphasis added.)). Contrary to

defendants' assertion, *Gibellina* placed the decision to grant a plaintiff's 2-1009 motion to voluntarily dismiss made after a potentially dispositive motion has been filed within the realm of the trial court's discretion. *Gibellina*, 127 Ill. 2d at 138. This court's decision in *Gibrick* is at best an expression that a trial court should not exercise that discretion where the clear sole purpose of granting the motion to voluntarily dismiss is to avoid a decision on the merits. *Gibrick*, 254 Ill. App. 3d at 975 ("the trial court should not be free to grant such dismissal, where its sole purpose would be to avert an unfavorable decision if the trial were to proceed to its conclusion."). Nonetheless, subsequent cases have affirmed that the force of *Gibellina* is to authorize the trial court to use discretion when a defendant's potentially dispositive motion is followed by a plaintiff's motion to voluntarily dismiss. *Mizell*, 147 Ill. 2d at 425; *Bochantin*, 145 Ill. 2d at 7. In *Bochantin*, the court specifically rejected the appellant's proposed interpretation of *Gibrick* and *Gibellina* as requiring a determination on the defendant's potentially dispositive motion first and ruled in favor of preserving the trial court's authority to make that decision in its discretion. *Bochantin* 145 Ill. 2d at 7.

¶ 18 Defendants failed to meet their burden to establish that no reasonable person could have taken the view taken by the trial court. *Bochantin*'s rejection of similar arguments to those raised by defendants here casts doubt on defendants' argument that defendants fail to overcome. *See id*. Further, *Bochantin* expressly provides the trial court the discretion to rule on plaintiffs' motion to voluntarily dismiss before defendants' motion for summary judgment. *See id.* Defendants' argument the trial court abused its discretion is based on an incorrect statement of the law.

¶ 19 Defendants have cited no authority supporting a different rule, even where a favorable ruling for defendants appears "imminent," nor do we find our supreme court intended any such rule.

> "By use of the permissive language 'may hear,' this court did indeed intend to give the trial court the discretion to hear and rule upon a motion that could dispose of the case prior to hearing a plaintiff's voluntary dismissal motion. By endowing the trial court with such discretion, the court intended to strike a balance between the legislative grant to plaintiffs of an 'unfettered right to voluntarily dismiss' and the abuse which that unfettered right has engendered from some plaintiffs.
>
> In *Gibellina*, this court did not establish a set of guidelines detailing when a plaintiff has abused the process such that a trial court is compelled to hear and allow a dispositive defense motion. Rather, the court intentionally left such matters to the discretion of the trial court and did not intend to tamper with that discretion unless it can be shown that the trial court has abused its discretion. [Citations.]" *Mizell*, 147 Ill. 2d at 425.

¶ 20 In this case, the trial court may have viewed plaintiffs' premature dismissal of what it believed to be necessary defendants and the need to reinstate them as a procedural requirement which should "not be used to prevent [plaintiffs] from having [their] 'day in court.' " See *id.* at 426. We note that during the hearing the trial court disputed defendants' assertion "there is no way that plaintiff could ever refile this case and make out a claim for *res ipsa* because there's no way they could bring in all of the responsible parties here." The trial court could have also decided to force plaintiffs to use their right to voluntary dismissal, with its concomitant payment

of defendants' costs, rather than delay the previously filed trial date. We need not decide and make no judgment on the trial court's reasons for granting plaintiffs' motion. Defendants have not argued the trial court acted unreasonably in granting the motion to voluntarily dismiss; defendants have only argued the trial court lacked authority to grant the motion to voluntarily dismiss.

¶ 21 Defendants failed to overcome the presumption that that the trial court's discretion was exercised reasonably and properly. See *Smith*, 36 Ill. App. 2d at 59. Therefore, the trial court's decision to grant plaintiffs' later oral motion to voluntarily dismiss prior to deciding defendants' previously filed potentially dispositive motion is affirmed.

¶ 22 B. Whether lack of notice or present nonpayment of costs provides grounds for dismissal of the trial court's grant of the section 2-1009 motion for voluntary dismissal.

¶ 23 A section 2-1009 motion to voluntarily dismiss is conditioned on notice of the motion and the plaintiff's payment of costs. 735 ILCS 5/2-1009(a) (West 2016). Although failure to tender costs can be grounds for reversal, the requirements concerning notice and payment of costs have been "relaxed *** where the defendant suffered no prejudice from the lack of notice and where the plaintiff agreed to pay the costs and the trial court's order provided for the plaintiff to pay the defendants costs upon presentation." *In re Marriage of Tiballi*, 2014 IL 116319, ¶ 19. A defendant is not prejudiced by the plaintiff's failure to provide notice of the motion or to pay the defendant's costs where the defendant presented their arguments against the motion and the plaintiff agreed to pay costs. See *Mizell*, 147 Ill. 2d at 428-29. In *Mizell*, the plaintiff did not tender payment of costs and provided no notice, making his motion to voluntarily dismiss only after his motion for continuance was denied. *Id.* at 424. The defendant objected to the lack of notice and lack of payment of costs. *Id.* The court found that the defendant was not prejudiced

by either the failure to tender payment concurrent with the motion to voluntarily dismiss or by the failure to provide notice as the defendant had the opportunity to argue against the motion and did not request a continuance. *Id.* at 428-29.

¶ 24 Defendants similarly introduce the issue of a lack of notice and failure to pay costs in this appeal. The record reflects that defendants made their argument to the trial court after plaintiffs moved for voluntary dismissal but did not raise any arguments concerning lack of notice until their appellant's brief. At no time did defendants request a continuance or argue that they would be prejudiced without notice in the trial court. If an argument was not raised to the trial court, that issue is forfeited and cannot be introduced on appeal. *K&K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 25. Therefore, defendants have forfeited the issue of lack of notice.

¶ 25 Even if defendants had not forfeited the argument, they would not prevail. In support of their argument, defendants cited *Valdovinos v. Luna-Manalac Medical Center*, 328 Ill. App. 3d 255, 267 (2002), in which the plaintiffs failed to give notice of a motion to voluntarily dismiss. The plaintiffs in that case had also "not paid the defendants *** their share of the costs and expenses awarded by the trial court." *Valdovinos*, 328 Ill. App. 3d at 267. There, like here, the defendants argued that, for those reasons, the plaintiffs were not entitled to voluntarily dismiss their case. *Id.* This court rejected that argument. *Id.* at 268. The *Valdovinos* court cited our supreme court's decision in *Mizell*, which affirmed the grant of a motion for voluntary dismissal without prejudice despite the fact the plaintiff had not given notice or tendered costs, where the defendant had been given a short recess to review the motion and present argument thereon and the trial court's order granting the motion required the payment of costs. *Id.* at 267 (citing *Mizell*, 147 Ill. 2d at 428-29). The *Valdovinos* court found the defendants in that case similarly

"were given an opportunity to respond to the plaintiffs' motion, despite the lack of notice, and the trial court's order granting the plaintiffs a voluntary dismissal without prejudice require[d] that they pay costs and expenses to the defendants." *Id.* at 268.

¶ 26 In this case we fail to see how defendants were prejudiced and, in accordance with *Mizell*, decline to reverse the trial court's order based upon the failure to strictly comply with the requirements of section 2-1009. Here, as in *Valdovinos*, defendants were given an opportunity to respond to plaintiffs' motion despite the lack of notice. Defendants' assertion the trial court cut them off when their attorney attempted to elaborate on her objection to plaintiffs' motion is unpersuasive. After defendants' attorney objected without elaboration, the trial court asked defendants' attorney whether allowing plaintiffs' motion was solely within its discretion. When counsel responded she would have to check the law on that, the court rejoined "I will tell you it is solely within my discretion." Defendants' attorney then continued, uninterrupted. The record does not reveal that once the trial court established that granting the motion was a matter of its discretion defendants' attorney could not make any argument in opposition to the motion, including the lack of notice, she wished. We also note defendants did not request a continuance to allow more time to prepare to respond to the motion. See *Mizell*, 147 Ill. 2d at 428. In this case, like the *Mizell* and *Valdovinos* courts, we fail to see how defendants have been prejudiced by the lack of notice.

¶ 27 Further, the fact that plaintiffs did not tender payment prior to moving for voluntary dismissal is neither extraordinary nor fatal and did not prejudice defendants. The present delay in the payment of costs is not grounds for reversal of the voluntary dismissal where there is no evidence plaintiffs refused to pay costs or failed to comply with an order to pay costs. See *Mizell*, 147 Ill. 2d at 428-29. But section 2-1009 does require costs to be paid by the plaintiff,

and the trial court's order granting plaintiffs' motion makes no specific mention of costs. However, the dismissal is stated to be pursuant to section 2-1009, and, "[p]ursuant to Supreme Court Rule 366(a)(5), this court may enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief *** that the case may require. [Citations.]" (Internal quotation marks omitted.) *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 35. Accordingly, we remand this case with the direction that the trial court order plaintiffs to pay defendants their costs pursuant to section 2-1009 of the Code.

¶ 28 Defendants have failed to show the trial court abused its discretion in this case when it granted plaintiffs' motion to voluntarily dismiss Counts III and IV. We remand for the entry of an order for plaintiffs to pay defendants' costs in accordance with section 2-1009 of the Code.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed, and the cause remanded for further proceedings consistent with this order.

¶ 31 Affirmed, cause remanded.