2018 IL App (1st) 172620-U
Order filed: August 31, 2018

FIRST DISTRICT
FIFTH DIVISION

No. 1-17-2620

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RON ZUREK, Plaintiff-Appellee, v. KENNETH P. ZUREK, Individually and as Successor Trustee of the Stella E. Zurek 2003 Declaration of Trust, Defendant-Appellant (Frank L. Zurek, Defendant).	)))))))))))))	Appeal from the Circuit Court of Cook County. No. 14 CH 18611 Honorable Thomas R. Allen, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Challenges to numerous orders entered by the trial court are rejected, where the record on appeal either does not support appellant's contentions of error or is insufficiently complete to allow for meaningful appellate review.

¶ 2 Defendant-appellant, Kenneth P. Zurek, individually and as successor trustee of the Stella E. Zurek 2003 Declaration of Trust, appeals *pro se* from a number of orders entered by the trial court. For the following reasons, we affirm.[1]

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[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written

¶ 3 I. BACKGROUND

¶ 4 Stella E. Zurek died on February 11, 2014, at which time she was a resident of Franklin Park, Illinois, living in her home with her son Kenneth. At the time of her death, she was survived by her three adult sons: *i.e.*, the parties to this action, Ron Zurek, Kenneth Zurek and Frank L. Zurek. Pursuant to a “2003 Declaration of Trust” and an amendment thereto (2003 Trust), both executed by Stella in August, 2003, upon Stella’s death Kenneth became the successor trustee of the 2003 Trust and was charged with distributing the trust’s assets among Stella’s three sons, *per stirpes*. The only exception to this arrangement involved Stella’s home (the property), with respect to which the 2003 Trust provided that it “shall not be sold until [Kenneth] moves out or becomes unwilling or unable to maintain the premises so long as [Kenneth] keeps the real estate and homeowner’s insurance current, maintains the premises consistent with state, local and federal building code requirements and generally maintains the property in a condition rated as good by real estate standards.” Upon any sale of the property, the 2003 Trust provided that any proceeds from the sale would likewise be distributed among Stella’s three sons, *per stirpes*.

¶ 5 On November 19, 2014, Ron initiated this lawsuit by filing a “Complaint to Compel Accounting, To Remove Trustee and Imposition of Constructive Trust,” naming as defendants both Frank and Kenneth, with Kenneth being named both individually and in his capacity as successor trustee of the 2003 Trust. Therein, Ron alleged that upon Stella’s death, the 2003 Trust contained the property and “other assets in excess of $200,000.” Ron also generally alleged that since Stella’s death, Kenneth had failed to: provide any information or accounting with respect to the assets of the 2003 Trust; provide any information confirming that Kenneth was fulfilling his

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order stating with specificity why no substantial question is presented.

responsibilities with respect to the property; or distribute any trust assets in accordance with the terms of the 2003 Trust. Further contending that Kenneth was improperly being personally benefited by his breach of the fiduciary duties imposed upon him by his role as successor trustee, Ron's complaint asked the trial court to: require Kenneth to provide all documentation with respect to his actions as trustee; require Kenneth to provide an accounting by a date certain; remove Kenneth as trustee; order Kenneth to pay Ron's attorney fees and costs; and award "such other, further or different relief as the Court deems just."

¶ 6 Kenneth, in his individual capacity, was served a copy of the lawsuit on November 26, 2014, and filed a *pro se* appearance the following month. It appears from the record that Frank and Kenneth, in his capacity as trustee, were not served until May, 2015, with Frank filing an appearance that month and Kenneth, as trustee, filing a *pro se* appearance in June, 2015.

¶ 7 In both his individual capacity and as trustee, Kenneth filed a host of pretrial motions and pleadings. Of relevance to this appeal, these included motions to dismiss the complaint on the merits, a motion to dismiss for Ron's alleged lack of diligence in obtaining service upon the defendants, motions for substitution of judge as of right and for cause, answers and affirmative defenses, counterclaims, and a motion for summary judgment. The parties also engaged in pretrial discovery. Of particular relevance to this appeal, in his responses to discovery, affirmative defenses, and in the context of prosecuting his pretrial motions, Kenneth generally asserted that Stella had revoked the 2003 Trust and transferred all of her assets to a subsequent trust (2013 Trust) disinheriting Ron prior to her death. With the exception of a single motion for substitution of judge as of right, all of the above-referenced pretrial motions were denied.

¶ 8 The matter proceeded to a one-day bench trial on Ron's complaint on June 12, 2017. The record on appeal does not contain a complete transcript of the trial proceedings, but it is

undisputed that the entirety of Ron's testimony and a portion of Kenneth's testimony have not been presented to this court. Nor does the record on appeal contain the 19 exhibits entered into evidence by Ron. The record does show that, at trial, Kenneth testified that the 2003 Trust was revoked by Stella and that the assets of that trust were transferred to the purported 2013 Trust. No original of the 2003 Trust revocation, and no documentation regarding the 2013 Trust, was ever presented to the trial court. However, the trial court was presented with a deed executed by Kenneth, dated and recorded in December, 2016, which purportedly transferred title in the property from the 2003 Trust to the purported 2013 Trust.

¶ 9 At the conclusion of trial, both in oral rulings made the same day and in a written order entered on June 30, 2017, the trial court found: (1) that Kenneth breached his fiduciary duties as trustee of the 2003 Trust, including converting trust assets for his own benefit; (2) that both the purported 2003 Trust revocation and the 2013 Trust alleged by Kenneth were "null and void," and that any assets held in any purported 2013 Trust are the sole property of the 2003 Trust; (3) that the 2016 deed purportedly transferring title of the property to the 2013 Trust to be null and void, and that title to the property was vested in the 2003 Trust; (4) ordered Kenneth to account for all of the assets of the 2003 Trust, which were specifically found to have included the property and at least $156,000 in liquid assets at the time of Stella's death; (5) removed Kenneth as trustee of the 2003 Trust *instanter*, replacing him with Ron; and (6) authorized and directed Ron to sell the property "as soon as possible" and to hold any proceeds of the sale of the property until further order of the trial court.

¶ 10 With respect to the fact that the language of the 2003 Trust specifically permitted Kenneth to live in the property, the trial court justified its decision to order the property sold as soon as possible by concluding that, "having considered all of the evidence *** [Kenneth] has

substantially breached his fiduciary duties and having otherwise refused to comply with the terms of the [2003] Trust including converting trust assets rightfully due Plaintiff for his own benefit to the substantial detriment of Plaintiff, that to permit [Kenneth] to continue to reside in the home would be inequitable and would serve to reward his wrongs to the further unwarranted detriment to the Plaintiff."

¶ 11 Finally, the trial court transferred Kenneth's remaining counterclaims to the law division for further proceedings, and made a finding that there was no just reason to delay enforcement or appeal of its order.

¶ 12 Thereafter, Kenneth filed a posttrial motion asking the court to vacate its June 30, 2017, written order due to various alleged errors, or to modify the relief granted therein due to the fact that the trial court improperly granted relief not requested in Ron's complaint against parties and entities (the purported 2013 Trust and its purported beneficiaries) not before the court. The trial court denied the posttrial motion, and Kenneth timely appealed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, Kenneth raises a host of challenges to a number of the trial court's orders. For the following reason, we reject all of them.

¶ 15 We first address Kenneth's argument that the trial court improperly denied his motion to dismiss Ron's complaint, filed pursuant to section 2-615 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615 (West 2014).[2]

¶ 16 "Generally, where a trial court denies a defendant's motion to dismiss a complaint, and that defendant elects to file an answer to the complaint, the defendant *waives* any defect in the pleading. [Citation.] A corollary to the waiver principle is the doctrine of aider by verdict. Under

[2] While Kenneth also sought dismissal of the complaint pursuant to section 2-619 of the Code below, he does not challenge the denial of that portion of his motion to dismiss on appeal.

that doctrine, where a defendant allows an action to proceed to verdict, that verdict will cure not only all formal and purely technical defects and clerical errors in a complaint, but will also cure any defect in failing to allege or in alleging defectively or imperfectly any substantial facts which are essential to a right of action." (Emphasis in original. Original and internal quotations omitted.) *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 60 (1994). Because this matter went to trial following the denial of Kenneth's motion to dismiss, the denial of that motion cannot now be raised on appeal.

¶ 17 "It is true that an important exception to the aforementioned rules is that a defendant may raise at any time a claim that the complaint fails to state a cause of action. [Citation.] However, this exception applies only when a complaint fails to state a recognized cause of action. The exception does not apply where the complaint states a recognized cause of action, but contains an incomplete or otherwise insufficient statement of that cause of action." *Id.* at 61-62. Because Kenneth only asserts an incomplete or otherwise insufficient statement of recognized causes of action, he may not take advantage of this exception.

¶ 18 We next turn to Kenneth's contention that the trial court improperly denied his motion to dismiss for Ron's alleged lack of diligence in obtaining service upon the defendants. This motion was brought pursuant to Illinois Supreme Court Rule 103(b) which provides:

> "If the plaintiff fails to exercise reasonable diligence to obtain service on a defendant prior to the expiration of the applicable statute of limitations, the action as to that defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice as to that defendant only and

> shall not bar any claim against any other party based on vicarious liability for that dismissed defendant's conduct." Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 19 A Rule 103(b) dismissal is intended "to protect defendants from unnecessary delay in the service of process on them and to prevent the circumvention of the statute of limitations." *Segal v. Sacco*, 136 Ill. 2d 282, 286 (1990). Here, Ron's complaint was filed on November 19, 2014. Kenneth, in his individual capacity, was served a copy of the lawsuit on November 26, 2014, and Frank and Kenneth, in his capacity as trustee, were served in May, 2015. There is no suggestion that any party was served after the expiration of the applicable statute of limitations. Again, the "primary reason for the passage of Rule 103(b) was to prevent the intentional delay of service of summons upon a defendant for an indefinite amount of time in order to circumvent the applicable statute of limitations." *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 16. On these facts, where the primary reason for Rule 103(b) would not be served by dismissal of this suit, we find no abuse of discretion in the trial court's denial of Kenneth's motion to dismiss on this basis. See also *Christian v. Lincoln Automotive Co*., 403 Ill. App. 3d 1038, 1042 (2010) (noting that because "controversies should ordinarily be resolved on their merits after both sides have had their day in court," dismissing a lawsuit with prejudice based on a lack of reasonable diligence in service is "a harsh penalty").

¶ 20 We next consider Kenneth's argument that the trial court improperly denied his motion for summary judgment.

¶ 21 "As a general rule, when a motion for summary judgment is denied and the case proceeds to trial, the denial of summary judgment is not reviewable on appeal because the result of any error is merged into the judgment entered at trial. [Citations.] The rationale for this rule is that review of the denial order would be unjust to the prevailing party, who obtained a judgment after

a more complete presentation of the evidence." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 355-56 (2002). Once again, because this matter went to trial Kenneth may not challenge the denial of this pretrial motion on appeal.

¶ 22 It is true that review of the denial of summary judgment may be appropriate after a trial where the motion presented a legal issue for determination by the court. *Id.* Here, however, Kenneth's motion for summary judgment primarily relied upon his contention that there were no genuine issues of material fact and he was entitled to summary judgment in his favor. The only exception was Kenneth's argument that he was entitled to summary judgment as a matter of law because Ron made determinative admissions by failing to respond to a number of Kenneth's affirmative defenses. The record belies this argument, as it clearly contains verified responses filed by Ron denying those very affirmative defenses. Even if it did not, any possible failure to respond to the affirmative defenses cited by Kenneth did not constitute admissions because those affirmative defenses did not contain any well-pleaded facts, but rather mere legal conclusions. *Janetis v. Christensen*, 200 Ill. App. 3d 581, 585 (1990).

¶ 23 We now turn to Kenneth's contention that the relief granted by the trial court was improper. On appeal, Kenneth specifically complains that the relief provided by the trial court should be reversed because the trial court improperly: (1) failed to require Ron to show that he had no adequate remedy at law; (2) failed to balance the equities; (3) granted relief to Ron, when Ron had unclean hands; (4) removed Kenneth as successor trustee and replaced him with Ron; (5) granted relief not requested in Ron's complaint; (6) ordered the immediate sale of the property in contravention of the express terms of the 2003 Trust allowing Kenneth to live there; (7) declared the purported 2013 Trust and the 2016 deed null and void; and (8) ignored certain statutory protections. We reject these contentions.

¶ 24 To the extent that Kenneth contends that the trial court did not have the authority to grant the relief contained in its final order, we note the following. " 'Courts of equity possess original and inherent power to recognize, execute and control trusts and trust funds.' " *Eychaner v. Gross*, 202 Ill. 2d 228, 278 (2002) (quoting *Village of Hinsdale v. Chicago City Missionary Society*, 375 Ill. 220, 233 (1940)). As such, among many other powers, they have the authority to: (1) remove a trustee (*Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill. App. 3d 457, 467 (2008)); (2) appoint a successor trustee (*Matter of Estate of Wasson*, 117 Ill. App. 3d 368, 371 (1983)); (3) order the cancellation of a trust, or a deviation or modification from the terms of a trust (*Church of Little Flower v. U.S. Bank*, 2012 IL App (4th) 120266, ¶ 17); (4) in appropriate circumstances, order the sale of trust assets contrary to the express terms of a trust (*American State Bank v. Kupfer*, 114 Ill. App. 3d 760, 765 (1983)); (5) trace trust assets and impose a constructive trust upon any such assets in order to return the property to rightful trust beneficiaries (*In re Commissioner of Banks & Real Estate*, 327 Ill. App. 3d 441, 480 (2001)); (6) set aside a trustee's wrongful conveyance of trust property (*Lehnard v. Specht*, 180 Ill. 208, 215 (1899) and *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000)); and (7) "enter a decree adjudicating all matters in controversy so as to avoid multiple litigation and to do full and complete justice." *Sadacca v. Monhart*, 128 Ill. App. 3d 250, 258-59 (1984). Thus, the trial court had the inherent authority to grant all of the relief Kenneth challenges on appeal.

¶ 25 To the extent that Kenneth contends that the trial court ignored certain statutory protections, we disagree. Kenneth first relies upon section 2-1403 of the Code, which in pertinent part provides: "No court, except as otherwise provided in this Section, shall order the satisfaction of a judgment out of any property held in trust for the judgment debtor if such trust has, in good

faith, been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor." 735 ILCS 5/2-1403 (West 2016). He also relies upon section 12-901 of the Code, which in pertinent part provides:

> "Every individual is entitled to an estate of homestead to the extent in value of $15,000 of his or her interest in a farm or lot of land and buildings thereon, a condominium, or personal property, owned or rightly possessed by lease or otherwise and occupied by him or her as a residence, or in a cooperative that owns property that the individual uses as a residence. That homestead and all right in and title to that homestead is exempt from attachment, judgment, levy, or judgment sale for the payment of his or her debts or other purposes and from the laws of conveyance, descent, and legacy, except as provided in this Code or in Section 20-6 of the Probate Act of 1975." 735 ILCS 5/12-901 (West 2016).

¶ 26 These sections are simply inapplicable here. Kenneth was not ordered to satisfy some unrelated judgment with property held in trust for him, nor was any homestead right he had in the property subjected to attachment, judgment or levy. Rather, the trial court simply entered authorized relief—relief which admittedly altered the rights granted by the 2003 Trust to Kenneth with respect to the property—in the context of its inherent authority to control trusts and trust funds. *Eychaner*, 202 Ill. 2d at 278.

¶ 27 Nor do we accept Kenneth's argument that the trial court improperly granted relief not requested in Ron's complaint. Ron's complaint specifically requested the trial court to award "such other, further or different relief as the Court deems just." And as to Kenneth's complaint that the trial court should not have declared the purported 2013 Trust and the 2016 deed null and void because these issues were not addressed in Ron's complaint, we note that it was Kenneth

himself that placed these matters at issue in his responses to discovery, affirmative defenses, in the context of prosecuting his pretrial motions, and at trial.

¶ 28 Finally, to the extent that Kenneth contends that the evidence presented to the trial court did not establish the need for the relief granted by the trial court or that the trial court improperly exercised the above referenced authority, we find that the record is insufficient to allow meaningful appellate review of such an argument.

¶ 29 It is the appellant's burden to provide the reviewing court with a sufficiently complete record to allow for meaningful appellate review. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Indeed, Rule 321 provides that the record on appeal should contain the entire common law record, including "documentary exhibits offered and filed by any party." Ill. S. Ct. R. 321 (eff. Feb. 1, 1994). In the absence of a sufficiently complete record, a reviewing court will resolve all insufficiencies apparent therein against the appellant and will presume that the circuit court's ruling had a sufficient legal and factual basis. *Foutch*, 99 Ill. 2d at 391-92.

¶ 30 In this case, the relief granted by the trial court's ruling was entered only after considering all the evidence entered into evidence at trial, specifically relying upon a number of the exhibits entered into evidence. However, a large portion of the trial testimony and all of the trial exhibits have been omitted from the record on appeal. Without the benefit of this evidence we have no basis upon which to evaluate the trial court's decision, and we must presume this decision had a sufficient legal and factual basis. *Lah v. Chicago Title Land Trust Co*., 379 Ill. App. 3d 933, 938-39 (2008) (where appellant failed to include trial exhibits in the record on appeal, trial court ruling was upheld pursuant our supreme court's ruling in *Foutch*); *In re K.S*., 317 Ill. App. 3d 830, 832-33 (2000) (same).

¶ 31 We note that in an attachment to his reply brief, Kenneth provides an affidavit purporting to explain the lack of a complete transcript of the trial testimony and essentially laying the blame upon Ron's attorney. We reject this effort. First, it would be improper for us to consider this affidavit on appeal. *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 55 (2001) (documents not submitted to the circuit court and not properly a part of the record on appeal cannot be considered on appeal). Even if we did consider the affidavit, at no point has Kenneth provided any explanation for his failure to provide this court with a record that includes the exhibits entered into evidence at trial. Without that evidence, we must uphold the trial court's rulings.

¶ 32 The final argument raised by Kenneth on appeal is that he was denied a fair trial by the trial court. We also reject this contention.

¶ 33 Kenneth first relies upon evidentiary rulings against him for which we once again have not been presented with a sufficient record to review. He also relies upon the same claims of bias that were twice rejected below in the context of his motions for substitution of judge for cause, with the denial of those motions not challenged on appeal. Finally, Kenneth claims that the trial court failed to "exercise conscientious judgment," illustrating this argument with examples as to why the trial court's rulings were in error.

"A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice." *Eychaner*, 202 Ill. 2d at 280 (2002). "A judge's rulings alone almost never constitute a valid basis for a claim of judicial bias or partiality." *Id.* "Allegedly erroneous findings and rulings by the trial court are insufficient reasons to believe that the court has a personal bias for or against a litigant." *Id.* Moreover, " 'judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.' " *Id.* (quoting

Liteky v. United States, 510 U.S. 540, 555 (1994)). See also *People v. Urdiales*, 225 Ill. 2d 354, 426 (2007) ("The fact that a judge displays displeasure or irritation with an attorney's behavior is not necessarily evidence of judicial bias against the [party] or his counsel."). In light of this authority and the record before us, we reject Kenneth's contention that he was denied a fair trial.

¶ 34 III. CONCLUSION

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

¶ 36 Affirmed.