THIRD DIVISION
August 22, 2018

No. 1-18-0085

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ROBERT R. TEPPER,	)	
	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
	)	Cook County
v.	)	
	)	No. 10 L 10980
SHEILA HENAGHAN,	)	
	)	The Honorable
Defendant-Appellee.	)	Margaret A. Brennan,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Where settlement agreement calling for monthly installment payments provided that defendant's failure to cure default within 10 days of plaintiff sending notice would entitle plaintiff to have judgment entered for the full amount claimed, and defendant mailed check within 10 days which was not received by plaintiff until 3 days after date specified in notice, trial court did not err in denying plaintiff's motion to enforce judgment.

¶ 2 In this appeal, we address whether the trial court erred in denying the plaintiff's motion to enforce a settlement agreement after dismissal in a claim involving unpaid attorney fees. The

plaintiff, Robert R. Tepper, is an attorney who represented the defendant, Sheila Henaghan, in several underlying lawsuits involving a limited liability company of which she was a member. The plaintiff also represented Michael Cullen in these lawsuits. The plaintiff sued Cullen in the case for attorney fees, but he voluntarily dismissed all claims against him with prejudice after Cullen filed for bankruptcy.

¶ 3 Pursuant to Illinois Supreme Court Rule 321 (eff. Feb. 1, 1994), the parties have stipulated to providing this court with a limited record on appeal. That record reflects that their underlying claim for attorney fees was settled on March 13, 2013. Three documents were entered into the court file that day: (1) a settlement agreement, (2) a stipulation, and (3) a dismissal order.

¶ 4 The settlement agreement, signed by both plaintiff and defendant, recites that the plaintiff claimed that the defendant owed him $66,958.49 in attorney fees, based on legal services he rendered to her. The defendant denied she owed the plaintiff anything. However, they agreed to compromise their claim for $25,000, plus interest. Of the $25,000 settlement, the first $10,000 was to be paid within ten days of the settlement. The remainder was to be paid in monthly installments, whereby "on or before the first day of each month thereafter, [the defendant] shall pay [the plaintiff] the sum of $300 until the entire amount due, plus interest, shall have been paid in full." Interest accrued at a rate of 3 percent if the defendant was current on the balance, but it could go as high as the lesser of 18 percent or the highest rate permissible by law if the defendant defaulted on the payments.

¶ 5 The settlement agreement further provided that, upon execution of the settlement agreement, the plaintiff's lawsuit seeking attorney fees would be dismissed "without prejudice and with leave to reinstate as more fully set forth below." It then contained the following provision, out of which the dispute at issue arises:

> "7. In the event Henaghan misses any payment due hereunder, Tepper may send a notice to Henaghan. If Henaghan does not cure the default within ten days of the giving of the notice, Tepper shall be entitled to a judgment against Henaghan in the Lawsuit in the amount of $66,958.49 less any amounts heretofore paid. Henaghan may cure the default at any time prior to the date set forth in the notice, which shall be at least ten days after the notice was given. The notice called for by this paragraph herein may be coupled with a Notice of Motion with respect to a Motion seeking entry of the Agreed Judgment Order."

It further provided that if the plaintiff had to send a second or subsequent notice, the defendant would pay an additional $50 late fee to compensate the plaintiff for the administrative expense of sending notice. The settlement agreement provided that notices would be deemed given one day after being sent for next-day delivery by FedEx or similar overnight courier service to the plaintiff's address. It did not, however, contain any similar provision specifying how the plaintiff was to pay the defendant or when such payments would be considered made. Finally, it provided that upon payment in full, the plaintiff would cooperate with the defendant or her attorney to cause the dismissal without prejudice to be changed to a dismissal with prejudice.

¶ 6 The court file also includes a stipulation filed March 13, 2013, signed by the plaintiff and the attorney for the defendant. The stipulation incorporated the parties' settlement agreement and provided that the matter would be dismissed without prejudice and with leave to reinstate. Pertinent to this dispute, it provided that "[u]pon default and failure to cure as set forth in the Settlement Agreement, the Court shall enter a judgment in favor of Plaintiff and against Defendant Henaghan in the amount of $66,958.49, less any amount heretofore paid pursuant to said Settlement Agreement."

¶ 7 Finally, the court file contains an order entered March 13, 2013, which provided that the cause was dismissed without prejudice as to the defendant, as it appeared to the trial court that the case had been resolved through settlement by agreement of the parties. As stated above, the claim against Cullen was voluntarily dismissed with prejudice by a separate order entered later.

¶ 8 On October 17, 2017, the plaintiff filed in the trial court a "Motion for Entry of Judgment" against the defendant. By that motion, the plaintiff sought to have the trial court enter a judgment against the defendant pursuant to paragraph 7 of the settlement agreement, set forth above. The motion recited that the defendant had paid $26,400 toward the settlement, but the payment that had been due on October 1, 2017 was not timely made. Attached to the motion was a notice that the plaintiff had purportedly sent to the defendant, along with a proof of delivery by FedEx to the defendant's address on October 6, 2017. The notice stated:

> "You are hereby notified that the payment due under the Settlement Agreement dated March 13, 2013, in Case No. 10 L 10980 was not made October 1, 2017. The amount presently past due consists of 1 payment, totaling $300, plus a $50 late fee—$350 in total. Absent payment in accordance with said Settlement Agreement by October 16, 2017, the undersigned reserves the right to seek a judgment pursuant to said Settlement Agreement."

According to the plaintiff's motion, no payment was received by October 16, 2017. Based on this, the plaintiff argued he was entitled to a judgment pursuant to the terms of the settlement agreement. The motion sought entry of judgment in the amount of $40,558.49, which was $66,958.49 less the $26,400 paid by the defendant as of that date.

¶ 9 The defendant filed a response brief which was supported by her own affidavit. In her brief, the defendant argued that she had "cured" any default, as allowed by paragraph 7 of the

settlement agreement, by mailing a check to the plaintiff on October 14, 2017. She argued that she had been making payments this way (*i.e.*, by sending a check through the U.S. Mail) since April 1, 2013, and thus the plaintiff had assented to this method of payment. She also argued in her brief that she had actually paid the plaintiff $27,000, when the total amount owed with interest was only $26,876.50. Finally, she argued that it would be unconscionable to award the plaintiff a judgment in the amount of $40,558.49, when at the time of default she had paid $26,400 toward a debt of $26,876.50, and since that time she had paid the debt in full.

¶ 10 The plaintiff filed a reply brief in which he acknowledged that he had received a $350 check in the mail from the defendant on October 19, 2017. He argued that the defendant had not "cured" the default by mailing the check prior to October 16, 2017, but rather a "cure" required that he actually receive the funds by that date. He argued that the fact that he had accepted payments sent by mail in the past was "not an implied agreement that a default will be deemed cured upon making a check." He also stated in his reply brief that the default of the payment due October 1, 2017, was "not the first default, nor the first one not timely cured." He further argued that the defendant was miscalculating the total that she owed under the settlement agreement, and she still owed approximately $1,956.89 and had not paid off the debt. Finally, he argued that enforcing the settlement agreement's provisions against the defendant would not be unconscionable, as the settlement had provided her with "a very large discount if, and only if, she paid the discounted amount on a timely basis," which she failed to do.

¶ 11 On December 7, 2017, the trial court entered an order denying plaintiff's motion for entry of a judgment. No report of proceedings or bystander's report from the hearing of December 7, 2017, is included in the limited record on appeal to which the parties stipulated. Ill. S. Ct. R. 323(a), (c) (eff. July 1, 2017). Thus, we are unable to ascertain the specific basis upon which the

trial court ruled or its exact reasons for doing so.

¶ 12 ANALYSIS

¶ 13 Before we can reach the merits of this appeal, we must address the defendant's argument that this court lacks jurisdiction to do so. The defendant argues that the trial court's order denying the plaintiff's motion for entry of judgment is not a final judgment subject to appellate review, in that it did not dispose of all the rights between the parties. The defendant posits that hypothetically she could still breach the settlement agreement in the future prior to fully paying off the debt, if she defaults on a future installment payment and fails to cure it, in which case the plaintiff could file a new motion for judgment. Thus, she argues the trial court's ruling is merely interlocutory. She argues that the motion at issue is "akin to a summary judgment motion, the denial of which is not final or appealable."

¶ 14 We conclude that we have jurisdiction over this appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994), which provides that "[e]very final judgment of a circuit court in a civil case is appealable as of right." A final judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit. *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33 (2005). A judgment is final if it determines the litigation on the merits so that, if affirmed, nothing remains for the trial court to do but to proceed with its execution. *Id.* at 233 (citing *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982)). "Accordingly, only an order which leaves the cause still pending and undecided is not a final order for purposes of appeal." *People v. Shinaul*, 2017 IL 120162, ¶ 10. Further, in determining whether a judgment or order is final, we look to its substance rather than its form. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 24.

¶ 15 Procedurally, the order at issue was entered in a case that had been dismissed over three

years earlier. We do not believe it was significant that the dismissal order stated the dismissal was "without prejudice," as it clearly provided that the basis for dismissal was the fact that the parties had agreed to a settlement. Concerning finality, the effect of a dismissal order is determined by its substance, not by whether the trial court described the dismissal as being "with prejudice" or "without prejudice." *Schal Bovis, Inc. v. Casualty Ins. Co.*, 314 Ill. App. 3d 562, 567-68 (1999). A dismissal order entered pursuant to a settlement agreement is a final order. *Ad-Ex, Inc. v. City of Chicago*, 207 Ill. App. 3d 163, 177 (1990). Thus, the trial court's dismissal order pursuant to the settlement concluded the underlying litigation pending between the parties.

¶ 16 Although the order provided that the dismissal was without prejudice, if the plaintiff were to reinstate the case in this situation, it would not be a reinstatement of his original claim seeking unpaid attorney fees. Rather, any reinstated claim would be one to enforce the terms of the settlement contract. See *People ex rel. Dept. of Public Health v. Wiley*, 348 Ill. App. 3d 809, 818 (2004). While the plaintiff could have filed a new lawsuit to enforce the settlement agreement if he believed it had been breached (*Kempa v. Murphy*, 260 Ill. App. 3d 701, 706 (1994)), he also had the right to avail himself of the inherent authority of the trial court in the original case to enforce a settlement agreement entered within that case. *Director of Insurance ex rel. State v. A&A Midwest Rebuilders, Inc.*, 383 Ill. App. 3d 721, 725 (2008) (holding the trial court had jurisdiction to enforce settlement agreement by reducing it to judgment after defendant ceased making installment payments two years after case was dismissed with prejudice). It is well-established under Illinois law that a trial court retains the inherent authority to enforce its own orders. *Id.* at 723. The trial court's jurisdiction to do so is retained indefinitely. *Id.*; *In re Marriage of Allen*, 343 Ill. App. 3d 410, 412 (2003); see also *Klier v. Siegel*, 200 Ill. App. 3d 121, 126 (1990).

¶ 17 Therefore, when the plaintiff filed the instant motion seeking to enforce the settlement agreement by entering judgment against the defendant, it was this inherent authority of the trial court to enforce its orders that the plaintiff was seeking to invoke. At the time he filed his motion, the litigation between the parties had been dismissed, and nothing was pending before the court. The court was not overseeing whether the defendant made the installment payments called for by the settlement agreement. Absent the plaintiff's motion, the trial court would never have needed to take further action with respect to the parties or the underlying case. By entering the order denying the plaintiff's motion, the trial court left the parties in the position they had been in, with no litigation pending and their rights and liabilities to each other controlled by their settlement agreement. Thus, the order at issue ascertained and fixed their rights absolutely and finally, by determining that their rights as to each other would remain as they had been and would not be changed through the entry of a judgment. No further rulings or action are contemplated by the trial court. For these reasons, we find the trial court's order to be a final judgment, thereby giving us jurisdiction to consider this appeal.

¶ 18 Turning to the merits, the plaintiff argues that the trial court erred by failing to enter a judgment against the defendant under paragraph 7 of the settlement agreement. The plaintiff argues that the defendant's act of mailing the check to him by October 16, 2017, does not amount to a "cure" of the default called for by paragraph 7. Rather, he argues that the default was not "cured" until he had the check in his possession, which was October 19, 2017. He cites several secondary sources and an out-of-state case for the principle that a payment is not effective until received by a creditor, and mailing of a payment is not sufficient. He argues that because the defendant did not cure the default within ten days of his giving notice, which would be October 16, 2017, he is entitled to a judgment under the terms of the settlement agreement.

¶ 19 Because the limited record on appeal that the parties stipulated to provide to us does not include a report of proceedings or bystander's report from the hearing of December 7, 2017, we do not know the specific basis upon which the trial court ruled or the reasons for its ruling. When that occurs, we indulge every reasonable presumption favorable to the judgment, order, or ruling from which the appeal is taken. *Balough v. Northeast Illinois Regional Commuter R.R. Corp.*, 409 Ill. App. 3d 750, 771 (2011). While we may consider the issues raised by the plaintiff by reference to the common law record alone, any doubts raised by insufficiencies in the record will be resolved against the plaintiff, who had the burden as appellant to present this court with a sufficiently complete record of the trial court proceedings to support his claims of error. *Id.* at 770-71.

¶ 20 We do not find any error in the trial court's denial of the plaintiff's motion to enforce the judgment. This court has expressly held that "where monetary settlements were paid in full but may not have been tendered in accordance with explicit deadlines, even where time was of the essence, a trial court does not abuse its discretion in refusing to rescind the underlying settlement agreement and reinstate an earlier judgment." *Swiatek v. Azran*, 359 Ill. App. 3d 500, 503 (2005) (citing *Mederacke v. Becker*, 129 Ill. App. 2d 434, 438-39 (1970), and *Berg v. Lippig*, No. 96 C 881, 1996 WL 332419 (N.D. Ill. Jun. 13, 1996)); see also *Janssen Brothers, Inc. v. Northbrook Trust & Savings Bank*, 12 Ill. App. 3d 840, 844 (1973).

¶ 21 The facts of *Swaitek* are similar to those of this case. There, the plaintiff and defendant settled a lawsuit through a stipulation in which the defendant agreed to pay the plaintiff $24,000 in two installments. *Id.* at 501. The first payment of $20,000 was due by November 13, 2002, and the second payment of $4,000 was due by November 13, 2003. *Id.* The parties' stipulation provided that the cause would be dismissed without prejudice, but if the defendant failed to

comply with the settlement agreement, the plaintiff would "have judgment entered against Defendant in the full amount claimed," which was $43,235, plus costs and attorney fees but less payments actually made. *Id.* In December 2003, the plaintiff filed a motion to reinstate the case and for judgment in the amount of $23,235, alleging that while the defendant made the first payment of $20,000 in a timely manner, he had failed to make a timely payment of the second $4,000 payment. *Id.* at 501-02. The trial court initially granted this motion and entered judgment in this amount. *Id.* at 502. However, in January 2004, the trial court vacated that judgment after the plaintiff filed an emergency motion to reconsider. *Id.* The trial court found that by then the defendant had tendered a check to plaintiff in the amount of $4,000 and a check to the plaintiff's attorney in the amount of $350. *Id.* The plaintiff then brought another motion to reconsider, which the trial court denied. *Id.* The plaintiff appealed, arguing the settlement agreement was a binding contract, the timing of the payment of the agreed-upon amounts was of the essence, and the trial court was obligated to enforce it, which it failed to do by allowing the defendant to tender the $4,000 amount after the agreed-upon deadline. *Id.* at 502-03.

¶ 22 This court affirmed the trial court. We recognized that settlement agreements are construed and enforced according to principles of contract law. *Id.* at 503 (citing *Solar v. Weinberg*, 274 Ill. App. 3d 726, 731 (1995)). Where one party breaches a settlement agreement, the non-breaching party may be entitled to rescind the settlement agreement. *Id.* However, not every breach of a settlement agreement entitles the non-breaching party to rescind it, "and the decision whether to rescind a settlement agreement is left largely to the discretion of the trial court." *Id.* (citing *Solar*, 274 Ill. App. 3d at 733; *Mederacke*, 129 Ill. App. 2d at 438-39; *Janssen Brothers*, 12 Ill. App. 3d at 844). A party may be entitled to rescind a settlement agreement only where there has been substantial breach or nonperformance by the other party. *Id.* Substantial nonperformance occurs

where the matter not performed is of such a nature and importance that the agreement would not have been entered into without it. *Id.* We noted the observation of the Fourth District in *Mederacke*, that in a situation where no prejudice is shown from the late payment and there is no evidence to suggest that the settlement is not fair or equitable, rescinding the settlement agreement is both "lacking in equity and unwise." *Id.* at 503 (quoting *Mederacke*, 129 Ill. App. 2d at 438).

¶ 23 In this case, it is undisputed that the plaintiff received the defendant's $300 payment due October 1, 2017 under the settlement agreement, albeit he did not receive it until October 19, 2017. This was three days after the October 16, 2017 deadline he gave the defendant in the notice he sent her to cure the default. The defendant paid a $50 late fee with this payment. Under the reasoning of *Swiatek*, the trial court would not abuse its discretion by refusing find that this purported breach of the settlement agreement warranted rescinding the parties' agreement to settle for $25,000 and instead entering a judgment against the defendant for $40,558.49. Nowhere in the plaintiff's motion or his briefs on appeal does the plaintiff identify any prejudice he suffered by receiving the defendant's payment on October 19 instead of October 16. The date of October 16 was a deadline the plaintiff selected in his notice, and he could have chosen a later date (although not an earlier one). Further, the evidence in the record on appeal suggests that the plaintiff routinely accepted late payments from the defendant, sometimes well after the 19th of the month they were due. The plaintiff admits in his briefs that in past instances, the defendant had failed to timely cure defaults, but he accepted the payments anyway. All of this suggests that payment by October 16, 2017 was not "of such a nature and importance that the agreement would not have been entered into without it," so as to justify rescission of the agreement to settle for $25,000 and entry of judgment. *Id.* at 503. This is in accord with the law that performance

dates, even when attached to explicit termination provisions, are by their nature accessory rather than central aspects of most contracts. *Chariot Holdings, Ltd. v. Eastmet Corp.*, 153 Ill. App. 3d 50, 58 (1987).

¶ 24 Accordingly, we affirm the trial court's order denying the plaintiff's motion for entry of judgment.

¶ 25 Affirmed.