2019 IL App (1st) 181034-U

FOURTH DIVISION
March 29, 2019

No. 1-18-1034

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT BARTELS and C&B REAL ESTATE, LLC,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	No. 15 L 9568
STANLEY CLEMENT,	)	
Defendant-Appellee.	)	Honorable Margaret A. Brennan, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment where the circuit court did not abuse its discretion when it denied plaintiffs' motion to disqualify defendant's counsel and summary judgment was properly entered in defendant's favor.

¶ 2 Plaintiffs Robert Bartels (Bartels) and C&B Real Estate, LLC (C&B) (collectively

plaintiffs), appeal from summary judgment entered in favor of defendant, Stanley Clement, as well as the circuit court's denial of their motion to disqualify defendant's attorney. On appeal, plaintiffs contend that the circuit court erred in its denial of their motion to disqualify and that a genuine issue of material fact exists so as to preclude summary judgment. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The pleadings, affidavits, depositions, and other evidence in the record establish the following undisputed facts. Bartels and defendant met in the 1990s and defendant began working at Bartels' company Safety Management Services, Inc. (SMS) as a sales representative. Defendant was eventually promoted to the position of vice president and chief operating officer, becoming a 20% shareholder in the company. While defendant was employed with SMS, he and Bartels purchased a building at 1500 North Arlington Heights Road, in Arlington Heights, Illinois, where SMS had its offices. Bartels and defendant each put in $200,000 of his own funds and obtained a mortgage loan in the amount of $650,000. In 2004, C&B was created to manage the building. The C&B operating agreement listed Bartels and defendant as the members of C&B, with Clement also being named the managing member as well as the tax matters partner. Each member had a 50% interest in C&B. C&B opened a checking account at Libertyville Bank & Trust with Bartels, defendant, and another SMS employee as signatories to the account. Bartels paid the mortgage and real estate taxes for the building while defendant managed the day-to-day operations.

¶ 5 The building was never fully occupied. At most, five tenants occupied the building at one time. SMS was the anchor tenant of the building. Initially, SMS did not have a lease with C&B. Although, in 2011 SMS did sign a three-year lease with C&B. The lease provided in

pertinent part that SMS would pay $6,750 per month in rent and an amount of real estate taxes based on its percentage of occupancy in the building. Over the next two years, C&B lost two tenants, leaving the building occupied by only three tenants.

¶ 6 In fall 2013, defendant was fired from SMS and took over full management of the building, which included collecting the rents, maintaining the building, paying the mortgage and real estate taxes, paying bills, and managing day-to-day operations. Due to the loss of tenants, C&B was operating at a loss. By December 2013, real estate taxes which were due on the building amounting to $25,000 were not paid. There is a question as to whether there were sufficient funds to pay for the real estate taxes in 2013. The parties agree that defendant paid other bills that were due and owing instead of paying the real estate taxes at that time. Thereafter in 2014, both parties were aware that C&B had a "cash flow problem" and continued to have insufficient funds to pay for any of the real estate taxes (which were now in excess of $50,000) or the mortgage. This "cash flow problem" was exacerbated by the parties' agreement to lower SMS's rent from $6,750 to $4,200 with no obligation to contribute to the real estate taxes.

¶ 7 With both Bartels and defendant aware of C&B's financial problems, they tried to find some solution but could not agree. Bartels wanted defendant to contribute personal funds to pay the real estate taxes. Defendant wanted to list the property for sale or obtain an equity loan. None of these options came to fruition and, as a result of the nonpayment of the mortgage and taxes, the property went into foreclosure in August 2015.

¶ 8 On September 18, 2015, plaintiffs filed their three-count complaint against defendant alleging (1) breach of contract, (2) gross negligence, and (3) breach of fiduciary duty. All three counts were based on the allegations that defendant breached his duty under the operating agreement to make a timely payment of the real estate taxes on the building for 2014. Section

4.4 of the operating agreement, which was attached as an exhibit to the complaint, provided as follows:

> "Liability for Certain Acts. Each Member shall perform his duties as Member in good faith, in a manner he reasonably believes to be in the best interests of the Company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. A Member shall not be liable to the Company or to any Member for any loss or damage sustained by the Company or any Member, unless the loss or damage shall have been the result of fraud, deceit, gross negligence, willful misconduct or a wrongful taking by the Member(s)."

The complaint further alleged that defendant failed to provide plaintiffs timely and sufficient notice of his refusal to pay the real estate taxes. Plaintiffs also alleged defendant breached his fiduciary duty to plaintiffs by failing to pay the real estate taxes.

¶ 9 On November 13, 2015, defendant filed his answer denying all of the allegations in the complaint. Defendant also set forth five affirmative defenses: (1) C&B is not a proper plaintiff in the action; (2) plaintiff failed to attach a copy of the operating agreement to the complaint; (3) C&B did not have sufficient funds to pay the real estate taxes because SMS refused to pay for its portion of the real estate taxes as provided in its lease; (4) Bartels breached his fiduciary duty to C&B by causing SMS to default in its lease obligations to C&B thereby depriving C&B of sufficient funds to pay the real estate taxes; and (5) at all times Bartels was aware of the real estate tax delinquency and had the ability to pay the real estate taxes from C&B's checking account.

¶ 10 On September 15, 2016, plaintiffs filed a motion to disqualify defendant's attorney, Bradley Foreman (Foreman) because he filed a lawsuit on behalf of a client INT, Inc. against

SMS in January 2014 and that case was currently pending in the circuit court of Cook County. Plaintiffs argued that both Bartels and defendant were shareholders and part owners of SMS. Plaintiffs concluded that Foreman violated Rule 1.7(a) of the Illinois Rules of Professional Conduct by suing SMS while at the same time appearing on behalf of defendant in this suit. In response, Foreman filed an affidavit stating he had no conflicts of interest with any of the parties.

¶ 11 After the matter was fully briefed and argued, the circuit court denied the motion finding plaintiffs failed to meet their burden to prove that defendant's attorney must be disqualified. The circuit court first found that the INT litigation did not name either Bartels or defendant as a party, only SMS, as a corporate entity. The circuit court further observed that the attorney representing the concerned parties was in the best position to determine whether a conflict of interest exists, and Foreman stated in his affidavit that there was no conflict.

¶ 12 Plaintiffs filed a motion to reconsider this ruling, arguing that they were not given an opportunity to present an order entered on November 30, 2016, disqualifying Foreman from the INT litigation. In response, defendant argued this was not "newly discovered evidence" and the circuit court did not err in its decision.

¶ 13 The circuit court denied the motion to reconsider on April 18, 2017, and defendant was given leave to file a second amended answer and affirmative defenses to plaintiffs' complaint *instanter*. The parties then engaged in discovery, with Bartels and defendant being deposed in August 2017.

¶ 14 On November 29, 2017, defendant filed a motion for summary judgment as to all three counts of the complaint. Defendant maintained that plaintiff set forth no material facts establishing that he breached any part of the operating agreement. According to defendant, the undisputed evidence demonstrated that C&B had insufficient resources and cash flow and that

the operating agreement did not require either party to contribute additional capital. Regarding count II, gross negligence, defendant maintained that plaintiff alleged defendant was negligent in not paying the 2014 real estate taxes, but there are no facts stated that indicate the amount of those taxes, whether C&B had sufficient resources to pay, and when those taxes became due. Defendant further argued that plaintiff failed to assert any facts that amounted to gross negligence and that, under *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982), plaintiff cannot recover solely economic loss under a tort theory of negligence. Finally, defendant asserted that summary judgment should be entered in his favor on count III because under Illinois law there is no separate cause of action for breach of fiduciary duty and the operating agreement does not set forth such a duty.

¶ 15 Attached as an exhibit to his motion for summary judgment was an affidavit from defendant in which he averred that true and correct copies of certain emails between him and plaintiff were attached. An email dated March 29, 2014, from defendant to plaintiff stated that C&B's accountant "did a cash flow analysis and believes we need an additional $44,000 this year in order to stay solvent[.]" Other emails established that defendant sought to list the property for sale due to the financial state of the company, but plaintiff disagreed with listing the property for sale. An email dated May 28, 2014, from defendant to plaintiff indicated that there was a $2,600 balance in the C&B checking account. Defendant also communicated to plaintiff in an email on July 24, 2014, that the first installment of real estate taxes for 2013 was delinquent, the second installment would be coming due, and C&B had insufficient funds to pay those taxes. Finally, an email dated November 19, 2014, from defendant to plaintiff purported to attach the quarterly reports as requested by plaintiff and reminded plaintiff that the 2013 real estate taxes had not been paid.

¶ 16 In response, plaintiffs maintained that a genuine issue of material fact existed as to whether there were sufficient funds available to pay the real estate taxes on the property.

¶ 17 After hearing argument from the parties, the circuit court granted defendant's motion for summary judgment on every count as to both plaintiffs, expressly finding that Bartels was not authorized to bring C&B's derivative action. After a motion to reconsider was denied, this appeal followed.

¶ 18 ANALYSIS

¶ 19 Motion for Disqualification

¶ 20 Plaintiffs first argue that the circuit court erred when it denied their motion to disqualify Foreman. Plaintiffs maintain that Rule 1.7 of the Illinois Rules of Professional Conduct was violated when Foreman represented a plaintiff in a lawsuit against SMS, a corporate entity owned in part by Bartels and defendant and Foreman was disqualified from representing INT in that case.

¶ 21 We first observe that plaintiffs do not challenge the circuit court's denial of their motion to reconsider on the issue of disqualification. The notice of appeal, the arguments in the briefs, and the relief requested, all seek review of the December 9, 2016, order where the circuit court initially denied plaintiffs' motion to disqualify. Accordingly, we will not consider any arguments or points not before the circuit court when it ruled on that motion.

¶ 22 When determining whether to grant or deny a motion to disqualify an attorney, a circuit court must consider that "[a]ttorney disqualification is a drastic measure because it destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing." *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 178 (1997). Therefore, a circuit court should grant a motion to disqualify an attorney only when absolutely necessary. *In re Estate of Klehm*,

363 Ill. App. 3d 373, 377 (2006). In addition, the party seeking disqualification carries a heavy burden to prove that his motion for disqualification is not being brought as a tactical weapon to gain undue advantage in the litigation. *In re Marriage of Stephenson*, 2011 IL App (2d) 101214, ¶ 19. A circuit court's decision to deny a motion to disqualify an attorney will not be disturbed absent an abuse of discretion. *Schwartz*, 177 Ill. 2d at 176. "An abuse of discretion occurs where no reasonable person would agree with the position adopted by the [circuit] court." *Id.*

¶ 23 Rule 1.7 regulates an attorney's ability to undertake representation adverse to a present client, and provides as follows:

> "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent." Ill. R. Prof'l Conduct (2010) R. 1.7 (eff. Jan. 1, 2010).

This court addressed the nuances of Rule 1.7 in *Board of Managers of Eleventh Street Loftominium Association v. Wabash Loftominium, L.L.C.*, 376 Ill. App. 3d 185 (2007):

> "[O]n the one hand, disqualification [pursuant to Rule 1.7] will protect the attorney-client relationship by ensuring that clients receive the undivided loyalty of their legal representative. [Citation.] On the other hand, it is well-settled that disqualification is 'a drastic measure which courts should hesitate to impose' unless absolutely necessary. [Citation.] In addition to delaying the proceedings, disqualification will deprive a party of his chosen legal advisor. [Citation.] Furthermore, disqualification requests should be viewed ' "with extreme caution for they can be misused as techniques of harassment." ' [Citations.] Therefore:
>
> ' "[The court] considers the right of a party to select counsel of his choice to be a matter of significant importance, which will not be disturbed unless a specifically identifiable impropriety *has occurred.* A disqualification order discredits the bar generally and the individual attorneys particularly. Thus, while there can be no hesitation to disqualify where impropriety *has occurred* *** judges must exercise caution not to paint with a broad brush stroke under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the public's respect. The opposite effects are just as likely—encouragement of vexatious tactics and increased cynicism by the public." [Citation.]' (Emphasis in original.)" *Id.* at 192-93 (citing *Guillen v. City of Chicago*, 956 F.Supp. 1416, 1421 (N.D. Ill. 1997), quoting *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982) and *Panduit Corp. v.*

All States Plastic Manufacturing Co., 744 F.2d 1564, 1576-77 (Fed. Cir. 1984).

¶ 24 Here, the circuit court issued an extensive written order denying plaintiff's motion to disqualify Foreman. Prior to reaching the merits of the motion, the circuit court acknowledged that the right of a party to select counsel of his choice is a matter of significant importance, which will not be disturbed unless a specifically identifiable impropriety has occurred. In the order, the circuit court considered the affidavits of Foreman and Bartels. The circuit court observed that Foreman averred no conflict existed where the INT litigation was not against the individual shareholders of SMS, but was against SMS as a corporate entity. In contrast, the circuit court noted that Bartels' affidavit alleged "based on 'information and belief' that the impropriety has already occurred" and that plaintiffs provided no other proof that the circuit court could consider as evidence of a violation of the rules of professional conduct. Accordingly, the circuit court concluded that plaintiffs failed to meet their burden of proof that Foreman must be disqualified. On appeal, plaintiffs provide us with no basis on which to find the circuit court abused its discretion in denying the motion to disqualify Foreman. We cannot say, and plaintiffs cannot point to, any way the circuit court acted arbitrarily, fancifully, or unreasonably in deciding this motion. Therefore, we affirm the circuit court's determination.

¶ 25 Motion for Summary Judgment

¶ 26 Plaintiffs also challenge the propriety of the circuit court's order granting summary judgment in favor of defendant as well as the circuit court's finding that Bartels was not authorized to bring a derivative action on behalf of C&B. 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). We review a circuit court's entry of summary judgment *de novo*. *Id.* at 102.

¶ 27 At this juncture, we observe that on appeal plaintiffs raise arguments only regarding counts I and II of the complaint, therefore, the circuit court's entry of summary judgment on count III is affirmed as plaintiffs have forfeited any argument regarding this count. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 28 Turning to the merits, the issue before us is whether there is a genuine issue of material fact regarding whether defendant breached his duties under the operating agreement and committed gross negligence when he failed to pay the real estate taxes as alleged in the complaint for the year 2014.

¶ 29 When dealing with limited liability companies and the duties owed to them, we must look—first, foremost, and primarily—to the Limited Liability Company Act (Act) (805 ILCS 180/1 *et seq.* (West 2016)). See *Puleo v. Topel*, 368 Ill. App. 3d 63, 66-67 (2006) (we look to the provisions of the Act to determine the duties owed to a limited liability company). Section 15-5 of the Act allows a limited liability company to "enter into an operating agreement to regulate the affairs of the company and the conduct of its business and to govern relations among the members, managers, and company." 805 ILCS 180/15-5(a) (West 2016) (the Act applies to the extent that the company's operating agreement does not, to fill in any gaps). Such an operating agreement, then, comes to control. See *Katris v. Carroll*, 362 Ill. App. 3d 1140, 1146-47 (2005). In the instant cause, C&B was formed by and operated under its operating agreement.

Plaintiffs maintain that defendant breached section 4.4 of the operating agreement, which provides:

> "Each Member shall perform his duties as Member in good faith, in a manner he reasonably believes to be in the best interests of the Company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. A Member shall not be liable to the Company or to any Member for any loss or damage sustained by the Company or any Member, unless the loss or damage shall have been the result of fraud, deceit, gross negligence, willful misconduct or a wrongful taking by the Member(s)."

The operating agreement does not specifically reference the duties of the managing member or the duties of the tax matters partner. Section 15-3 of the Act (805 ILCS 180/15-3 (West 2016)), provides that a managing member owes the duty of care and the duty of loyalty to the company; this includes refraining from grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

¶ 30 When considering a motion for summary judgment, "[u]nsupported assertions, opinions, and self-serving or conclusory statements made in deposition testimony are not admissible evidence." *Perfection Corp. v. Lochinvar Corp.*, 349 Ill. App. 3d 738, 744 (2004). 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." (Internal quotation marks omitted.) *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14 (quoting *Eberts v. Goderstad*, 569 F.3d 757, 767 (7th Cir. 2009)). Thus, a party opposing summary judgment must present some evidence to support the elements of his cause of action. *Krueger v. Oberto*, 309 Ill. App. 3d 358, 367 (1999). Although all reasonable inferences are drawn in favor of the nonmoving party, the

court must still be convinced that there exists admissible evidence that would support a judgment in the nonmoving party's favor. *Robinson v. Village of Oak Park*, 2013 IL App (1st) 121220, ¶ 21.

¶ 31 Our review of the pleadings, depositions, admissions on file, and the affidavits viewed in the light most favorable to the nonmoving party demonstrates that there is no genuine issue of material fact and that the circuit court properly entered judgment in favor of defendant. The undisputed facts establish that defendant had a duty to manage the property which included collecting rents, paying bills, paying taxes, and maintaining the building. Importantly, the parties agree that defendant had a duty to pay the real estate taxes. Defendant, however, also had a duty to pay the other bills associated with the property. Even taking as true Bartels' uncorroborated deposition testimony that at one point in 2013 there was $28,000 in the C&B checking account which could have been used to pay the $25,000 real estate tax bill, the operating agreement does not set forth that defendant had a duty to pay those taxes before all other bills. The operating agreement merely states that the member's duties are to be performed "in good faith, in a manner he reasonably believes to be in the best interests of the Company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances." Plaintiffs have failed to present evidence demonstrating that defendant did not act in good faith, in a reasonable manner in accordance with the operating agreement and, in fact, the record demonstrates otherwise.

¶ 32 In that vein, plaintiffs failed to present even some evidence that defendant's purported actions constituted gross negligence. The incontrovertible evidence in this case established that beginning in 2012 multiple tenants vacated the C&B property and were not replaced with new tenants. Additionally, the three-year lease C&B had with SMS provided that SMS was

responsible for the payment of real estate taxes in accordance with its percentage of occupancy of the building from December 31, 2011, through December 31, 2013. It is undisputed that SMS did not pay these real estate taxes in 2013, which was another lost source of revenue for C&B. Moreover, in 2014 SMS began paying less rent, although by agreement between the parties. Plaintiff and defendant both understood that this lack of revenue led to, in plaintiff's words, "cash flow problems." The evidence undeniably established that as of 2014 C&B lacked sufficient funds to remain solvent. The record further demonstrates that defendant worked to find new tenants for the property, sought to obtain the funds for the real estate taxes due and owing from SMS, contacted a real estate agent to list the building, and reached out to a banker to obtain an equity line of credit all in order to prevent the property from going into foreclosure.

¶ 33 Where a moving party provides material evidentiary facts which are not contradicted, those facts are accepted as true (*Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 381 (1974)), and the nonmoving party may not rest on his complaint or mere denials to survive a summary judgment motion (*Myers v. Levy*, 348 Ill. App. 3d 906, 922 (2004). It is axiomatic that plaintiffs, as the burdened party, "should not be permitted to avoid summary judgment and advance to trial under the facts in this case merely by suggesting that defendant's affidavits and sworn discovery testimony are false." *Hannah v. Midwest Center for Disability Evaluation, Inc.*, 181 Ill. App. 3d 67, 75 (1989). This is because "[s]uch a rule would make a mockery of the summary judgment procedure, for it would obviously increase delay and expense in the final disposition of litigation and would thus exacerbate the very problem the procedure was devised to solve." *Id.* Given the record in this case, including the testimony of Bartels himself, we find no evidence which would rise to a genuine issue of material fact and thus we conclude that the circuit court did not err in granting summary judgment in defendant's favor. Given this

conclusion, we need not address Clement's other bases supporting the circuit court's entry of summary judgment or whether the court erred in concluding Bartels had no authority to file a derivative action on behalf of C&B. See *Destiny Health, Inc. v. Connecticut General Life Insurance Co.*, 2015 IL App (1st) 142530, ¶ 46.

¶ 34 CONCLUSION

¶ 35 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.