2019 IL App (1st) 181553-U

FIRST DIVISION
APRIL 29, 2019

No. 1-18-1553

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THOMAS MINER, Plaintiff-Appellant, v. FRANKLIN PARTNERS LLC, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County. No. 15 L 5526 Honorable Robert Senechalle, Judge presiding.

JUSTICE GRIFFIN delivered the judgment of the court.
Justices Pierce and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in when it dismissed plaintiff's spoliation claim. Denial of plaintiff's motion for a new trial was not an abuse of discretion.

¶ 2 Plaintiff Thomas Miner filed a personal injury lawsuit against defendant Franklin Partners, L.L.C. after he fell in the lobby of a building located at 980 N. Michigan Ave. in Chicago ("980 N. Michigan"). Prior to trial, plaintiff amended his complaint to include a negligent spoliation of evidence claim and alleged that defendant possessed a video of his slip and fall, but destroyed the evidence. Defendant filed a motion to dismiss for failure to state a claim and the trial court granted it without prejudice. Plaintiff never amended his complaint.

¶ 3 The parties tried the case before a jury. Plaintiff lost. He filed a motion for a new trial arguing, in part, that defense counsel's comments during closing arguments were prejudicial and deprived him of a fair trial. The trial court denied the motion for a new trial.

¶ 4 Plaintiff appeals, and argues that the trial court erred when it dismissed his spoliation claim and abused its discretion when it denied his motion for a new trial. We affirm.

¶ 5 BACKGROUND

¶ 6 Plaintiff filed a lawsuit in the circuit court of Cook County on June, 1, 2015 seeking damages for injuries sustained when he slipped and fell in the lobby of 980 N. Michigan. Plaintiff claimed that defendant, the building's management company, was responsible for his injuries and pleaded several causes of action sounding in negligence.

¶ 7 Three months after his alleged injury, plaintiff sent defendant a letter asking the company to preserve the surveillance video of 980 N. Michigan's lobby on the date of the incident: June 6, 2013. By the time defendant received the written request, the video had been erased.

¶ 8 After the close of discovery, plaintiff was granted leave to amend his complaint and pleaded a cause of action for spoliation of evidence, which occurs when a party negligently loses or destroys evidence that would have affected the outcome of the trial. Plaintiff claimed that defendant destroyed the surveillance video of his slip and fall "despite having been put on notice of the event by virtue of documented incident reports."

¶ 9 Defendant filed a motion to dismiss the spoliation claim pursuant to section 2-615 of the Illinois Code of Civil Procedure (720 ILCS 5/2-615 (West 2016)) ("section 2-615"), which allows a court to dismiss a cause of action if no set of facts can be proven that would entitle the plaintiff to relief. Plaintiff responded to the motion and attached the letter he sent to defendant requesting the preservation of the surveillance video. Plaintiff did not attach the letter to his complaint.

¶ 10 In its reply, defendant attached the supporting affidavit of employee Julia A. Baginskis, who attested that there were "approximately fifty (50)" video cameras throughout 980 N. Michigan in June of 2013, but the "storage capacity of the [digital video recorder] for the number of cameras in place *** [was] approximately thirty (30) days" and by the time defendant received plaintiff's letter "the images from June 6, 2013 no longer existed *** as more than thirty (30) days had passed."

¶ 11 The trial court held a hearing on the motion and dismissed the spoliation claim without prejudice in a written order after finding that plaintiff failed to allege sufficient facts to establish a duty on the part of defendant to preserve the surveillance video. The trial court indicated that it did not consider plaintiff's letter because it was not attached to his complaint.

¶ 12 The trial court noted it would entertain a request for leave to amend, but not without a motion accompanied by the proposed amended complaint. Plaintiff never sought leave to amend his complaint despite the fact his claim was dismissed without prejudice. The parties tried the case before a jury.

¶ 13 During closing arguments, defense counsel repeatedly referenced his personal beliefs about the evidence and told the jury that plaintiff's expert physician witness was paid for his testimony and failed to look at certain medical records before trial. The jury returned a verdict in favor of defendant and against plaintiff.

¶ 14 Plaintiff timely filed a motion for a new trial arguing that: (1) the trial court erred when it dismissed his spoliation claim; and (2) defense counsel's comments to the jury were prejudicial and deprived him of a fair trial. The trial court held two separate hearings on the motion.

¶ 15 At the first hearing, the trial court denied plaintiff's motion in part for the reasons stated in its previous order dismissing the spoliation claim. At the second hearing, the trial court stated its concern about the cumulative effect of defense counsel's comments, but nonetheless denied

plaintiff's motion because the evidence weighed heavily in defendant's favor and plaintiff received a fair trial.

¶ 16 Plaintiff appeals, and argues that the trial court erred when it dismissed his spoliation claim and denied his motion for a new trial.

¶ 17 ANALYSIS

¶ 18 The issues on appeal are whether the trial court erred when it dismissed plaintiff's spoliation claim and abused its discretion when it denied plaintiff's motion for a new trial.

¶ 19 Plaintiff's spoliation claim was dismissed under section 2-615 (735 ILCS 5/2-615 (West 2016)). Such a motion attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. *Fox v. Seiden*, 382 Ill.App.3d 288, 294 (2008). All well-pleaded facts must be taken as true, and any inferences should be drawn in favor of the nonmovant. *Jones v. Brown-Marino*, 2017 IL App (1st) 152852, ¶ 19. A section 2-615 motion to dismiss should not be granted unless no set of facts could be proved that would entitle the plaintiff to relief. *Id*. We review a trial court's grant of a section 2-615 motion to dismiss *de novo*. *Bogenberger v. Pi Kappa Alpha Corp., Inc.*, 2018 IL 120951, ¶ 65.

¶ 20 In Illinois, spoliation is not an independent cause of action, but instead a form of negligence. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 192 (1995); *Castillo v. Board of Education of City of Chicago*, 2018 IL App (1st) 171053, ¶ 27. To prevail on a claim of negligent spoliation of evidence, a plaintiff must properly plead and prove the following: (1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached that duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages. *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408, ¶ 21.

¶ 21 The general rule in Illinois is that there is no duty to preserve evidence. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004). However, an exception to the general rule exists where a plaintiff can show that: (1) an agreement, contract, statute, special circumstance, or voluntary undertaking gave rise to a duty to preserve evidence on the part of the defendant; and (2) the duty extends to the evidence at issue or "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 195 (1995).

¶ 22 Plaintiff contends that the following allegation contained in his complaint established a special circumstance and gave rise to a duty on the part of defendant to preserve the surveillance video: defendant "erased the video while it was in Defendant's sole possession despite having been put on notice of the event by virtue of documented incident reports." In support of his contention, plaintiff cites to federal case law and other cases from foreign jurisdictions because, according to him, Illinois law is "not conclusive" on the issue of whether incident reports give rise to a special circumstance. Such cases are not binding on this court. *Kranzler v. Kranzler*, 2018 IL App (1st) 171169, ¶ 75.

¶ 23 At the outset, it is necessary to define the scope of our review. The record shows that plaintiff requested in writing that defendant preserve the surveillance video. However, our review of plaintiff's spoliation claim excludes that request. An exhibit attached to a complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. Plaintiff never attached the letter to his complaint and after his claim was dismissed *without prejudice*, he never sought leave to amend.

¶ 24 In absence of the letter, plaintiff's spoliation claim alleges that defendant was in possession of a surveillance video of plaintiff's slip and fall in the lobby of 980 N. Michigan on June 6, 2013 and erased that video "despite having been put on notice of the event by virtue of

documented incident reports." These allegations, taken as true and with all inferences drawn in the plaintiff's favor, establish possession and control of the video as well as knowledge on the part of defendant that the incident occurred.

¶ 25 Plaintiff "acknowledges" in his opening brief, that "under [*Martin v. Keeley & Sons, Inc.*, 2012 IL 113270], possession and knowledge are insufficient alone to constitute a special circumstance." Our Supreme court in *Martin* held that "something more than possession and control are required" to establish a duty to preserve evidence, such as: (1) "a request by the plaintiff to preserve the evidence; and/or (2) the defendant's segregation of the evidence for the plaintiff's benefit." *Id.*, ¶ 45.

¶ 26 In an attempt to make light of this concession, plaintiff argues that the incident reports were actually "complaints" similar to those alleged by the plaintiffs in the case of *Brobbey v. Enterprise Leasing Co. of Chicago*, 404 Ill. App. 3d 420 (2010), where we reversed the trial court's dismissal of a spoliation claim in a products liability case involving an allegedly defective rental car. The plaintiff's in *Brobbey* alleged that they complained to the defendant "both before and after the accident that there was some defect" in the van. *Id*. That was not the only allegation. The plaintiffs also alleged the defendant: (1) was in possession and control of the van; (2) segregated the van for the plaintiffs' benefit; and (3) undertook to preserve the van to conduct its own inspection. The plaintiffs further alleged that they requested an inspection of the van.

¶ 27 Turning to this case, plaintiff's complaint contains not a single allegation that he complained, either before, during or after the incident to defendant about anything. In fact, the word "complain" is absent from his pleading. We read the words "documented incident reports" as just that, reports that documented the incident's occurrence. These words give rise to no more than knowledge on the part of defendant that the incident occurred, which plaintiff conceded is

not a special circumstance. Whether the content of the incident reports would reveal additional facts remains a mystery because he failed to attach them to his complaint.

¶ 28 *Brobbey* has no application to this case. The spoliation claim in *Brobbey* included allegations that the plaintiffs complained about the evidence, i.e. the allegedly defective rental van, which was alleged to have caused the plaintiffs' injuries and been destroyed as a result of the defendant's negligence. We have no such circumstances here. Plaintiff makes no argument that he complained to defendant about a dangerous condition existing in the lobby of 980 N. Michigan or that defendant negligently failed to preserve the condition that allegedly caused his injuries. The *Brobbery* plaintiffs also pleaded a number of allegations (defendant's possession, control, segregation and preservation of the evidence) in addition to their having complained about the condition of the van. Such allegations are noticeably absent from plaintiff's complaint here.

¶ 29 In any event, "[m]ere complaints about the evidence are not the functional equivalent of a request to preserve evidence and can never provide such clear knowledge—along with possession and control—to form the basis of a duty." *Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶ 20; *Mohiuddin*, 2013 IL App 113408, ¶ 32 (finding that mere knowledge of the accident and of the possible causes of the accident, standing alone, is insufficient to create a duty to preserve the evidence). We find plaintiff's argument to be no more than a bare request to create a *per se* special circumstance out of the words "incident reports."

¶ 30 We hold that plaintiff failed to plead facts sufficient to establish the existence of a special circumstance such that the trial court did not err when it dismissed his spoliation claim pursuant to section 2-615. 720 ILCS 5/2-615 (West 2016). Given our holding, we need not consider whether the erasure of the surveillance video affected the outcome of plaintiff's case at trial.

¶ 31 Plaintiff argues that the trial court abused its discretion when it denied his motion for a

new trial. Plaintiff's argument is that defense counsel's repeated references to his personal beliefs and derogatory comments made to the jury during closing arguments were prejudicial and deprived him of a fair trial.

¶ 32 The determination of the prejudicial effect of improper comments made during closing arguments is within the sound discretion of the trial court and we may not substitute our judgment for that of the trial court or even determine whether the trial court exercised its discretion wisely. *Sikora v. Parikh*, 2018 IL App (1st) 172473, ¶ 57. A trial court abuses its discretion when its ruling is unreasonable, arbitrary, or fanciful, or where no reasonable person would adopt the same view. *Id*.

¶ 33 Improper closing arguments require reversal only when the comments resulted in substantial prejudice to the opposing party. *Zickuhr v. Ericsson, Inc.*, 2011 IL App (1st) 103430, ¶ 75. If the trial was fair as a whole and the evidence was sufficient to support a jury's verdict, a case will not be reversed upon review. *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 601 (2008).

¶ 34 Defense counsel's comments about his personal beliefs, though improper, were met with curative instructions given to the jury by the trial court ("what the lawyers think or feel or believe themselves is not evidence to be considered by you"). See *Willaby v. Bendersky*, 383 Ill. App. 3d 853, 862 (2008) (when the trial court sustains a timely objection and instructs the jury to disregard the improper comment, it sufficiently cures any prejudice). We find no prejudice here.

¶ 35 With respect to defense counsel's comment about plaintiff's expert physician witness, our review of the record shows that plaintiff did not object to it. His argument is forfeited. See *Babikian v. Mruz*, 2011 IL App (1st) 102579, ¶ 13 ("the failure to object to allegedly improper comments during closing argument operates as a forfeiture of the objection").

¶ 36 Even if plaintiff's argument was not forfeited, defense counsel stopped short of telling the

jury what he thought about plaintiff's expert witness ("[w]e know what Dr. Rhode is") and his additional statements, that the witness sees "250 to 300 people a week," testifies "3 times in terms of depositions a week" and that he should "at least have the courtesy to look at the records" before trial, may or may not have been improper based on the evidence presented at trial. We are unable to make the determination because plaintiff's expert witness testified by "videotape" and there is no transcript of his testimony in the record.

¶ 37 The appellant has the burden of producing a sufficient record on appeal to support a claim of error. *Foutch v. O'Bryant*, 99 Ill.2d 389, 391–92 (1984). In the absence of a sufficient record, we will presume that the judgment of the trial court conforms to the law and that there are sufficient facts to support it. *Id.*, at 392. Accordingly, plaintiff's argument fails independent of forfeiture.

¶ 38 We hold that the trial court did not abuse its discretion when it denied in part plaintiff's motion for a new trial on the basis that, although defense counsel's comments may have been improper, they were not prejudicial such that a new trial was not warranted.

¶ 39 CONCLUSION

¶ 40 Accordingly, we affirm.

¶ 41 Affirmed.