2019 IL App (2d) 180614-U
No. 2-18-0614
Order filed August 23, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIRST NATIONAL BANK OF OMAHA,	)	Appeal from the Circuit Court
	)	of DeKalb County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-L-87
	)	
DR. PAUL C. MADISON,	)	Honorable
	)	William P. Brady,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's claim of fraud could not survive summary judgment where no issue of fact existed as to plaintiff's knowledge of the falsity of the allegedly fraudulent statements; no issue of material fact existed as to amounts due on note; plaintiff had no duty to take reasonable care to preserve collateral prior to time it was in plaintiff's actual possession; defendant forfeited claims pertaining to attorney fees and conduct of the proceedings.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Paul C. Madison, appeals an order of the circuit court of DeKalb County granting summary judgment in favor of plaintiff, First National Bank of Omaha. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 The instant case arises out of defendant's alleged default on a promissory note. An airplane secured the note. Defendant purchased the aircraft in 2000 with proceeds from the note. Various appraisals of the aircraft were performed, at plaintiff's behest. The loan was refinanced periodically. In 2009, defendant informed plaintiff that he would not be able to make further payments on the loan. Plaintiff did not take possession of the aircraft until 2011, at which time it was declared worthless.

¶ 6 On September 8, 2009, plaintiff initiated the present action by filing a complaint seeking damages for breach of a promissory note. Default judgment against defendant was entered on February 22, 2010, as defendant had failed to appear. Defendant was served with a citation to discover assets, and he again failed to appear. A rule to show cause was issued, and, after defendant failed to respond, an order for body attachment was issued. On June 15, 2010, counsel for defendant appeared and moved to quash service of summons. Before a hearing on that motion could be held, defendant filed for bankruptcy. All matters were continued until after bankruptcy proceedings resolved. The case resumed on March 20, 2013. A period of litigation followed. Eventually, on January 21, 2018, the trial court quashed service upon defendant and vacated the earlier judgment; however, it further found that subsequent to the entry of that earlier judgment, defendant had submitted himself to the jurisdiction of the trial court.

¶ 7 Plaintiff moved for summary judgment on February 9, 2018. The trial court granted the motion and entered judgment in the amount of $933,925. It reserved ruling on plaintiff's request for attorney fees and costs. On May 11, 2018, plaintiff filed a petition seeking fees and costs. On June 8, 2018, defendant filed a motion to reconsider the grant of summary judgment. A hearing on the two motions was held on July 2, 2018. The trial court denied defendant's motion

and granted, in part, plaintiff's petition, awarding fees and costs incurred after January 31, 2018, in the amount of $3,500. Defendant now appeals.

¶ 8 III. ANALYSIS

¶ 9 On appeal, defendant raises five primary issues. First, he contends that he was fraudulently induced to agree to the loan. Second, he alleges that a material issue of fact exists regarding the amount due on the promissory note. Third, he argues that any amount owing on the note must be reduced due to plaintiff's spoliation of the aircraft that secured the loan. Fourth, he contends that the trial court's award of attorney fees is improper. Fifth, he asserts that '[t]he road travelled in this case prevented [him] from achieving a fair shake." We find none of defendant's contentions persuasive.

¶ 10 This appeal comes to us following a grant of summary judgment; thus, review is *de novo*. *Malone v. American Cyanamid Co.*, 271 Ill. App. 3d 843, 845 (1995). In assessing a grant of summary judgment, a court must construe the record strictly against the movant and in the light most favorable to the opponent of the motion. *Id*. Summary judgment is warranted only if "no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id*. It is a drastic method of resolving litigation, so it should only be granted if the movant's right to prevail is clear and free from doubt. *Wells v. Enloe*, 282 Ill. App. 3d 586, 589 (1996).

¶ 11 Before proceeding farther, we note that, as plaintiff points out, defendant has not included any copies of reports of proceedings in the record on appeal. Plaintiff correctly points out that such an omission can be fatal to an appeal. See, *e.g., Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005). However, because this appeal involves review of a grant of summary judgment, it is not. Such an order is reviewed *de novo*. *Collins v. St. Paul Mercury Insurance*

Co., 381 Ill. App. 3d 41, 45 (2008). Summary judgment does not involve fact finding or determinations concerning credibility. *Martin v. State Journal-Register*, 244 Ill. App. 3d 955, 961-62 (1993). We owe no deference to the trial court's decision. *Id*. at 962. Moreover, it is axiomatic that we review the result at which the trial court arrived rather than its reasoning. *In re Marriage of Ackerley*, 333 Ill. App. 3d 382, 392 (2002). Thus, while having access to the trial court's reasoning may be instructive, it is not necessary in reviewing a summary-judgment order.

¶ 12 We further note that defendant does not seriously contest that plaintiff has made out a *prima facie* case sufficient for it to prevail on the promissory note. Instead, he contends that the transaction was tainted by fraud and that material facts remain as to the amount of damages.

¶ 13 A. FRAUD

¶ 14 Defendant first contends that he was fraudulently induced to execute the loan. Defendant correctly points out that fraud in the inducement vitiates a contract. *Ainsworth Corp. v. Cenco Inc.*, 107 Ill. App. 3d 435, 439 (1982). To prevail on a claim of fraud, the party asserting the claim must establish the following elements: "(1) a false statement of material fact; (2) by one who knows or believes it to be false; (3) made with the intent to induce action by another in reliance on the statement; (4) action by the other in reliance on the truthfulness of the statement; and (5) injury to the other resulting from that reliance." *State Security Insurance Co. v. Frank B. Hall & Co.*, 258 Ill. App. 3d 588, 591-92 (1994). Defendant provides no detailed analysis of these elements, instead simply stating, "[Defendant's] Affidavit establishes each of those elements as a material fact which facially must be construed strictly against Plaintiff and literally in favor of Defendant."

¶ 15 Indeed, defendant's argument is that plaintiff secured two appraisals of the aircraft that was used to secure the loan. One put the value at $1,780,140 and the other estimated it to be

$1,500,000. This led defendant to believe the loan he agreed to ($1,200,000 initially) was fully secured. However, according to defendant, plaintiff "was aware or should have been aware that the value of the aircraft was insufficient to collateralize the loan." One of the appraisers, defendant points out, was convicted of fraud as the result of an unrelated scheme (defendant submitted a newspaper article documenting this). Defendant has executed an affidavit averring these propositions.

¶ 16 The averments in this affidavit are insufficient to raise an issue of material fact regarding fraud. The second element—that plaintiff knew the appraisal to be inaccurate (*State Security Insurance Co.*, 258 Ill. App. 3d at 591-92)—is particularly problematic for defendant. In support of this allegation, the only evidence of record that we can locate is contained in defendant's affidavit. There, defendant avers, "At the time [plaintiff's subsidiary] made the representations regarding the sufficiency of the collateral, [plaintiff's subsidiary] was aware that the value of the aircraft was insufficient to collateralize the loan, that the appraisals were false and inflated and that [one of the appraisers] had been imprisoned in Florida for fraud relating to aircrafts since August 2007." While defendant submits a newspaper article documenting the jailed appraiser's participation in a fraudulent scheme, defendant points to nothing that indicates that plaintiff was aware of these events.

¶ 17 An affidavit submitted in connection with a summary judgment motion is governed by the following provisions of Illinois Supreme Court Rule 191(a) (eff. January 4, 2013):

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure * * * shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified

> copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

Evidence that would not be admissible at trial cannot be considered. *US Bank National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 22. So long as, "from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied." *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999). Mere conclusions are insufficient; rather, the affidavit must contain the facts the affiant relied on in drawing such conclusions. *Id*. Further, "[u]nsupported assertions, opinions, and self-serving or conclusory statements do not comply with Rule 191(a)." *Jones v. Dettro*, 308 Ill. App. 3d 494, 499 (1999) (citing *Larson v. Decatur Memorial Hospital*, 236 Ill. App. 3d 796, 801-02 (1992)). Finally, when an affirmative defense is at issue, "It must appear from defendant's affidavit that defendant has a defense which is sufficient in point of law." *St. Charles National Bank v. Ford*, 39 Ill. App. 3d 291, 296 (1976).

¶ 18 Defendant's affidavit, at least insofar as it concerns plaintiff's knowledge that the appraisals in question here were incorrect, falls well short of the standards set forth in Rule 191(a). Defendant simply avers that plaintiff "was aware that the value of the aircraft was insufficient to collateralize the loan." No basis for this knowledge is set forth. It is likewise not inferable that defendant would have such knowledge based on his relationship with plaintiff. Indeed, if defendant knew that plaintiff knew the appraisals were flawed, defendant would also know that the appraisals were flawed, making it impossible for defendant to meet the fourth element of fraud, *i.e.*, "action by the other in reliance on the truthfulness of the statement." *State*

Security Insurance Co., 258 Ill. App. 3d at 591-92. Regardless, there is no indication that this averment is made on defendant's personal knowledge, as required by Rule 191(a). Moreover, also in contravention of the rule, defendant's assertion is completely conclusory. In short, defendant's affidavit is insufficient to raise an issue of fact concerning the second element of fraud. *Cf. Pruitt v. Pruitt*, 2013 IL App (1st) 130032, ¶ 18 ("A statement of belief is certainly not a statement made on the basis of personal knowledge but rather is a conclusion that is not competent evidence under Rule 191.").

¶ 19 Defendant also argues that the fact that various appraisals attribute different valuations to the aircraft "not only suggest the basis for the allegation of fraud, but confirm it." Aside from pointing out that these appraisals are attached to the response to plaintiff's summary judgment motion, this is the entirety of defendant's argument on this point. No legal authority is cited, and this argument is supported only with a general, 30-page, citation to the record. Indeed, defendant makes no attempt to relate these facts to any particular element of fraud. It has oft been held that "[a] reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research [citation]; it is neither the function nor the obligation of this court to act as an advocate or search the record for error." *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993). Defendant has forfeited this issue. *Id.*

¶ 20 Moreover, we find defendant's argument on this point meritless. Contrary to defendant's assertions, the appraisals available to plaintiff did not involve "vastly different valuations." There were two appraisals performed in connection with the original loan. Dan Cretsinger valued the airplane at $1,780,140 and Phillip Casciola (who was imprisoned for his participation in an unrelated fraud scheme seven years after the genesis of this loan) valued it at $1,680,000

"high retail" value and $1,500,000 "moderate retail" value. Thus, the appraisals performed in connection with the original loan were reasonably similar. The only other appraisal appearing in the record was done retrospectively, when defendant asked an appraiser, Greg Hermans, to determine the value in May 2003. We have been unable to locate the date this appraisal was performed in the record. Hermans determined the value to have been $725,000 at that time. Defendant makes no attempt to establish when, if ever, plaintiff became aware of the Hermans appraisal. Thus, it is difficult to see how this appraisal could have affected plaintiff's perception of the other two appraisals such that plaintiff knew or believed the earlier appraisals were flawed and that the aircraft did not fully collateralize the loan.

¶ 21 In short, defendant has failed to identify a question of fact as to whether plaintiff knew that the value of the aircraft was insufficient to collateralize the loan or that the appraisals were unduly high. Further, we are not required to abandon common sense at the courthouse door. See *People v. Greene*, 50 Ill. App. 3d 872, 875 (1977); see also *Erasmus v. Chicago Housing Authority*, 86 Ill. App. 3d 142, 145 (1980) (holding that a "court need not strain to adduce some remote factual possibility that will defeat the motion"). It strains credulity to suggest plaintiff—a bank—was attempting to overvalue the collateral that would secure its substantial loan to defendant, leaving plaintiff with a partially unsecured loan. We find this argument ill taken.

¶ 22 B. AMOUNT DUE

¶ 23 Defendant next contends that a material fact exists as to the amount due on the note. The trial court awarded plaintiff $933,925.46. In the same order, it reserved the issue of attorney fees, directed plaintiff to file an appropriate petition with the court, and continued the matter for a hearing on the petition. In support, plaintiff filed the affidavit of one of its senior managers stating that the amounts due on the note were $542,339.62 principal, $391,585.84 interest, and

no late charges. These sums total $933,925.46. Extensive documentation, in the form of plaintiff's business records, is attached to the affidavit. Thus, plaintiff's affidavit supports the trial court's judgment.

¶ 24 Defendant attempt to raise an issue of fact by pointing to several earlier documents. For example, defendant first points to a promissory note dated November 15, 2007, which states that the amount owed was $772,060. Defendant makes no attempt to extrapolate from this figure, in accordance with the terms of the note, how it would render the awarded amount of $933,925.46. erroneous. Defendant points to other documents that list different sums, but fails to explain how these are inconsistent with the amount awarded by the trial court pursuant to its grant of summary judgment. It is simply not surprising that the amount defendant owed in March 2018 was different than what he owed at an earlier time.

¶ 25 Defendant also argues that the amount the trial court awarded at summary judgment contained attorney fees and plaintiff has not shown that these fees were reasonable, rendering the amount a disputed issue of fact. See *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983 (1987) ("In all cases, however, only those fees which are reasonable will be allowed."). However, the trial court's order clearly excludes attorney fees, as does the affidavit filed in support of summary judgment. This argument is misplaced (defendant raises this argument in a different context later, and we will discuss it there).

¶ 26 In sum, no issue of material fact exists regarding the amount of the award.

¶ 27 C. SPOLIATION OF THE COLLATERAL

¶ 28 Next, defendant contends that he is entitled to an offset, as plaintiff failed to take proper care of the aircraft after defendant informed plaintiff that he would no longer make payments on

it and its value diminished to zero. The trial court ruled that plaintiff had no duty to repossess the aircraft and therefore had no duty to care for this property, which was not under its control.

¶ 29 Initially, we note that plaintiff invokes the law-of-the-case doctrine, arguing that since defendant has already litigated this issue (before the trial court), he is precluded from now raising the issue again. Plaintiff misperceives our role, as we are a court of review. Regarding questions of law (such as the existence of a duty (*Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003)), the law-of-the-case doctrine holds that issues "decided on a previous appeal are binding on the trial court on remand as well as on the appellate court in subsequent appeals." *Bjork v. Draper*, 404 Ill. App. 3d 493, 501 (2010). The decisions of the trial court are not binding upon us; indeed, the very nature of an appeal involves this court revisiting issues decided by a lower tribunal. The law-of-the-case doctrine has no application here.

¶ 30 Turning to the merits of defendant's argument, we agree with the trial court that plaintiff had no obligation to repossess the aircraft. In a section of the 2007 note titled "REMEDIES," five options are listed. The fifth option, which would apply here, as repossession is not listed under any of the other options, states, "You *may* use any remedy you have under state or federal law." (Emphasis added.) Of course, unless ambiguous, the plain language of a contract must be given effect. *Premier Title Co. Donahue*, 328 Ill. App. 3d 161, 164 (2002). Here, the use of the term "may" clearly indicates that plaintiff is free to choose the remedy it wishes to pursue. See *Christensen v. Numeric Micro, Inc.*, 151 Ill. App. 3d 823, 831 (1987) ("Plaintiffs' argument, therefore, that Master Lease had a duty under the agreement to accept plaintiffs' rejection, repossess the system, and not demand any more payments under the lease agreement is without merit. There is no language in the purchase order indicating any such duty by Master Lease.").

¶ 31 Defendant argues, nevertheless, that plaintiff was in constructive possession of the aircraft. Assuming, *arguendo*, that plaintiff was in constructive possession of the aircraft from the time of defendant's default (a claim of which we are skeptical), case law indicates that this would not be sufficient to impose a duty on plaintiff to care for the collateral. Like the instant case, *First National Bank of Thomasboro v. Lachenmyer*, 131 Ill. App. 3d 914 (1985), involved repossession of an airplane used to secure a loan. In that case, the defendant defaulted on a promissory note. The plaintiff, a bank, repossessed the airplane. After repossessing the airplane, which had a mechanical problem, the bank caused it to be flown from one airport to another. The trial court found that "any preexisting damage to the engine of [the] defendant's plane was at least exacerbated by the flight." *Id.* at 924. The defendant sought an offset for diminution in value of the collateral. Relying on section 9-207 of the Uniform Commercial Code—Secured Transactions (Code) (810 ILCS 5/9-207 (West 2008)), the reviewing court held that the Code "does not impose liability on the Bank for damages to or deterioration of the collateral which occurs prior to its possession." *First National Bank of Thomasboro*, 131 Ill. App. 3d at 927. It then held, "[O]nce a secured party has possession of the collateral, its actions with regard to collateral must be reasonable in all respects." *Id.* Thus, the plaintiff's duty to use reasonable care to preserve the collateral did not arise at the time of default, as defendant intimates here; rather, it arose when the plaintiff took actual possession of the airplane.

¶ 32 Such an interpretation is confirmed by the plain language of section 2-207 of the Code (810 ILCS 5/9-207 (West 2008)), which provides, in pertinent part, as follows:

"§ 9-207. Rights and duties of secured party having *possession or control* of collateral.

(a) Duty of care when secured party in *possession*. Except as otherwise provided in subsection (d), a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. * * *.

(b) Expenses, risks, duties, and rights when secured party in *possession*. Except as otherwise provided in subsection (d), if a secured party has *possession* of collateral:

(1) reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(2) the risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;

(3) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(4) the secured party may use or operate the collateral:

(A) for the purpose of preserving the collateral or its value;

(B) as permitted by an order of a court having competent jurisdiction; or

(C) except in the case of consumer goods, in the manner and to the extent agreed by the debtor.

(c) Duties and rights when secured party in *possession or control*. Except as otherwise provided in subsection (d), a secured party having possession of collateral or control of collateral under Section 7-106, 9-104, 9-105, 9-106, or 9-107:

(1) may hold as additional security any proceeds, except money or funds, received from the collateral;

(2) shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and

(3) may create a security interest in the collateral." (Emphasis added.)

Note that, while this section of the Code does not mention "constructive possession," it distinguishes between "possession" and "control." Notably, the duty to preserve attaches only when the secured party is in possession of the collateral. Absent unusual circumstances (such as the involvement of a third party (see *First National Bank, Giddings v. Helwig*, 464 S.W.2d 953, 954-55 (Tex Civ. App. 1971))), it seems to us that this duty attaches only on actual possession of the collateral, as "constructive possession" appears more akin to "control." In any event, defendant has not convinced us that constructive possession is sufficient here.

¶ 33 Moreover, we find defendant's claim that plaintiff was in constructive possession of the aircraft dubious. Defendant asserts, "Plaintiff's control of the aircraft is evidenced by the fact that Plaintiff was required to agree when it sought to have some equipment released from the loan." From this, defendant contends, it is inferable that the aircraft "could not legally have been moved or disposed of without Plaintiff's acquiescence." The document defendant relies on here simply amends the security agreement by substituting one engine for another as collateral. The amendment to the security agreement is dated May 2, 2000, well before default. Defendant does not explain how the rights plaintiff held under the security agreement, which were in effect from the time the security interest was created, somehow equate to possession after default.

¶ 34 In conclusion, we find defendant's argument on this issue unpersuasive.

¶ 35 D. LACK OF FINDINGS REGARDING ATTORNEY FEES

¶ 36 Defendant next complains that the trial court did not make specific findings when it partially granted and partially denied plaintiff's petition for attorney fees. He cites nothing in

support of the notion that such explicit findings are required, thus forfeiting the issue. *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 19. Moreover, it is axiomatic that we review the result arrived at by the trial court and not its reasoning. *Ackerley*, 333 Ill. App. 3d at 392. In this court, it was incumbent on defendant to explain why the outcome of the proceedings was error. The trial court's failure to make specific findings provides no basis for reversal.

¶ 37 E. PROPRIETY OF THE FEE AWARD

¶ 38 In an exceptionally brief argument, again without citation to authority, defendant contends that the trial court's award of fees was "improper." Defendant does not even identify the standard of review here. We note that plaintiff's fee petition is supported by almost 100 pages of billing records. Defendant makes no attempt to explain why these records are insufficient to show the fees are reasonable. Defendant refers us to an earlier section of the brief (incorrectly identifying it as section "III A 3," which does not exist); however, that section, after reciting the law regarding the recovery of fees, again simply asserts that plaintiff's submission is insufficient, without any analysis whatsoever. Accordingly, this argument if also forfeited. *Obert*, 253 Ill. App. 3d at 682.

¶ 39 F. WHETHER DEFENDANT GOT A "FAIR SHAKE"

¶ 40 Finally, defendant contends, "The road travelled in this case prevented [him] from achieving a fair shake." Defendant again cites no legal authority, thereby forfeiting the issue. *Gakuba*, 2015 IL App (2d) 140252, ¶ 19. Defendant begins by reciting the early procedural history of this case which led to the default judgment in 2010. That judgment was vacated, so we do not see its relevance here. Defendant's chief complaint seems to be that after the judgment was vacated, plaintiff filed its summary judgment motion nine days later and he was not given adequate time to conduct discovery. Defendant does not identify where he moved the

trial court to continue the summary-judgment motion to allow him conduct further discovery. Moreover, such issues are reviewed using the abuse-of-discretion standard. *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 22. Thus we could reverse only if no reasonable person could agree with the trial court. *Clay v. County of Cook*, 325 Ill. App. 3d 893, 898 (2006). Even if defendant had not forfeited this issue, it appears unlikely to us that he could overcome this deferential standard of review given that litigation had been ongoing for nearly 10 years.

¶ 41 IV. CONCLUSION

¶ 42 In light of the foregoing, the judgment of the circuit court of De Kalb County is affirmed.

¶ 43 Affirmed.