SECOND DIVISION
JUNE 21, 2011

1-09-2573

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEERLESS METAL PRODUCTS CORPORATION and KENNETH N. JASZCZOR, Plaintiffs-Appellants, v. WILSON C. BROWN,[1] RONALD DI BASILIO, VICTOR FISHER, ROBERT J. TALERICO, MICHAEL A. MARTIN, JAMES CESAK, PETER HOPPE, RICHARD BERRY, BERRY & ASSOCIATES, and Other Unknown Persons or Entities, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 04 L 5653 Honorable Donald J. Suriano, Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

ORDER

Held: The trial court properly granted summary judgment against the plaintiffs, Kenneth Jaszczor and Peerless Metal Products Corporation, on the basis that Jaszczor lacked standing to bring this lawsuit against the defendants.

---

[1]Wilson Brown is a deceased individual. At the outset, the complaint named "Mary Sue Brown, as Special Administrator of the Estate of Wilson Brown." However, on July 5, 2005, the trial court dismissed Mary Sue Brown without prejudice from the lawsuit on the basis that neither she nor anyone else was the administrator of the estate because the estate had already been fully administered and closed prior to the filing of the complaint. Thus, Brown was no longer a named defendant even though it is unclear from the record why Brown's name remained in the caption.

This appeal arises from the August 31, 2009 order issued by the circuit court of Cook County, granting a motion for summary judgment in favor of the defendants, Wilson Brown (Brown), Ronald Di Basilio (Di Basilio), Victor Fisher (Fisher), Robert Talerico (Talerico), Michael Martin (Martin), James Cesak (Cesak), Peter Hoppe (Hoppe), Richard Berry (Berry), Berry & Associates, and other unknown persons or entities. On appeal, the plaintiffs, Peerless Metal Products Corporation (Peerless) and Kenneth Jaszczor (Jaszczor), argue that the trial court erred in granting summary judgment against them on the basis that Jaszczor lacked standing to bring this lawsuit against the defendants. For the following reasons, we affirm the judgment of the circuit court of Cook County.

BACKGROUND

In August 1994, Jaszczor purchased Peerless from Jones & Brown Company, Inc. (J&B). Brown was the chairman of J&B at that time. On August 15, 1994, Peerless entered into a security agreement with American National Bank and Trust Company of Chicago (bank), pursuant to which the bank agreed to issue a loan to Peerless in the amount of $2,288,052. On that same day, August 15, 1994, Peerless also received financing from J&B, pursuant to a promissory note, in the principal amount of $664,713.[2] Jaszczor and J&B also entered into a "stock pledge agreement," the terms of which stated, *inter alia*, that Jaszczor pledged 100% of Peerless' common stocks to J&B as collateral. Also on August 15, 1994, J&B and the bank entered into a "subordination agreement," which stated that any rights J&B had as a creditor of Peerless were subordinate to the bank's rights

[2]Other portions of the record show that the amount was $722,038. Nevertheless, the exact amount of the loan Peerless received from J&B does not affect our resolution of the issue on appeal.

as a creditor of Peerless. On September 1, 1995, J&B issued a second loan to Peerless, pursuant to another promissory note, in the amount of $120,000.

Subsequently, Peerless defaulted on its loan payments to J&B. In a letter dated September 26, 1997, John Creighton (Creighton), chairman of the board for J&B, informed Jaszczor and Jaszczor's attorney, James Feddersen (Attorney Feddersen) of Whyte Hirschboeck Dudek, that Peerless "has defaulted in payment of the [n]otes and has failed to cure the payment default as provided in the [n]otes. The outstanding principal amount of the [n]otes has been accelerated." The September 26, 1997 letter further stated that, pursuant to the August 1994 stock pledge agreement entered into between Peerless and J&B, "this letter will serve as notification that *** [J&B] hereby transfer and register in its name the shares representing 100% of the capital stock of Peerless," and that Peerless is "directed to issue a replacement stock certificate representing 100% of the capital stock of Peerless standing in the name of [J&B] and deliver the new certificate to [J&B]." Additionally, the September 26, 1997 letter noted that J&B "exercises its voting rights with respect to the capital stock of Peerless to remove the current directors of Peerless and elect in their stead the following individuals as directors of Peerless: [Brown], Steven Brown, [Di Basilio] and [Creighton]. The [c]ompany should not make any significant commitments or business changes without the approval of the new Board of Directors. [Jaszczor] will remain as President of Peerless."

On February 10, 1998, Peerless entered into a "trust agreement and assignment for the benefit of creditors" (trust agreement and assignment) with its "trustee-assignee," David Abrams (Abrams). The trust agreement and assignment stated, *inter alia*, that Peerless was:

"indebted to various persons, corporations and other entities

> and [was] unable to pay its debt in full, and has decided to discontinue its business, and [was] desirous of transferring its property to an [a]ssignee for the benefit of creditors so that the property so transferred may be expeditiously liquidated and the proceeds thereof be fairly distributed to its creditors ***."

Further, the terms of the trust agreement and assignment transferred all of Peerless' tangible and intangible assets to Abrams, who, as trustee-assignee of Peerless, had the power and duty to sell and dispose of all of Peerless' assets for the benefit of Peerless' creditors. The trust agreement and assignment was signed by Jaszczor, acting as president, rather than director or owner, of Peerless.

On November 2, 1998, Peerless was officially dissolved by the Illinois Secretary of State as a corporate entity. In a "notice of abandonment" dated June 15, 1999, Abrams informed "all known creditors, equity security holders and parties in interest of [Peerless]" that, as assignee of Peerless' assets, "[s]ubstantially all physical assets of Peerless were liquidated by [Abrams] in 1998 and the proceeds thereof were paid to the secured creditors, namely, the [bank] and [J&B]." The June 15, 1999 notice of abandonment further stated that:

> "[t]he only identified assets that remain unresolved and unliquidated consist of potential causes of action and claims against various parties relating to their pre-assignment conduct. Such claims and causes of action include potential claims and causes against the incorporators, officers, directors, shareholders and employees of Tal-Mar Metal Fabricators, Inc.[,] as well as the directors, officers and

shareholders of [J&B].

The [a]ssignee has analyzed and evaluated the claims and causes of action identified above and has determined not to pursue them, having concluded that pursuit of such claims and causes of action would substantially delay the closing of this estate, that the prospects of recovery are speculative and uncertain and that the value, if any, of the causes of action does not justify any further delay in closing of this estate.

Accordingly, the [a]ssignee has decided to abandon the causes of action identified above effective as of June 30, 1999, and hereby provides notice that he will take no action to prosecute these causes of action." (Emphasis in original.)

On May 19, 2004, Jaszczor and Peerless filed a six-count complaint[3] against the defendants, alleging breach of fiduciary duty (counts I, II and III), interference with the prospective economic advantage (count IV), interference with contractual relationships (count V) and civil conspiracy (count VI). The crux of the complaint alleged that former employees of Peerless formed and established a company called Tal-Mar Custom Metal Fabricators, Inc. (Tal-Mar), which became a direct competitor of Peerless. The complaint further alleged, *inter alia*, that as a result of the

[3]Although not included as part of the record on appeal, portions of the record seem to suggest that Jaszczor and Peerless had previously filed a complaint against the same defendants but, for reasons which are unclear to this court, had voluntarily dismissed that complaint on May 7, 2004.

defendants' conduct in forming Tal-Mar, Peerless suffered a loss of business and was subsequently forced into liquidation

On February 23, 2005, the defendants filed a section 2-619 motion to dismiss the complaint. On July 5, 2005, the trial court dismissed Jaszczor from counts I, II and III of the complaint,[4] but denied the defendants' motion to dismiss "in all other respects."

On April 2, 2007, the defendants filed a motion for summary judgment, alleging that Jaszczor "lack[ed] standing to prosecute this lawsuit in the corporate name to seek any recovery whatsoever" because J&B had "transferred to itself and registered in its name 100% of the capital stock of Peerless" after Peerless defaulted on its loan payments to J&B in September 1997. The motion for summary judgment further alleged that Jaszczor was not the owner of Peerless because he was no longer a shareholder of Peerless, and thus, Jaszczor was not a real party in interest to any recovery in favor of a defunct corporation.

On August 31, 2009, the trial court granted the defendants' motion for summary judgment "as to all causes of action and all parties." On September 25, 2009, Jaszczor and Peerless filed a notice of appeal before this court.

ANALYSIS

The sole issue on appeal before this court is whether the trial court erred in granting the defendants' motion for summary judgment, which we review *de novo*. *Hahn v. Union Pacific Railroad Co.*, 352 Ill. App. 3d 922, 929, 816 N.E.2d 834, 840 (2004).

---

[4]The record is unclear as to the basis upon which the trial court dismissed Jaszczor from counts I, II and III of the complaint.

Jaszczor and Peerless argue[5] that the trial court should not have entered summary judgment against them because Creighton's September 26, 1997 letter regarding Peerless' default of its loan payments to J&B did not constitute "a total and absolute transfer of legal ownership of Peerless from [Jaszczor] to [J&B]." Rather, they argue, no such transfer of legal ownership ever took place because J&B never took any steps to transfer Peerless' stocks to J&B's name. Thus, Jaszczor and Peerless contend that at all relevant times, Jaszczor maintained rightful control and ownership of Peerless.

The defendants counter that the trial court properly granted summary judgment in their favor because Jaszczor and Peerless' default of the loan payments to J&B "effectively and immediately caused the reversion of ownership of Peerless to [J&B]." Thus, they maintain, Jaszczor no longer had any ownership interest in Peerless upon default of the loan, and, therefore, lacked standing to sue the defendants on behalf of Peerless. The defendants further noted that Creighton's September 26, 1997 letter was never rescinded. Therefore, they argue, there was no genuine issue of material fact of Jaszczor and Peerless' default, as a result of which any assets of Peerless rightfully belonged to J&B.

Summary judgment is proper where "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 judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008).

---

[5]On January 5, 2011, this court granted the defendants' motion to strike portions of Jaszczor and Peerless' brief before this court, which inappropriately cited to his complaint at law as "facts" of the case and which cited to a "supplemental record" that Jaszczor and Peerless had not sought permission from this court to file.

"In considering a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party." *Pielet v. Pielet*, 474 Ill. App. 3d 407, 419, 942 N.E.2d 606, 622 (2010). "The purpose of summary judgment is not to try a question of fact, but to determine whether one exists" that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421, 432, 781 N.E.2d 249, 254, 260 (2002). "Thus, although the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment." *Id.* at 432, 781 N.E.2d at 260.

"The doctrine of standing requires that a party have a real interest in the action brought and its outcome." *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 147, 688 N.E.2d 90, 93 (1997). "The purpose of the doctrine is to [e]nsure that courts decide real controversies and not abstract questions or moot issues." *Id.* Standing requires that a plaintiff to a lawsuit have "some injury in fact to a legally cognizable interest." *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6, 940 N.E.2d 118, 123 (2010).

We find that, as the trial court correctly held, Jaszczor had no standing in the instant case to bring a lawsuit against the defendants on behalf of Peerless. In the instant case, it is undisputed that in August 1994, Jaszczor entered into a stock pledge agreement with J&B, the terms of which stated that Jaszczor pledged 100% of Peerless' common stocks to J&B as collateral for a secured loan J&B issued to Peerless in connection with Jaszczor's purchase of Peerless from J&B. It is also undisputed that, in September 1997, Peerless defaulted on the loan payments to J&B. Pursuant to the terms of the stock pledge agreement, upon default of the loan payments by Jaszczor and Peerless

in September 1997, ownership of Peerless passed to J&B–the secured party to which 100% of Peerless' common stocks were pledged. The September 26, 1997 letter from Creighton informing Jaszczor about Peerless' defaulted loan only served as a notification that J&B was exercising its right to 100% of Peerless' shares of stocks and the voting rights associated with owning the stocks at issue. According to Creighton's deposition and affidavit in the record on appeal before us, neither he nor anyone acting on behalf of J&B ever rescinded, nullified, destroyed or withdrew the September 26, 1997 letter that he wrote to Jaszczor. Moreover, as discussed, on February 10, 1998, the trust agreement and assignment, signed by Jaszczor as the president, rather than as the director or owner of Peerless, transferred all of Peerless' tangible and intangible assets to Abrams, who, as trustee-assignee of Peerless, had the power and duty to sell and dispose of all of Peerless' assets for the benefit of Peerless' creditors.

Jaszczor and Peerless attempt to undermine the legal effect of the terms of the August 1994 stock pledge agreement by arguing that the stock pledge agreement stated that J&B, as a secured creditor, "may exercise" its rights upon the event of a default by Jaszczor and Peerless. We find this argument to be unpersuasive. Rather, reading the "may exercise" language of the stock pledge agreement in context and as a whole, we find that the terms at issue only refer to J&B's discretion to exercise its rights and remedies under the Uniform Commercial Code (UCC), in addition to its rights under the stock pledge agreement, in the event of a default. See *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 164, 765 N.E.2d 513, 516 (2002) (in determining the intent of the parties to an agreement, a court must consider the document as a whole and not focus on isolated portions of the document). Thus, we find that the "may exercise" language in the stock pledge agreement did not

raise a genuine issue of material fact regarding J&B's absolute right to ownership of Peerless upon default of the loan.

We further find that even if ownership of Peerless did not transfer to J&B by operation of the September 1997 default, J&B's right to ownership of Peerless did not diminish simply because J&B did not physically transfer Peerless' stocks to J&B's name at that time, as Jaszczor and Peerless assert. Here, the plain language of the "default and remedies" section of the August 1994 stock pledge agreement stated that J&B "shall not have any duty to exercise any *** right or to preserve the same and shall not be liable for any failure to do so or for any delay in doing so," and that "[n]o failure or delay on the part of [J&B] to exercise any *** right, power or remedy and no notice or demand which may be given to or made upon [Jaszczor] by [J&B] with respect to any such remedies shall operate as a waiver thereof, or limit or impair [J&B]'s right to take any action or to exercise any power or remedy hereunder, without notice or demand, or prejudice its rights as against [Jaszczor] in any respect." See *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556, 866 N.E.2d 149, 153 (2007) (the intent of the parties to a contract must be determined from plain and ordinary language of the agreement as written). Thus, by virtue of the plain language of the stock pledge agreement, J&B never lost its right to ownership of Peerless regardless of whether ownership transferred at the moment of Peerless' default of the loan payments or by a later physical transfer of the stocks to J&B.

Nonetheless, Jaszczor and Peerless further argue that Jaszczor maintained ownership of and held a financial interest in Peerless after the September 1997 default of loan payments to J&B, by pointing to Jaszczor's amended affidavit in the record to show that in October 1997, an alleged

meeting occurred between various representations of J&B, Jaszczor and his counsel, Daryl Diesing (Attorney Diesing).[6] In his amended affidavit, Jaszczor stated that as a result of this alleged meeting, the parties "agreed that Peerless would seek financing/re-financing of various obligations and would begin a modified repayment plan to [J&B]," and that "[t]he proposed repayment plan consisted of monthly payments of $25,000.00 from Peerless to [J&B] beginning February 15, 1998." We find that Jaszczor's amended affidavit did not raise a genuine issue of material fact regarding J&B's ownership of Peerless following its September 1997 default because, viewing the record in the light most favorable to Jaszczor and Peerless, there is no evidence to show that they had in fact complied with any refinancing arrangements with J&B or had in fact made any monthly payments as outlined in the proposed repayment plan. Moreover, the alleged October 1997 meeting and any resulting proposed repayment plans between the parties, did not undermine the undisputed fact that Jaszczor and Peerless defaulted on the loan payments to J&B, which entitled J&B to 100% of Peerless' common stocks, as pledged by Jaszczor to J&B in the August 1994 stock pledge agreement. Thus, this argument must fail.

Jaszczor and Peerless concede in their brief before this court that Jaszczor could have only remained in operational control and ownership of Peerless until the execution of the February 10, 1998 trust agreement and assignment with Abrams, the trustee-assignee for Peerless, but argues that any potential causes of action and claims Peerless had against the defendants reverted to Jaszczor once Abrams abandoned them in June 1999. We find nothing in the record to raise a genuine issue

[6]Attorney Diesing and Attorney Feddersen, both from the law firm of Whyte Hirschboeck Dudek, represented Peerless and Jaszczor at this time.

of material fact that any potential causes of action and claims that Peerless had against the defendants automatically reverted to Jaszczor upon Abrams' abandonment of them in June 1999. Rather, the record shows that, by the time Abrams issued the June 15, 1999 notice of abandonment, Peerless had already been officially dissolved by the Illinois Secretary of State, and all physical assets of Peerless had been liquidated to pay Peerless' secured creditors–namely, the bank and J&B. Thus, no genuine issue of material fact was raised to show that any potential causes of action and claims against the defendants remained with anyone other than J&B and the bank. Therefore, we find that Jaszczor had no standing to bring the instant lawsuit against the defendants.

Nevertheless, Jaszczor and Peerless make much of the fact that the August 15, 1994 subordination agreement gave the bank priority over J&B regarding Peerless' assets, by arguing that "whatever rights [J&B] may have had in the event of a default by Peerless should not have been exercised without careful consideration of the rights of [the bank] under the [s]ubordination [a]greement." We find this argument to be without merit. The only relevant inquiry at issue is whether Jaszczor had ownership over Peerless upon default of its loan payments to J&B, which, as discussed, we found that he did not.

Moreover, Jaszczor and Peerless argued that the trial court erred in granting summary judgment against them because the instant case had appeared before two different judges in the circuit court prior to being administratively reassigned to Judge Donald Suriano (Judge Suriano), who then entered the August 31, 2009 final order granting the defendants' motion for summary judgment. Jaszczor and Peerless' arguments seem to imply that summary judgment was erroneously granted because Judge Suriano made a ruling on the defendants' motion for summary judgment after

only having had the case under his advisement for a brief time. We reject this argument as without any merit. Here, no transcripts of any hearings on the motion for summary judgment were included in the record and, without a complete record, it is presumed that the order entered by the trial court was made in conformity with the law and has a sufficient factual basis. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 749 N.E.2d 958, 959 (1984) ("an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error"). Thus, any doubt arising from this incomplete record before us must be resolved against Jaszczor and Peerless. See *Foutch*, 99 Ill. 2d at 392, 749 N.E.2d at 959. Moreover, contrary to Jaszczor and Peerless' assertion, there was no evidence in the record to show that the trial court failed to take into account all pleadings and documents prior to granting the defendants' motion for summary judgment. Rather, as Jaszczor and Peerless have conceded in their brief before this court, Judge Suriano had "requested a full and complete set of all of the motions, pleadings, affidavits, and deposition transcripts for his review. The parties submitted full and complete copies of all materials to Judge Suriano for his review." We find no evidence in the record to show that the trial court failed to consider all documentation presented before it prior to granting the motion for summary judgment.

We further note that the arguments contained in the defendants' motion for summary judgment only pertained to the issue of Jaszczor's standing to sue in the instant case, and that Jaszczor and Peerless have made no other arguments before this court regarding whether the substance of the complaint could also survive summary judgment. Thus, we find those arguments to be forfeited under Supreme Court Rule 341(h) (eff. September 1, 2006) and we need not address those issues. Accordingly, we hold that there is no genuine issue of material fact as to whether J&B

had ownership of Peerless following the September 1997 default, and Jaszczor had no standing to bring this lawsuit against the defendants.

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.