2011 IL App (1st) 102564-U

THIRD DIVISION
December 21, 2011

No. 1-10-2564



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| YELLOW BOOK SALES AND DISTRIBUTION COMPANY, INC.<br><br>Plaintiff-Appellee,<br><br>v.<br><br>AMERICAN EAGLE PEST ELIMINATION, INC. and GEORGE MANNING<br><br>Defendant-Appellants. | ) | Appeal from the Circuit Court of Cook County<br><br>No. 07 M1 181945<br><br>Honorable Anthony J. Burrell, Judge Presiding. |

JUSTICE SALONE delivered the judgment of the court.
Justice Neville and Justice Murphy concur in the judgment.

**ORDER**

***HELD*:** Where plaintiff filed a small claim breach of contract action against defendants, the trial court properly held that plaintiff had standing to bring this action, did not err in admitting certain evidence at trial, and properly struck defendants' post-trial motion.

¶1 Following a bench trial, judgment was entered in the amount of $7,778.92 in favor of plaintiff, Yellow Book Sales and Distribution Company, Inc., on its breach of contract claim against defendant, American Eagle Pest Elimination Co. (American Eagle). On appeal, American Eagle contends the circuit court erred in three respects: plaintiff lacked standing to bring this action; certain evidence was improperly admitted; and defendants' post-trial motion was improperly stricken. For the reasons that follow, we affirm the judgment of the circuit court.

¶2 BACKGROUND

¶3 Plaintiff filed a small-claim[1] breach of contract complaint against American Eagle and its president, George Manning (Manning). Plaintiff's complaint alleged that the parties had entered into an agreement on April 24, 2004, wherein plaintiff was to provide American Eagle with directory advertising at a set monthly rate. The agreement was signed by Manning in his capacity as president of American Eagle. Plaintiff contended that although it performed all duties required under the contract, American Eagle breached the agreement by failing to pay plaintiff charges due and owing in the sum of $7,778.92. Further, the complaint alleged that pursuant to paragraph 15F of the contract, Manning was individually liable as the signer of the agreement.

¶4 A bench trial was held on March 11, 2010.[2] Plaintiff called James Griffiths, one of its account agents whose duties included collection of accounts receivable. Griffiths testified regarding several documents, including the contract executed between the parties, photocopies of American

[1]Supreme Court Rule 281 defines a "small claim" as "a civil action based on either tort or contract not in excess of $10,000, exclusive of interest and costs."

[2]Although there is no transcript of the proceedings, a bystander's report was submitted by Terrence M. Jordan, counsel for defendants. Therefore, all references to the testimony and evidence adduced at trial are taken from Jordan's report.

Eagle's advertisements in the Yellow Book directory, monthly invoices mailed to defendants, and a statement summarizing defendants' account history. The trial court then admitted these documents into evidence over defendants' objections. Next, Manning testified, first as an adverse witness for plaintiff, then as a witness on his own behalf. Manning admitted that he had signed the contract and stated that he believed that all payments due and owing under that agreement had been made. At the close of evidence, judgment was entered against American Eagle in the amount of $7,778.92. Judgment was also entered in favor of Manning.

¶5 On April 12, 2010, American Eagle filed a post-trial motion to vacate the judgment. The motion alleged that the judgment was not supported by the evidence, that plaintiff failed to show it was the proper plaintiff, and that the court failed to give defendant credit for payments plaintiff received during the contract period. Plaintiff did not receive a copy of defendants' motion until April 23, 2010, and hearing on that matter was set for June 22, 2010. However, on June 15, 2010, plaintiff filed an emergency motion requesting that the court strike defendants' motion on the basis it violated Supreme Court Rule 287(b), which generally provides that no motion shall be filed in a small claims action without prior leave of court. On July 22, 2010, the trial court struck American Eagle's motion to vacate the judgment on the basis that it was filed without leave of court. On August 20, 2010, defendants filed an appeal of both the judgment entered against it on March 11, 2010 and the order striking its motion to vacate on July 22, 2010.

¶6 Additional pertinent facts will be set forth as necessary in the course of the discussion.

¶7 DISCUSSION

¶8 On appeal, defendants raise three issues: (1) whether plaintiff lacked standing to bring this

action; (2) whether defendants' objections should have excluded certain evidence; and (3) whether it was proper to strike defendants' post-trial motion because it was filed without leave of court. For the reasons that follow, we reject defendants' arguments and affirm the judgment of the circuit court.

¶9 A. Plaintiff's Standing

¶10 Defendants' argument with respect to plaintiff's standing is two-fold. First, defendants contend that plaintiff lacked standing to bring this lawsuit because defendants did not enter into a contract with it. Defendants assert that they contracted with McLeodUSA, Inc., and, therefore, McLeodUSA, Inc. was the proper plaintiff. Second, defendants argue in the alternative that even if they contracted with plaintiff, plaintiff still lacked standing because it did not attach a document to the complaint showing that it had been assigned the rights to enforce this contract. We find that both contentions lack merit.

¶11 Defendants' assertion that they contracted with McLeodUSA, Inc. is grounded in a single line within the first provision of the "Terms and Conditions" portion of the contract, which provides:

> "Agreement for Advertising/Internet Services: Customer and Publisher (Yellow Book USA, Inc., or Yellow Book of New York, Inc. in CT, NY and MA, or McLeodUSA Publishing Company in CO, IA, ID, IL, IN, KS, LA, MI, MN, MO, MY, ND, NE, NM, OH, SD, UT, WI, WY or National Directory Company in Arizona, California and New Mexico) agree that Publisher will publish advertising in the Directories and/or provide the Internet Services, in accordance with the terms

and conditions of this agreement."

We find that the plain language of this provision identifies four possible publishers: (1) Yellow Book USA, Inc.; (2) Yellow Book of New York, Inc.; (3) McLeodUSA, Inc.; and (4) National Directory Company. We further find that this provision limits the states within which three of the four publishers may operate. In light of the first "or" contained within the sentence, Yellow Book USA, Inc. is the only publisher to which no state restrictions are attached.

¶12 Defendants, however, read this provision to state that McLeodUSA was the contracting publisher because the advertisements were published in Illinois. Defendants arrive at this conclusion by ignoring the first "or" set forth in the sentence. This construction allows defendants to contend that Yellow Book USA, Inc. - like Yellow Book of New York - publishes in only Connecticut, New York or Massachusetts. Defendants' construction also allows it to assert that the only publisher in Illinois was McLeodUSA. However, as stated, by virtue of the first "or" within the sentence, there is no limitation on the geographic scope of the publishing authority of Yellow Book, USA, Inc. As such, Yellow Book USA, Inc. was a possible publisher of directories in all states, including Illinois. We hold that defendants' interpretation of this provision runs counter to its plain language.

¶13 Defendants' construction of this provision is also in conflict with the testimony adduced at trial. At no time did Manning testify that he believed that he contracted with McLeodUSA. Instead, Manning stated that the words "Yellow Book USA" were prominently located on the front of the contract he signed on behalf of American Eagle. Our review of that document confirms that on the signature page, the top right-hand corner contains the name and logo of Yellow Book USA. Absent ambiguity, the intention of the parties is best ascertained by the plain language of the contract. *Air*

*Safety v. Teacher's Realty Corp*., 185 Ill. 2d 457, 462 (1999). Further, Manning admitted that all payments were made to "Yellow Book " or "Yellow Book USA."

¶14 It is clear from both the plain language of the contract and the evidence adduced at trial that Yellow Book USA, Inc. was the publisher with whom defendants contracted.

¶15 Next, defendants assert that even if they contracted with Yellow Book USA, Inc., plaintiff still lacked standing to bring this action because it did not attach to the complaint the document assigning to plaintiff certain contractual rights previously held by Yellow Book USA, Inc. In support, defendants rely upon section 2-403(a) of the Code of Civil Procedure (735 ILCS 5/2-403(a) (West 2010)), which provides that an assignment must be pled in the complaint. We find that defendants' contentions lack merit.

¶16 It is well-settled that if a complaint in a small claims action clearly notifies the defendant of the plaintiff's claim, it states a cause of action. *Miner v. Bray*, 160 Ill. App. 3d 241, 243 (1987). Here, plaintiff stated its cause of action for breach of contract and attached the contract upon which it based its claim. For the duration of the lawsuit, plaintiff was identified as "Yellow Book Sales and Distribution Company, Inc." Defendants were thus on notice of plaintiff's identity since first being served with the lawsuit. Although plaintiff acknowledges that the assignment agreement between itself and Yellow Book USA, Inc. was not attached to the original complaint, defendants never brought a motion for leave to file a motion to dismiss, a motion for summary judgment or any other dispositive motion prior to the day of trial to raise the issue of plaintiff's standing.

¶17 At trial, plaintiff, through Griffiths, introduced evidence of the assignment agreement and the document was entered into evidence over defendants' objection. Section 2-616(c) of the Code

of Civil Procedure allows parties to amend the pleadings to conform to the proofs at any time throughout the litigation. 735 ILCS 5/2-616(c)(West 2010)("[a] pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs."). We note the strong preference for courts to resolve cases on the merits, so that "trial courts should give plaintiffs at least one opportunity to cure factually insufficient complaints." *In re County Collector of Lake County*, 343 Ill. App. 3d 363, 370 (2003). Had the trial court sustained defendants' objection regarding the assignment in the complaint, plaintiff could have requested the opportunity to amend its complaint to include the assignment, and the case could have continued to proceed. In an effort to expedite the process, the trial court entertained defendants' objections to the assignment and ultimately overruled them. Because the "the purpose of small claims actions *** is to 'provide a simplified and inexpensive procedure for small claims,'" the "trial judge in a small claims case is vested with a great deal of discretion in regard to handling of the pleadings." *Obernauf v. Haberstich*, 145 Ill. App. 3d 768, 772 (1986), quoting *Murray v. Cockburn* ,124 Ill. App. 3d 724, 727 (1984). Based upon the evidence presented, the trial court concluded that there was a valid assignment and held that plaintiff had proper standing to pursue this claim.

¶18 A trial court's determination of a valid assignment is reviewed under an abuse of discretion standard. *Green v. Safeco Life Insurance Co.*, 312 Ill. App. 3d 577, 580 (2000). "An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Donoho*, 204 Ill.2d 159, 182 (2003). We conclude that there was no abuse of discretion on the part of the trial court.

¶19 B. Admission of Evidence

¶20 Defendants next contend that the trial court erred when it overruled their objections to the admittance into evidence of three documents at trial.

¶21 "Evidentiary rulings are within the sound discretion of the trial court and will be upheld absent an abuse of discretion that resulted in prejudice to the objecting party." *Stallings v. Black & Decker (U.S.), Inc.*, 342 Ill. App. 3d 676, 683 (2003). Thus, it is not enough to merely show that the trial court made an incorrect ruling. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 36 (2010). The burden is on the party seeking reversal to establish prejudice. *Atkins v. Thapedi*, 166 Ill. App. 3d 471, 477 (1988). Furthermore, there is a strong presumption in a bench trial that the trier of fact relied only upon proper evidence in reaching its decision on the merits. *Loseke v. Mables*, 217 Ill. App. 3d 521, 524 (1991). Finally, as this is a small claims case, Supreme Court Rule 286(b) provides that the trial court "may relax the rules of procedure and the rules of evidence."

¶22 Defendants first contend that the trial court erred in admitting photocopies of the cover and inside pages of the telephone directories containing defendants' advertisements, as this violated the best evidence rule. We disagree.

¶23 The best evidence rule expresses a preference for the original document when the contents of the documentary evidence are sought to be proved. *People v. Tharpe-Williams*, 286 Ill. App. 3d 605 (1997). However, here the copies were not offered to prove the contents of the documents. Instead, they were offered for the limited purpose to prove that plaintiff performed under the contract. Griffiths testified that the advertisements were run in the directories, and the exhibits supported that testimony. Because the contents of the documents were not at issue, the best evidence rule does not apply.

¶24 The second argument advanced by defendants is that the trial court erred in admitting the assignment agreement between Yellow Book USA, Inc. and plaintiff over its objections that the document lacked foundation, was hearsay and lacked relevance. We disagree.

¶25 Supreme Court Rule 236 governs the admissibility of business records at trial. Rule 236(a) provides, in pertinent part:

> "Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility."

In this small claim case, this Rule must be read in conjunction with Supreme Court Rule 286(b), which, as stated, allows the trial court to relax the rules of evidence and procedure.

¶26 Griffiths' testimony established that the assignment agreement was a record created by plaintiff and kept as part of its business records. As stated, evidentiary rulings are within the sound

discretion of the trial court and will be upheld absent an abuse of discretion that resulted in prejudice to the objecting party. Defendants have established no prejudice from this ruling. We hold that the trial court did not abuse its discretion in ruling that the assignment agreement was admissible as a business record.

¶27 We also reject defendants' assertion that the assignment agreement was irrelevant to the issues raised at trial. Evidence is relevant if it tends to prove a fact in controversy or renders a matter in issue more or less probable. *In re A.W.*, 231 Ill. 2d 241, 256 (2008). Defendants themselves called plaintiff's standing into question, and the existence of the assignment agreement was relevant to this issue. The trial court did not err when it overruled defendants' objections.

¶28 Defendants' third and final contention of error with respect to the trial court's evidentiary rulings is that it committed error when it admitted a statement of account dated July 27, 2007 which showed defendants' outstanding balance under the contract. Defendants objected on the grounds of hearsay and lack of foundation.

¶29 Griffiths testified that the statement of account was a summary of the payment history of American Eagle, derived from invoices issued to defendants. Griffiths stated that the invoices themselves were documents prepared and kept in the ordinary course of plaintiff's business, but that the summary was generated for purposes of this litigation. Records prepared in anticipation of litigation are not records made in the regular course of business and thus are not admissible into evidence pursuant to the business records exception. *In re A.B.*, 308 Ill. App. 3d 227, 236 (1999). Thus, the statement of account did not fall under this exception. However, as stated, defendants must show more than mere error - they must establish that prejudice resulted from the ruling. *Atkins*,

166 Ill. App. 3d at 477. Defendants have not met this burden. The statement of account was a compilation of defendants' account history which supported the testimony of Griffiths, who recounted payments made by defendants. In addition, the statement of account was a summary of the invoices for defendants' account, which were admitted into evidence at trial under the business records exception, a ruling not challenged by defendants in this action. We again observe that as this is a small claims case, Supreme Court Rule 286(b) allows the trial court to "relax the rules of procedure and the rules of evidence."

¶30 We also note that although defendants argue that the statement of account should not have been admitted, they simultaneously point to its contents in support of their assertion that it supports their position that they paid off the account. Defendants argue because the statement reflects that they paid a total of $16,050.00 between August 2004 and January 2007, and the contract required payment in the amount of $14,148.00, no balance is owed on the account. We first note that there is no indication in the record that defendants have previously argued or pled any set-off on this account. Section 2-608 of the Code of Civil Procedure states, in pertinent part:

> "(a) Any claim by one or more defendants against one or more plaintiffs *** whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action, and when so pleaded shall be called a counterclaim.
>
> (b) The counterclaim shall be a part of the answer, and shall

be designated as a counterclaim." (735 ILCS 5/2-608 (a)(b)(West 2010)).

¶31 Although section 2-608(a) is framed as permissive, it does not eliminate the need to include a request for setoff as part of a defendants' pleadings. *Bartsch v. Gordon N. Plumb, Inc*., 138 Ill. App. 3d 188, 200, (1985). To allow otherwise would deprive a plaintiff of the right to notice and opportunity to defend against such a claim. *Vieweg v. Friedman*, 173 Ill. App. 3d 471, 474 (1988). Again, although Supreme Court Rule 286(b) allows the trial court to "relax the rules of procedure and the rules of evidence," fairness calls for defendant to have raised the issue of a setoff prior to trial to allow plaintiff to respond.

¶32 In addition to the untimeliness of defendants' argument, it also contradicts the testimony adduced at trial. Manning testified that American Eagle contracted with Yellow Book for advertising prior to the 2004 agreement at issue in this appeal. The trial testimony confirmed that defendants had other, older invoices in their account, and that defendants had paid off those previous invoices. Griffiths testified that payments are applied to outstanding older invoices first. Thus, it does not automatically follow, as defendants contend, that all payments made subsequent to July 16, 2004 were allocated towards the contract at issue in this case.

¶33 C. Striking of Defendants' Post-Judgment Motion

¶34 Defendants' final argument on appeal concerns its post-trial motion to vacate judgment. On April 12, 2010, American Eagle filed a motion to vacate judgment. Thereafter, plaintiff filed an emergency motion to strike defendants' motion, which the trial court regarded as plaintiff's response to defendants' motion to vacate. Plaintiff argued, *inter alia*, that defendant violated Supreme Court

Rule 287(b) by failing to obtain leave of court to file its motion.

¶35 Rule 287(b) provides that, except in limited circumstances not present here, leave of court is required prior to filing motions in small claims matters. This provision applies equally to motions which are filed post-trial. See *Bolin v. Sosamon*, 181 Ill. App. 3d 442, 445 (1989)("in small claims cases, post-trial motions may not be filed without leave of court."). Thus, because defendants filed their post-trial motion without obtaining prior leave of court to do so, the trial court properly struck the motion.

¶36 III. CONCLUSION

¶37 For the foregoing reasons, we affirm the judgment of the trial court.

¶38 Affirmed.