2012 IL App (1st) 110932-U

FIFTH DIVISION
September 28, 2012

No. 1-11-0932

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROSLYN DIXON, Individually and as Special Administrator for the ESTATE OF ARTHUR JAMES DIXON, Deceased, Plaintiff-Appellant, v. OTIS BANKHEAD, CARL TERRELL MITCHELL a/k/a TWISTA, RAWLE STEWART, Individually and d/b/a SHOWTIME ENTERTAINMENT AGENCY, INC., an Illinois Corporation, TYSHAWN CARR, ATLANTIC RECORDING CORPORATION, a Delaware Corporation, and CLEAR CHANNEL COMMUNICATIONS, Defendants- Appellees.	)	Appeal from the Circuit Court of Cook County. No. 06 L 009336 Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 HELD: Trial court properly granted defendant's motion for summary judgment where there was no evidence to support plaintiff's allegation as to the existence of a joint venture between Atlantic and any of the other defendants.

¶ 2 Plaintiff Roslyn Dixon, individually and as special administrator of the Estate of Arthur James Dixon, deceased, brings this interlocutory appeal pursuant to Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2006)) from an order of the circuit court granting summary judgment in favor of defendant Atlantic Recording Corporation (Atlantic) and Clear Channel Communications (Clear Channel) on plaintiff's complaint seeking damages arising out of the death of decedent as the result of a single-car automobile accident. On appeal, plaintiff contends that summary judgment was improperly granted to Atlantic where genuine issues of material fact remain.[1] For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff filed a 12-count second amended complaint against defendants Otis Bankhead; Carl Terrell Mitchell a/k/a Twista (Twista); Rawle Stewart, individually and d/b/a Showtime Entertainment Agency, Inc. (Showtime); Tyshawn Carr; Atlantic; and Clear Channel; seeking damages arising from the death of Arthur James Dixon (decedent) as the result of an automobile accident on September 6, 2004. The accident occurred when the driver of the seven-passenger vehicle fell asleep, causing the vehicle to roll over. One of a passengers was the rap artist, Twista, who was traveling back to Chicago after a performance at the New York State Fair. Decedent was Twista's bodyguard. The vehicle was owned by Showtime, which paid for

[1] Plaintiff has not included the summary judgment in favor of Clear Channel as part of this interlocutory appeal.

Twista's performance at the fair. Plaintiff's complaint alleged that Showtime, Clear Channel, Atlantic and Twista formed a joint venture to promote Twista's album, and that the trip to New York was part of that promotion.

¶ 5 Counts I through VI of the second amended complaint are directed against Atlantic, as well as others. Counts I through IV base Atlantic's liability on the existence of a joint venture with the other defendants, and counts V and VI allege an agency or employment relationship between Atlantic and Bankhead.

¶ 6 Atlantic filed a summary judgment motion in which it contended that Bankhead was a member of Twista's entourage and was not an employee or agent of Atlantic. Atlantic also contended that the evidence in the record did not support any elements of an agency claim and further that there is no evidence of the existence of a joint venture or a joint enterprise. Additionally, Atlantic contended that its exclusive recording agreement with Twista did not create any joint venture or enterprise, and did not create any agency relationship with the other passengers. Moreover, Atlantic maintained that the evidence clearly showed that it had nothing to do with Twista's appearance at the fair or any other concert performances; nor did any of the other contracts in the record create any joint venture relationships or have any nexus to any concert performances by Twista.

¶ 7 In response, plaintiff asserted that all of the agreements in the record showed that a joint venture existed with Atlantic with regards to Twista's New York performance at the fair and that there is enough evidence to at least raise an issue of fact as to the existence of the joint venture. Plaintiff further asserted that as the driver, Bankhead was an employee of Showtime and as

Showtime and Atlantic had a joint venture related to the New York trip, Atlantic was liable for the negligence of joint venturer Showtime's employee.

¶ 8 In a written memorandum opinion entered on March 21, 2011, the trial court noted that each of the contracts that Atlantic had with any of the other parties specifically stated that it did not create a joint venture between the contracting parties. Additionally, the court noted that there was nothing in any of those contracts that supported the existence of a joint venture between Atlantic and any of the other defendants, nor did any of the contracts deal with Twista's performance at the New York fair or any concert performance. The court concluded that there was no other evidence in the record which even raised an issue of fact as to the existence of a joint venture in reference to the New York contract or the travel to and from the concert. Thus, the court found that there was no basis upon which to impose liability on Atlantic for the automobile accident by virtue of the existence of a joint venture or joint enterprise and granted summary judgment in favor of Atlantic on counts I through IV. As to counts V and VI, the court noted that there was no evidence in the record to establish an employment or other agency relationship between Atlantic and Bankhead. Specifically, the court stated "while agency is ordinarily a question of fact, it can be decided as a matter of law where, as here, there is no evidence to support the existence of the agency relationship," and entered summary judgment in favor of Atlantic on counts V and VI. The court added Rule 304(a) language to its opinion, and this timely interlocutory appeal followed.

¶ 9 ANALYSIS

¶ 10 Plaintiff contends that the trial court erred in granting summary judgment in favor of

Atlantic because genuine issues of material fact remain that preclude summary judgment. Specifically, plaintiff contends that there are genuine issues of material fact regarding: (1) whether a joint venture existed among defendants Atlantic, Showtime, and/or Twista with respect to the Kamikaze Album Project; (2) whether the September 5, 2004, and the September 6, 2004, concert promotional events/transactions were within the customary course, scope and/or in furtherance of the joint venture business; and (3) whether the fatal accident on September 6, 2004, was within the course and/or in furtherance of the joint venture, making all joint venturers equally liable for decedent's death. We disagree.

¶ 11 As a preliminary matter, as noted previously, the trial court's order granting summary judgment in favor of Atlantic contained a special finding pursuant to Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2006)) that "there is no just reason to delay enforcement or appeal." A reviewing court has an obligation to examine its jurisdiction and to dismiss an appeal if it determines that it lacks the requisite jurisdiction, even if neither party to the appeal has raised the issue. *Shanklin v. Hutzler*, 277 Ill. App. 3d 94, 99 (1995). When multiple parties or multiple claims for relief are involved in an action, Rule 304(a) allows an appeal from "a final judgment as to one or more but fewer than all of the parties or claims." Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2006). Here, the trial court specifically found that there was no evidence of a joint venture between Atlantic and any of the other parties, and further found that while agency is ordinarily a question of fact, it can be decided as a matter of law where there is no evidence to support the existence of the agency relationship. The summary judgment entered in favor of Atlantic was a final order as to all claims directed against Atlantic in plaintiff's second amended complaint, and

this court has jurisdiction to hear the appeal pursuant to Rule 304(a).

¶ 12 Turning to the merits of plaintiff's contentions, we find that the trial court properly granted summary judgment in favor of Atlantic on counts I through VI of plaintiff's second amended complaint.

¶ 13 Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fidelity National Title Insurance Co. of New York v. Westhaven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007). In determining whether the moving party is entitled to summary judgment, the pleadings and evidentiary material in the record must be construed strictly against the movant. *Fidelity*, 386 Ill. App. 3d at 212. The circuit court's decision to grant or deny a motion for summary judgment is reviewed *de novo*. *Fidelity*, 386 Ill. App. 3d at 212. We may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the trial court relied upon that ground. *Perez v. Sunbelt Rentals, Inc.*, 2012 IL App (2d) 110382, ¶7.

¶ 14 A joint venture is an association of two or more persons or entities to carry out a single, specific enterprise for profit. *Kaporovskiy v. Grecian Delight Foods, Inc.*, 338 Ill. App. 3d 206, 211 (2003). Whether a joint venture exists is a matter of the intention of the alleged joint venturers. *Kaporovskiy*, 338 Ill. App. 3d at 211. In any joint venture, there must be a community of interest, a proprietary interest in the subject matter, a right to govern the policy in connection therewith, and a sharing in both profit and losses. *Kapororvskiy*, 338 Ill. App. 3d at 211. The existence of a joint venture may be inferred from facts and circumstances showing such an enterprise was in fact entered into and the intent of the parties is the most significant element.

Holstein v. Grossman, 246 Ill. App. 3d 719, 737 (1993). Courts look to the substance and not to the form to determine whether there is a joint venture with the most important element being the intention of the parties. *Petry v. Chicago Title & Trust Co.*, 51 Ill. App. 3d 1053, 1057 (1977). The burden of proving the existence of a joint venture is on the party who claims the relationship exists. *Petry*, 51 Ill. App. 3d at 1057.

¶ 15 The purpose of summary judgment is not to try a question of fact, but to decide whether a genuine issue of material facts exists. *Mazin v. Chicago White Sox, Ltd.*, 358 Ill. App. 3d 856, 862 (2005). A triable issue precluding summary judgment exists where there is a dispute as to material facts or where, the material facts being undisputed, reasonable persons might draw different inferences from the facts. *Mazin*, 358 Ill. App. 3d at 862. Mere denials of fact in pleadings, however, do not create a genuine issue which will preclude the entry of a summary judgment. *Joseph W. O'Brien Co. v. Highland Lake Construction Co.*, 9 Ill. App. 3d 408, 412 (1972). Even though a complaint may purport to raise issues of material fact, summary judgment is appropriate if the issues are not supported by evidentiary facts. *Petry*, 51 Ill. App. 3d at 1057.

¶ 16 In this case, plaintiff contends that certain business agreements between the defendants reflect a common enterprise and joint interest of all three parties regarding Twista's Kamikaze album. Moreover, plaintiff contends that all three parties participated in the scheduling, planning, promoting and marketing of various events in support of Twista and his album at the New York State Fair concert and the Pepsi Arena concert.[2] Additionally, plaintiff contends that the affidavit of its expert, Mr. Resnick, opined that the joint venture of the

[2]Twista did not perform at the Pepsi Arena concert as it was cancelled.

defendants prevailed throughout the Kamikaze album project as demonstrated by the customary practices of recordings, "indy" promotions and videos by Atlantic and multiple professional touring appearances by Twista. According to plaintiff, Mr. Resnick's affidavit also opined that in accordance with industry practices, evidence of the concert appearances and radio promotional support activity for the concerts confirms that such events were within the scope and/or furtherance of the joint venture between the parties. Plaintiff contends that Mr. Resnick's affidavit was never addressed by Atlantic or the trial court.

¶ 17 After a careful review of the various contracts contained within the record, we find that the evidence does not establish the existence of a joint venture between Atlantic and any of the other defendants. The record indicates that Atlantic had an exclusive recording agreement with Twista, which specifically stated in paragraph 27 "Company and you are independent contractors and this agreement does not constitute or acknowledge any partnership or joint venture between us." The record also contains agreements between Atlantic, Showtime, Twista and several other third parties relating to various promotions by Twista and each indicates that all parties to those individual agreements are independent contractors and that they do not create any joint venture, partnership, agency or employment relationships between the parties.

¶ 18 The record also indicated that Twista and Showtime scheduled separate appearances by Twista at paid events. Twista and Showtime scheduled, managed and controlled the paid appearances without any input from Atlantic, although Atlantic attempted to schedule advertising and promotions for the 2004 album to coincide with Twista's other paid appearances.

¶ 19 The burden of proving a joint venture is on the person who claims such a relationship

exists. *O'Brien v. Cacciatore*, 227 Ill. App. 3d 836, 843 (1992). In the documents cited by plaintiff, the parties stated that it was not their intention to form a joint venture. Additionally, there is no evidence that Atlantic had any control over the New York State Fair concert appearance or shared in the profits and losses from the appearance. These factors negate the existence of a joint venture. We, therefore, conclude that plaintiff has failed to meet her burden of establishing the existence of a joint venture.

¶ 20 With regards to the affidavit of plaintiff's expert, we find that it fails to allege facts which support the conclusion that Atlantic was involved in a joint venture with the other defendants, especially in light of the specific language in its agreement which indicated that a joint venture relationship was not created. Unsupported allegations in a complaint cannot raise factual issues where the affidavits which support a motion for summary judgment are to the contrary. *Northrop v. Lopatka*, 242 Ill. App. 3d 1, 8 (1992). Supreme Court Rule 191(a) is specific in mandating that affidavits opposing summary judgment must set forth facts admissible in evidence and not consist of conclusions. Ill. S. Ct. Rule 191(a) (eff. July 1, 2002). Affidavits in opposition to summary judgment motions must consist of facts admissible in evidence as opposed to conclusions and conclusory matters may not be considered in opposition to motions for summary judgment. *Woolums v. Huss*, 323 Ill. App. 3d 628, 636 (2003) (citing *O'Rourke v. Oehler*, 187 Ill. App. 3d 572, 585 (1989)). Accordingly, the trial court was not required to defer to Resnick's conclusions in ruling on Atlantic's summary judgment motion.

¶ 21 Turning our consideration to whether an employee or agent relationship existed between Atlantic and Bankhead, we find that the record does not support such a conclusion. The test of

agency is whether the alleged principal has the right to control the manner and method in which work is carried out by the alleged agent and whether the alleged agent can affect the legal relationships of the principal. *Anderson v. Boy Scouts of America, Inc.*, 226 Ill. App. 3d 440, 443-44 (1992); *Oliveira-Brooks v. Re/Max International, Inc.*, 372 Ill. App. 3d 127, 134 (2007). While the existence of any agency relationship is usually a question of fact, it becomes a question of law when the facts regarding the relationship are undisputed or no liability exists as a matter of law. *Anderson*, 226 Ill. App. 3d at 444, *Oliveira-Brooks*, 372 Ill. App. 3d at 134. The burden of proving the existence of an agency relationship and the scope of authority is on the party seeking to charge the alleged principal. *Anderson*, 226 Ill. App. 3d at 444.

¶ 22 Here, plaintiff fails to raise any question of material fact that there exists an agency relationship between Atlantic and Bankhead. Bankhead, who was Twista's cousin, fell asleep while driving Twista and others to Chicago from New York following Twista's appearance at the state fair. The record indicates that Atlantic was not a party to anything regarding Twista's New York state fair performance, including the leasing of the vehicle or employment of the driver. Nor does the record indicate that Atlantic had any relationship at all with Bankhead, who was allegedly employed by Showtime; the record only indicates various agreements between Atlantic, Twista and Showtime in connection with the promotion of Twista's recordings that were referenced in his recording contract with Atlantic. As stated previously, each of those agreements indicate that the parties were not creating a joint venture agreement but were independent contractors. Accordingly, the evidence presented does not support plaintiff's conclusion that Atlantic was liable for Bankhead's actions through an employment or agency

relationship, thus no genuine issue of material fact exists as to that issue.

¶ 23 We, therefore, conclude that there is no genuine issue of material fact as to whether Atlantic had a joint venture relationship with any of the other defendants as none of the elements of a joint venture are met. As such, summary judgment was properly granted in favor of Atlantic on counts I through VI.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.