2013 IL App (1st) 122797-U

SIXTH DIVISION
June 21, 2013

No. 1-12-2797

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT D. BANZULY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 L1 0751
	)	
LIEBERMAN CENTER FOR HEALTH	)	
AND REHABILITATION,	)	Honorable
	)	Joan Powell,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

O R D E R

¶ 1 ***Held:*** In this breach of contract action, trial court properly granted summary judgment in favor of defendant rehabilitation facility because even accepting plaintiff's argument that use of an occupational therapy student to provide therapy created a contractual obligation to supervise the student, there was no indication that that obligation included a requirement for direct personal oversight of every activity.

¶ 2 The cause of action in this case arises from injuries suffered by plaintiff Robert D. Banzuly when he fell during an occupational therapy session provided to him during his stay at defendant Lieberman Center for Health and Rehabilitation's (Lieberman) facility. Banzuly filed suit alleging that Lieberman breached its contract with him by using an unlicensed student to

provide physical therapy and that he was injured as a result. Lieberman moved for summary judgment alleging, *inter alia*, that it was not providing physical therapy, but rather occupational therapy when defendant fell, and that although the occupational therapy was being provided by a student she was "under the supervision" of a licensed therapist. The trial court granted the motion, and Banzuly timely appealed. On appeal, Banzuly, an attorney, appears *pro se* and contends that summary judgment was improper because there is a question of material fact regarding the supervision of the student, and because the affidavit submitted by the student is conclusory. We affirm.

¶ 3 Although, as discussed below, the parties question the quality of the affidavits offered in support of their positions on summary judgment, the great majority of the facts in this case are undisputed. Around August 20, 2008, Banzuly entered Lieberman's facility as a patient and his wife signed a contract on his behalf. On September 24, 2008, an unlicensed student was providing occupational therapy[1] services to Banzuly. During that time, Banzuly fell and was injured. Although the parties dispute the meaning of the word "supervised" in the Illinois Occupational Therapy Practice Act (225 ILCS 75/1 *et seq.* (West 2008)), they agree that at the time the student was providing therapy, the licensed therapist who was supervising her was not present in the room with her and Banzuly.

¶ 4 Lieberman filed a motion for summary judgment in which it argued that: (1) Banzuly was not receiving physical therapy at the time of his fall, but rather receiving occupational therapy; (2) that an unlicensed student may provide occupational therapy under the supervision of a licensed occupational therapist; and (3) that the student providing the therapy was under the

[1]Although the complaint alleged that Lieberman was providing physical therapy services at the time of the incident, Banzuly has indicated on appeal that he considers the distinction irrelevant.

supervision of a licensed therapist. Lieberman supported its motion with, *inter alia*, the deposition of Banzuly during which Banzuly testified that he had no memory of his fall or the circumstances leading up to it, the affidavit of the student, Sari Gershman, which described the incident and stated in pertinent part: "At all times during the September 24, 2008 occupational therapy session, I was operating under the supervision of Dat Ly Nguyen, a licensed occupational therapist."

¶ 5 Banzuly responded to the motion arguing that the student was not being supervised because the licensed therapist was not "helping the student or standing by at the time of the incident." Banzuly supported his response with the affidavit of his wife who averred that the licensed therapist told her that Banzuly had been dropped by the student during a transfer. Banzuly's wife further averred that the licensed therapist told her that he was in the far section of the therapy area during the transfer. The affidavit concluded with the following statement: "[The licensed therapist] told me that he was sorry and had made a mistake by accepting the student therapist's assertion that she knew how to transfer a patient and by leaving her alone to transfer [Banzuly]."

¶ 6 The trial court subsequently granted Lieberman's motion for summary judgment and Banzuly filed a timely appeal.

¶ 7 Banzuly first contends that summary judgment was improper because the affidavit supporting Lieberman's motion violated Supreme Court Rule 191(a) (eff. Jan. 4, 2013) because it consisted of conclusions rather than facts admissible in evidence. Specifically Banzuly argues that the student's statement that she was "operating under the supervision" of a licensed therapist is a conclusion made without facts to support it.

¶ 8 Rule 191(a) states, in pertinent part, affidavits "shall not consist of conclusions but of facts admissible in evidence." However, it is the burden of the party objecting to the sufficiency of a Rule 191(a) affidavit to challenge the affidavit in the trial court and obtain a ruling thereon. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 383 (2008). Failing to do so results in waiver, and the sufficiency of affidavits cannot be tested for the first time on appeal. *Id.* citing, *Arnett v. Snyder*, 331 Ill. App. 3d 518, 523 (2001).

¶ 9 Here, although Banzuly's response to Lieberman's motion for summary judgment described the affidavit as "inadequate," there is no indication in the record that Banzuly ever moved to strike or otherwise challenged the affidavit for failing to comply with Rule 191(a). Accordingly, Banzuly's contention that the affidavit fails to comply with Rule 191(a) is waived on appeal.

¶ 10 Banzuly next contends that summary judgment was improper because the fact of the student's supervision is disputed. We review, *de novo*, the trial court's decision to grant a motion for summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

¶ 11 On appeal, Banzuly simply identifies a list of documents and concludes that they indicate a genuine issue of material fact regarding supervision of the student. Banzuly does not specify what the issue of material fact is, or otherwise flesh out his argument. Generally, failing to do so violates Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) and waives the argument on appeal. However, we have the benefit of a cogent appellee's brief, and the record contains Banzuly's response to Lieberman's motion for summary judgment. Accordingly, we will address Banzuly's arguments to the extent we can discern them from these documents.

¶ 12 The gist of the parties' arguments appears not to be a factual issue, *i.e.*, the parties appear to agree that the licensed therapist was not providing direct immediate supervision of the student at the time of Banzuly's injury. Rather the dispute between the parties appears to focus on the meaning of "supervised course of study" as used in section 3(3) of the Illinois Occupational Therapy Practice Act (225 ILCS 75/3(3) (West 2008)). Section 3 provides, in pertinent part:

> "Nothing in this Act shall be construed as preventing or restricting the practice, services, or activities of:
>
> * * *
>
> (3) Any person pursuing a course of study leading to a degree of certification in occupational therapy at an accredited or approved educational program if such activities and services constitute a part of a supervised course of study ***."

The Act does not define "supervised course of study."

¶ 13 Assuming for the moment, that the parties' contract included a provision for providing occupational therapy, and assuming that that provision incorporates the limitations of the Act, we find that Banzuly has still failed to demonstrate a breach of contract based on the failure to "help[] the student or stand[] by at the time of the incident."

¶ 14 The fundamental objective of statutory construction is to ascertain and give effect to the legislature's intent. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2013 IL 110505, ¶ 48. The language of the statute, given its plain and ordinary meaning, is the best indication of legislative intent. *Id.* A dictionary can be used to ascertain the ordinary and popular meaning of words. *Detrana v. Such*, 368 Ill. App 3d 861, 867 (2006). Black's Law Dictionary defines supervision as "[t]he act of managing, directing, or overseeing persons or projects." Black's Law

Dictionary (9th ed. 2009). We find nothing in the language of the statute to indicate that "supervised course of study" requires the sort of immediate direct supervision Banzuly suggests at all times under all circumstances. Accordingly, we find that such direct supervision was not required by the contract and the trial court did not err when it granted summary judgment.

¶ 15 We express no opinion on whether the supervision the licensed therapist provided the student was adequate under the circumstances or breached the standard of care for occupational therapy. Such matters are questions relevant to tort theories of recovery, and Banzuly has elected to limit his claims against Lieberman to breach of contract.

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

¶ 17 Affirmed.