2014 IL App (1st) 122876-U

THIRD DIVISION
AUGUST 13, 2014

No. 1-12-2876

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LEO STOLLER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 08 L 10052
	)	
LOU HERBERT and LIZ HERBERT,	)	Honorable
	)	John C. Griffin,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order quashing service and dismissing the complaint with prejudice for lack of jurisdiction is affirmed where the out-of-state defendants are not subject to jurisdiction in Illinois and the alleged service was improper.

¶ 2 In this breach of contract action, plaintiff Leo Stoller, *pro se*, appeals from an order of the circuit court quashing service and dismissing his complaint with prejudice due to lack of jurisdiction over defendants, Lou and Liz Herbert. On appeal, plaintiff contends that defendants are subject to jurisdiction in Illinois because plaintiff is a resident of Illinois and the "injury" occurred in Illinois. Plaintiff further argues that defendants waived their objection to jurisdiction

because their combined motion to quash service and motion to dismiss for lack of jurisdiction is a "responsive pleading." In addition, plaintiff contends that the circuit court erred when it allowed defendants to file a special and limited appearance to object to jurisdiction because the legislature eliminated special appearances when it amended the statute in 2000.

¶ 3 Documents contained in the record show that on September 10, 2008, plaintiff filed a *pro se* complaint for breach of contract against defendants, whom he alleged were residents of Wauna, Washington who were doing business in Cook County, Illinois, where plaintiff resides. Plaintiff alleged that on July 1, 2008, the parties entered into an agreement that defendants would produce a video from photographs supplied by plaintiff. Plaintiff alleged that defendants failed to produce the video and refused to return his photographs, causing him to suffer $29,000 in damages.

¶ 4 Plaintiff attached three emails to his complaint. The first email, dated July 1, 2008, was sent by defendant Lou Herbert to "Chris," later identified in the record as plaintiff's brother. The email simply stated "it was a pleasure talking with you. I'm looking forward to working on your project." The second email, dated August 19, 2008, was sent by plaintiff to Lou with the subject "Notice of Lawsuit and settlement offer." Therein, plaintiff claimed defendants had engaged in "extortion" by raising their fee, and he threatened to file a lawsuit in Chicago for violation of the RICO Act if defendants did not agree to resolve the matter amicably within 36 hours. In the third email, dated August 20, 2008, plaintiff thanked Lou for agreeing to an amicable resolution.

¶ 5 Plaintiff subsequently filed an affidavit of service of summons for each defendant. Both affidavits indicated that an unidentified process server mailed the summons and a copy of the complaint to each defendant in Wauna, Washington on September 20, 2008. The affidavits did not include a street address for defendants, or any additional information.

¶ 6 In October 2008, plaintiff moved for a default judgment and the circuit court struck that motion. Thereafter, it appears that this case was pending in the circuit court for three and a half years with minimal activity. On February 29, 2012, plaintiff was granted leave to file a motion for a default judgment, and the case was subsequently continued for prove-up.

¶ 7 On May 3, 2012, defendants, through counsel, filed a combined motion to quash service and dismiss the case, and for leave to file a special and limited appearance to object to the court's jurisdiction. Defendants argued that service should be quashed because the affidavits of service demonstrated that they were not properly served in accordance with the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-203; 2-208 (West 2008)). Defendants argued that the affidavits did not comply with the requirements of the Code, and that neither personal nor abode service was made, as required by the Code. Defendants further stated that they did not live in the town of Wauna, Washington, and never received the summons in this case.

¶ 8 Defendants further argued that they were not subject to jurisdiction in Illinois because they are residents of the State of Washington and never transacted any business within, or connected to, the State of Illinois. Defendants stated that they made an oral agreement over the telephone with plaintiff's brother, Christopher Stoller, to edit a video. Throughout their communications with Christopher, whether by telephone, email or in person, defendants remained in Washington. Defendants stated that plaintiff subsequently emailed them, purporting to represent Christopher in an alleged breach of contract claim, and then filed the instant lawsuit naming himself as the plaintiff. Defendants further asserted that they had no contact with the State of Illinois and had not committed any acts which would subject them to jurisdiction under Illinois' long-arm statute (735 ILCS 5/2-209(a) (West 2008)). In their prayer for relief, defendants requested leave to file a special and limited appearance for the sole purpose of

objecting to the court's jurisdiction. Defendants reference seven exhibits in the motion, including affidavits from each defendant, and state that those exhibits were attached to their motion. None of the exhibits, however, are included in the record on appeal.

¶ 9 Plaintiff filed a response to defendants' motion claiming that their motion constituted a "responsive pleading," and therefore, pursuant to section 2-301(c) of the Code (735 ILCS 5/2-301(c) (West 2008)), defendants waived all objections to the court's jurisdiction. In reply, defendants argued that their motion was not a responsive pleading, but instead, was specifically authorized by section 2-301. Defendants continued to maintain that service was not proper and that they were not subject to jurisdiction in Illinois. Defendants noted that plaintiff had not submitted an affidavit disputing or contradicting the facts stated in their affidavits.

¶ 10 The circuit court first found that defendants did not file a responsive pleading, but instead, filed one combined motion challenging service and jurisdiction as allowed by section 2-301 of the Code. Accordingly, defendants did not waive their right to object to service of process or jurisdiction. The court next found that plaintiff's affidavits of service failed to satisfy the service requirements under Illinois law because they only stated that the summons and complaint were mailed to each defendant and did not indicate that either personal or abode service had been made. Consequently, the court found that plaintiff did not properly serve process on the defendants, and quashed service as to both of them.

¶ 11 Finally, the circuit court found that defendants are not subject to jurisdiction in Illinois. The court pointed out that defendants' unrefuted affidavits stated that plaintiff's brother contacted them from Arizona to perform the video service for him. The court further noted that all of the contacts defendants had with plaintiff's brother under the contract happened in person in the State of Washington, or over the telephone or through email between the states of Washington

and Arizona. The court stated that plaintiff provided nothing to refute the statements in defendants' affidavits, nor any evidence showing that defendants had any contacts with Illinois whereby they would invoke the benefits and protections of its laws. Moreover, the court found that it would be unreasonable to require defendants to defend the underlying action in Illinois because they did not have any type of agreement with plaintiff that justified subjecting them to jurisdiction in Illinois. Based on its findings, the circuit court granted defendants' motion to file a special appearance to object to jurisdiction, quashed service, and dismissed plaintiff's complaint with prejudice. Plaintiff now appeals claiming that the circuit court "missed the boat on every issue."

¶ 12 As a threshold matter, we note that defendants have not filed an appearance or an appellee's brief. In his notice of filing his notice of appeal, plaintiff claims he mailed notice of this appeal to the persons on the service list; however, the record contains no service list and the "TO:" section of his notice is blank. Based on our review of the proceedings below, we are doubtful that defendants are aware of this appeal. Regardless, this court has elected to consider this appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 13 Plaintiff first contends that the circuit court has personal jurisdiction over defendants because the "injury" occurred to a Cook County resident. Plaintiff notes that the record contains an email he sent to defendants, and he claims that this email established that he had contact with defendants from Illinois, which therefore subjected defendants to jurisdiction in Illinois. Plaintiff relies solely on *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997), which held that a tortfeasor is subject to jurisdiction in the state where the injury and tort occurs. Plaintiff claims Janmark is "the controlling case nationally."

¶ 14 We initially observe that decisions of lower federal courts are not binding on state courts (*People v. Kidd*, 129 Ill. 2d 432, 457 (1989)), but more specifically, *Janmark* does not apply to the case at bar because it is no longer good law. The Seventh Circuit recently recognized that its holding in *Janmark* has been abrogated by the United States Supreme Court's holding in *Walden v. Fiore*, 134 S. Ct. 1115 (2014). See *Advanced Tactical Ordinance Systems, LLC v. Real Action Paintball, Inc.*, 751 F. 3d 796, 802 (7th Cir. 2014). In *Walden*, the Supreme Court expressly stated "the plaintiff cannot be the only link between the defendant and the forum." *Walden*, 134 S. Ct. at 1122. Accordingly, plaintiff's argument that the circuit court has personal jurisdiction over defendants because plaintiff resides in Cook County is completely without merit.

¶ 15 Where the circuit court has granted a motion to dismiss for lack of personal jurisdiction without an evidentiary hearing, we review that ruling *de novo*. *Old Orchard Urban Limited Partnership v. Harry Rosen, Inc.*, 389 Ill. App. 3d 58, 64 (2009). Under Illinois' long-arm statute, an Illinois court may exercise personal jurisdiction over a nonresident defendant if the defendant transacts any business within the state. 735 ILCS 5/2-209(a)(1) (West 2008); *Old Orchard*, 389 Ill. App. 3d at 64. It is plaintiff's burden to establish a *prima facie* case for the exercise of personal jurisdiction. *Old Orchard*, 389 Ill. App. 3d at 64.

¶ 16 In this case, we find that plaintiff failed to meet his burden of establishing that defendants were subject to personal jurisdiction in Illinois. In his complaint, plaintiff stated that defendants were residents of Washington who were "doing business in Cook County." There is absolutely no evidence in the record that defendants ever conducted any business in Illinois. Defendants only connection to Illinois in this case was the email plaintiff sent to them in August 2008 threatening to sue them for extortion. Moreover, the record does not show that any agreement ever existed between plaintiff and defendants, but rather, that defendants' agreement was with

plaintiff's brother, who resided in Arizona. It thus appears that plaintiff never had a basis for suing defendants.

¶ 17 We also find no merit in plaintiff's claim that defendants waived their objection to jurisdiction by filing a responsive pleading. The circuit court correctly found that defendants' combined motion challenging service and jurisdiction, which was the only motion filed by defendants, was in compliance with section 2-301 of the Code. 735 ILCS 5/2-301 (West 2008). In addition, the fact that the circuit court stated that it was granting defendants leave to file a special appearance to challenge jurisdiction after special appearances were eliminated from the statute is of no import. Under section 2-301(a) of the Code, parties are no longer required to file special appearances, but instead, can simply file a motion to dismiss or motion to quash service, which was properly done in this case. 735 ILCS 5/2-301(a) (West 2008).

¶ 18 Plaintiff correctly notes that defendants' affidavits are not contained in the record before us. However, it is well settled that, as the appellant, it was plaintiff's burden to provide this court with a sufficient record to review for any possible error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). The record shows that defendants' affidavits, as well as other exhibits provided by defendants, were thoroughly reviewed and relied upon by the circuit court in rendering its decision. Under these circumstances, we must presume that the circuit court acted in conformity with the law and ruled properly after considering the evidence before it. *Webster v. Hartman*, 195 Ill. 2d 426, 433-34 (2001); *Foutch*, 99 Ill. 2d at 391-92.

¶ 19 Accordingly, we affirm the judgment of the circuit court of Cook County dismissing this case for lack of personal jurisdiction over defendants.

¶ 20 Affirmed.