FOURTH DIVISION
June 19, 2014

1-13-1960



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| CALVIN PETTIGREW, JR., | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 M 121971 |
| | ) | |
| DAIERN THOMPSON and SHEMIKA SWAN THOMPSON, | ) | |
| | ) | Honorable |
| | ) | Thomas V. Lyons, II, |
| Defendants-Appellees. | ) | Judge Presiding. |

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PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court of Cook County's order denying plaintiff's motion for default judgment and entering judgment notwithstanding the verdict after trial in favor of defendants on plaintiff's claim for damages arising out of an automobile accident is affirmed. The record contains evidence of both defendants' appearances so that neither was in default; and plaintiff failed to present a record that he adduced evidence of damages such that the judgment notwithstanding the verdict was not warranted.

¶ 2 Plaintiff, Calvin Pettigrew, Jr., has appeared *pro se* throughout these proceedings. Plaintiff filed a small claims complaint against defendants, Daiern Thompson and Shemika Swan Thompson, seeking damages resulting from an automobile accident. After several attempts by plaintiff at achieving a default judgment against defendants and a rejection by defendants of an arbitrator's award in favor of plaintiff, the matter proceeded to a trial before a jury. The jury returned a verdict in plaintiff's favor but the circuit court of Cook County entered a judgment notwithstanding the verdict in favor of defendants. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On January 8, 2010, the circuit court of Cook County granted plaintiff leave to file an amended small-claims complaint against defendants for damages arising from an automobile accident. The complaint alleged that defendant Daiern, while driving a vehicle Shemika owned, struck plaintiff's vehicle in the rear. The purpose of the amended complaint was to add Daiern Thompson as a defendant because his name (at the time misidentified as Daiene Thompson) did not appear on the caption but was listed as a party in the body of the original complaint. On January 26, 2010, the court ordered Shemika to file an appearance, answer, or to otherwise plead within 7 days. On February 2, 2010, Shemika, by her attorneys, filed an appearance and jury demand.

¶ 5 On February 4, 2010, Shemika, through counsel, filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). On April 1, 2010, the trial court granted the motion to dismiss and granted plaintiff 21 days in which to file an amended complaint. On April 21, 2010, plaintiff filed an amended complaint.

The amended complaint seeks to recover only from Daiern Thompson (again misnamed Daiene Thompson).

¶ 6 On June 10, 2010, the circuit court of Cook County appointed the Illinois Secretary of State to make service of process. On June 25, 2010, the Illinois Secretary of State accepted service for defendants. On September 1, 2010, plaintiff moved for default judgment in the amount of $1750.

¶ 7 On September 13, 2010, the trial court entered an order denying plaintiff's motion for default judgment without prejudice and granting Daiern Thompson 7 days, by September 20, 2010, in which to appear and plead. On September 21, 2010, defense counsel who filed Shemika's appearance filed an "amended appearance" with a motion to allow the amended appearance to stand because it was filed one day late. On October 4, 2010, the trial court entered an order that defendants' previously filed amended appearance of September 21, 2010 shall stand and that plaintiff's motion to default is denied. Plaintiff filed a motion to vacate and strike the October 4, 2010 order on the grounds Daiern failed to pay the required filing fee with the September 21, 2010 "amended appearance."

¶ 8 On November 16, 2010, the parties participated in an arbitration hearing. An arbitrator entered an award in favor of plaintiff for $1825. On December 6, 2010, defense counsel filed a notice of rejection of the arbitrator's award.

¶ 9 On August 23, 2011, the trial court ruled on various pending motions, including plaintiff's pending motion to vacate and strike the October 4, 2010 order that Daiern's September 21, 2010 appearance would stand. The court denied the motion to strike Daiern's appearance because (1) the court granted Daiern's motion to allow the previously filed

appearance to stand, (2) that order was within the court's discretion, and, (3) therefore, the October 4, 2010 order was the law of the case.

¶ 10 On February 5, 2013, the matter proceeded to a trial before a jury. The jury returned a verdict in plaintiff's favor and awarded damages. The trial court entered a judgment notwithstanding the verdict in favor of defendants on the grounds plaintiff failed to produce evidence of damages.

¶ 11 This appeal followed.

¶ 12 ANALYSIS

¶ 13 Plaintiff argues the trial court should be reversed because the trial court exceeded its authority, and the order violates Illinois Supreme Court Rule 13(c)(1) and local rule 1.4(a) of the circuit court of Cook County. Plaintiff argues the trial court is constrained by the supreme court's rules to apply the local rules, and the court violated local rules and lacked authority to deny his motion for default because defendants violated both the supreme court and local rules on responses to summonses. Plaintiff argues defendants violated those rules in that defendants did not appear until more than 40 days after receipt of service of summons. Plaintiff argues Daiern never properly filed an appearance in this case. Therefore, plaintiff argues, the trial court's order denying his motion for default was void *ab initio*.

¶ 14 Plaintiff also argues the arbitration award is binding at least as to Daiern because he could not properly file a notice rejecting the arbitrator's award within 30 days as required by Supreme Court Rule 93(a), therefore plaintiff is entitled to an order confirming the award. Finally, plaintiff argues the trial court's order entering judgment notwithstanding the verdict should be reversed.

¶ 15 1. Default Judgment

¶ 16 Plaintiff argues the September 13, 2010 order denying his motion for default judgment should be reversed because he was entitled to a default judgment based on defendants' failure to file an appearance pursuant to the summonses issued on June 11, 2010 and served June 25, 2010. Defendants respond plaintiff was not entitled to a default judgment on September 13, 2010 because defendants were never served. Defendants admit Shemika appeared voluntarily on February 2, 2010, but Daiern did not appear until September 21, 2010, pursuant to the trial court's September 13, 2010 order. Defendants argue that although the Illinois Secretary of State purported to accept service, that acceptance was invalid because the requirements of neither section 10-301 of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/10-301 (West 2010)) or section 2-203.1 of the Code (735 ILCS 5/2-203.1 (West 2010)) were met.

¶ 17 The trial court had jurisdiction over Shemika when it entered the September 13, 2010 order denying plaintiff's motion for default judgment because Shemika voluntarily appeared on February 2, 2010. "Personal jurisdiction may be established either by service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction." *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 18. Therefore, whether service on the Secretary of State was effective as to Shemika is inconsequential, and she was not in default.

¶ 18 The Illinois Secretary of State accepted service of summons as to both Shemika and Daiern. If that service was effective as to Daiern, the trial court had jurisdiction to enter a default judgment against him, but was not required to. The decision to grant a motion for default judgment is within the trial court's discretion. *Dupree v. Hardy*, 2011 IL App (4th)

100351, ¶ 51. "In exercising that discretion, courts must be mindful that entry of default is a drastic remedy that should be used only as a last resort." *In re Haley D.*, 2011 IL 110886, ¶ 69. "A trial court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted. [Citation.]" (Internal quotation marks omitted.) *Dupree*, 2011 IL App (4th) 100351, ¶ 51. "Illinois public policy prefers to decide legal issues on their merits." *Id.* at ¶ 59. Moreover, the court has found that a default judgment should be vacated based, in part, on "the possible existence of a meritorious defense sufficient to warrant a trial on the merits of the cause." *City of Chicago Heights v. Furrer*, 99 Ill. App. 3d 414, 420 (1981). Before a final judgment, "the overriding consideration is simply whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits." *In re Haley D.*, 2011 IL 110886, ¶ 57.

¶ 19 In this case, regardless of whether Daiern had been served when plaintiff moved for default, the trial court did not abuse its discretion in denying the motion for default judgment. Default judgment is a last resort. We cannot say that denying the motion for default was an abuse of discretion because plaintiff did not suffer substantial prejudice in being forced to proceed first to arbitration and then to trial. Plaintiff actually prevailed in both of those proceedings. *Dupree*, 2011 IL App (4th) 100351, ¶ 59 (rejecting the plaintiff's claim that the trial court abused its discretion by denying motion for default judgment where "the record does not show that defendants' actions prejudiced him."). Although Daiern has not argued that he had a meritorious defense at the time of the default judgment, it was not necessarily

his burden to do so. *In re Haley D.*, 2011 IL 110886, ¶ 57 ("the litigant need not necessarily show the existence of a meritorious defense and a reasonable excuse for not having timely asserted such defense"). The concern for the court is substantial justice to both parties. In light of our public policy, it was reasonable to require this matter to be resolved on the merits. *Dupree*, 2011 IL App (4th) 100351, ¶ 59 (citing *Midwest Builder Distributing, Inc., v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 665 (2007)) ("Illinois public policy prefers to decide cases on their merits instead of dismissing them purely on procedural grounds.").

¶ 20 We decline to address the validity of the attempt at service through the Illinois Secretary of State pursuant to statute because addressing that issue will have no effect on our judgment regardless of how that issue is resolved. *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009) ("As a general rule, courts in Illinois do not *** consider issues where the result will not be affected regardless of how those issues are decided."). The trial court's orders denying plaintiff's motion for default judgment are affirmed.

¶ 21 2. Validity of Arbitration Award

¶ 22 Plaintiff also argues that the attorneys for Daiern never properly filed an appearance in this case, because they did not pay an additional filing fee. Therefore, plaintiff argues Daiern never properly rejected the arbitrator's award and, plaintiff is entitled to a judgment confirming the arbitrator's award in his favor. Plaintiff argues Daiern's September 21, 2010 appearance is "*dehors*" the record because the certified record on appeal does not reveal that anyone filed an appearance between September 13, 2010 and October 4, 2010, or paid the filing fee required by local rule 1.3(c) to "validate" the amended appearance. Plaintiff also argues defense counsel failed to properly file the amended appearance because counsel only

attached the document to a motion, but did not properly (*i.e.*, in the right room) file the amended appearance with the clerk of the court or pay the required filing fee. Therefore, plaintiff argues, defense counsel also violated local rule 1.4(a) and the notice of rejection is void as to Daiern because defense counsel did not file an appearance on his behalf and therefore her signature is not a signature of his attorney of record. Moreover, because Daiern never paid an appearance fee he could not appear before the court even on his own behalf.

¶ 23 Plaintiff argues the record proves defense counsel is not Daiern's counsel of record because the trial court ordered counsel to file an appearance on his behalf on September 13, 2010; when the court found the order that the "previously filed appearance would stand" was the law of the case, the court reiterated at that time that Daiern did not appear until September 21, 2010; and the court file contains no record of any other appearance or payment of a filing fee to "validate" the September 21, 2010 appearance. Plaintiff argues defense counsel lacked "standing" to represent Daiern and that every paper she filed on his behalf is a nullity. Plaintiff argues that in the absence of a valid rejection of the award the trial court's only function was to enter judgment confirming the award, and it erred when it forced plaintiff to proceed to trial. Plaintiff asserts he presented a certified copy of the case file dated March 18, 2011 to the court prior to its August 23, 2011 order but the court failed to consider the case file.

¶ 24 On appeal, defendants do not address plaintiff's argument directly. Defendants note that plaintiff "repeatedly moved the court below to default the defendants for failure to file an appearance" and state that on September 21, 2010, defendants, by their attorneys, filed their amended appearance and jury demand. But defendant's assertion is misleading and misses the

main point of plaintiff's argument. Simply saying that defendants filed an appearance on September 21, 2010 aids nothing. Plaintiff's main point is that Daiern did not pay a filing fee with his appearance, therefore it is invalid under local rule 1.3.

¶ 25 Facially, the "amended appearance" appears to be an initial appearance on behalf of Daiern. The "amended appearance" only lists Daiern, and plaintiff has interpreted it as his separate appearance. Plaintiff's interpretation of the document as a separate appearance--which is reasonable based on (1) the trial court's order for Daiern to file an appearance, (2) the face of the document, and (3) defense counsel's confusing motion referencing its "previously filed appearance" as the appearance (only on behalf of Daiern) filed a day late in advance of the motion to allow--explains plaintiff's insistence the appearance is invalid because Daiern did not pay an additional filing fee--an assertion of fact defendants do not dispute and which is supported by the record before this court. "If separate appearances are entered for several parties, either by the same or different attorneys, separate appearance fees shall be paid." Cook Co. Cir. Ct. R. 1.3 (July 1, 1976). The record contains no evidence of a separate appearance fee on behalf of Daiern.

¶ 26 The trial court could have interpreted the document to amend the appearance already on file on behalf of Shemika to include Daiern rather than as a separate appearance for Daiern. To the extent the document amends the appearance already on file it does so by supplementation, not by supplantation as would be expected. The trial court had discretion to allow the amendment. *Illinois State Bar Ass'n Mutual Insurance Co. v. Cavenagh*, 2012 IL App (1st) 111810, ¶ 23 ("The decision whether to allow or deny an amendment is a matter within the circuit court's discretion."); *Hernandez v. Williams*, 258 Ill. App. 3d 318, 323 (1994)

("[A] small claims appearance and jury demand constitute a 'paper' within the meaning of Rule 137."). Determining whether an attorney's appearance is authorized is a question of fact. *Eckel v. Bynum*, 240 Ill. App. 3d 867, 876 (1992). The trial court's underlying factual findings are reviewed deferentially and will not be disturbed on review unless those findings are against the manifest weight of the evidence. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 154 (2005). "A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. [Citation.] A reviewing court must not substitute its own judgment for the judgment of the trier of fact. [Citation.]" (Internal quotation marks omitted.) *Id.* at 155.

¶ 27 The trial court's finding that defense counsel's appearance was authorized is not against the manifest weight of the evidence. It is unclear whether defense counsel intended to amend the appearance on file and drafted the "amended appearance" sloppily, or inexplicably intended to file a separate appearance and neglected to pay Daiern's appearance fee. The trial court's written judgments do not expressly construe defendant's filing and we lack reports of hearings that might shed light on the question plaintiff raised. Nonetheless, we are constrained in that "[t]o the extent that the record is incomplete, we must construe any resultant ambiguity against plaintiff as the appellant." *Village of Mundelein v. Bogachev*, 2011 IL App (2d) 100346, ¶ 30. The record is incomplete insofar as it does not explain the reasons for the trial court's orders finding that Daiern's attorney filed a proper appearance. Plaintiff presents a compelling argument that the record proves defense counsel did not file a proper appearance, but a finding that defense counsel amended the appearance on file rather than filing a separate appearance is not unreasonable, arbitrary, or not based on the evidence. The

document at issue is at least titled "amended appearance" even thought it could be construed differently. Further, on appeal, we must draw from the evidence all reasonable inferences that support the judgment. *In re Marriage of Manker*, 375 Ill. App. 3d 465, 477 (2007).

¶ 28 Absent the trial court's interpretation of defendants' filing as amending the appearance on file rather than a separate appearance--a holding gleaned not from any express ruling by the trial court but as necessary to explain the trial court's repeated rulings denying plaintiff's motions for default--plaintiff's arguments would be very persuasive. But the only support for the trial court's judgment is found in construing the September 21, 2010 document as an amendment to the appearance on file to add Daiern as a party on whose behalf counsel appeared and we are compelled to construe the document that way. *Id.* This means that defense counsel filed a single appearance for several parties. "If a single appearance is entered for several parties, a single appearance fee shall be paid." Cook Co. Cir. Ct. R. 1.3 (July 1, 1976). Plaintiff was not prejudiced or deprived of any rights by any alleged failure to examine certified records of the clerk of the court. The record is clear that defendants paid at least a single appearance fee. See P*owell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶ 87 ("Where it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment or decree will not be disturbed.")

¶ 29 Having made this determination, plaintiff loses the mainstay of his argument and his position collapses. If defendants both filed appearances and defense counsel represented them, then the notice of rejection of the arbitrator's award was valid, and plaintiff is not entitled to an order confirming the arbitrator's award. Plaintiff argues, for the first time in his reply brief, that defendants violated the trial court's September 13, 2010 order not just by failing to

file an appearance, but by failing to then plead as well. This assertion is completely at odds with the trial court's interpretation of its own order, which clearly intended to require Daiern to appear or otherwise plead. "An order is to be construed in a reasonable manner that gives effect to the apparent intention of the trial court." *Garcia v. Gutierrez*, 331 Ill. App. 3d 127, 129 (2002). Regardless, the reply brief shall be confined strictly to replying to arguments presented in the brief of the appellee, and points not argued in the opening brief are waived and shall not be raised in the reply brief. *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 130482, ¶ 56. For the foregoing reasons, plaintiff's arguments all fail.

¶ 30 3. Judgment Notwithstanding the Verdict

¶ 31 Finally, we address the trial court's order entering judgment in favor of defendants after the jury returned a verdict in plaintiff's favor. The trial court reasoned that the jury "had no reasonable basis to compute damages as no estimates or valuations were admitted into evidence." On appeal, plaintiff argues he proved his damages at the February 5, 2013 jury trial based on a color photograph of his vehicle after the accident that was admitted into evidence at trial.

> "This court reviews a trial court's decision to grant or deny a motion for judgment notwithstanding the verdict *de novo*; however, like the trial court, we must be careful not to usurp the function of the jury and substitute our own assessment. [Citation.]" (Internal quotation marks omitted.) *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 46.

¶ 32 Assuming the trial court admitted a photograph of plaintiff's vehicle into evidence as depicting plaintiff's vehicle after the accident--which we do not know due to an incomplete record--the photograph would still be insufficient to establish plaintiff's damages. As a general proposition of law damages may be proven in any reasonable manner. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 108 (2006). For example, production of a repair bill and evidence of payment thereof could be sufficient proof of damages. *Singer v. Cross*, 257 Ill. App. 41, 45 (1930).

¶ 33 In *Razor*, the defendant argued the trial court should have entered judgment notwithstanding the verdict in its favor because the plaintiff presented no evidence to support the jury's damages award and the award could only have represented a guess by the jury. *Razor*, 222 Ill. 2d at 106. In *Razor*, the measure of damages was "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted" and the court found that the only possible evidence of those damages was the plaintiff's testimony that she would not pay the price today she originally paid for the vehicle. *Id.* at 106-07. On appeal, the plaintiff noted that the price of the car was also entered into evidence and suggested that "jurors have sufficient familiarity with cars and breakdowns that they ought to be permitted to determine for themselves how much a car's value would be diminished by events of the type which occurred in this case." *Id.* at 107-08. Our supreme court rejected that argument, holding that "[a]lthough jurors are not required to check their common sense at the courtroom door [citation], we are not prepared to endorse the proposition that jurors are as a class sufficiently familiar with automobiles as to be able to determine the degree of diminution of a particular vehicle's value

based on a particular defect without the need for any evidence at all." *Razor*, 222 Ill. 2d at 108.

¶ 34 In *Benford v. Everett Commons, LLC*, 2014 IL App (1st) 130314, ¶ 30, the plaintiff had to prove the fair market value of personal property as the measure of damages for the loss of the property allegedly caused by the defendant. In that case, the plaintiff presented evidence of the original cost of the items of personal property and argued on appeal that the jury could use that evidence to extrapolate the fair market value. *Id.* at ¶ 34. The court rejected that argument holding that "it is not the jury's role to extrapolate the fair market value. A jury verdict must be supported by the evidence and cannot be based on conjecture or speculation." *Id.*

¶ 35 Plaintiff's reliance on a photograph of the damage to his vehicle as proof of damages caused by defendant's negligent driving would require the jury to speculate as to either the diminution in value to the vehicle because of the damage or the cost to repair the damage, or both. Neither is acceptable to sustain an award of damages. *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 33 ("Speculation and conjecture are not proper bases for an award of damages."). We do not know what, if any, additional evidence of damages was adduced at trial due to an incomplete record. Although estimates or valuations were not necessarily required (*Razor*, 222 Ill. 2d at 108), because just a photograph would require conjecture or surmise and plaintiff failed to present a record of additional evidence, we must presume the trial court's determination that the jury had no reasonable basis to compute damages was correct. *Balough v. Northeast Illinois Regional Commuter Railroad Corp.*, 409 Ill. App. 3d 750,

770 (2011). The trial court's judgment notwithstanding the verdict in favor of defendants is affirmed.

¶ 36 CONCLUSION

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

¶ 38 Affirmed.