2017 IL App (1st) 161870-U

No. 1-16-1870

Order filed June 16, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DON AVERY, SR.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 M1 302515
	)	
THE CHICAGO TRANSIT AUTHORITY,	)	
a municipal corporation,	)	Honorable
	)	Cassandra Lewis,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: This court reversed the circuit court's order finding that an oral settlement agreement was entered into by the parties and enforcing the agreement. There was insufficient evidence in the record for the court to determine summarily the existence and the terms of the alleged oral settlement agreement. The case was remanded for an evidentiary hearing.

¶ 2 The plaintiff, Don Avery, Sr., appeals from an order of the circuit court of Cook County granting the motion of the defendant, the Chicago Transit Authority (CTA) to enforce an oral

settlement of the plaintiff's claim for personal injuries against the CTA. On appeal, the plaintiff contends that: the enforcement of the oral settlement agreement was against the manifest weight of the evidence, and the denial of the plaintiff's motion for reconsideration was an abuse of discretion.

¶ 3 For the reasons set forth below, we conclude that the circuit court erred when it found that the parties entered into an enforceable oral settlement agreement and therefore, an evidentiary hearing is required to resolve that issue. We do not reach the issue of whether the circuit court erred in denying the plaintiff's motion for reconsideration.

¶ 4 BACKGROUND

¶ 5 On September 9, 2011, the plaintiff was injured while attempting to board a CTA bus. On September 6, 2012, the plaintiff's attorney filed a complaint against the CTA seeking damages for personal injuries suffered by the plaintiff as a result of the September 9, 2011, accident. The CTA filed an appearance, a jury demand and an answer to the complaint. Thereafter, the parties engaged in discovery.

¶ 6 Following the mandatory arbitration hearing, the arbitrators awarded the plaintiff $8,500 in damages and $397 in costs. The CTA rejected the arbitrators' award. Thereafter the case was set for trial on November 20, 2013.

¶ 7 On November 4, 2013, the CTA filed a motion to enforce settlement and on November 18, 2013, the CTA filed an amended motion to enforce settlement. The amended motion and its supporting exhibits alleged as follows.

¶ 8 Two months after the September 9, 2011, accident, the plaintiff and the CTA reached an agreement to settle the plaintiff's injury claim. In his affidavit, Benny Cabrera, a CTA claims

representative, averred that the plaintiff orally agreed to settle his claim against the CTA for $2,500. On November 4, 2011, Mr. Cabrera sent two copies of the release in the amount of $2,500 to the plaintiff in settlement of his claim against the CTA. In the letter accompanying the release form, Mr. Cabrera instructed the plaintiff sign both copies of the form and have his signature witnessed by two individuals over the age of 18 years. The letter went on to state that upon receipt of the "properly executed releases, we will forward our check in payment." The plaintiff returned the form to the CTA with the signatures of two witnesses, but he did not sign the release form.

¶ 9 Upon receipt of the release forms, on December 6, 2011, the CTA sent a check to the plaintiff in the amount of $2,500. The check listed the payees as Don Avery Sr., Medical Recovery Specialists, LLC (MSRI), representatives for Rush University Medical Center, and Medicare. The plaintiff returned the check to the CTA, with a hand-written note objecting to the fact that the check had additional payees and requested that the CTA send him a check to pay the hospital bills.

¶ 10 Based on the above allegations, the CTA maintained that the parties' settlement negotiations had resulted in an offer, acceptance and a final agreement on all the material terms and that as of November 9, 2011, there was a binding and enforceable oral agreement between the parties. On December 20, 2013, the circuit court granted the motion to enforce the settlement. The plaintiff filed a motion for reconsideration.

¶ 11 On April 2, 2014, the circuit court denied the plaintiff's motion for reconsideration. In ruling on the motion for reconsideration, the circuit court stated in pertinent part as follows:

> "[I]n the final analysis, I have to say that if we're holding this person to the standard of an attorney, which is what I have to do if he is representing himself, an attorney would have known to ascertain the existence of any liens, aside from whether or not there were medical expenses or any type of expenses incurred."

In rejecting the plaintiff's argument that a material mistake of fact occurred, the court found that the basis of the plaintiff's mistake was due to his own negligence stating further as follows:

> "Arguably, there was negligence because somebody skilled in the practice of law would have known that there is a likelihood that there are liens made on checks and they would have contemplated that when they were entering into negotiations."

¶ 12 The plaintiff appealed, and this court dismissed the appeal for lack of a final order. See *Avery v. Chicago Transit Authority*, 2016 IL App (1st) 141437. Thereafter, the circuit court issued an order dismissing the case. On July 14, 2016, the plaintiff filed an amended notice of appeal from the circuit court's orders granting the motion to enforce the oral settlement agreement and the denial of his motion to reconsider that order.

¶ 13 ANAYLSIS

¶ 14 The plaintiff contends that the circuit court erred in ordering the enforcement of the alleged oral settlement agreement between the CTA and him.

¶ 15 I. Standard of Review

¶ 16 "[A] motion to enforce a settlement agreement can be a motion unto itself, albeit one not expressly authorized by the Code of Civil Procedure or supreme court rules." *City of Chicago v. Ramirez*, 366 Ill. App. 3d 935, 946 (2006). Finding such a motion "best classified as a motion for summary judgment concerning the issue of settlement," the reviewing court determined that "the

decision to grant or deny enforcement of a settlement agreement made on the motion pleadings and attachments, without holding an evidentiary hearing, is reviewable *de novo*." *Ramirez*, 366 Ill. App. 3d at 946. Where an evidentiary hearing on a motion to enforce an oral settlement agreement was held, the manifest weight of the evidence applies to our review of the trial court's decision.*Condon & Cook, L.L.C. v. Mavrakis*, 2016 IL App (1st) 151923, ¶ 58.

¶ 17 The record on appeal does not contain a report of proceedings from the hearing on the CTA's motion to enforce the settlement agreement. Neither party argues that the circuit court conducted an evidentiary hearing nor does the record on appeal indicate that an evidentiary hearing was held. Therefore, our review is *de novo*.

¶ 18 II. Discussion

¶ 19 A. Forfeiture

¶ 20 The plaintiff contends that the CTA's motion to enforce the alleged oral settlement agreement was untimely and violated section 2-613(d) of the Code of Civil Procedure (735 ILCS 5/2-613(d) (West 2012)(Code) (affirmative defenses are to be set forth in the answer or reply). In order to avoid surprise to the opposing party, an affirmative defense must be set out completely in a party's answer to the complaint, and failure to do so results in forfeiture of the defense. *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, 53-54 (2003).

¶ 21 In the present case, the plaintiff raised the CTA's failure to comply with section 2-613(d) for the first time on appeal. Issues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). Waiver and forfeiture rules serve as admonitions to the litigants rather than a limitation upon the jurisdiction of the reviewing court, and courts of review may sometimes override considerations

of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent. *Jackson v. Board of Election Comm'rs of the City of Chicago*, 2012 IL 111928, ¶ 33; Ill. S. Ct. Rule 366(a) (eff. Feb. 1, 1994). Nonetheless, Rule 366(a) does not nullify standard waiver and forfeiture principles. The principle embodied in Rule 366(a) is not and should not be a catchall that confers upon reviewing courts unlimited authority to consider forfeited issues at will. *Jackson*, 2012 IL 111928, ¶ 33.

¶ 22 Moreover, the reasons for considering a forfeited issue, a sound and uniform body of precedent and a just result, do not support bypassing the forfeiture rule in this case. Our courts have permitted consideration of an affirmative defense even where the party failed to raise it in its answer. In *Hanley*, the defendant first raised an affirmative defense in its motion for summary judgment. The reviewing court held that the plaintiff forfeited her argument that the raising of the affirmative defense was untimely where she did not object until she moved to reconsider the grant of the summary judgment. *Hanley*, 343 Ill. App. 3d at 54; see *Morris v. City of Chicago*, 130 Ill. App. 3d 740, 745 (1985) (the defendant did not waive its affirmative defense of statutory immunity which was raised for the first time after the trial had commenced where the affirmative defense was interposed prior to the final judgment, and there was no surprise or prejudice to the plaintiff).

¶ 23 The plaintiff points out that when the parties appeared before the circuit court on November 15, 2013, on the CTA's motion to enforce the alleged oral settlement agreement, the court ordered them to submit authority for their respective positions by 5 p.m. that day and continued the case to November 20, 2013. While the plaintiff maintains that he was not given an opportunity to file a written response, there is nothing in the order to indicate that the plaintiff

requested time to file a written response. The CTA then filed an amended motion to enforce. On November 20, 2013, the court ordered the parties to provide the court with any case law "on point to the issues discussed" by December 6, 2013, and continued the case to December 20, 2013, for hearing on the CTA's amended motion to enforce the alleged oral settlement agreement. There is nothing in the record to support the plaintiff's argument that he was denied an opportunity to respond to the CTA's motion or amended motion to enforce the alleged oral settlement agreement. Therefore, the interests of a sound and uniform body of precedent or of a just result do not require us to bypass the forfeiture rule in this case.

¶ 24 We conclude that the plaintiff forfeited his objection to the CTA's failure to raise its affirmative defense of settlement in its answer to the plaintiff's complaint.

¶ 25 B. Sufficiency of the Facts Establishing the Oral Agreement

¶ 26 An oral contract is binding where there is an offer, an acceptance and a meeting of the minds as to the terms of the agreement. *Condon & Cook, L.L.C.*, 2016 IL App (1st) 151923, ¶ 56. As with any other contract, the essential terms of the settlement agreement must be definite and certain for the agreement to be enforceable. *Ramirez*, 366 Ill. App. 3d at 946. The existence of a contract, its terms and the intent of the parties are questions of fact. *In re Marriage of Gibson-Terry*, 325 Ill. App. 3d 317, 322 (2001).

¶ 27 Since a motion to enforce a settlement agreement is akin to a motion for summary judgment, the following principles guide our review. "Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006). In *de novo*

review, the reviewing court owes no deference to the decision of the lower court; instead, the court considers anew the pleadings, affidavits, depositions, admissions and exhibits on file to determine whether the lower court's decision was correct. *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001).

¶ 28 "Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied." *Seymour v. Collins*, 2015 IL 118432, ¶ 42. "[L]ike a summary judgment motion, if the court determines that there is insufficient evidence to decide summarily whether a settlement agreement exists or what its terms are, the factual dispute regarding the settlement agreement may be resolved in an evidentiary hearing or trial."*Ramirez*, 366 Ill. App. 3d at 946.

¶ 29 Initially, we are concerned with the circuit court's determination that the plaintiff decided to represent himself and therefore, the court held him to the standard of an attorney in determining that the plaintiff's "mistake" as to the terms of the settlement with the CTA was due to negligence on his part. None of the cases cited by the CTA involve pre-litigation scenarios; rather, the cases involve individuals who chose to represent themselves in pursuing an action or defending a case in our courts.

¶ 30 For example, in *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, the plaintiff represented himself both in the circuit court and on appeal. The defects in his appellant's brief prompted this court to comment: "[a] *pro se* litigant such as plaintiff here is not entitled to more lenient treatment than attorneys. In Illinois, parties choosing to represent themselves without a lawyer must comply with the same rules and are held to the same standards as licensed attorneys." *Holzrichter*, 2013 IL App (1st) 110287, ¶ 78. We quoted the following from *In re*

Estate of Pellico, 394 Ill.App.3d 1052 (2009): " 'Further, we note that *pro se* litigants are presumed to have full knowledge of applicable court rules and procedures and must comply with the same rules and procedures as would be required of litigants represented by attorneys.' " *Holzrichter*, 2013 IL App (1st) 110287, ¶ 78 (quoting Estate of Pellico, 394 Ill.App.3d at 1067). Finally we observed that "Illinois courts have strictly adhered to this principle, noting a '*pro se* litigant must comply with the rules of procedure required of attorneys, and a court will not apply a more lenient standard to *pro se* litigants.' " *Holzrichter*, 2013 IL App (1st) 110287, ¶ 78 (quoting *People v. Fowler*, 222 Ill.App.3d 157, 163 (1991).

¶ 31 In rejecting the plaintiff's argument that a material mistake occurred, the circuit court determined that in settling the claim against the CTA an attorney would take into consideration what the plaintiff's medical bills were before agreeing to a settlement amount. The court then held the plaintiff to the same level of knowledge as an attorney. We note that in the cases cited above that the reviewing courts used the term "litigant," in requiring the *pro se* individuals to adhere to the standard of attorneys. "Litigant" is defined as "[a] party to a lawsuit." Black's Law Dictionary 952 (8th ed. 2004). At the time of the meeting between the plaintiff and Mr. Cabrera, no lawsuit had been filed and therefore, the plaintiff was not yet a "litigant." Whether the plaintiff chose to represent himself in speaking with Mr. Cabrera about his claim against the CTA is a factual question not resolved by the record before the circuit court.

¶ 32 We conclude that a genuine issue of material fact exists as to whether the plaintiff knew or should have known that his medical providers would have to be paid as part of the settlement agreement when he agreed to settle the case for $2,500. Moreover, after reviewing the pleadings and exhibits, including Mr. Cabrera's affidavit, the release and the plaintiff's note on the

returned settlement check, we further conclude that a genuine issue of material fact exists as to the terms of the oral settlement agreement.

¶ 33 Mr. Cabrera's affidavit states that the parties entered into an oral agreement to settle the plaintiff's claim and that the amount was $2,500. No other facts were alleged in support of the legal conclusion that an oral agreement was created or what the terms were other than the amount of the settlement. Mr. Cabrera's affidavit made no reference to the plaintiff's medical providers being paid from the $2,500 amount. The fact that when issued the check had multiple payees and the plaintiff returned the check objecting to the multiple payees created a genuine issue of material fact as to what the terms of the oral agreement were. At the very least, a reasonable person could draw different inferences from these facts.

¶ 34 Finally, we note that the CTA did not move to enforce the alleged oral settlement agreement until two years after the date the oral agreement was allegedly entered into by the plaintiff and more than one year after the complaint was filed. Between the filing of the complaint and the filing of the motion to enforce, the CTA appeared, filed an answer, engaged in discovery and participated in an arbitration hearing on the plaintiff's claim. It was only after a trial date had been set that the CTA filed the enforcement motion. Our determination that the plaintiff forfeited his right to argue that the enforcement motion was untimely does not require this court to ignore the inference from the record that the tardiness in raising the alleged oral settlement agreement presents additional factual questions regarding its validity.

¶ 35 CONCLUSION

¶ 36 The existence of genuine issues of material fact as to the existence and terms of the alleged oral settlement agreement between the plaintiff and the CTA and what the plaintiff, as a

layperson, knew or should have know at the time the settlement of his claim was negotiated precluded summary judgment for the CTA. This case must be remanded for an evidentiary hearing to resolve these issues.

¶ 37 The order of the circuit court granting the CTA's motion to enforce an oral settlement agreement of the plaintiff's claim against it is reversed, and the case is remanded for an evidentiary hearing on the CTA's motion to enforce the oral settlement agreement with the plaintiff.

¶ 38 Reversed and remanded with directions.