2018 IL App (1st) 170062-U

FIRST DIVISION
May 14, 2018

No. 1-17-0062

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IAN J. BRAUNSTEIN, Plaintiff-Appellant, v. MITCHELL SHINER, in His Capacity as Administrator of the Estate of I. Randolph Shiner, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. No. 2007 CH 10616 Honorable Peter Flynn, Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Griffin concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary judgment for defendant affirmed on plaintiff's claims for fraudulent inducement and breach of contract. Trial court did not err in its evidentiary rulings or in vacating a default order. The will's no contest clause would have had no relevance to this case.

¶ 2 Plaintiff, Ian J. Braunstein, appeals from the trial court's grant of summary judgment in favor of defendant, Mitchell Shiner (Mitchell), in his capacity as administrator of the estate of his late father, I. Randolph Shiner (Randy). The trial court found Mitchell was entitled to summary judgment on Mr. Braunstein's claims of fraudulent inducement and breach of contract regarding

a Joint Venture Agreement (JV Agreement) he and Randy had entered into together. The JV Agreement was an agreement to buy real estate properties "through negotiation or litigation" from the estate of Randy's father, Seymour Shiner (Seymour), using Randy's expected inheritance from that estate (also to be obtained "through negotiation or litigation" in a probate action) as a down payment, with the two men (Randy and Mr. Braunstein) splitting any profits from the venture.

¶ 3 The trial court determined that any representations by Randy as to his expected inheritance were statements of opinion, not of material fact, and thus were not actionable under a fraudulent inducement theory. It also determined that the JV Agreement was a nullity: the underlying contract to buy specific real estate properties from Seymour's estate was not possible because the court had already ruled in a different case that the underlying real estate contract—between Mr. Braunstein's company, Armitage Growth Properties, LLC (AGP), and Seymour's estate (AGP Agreement)—giving rise to the JV Agreement was cancelled by Seymour's estate before the parties entered into the JV Agreement. And while the joint venture could have also purchased other properties, this was only part of the JV Agreement if Randy's inheritance exceeded $1 million, which it had not. On appeal, Mr. Braunstein asserts multiple errors he claims warrant reversal. For the following reasons, we affirm the judgment of the trial court.

¶ 4 I. BACKGOUND

¶ 5 This case involves the relationships between Mr. Braunstein and three generations of Shiners—grandfather Seymour Shiner, father (and the original defendant) Randy Shiner, and son (the substitute defendant after the death of his father) Mitchell Shiner.

¶ 6 A. The Estate of Seymour Shiner and the AGP Litigation

¶ 7 Seymour Shiner died testate in 2000. He had acquired a number of real estate properties

during his life, the interests of which he held through his 100% ownership of Creativity Circle, Inc. (CCI). Upon his death, Seymour's estate was opened in the probate court of Cook County, Illinois, No. 2000 P 010408. In his will, Seymour named four legatees—including his son Randy—each of whom would receive 25% of the shares of CCI's outstanding stock.

¶ 8 Mr. Braunstein began discussing a possible real estate transaction between AGP and Seymour's estate in November 2003 with representatives of the estate. This culminated in the AGP Agreement to purchase certain real estate properties from CCI and Seymour's estate. Under the AGP Agreement, AGP was to make an earnest money deposit of $50,000 by December 1, 2003, with a full purchase price of $9 million. AGP ultimately did not make the deposit and Seymour's estate cancelled the AGP Agreement.

¶ 9 In 2007, Mr. Braunstein and AGP filed a series of lawsuits in the circuit court of Cook County against CCI and Seymour's estate, predicated on the AGP Agreement. These cases were later consolidated (AGP litigation). On June 25, 2009, the trial court in the AGP litigation found that CCI and Seymour's estate properly cancelled the AGP Agreement in December 2003. On March 22, 2010, the trial court entered a final order dismissing the case and rendering its June 25, 2009, order final and appealable. Neither Mr. Braunstein nor AGP ever appealed the decision in the AGP litigation.

¶ 10 B. The Joint Venture Agreement

¶ 11 On April 26, 2004, Mr. Braunstein entered into the JV Agreement with Randy, predicated in part on the AGP Agreement. We quote the relevant provisions of Articles II and III of the JV Agreement here at some length because they bear on nearly all of the parties' arguments:

> "Article II – Purpose of Joint Venture
>
> 2.1 Venture.

2.1.1 The Venture, in addition to the foregoing, shall be specifically but not limited to the following purposes of the Venturers by mutual agreement:

2.1.1. The enforcement, through negotiation or litigation, of that certain Agreement for the Purchase of Real Estate by and between [AGP] ("Purchase Agreement") *** which such Purchase Agreement is attached hereto and made a part hereof as Exhibit A and the Estate of [Seymour] Shiner for the purchase of a portfolio of fourteen (14) individual real estate properties ("Properties") located at various locations in the city of Chicago, IL.

2.1.2. Obtaining the release of payment for the beneficial interest of Shiner as defined in the Last Will and Testament of Seymour Shiner, dated November 27, 1995, which such Will is attached hereto and made a part hereof as Exhibit B, in and from the Estate of Seymour Shiner, Circuit Court of Cook County, IL, Probate Case # 00 P 010408 ("Estate") through negotiation with or litigation against the Estate, the Executrix of the Estate and / or her advisors and any other parties the Venturers may deem appropriate upon advice of counsel.

2.1.3. Utilizing Shiner's expected beneficial interest for the purpose of providing equity capital to this Joint Venture and / or a succeeding operating entity ("Operating Entity") to be formed by the Venturers for the benefit of the Venturers and / or Parties to said Succeeding Operating Entity as per the same terms and conditions contained in and governed by this agreement. This succeeding Operating Entity will be created upon the successful conclusion to any negotiation and / or litigation undertaken by the Venturers and / or Parties to said succeeding Operating Entity as contemplated in Paragraphs 2.1.1. and 2.1.2.

above.

* * *

Article III – Duties and Agreements of the Parties

3.1 Assignments and Pledges.

3.1.1. Braunstein, on behalf of [AGP] hereby agrees to assign to this Joint Venture and / or the succeeding Operating Entity, upon its formation, all rights and obligations in and to the Purchase Agreement prior to Closing, as defined therein, so that title to the Properties will be taken at Closing in the name of this Joint Venture and / or the succeeding Operating Entity, in consideration of which he will receive a fifty percent (50%) ownership interest in this Joint Venture and / or the succeeding Operating Entity (whether or not said negotiation or litigation is successful), with Shiner to receive the other fifty percent (50%) ownership interest in this Joint Venture and / or the succeeding Operating Entity. Braunstein shall cause the records of [AGP] to reflect this contribution and hereby further warrants that he has the authority to make this Agreement at this time and to bind [AGP] hereby.

3.1.2. In order to purchase and obtain financing to acquire said Properties for this Joint Venture and / or the succeeding Operating Entity, Shiner hereby agrees to assign to this Joint Venture and / or the succeeding Operating Entity, all of his expected beneficial interest in the Estate, as a Capital Contribution to this Joint Venture and / or the Operating Entity in consideration of which he will receive fifty percent (50%) ownership in this Joint Venture and / or the succeeding Operating Entity with Braunstein to receive the other fifty percent

(50%) ownership interest in this Joint Venture and / or the succeeding Operating Entity.

3.1.3. In the event that said Properties are sold to other third party Purchasers for more money than this Joint Venture and / or the Operating Entity is willing to pay, or for any other reason whatsoever, and Shiner receives a cash payout from the estate, the Venturers hereby agree that Shiner will utilize said funds in excess of one million dollars ($1,000,000.00), if paid in cash, for the purpose of providing equity capital to purchase different Real Estate properties, which the Venturers will mutually agree to acquire in a like manner as per the same terms and conditions of this Agreement."

¶ 12 C. Procedural History of this Case

¶ 13 Mr. Braunstein filed this lawsuit on April 18, 2007, in the chancery division of the circuit court of Cook County, alleging in his original complaint that Randy breached the JV Agreement and committed fraud. The first amended complaint, which is operative in this appeal, was filed on August 11, 2008, and alleged three counts: (1) fraudulent inducement by Randy in misrepresenting the value of his interest in Seymour's estate and inducing Mr. Braunstein to enter the JV Agreement, all the while knowing that he, Randy, had no intention of assigning his inheritance; (2) tortious interference with contract when Randy's actions around the JV Agreement interfered with Mr. Braunstein's ability to execute a real estate contract; and (3) breach of the JV Agreement. This case was transferred, on Mr. Braunstein's motion, to Judge Peter Flynn, because he was the judge who had presided over the AGP litigation.

¶ 14 Mr. Braunstein filed a motion for a default order on November 13, 2008, based on Randy's failure to answer the first amended complaint. That motion was denied, and Randy was

granted leave to file his answer to the first amended complaint, which he did on March 6, 2009. Mr. Braunstein's second attorney subsequently was allowed to withdraw, after which Randy was granted leave to file an amended answer. Then Randy's attorney sought leave to withdraw. This carried the case to August of 2010, which was the last activity for that calendar year.

¶ 15 On its own motion, the trial court set the case for a status conference on April 8, 2011, at which time it entered a default order against Randy, apparently for his failure to appear in court multiple times or to provide the amended answer he had been given leave to file. The court scheduled a prove-up hearing on April 29, 2011. There are six orders entering and continuing the prove-up to August 19, 2011. Counsel for Mr. Braunstein appeared on September 8, 2011, and then the trial court entered an order on September 16, 2011, setting the matter for prove-up on September 23, 2011. There follows a nearly four-year gap in the record where nothing appears to have happened in the case, until Mr. Braunstein filed a motion on July 10, 2015, for prove-up and to spread Randy's death of record. Counsel for Mitchell Shiner, as putative substitute defendant, appeared on July 30, 2015.

¶ 16 Randy Shiner had died in October 2014; Randy's estate was opened and his will was later admitted to probate on February 23, 2015, in California where he had resided. The California probate court appointed his adult son Mitchell as administrator of Randy's estate. Mitchell then appeared in this case, as well as in his grandfather Seymour's probate action.

¶ 17 Mr. Braunstein sought leave to file a motion to substitute Mitchell as defendant in his capacity as Administrator of Randy's estate. Mitchell objected and also filed a motion to vacate the April 8, 2011, default order. After a hearing on January 13, 2016, the court granted the substitution over Mitchell's objection. The court also vacated the default order of April 8, 2011.

¶ 18 On February 10, 2016, Mitchell filed a verified answer and affirmative defenses, along with a motion for summary judgment. On December 9, 2016, the trial court granted summary judgment for Mitchell on counts I and III of the first amended complaint, and Mr. Braunstein voluntarily withdrew count II, making that a final order terminating the case. This appeal followed.

¶ 19 II. JURISDICTION

¶ 20 Mr. Braunstein timely filed his notice of appeal on January 6, 2017, challenging only the trial court's December 9, 2016, order. We have jurisdiction under Illinois Supreme Court Rules 301 and 303, governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 21 III. ANALYSIS

¶ 22 Mr. Braunstein is representing himself. His briefs are sometimes difficult to follow. Although the parties denominate nine issues, there are essentially four issues for us to decide: (1) whether the trial court erred by vacating the default order; (2) whether summary judgment in favor of Mitchell was proper; (3) whether the trial court misapplied the Dead Man's Act; and (4) whether we should consider "newly discovered evidence" in the form of Randy's will, which was brought into this case for the first time in an amended opening brief on appeal and, if so, whether that changes the result in this case. We address each of these in turn.

¶ 23 A. Default Order

¶ 24 Mr. Braunstein first argues that the trial court erred in vacating the default judgment against Randy. He contends that a default judgment was proper because Randy delayed proceedings in the trial court in bad faith.

¶ 25 Mitchell argues that we may not review the trial court's order of default because that

order is not separately listed on Mr. Braunstein's notice of appeal, and "any alleged error [in vacating the default order] merged into the final judgment." Mitchell insists that, as a result, we lack jurisdiction to review the order vacating the order of default. This is incorrect. We have long held that "an appeal is perfected by the filing of a notice of appeal in the trial court and that such notice of appeal shall specify the judgment from which the appeal is taken." *People v. Harvey*, 5 Ill. App. 3d 499, 502 (1972). The parties do not dispute that Mr. Braunstein timely filed a notice of appeal listing the judgment of December 9, 2016. This "is the only jurisdictional step in the appellate process." *Id*. It is our "scope of review [that] is limited *** to the judgment appealed from." *Id*. Thus, the only issue that we have to address is the proper scope of our review.

¶ 26 In doing so, we bear in mind certain principles. Notices of appeal are liberally construed. *CitiMortgage, Inc. v. Hoeft*, 2015 IL App (1st) 150459, ¶ 8. An appeal from a final judgment "draws into issue all previous interlocutory orders that produced the final judgment." *Id*. A notice of appeal is deemed to include an unspecified interlocutory order if that order was a step in the procedural progression leading to the judgment specified in the notice of appeal. *Id*.

¶ 27 We will assume that the order vacating the default was a step in the procedural progression and is properly before us. We find no abuse of the trial court's discretion that would warrant reversal. Vacating a default is appropriate under section 2-1301(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2010)), in order to achieve "substantial justice." *In re Haley D.*, 2011 IL 110886, ¶ 57.

¶ 28 The trial court in this case never entered a default judgment. Rather, it issued a default *order* on April 8, 2011. "A default order and a default judgment are two different things." *American Services Insurance Co. v. City of Chicago*, 404 Ill. App. 3d 769, 778 (2010). A plaintiff may move for entry of a default judgment pursuant to section 2-1301 of the Code if a

defendant has been served with process and "fails to enter an appearance, file pleadings or make any other response to plaintiff's complaint." *American Services*, 404 Ill. App. 3d at 778. If granted, the trial court will first enter an order of default in the plaintiff's favor and against the defendant and, after the defendant receives notice, "the trial court may hold a prove-up hearing." (Internal quotation marks omitted.) *Id.*

¶ 29 Under section 2-1301(e), the trial court "may in its discretion, before final order or judgment, set aside any default." 735 ILCS 5/2-1301(e) (West 2010). The "overriding consideration" in a trial court's decision to vacate a default order is "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." *Haley D.*, 2011 IL 110886, ¶ 57. As our supreme court noted in *Haley D.*, in exercising discretion the trial courts "must be mindful that entry of default is a drastic remedy that should be used only as a last resort. [Citation.] The law prefers that controversies be determined according to the substantive rights of the parties. [Citation.]" *Id.* ¶ 69.

¶ 30 In this case, the trial court entered the default order on April 8, 2011, and set the matter for prove-up on April 29, 2011. The record reveals a series of continuances to September 2011, followed by a nearly four-year gap, during which the original defendant, Randy, died. Mr. Braunstein filed a motion for prove-up and to spread Randy's death of record on July 10, 2015. After the trial court spread the death of record, it granted Mr. Braunstein leave to file a motion to substitute defendants, which he did. Mitchell filed responses to the motions for substitution and for prove-up, along with his own motion to vacate the April 8, 2011, default order. The trial court heard argument and vacated the default order on January 13, 2016.

¶ 31 At the hearing in which it vacated the default order, the trial court initially noted that

"there was a four-year period during which *** plaintiff didn't do anything about the prove up either." In granting the motion to vacate the default order, the trial court relied on our supreme court's decision in *Haley D.*, 2011 IL 110886, ¶ 57, reasoning that it wanted "to make sure that the merits of this are fairly presented," and that "the law prefers that controversies be determined according to the substantive rights of the parties," rather than by a default. We find no abuse of discretion in the trial court's finding that the vacatur was done for "substantial justice." *Id.* The fact, which Mr. Braunstein emphasizes in his amended brief, that "Randy Shiner was a practicing attorney *** and certainly knew of the potential ramifications of a default judgment," does not change this analysis. The trial court allowed both the motion to substitute Mitchell and to vacate the default so that it could consider the merits of this case. This was in keeping with our supreme court's emphasis on achieving "substantial justice."

¶ 32 Mr. Braunstein's additional contention in his amended brief—that vacating the default "was improper because the petition to vacate was not filed within the required 2 year period as set forth in 735 ILCS 5/2-1401"—draws on the incorrect statute. As stated above, the trial court issued a default order, not a final default judgment, on April 8, 2011. Such orders are governed by section 2-1301(e), not section 2-1401, of the Code. 735 ILCS 5/2-1301(e) (West 2010) ("The court may in its discretion, before final order or judgment, set aside any default ***.")

¶ 33 B. Summary Judgment for Mitchell Shiner

¶ 34 On December 29, 2016, the trial court granted summary judgment to Mitchell on counts I (fraudulent inducement) and III (breach of contract). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). "A party opposing a motion

for summary judgment cannot rest on its pleadings if the other side has supplied uncontradicted facts that would warrant judgment in its favor [citations], and unsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact." *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 20. Our standard of review on summary judgment is *de novo*. *Emerson Electric Co. v. Aetna Casualty & Surety Co.*, 281 Ill. App. 3d 1080, 1083 (1996).

¶ 35 Fraudulent inducement is a form of common-law fraud, and to prove such a claim a plaintiff must show (1) a false statement of material fact by the defendant, (2) knowledge or belief by the defendant that the statement was false, (3) that the defendant intended to induce the plaintiff to act, (4) the plaintiff's reasonable reliance upon the truth of the statement, and (5) damage to the plaintiff resulting from this reliance. *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15. Notably, "[t]he basis of a fraud or negligent misrepresentation claim must be a statement of fact, not an expression of opinion." *Id.* ¶ 17.

¶ 36 Count I of Mr. Braunstein's first amended complaint alleged that Randy "misrepresented the value of his interest in the estate [of Seymour] and his willingness to assign this value for the consideration given by [Mr. Braunstein]"; "knew that he would be unable to fund the Joint Venture pursuant to the Agreement" due to an illness the treatment of which would require significant resources; and "stated his intention to enter into the [JV Agreement], both orally and as evidenced by his signature upon the Agreement and *** the Ratification." Mr. Braunstein alleged that Randy "thus made specific and explicit promises to [Mr. Braunstein] regarding entry into [the JV Agreement] and the assignment of his interest in the Estate to that [JV Agreement]"; Randy knew the promises were false, misrepresented his intention to perform on the JV Agreement, and terminated all communications with Mr. Braunstein; Randy knew that his

misrepresentations as to the value of his interest would induce Mr. Braunstein to enter into the JV Agreement; and Mr. Braunstein did in fact enter the JV Agreement upon his reliance on Randy's statements and promises. Mr. Braunstein finally claimed he was "damaged in that neither he nor the entity he manages was able to purchase the Estate properties and realize half the profits from their eventual sale in accordance with the terms of [the JV Agreement]."

¶ 37 Mitchell moved for summary judgment on count I, arguing before the trial court—as he does on appeal—that (1) "the alleged fraudulent statements were non-actionable statements of opinion and future conduct," rather than "material facts"; and (2) "there were no actual damages proximately caused by the alleged fraud" because the trial court in the AGP litigation had previously entered a final judgment finding that the AGP Agreement was cancelled before the parties ever entered into the JV Agreement.

¶ 38 The trial court concluded that the alleged fraudulent representations as to the expectancy of Randy's inheritance or the future conduct of the joint venture were not the type of representations upon which a party could reasonably rely and they could not, therefore, support a fraud claim. We agree.

¶ 39 According to Mr. Braunstein's first amended complaint, the alleged fraud consisted of Randy's financial projections of the amount of his expected inheritance from his father's estate and promises of what Randy would do under the JV Agreement. These statements, even if made, cannot support a claim for fraud because a future financial projection is an opinion, not a statement of fact; and a promise to do something in the future, while it might support a contract claim, is not a statement of present fact that is actionable as fraud. *Avon Hardware*, 2013 IL App (1st) 130750, ¶ 17; *Abazari v. Rosalind Franklin University of Medicine and Science*, 2015 IL App (2d) 140952, ¶ 15. Thus, summary judgment was properly entered on count I.

¶ 40 The essential elements of a breach of contract in count III were (1) the existence of a valid and enforceable contract, (2) performance by the plaintiff, (3) breach of the contract by the defendant, and (4) a resultant injury to the plaintiff. *Babbitt Municipalities, Inc. v. Health Care Service Corp.*, 2016 IL App (1st) 152662, ¶ 27.

¶ 41 Count III of Mr. Braunstein's first amended complaint alleged that he "agreed to cause $50,000.00 to be loaned to [Randy] Shiner" in consideration of which Randy entered into the JV Agreement and "assigned all of his expectancy in the Estate" to the agreement, allegedly valued at more than $2 million, to "be used to purchase the Estate Properties" or "in the alternative the replacement properties." Mr. Braunstein also alleged that he actually "caused the $50,000.00 to be loaned to [Randy] Shiner"; that Randy "did not assign his interest" and instead "refused to fund the [joint venture] or perform in accordance with any other terms of the contract"; and that this breach substantially damaged Mr. Braunstein, in that he "was unable to realize his shares of the profits that would have resulted from the purchases and eventual sale of the Estate properties or other similar residential and/or commercial properties."

¶ 42 Mitchell moved for summary judgment on count III on the grounds that (1) there was no valid and enforceable contract, (2) Mr. Braunstein did not perform on the JV Agreement, (3) Randy's alleged obligations under the agreement were discharged, and (4) Mr. Braunstein could not show the alleged breach proximately caused him damages because the AGP Agreement was cancelled and the two parties never mutually agreed to acquire any other properties under the JV Agreement.

¶ 43 The trial court granted summary judgment to Mitchell on count III, noting that:

> "What we have with this agreement, assuming that the parties entered into it and assuming that it is what Mr. Braunstein says it is, is a total failure on both

> sides. The agreement was an agreement to buy litigation on both sides. On one side litigation over the [AGP] Agreement for the purchase of real estate [from Seymour's estate]. On the other side litigation over the value of [Randy] Shiner's interest in the estate. We know that the litigation over the [AGP Agreement] didn't go anywhere. This court entered an order that said the [AGP Agreement] was a dead duck. It had been canceled before this [JV Agreement] was ever entered into. *** The other side is [Randy] Shiner's interest in the estate of Seymour Shiner. The only thing we really need to know about that for purposes of this [JV Agreement] is it never got anywhere near $1 million in cash [distribution from the estate].
>
> * * *
>
> The venture *** didn't have anything in it. There was never a succeeding operating entity because under 2.1.3 the succeeding operating entity was only going to be created [], 'Upon the successful conclusion to any negotiation and/or litigation undertaken by the venturers and/or parties to said succeeding operating entity as contemplated in paragraphs 2.1.1 [concerning the AGP Agreement to purchase real estate] and 2.1.2 [concerning the release of Randy's interest in Seymour's estate],' *** neither of which happened. This thing never got off the ground."

¶ 44 Although we owe no deference to the trial court's reasoning in a *de novo* review (*Emerson Electric*, 281 Ill. App. 3d at 1083), in this case we agree fully with the court's construction of the JV Agreement and its conclusion that Randy never had an obligation under that agreement.

¶ 45 The trial court in the AGP litigation found (in a final order entered on June 25, 2009 that was not appealed) that the agreement AGP had entered into to purchase real estate from Seymour's estate was cancelled on December 10, 2003, because AGP did not deposit earnest money by the stipulated deadline in that agreement. That June 25, 2009, ruling rendered section 2.1.1 of the JV Agreement, which was to purchase the properties promised to AGP in the AGP Agreement, a nullity. There simply were no properties that AGP had a right to purchase.

¶ 46 The other aspect of the JV Agreement, articulated in section 2.1.2, was to obtain Randy's beneficial interest in Seymour's estate, to be used according to sections 3.1.2 and 3.1.3 to buy properties from that estate. Section 3.1.2 was limited to buying properties that were part of the AGP Agreement and therefore was a nullity because there was no enforceable AGP Agreement. Section 3.1.3 was not limited to the properties in the AGP Agreement, but that provision only requires that the JV Agreement be supplied with funds for the purchase of these other properties to the extent that Randy got a payout from his father's estate "*in excess of one million dollars* ($1,000,000.00)." (Emphasis added.)

¶ 47 The record reveals that, in fact, Randy received less than $160,000 in disbursements from Seymour's estate. Therefore, there was no obligation to use proceeds of the estate to purchase this other real estate. While, in theory, Randy could continue to get disbursements from his father's estate, section 10.1.3 of the JV Agreement provides that the agreement "shall be terminated on the earlier to occur of" either the "mutual agreement of all of the parties," "[a]ny act or event that makes the continuation of the business of the Venture *** impracticable," or "April 26, 2014." Thus, the JV Agreement terminated over two years before summary judgment was granted, making any further disbursements from Seymour's estate irrelevant to Randy's obligation to fund the JV Agreement under section 3.1.3.

¶ 48 Mr. Braunstein makes a series of arguments regarding what he claims was the trial court's misunderstanding of the JV Agreement. We will address these arguments to the extent that we can comprehend them. Mr. Braunstein argues that the trial court incorrectly assumed that the JV Agreement "only began upon receipt of $1 million dollars." But section 3.1.3 of the JV Agreement is clear that "[Randy[Shiner will utilize said funds in excess of one million dollars ($1,000,000.00), if paid in cash, for the purpose of providing equity capital to purchase" different real estate properties, by mutual agreement of the parties. While the JV Agreement could have also been implemented through the AGP Agreement, without an inheritance of over $1 million, the AGP Agreement had become a nullity before the JV Agreement began.

¶ 49 Mr. Braunstein also argues that the trial court "erred in concluding that the Joint Venture did not have anything in it to operate or control," because "Randy's 25% of the estate of Seymour Shiner was in the agreement pursuant to 3.1.2 *** to operate or control." While Mr. Braunstein is quite right that section 3.1.2 obligates Randy to assign "all of his expected beneficial interest" in his father's estate, that obligation was meaningless because there was no AGP Agreement for the joint venture to enforce and any obligation to purchase properties other than those in the AGP Agreement was contingent on Randy inheriting more than $1 million, which did not happen.

¶ 50 Mr. Braunstein argues that the trial court erred when it concluded that the only way he could obtain any property under the JV Agreement was by " 'doing a deal' with the estate of Seymour Shiner" because, according to Mr. Braunstein, the JV Agreement was "not limited to just the Seymour Shiner properties." Mr. Braunstein is again correct that the joint venture could have acquired other properties (not within the AGP Agreement) under section 3.1.3, but as noted above, that only came into effect if Randy inherited more than $1 million.

¶ 51 Section 6.1 of the JV Agreement provides that the joint venture continues after the death of one party and grants certain rights to the surviving member. Mr. Braunstein relies on this section to claim that the JV Agreement established him as trustee upon Randy's death and that there was a breach of that provision. The trial court rejected this argument on the basis that the JV Agreement did not meet the formalities of a will. We further note that, by the very terms of the JV Agreement at section 10.1.3, it terminated on April 26, 2014, before Randy's death in October 2014. The JV Agreement could not then, as Mr. Braunstein frames it, "establish[] the Plaintiff as trustee upon Randy Shiner's death" or "be a part and parcel" to Randy's will.

¶ 52 C. Dead Man's Act

¶ 53 Mr. Braunstein argues that the trial court erred when it "denied the [Rule 191] affidavit at the hearing [on Mitchell's motion for summary judgment] submitted by Plaintiff, concluding it violated the Dead Man's Act" without specifying "what portions were admitted and what were denied." The Dead Man's Act provides, with a few specific exceptions, that in "any action in which any party sues or defends as the representative of a deceased person," no adverse party "shall be allowed to testify on his or her own behalf to any conversation with the deceased *** or to any event which took place in the presence of the deceased." 735 ILCS 5/8-201 (West 2016). "The purposes of the Act are to protect decedents' estates from fraudulent claims and to equalize the position of the parties in regard to the giving of testimony." *Gunn v. Sobucki*, 216 Ill. 2d 602, 609 (2005). Whether a trial court erred in admitting or denying testimony about conversations that Mr. Braunstein says he had with a dead person is an evidentiary issue we review for an abuse of discretion. *Beard v. Barron*, 379 Ill. App. 3d 1, 9 (2008).

¶ 54 Mr. Braunstein proffered his Rule 191 affidavit on the day of the hearing on the motion for summary judgment. The affidavit describes several conversations in which Randy allegedly

agreed to certain things about the joint venture litigation. In particular, the affidavit states that "Randy Shiner agreed to a default judgment in my favor" and agreed "to toll the enforcement of the agreement *** until such time as the real estate market improved," and that "[a]t that time I [Mr. Braunstein] was unable to locate buyers in that Real Estate environment" and so "Randy stated he did not wish to further litigate and incur any additional expense, denying the JV contract that he had in fact entered into." These particular alleged conversations with Randy certainly violate the Dead Man's Act in that they are claims against the decedent's estate "which the decedent could have refuted." *Gunn*, 216 Ill. 2d at 609.

¶ 55 Mr. Braunstein now argues that the trial court "summarily concluded that the affidavit violated the [Dead Man's] Act but failed to state what portions, if any, did so." In fact, however, the trial court did not summarily deny or strike Mr. Braunstein's Rule 191 affidavit. When Mr. Braunstein presented the late-filed affidavit, the court cautioned that "[a]ffidavits in support of or opposition to a motion for summary judgment must constitute admissible evidence," and that an affidavit that violates the Dead Man's Act "is obviously not admissible evidence." When Mitchell's counsel asked the trial court whether it would "entertain" Mitchell's motion to strike the affidavit, the court stated that it would not because it had not "had a chance to read it." The court further stated: "If it says anything which is admissible, then it can be considered for whatever it's worth. My point is simply that to the extent that it says things that aren't admissible [under the Dead Man's Act], they don't count." Considering the lateness of the affidavit and its contents, the trial court was being more than generous to Mr. Braunstein by admitting the document and disregarding those portions which clearly offended the Act. Mr. Braunstein does not point to any admissible portions of the affidavit that he claims the trial court disregarded.

¶ 56 Mr. Braunstein also argues, although he did not make this argument at all in the trial

court, that Mitchell "opened the door" to the Dead Man's Act when his counsel "participated and questioned Randy Shiner's attorney, Milton Tornheim during deposition regarding the event (the JV Agreement)." Setting aside Mr. Braunstein's forfeiture of this argument (see *Lajato v. AT & T, Inc.*, 283 Ill. App. 3d 126, 136 (1996), noting that "contentions not raised in the trial court are [forfeited] on appeal, even in a summary judgment case"), Mr. Braunstein is mistaken. The record reveals that Mitchell did not draw on the testimony of any witness in support of summary judgment as to the late Randy's conversations with Mr. Braunstein; the only deposition attached to Mitchell's motion was that of Mr. Braunstein himself. Deposition statements that have not been introduced as evidence to support summary judgment do not "open the door." *Gleneke v. Lesny*, 130 Ill. App. 2d 116, 118 (1970).

¶ 57 For a similar reason, we reject Mr. Braunstein's claim that Mitchell forfeited any application of the Dead Man's Act "when he changed Randy Shiner's answers in pleadings." Pleadings are not testimony and cannot "open the door" to evidence rendered incompetent by the Dead Man's Act. See *Coley v. St. Bernard's Hospital*, 281 Ill. App. 3d 587, 593 (1996) (noting that pleadings are not evidence).

¶ 58 D. Randy Shiner's Will

¶ 59 Before his reply brief was due in this court, Mr. Braunstein sought leave to supplement the record with Randy's will and two other documents from the California probate action regarding Randy's estate. He also sought leave to amend his appellate brief to include citations to these new materials. We granted him leave to do so and granted Mitchell leave to respond to that amended brief.

¶ 60 Mr. Braunstein claims that Randy's will, is "newly discovered evidence *** invalidat[ing] (a) all of the actions of Decedent Administrator and (b) all of the above actions of

the [trial court], therefore entitling Plaintiff to an order as to the relief he has requested." This argument is raised for the first time in Mr. Braunstein's amended opening brief on appeal. Mr. Braunstein argues the will contains a "no contest" clause that applies to the JV Agreement, and the will "was never disclosed by the Estate or Randy Shiner until it was attach[ed] as an exhibit to a motion" filed in the California probate court.

¶ 61 The proper vehicle for Mr. Braunstein to try to introduce Randy's will into this case after the trial court's ruling would have been for him to petition for post-judgment relief through section 2-1401 of the Code. 735 ILCS 5/2-1401 (West 2016); *In re Marriage of Lyman*, 2015 IL App (1st) 132832, ¶ 55 ("The purpose of a section 2-1401 petition is to bring before the court facts not appearing in the record, which, if known at the time of the entry of judgment, would have prevented its rendition.").

¶ 62 The fact that the will was never presented in the trial court need not necessarily preclude our consideration of the will on appeal, however. In certain circumstances, "[a]n appellate court may take judicial notice of readily verifiable facts if doing so will aid in the efficient disposition of a case, even if judicial notice was not sought in the trial court." (Internal quotation marks omitted.) *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶ 37; see, *e.g.*, *Muller v. Zollar*, 267 Ill. App. 3d 339, 341-42 (1994) (taking judicial notice of Illinois Department of Professional Regulation's letter to a college indicating that its nursing program was denied accreditation, where authenticity was not in question and the letter would "aid in the efficient resolution of this case").

¶ 63 For the efficient disposition of this case, we will take judicial notice of Randy's will. The will is publicly available as part of the California probate case concerning Randy's estate and neither party questions its authenticity.

¶ 64 Mr. Braunstein argues that the "no contest" clause in section 7 of the will "applies to all instruments that Randy authored, including the Joint Venture." Mr. Braunstein argues that the "no contest" clause prohibits litigation around any agreement that Randy authored, including the JV Agreement, by any heir of Randy's. Mr. Braunstein cites California cases from half-a-century ago, interpreting different (and outdated) provisions of the California Probate Code (*Estate of Kazian*, 59 Cal. App. 3d 797 (1976); *In re Howard's Estate*, 68 Cal. App. 2d 9 (1945)), for the general rule that "California upholds no contest clauses" and has "historically enforced no contest clauses against beneficiaries making such claims," so long as the will demonstrates that is what the decedent plainly intended. We find nothing in Randy's will that demonstrates that Randy "plainly intended" that his son should not continue to defend the claims that he had defended before he died. But under current California law, it does not matter.

¶ 65 California law provides that "no contest" clauses "shall only be enforced against the following types" of contests: (1) a direct contest brought without probable cause; (2) a challenge to the transfer of property on the grounds that it was not the transferor's property at the time of the transfer, and only if that the "no contest" clause in question expressly provides for that application; and (3) a creditor's claim or prosecution of an action based on it, again only if expressly provided in the "no contest" clause. Cal. Probate Code § 21311 (West 2016). Mitchell's defense in this litigation does not fall under any of these three types of cases. Thus, Randy's will and its "no contest" provision have absolutely no impact on the result in this case.

¶ 66 IV. CONCLUSION

¶ 67 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 68 Affirmed.