2012 IL App (2d) 111106-U
No. 2-11-1106
Order filed February 10, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT M. GOVENAT, JAN A. GOVENAT, and MILDRED MIHALIK,	)	Appeal from the Circuit court of Kane County.
Plaintiffs-Appellees,	)	
v.	)	No. 11-L-235
MADISON AVENUE SECURITIES, INC.,	)	
Defendant-Appellant	)	
(Equitrust Life Insurance Co. and Algird M. Norkus, Defendants; Peter John Pflanzer, Oakwood Financial Services, Inc., and Asset Marketing Systems Insurance Services, LLC, Respondents in Discovery).	)	Honorable Robert B. Spence, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court erred in denying Madison Avenue Securities, Inc.'s motion to compel arbitration on procedural grounds where plaintiffs judicially admitted the existence of the agreement to arbitrate attached to the motion to compel.

¶ 1 Defendant, Madison Avenue Securities, Inc. (MAS), appeals from an order of the circuit court of Kane County denying its section 2-619(a)(9) motion to dismiss plaintiffs' complaint and to

compel arbitration. For the reasons that follow, we reverse and remand to the trial court for further proceedings.

¶ 2 BACKGROUND

¶ 3 On April 29, 2011, plaintiffs, Robert M. Govenat, Jan A. Govenat, and Mildred Mihalik, filed an 18-count complaint against MAS, Equitrust Life Insurance Co., and Algird M. Norkus alleging that Norkus, while he was associated with MAS as a broker of financial and insurance products, defrauded plaintiffs of hundreds of thousands of dollars. On June 24, 2011, MAS filed a "Motion to Compel Arbitration." The motion recited that it was brought pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2010)) and in accordance with the Illinois Uniform Arbitration Act (710 ILCS 5/1 *et seq*. (West 2010)) and the Federal Arbitration Act (9 U.S.C. § 1 *et seq*. (West 2010.)) In the motion, MAS requested dismissal of the complaint with prejudice and an order "compelling resolution of all of [p]laintiffs' claims against MAS by arbitration." The motion alleged that plaintiffs opened an account with MAS on June 11, 2006, at which time they executed a MAS New Account Form. Attached as an exhibit to the motion was a New Account Form purportedly signed by plaintiff Robert M. Governat. The following admonishment appears at the top of the signature page: "This New Account Form contains a provision, as follows, which requires that all claims arising out of transactions or activities affecting the Client's account be resolved through arbitration." The form then described in detail that the parties to the agreement were giving up their right to sue each other in court and how the arbitration procedure worked. The motion alleged that the New Account Form attached as an exhibit was a true and correct copy, but MAS did not provide an affidavit otherwise authenticating the exhibit.

¶ 4 Plaintiffs, through their attorney, filed an unverified written response to MAS's motion. In the introduction to their response, plaintiffs wrote:

> "First, Robert Govenat's claims should not be submitted to arbitration because only he contracted to submit his individual claims to arbitration, not those jointly owned with his wife. Moreover, neither Jan Govenat, nor Mildred Mihalik, are contractually bound to arbitrate any of their claims against MAS."

Section I of the response is titled as follows: "Robert Govenat's Claims Should Not Be Submitted to Arbitration, as the Arbitration Agreement Only Encompasses his Individual Claims, not Joint Claims." In the body of section I, plaintiffs state that at the time they filed their complaint, MAS had represented to their counsel that there was no arbitration agreement. Plaintiffs then state:

> "Although MAS has since come forward with an arbitration agreement for Robert Govenat, Mr. Govenat only contracted to submit his individual claims to arbitration related to his IRA account, not those jointly owned with his wife."

Plaintiffs went on to state:

> "In support of its motion to compel arbitration, the Defendant attached a copy of the arbitration provisions for Madison Avenue Account No. *** in the name of CB&T Custodian of IRA for Robert M. Govenat. Robert Govenat signed this agreement in June 2006 when he transferred his IRA to MAS."

In a further paragraph, plaintiffs state: "Robert Govenat contracted to arbitrate his individual claims with MAS. However, he did not contract to arbitrate claims on behalf of investments that he makes jointly with his wife."

¶ 5 MAS filed a written reply to plaintiffs' written response. Attached to the reply are exhibits A through D, which are documents that apparently pertain to financial transactions between the parties. MAS provided no affidavits authenticating those exhibits.

¶ 6 The trial court conducted a hearing on MAS's motion to compel arbitration on October 12, 2011. No court reporter was present. The parties stipulated to, and the trial court certified, a bystanders report. According to the bystanders report, the following occurred. No witnesses testified, nor did the parties present other evidence. MAS first summarized the issues presented to the court in the parties' written memoranda and then argued the merits of its motion to compel arbitration. Plaintiffs then argued the insufficiency of MAS's motion, in that, contrary to the requirements of section 2-619(a), the exhibits attached to MAS's motion and reply were not supported by affidavits. The trial court agreed with plaintiffs that it could not consider the exhibits. The court, therefore, did not consider the arbitration agreement attached to the motion and denied the motion. MAS requested leave to file a new motion, which the trial court also denied.

¶ 7 MAS filed a timely motion to reconsider, but filed its notice of interlocutory appeal before the trial court ruled on the motion to reconsider. MAS brings this appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. February 26, 2010). Rule 307(a)(1) allows an appeal from an interlocutory order granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction. *Craine v. Bill Kay's Downers Grove Nissan*, 354 Ill. App. 3d 1023, 1025 (2005). An order denying a defendant's motion to compel arbitration is appealable as an injunction under Rule 307(a)(1). *Craine*, 354 Ill. App. 3d at 1025.

¶ 8 ANALYSIS

¶ 9 MAS first argues that the trial court erred in denying the motion to compel arbitration because of the insufficiency of the motion. MAS asserts that the motion was brought pursuant to the Illinois and federal arbitration acts, which do not require an affidavit supporting claims that do not appear on the face of the pleading being attacked. This argument is untenable. A motion to compel arbitration and dismiss a lawsuit is essentially a motion brought pursuant to section 2-619(a)(9) to dismiss based upon the exclusive remedy of arbitration. *Griffith v. Wilmette Harbor Ass'n, Inc.*, 378 Ill. App. 3d 173, 179-80 (2007). In our case, the motion clearly and unequivocally stated that it was a motion to dismiss the complaint brought pursuant to section 2-619(a)(9) of the Code, and the relief requested was dismissal with prejudice and to compel arbitration.

¶ 10 Section 2-619 provides that a defendant may, within the time for pleading, file a motion for dismissal upon any of the grounds enumerated therein. Subsection (a)(9) allows a defendant to move to dismiss on the basis that the claim is barred by "other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). In this case, the "other affirmative matter" barring the claim was the agreement to arbitrate. Section 2-619 further provides that if "the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit." 735 ILCS 5/2-619(a) (West 2010). The complaint alleged that plaintiffs invested in financial products sold to them by MAS's representative, Norkus, and specifically alleged that Norkus convinced plaintiffs to invest in certain "Corporate Agreements," which he falsely misrepresented were safe investments similar to annuities but with a higher guaranteed rate of return. However, the complaint did not allege the existence of any written contractual agreements between plaintiffs and MAS. Nothing in the complaint referred to an agreement to arbitrate. Consequently, the grounds for MAS's attack on the complaint do not appear on the face of the complaint. Where

the grounds for dismissal do not appear on the face of the pleadings, section 2-619(a) mandates that the motion "shall be supported by affidavit." 735 ILCS 5/2-619(a) (West 2010); *Doe v. Montessori School of Lake Forest*, 287 Ill. App. 3d 289, 295-96 (1997). Accordingly, MAS was required to support its claim that the New Account Form was affirmative matter barring the lawsuit with an affidavit. On review, we do not defer to the trial court's ruling on a section 2-619 motion to dismiss, but we consider the issue *de novo*. *Buckner v. O'Brien*, 287 Ill. App. 3d 173, 177 (1997).

¶ 11 To say that MAS had to support its motion with an affidavit does not end our inquiry because the Code needs to be construed liberally to fulfill its purpose of providing substantial justice and resolution on the merits, rather than imposing seemingly insurmountable procedural obstacles to litigation. *Doe*, 287 Ill. App. 3d at 296. MAS contends that plaintiffs judicially admitted the existence of the agreement between MAS and Robert M. Govenat to arbitrate in their written response to the motion to compel arbitration, which was filed on August 17, 2011. MAS urges that it was "sandbagged" when plaintiffs waited to raise the procedural objection orally for the first time at the hearing on October 12, 2011.

¶12 Judicial admissions are formal acts by a party or his attorney for the purpose of dispensing with proof by the opposing party of some fact claimed by the latter to be true. *Feret v. Schillerstrom*, 363 Ill. App. 3d 534, 539 (2006). Judicial admissions are defined as "deliberate, clear, unequivocal statements" by a party about a concrete fact within that party's knowledge. *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 468 (2009). In order to constitute a judicial admission, a statement must not be a matter of opinion, estimate, appearance, inference, or uncertain summary. *Smith*, 394 Ill. App. 3d at 468. It must be an intentional statement that relates to concrete facts. *Smith*, 394 Ill. App. 3d at 468. An admission in an unverified pleading signed by an attorney is binding on the party as a

judicial admission. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 558 (2005). Here, the filing of the written response to the motion to compel arbitration was a formal act. In the response, plaintiffs stated unequivocally and clearly five times that Robert M. Govenat contracted to submit his individual claims to arbitration. Whether Robert M. Govenat signed the document was a fact within his knowledge. Plaintiffs argue that the statements were made merely in the context of their argument in opposition to the motion to compel arbitration. However, if Robert M. Govenat had not executed the document, or did not recall executing it, or claimed it was a forgery, plaintiffs could have said so. We also reject plaintiffs' argument that they merely failed to deny the existence of the arbitration agreement. Plaintiffs acknowledged in their written response that MAS came forth with an arbitration agreement, which Robert M. Govenat signed. Plaintiffs clearly and unequivocally admitted the existence of the document, which had the effect of withdrawing that fact from issue. See *Knauerhaze*, 361 Ill. App. 3d at 557-58 (2005) (judicial admissions have the effect of withdrawing a fact from issue and dispensing with the need for proof of the fact). Thus, the trial court erred in ruling that it could consider only the allegations of the complaint and not the arbitration agreement. However, we agree with plaintiffs that the legal effect of the document, that is, whether it required arbitration of some or all of plaintiffs' claims, was not admitted.

¶ 13 Having determined that the trial court should not have denied the motion to compel arbitration on procedural grounds, it is not necessary for us to consider MAS's argument that the trial court should have allowed it to file a new motion.

¶ 14 Plaintiffs contend that MAS forfeited the argument that plaintiffs made judicial admissions by raising it for the first time on appeal. We are mindful of the procedural posture in which plaintiffs placed MAS, a result of what MAS terms plaintiffs' "gamesmanship." Plaintiffs were aware as of

June 24, 2011, when MAS filed the motion to compel arbitration, that the New Account Form attached to the motion was unsupported by affidavit. Nevertheless, plaintiffs did not raise this procedural difficulty in their response but deliberately admitted the existence of the document at least five times while denying its legal significance. MAS then filed a reply in which it appended more documents without a supporting affidavit. Aware of this, plaintiffs did not move to strike the documents but waited until the commencement of the hearing on October 12, 2011, to make an oral objection of which MAS had no notice. Once the trial court ruled in plaintiffs' favor and denied MAS's request to file a new motion, the horse had left the barn. MAS had no further opportunity to raise the issue before the trial court. Neither party is blameless, as MAS failed to adhere to an important procedural rule. However, the doctrine of forfeiture is an admonishment to the parties, not a limitation on this court. *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 800 (2009). Under the circumstances, we decline to apply the doctrine of forfeiture.

¶ 15 MAS argues the merits of its motion to compel arbitration in its brief, and plaintiffs have answered those arguments. However, because the trial court never ruled on the merits, this court cannot decide the merits in the first instance. Plaintiffs' position that we should not remand for a hearing on the merits because MAS had its opportunity to present evidence and did not do so is misplaced. Plaintiffs erroneously precluded the trial court from considering the merits. Accordingly, we remand this cause to the circuit court for further proceedings on MAS's motion to compel arbitration.

¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed, and the cause is remanded for further proceedings consistent with this Order.

¶ 18 Reversed and remanded.