2013 IL App (2d) 120118-U
No. 2-12-0118
Order filed May 2, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JEFFREY HARTNEY,	)	Appeal from the Circuit Court
	)	of DuPage County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09 L 1073
	)	
ROBERT BEVIS	)	Honorable
	)	Dorothy F. French
Defendant-Appellee.	)	Judge, Presiding

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: In suit to collect on a promissory note, where the trial court struck defendant's affirmative defense of lack of consideration but retained his defense of duress, and where the court later admitted evidence of the parties' prior financial dealings with the express limitation that it would consider that evidence only as it showed the history of the parties' relationship, the court erred in ultimately relying on that evidence to conclude that there was no debt underlying the note and that, therefore, defendant would have signed the note only if compelled by external pressure. Accordingly, the judgment of the trial court is reversed and the cause is remanded.

¶ 2 Following a bench trial, the court entered judgment against plaintiff, Jeffrey Hartney, and in favor of defendant, Robert Bevis, on plaintiff's complaint to collect on a promissory note. Plaintiff appeals. We agree with him that the trial court, having struck defendant's affirmative defense of lack

of consideration for the promissory note, erred when it exceeded the scope of its prior evidentiary ruling and considered evidence of the parties' prior financial dealings as establishing that the note was not supported by consideration. Therefore, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 Plaintiff filed his complaint in August 2009. He sought to enforce a promissory note (Note) in the amount of $131,200. A copy of the Note was attached to the complaint. Defendant's notarized signature on the Note is dated July 3, 2009.

¶ 5 Defendant filed his first answer in December 2009. He generally denied knowledge of the Note but, inconsistently, pled two affirmative defenses disputing the amount of the Note. Defendant labeled the defenses only as "Count I" and "Count II." Count I alleged that, in February 2006, defendant was the sole owner of Tooth Bright, Inc., an Illinois corporation. On February 22, 2006, plaintiff purchased 5% of defendant's stock in Tooth Bright for the sum of $50,000. Count II alleged that, in 2006, plaintiff's brother, Scott J. Hartney, loaned defendant the sum of $50,000. Defendant asserted that the Note "improperly and fraudulently" included the two $50,000 sums, and, therefore, that the sum of $100,000 "should be subtracted from any debt that might be found to be due from the Defendant to the Plaintiff."

¶ 6 Plaintiff moved to strike the answer, arguing that the affirmatives defenses were insufficient because they cited events "unrelated" to the Note. In response, defendant withdrew the answer.

¶ 7 In February 2010, defendant filed his second answer. Defendant now admitted that he signed the Note, but only after he and his family were threatened by plaintiff, who is "possessed of a violent, vicious[,] and ungovernable temper." Defendant again raised two affirmatives defenses labeled "Count I" and "Count II." Count I essentially restated count I from the first answer, but added more

details about plaintiff's investment in Tooth Bright. Count II expanded the former count II by alleging that plaintiff discussed his investment in Tooth Bright with his brother Scott and that, subsequently, defendant received a check from Scott for $50,000. Defendant, as in his first answer, alleged that the Note "improperly and fraudulently" included the two sums of $50,000 alleged in the two counts. Accordingly, defendant asked that the trial court subtract $100,000 from any indebtedness that defendant was found to owe plaintiff.

¶ 8 Plaintiff likewise moved to strike the second answer. He argued that defendant was citing "unrelated transactions that occurred prior to the execution of the Note" and relying impermissibly on parol evidence to alter the unambiguous terms of the Note. The trial court, without stating its reasons, struck the affirmative defenses and gave defendant leave to file another answer.

¶ 9 In July 2010, defendant filed his third answer, and again brought two counts as affirmatives defenses. He alleged duress not only in his general averments, but also in count I of his affirmative defenses. Count I included more details than before about defendant's association with plaintiff. Defendant alleged in part:

> 5. On or about February 22, 2006, the Plaintiff *** purchased from the Defendant 5% of the corporate stock of Tooth Bright *** for the sum of $50,000.00 ***.
>
> 6. Upon information and belief, the Plaintiff borrowed funds from his brother and thereafter, the Defendant received a check from Scott J. Hartney in the sum of $50,000.00 as an investment in Tooth Bright, Inc."

Defendant further alleged that, in 2008, his friendship with plaintiff "began to dissolve" as plaintiff "became increasingly angry" with defendant. In the spring of 2009, plaintiff began to demand that

defendant sign a promissory note. After threats of "great bodily harm" to himself and his family, defendant signed the note.

¶ 10 In count II of his affirmative defenses, defendant incorporated all of the allegations from count I and supplemented them with the bare statement that he "received no consideration for signing the [Note]." Notably, defendant did not, as in the first two answers, allege that any specific sum was improperly included in the Note.

¶ 11 Plaintiff moved to strike this answer as well. Plaintiff argued that defendant's claim of lack of consideration was a mere legal conclusion. Again without stating a rationale, the trial court struck the third answer but permitted defendant to file another answer.

¶ 12 In November 2010, defendant filed his fourth answer. Defendant re-alleged in count I that he sold plaintiff $50,000 in Tooth Bright stock, that plaintiff borrowed $50,000 from his brother Scott, and that defendant thereafter received a $50,000 check from Scott "as an investment" in Tooth Bright. Defendant now described more specifically the "threats" plaintiff made. Count II did not incorporate all of the allegations from count I, but only the allegation that plaintiff purchased $50,000 in Tooth Bright stock. Additionally, count II alleged that, in January 2008, plaintiff loaned defendant $8,100 for medical expenses for his son. Defendant alleged that "[t]hereafter, the parties had no financial dealings whatsoever," and that "[n]o other money, cash, check[,] or anything of value whatsoever was ever paid by or received by either party from or to the other."

¶ 13 Moving to dismiss defendant's fourth answer, plaintiff again argued that defendant's allegations of prior financial dealings between the parties were "irrelevant."

¶ 14 The trial court, for reasons unstated, struck both affirmative defenses. Count II was struck with prejudice. The court, however, permitted defendant "a final opportunity to plead the affirmative defense of duress."

¶ 15 In January 2011, defendant filed his fifth and final answer. He now pled duress as his sole affirmative defense. Defendant added more details about threatening conduct by plaintiff. He also continued to allege that plaintiff purchased Tooth Bright stock and borrowed from Scott the $50,000 purchase price. (Defendant did not re-allege that plaintiff lent defendant money for medical expenses.) Defendant did not claim that plaintiff was seeking, via the promissory note, amounts for which he had already received value.

¶ 16 A bench trial was held in December 2011. Defendant was *pro se*. During defendant's opening statements, as he began to mention the parties' financial dealings predating the Note, plaintiff objected, reminding the court that it had struck defendant's affirmative defense of lack of consideration. Plaintiff quoted to the court the following language from *M. Loeb Corp. v. Brychek*, 98 Ill. App. 3d 1122, 1125 (1981):

> "Consideration for a promissory note is rebuttably presumed and requires no proof other than the note itself. [Citations.]. Failure or want of consideration is an affirmative defense [citation], and as such must be specially pleaded [citation]. A defense not properly pleaded is deemed waived although it may appear to be within the evidence. [Citation.]."

The court sustained the objection.

¶ 17 For his case-in-chief, plaintiff introduced the Note into evidence without objection. The Note recites that the promise to pay is in exchange "for value received." Plaintiff testified that he witnessed defendant sign the note in the presence of a notary. The typewritten text of the Note calls

for an initial payment of $50,000 on July 21, 2009, and subsequent monthly payments commencing August 15, 2009. "July 21," however, is crossed out by hand and "August 5" written in hand just below. Likewise, in the paragraph concerning the monthly payments, there is handwriting crossing out "August" and inserting "September" just above. The initials "J.H." and "R.B." appear next to both handwritten changes. Plaintiff explained that defendant, in the presence of the notary, requested additional time for the first payment, and a handwritten change was made. Plaintiff rested his case after presenting the Note.

¶ 18 As defendant presented his case, the parties argued over the admission of various documents. During plaintiff's examination as an adverse witness, defendant offered defense exhibit No. A-2, which was an agreement, dated February 22, 2006, for plaintiff to purchase 5% of the shares of Tooth Bright.[1] The purchase price was $50,000. Plaintiff objected, noting that defendant was "apparently *** going into [the] area of consideration." The trial court then had this exchange with defendant:

> "THE COURT: *** Are you going into these documents to show that there was no—that the money of $50,000 was to purchase stock in the corporation and it was not a loan[?]
>
> MR. BEVIS: I am, your Honor.
>
> THE COURT: That would be the consideration underlying the note, and we saw previously that the law is you have to file a lack of consideration as an affirmative defense

[1] Also offered, and admitted into evidence, was defense exhibit No. A-1, which apparently was a second document memorializing the same purchase.

and it wasn't filed in this case, so is there any other reason you are going into the Tooth Brite [*sic*], Inc.?

MR. BEVIS: No, there is not.

THE COURT: In that case, I will sustain the objection, and I am going to let you go ahead and ask the question as an offer of proof."

During the offer of proof, plaintiff acknowledged that he signed defense exhibit No. A-2. Plaintiff remarked that, while he had thought he was purchasing Tooth Bright stock, "it turned out to be a sham" because the stock did not exist. At the conclusion of the offer of proof, the following discussion occurred:

"MR. BEVIS: Your Honor, it's my understanding that I cannot bring evidence regarding the moneys being paid to me that are part of his claim that I owe him?

THE COURT: Well, let me review your affirmative defense here.

MR. BEVIS: Okay.

THE COURT: I'm going to reconsider the evidence that you offered as to the Tooth Brite [*sic*] stock and the documents because your affirmative defense definitely mentions it and it mentions it as part of [the] history as to why the relationship traveled the path that it did, so Mr. Williams [plaintiff's counsel], do you have any objection to the Court admitting the testimony that [plaintiff] just testified to with regard to [defense exhibit No. A-2] for the limited purpose of showing the relationship and why it may have disintegrated and resulted in—

MR. WILLIAMS [plaintiff's counsel]: Judge, excuse me.

THE COURT: As opposed to I would not allow it in for lack of consideration?

MR. WILLIAMS: I missed your last comment, your Honor.

THE COURT: I would limit it to that and not allow it in for lack of consideration.

MR. WILLIAMS: Fine, Judge. I have no objection."

¶ 19 Defendant then showed plaintiff defense exhibit No. B-1, which plaintiff identified as photocopies of the front and back of a $50,000 check dated February 21, 2006, and written to plaintiff from the account of Scott and Karen Hartney. Plaintiff's counsel interjected to clarify that the court would consider defense exhibit Nos. A-2 and B-1 for the limited purpose of showing "the prior relationship between the parties." The court replied that counsel could "have a continuing objection to anything that might be considered evidence of lack of consideration." Counsel said, "Fine." The court then said it would allow defendant "to proceed to show the history of the relationship." Plaintiff testified that he recognized his signature on the back of the check, and acknowledged that he endorsed the check to defendant. Plaintiff testified that the transfer was a "personal loan" to defendant and was not payment for Tooth Bright stock.

¶ 20 Defendant then showed plaintiff defense exhibit No. B-2, another page consisting of two photocopied images: the face side of a check and the endorsement side of a check. The face side showed "Fidelity Bank" as payer, and "Jeff Hartney" was typewritten in the payee line. The date on the face side was May 11, 2006, and the amount was $50,000. Plaintiff testified that he did not do business with Fidelity Bank and did not recognize the face side. Plaintiff did, however, acknowledge that the other copy was of an endorsement from him to defendant. Plaintiff had "no idea" why he made the endorsement. Plaintiff stated that "the back [of the check] may be legitimate, but the top half is not legitimate." Initially, the trial court admitted only the endorsement copy, but later admitted both copies.

¶ 21 Plaintiff was next shown defense exhibit No. B-3, which was a promissory note showing plaintiff as lender and "Robert Bevis for IIRS, Inc." as borrower. The document states the "amount of [the] Note" as $50,000, but the amount the borrower agrees to repay is $60,000. Plaintiff testified that IIRS, Inc., was defendant's towing business. Plaintiff asserted that, while the note was printed on IIRS stationary and the company was listed as borrower, the loan was actually to defendant personally. The document has a blank for "date" that reads "_____ 2006," but no month or day is supplied (since, however, the due date for the note is January 15, 2007, a date within 2006 is possible).

¶ 22 Plaintiff was next shown defense exhibit No. C-2, which he identified as a $12,000 check from him to defendant, dated June 10, 2008. Plaintiff's counsel then objected on the ground of relevance. The trial court replied:

> "Under the same premise that this is all describing the relationship between these two parties and not going towards the consideration, I will admit [defense exhibit No. C-2] and overrule the relevancy objection."

Written in the memo line of the check is "Startup." Plaintiff testified as to the impetus for the check:

> "You said start up. You needed money for the family. You thought one of your inventions was going to come through. You told me that money was coming for payment, and you needed money to keep going with the family. You told me your family did not have money to eat."

Plaintiff denied that the $12,000 was payment for surveillance services performed by defendant, who was a licensed private investigator.

¶ 23 Both as an adverse witness in defendant's case-in-chief, and as his own witness in his rebuttal case, plaintiff described defendant's signing of the Note. At some point prior to July 3, 2009, plaintiff phoned defendant and said that he had consolidated all of his loans to defendant onto a single promissory note and wished to come to defendant's house for him to sign it. Defendant said "fine." On July 3, 2009, plaintiff and his 12-year-old daughter went to defendant's house. Either defendant or his son let plaintiff and his daughter in. Plaintiff presented defendant the Note. As defendant was poised to sign it, plaintiff suggested that the signature be notarized. Defendant and plaintiff drove separately to a nearby bank. Defendant, plaintiff, and plaintiff's daughter met with a notary. Defendant requested additional time to make the initial payment under the Note. A handwritten change was made, and both parties initialed it. According to plaintiff, he and defendant parted ways after the signing and did not see each other again.

¶ 24 Plaintiff denied that he repeatedly demanded that defendant sign the Note. Plaintiff further denied that he ever tried to harass, threaten, or intimidate defendant into signing the Note. Plaintiff acknowledged that, at some point, his relationship with defendant deteriorated. Asked why that occurred, plaintiff said:

> "Because all of a sudden I was not loaning you any more money. I could not contact you to find out what was going on. I asked to meet the stockholders. I saw nobody for the Tooth Brite [*sic*] stuff, and at that point, you stopped talking to me because we filed on you after you signed the [N]ote."

¶ 25 Defendant testified in narrative form. He stated he and plaintiff became acquainted in 2005. Defendant informed plaintiff of his idea for a new kind of toothbrush. Plaintiff said he wanted to invest in the idea. Defendant testified that, in February 2006, plaintiff tendered defendant a check

for $50,000, and that defense exhibit No. B-1 was a copy of that check. Defendant and plaintiff began to "hit it off pretty good." Plaintiff, whose divorce was pending, asked defendant, a licensed private investigator, to perform surveillance on plaintiff's wife. At the time, defendant was also co-owner of IIRS, a towing business. Plaintiff told defendant that he wanted to purchase defendant's partner's interest in IIRS. Plaintiff, however, "couldn't do it until his divorce was up, because he was under court order not to transfer marital assets and things of that nature."

¶ 26 At this point, plaintiff objected and said:

"MR WILLIAMS [plaintiff's counsel]: Again, there's an umbrella objection, I guess, and I just want to make sure that, that is still in place with respect—

THE COURT: With regard to consideration?

MR. WILLIAMS: Yes, your Honor.

THE COURT: Yes.

***

*** That's overruled. I'm considering all of this as background. Go ahead."

¶ 27 Defendant proceeded to testify that plaintiff tendered a $50,000 check as a "loan to IIRS," and that defense exhibit No. B-2 was a copy of that check. Defendant further identified defense exhibit No. B-3 as the promissory note memorializing the loan. Defendant confirmed that the amount he received from plaintiff was $50,000 but that he agreed under the terms of the note to pay $60,000. According to defendant, the parties intended that plaintiff would become a full partner in IIRS after his divorce. Defendant used the $50,000 to buy out his partner, pay business debts, and move the business to a new location. The partner's stock was "absorbed into the company and was set aside for [plaintiff], but it never went anywhere." Plaintiff's divorce went on too long, and he

"was incapable of investing as he originally stated." Defendant never issued plaintiff any stock in IIRS.

¶ 28 Defendant testified that, on another occasion, plaintiff wrote defendant a check for surveillance services. Plaintiff wrote a check for a higher amount than was owed and asked defendant to cash the check and give him the difference. Defendant identified defense exhibit No. C-2 as the check in question. At this point, plaintiff objected on grounds of relevancy, and this exchange followed:

> "THE COURT: Okay. Well, that's overruled because, I think, Mr. Bevis, you are trying to establish that this $12,000 check was not a loan but was payment for services rendered.
>
> MR. BEVIS: That's correct, your Honor.
>
> MR. WILLIAMS: Well, and then Judge, I'm sorry, in terms—if that's what it's related to, then there is no element of consideration that's part of this case, and for additional purposes then it's absolutely irrelevant.
>
> THE COURT: Okay. Overruled."

¶ 29 Later in the proceeding, plaintiff sought clarification from the court that the documentary evidence offered by defendant was "admitted for the limited purpose because of the prior objection that was sustained as to the consideration." The court replied, "Correct."

¶ 30 Defendant testified that he continued to conduct surveillance on plaintiff's wife. Defendant's relationship with plaintiff "really started to deteriorate" when defendant was unable to establish the facts plaintiff wanted for purposes of the divorce. Later, defendant told his daughter not to babysit anymore for plaintiff. Plaintiff then began to demand that defendant repay all of plaintiff's

investments. Plaintiff mentioned that he had prepared a promissory note, which he wanted defendant to sign. According to defendant, plaintiff began to threaten, harass, and intimidate defendant. Defendant described several such incidents. According to defendant, the climax of this string of events occurred on July 3, 2009, when he was awakened from sleep by his son, who said that defendant was downstairs. Defendant testified:

> "So I started going down the stairs, and as I did, I saw [plaintiff] sitting there on my couch, and he stood up immediately and looked at me and he said, you better sign this and, you know, he would leave my family alone if I signed it, that I better sign it or else, that he wasn't F-ing around with me anymore. And at that time I just felt that he was in my house, he was around my kids, he was in the proximity of my domain. He was already inside. He gained entry into my home, and I didn't feel I had any choice but to sign it."

Defendant specified that, by it," he meant the Note. He continued:

> "I tried to sign it right there, and he insisted that we go and get it signed in front of a notary, and he wanted me to go with him. And his daughter was not in the house, she was in the car, and I told him that I wasn't going to do that. I said I would be out in a minute hoping that he would just get out of the house, but he sat there and waited until I got my shoes on, got dressed, and then he walked out of the house with me.
>
> And then I followed him to the bank. I didn't dare not follow him. I didn't know exactly what to do, so I went there, and I signed it, and that's pretty much what happened."

¶ 31 Defendant, accompanied by plaintiff, signed the Note at a bank in the presence of a notary. Defendant admitted that he did not tell the notary that plaintiff was pressuring him to sign the Note. Defendant explained that he "didn't know if [plaintiff] would go back and kill my family," but

defendant "wasn't taking any chances." Defendant testified that he did not recall asking plaintiff for additional time to make the initial payment.

¶ 32 Defendant also offered evidence of plaintiff's aggressive behavior toward others. In admitting this evidence, the court relied specifically on Rule 405(b)(1) of the Illinois Rules of Evidence (Ill. R. Evid. 405(b)(1) (eff. Jan.1, 2011)).[2] Rule 405 states in its entirety:

"**Rule 405.**

METHODS OF PROVING CHARACTER

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation, or by testimony in the form of an opinion.

(**b) Specific Instances of Conduct.**

(1) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct; and

(2) In criminal homicide or battery cases when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor, proof may also be made of specific instances of the alleged victim's prior violent conduct."

[2] The Rules governed here because the trial occurred after their effective date of January 1, 2011. *Cf.* People v. Villa, 2011 IL 110777, ¶ 32 (rules did not apply because the defendant was tried before their effective date).

Citing subsection (b)(1), the court reasoned that plaintiff's volatility was "an essential element of the defense, duress, because you have to believe the person is going to actually do something" "If," the court continued, "you are aware of violence in one situation, then you can believe that person is going to be violent to you in another situation."

¶ 33 Following the close of evidence, the trial court issued a memorandum opinion finding that defendant proved the defense of duress. The court relied heavily on the evidence that, at the time he signed the Note, defendant owed plaintiff no debt:

> "At trial, Plaintiff admitted into evidence [the Note] ***. There is no dispute that the Defendant signed the Note on July 3, 2009. The Court finds that Plaintiff made out a *prima facie* case which would allow recovery on the Note. The burden then shifts to the Defendant to prove that he signed the Note under coercion or duress. Mr. Bevis testified to all the events [of harassment or intimidation] stated in his Affirmative Defense with the exception of the event alleged in paragraph 14 regarding an incident occurring between Mr. Hartney and his wife. Mr. Hartney testified that none of the incidents testified to by Mr. Bevis even occurred. He stated that it was all lies. Mr. Hartney offered no evidence in rebuttal which would explain why Mr. Bevis would sign a Promissory Note for $131,200. He offered no evidence tending to prove that any loan had been made to Mr. Bevis or any other consideration given for the Note. The Court recognizes that the affirmative defense of lack of consideration was stricken. Evidence of consideration for [the Note] goes to the credibility of the parties and would explain why Mr. Bevis signed the Note for $131,200.
>
> * * *

It is understandable that Mr. Hartney would want his investment returned regarding Tooth Bright, Inc. It is also understandable that Mr. Hartney would want the [Note] signed by IIRS, Inc., paid by Mr. Bevis. Both these transactions amount to $110,000 without considering any interest. These prior transactions lend credence to why Mr. Hartney would threaten and intimidate Mr. Bevis into acknowledging the debt by signing [the Note]. However, a Promissory Note must be signed willingly and voluntarily to be enforceable. Neither the Stock Purchase in Tooth Bright, Inc., [n]or the IIRS, Inc., Promissory Note is a prior debt owed by Mr. Bevis to Mr. Hartney to be consolidated into the [Note] at issue. So why did Mr. Bevis sign the Note? No reasonable man willingly signs a Note for $131,200 if he does not owe that money. The only reasonable explanation is that Mr. Hartney threatened, intimidated[,] and coerced Mr. Bevis such that his free will was taken from him.

***

Let me be clear here. Whether Mr. Bevis owed $131,200 or not is not the issue. Even if he owed the money, if the [Note] was signed under duress, it is not enforceable and Mr. Hartney could not recover under the [Note]. The analysis of the financial relationship between these parties goes to the weight of the evidence and credibility of the witnesses. The testimony of Mr. Bevis is more credible when Mr. Hartney has a reason to coerce Mr. Bevis into signing the [Note]. If they did not have these prior financial dealings, there would be no reason for Mr. Hartney to threaten Mr. Bevis into signing the Note. If that were the case, Mr. Bevis's testimony would be less credible. However, with the financial history shown by the evidence, it is quite believable that Mr. Hartney would do what he could to recoup the funds."

¶ 34 Plaintiff filed this timely appeal.

¶ 35 ANALYSIS

¶ 36 Plaintiff challenges the trial court's evidentiary rulings as well as the court's ultimate finding of duress. First, plaintiff argues that the court erred in resting its finding of duress on the absence of consideration for the Note, where there was no affirmative defense of lack of consideration on file. The relevance and admissibility of evidence are committed to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of that discretion. *Wojcik v. City of Chicago*, 299 Ill. App. 3d 964, 971 (1998). "A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court [citation], or where its ruling rests on an error of law [citation]." *Peeples v. Village of Johnsburg*, 403 Ill. App. 3d 333, 339 (2010).

¶ 37 Citing *M. Loeb Corp.*, 98 Ill. App. 3d 1122, the case to which he referred the trial court, plaintiff asserts:

> "[T]he terms of the [N]ote are clear and unambiguous, and absent any pleading setting forth an affirmative defense for failure or want of consideration, the consideration for a promissory note is presumed and requires no proof other than the note. [Citations.]
>
> Consequently, when the trial court took th[e] parol evidence one step further by concluding that Plaintiff somehow knew that he could not recover from Defendant personally for the past debts (despite noting evidence to the contrary), and thereby demonstrating some motive to threaten, coerce[,] and intimidate him into signing [the Note], it improperly and expressly relied on this parol evidence to challenge the underlying consideration evidenced

> within the [N]ote itself despite there being no affirmative defense pleaded for lack or want of consideration."

¶ 38 We agree with plaintiff that the trial court erred. Section 2-613(d) of the Code of Civil Procedure (735 ILCS 5/2-613(d) (West 2012)) provides:

> "(d) The facts constituting any affirmative defense, such as *** want or failure of consideration in whole or in part, and any defense which by other affirmative matters seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, counterclaim, or third-party complaint, in whole or in part, and any ground of defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply."

Case law specific to promissory notes holds that the consideration for a note is presumed, yet subject to rebuttal, but only by way of an affirmative defense. See *M. Loeb Corp.*, 98 Ill. App. 3d at 1125 ("Consideration for a promissory note is rebuttably presumed and requires no proof other than the note itself," and "[f]ailure or want of consideration is an affirmative defense"); *Levin v. 37th Street Drug & Liquors, Inc.*, 103 Ill. App. 2d 248, 253 (1968) ("A promissory note is presumed to have been issued for valid and sufficient consideration, and evidence offered to rebut this presumption must be of a very clear and cogent nature."). "If a party fails to plead an affirmative defense, he is deemed to have waived the defense, and it cannot be considered even if the evidence suggests the existence of the defense." *Athans v. Williams*, 327 Ill. App. 3d 700, 705 (2002).

¶ 39 Here, defendant did not fail to plead lack of consideration, but rather the defense was pled and later stricken. The same principles apply. At trial, defendant offered evidence of financial dealings between the parties that predated the Note. When asked the relevance of this evidence,

defendant stated that he aimed to establish that the debt plaintiff was seeking to collect was in fact nonexistent. Defendant was attempting this through negative proof; he was eliminating potential candidates for the debt by showing that plaintiff received value for the monies transferred. Plaintiff objected, noting that lack of consideration was no longer an affirmative defense. The trial court ruled that it would only consider the evidence for how it explained the decline of the parties' relationship. Plaintiff not only lodged a standing objection to the use of the evidence to prove lack of consideration, but also continued to make individual objections along those lines at appropriate times, and in response the trial court consistently assured plaintiff that it was considering the evidence for "background" alone. However, without any prior hint that it was changing its approach, the trial court announced in its memorandum opinion that it was considering the financial dealings of the parties on the issue of "credibility." Specifically, the trial court believed that the absence of a debt lent credence to defendant's claim that he signed the Note under duress, for "[n]o reasonable man willingly signs a Note for $131,200 if he does not owe that money." It makes no difference, however, whether the trial court viewed the absence of consideration as sufficient of itself to void the Note, or whether the lack of consideration simply informed the trial court's finding of duress. In either case, plaintiff was entitled to notice, under both section 2-613(d) and case law, that consideration would be an issue at trial.

¶ 40 We recognize that the duress defense set forth in defendant's fifth answer filed in January 2011 relates some of the financial history of the parties that was developed at trial, but there is no allegation in that defense that the financial history tended to show that defendant owed no money to plaintiff. "The clear purpose of section 2-613(d) is to facilitate the decision of cases on their merits, and to eliminate the harsh consequences which often stemmed from unfair surprise at trial

prior to enactment of the modern rules of procedure." *Harmon Insurance Agency, Inc. v. Thorson*, 226 Ill. App. 3d 1050, 1052 (1992). The unfair surprise did not occur when defendant introduced evidence suggesting that he owed no debt to plaintiff. The trial court mitigated any surprise (at least for the time) by assuring plaintiff that the evidence would be considered only as showing how the parties' relationship soured. The unfair surprise occurred later, when the trial court announced that it had broadened its reliance on the evidence and now regarded it as establishing that the Note was not supported by consideration. Plaintiff, who had been assured that consideration was not an issue in the case, was deprived of the opportunity to more vigorously challenge defendant's proof that plaintiff received value for all of his monetary transfers to defendant.

¶ 41 Defendant argues that the trial court was right to consider the financial dealings of the parties as they bore on the issue of consideration, as a court "is allowed to consider the conduct of the parties which is relevant to the ultimate signing of [a promissory note]." Defendant cites the parol evidence rule as stated in *Spindler v. Krieger*, 16 Ill. App. 2d 131,139 (1958):

> "The parol evidence rule has been stated in various terms but the broad general rule may be stated as follows: Parol or extrinsic evidence is inadmissible to vary, alter or contradict a written instrument where the instrument is complete on its face, unambiguous, valid, and there is no fraud, duress, mistake, or illegality in respect of the instrument [citations]. Parol or extrinsic evidence may be admitted, however, to disprove the legal existence of a binding contract [citations]."

The issue here, however, is not relevancy, but notice. Evidence that defendant owed no debt to plaintiff may well point to external pressure as the cause for the signing of the Note. Nonetheless, section 2-613(d) entitled plaintiff to notice that lack of consideration would be an issue in the case.

Plaintiff did not receive that notice. *Spindler* is distinguishable because there was no issue concerning the pleading of affirmative defenses. We conclude that the trial court abused its discretion in considering the parties' transactional history for what it revealed about the consideration (or lack thereof) for the Note.

¶ 42 While this error is a sufficient ground on which to reverse the judgment of the trial court, we do have authority to address, in the interest of judicial economy, evidentiary issues that might recur on remand (*Solis v. BASF Corp.*, 2012 IL App (1st) 110875, ¶ 74 (2012)). Plaintiff's other contention of error in the admission of evidence concerns the testimony regarding his "prior bad acts" (as he describes them). As plaintiff notes, the trial court admitted this evidence under Rule 405. The trial court specifically cited subsection (b)(1). We cannot provide any guidance on this issue for the court on remand, for plaintiff has failed to develop an argument with citation to appropriate authority. Rather than discuss Rule 405, which was the trial court's express basis for receiving the evidence, plaintiff cites the common law's general prohibition on character evidence. See *Doe v. Lutz*, 281 Ill. App. 3d 630, 642 (1996) ("evidence of prior bad acts is not admissible to show a defendant's character or propensity to commit the alleged crime"). Certainly, common-law holdings might be relevant in construing Rule 405, but plaintiff does not explain how the principle from *Doe* bears on Rule 405 generally, much less on subsection (b)(1) specifically. Since plaintiff has failed to engage the trial court's analysis, we can find no error.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, we reverse the judgment of the trial court and remand for further proceedings consistent with this order.

¶ 45 Reversed and remanded.