2013 IL App (2d) 121403-U
No. 2-12-1403
Order filed September 13, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ALEX R. LARGO, Plaintiff and Counterdefendant-Appellant, v. LINDA K. TURNER and TAMMY M. BOWDEN, Defendants and Counterplaintiffs-Appellees (First Midwest Bank, Unknown Owners and Non-Record Claimants, Defendants).	)	Appeal from the Circuit Court of Lake County. No. 07-CH-1280 Honorable Luis A. Berrones, Judge, Presiding.

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

ORDER

¶ 1 *Held*: Defendants, who, along with plaintiff, were tenants in common in a property that was rendered uninhabitable due to a fire, were entitled to a proportionate share of the insurance proceeds notwithstanding that plaintiff held sole occupancy of the property and paid all taxes, maintenance and upkeep, and insurance premiums without any contribution from defendants. Plaintiff's argument that the trial court abused its discretion in refusing to allow him to amend the complaint to conform to the proofs could not be considered where plaintiff failed to include in the record a transcript of the pertinent hearing.

¶ 2 Plaintiff and counterdefendant, Alex R. Largo, appeals the judgment of the circuit court of Lake County awarding one-half of the insurance proceeds to defendants and counterplaintiffs, Linda K. Turner and Tammy M. Bowden, that were obtained following a fire which rendered uninhabitable the property in which plaintiff and defendants were tenants in common. The trial court held that plaintiff, who had sole possession of the property and paid all taxes, maintenance and upkeep, and insurance premiums, had the obligation to provide insurance for all the cotenants, and not just in his name alone. The trial court also denied plaintiff's request to amend his complaint to conform to the proofs at trial after a judgment had been rendered. Plaintiff appeals, arguing that, under the circumstances of this case, he did not have to share the insurance proceeds, and the trial court erred in refusing his request to amend his complaint to add a new claim of resulting trust where the evidence supporting the amendment was admitted during the trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In the 1970s, plaintiff and his wife, Jeanie Largo, purchased a property on Oakwood Place in Deerfield, Illinois, establishing the property as the family's residence. Eventually, plaintiff mortgaged this property to obtain working capital to fund his business endeavors, including real estate investments. In 1995, Jeanie Largo was undergoing her terminal illness. She wanted to be sure that her daughters, defendants, would receive an interest in the Oakwood Place property, so she asked plaintiff to remove the property from its trust, and to convey it to plaintiff and defendants. Plaintiff acceded to Jeanie Largo's request, and, in March 1995, a deed was executed, granting plaintiff an undivided one-half interest in the property and granting defendants, as joint tenants, an undivided one-half interest in the property. Plaintiff and defendants held the property as tenants in common. The deed specified that it was subject to any lien, mortgage, or encumbrance on the

property, and the deed was promptly recorded. The property, which had been the family's residence and was now plaintiff and Jeanie Largo's residence, was improved with a single-family home. In May 1995, Jeanie Largo passed away.

¶ 5 At the time of Jeanie Largo's death, the parties expected that plaintiff would continue to live in the house and to pay all costs, expenses, and taxes while he had sole possession of the property. In 2002, the bank supplying the mortgage/line of credit collateralized by the property finally discovered that plaintiff's daughters had been added as co-owners to the property's title and demanded that a new mortgage be executed with defendants' signatures. Plaintiff's attorney contacted Bowden with the request that she and Turner sign the mortgage on plaintiff's line of credit that he used for his real estate investments. Via his attorney, plaintiff promised that, in return for defendants' signatures, defendants would not be responsible for any payments on the mortgage. The letter additionally referenced an agreement to provide insurance on the property. Defendants duly executed the mortgage.

¶ 6 On January 1, 2007, a fire broke out at the house, damaging it and rendering it uninhabitable. Plaintiff filed a claim with his insurance company, and he received $283,804.44 on the claim. Plaintiff did not use the insurance proceeds to repair the house, and he did not pay a portion to defendants. Plaintiff, believing that the value of the property was solely in the land, undertook to sell the property. One of defendants discovered a "for sale" sign in the yard of the property and questioned plaintiff. Plaintiff claimed to have received a favorable offer on the property, but defendants refused to allow the sale to go through. Plaintiff averred that, at that point, he gave up trying to sell the property and turned over the responsibility to sell the property to defendants. Eventually, the house sold for $357,000, and the outstanding mortgage was paid off from the

proceeds of the sale. The remaining amount of the sale proceeds was placed in escrow awaiting the outcome of the litigation in this case.

¶ 7 On May 11, 2007, plaintiff filed a single-count complaint seeking to partition the property, naming as parties defendant both defendants and the First Midwest Bank. The bank filed an answer and raised its mortgage interest in the property as an affirmative matter. Defendants ultimately responded by filing an amended verified answer and counterclaims. The counterclaims included one for conversion, unjust enrichment and accounting, and they sought recovery of their share of the insurance proceeds.

¶ 8 During the pendency of this case, the property was sold, and the mortgage was paid from the sale proceeds, causing the bank to exit from the proceedings. The case continued on defendants' counterclaims, including the issues about the insurance proceeds. On April 30, 2012,[1] the matter proceeded to a bench trial at which the parties testified consistently with the factual summary presented above. Plaintiff argued that defendants were entitled to only one-half of the net sale proceeds less set-offs, including the cost to obtain the insurance proceeds, one-half of real estate taxes paid during the tenancy in common, and one-half the costs of the improvement made during the tenancy in common. Defendants sought one-half of the gross sale price plus one-half of the insurance proceeds. The trial court held, pertinently, that, pursuant to *In re Estate of Ray*, 7 Ill. App. 3d 433 (1972), plaintiff, as the tenant in possession of the property was obligated to protect the interests of all of the tenants in common and that defendants were entitled to one-half of the insurance proceeds. The trial court made several other holdings which plaintiff does not appeal and

[1]The report of proceedings represents that the trial in this matter occurred on November 30, 2012. This appears to be in error, and we accept April 30, 2012, as the correct trial date.

are not pertinent here. The trial court entered judgment in favor of each defendant and against plaintiff in the amount of $150,252.99 ($300,505.98 total).

¶ 9 On September 10, 2012, plaintiff filed a motion to reconsider the judgment from the trial. On November 13, 2012, plaintiff filed a motion for leave to file an amended complaint, adding a new count for resulting trust. Plaintiff argued that he was simply trying to amend the complaint to conform to the proofs presented at trial. On November 16, 2012, the trial court denied both of plaintiff's motions. Plaintiff timely appeals.

¶ 10 II. ANALYSIS

¶ 11 On appeal, plaintiff argues that he did not have an obligation to insure the property on behalf of the non-occupying tenants in common at his own expense. He also contends that the trial court erred in refusing his motion to amend the pleadings to conform to the proofs at trial an introducing a new count sounding in the theory of a resulting trust. We consider each contention in turn.

¶ 12 Plaintiff argues initially that he had no duty or obligation to insure the property on behalf of all of the tenants in common. Whether a duty exists poses a legal question subject to *de novo* review. *Fox v. Heimann*, 375 Ill. App. 3d 35, 44 (2007). Plaintiff argues that the trial court erred in its application of and reliance on *Ray*, and, instead, it should have followed *Aguilera v. Pacific Insurance Co., Ltd.*, No. 95-C-1163, 1996 WL 14043 (N.D. Ill. Jan. 11, 1996). Defendants, by contrast, argue that *Ray* is controlling, the trial court properly applied it to the facts of this case, and *Aguilera* is distinguishable and inapplicable. Our first order of business, then, is to review *Ray* and *Aguilera*.

¶ 13 We begin with *Ray*. In that case, a farm was owned by the decedent who had taken out an insurance policy for the contents and structures solely in his own name. *Ray*, 7 Ill. App. 3d at 436.

The decedent had sole possession and occupancy of the farm, and he retained the profits and avails of the farm despite the fact that he was only a co-tenant along with his six children. *Id.* at 435. The decedent paid the taxes and bills accruing to the farm with income derived from the farm. *Id.*

¶ 14 The decedent's house burned while he was in the hospital, and this led to the decedent's decline and demise. *Id.* at 436. Before he died, the decedent endorsed the insurance check and gave it to his daughter with whom he shared a joint account and who managed his affairs, and the decedent told the respondent that he wanted to her to have the full amount of the insurance proceeds. *Id.* The decedent died, and the other five siblings challenged the purported gift of the insurance proceeds to the respondent. *Id.*

¶ 15 The appellate court initially ruled that the trial court's determination that the decedent had been competent to make a gift of the insurance proceeds to the respondent was not against the manifest weight of the evidence. *Id.* at 438-49. The appellate court then considered whether the decedent had an obligation to provide insurance for all of the co-tenants, and held, pertinently:

¶ 16 "In this case the decedent was the owner of one-third of the farm as a tenant in common with his six children who each owned a one-ninth interest as tenants in common. As tenants in common the children were also entitled to possession the same as [the] decedent. They, doubtless in recognition of their moral and legal duty to their father, permitted him the exclusive possession of the premises as his residence and to retain the avails of the property. The record does not yield any evidence of any express agreement pertaining to the gift of the proceeds of the farm to the decedent, nor or any agreement whereby the decedent was to have the property insured for the benefit of all owners and pay the premiums from the farming proceeds. One child did, however, testify that it was

understood that their father was to keep the place insured out of the farming proceeds. Nevertheless, we think that where one tenant in common is in possession of the commonly owned property and in receipt of all profits from the common property he has a duty to be reasonably prudent in looking after and preserving the common property. Further, that this duty would extend to keeping the property insured for the benefit of all owners. 'A co-tenant in sole possession and receiving all profits derived from the property is deemed to have undertaken certain duties to the other co-tenants and will be required to defray all such expenses at least to the extent of all such profits and rents.' (20 Am. Jur. 2d, Co-Tenancy Joint Ownership, section 56.) Absent such a duty in this case, the co-tenant in possession could use the avails of the commonly owned property to obtain insurance to the extent of its full value in his name alone, and upon the loss by fire of such property retain as his own the entire proceeds of the policy. The surrender by the children of the right to possession to their decedent father is certainly a thing apart from the surrender of their entire ownership in the residence. While it is true that children have a legal duty to support their parents, the concept appears in this case only as an afterthought. Such duty cannot be utilized by respondent after the death of the father to support her contention that the avails of the farm were a gift to the father so that his payment of premiums on the insurance policy was with his own funds. The duty to support does not, upon the evidence in this case, override the duty of a tenant in common in possession to use the commonly owned avails of the property in its care and preservation, including the security of insurance which will be protective of the ownership of all the tenants in common." *Id.* at 44-41.

¶ 17 The trial court used the factual similarity of *Ray* as the basis of its holding that plaintiff was required to insure the property for all of the tenants in common and why he was not allowed to keep all of the insurance proceeds. Defendants essentially echo the trial court's reasoning and note, as did the trial court, that plaintiff received the benefit of the avails of the property because he was able to extend his loan collateralized by the property and continue to use the loan amount in his business dealings. Plaintiff argues that *Ray* was focused on the concept of profit, and it was only the fact that the decedent in *Ray* used the farm's profits to pay the bills, taxes, and insurance that allowed the other co-tenants to reach their proportionate shares of the insurance proceeds.

¶ 18 At this point, we agree with defendants and the trial court. Even if plaintiff is correct that *Ray* turned on the issue of kept profits, the evidence shows that plaintiff retained the benefits of the property in the deal he worked out with defendants. Plaintiff was able to extend the mortgage and to keep the funds from the loan (that was collateralized by the property) in his business dealings and investments.

¶ 19 Plaintiff argues that, because the property was residential, was his residence, and was not leased out to generate income, there were no profits associated with the property. Plaintiff further argues that the loan proceeds were generated when the loan was first taken, and the re-signed mortgage did not result in any cash in his pocket, which could have been considered profits. Plaintiff reasons that, if there were no profits, then there was no obligation to insure for the benefit of the other co-tenants under *Ray*. We disagree. Although the deal with defendants did not appear to result in any cash directly appearing in plaintiff's pocket, he was still able to extend the loan and did not have to repay it. Thus, plaintiff was able to continue to use the proceeds of the loan for business purposes and did not have to come up with the payoff amount, as he would have had to had the loan

(and the mortgage on the property) not been extended. The evidence further showed that plaintiff utilized the loan in his business and investments, and did not directly share any proceeds from those endeavors with defendants. Thus, the evidence supports a conclusion that plaintiff retained all profits, benefits, and avails accruing from the property, as well as retaining sole possession. These facts place this case on the same footing as *Ray*. We now turn to *Aguilera*.

¶ 20 As an initial matter, we note that *Aguilera* is an unpublished federal district court case. This is problematic, because, generally, a party is not supposed to use such a case, even if it is interpreting Illinois law, because it is not precedential, and Illinois Supreme Court Rule 23(e) (eff. July 1, 2011) prohibits the use of unpublished orders except to support contentions of double jeopardy, *res judicata*, collateral estoppel, or law of the case (*Napleton v. Great Lakes Bank, N.A.*, 408 Ill. App. 3d 448, 453 (2011)), none of which exceptions are present here. Plaintiff should not have cited this case under the applicable rules and authority; we are not required to consider *Aguilera*. *Id.* Thus, based on our analysis above, we conclude that *Ray* is properly controlling.

¶ 21 *Napleton*, while perhaps among the last words on the issue of using unpublished cases as authority, is not the only one.[2] This court has previously reached a different conclusion regarding the use of unpublished cases in *Nulle v. Krewer*, 374 Ill. App. 3d 802, 806 n.2 (2007), in which we stated that, while a disposition may be unpublished, "we are free to deem it persuasive." Thus, under *Nulle*, we could consider *Aguilera*, but even if we did so, *Aguilera*'s posture is manifestly distinguishable from this case. In *Aguilera*, three brothers owned a property with each holding an undivided one-third interest as tenants in common. *Aguilera*, No. 95-C-1163, 1996 WL 14043, at

[2]We need not (and do not) resolve the conflict between the two voices, because, under either analysis, with or without *Aguilera*, the outcome is the same.

*1. One brother, Cesar, managed the property, including collecting rents and buying insurance, with the acquiescence of the other two brothers, occasionally spending the family's money on the property's expenses. *Id.* Cesar purchased insurance for the whole of the property, but the other two brothers were not mentioned on the policy (and Cesar was not asked about the ownership of the property when he applied for the insurance). The insurance was issued in the amount of $2 million, representing the insurer's valuation of the property, and, later, the building burned, sustaining over $761,000 in damage (again according to the insurer's estimate). *Id.* Cesar made a claim, and for the first time was asked about the ownership of the property, to which he replied honestly and forthrightly. The insurer tried to pay Cesar only one-third of the loss, arguing that, because the other brother/owners were not on the insurance policy, Cesar had insured the building for only his share of the ownership. *Id.*

¶ 22 The district court rejected the insurer's position. As is pertinent here, the court held that tenants in common have a fiduciary duty to look after each other's interests, which included the duty and authority to insure the entirety of the property. *Id.* at *5. The court also determined that, because the brothers were partners in owning a commercial property, an analysis under partnership law yielded the same result. *Id.* While the court acknowledged that a partner who insures a property in his own name without any stipulation or understanding that the insurance is for the benefit of the partnership may be presumed to have insured only his own interest in the property, such a partner may nevertheless recover the full value of the insurance when the partnership's custom has been to allow that partner to manage it, or where the partnership's money has been used to pay for the insurance. *Id.* The court also stressed that, if the insurer were allowed to retain the two-thirds of the

loss it would result in unjust enrichment to the insurer, whereas if Cesar were given the full proceeds, it would simply be reimbursement for the loss. *Id.*

¶ 23 Plaintiff uses the reasoning in *Aguilera*, seizing upon the district court's acknowledgment that a partner who insures a property in only his name is presumed to have insured only his share of the property. Plaintiff further points to the fact that he undisputedly paid all the insurance premiums, and defendants did not share in any of the expenses associated with the property. According to plaintiff, because defendants did not share in the payments for the insurance, *Aguilera* compels the conclusion that he insured only his interest in the property. *Aguilera*'s reasoning is unpersuasive.

¶ 24 Plaintiff ignores the court's citation of the rule that tenants in common have a fiduciary duty to look after each other's interests. *Id.* Further, plaintiff fails to attempt to reconcile his view of *Aguilera* with its clear pronouncement that so sharply undercuts his position. In other words, *Aguilera* actually supports both *Ray* and our view of the situation: plaintiff as a tenant in common with defendants was obligated to insure their interests in the property as well as his own.

¶ 25 Plaintiff's attempt to use *Aguilera* to support the converse of its holding, namely, that, because none of defendant's funds were used in purchasing the insurance, plaintiff only insured his own interest, fares little better. Plaintiff overlooks the fact that, in obtaining defendants' agreement to sign the mortgage document to extend his loan, he expressly promised that defendants would incur no obligations to pay for any of the expenses on the loan, and among those expenses was the requirement to insure the property. Thus, plaintiff promised that defendants would not have to pay to procure insurance, among other things, and now, he seeks to misuse that promise, which was carried out, to support his argument that the converse holding of *Aguilera* should obtain here. We flatly reject that position.

¶ 26 Last, and perhaps most significantly, *Aguilera* involves an insurance company trying to avoid its contractual obligation to pay the full amount of insurance proceeds following a loss. The question in *Aguilera* of whether a co-tenant is obligated to insure the whole of the property on the behalf of the other co-tenants is, at best, tangential. Further, it was settled clearly in defendants' favor in *Aguilera*, which plaintiff conveniently ignores. *Id.* ("[t]enants in common have a fiduciary duty to look after each others' interests"). For these reasons, then, *Aguilera* does not support plaintiff's argument or the result plaintiff hoped to reach. Rather, if *Aguilera* were applied to this case at all, it would support our reading of *Ray*, as well as our holding that plaintiff was obligated to insure defendants' interests in the property as well as his own when he procured the insurance on the property.

¶ 27 Summing up, plaintiff's argument is that *Ray* was misread and *Aguilera*, or at least its reasoning (actually the converse of the holding in that case), should guide the outcome. We determined that the trial court properly viewed *Ray*, that *Ray* clearly supports the trial court's ruling on the insurance proceeds. We also determined that, under *Napleton*, we should not consider *Aguilera*, but, recognizing that there are other voices in the debate over the use of unpublished dispositions as authority, determined, in an analysis under *Nulle*, that *Aguilera*'s reasoning actually would support the trial court's ruling. Accordingly, we reject plaintiff's contentions on this issue and hold that the trial court properly held that defendants were entitled to a proportionate share of the insurance proceeds.

¶ 28 Turning to plaintiff's remaining issue on appeal, he argues that the trial court abused its discretion in refusing to allow him to amend the complaint to conform to the proofs adduced at trial, which support a new count of resulting trust. Section 2-616(c) of the Code of Civil Procedure

(Code) (735 ILCS 5/2-616(c) (West 2012)) provides: "A pleading may be amended at any time before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." The decision whether to allow an amendment to a complaint is within the trial court's sound discretion and its decision will not be disturbed absent an abuse of that discretion. *Mandel v. Hernandez*, 404 Ill. App. 3d 701, 705 (2010). A trial court abuses its discretion when no reasonable person would take the view adopted by the trial court. *Id.* at 706. Further, while the standard under section 2-616(c) is liberal for a prejudgment motion, it is viewed differently where a party is trying to amend the complaint postjudgment. *Id.* at 707.

¶ 29 Here, after judgment on the complaint was entered, plaintiff filed a motion for leave to amend, seeking to add the count of resulting trust, and averring that the amendment would simply conform the complaint to the proofs adduced at trial. The trial court heard argument on the motion and denied it. The transcript of the motion hearing was not included in the record on appeal. Likewise, no explanation of the trial court's reasoning appears in the record.

¶ 30 The lack of a transcript of the trial court's exercise of discretion (and the trial court's written order states only that the motion for leave to amend was "denied") is insuperably troublesome where we are required to pass on that exercise of discretion. The appellant has the burden to provide a sufficiently complete record of the proceedings at trial to support his or her claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). In the absence of a sufficiently complete record, the court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Id.* at 392. All doubts arising from the incompleteness of the record will be resolved against the appellant. *Id.* Accordingly, we find that plaintiff has not provided a sufficient record to support his claim that the trial court abused its discretion in denying leave to amend the

complaint to conform to the proofs at trial, and we hold that, as a result of that incomplete record on appeal, there is no basis for holding that the trial court abused its discretion. *Id.* ("[a]s there is no transcript of the hearing on the motion to vacate here, there is no basis for holding that the trial court abused [its] discretion in denying the motion").

¶ 31 Even if we were to consider this argument, the outcome would not be different. Plaintiff sought to add a new count to the complaint that could have been pleaded before judgment. Instead, plaintiff waited until after the judgment before seeking to add the new count, albeit under the guise of a motion to conform the complaint to the proofs. In *Mandel*, the court held this was improper even though the evidence had been admitted at trial because the claim could have been added before the trial and the plaintiff did not provide any reasons why she did not seek to add the claim before the trial concluded. *Mandel*, 404 Ill. App. 3d at 709-10. Likewise here. If plaintiff was able to admit the evidence at trial to support his claim of resulting trust, then he could have made the allegations well in advance of the final judgment of the trial. Under these circumstances, we see no error in the trial court's judgment.

¶ 32 Additionally, even though plaintiff asserts that the amendment would conform the complaint to the proofs, it is nevertheless adding an entirely new count to the complaint. "A complaint 'may only be amended after judgment to conform the pleadings to the proofs.' " *Id.* at 710 (quoting *Witvoet v. Fireman's Fund Insurance, Inc.*, 317 Ill. App. 3d 915, 920 (2000)). Amending a complaint to add a new cause of action is simply not a proper postjudgment motion, and it is well settled that a complaint may not be amended in this manner postjudgment. *Id.* Again, we perceive no error where the trial court refused to allow plaintiff to amend his complaint and add a new claim, which, had leave to amend been allowed, would have contravened well-settled law.

¶ 33 Summing up, the incomplete record provided by plaintiff raises the presumption that the trial court's judgment was in conformity with the law and the evidence in the record. From this presumption, we conclude there was no abuse of discretion. Alternatively, passing upon whether the trial court should have allowed the amendment, we perceive no error in the trial court's judgment. Accordingly, we cannot say that the trial court abused its discretion in refusing plaintiff leave to amend postjudgment.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 36 Affirmed.