2016 IL App (2d) 141146-U
No. 2-14-1146
Order filed January 19, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DISCOVER BANK,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
	)	
v.	)	No. 14-SC-3167
	)	
STAN OLSON,	)	Honorable
	)	Theodore S. Potkonjak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: In this action to collect upon a credit card indebtedness, the trial court did not err in entering judgment in plaintiff's favor and denying defendant's motion to substitute the judge for cause. Affirmed.

¶ 2 Plaintiff, Discover Bank, filed an action to collect an indebtedness incurred by defendant, Stan Olson, on a credit card plaintiff issued to him. Defendant, *pro se*, now appeals the trial court's: (1) September 25, 2014, order, denying his motion for substitution of judge for cause and striking an affidavit; (2) October 10, 2014, order, denying his motion to dismiss the

complaint; and (3) October 17, 2014, order, granting judgment in plaintiff's favor in the amount of $2,783.20, plus costs. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff's complaint alleged that it issued defendant a credit card and that defendant defaulted thereon in the amount of $3,112.20. Attached to the complaint was an affidavit from plaintiff's servicing agent, attesting that the account records attached to the complaint accurately reflected defendant's outstanding balance and that the cardmember agreement attached to the complaint applied to defendant's account.

¶ 5 Defendant moved *pro se* to dismiss the complaint. He alleged that he had received "legal notice" from an individual named David A. Olsson that Olsson and plaintiff had entered into an agreement whereby plaintiff had transferred to Olsson all of its rights, title, and interest in defendant's credit card account. Defendant attached the "legal notice" to his motion. The notice listed Olsson's name and address and the term "Legal Notice" in the header, and it informed defendant that: (1) he should not make any further payments to plaintiff; (2) he should forward to Olsson any future communications from plaintiff; and (3) upon receipt of defendant's signed acknowledgment of the notice, Olsson's office would forward to him instructions concerning any future payments.

¶ 6 Attached to the notice were two additional documents. First, a copy of a check. The front of the check reflects Olsson's name and address. Handwritten at the top are the words "Restrictive Endorsement." The check was written in the amount of $329.00, and, in the memo line is written "Stan Olson [*i.e.*, defendant] Settlement[.]" On the back of the check is stamped a paragraph starting with the words "Restrictive Endorsement," however, the body of the

paragraph is partially obscured by JP Morgan Chase's stamp negotiating the check. Apparently, plaintiff cashed the check on June 9, 2014.

¶ 7 The second attachment is an "Offer of Compromise and Settlement Re: Stanley M. Olson – debtor." This document is dated May 29, 2014, and was purportedly prepared by Paul W. Graffia, CPA, BSA and "Attorney-in-Fact." The document summarizes that defendant has been unemployed since 2008 and that future employment is unlikely. It makes various creditors, including plaintiff, a limited time offer to settle defendant's outstanding obligations by having a "family member" pay the sum of $10.00 for each $100.00 defendant owed. The settlement funds were offered contingent to the creditors' acceptance of the "restrictive endorsement initial payment—settlement check payment terms" which provided:

> "—RESTRICTIVE ENDORSEMENT—
>
> Negotiation of this check constitutes acceptance by the payee of payor's offer to cause and effect Payee's assignment, transfer, sale, compromise, settle, satisfy and discharge in full any and all obligation[s] of debtor pertaining to the credit card account number *(actual account number inserted here)* in favor of the payor hereof for the amount hereby paid pursuant to this check. It is hereby agreed that any electronic deposit and/or payment made pursuant to this check shall constitute 'negotiation' hereof and payee's unconditional acceptance of the above stated restrictive endorsement terms." (Emphasis in original.)

The document reiterated that a creditor's acceptance of the terms would be evidenced by its deposit of the restrictive endorsement initial payment check and, further, that the funds made available did *not* belong to defendant and, therefore, "are not subject to any credit card agreement terms between the debtor and creditor."

¶ 8 According to defendant's motion to dismiss, the foregoing reflects that plaintiff lacked standing to pursue its claim against defendant because, by negotiating and cashing Olsson's check, plaintiff transferred to Olsson all of its rights and interest in the account. Further, defendant alleged that the complaint was not brought in good faith, as it was unverified and plaintiff had transferred the account.

¶ 9 Plaintiff's response alleged that the motion to dismiss should be denied for two reasons. First, where there was no *bona fide* dispute over the amount owed, nor a shared, mutual intent to compromise the claim, defendant's motion to dismiss did not reflect the existence of a valid accord and satisfaction. Second, plaintiff argued that the parties' cardmember agreement expressly allowed it to cash a check containing a restrictive endorsement without losing any rights under the agreement. Specifically, the cardmember agreement, attached to the complaint, provides:

> "We can accept late payments, partial payments or payments marked 'payment in full' or *with any other restrictive endorsement* without losing any of our rights under this Agreement." (Emphasis added.)

Further, the agreement contains a clause providing that:

> "We may sell, assign or transfer your Account or any portion of it without notice to you. *You* may not sell, assign or transfer your Account without first obtaining our prior written consent." (Emphasis added.)

¶ 10 Apparently, on August 29, 2014, plaintiff's response to defendant's motion was presented to defendant in open court and filed *instanter*. The case was continued for hearing on September 5, 2014. On that date, defendant filed a reply to the motion to dismiss, asserting that, in fact, he had never argued that there was an accord and satisfaction. Rather, his argument was that

plaintiff lacked standing to pursue the claim. Defendant asserted that the doctrine of accord and satisfaction was irrelevant because he, the debtor, never made any offer, nor did Olsson make one on his behalf. Rather, Olsson, who was not defendant's agent or attorney, acted *on his own* in offering to purchase plaintiff's rights and interest in the credit card account. Plaintiff received the offer of compromise and settlement, and it negotiated the payment with the restrictive endorsement; as such, according to defendant, plaintiff's attempt to bring the instant action reflects that it took Olsson's check under false pretenses and committed breach of contract. Defendant asserted that to allow the action would ratify plaintiff's attempt to "double collect" on the debt and would ratify plaintiff's misuse of the restricted payment. Defendant argued that the terms of the cardmember agreement are irrelevant because Olsson was not a party to the agreement.

¶ 11 Also on September 5, 2014, defendant filed a motion for substitution of judge for cause. In his affidavit attached to the motion, defendant attested that, on August 29, 2014, when he was served with plaintiff's response to the motion to dismiss, Judge Potkonjak appeared to assume the role of plaintiff's advocate and, on at least three separate occasions, commented that the contract between plaintiff and Olsson was invalid. Each time, defendant asked whether the judge was making a ruling, but he did not answer, nor did he provide a reason for the contract's purported invalidity. Defendant further attested that, during the hearing, he asked the judge whether Olsson, who was not present, was a necessary party concerning Olsson's contract with plaintiff, and the judge responded that he had already determined that the contract was "no good" and did not apply. Moreover, defendant attested that the judge announced that the motion to dismiss was denied. When defendant objected on the basis that he had just received plaintiff's answer and needed an opportunity to address plaintiff's arguments, the matter was continued.

Finally, defendant attested that he heard the judge comment that he had family members who had trouble timely paying their credit cards, but they had to work through those problems "just like everyone else." Defendant asserted that the judge was biased and, further, that the judge and plaintiff's counsel had "devised a scheme and artifice to, among other things, impair David A. Olsson's fundamental right of contract, deprive David A. Olsson of his due process rights to defend his own interests and contract rights, and to compel [defendant] to participate in such scheme and artifice."

¶ 12 Defendant's motion to substitute judge for cause was transferred to another judge's courtroom. In that same order, the matter was set for September 25, 2014, for "status and to set a hearing date on *** the motion for substitution of judge for cause."

¶ 13 On September 22, 2014, defendant filed a motion to call Judge Potkonjak as a special witness or, alternatively, that Judge Potkonjak be required to submit an affidavit rebutting defendant's affidavit. Defendant attached to the motion an affidavit from Sheila A. Mannix, who attested that she attended the proceeding on September 5, 2014, and heard Judge Potkonjak say that "defendant's contract is with Discover and whoever else got involved doesn't change that."

¶ 14 On September 25, 2014, Judge Jorge Ortiz denied defendant's motion to substitute for cause, "actual prejudice not having been established." Further, Judge Ortiz struck Mannix's affidavit. The matter was re-set for October 10, 2014, before Judge Potkonjak, for hearing on defendant's motion to dismiss.

¶ 15 On October 10, 2014, defendant's motion to dismiss was denied, and the case was set for "trial" on October 17, 2014.[1] The October 17, 2014, order reflects that defendant renewed his

[1] We note that no hearing transcripts or bystander's reports are included in the record on appeal.

objection to plaintiff's standing to sue. However, the court entered judgment in plaintiff's favor and against defendant in the amount of $2,783.20, plus costs. (We note that the judgment amount reflects the amount sought in the complaint ($3,112.20), less the amount paid by Olsson ($329.00)). Defendant appeals.

¶ 16 II. ANALYSIS

¶ 17 A. Motion to Dismiss and Judgment

¶ 18 Defendant argues first that the trial court erred in denying his motion to dismiss and entering judgment in plaintiff's favor. He asserts that plaintiff lacked standing to bring a claim on the account because it had previously transferred all rights, title, and interest therein. Defendant further argues that the court erred where it proceeded without Olsson, whom he alleges was a necessary party. Finally, defendant argues that the court erred where it failed to strike or reject plaintiff's assertion that Olsson's offer to purchase defendant's account constituted an attempted accord and satisfaction. [2]

¶ 19 We note first that the judgment defendant seeks to vacate was purportedly entered after a trial, for which we have no hearing transcripts, nor bystander's report. Illinois Supreme Court Rule 323 requires an appellant to prepare and file a transcript or bystander's report of the proceedings in the trial court. Ill. S. Ct. R. 323(a), (c) (eff. Dec. 13, 2005). "[A]n appellant has the burden to present a sufficiently complete record of the proceedings * * * to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered

[2] The parties both argue that no valid accord and satisfaction occurred, although for different reasons. Moreover, it is not clear from the record that the trial court even found in plaintiff's favor under a theory of accord and satisfaction. Accordingly, we need only address defendant's contention that plaintiff assigned its rights to Olsson.

by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). We hold *pro se* litigants to a lesser standard in complying with supreme court rules; nevertheless, they must meet the minimum standard of providing this court with a record sufficient to adequately review the lower court's decision. *Rock Island County v. Boalbey*, 242 Ill. App. 3d 461, 462 (1993). In short, to the extent our review encounters any doubts which arise from the incompleteness of the record, they will be resolved against defendant. *Foutch*, 99 Ill. 2d at 391. To the extent our review involves questions of law, it is *de novo*. See *Illinois Tool Works, Inc. v. Commerce and Industry Ins. Co.*, 2011 IL App (1st) 093084, ¶ 20 (contract interpretation and assignments reviewed *de novo*).

¶ 20 Here, defendant does not dispute that plaintiff issued him a credit card, that the cardmember agreement and balance documentation attached to the complaint applied to defendant's account with plaintiff and were accurate, that defendant used the credit card issued by plaintiff to make purchases, and that defendant failed to make payments in accordance with the terms of the agreement. Therefore, defendant's sole contention is that, by virtue of negotiating the check with the restrictive endorsement, plaintiff assigned or transferred the account and any interest therein to Olsson and, accordingly, it lacked standing to pursue its claim against defendant. We disagree.

¶ 21 Assignments are "subject to the same requisites for validity as are other contracts, such as *intent, mutuality of assent*, capacity to contract, legal subject matter, and consideration." (Emphasis added.) *Cincinnati Ins. Co. v. Am. Hardware Mfrs. Ass'n*, 387 Ill. App. 3d 85, 100 (2008). While an assignment need not take any particular form, it must "sufficiently evidence[] the *intent* of the assignor to vest ownership of the subject matter of the assignment in the assignee[.]" (Emphasis added.) *Id.* Whether an assignment has occurred is dependent on "proof

of intent to make an assignment" and "that intent must be manifested." *Id.*; see also *Illinois Tool Works*, 2011 IL App (1st) 093084, ¶ 20.

¶ 22 Here, the documents in the common law record do not sufficiently evidence an intent on plaintiff's behalf to make an assignment of the account to Olsson. Although the limited-time offer of settlement and the restrictive-endorsement check were apparently received by plaintiff, and the check was negotiated, the terms governing defendant's account provided that plaintiff's acceptance of a restrictive-endorsement payment in no way bound plaintiff to any restrictive-endorsement terms. Again, the agreement provides:

> "We can accept late payments, partial payments or payments marked 'payment in full' or with *any other restrictive endorsement* without losing any of our rights under this Agreeement." (Emphasis added.)

As such, the terms of the cardmember agreement essentially rendered invalid any restrictive endorsements. That Olsson was not a party to the agreement is irrelevant; the clause broadly refers to acceptance of any payments, without restricting from whom they may come and, in any event, the import of the agreement reflects that, without more, plaintiff's intent when accepting a restrictive-endorsement payment was *not* to alter its rights under the agreement, which include the right to collect on the account.

¶ 23 We further note that the agreement prohibited defendant from assigning or transferring his account without plaintiff's prior written consent. Defendant argues that *he* did not assign or transfer anything; rather, Olsson acted independently. The offer of settlement and compromise, however, belies defendant's suggestion that Olsson acted purely in his own interest, as opposed to as defendant's benefactor. The offer document plainly states that the funds were to be paid by defendant's "family member." The relevant funds were then paid by Olsson. The intended

result of the transaction was to render the account paid in full, with defendant "off the hook," so to speak, at least as to his obligations to plaintiff. As such, in the absence of further evidence, the assignment language in the agreement, particularly when considered in conjunction with the language prohibiting any effect of restrictive endorsements, further belies any intent by plaintiff to transfer or assign defendant's account simply by virtue of cashing the check.

¶ 24 As such, the record as it stands does not reflect mutuality of assent and a manifested intent by plaintiff to assign its rights to collect defendant's debt to Olsson. The appellate briefs are silent as to whether there were any witnesses ever called to testify about the parties' respective intents and, even if there was such testimony, we have no record of it and must resolve any doubts arising from that incompleteness against defendant. *Foutch*, 99 Ill. 2d at 391. The trial court, therefore, did not err in entering judgment in plaintiff's favor.

¶ 25 Addressing defendant's argument that the trial court should have brought in Olsson as a necessary party, we disagree. A necessary party is one who "has a legal or beneficial interest in the subject matter of the litigation and will be affected by the action of the court." *Holzer v. Motorola Lighting, Inc.*, 295 Ill. App. 3d 963, 970 (1998). Reasons to consider a party as necessary, such that the lawsuit should not proceed in his or her absence, include: (1) to protect an interest which he or she has in the subject matter of the controversy which would be materially affected by a judgment entered in his or her absence; (2) to protect the interests of those who are before the court; or (3) to enable the court to make a complete determination of the controversy." *Id.* Here, the absence of a valid assignment reflects that Olsson has *no* legal interest in the account, and that the controversy between the contracting parties, *i.e.*, plaintiff and defendant, could be completely resolved in his absence. Defendant objects that Olsson's absence is allowing plaintiff to "double collect" on the debt. However, as we previously noted, the

judgment reflects that plaintiff received in the judgment only the balance owed by defendant, less the amount paid by Olsson. As such, there is no double recovery of Olsson's $329.00 payment. Further, to the extent that defendant is concerned that he will be asked to pay both plaintiff and, possibly, Olsson, that claim is premature and, in any event, this decision precludes a double obligation.[3]

¶ 26 B. Motion for Substitution of Judge for Cause

¶ 27 Defendant next argues that the trial court erred where it: (1) failed or refused to rule on appellant's motion to call Judge Potkonjak as a special witness; (2) struck Mannix's affidavit; and (3) denied appellant's motion for substitution on a date that was set only "for status and to set a hearing date." We reject defendant's arguments.

¶ 28 We address first defendant's argument that the court failed or refused to rule on his motion to call Judge Potkonjak as a special witness. We note that the motion had further requested that Judge Potkonjak be ordered to submit a counteraffidavit. It is true that there appears to be no order in the record specifically denying defendant's motion. Nevertheless, "a movant has the responsibility to obtain a ruling on his motion if he is to avoid forfeiture on appeal." *Hernandez v. Pritikin*, 2012 IL 113054, ¶ 41. Therefore, we find defendant's argument forfeited. Further, as defendant notes, section 2-1001(a)(3)(iii) of the Code of Civil Procedure provides that the judge named in the petition for substitution for cause "need not testify but *may* submit an affidavit *if the judge wishes*." (Emphasis added.) 735 ILCS 5/2-1001(a)(3)(iii) (West

[3] We further note that, in our view, several of defendant's arguments are not his to raise. For example, defendant objects that plaintiff has interfered with Olsson's right to contract and Olsson's due process rights: those arguments belong to Olsson, should he ever choose to pursue them, not defendant.

2014). Accordingly, the statute makes clear that neither the attendance nor affidavit of Judge Potkonjak was required.

¶ 29 We address defendant's remaining arguments collectively. In sum, defendant complains that he was unable to obtain a counteraffidavit from Judge Potkonjak to rebut his own affidavit attached to his motion for substitution. He argues that, in the absence of a counteraffidavit or other evidence, the allegations of his motion should have been deemed admitted. Defendant further argues that the court erred where it struck Mannix's affidavit, where she was a witness he wanted to call at the hearing on the motion. Finally, defendant argues that the judge converted a status hearing into a "hearing on the merits" without notice, violating due process.

¶ 30 Defendant's remaining arguments must be rejected. First and foremost, as to his allegation that the court held a hearing on the merits concerning the motion for substitution, we have no hearing transcript and must, therefore, presume the trial court acted in accord with the law and had a sufficient factual basis for both holding the hearing and denying defendant's motion. *Foutch*, 99 Ill. 2d at 391. Further, defendant misses the point that the absence of a counteraffidavit or testimony from Judge Potkonjak likely worked in his favor. As to Mannix's affidavit, we do not know the basis for the court's decision to strike it; however, it was certainly of minimal probative value, where she claimed only to have heard Judge Potkonjak say "defendant's contract is with Discover and whoever else got involved doesn't change that." Finally, the trial court's order states that it denied defendant's motion for substitution because he failed to establish actual prejudice. See, *e.g.*, *In re Marriage of O'Brien*, 2011 IL 109039, ¶¶ 30-31 (actual prejudice required to remove a judge for cause). We therefore presume that the court considered defendant's motion and affidavit and determined that, even if true, requisite prejudice was not established. On this record, we have no reason to find that conclusion contrary to the

manifest weight of the evidence. See, *e.g.*, *Jacobs v. Union Pacific R.R. Co.*, 291 Ill. App. 3d 239, 244 (1997) (trial court's determination on allegations of actual judicial prejudice in a motion to substitute for cause will not be reversed unless against the manifest weight of the evidence). In sum, we reject defendant's arguments.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 33 Affirmed.