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2013 IL App (3d) 120235-U

Order filed January 8, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

CLAYPOOL DRAINAGE and LEVEE DISTRICT,	) Appeal from the Circuit Court
	) of the 13th Judicial Circuit,
	) Grundy County, Illinois,
Petitioner-Appellee,	)
	)
v.	) Appeal No. 3-12-0235
	) Circuit No. 1963-TX-1836
CHARLES O. HART, FRANK J. PLUTH,	)
and CECO EMPLOYEES RECREATION ASSOCIATION,	)
	) Honorable
	) Lance R. Peterson,
Respondents-Appellants.	) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly struck portions of affidavit filed by landowners' expert in response to petition for annexation filed by drainage and levee district where the affidavit did not comply with supreme court rule and contained opinions not disclosed by the discovery deadline. Trial court properly granted summary judgment to drainage and levee district on its petition to construct improvements where it established that landowners' property was servient estate. Trial court properly granted summary judgment to drainage and levee district on its petition to annex where it presented un rebutted evidence that the property to be annexed would benefit

from annexation.

¶ 2 The Claypool Drainage and Levee District (District) filed petitions to annex and construct improvements on property owned by respondents Charles O. Hart, Frank Pluth, and CECO Employees Recreation Association (collectively referred to as "Association"). After the trial court denied the District's first motion for summary judgment, the District filed a subsequent motion for summary judgment, as well as a motion to strike the affidavit of the Association's expert. The trial court granted, in part, the District's motion to strike and granted the District's motion for summary judgment. On appeal, the Association argues that the trial court erred in striking portions of its expert's affidavit and granting summary judgment to the District on its petition to construct improvements and its annexation petition. We affirm.

¶ 3 FACTS

¶ 4 The District was organized in 1896. At that time, the District included the south half of section 24 in township range 33N in Coal City. A significant portion of property now owned by the Association became part of the District in 1986. In July 2009, fifteen new parcels were annexed into the District. Most of them were located in the north half of section 24 range 33N and largely comprised the White Deer subdivision.

¶ 5 In November 2009, the District filed a petition to annex two parcels of property owned by the Association located in the northern half of section 24 range 33N, directly south of the property annexed in July 2009. The petition was signed by three of the District's commissioners and stated that the land to be annexed "has been connected to a district drain, or has been or will be benefitted by district work done and to be done." The petition further stated:

"In the professional opinion of Graig Neville, PE, of Manhard Consutling [sic], the

property sought to be annexed falls within the watershed of the Claypool Drainage and Levee District. This property benefits from the Claypool drainage system by virtue of direct and indirect connection to the drainage system, reliance on downstream conveyance systems operated and maintained by the District for proper drainage, owning adjacent parcels that are hydrologically connected to land already within the District limits and by being surrounded by parcels already being assessed by the District."

Attached to the petition was a letter from Neville containing the above opinion.

¶ 6 Two days later, the District filed a petition to construct drainage improvements along Duck Pond Road. The petition sought permission to install an 18-inch tile allowing storm water to drain from the White Deer subdivision, south across Duck Pond Road, to the Association's property. The petition was supported by Neville, who opined that proper drainage in the area was altered by mining activities at the Association's property, and the improvement will direct the water runoff back to its natural course.

¶ 7 In December 2009, the Association filed an objection to the District's annexation petition, asserting that its land is not directly connected to the District's drainage ditches and will not benefit from annexation. In June 2010, the District filed a motion for summary judgment on its annexation and improvement petitions. Attached to the motion was a letter from Neville, which opined that the Association's parcels "obviously benefit due to their direct hydraulic connection with the main ponds in the CECO Club and were annexed into the District along with those properties north of Duck Pond Road." Neville further opined that the parcels annexed north of Duck Pond Road are dominant to the Association's parcels, which must accept natural drainage from those properties. The court

denied the Association's motion for summary judgment.

¶ 8 On June 8, 2011, the court entered an order, which stated: "All rule 213 expert witnesses and their opinions and reports shall be disclosed within 30 days. All rebuttal opinions shall be disclosed within 30 days thereafter." The Association timely submitted a report by Karen Kabbes, a civil engineer, which stated in part:

"Based on the review of the area drainage it is not clear that CECO is the historic subordinate landowner to the properties north of Duck Pond Rd. The elevations on both sides of Duck Pond Rd are very similar, except where noted. There is no clear evidence that the properties north of Duck Pond Road historically drained to the south to CECO. The evidence of the unaltered land on the CECO site, considered with the Grundy County topographic maps, soils maps and White Deer Subdivision Plat of Survey suggest in some areas the water may have drained from CECO to the north. Properties north of Duck Pond Rd. may have drained to the east or west before draining north or south."

¶ 9 On September 1, 2011, the District filed a second motion for summary judgment on its petitions. Attached to the motion were many exhibits, including two affidavits from Neville. Neville's affidavits stated that it was his professional opinion, based on investigation and analysis, that the area north of Duck Pond Road, including the White Deer subdivision, drains to the south to the Association's property and then to an area that is already part of the Claypool Drainage District. Therefore, the Association's parcels that are the subject of the annexation petition are "currently benefitting from the Claypool drainage system."

¶ 10 On October 28, 2011, the Association filed a response to the District's motion for summary

judgment, attached to which were many exhibits, including an affidavit from Karen Kabbes that attempted to contradict various portions of Neville's affidavit. In her affidavit, Kabbes concluded that "water may flow north to the White Deer Subdivision northern quarry pond before it would ever flow into the CECO lakes, even with the existing cross-culvert under Duck Pond Rd. cleaned out." The District filed a motion to strike Kabbes' affidavit because it contained information that was not disclosed in her report and that did not comply with Supreme Court Rule 191. Thereafter, the Association filed a motion to dismiss the District's petitions, asserting that the court did not have subject matter jurisdiction because the Association's property was "never within the 'watershed' of the Claypool Drainage and Levy District."

¶ 11 On December 20, 2011, the trial court denied the Association's motion to dismiss. The court granted, in part, the District's motion to strike, striking several paragraphs of Kabbes' affidavit because they did not comply with Supreme Court Rule 191 and/or contained opinions that were not timely disclosed.

¶ 12 Thereafter, the District filed its reply in support of its motion for summary judgment. Attached thereto was an affidavit from Neville responding to Kabbes' affidavit and several exhibits supporting the affidavit. In his affidavit, Neville agreed with Kabbes that portions of the White Deer Subdivision drain north and that the District had no plans to change that. However, his data showed that much of the area north of Duck Pond Road drains to the south, making the Association's property the "servient tenement." The Association filed a motion to strike Neville's affidavit and exhibits.

¶ 13 On December 30, 2011, the trial court held a hearing on the District's second motion for summary judgment and the Association's motion to strike. The court granted the Association's

motion to strike, in part, striking several paragraphs of Neville's affidavit. The court then granted the District's motion for summary judgment on its annexation petition. The court found that the evidence in the record showed that (1) the parcels sought to be annexed are surrounded by properties to the north and south that are already part of the district, and (2) the Association's lakes, as a whole, flow into the Dresden Culvert, which is southwest of the parcels, and then flows into the Coal City Area Club lakes, which drain into the District's drainage ditch.

¶ 14 The court explained: "Even if no paragraphs of Karen Kabbes' affidavit were stricken, even if I left in every word, there is still no material issue of fact in this case. Everything she says is may, might, could be on any of the material issues in this case." He pointed out that Kabbes never stated that it was her opinion to a reasonable degree of certainty that the water flows north. The court found that there was no disputed issue of fact because Neville would testify that the water in and around the Association's property flows south, and Kabbes' would not directly contradict that. Thus, the court concluded that "the evidence is that the water flows from the north to the south generally. It does not flow north." The court further found that annexation was warranted because the Association's parcels "are within the watershed that the district manages."

¶ 15 The court reserved ruling on the District's petition to construct improvements so that it could determine whether the notice provided by the District was adequate. On March 1, 2012, the court ruled that no additional notice to landowners was required. The court entered summary judgment in favor of the District on its petition to construct improvements and made its order granting summary judgment to the District on its petition to annex final and appealable.

¶ 16 ANALYSIS

¶ 17 I. Motion to Strike

¶ 18 Generally, the sufficiency of an affidavit is tested by a motion to strike. *Kearns v. Board of Education of North Palos Elementary School District No. 117, Cook County*, 73 Ill. App. 3d 907, 913-14 (1979). The form and contents of affidavits offered in support of and in opposition to a motion for summary judgment are governed by Illinois Supreme Court Rule 191(a). Ill. S. Ct. R. 191(a) (eff. July 1, 2002). Rule 191 provides in pertinent part:

"Affidavits in support of and in opposition to a motion for summary judgment *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible into evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

When a trial court rules on a motion to strike an affidavit in conjunction with a motion for summary judgment, the appellate court reviews that ruling *de novo*. *Collins v. St. Paul Mercury Insurance Co.*, 381 Ill. App. 3d 41, 46 (2008); *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (2001).

¶ 19 There must be strict compliance with Rule 191 to insure that trial judges are presented with valid evidentiary facts upon which to make a decision. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 336 (2002). A court does not take as true affidavits, or portions thereof, that do not comply with Supreme Court Rule 191. See *Forrester v. Seven Seventeen HB St. Louis Redevelopment Corp.*, 336 Ill. App. 3d 572, 580 (2002). Affidavits that contain unsupported assertions, opinions and conclusions, rather than facts, do not comply with Rule 191 and may be stricken. See *Majca v. Beekil*, 183 Ill. 2d 407, 423-24 (1998); *Collins*, 381 Ill. App. 3d at 46.

¶ 20 Illinois Supreme Court Rule 219(c) "authorizes a trial court to impose a sanction *** upon any party who unreasonably refuses to comply with any provisions of this court's discovery rules or any order entered pursuant to these rules." *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). The rule outlines a nonexhaustive list of sanctions that may be imposed, including striking a portion of the offending party's pleading and barring a witness from testifying concerning a certain issue. See *Cronin v. Kottke Associates, LLC*, 2012 IL App (1st) 111632, ¶ 35; Ill. S. Ct. R. 219(c)(iv)&(vi) (eff. July 1, 2002). "The sanctions authorized under Rule 219 are intended to combat abuses of the discovery system and to maintain the integrity of the court system." *Smith v. P.A.C.E.*, 323 Ill. App. 3d 1067, 1075 (2001).

¶ 21 Here, the trial court struck portions of Kabbes' affidavit for noncompliance with Rule 191(a) and as a sanction, pursuant to Rule 219(c), for failing to comply with the discovery deadline. We have carefully reviewed the portions of the affidavit stricken by the trial court for failing to comply with Rule 191(a) and agree that the paragraphs stricken contain unsupported assertions, opinions and conclusions in violation of Supreme Court Rule 191(a). See *Majca*, 183 Ill. 2d at 423-24; *Collins*, 381 Ill. App. 3d at 46. Thus, the trial court did not err by striking those paragraphs. See *Collins*, 381 Ill. App. 3d at 46. Furthermore, the trial court's decision to strike various paragraphs of Kabbes' affidavit as a discovery sanction was not improper since the opinions expressed in those paragraphs were not timely disclosed. See *Cronin*, 2012 IL App (1st) 111632, at ¶ 35; Ill. S. Ct. R. 219(c) (eff. July 1, 2002).

¶ 22 Even if the trial court had erred in striking portions of Kabbes' affidavit, we would find that the error was harmless. An error is harmless if it does not change the result of the proceeding. See *Downey v. Dunnington*, 384 Ill. App. 3d 350, 389 (2008). Here, the trial court stated, and we agree,

that even if it had considered Kabbes' entire affidavit, it would still have entered summary judgment in favor of the District. Thus, the result of the proceedings would have been the same even if the court did not strike portions of Kabbes' affidavit.

¶ 23

II. Motion for Summary Judgment

¶ 24 Summary judgment is proper where the pleadings, depositions, admissions and affidavits on file, viewed in the light most favorable to the non-moving party, reveal no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Travel 100 Group, Inc. v. Mediterranean Shipping Co. (USA) Inc.*, 383 Ill. App. 3d 149, 153 (2008). The purpose of summary judgment is not to try a question of fact but, rather, to determine if a question of fact exists. *Id.* at 154. If the undisputed material facts could lead reasonable observers to divergent inferences, or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Id.* Summary judgment should not be entered unless the moving party's right to judgment is clear and free from doubt. *Id.* We review a trial court's grant of summary judgment *de novo*. *Id.* at 153-54.

¶ 25

A. Petition to Construct Improvements

¶ 26 "[T]he law provides that the owner of the higher estate has the right to allow surface water to follow the natural course of drainage onto the lower estate and may even construct artificial devices such as ditches or drains to more efficiently carry off surface water." *Hahn v. County of Kane*, 2012 IL App (2d) 110060, ¶ 8. Pursuant to the Illinois Drainage Code (Code), an owner of land may extend a drain through the land of others in the general course of natural drainage in order to obtain a proper outlet. 70 ILCS 605/2-2 (West 2010).

¶ 27 Here, the District filed a petition seeking authority to construct drainage improvements along

Duck Pond Road. The petition sought permission to install an 18-inch tile allowing storm water to drain from the White Deer subdivision, south across Duck Pond Road, to the Association's property. In determining whether to grant the District's petition, the trial court had to decide if the storm water naturally drains from the White Deer subdivision south to Duck Pond Road.

¶ 28 The District's expert, Neville, unambiguously concluded that the White Deer subdivision has a higher elevation than the Association's properties and drains south onto the Association's parcels. Neville determined that the parcels annexed north of Duck Pond Road are dominant to the Association's parcels, which must accept natural drainage from those properties.

¶ 29 The Association's expert, Kabbes, never directly contradicted Neville's conclusion that the water from White Deer subdivision flows south onto the Association's property. Rather, she asserted that "it is not clear that CECO is the historic subordinate landowner to the properties north of Duck Pond Rd." and that "water may flow north" from the White Deer subdivision. Such opinions were not supported by facts, but were based on speculation. Mere speculation is not enough to create a genuine issue of material fact sufficient to survive a motion for summary judgment. *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 586 (2007).

¶ 30 Thus, the trial court properly found that, based on the unrebutted opinions expressed by Neville, summary judgment should be entered in favor of the District on its petition to construct improvements.

¶ 31 B. Petition to Annex

¶ 32 Section 8-3 of the Code provides: "When any land lying outside of a district has been connected to a district drain or has been or will be benefitted or protected by any district work done or ordered to be done, the commissioners may petition the court to annex such land to the district."

70 ILCS 605/8-3 (West 2010). The District has the burden of proving that the lands to be annexed would be benefitted thereby. *In the Matter of Lawrence County Consolidated Drainage District*, 155 Ill. App. 3d 1047, 1056 (1987). Where the District presents a *prima facie* case that land will be benefitted by annexation, the landowners must present evidence in rebuttal. *Id.* If the landowners fail to rebut the District's case, the trial court's order allowing annexation should be affirmed. *Id.*

¶ 33 Here, Neville presented *prima facie* evidence that the Association's parcels will be benefitted by annexation. While Kabbes questioned Neville's conclusions and suggested that more research was necessary to determine whether the water in fact flowed to the south, Kabbes' affidavit contained only speculation. Mere speculation does not create a genuine issue of material fact sufficient to survive a motion for summary judgment. *Judge-Zeit*, 376 Ill. App. 3d at 586.

¶ 34 The Association failed to present evidence rebutting the District's *prima facie* case. Thus, we affirm the trial court's order granting summary judgment to the District on its annexation petition.

¶ 35 CONCLUSION

¶ 36 The judgment of the trial court of Grundy County is affirmed.

¶ 37 Affirmed.