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2015 IL App (3d) 130692-U

Order filed September 1, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

NORTHBROOK BANK AND TRUST)	Appeal from the Circuit Court
COMPANY, an Illinois state chartered bank, as)	of the 13th Judicial Circuit,
successor to FIRST CHICAGO BANK AND)	Grundy County, Illinois.
TRUST, an Illinois corporation,)	
)	
Plaintiff-Appellant,)	
)	
v.)	
)	
MORRIS HEALTHCARE AND)	
REHABILITATION CENTER, LLC, an Illinois)	Appeal No. 3-13-0692
limited liability company; and LEWIS J.)	Circuit No. 11-CH-377
BORSELLINO, an individual,)	
)	
Defendants-Appellees)	
)	
(MORRIS REAL ESTATE HOLDINGS II,)	
LLC; MORRIS SENIOR LIVING, LLC;)	
UPPER ILLINOIS RIVER VALLEY)	
DEVELOPMENT AUTHORITY, a political)	
subdivision, body politic and municipal)	
corporation of the State of Illinois; WELLS)	
FARGO BANK, N.A., as Trustee of Indenture)	
of Trust dated December 1, 2007; and)	
UNKNOWN OWNERS and NON-RECORD)	
CLAIMANTS,)	Honorable
)	Lance R. Peterson,
Defendants).)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice McDade and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing the third-party citations to discover the assets of a defendant. The trial court did not err in denying the plaintiff's request to strike the affidavit of defendants' counsel that had been submitted in support of defendants' motion to dismiss the citations.

¶ 2 After obtaining a summary judgment, based on a loan default, the plaintiff, Northbrook Bank, filed citations to discover assets of the defendant, Morris Healthcare and Rehabilitation Center, LLC, (Morris Healthcare) and third-parties that owed money to Morris Healthcare. The defendants, Morris Healthcare and Lewis J. Borsellino, filed a motion to stay and dismiss the citations. The trial court granted the defendants' motion to dismiss the third-party citations, finding that under the language of the loan documents the Bank waived any claim to the defendants' assets that may have been in the possession of the third-parties. The trial court also denied the Bank's request to strike an affidavit that had been attached to the motion to dismiss the citation and the Bank's request to stay the order dismissing the citation and for a bond pending appeal. The Bank appealed.

¶ 3 FACTS

¶ 4 According to the Bank's¹ verified complaint, Morris Senior Living, LLC (Morris Senior Living) was a supportive living facility (SLF) providing supportive living services to low income

¹ Northbrook Bank alleged that it was the successor of First Chicago Bank and Trust pursuant to a Purchase and Assumption agreement with the Federal Deposit Insurance Corporation (FDIC). The plaintiff, either acting as Northbrook Bank or First Chicago Bank and Trust, will be referred to as the "Bank."

seniors under the Illinois Supportive Living Medicaid Waiver Program. Morris Senior Living's principle place of business was located at 1221 South Edgewater Drive (1221 Edgewater) in Morris, Illinois. Morris Healthcare was a skilled nursing facility (SNF) that was located at 1223 South Edgewater Drive (1223 Edgewater) in Morris, Illinois. Morris Real Estate Holdings II, LLC, (Morris Real Estate Holdings II) owned the properties located on 1221 and 1223 Edgewater. Morris Real Estate Holdings II, Morris Senior Living, and Morris Healthcare were all owned and controlled by Lewis J. Borsellino. In bringing the complaint, the Bank sought to foreclose the mortgage, security agreement, and fixture financing statement executed on December 1, 2007, under which the Bank had obtained a security interest in the property at 1221 Edgewater and the personal property located at or used in conjunction with the 1221 Edgewater location. The Bank also sought to recover damages against the defendants for breaches under various notes and other instruments.

¶ 5 According to the verified complaint, on November 1, 2007, the Bank entered into a written agreement with Morris Senior Living, wherein the Bank agreed to make revolving loans to Morris Senior Living in the amount of up to \$500,000 (Morris Senior Living revolving loan). The Morris Senior Living revolving loan was guaranteed by Borsellino. On December 1, 2007, Morris Real Estate Holdings II signed a mortgage security agreement and fixture financing statement, with the Bank as the Mortgagee, pursuant to the Upper Illinois River Valley Development Authority Act (70 ILCS 530/1 *et seq.* (West 2012)), wherein the Upper Illinois River Valley Development Authority agreed to issue "Multi-Family Housing SLF Revenue Bonds" in the amount of \$8,000,000 in order to support the acquisition of land located at 1221 Edgewater and the construction and equipping of a 58-unit SLF on that property by lending the proceeds to Morris Real Estate Holdings II.

¶ 6 The complaint further alleged that on April 7, 2008, Morris Healthcare and the Bank executed a loan and security agreement, wherein the Bank agreed to extend revolving loans to Morris Healthcare up to \$2,500,000 (Morris Healthcare revolving loan). The Morris Healthcare revolving loan was guaranteed by Borsellino. On January 23, 2009, Morris Healthcare, as the borrower, and Borsellino, as the guarantor, executed a "Second Amendment to Loan and Security Agreement" (Second Amendment) to the Morris Healthcare revolving loan. The Second Amendment provided:

"Except as specifically set forth herein, the Loan Agreement and other Loan Documents remain in full force and effect, and the Borrower and Guarantor hereby ratify and confirm each and every covenant, condition, obligation and provision set forth therein."

¶ 7 The Second Amendment indicated that Morris Healthcare "provides certain services as an operator to the Grundy County Building Commission ('GCBC') in connection with a skilled and/or intermediate nursing facility owned by GCBC and located at 1338 Clay Street, Morris, Illinois (the 'Current SNF Property')." The second amendment also indicated that Morris Real Estate Holdings I, LLC owned the property located at "1221 S. Edgewater, Morris, Illinois, which property is legally described in Exhibit A attached hereto (the 'Future SNF property'), and *** [was] developing a skilled and/or intermediate care facility on the Future SNF Property, which [would] replace the Current SNF Property facility." Exhibit A contained the "Legal Description of the Future SNF Property," which described its common address was "1221 South Edgewater, Morris, Illinois."

¶ 8 The Second Amendment additionally stated that Morris Healthcare intended to lease the Future SNF Property and various equipment from Morris I SNF and operate the Future SNF

Property. The parties clarified that the collateral for the loan was Morris Healthcare's "interest in accounts and other assets related to services provided by [Morris Healthcare] in connection with the Current SNF Property," and the Bank had a first priority security interest "in any and all property that Morris Healthcare owned or used in connection with its services as operator of the current SNF property, wheresoever located and whether now existing or hereafter arising or acquired." In paragraph three of the Second Amendment, the parties agreed to add the following language:

"Bank acknowledges and agrees that Bank has no rights or interest in the Future SNF Property under the Loan Documents and Bank shall not file any claim, lien, security interest or assignment against the Future SNF Property, any asset of the Future SNF Property, proceeds derived from the ownership and operation of the Future SNF property, any reserves or accounts held in connection with the Future SNF Property, the rents or other income from the Future SNF Property, all personalty located at or used in connection with the Future SNF Property, any buildings or fixtures now or hereafter located on the Future SNF Property, the Future SNF Property Lease and the borrower's interest thereunder, any licenses or permits now or hereafter issued or related to the Future SNF Property, any provider agreements now or hereafter issued with respect to the Future SNF Property, and any certificate of need or replacement certificate of need now or hereafter issued with respect to the Future SNF Property."

¶ 9 On May 15, 2011, and June 15, 2011, the revolving notes of Morris Senior Living and Morris Healthcare respectively matured and both Morris Senior Living and Morris Healthcare defaulted on the notes. On November 1, 2011, the parties entered into a post-default letter

agreement, under which the defendants acknowledged their default. "Without waiving any of its rights and remedies" with respect to "the defaults now existing or hereafter occurring under the Loan Documents," the Bank agreed to permit overdrafts for employee payroll and vendor payments through November 30, 2011. The parties agreed that the post-default letter agreement "shall not establish a course of dealing or be construed as evidence of any willingness on Bank's part to refrain from taking enforcement actions or grant default waivers."

¶ 10 On December 30, 2011, the Bank filed an eight-count verified complaint against, *inter alia*, Morris Real Estate Holdings II, Morris Senior Living, Morris Healthcare, and Borsellino for defaulting on the loan agreements and breaching guarantees. On January 11, 2012, by agreement, the trial court appointed a receiver of the property that was subject to the foreclosure counts. On February 14, 2012, Morris Senior Living and Morris Real Estate Holdings II filed for bankruptcy. As a result, an automatic stay was implemented as to Morris Senior Living and Morris Real Estate Holdings II. Morris Healthcare and Borsellino filed an answer on June 8, 2012, and an amended answer on June 18, 2012, in which they admitted that Morris Healthcare was an LLC with its principal place of business at 1223 Edgewater and "provide[d] skilled nursing services to residents, and [was] an Illinois licensed nursing home."

¶ 11 On December 31, 2012, the Bank filed a motion for summary judgment on Counts VI and VIII against Borsellino for breach of his guaranties and on Count VII against Morris Healthcare for breach of the Morris Healthcare revolving loan note. In response, Borsellino and Morris Healthcare claimed that pursuant to the terms of the second amendment the Bank had no interest in the Future SNF Property. Borsellino and Morris Healthcare claimed in their response that Morris Healthcare was the Future SNF Property. Borsellino and Morris Healthcare also argued that the post-default letter agreement barred the Bank from commencing an action against

them or Morris Senior Living. In reply, the Bank argued that although it may have released its secured interest in the Future SNF property, it did not release any of the liability claims it had against the defendants.

¶ 12 On July 5, 2013, the trial court granted the Bank summary judgment on count VI against Borsellino for \$333,083.08 and on count VIII against Borsellino in the amount of \$4,802,447.23 for breach of his guarantees. The trial court also granted summary judgment on Count VII against Morris Healthcare in the amount of \$4,802,447.23 for its breach of the Morris Healthcare revolving loan note.

¶ 13 On July 18, 2013, pursuant to section 2-1402 of the Code of Civil Procedure (735 ILCS 5/2-1402 (West 2012)), the Bank issued a citation to discover assets to Morris Healthcare. The Bank also issued third-party citations to National Government Services, Inc. (NGS) and the Illinois Department of Healthcare and Family Services (IDHFS) to determine whether either agency had assets in which the judgment debtor, "Morris Healthcare & Rehabilitation Center, LLC," had an interest.² The address for Morris Healthcare was listed as the address of its registered agent in Chicago, Illinois. The IDHFS responded to the citation that as of July 30, 2013, it was holding warrants totaling \$326,156.71 "payable to the defendant" with the defendant listed in the caption as "Morris Real Estate Holdings II, LLC" and without indication as to the location of the defendant's facility to which the money was payable.

¶ 14 On August 16, 2013, Morris Healthcare and Borsellino filed a motion to stay the issuance of any further citations and dismiss the pending citations pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)). Defendants argued that the citations

² NGS disperses Medicare funds to Morris Healthcare. The IDHFS disperses Medicaid funds to Morris Healthcare.

functioned as liens and froze the assets and income of "the SNF operations, location on Edgewater Drive in Morris Illinois." See 735 ILCS 5/2-1402(m) (West 2012) (a judgment becomes a lien when a citation is properly served). Defendants claimed that the Bank had agreed not to pursue any assets of the SNF and "[a]ny citation issued concerning Morris Healthcare will be unjustified because all of Morris Healthcare's business is the operation of the SNF." Defendants requested that the trial court enter an order prohibiting the Bank from issuing additional citations to any entity dealing with Morris Healthcare's business operations or, alternatively, vacate the order granting summary judgment against Morris Healthcare.

¶ 15 In support of the motion to stay and dismiss the citations, defendants attached the Second Amendment of the Morris Healthcare Revolving Loan note. Also, in support of the motion, the defendants filed an affidavit by Maurice Salem, the defendants' attorney, which stated among other things that if Morris Healthcare's income from the third-party citation recipients was frozen, "then the operation of the SNF will be severely jeopardized where the business will not have sufficient funds to continue." On August 20, 2013, defendants additionally filed the affidavit of Suzanne Day, who had been an administrator for Morris Healthcare and its predecessor for 23 years. Day's affidavit indicated that payments from IDHFS had been stopped, which has prevented or may prevent Morris Healthcare from paying for vendors, utilities, food, medicine, payroll, or the mortgage. The affidavit also indicated that if NGS's payments were stopped then the SNF operation would terminate and the residents of the facility would be at risk for illness, injury and death. The Bank filed a motion to strike portions of the Salem affidavit, arguing that Salem stated unfounded legal and factual conclusions and failed to provide a foundation for his assertions.

¶ 16 On August 23, 2013, a hearing took place on the defendants' motion to stay and dismiss the citations. Defendants acknowledged that the Bank was entitled to enforce the judgment but argued that the Bank was barred from freezing the operational assets of the SNF under the contractual language of the loan documents. The Bank argued that it had released its "consensual lien rights" in the SNF but there was no language in the loan document that indicated the Bank waived its right to collect the judgment from Morris Healthcare. The trial court asked the parties whether the term "future SNF property" was defined in the contract. The Bank's attorney indicated that it was defined in the second amendment as "certain property at 1221 South Edgewater, Morris, Illinois, which property is legally described in Exhibit A." Exhibit A indicated that the "common address" of the future SNF property "was located at 1221 South Edgewater, Morris, Illinois."

¶ 17 The trial court denied the Bank's motion to strike the Salem affidavit. The court found that Salem had the requisite personal knowledge of the facts represented in the affidavit.

¶ 18 The trial court also granted the defendants' motion to dismiss the third-party citations to discover assets held by IDHFS and NGS. The trial court found that the language of the loan and the amendments was unambiguous, and the Bank clearly and unequivocally agreed to waive any claim against the operating income of the nursing facility that was subject to the third-party governmental agency citations. The trial court indicated that it was "not ruling that the [Bank] cannot collect the judgment," but the operational income subject to the third-party governmental agency citations "clearly fall under the property that they have contracted not to file a lien against."

¶ 19 The trial court additionally denied the defendants' motion to dismiss the Morris Healthcare citation but limited that citation to "any assets that are not 'Future SNF Property' as

that term is defined in the *** second amendment to the loan and security agreement." The trial court indicated that the Bank had "the right to pursue assets that don't fall under the definition of future SNF property." The trial court also denied the Bank's request to stay the order and for a bond pending appeal.

¶ 20 The Bank appealed.

¶ 21 ANALYSIS

¶ 22 On appeal, the Bank argues that the trial court erred by: (1) granting the defendants' motion to dismiss the third-party citations and limiting the Morris Healthcare citation; (2) denying the Bank's request for a stay and a bond pending appeal; and (3) denying the Bank's request to strike the Salem affidavit.

¶ 23 I. Dismissal of the Third-Party Citations

¶ 24 On appeal, the Bank argues that the trial court erred by granting the defendants' motion to dismiss the third-party citations and limiting the Morris Healthcare citation because the court misinterpreted the language of the loan documents. The defendants have failed to file an appellee's brief that may be considered in deciding the issues raised on appeal by the Bank. Nonetheless, this court may decide the merits of this appeal without the aid of an appellee's brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 25 Here, the trial court dismissed and limited the citations based on its interpretation of the loan documents and the second amendment thereto. A trial court's interpretation of a contract is generally reviewed *de novo*, but factual findings that inform the interpretation of the contract are given deference on review and are to be reversed only where the factual findings are against the manifest weight of the evidence. *Wiczer v. Wojciak*, 2015 IL App (1st) 123753, ¶ 33. Where the

trial court construes a contract as a matter of law, we may interpret the contract *de novo*, independently of the trial court's interpretation. *Id.*

¶ 26 Citations to discover assets are issued pursuant to section 2-1402 of the Code of Civil Procedure (Code). 735 ILCS 5/2-1402 (West 2012). Section 2-1402 provides in pertinent part:

"(a) A judgment creditor *** is entitled to prosecute supplementary proceedings for the purposes of examining the judgment debtor or any other person to discover assets or income of the debtor not exempt from the enforcement of the judgment, a deduction order or garnishment, and of compelling the application of non-exempt assets or income discovered toward the payment of the amount due under the judgment." 735 ILCS 5/2-1402(a) (West 2012).

¶ 27 When assets or income of the judgment debtor are discovered that can be applied toward the judgment, the court may compel the judgment debtor, or any person cited, to deliver those assets to be applied toward the judgment. 735 ILCS 5/2-1402(c)(1), (c)(2), (c)(3) (West 2012). At any citation hearing at which the judgment debtor appears and seeks a declaration that income or assets are exempt, the court shall determine whether the property is exempt from judgment. 735 ILCS 5/2-1402(l) (West 2012). At any time before the return date on the citation, the judgment debtor may make a written request for a hearing to declare that certain income and assets are exempt by notifying the clerk of the court before that time and the clerk will schedule a hearing at which the court shall determine whether the property which the judgment debtor declared to be exempt is exempt from judgment. 735 ILCS 5/2-1402(l) (West 2012). The judgment becomes a lien when a citation is properly served, which binds nonexempt personal property of the judgment debtor. 735 ILCS 5/2-1402(m) (West 2012).

¶ 28 In dismissing the third-party citations, the trial court found that the assets of Morris Healthcare that were being held by NGS and the IDHFS were excluded from the judgment based on the Bank's contractual agreement not to assert any claims against the "Future SNF Property." Our *de novo* review of the contract indicates that the "Future SNF Property" was defined as a facility to be located at 1221 Edgewater. The verified complaint indicates that Morris Senior Living was located at 1221 Edgewater and Morris Healthcare was located at 1223 Edgewater. Although Morris Healthcare is a SNF, it cannot be said to be the "Future SNF Property" when the "Future SNF Property" is defined as property located at 1221 Edgewater and Morris Healthcare is located at 1223 Edgewater. The citation to discover assets directed to IDHFS specifically listed the judgment debtor as "Morris Healthcare & Rehabilitation Center, LLC" in care of its registered agent. Thus, it would appear the citation was directed to assets belonging to Morris Healthcare at its location at 1223 Edgewater. In the response to the citation by the IDHFS, the IDHFS indicated that it was holding assets payable to "the Defendant." The only reference to the identity of the defendant in the response to the citation was in the caption listing "Morris Real Estate Holdings II, LLC" as the defendant. Given the citation notice, it would appear that the assets held by the IDHFS are those of Morris Healthcare located at 1223 Edgewater, which would not be excluded from collection based on the Bank's contractual agreement not to file claims against the "Future SNF Property" located at 1221 Edgewater.

¶ 29 Thus, the trial court erred in dismissing the third-party citations issued to NGS and IDHFS based on the language of the contract. Based on this record, it cannot be said that all or any of Morris Healthcare's assets and income are Future SNF Property so as to justify a dismissal of the third-party citations. The trial court limited the Morris Healthcare citation, in accordance with the language of contract, to "any assets that are not 'Future SNF Property'." As indicated

above, the "Future SNF Property" as defined in the second amendment only refers to the property located at 1221 Edgewater.

¶ 30 We note that the Bank argues that it was entitled to pursue claims against any assets of Morris Healthcare, including any assets and income of the "Future SNF Property," because the Bank had only agreed to release Future SNF Property as collateral for the loans. The Bank acknowledged that it agreed not to file a "consensual lien" against the Future SNF Property but claims that it had not released its right to enforce a judgment against Morris Healthcare, which would include a right to obtain a judicial lien against any Morris Healthcare property or assets. In support of its argument that it did not release its right to a judicial lien against the Future SNF property, the Bank claims that a "consensual lien" right obtained from a security interest in collateral is separate and distinct from a "nonconsensual lien" right which arises by way of a judicial lien or statutory lien by operations of law. The Bank argues its agreement not to pursue a claim against the Future SNF property was extinguished when the judgment was entered against Morris Healthcare.

¶ 31 Under the doctrine of merger by judgment, a contract upon which the proceeding is based becomes entirely merged in the judgment. 30 Richard A. Lord, *Williston on Contracts* § 76:50, at pg. 237 (4th ed. 2004). By the judgment of the court, the contract loses all of its vitality and ceases to bind the parties to its execution. *Id.* All remaining legal liability is transferred to the judgment and no further action can be maintained on the instrument because the merger bars a subsequent action for the same cause of action. *Id.* at 238. However, the doctrine of merger does not preclude those causes of action that operate as a counterclaim to an action on the contract, absent a statutory requirement making the bringing of such counterclaim compulsory. *Id.* at 238-39. Additionally, the parties may agree that certain contractual rights will survive the

entry of judgment or, as a matter of law, agreements as to the performance of future acts do not merge into the judgment. *Id.* at 239.

¶ 32 Here, the Bank's agreement that it would not file any claim against the Future SNF Property did not merge into the judgment. Nonetheless, as discussed above, the record does not show that Morris Healthcare is the "Future SNF Property" as defined in the loan documents so as to prevent the Bank from seeking its assets. Therefore, we reverse the trial court dismissal of the third-party citations that were issued to NGS and the IDHFS and remand for further proceedings on the reinstated citations.

¶ 33 II. Salem Affidavit

¶ 34 The Bank also argues that the trial court abused its discretion in denying its motion to strike the Salem affidavit because Salem had failed to provide a proper foundation for his alleged personal knowledge of his statements contained in the affidavit. The Bank argues that the abuse of discretion standard applies to evidentiary rulings, such as the trial court's ruling to deny its motion to strike the Salem affidavit.

¶ 35 Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) governs affidavits filed in support of certain dispositive motions, requiring *inter alia* that such affidavit be made on the personal knowledge of the affiants and shall not consist of conclusions but of facts admissible in evidence. The Bank argues that the Salem affidavit: (1) failed to identify his personal knowledge that the exhibits attached to the Motion to Dismiss were true and accurate; and (2) the second amendment was referenced by the Salem affidavit but was not attached to it. We note that the second amendment was attached to the motion to dismiss the citations to which the Salem affidavit had been attached. Additionally, as the defendants' attorney, Salem was able to attest

that the second amendment was the true and accurate copy. Thus, it appears that trial court did not abuse its discretion in denying the Bank's motion to strike the Salem affidavit.

¶ 36 III. Motion to Stay Enforcement Pending Appeal

¶ 37 Finally, the Bank argues that the trial court erred in denying its request for stay and bond pending appeal. The Bank argues that the trial court should have granted its request for a bond pending appeal to provide the Bank with security in the event that this court reversed the trial court's order dismissing the citations. Specifically, the Bank contends that a bond would have ensured that it "was not harmed in the event that other judgment creditors seek to take [its] former priority position with regard to the Citations."

¶ 38 Courts may grant a stay pending appeal as a matter of discretion. *Stacke v. Bates*, 138 Ill. 2d 295, 302 (1990). On review, this court will only reverse a trial court's ruling on a motion to stay the enforcement of a judgment pending appeal if the evidence establishes that there has been an abuse of discretion. See *Id.* at 302.

¶ 39 Supreme Court Rule 305(b) (eff. July 1, 2004) allows for the court to stay the enforcement of certain judgments. Rule 305(b) also provides that a bond or other form of security "may be required in any case, and shall be required to protect an appellee's interest in property." Requiring a bond is a way to provide a judgment creditor security during the pendency of the appeal and that if the judgment is affirmed the judgment creditor will be paid. *Bricks, Inc. v. C&F Developers, Inc.*, 361 Ill. App. 3d 157, 162 (2005).

¶ 40 Here, the trial court exercised its discretion and denied the Bank's request to stay the dismissal of the citations. As a result, the lien on the funds for Morris Healthcare from NGS and the IDHFS was extinguished and the funds could be released to Morris Healthcare. The trial court denied the request to stay, indicating that Morris Healthcare could use the current funds to

continue its operations during the pendency of the appeal, which would generate additional income for the subject citations in the case of a reversal of the trial court's dismissal of the citations. We do not find that the trial court abused its discretion in denying the Bank's request for a stay. Additionally, we noted that the Bank is both the appellant and the judgment creditor so that the purpose of a bond requirement is not applicable in this appeal. See *id.* Therefore, the trial court did not err in denying the Bank's request for stay of the judgment pending appeal and a bond.

¶ 41

CONCLUSION

¶ 42

The judgment of the circuit court of Grundy County is affirmed in part, reversed in part and this cause is remanded for further proceedings.

¶ 43

Affirmed in part and reversed in part; cause remanded.