2023 IL App (3d) 220101-U

Order filed June 22, 2023

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2023

STEVEN MAIELLI,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	
	)	
	)	Appeal No. 3-22-0101
CHRIS CZARNOWSKI, CHENTHIL JEYARAJ, STEELMEN GROUP LLC, (CASS SERIES), STEELMEN GROUP LLC, (CRYSTAL SERIES), AND STEELMEN GROUP LLC (CHICAGO SERIES),	)	Circuit No. 18-MR-1466
	)	Honorable
	)	John C. Anderson,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE DAVENPORT delivered the judgment of the court.
Justices McDade and Hettel concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The court did not err in denying plaintiff's Rule 191(b) motion and partially granting defendants' motion for summary judgment when discovery had been ongoing for nearly two years and defendants' evidence was unrebutted. (2) The court erred in granting defendants' section 2-619 motion to dismiss when the purported release did not release plaintiff of all liability, and his claims were not moot, but it did not err in dismissing plaintiff's dissolution claim. Affirmed in part, reversed in part, and remanded.

¶ 2 Plaintiff, Steven Maielli, sued his former business partners, defendants Chris Czarnowski and Chenthil Jeyaraj, alleging breach of fiduciary duty, seeking recission of promissory notes, and seeking dissolution of three LLC entities. The circuit court granted defendants' motion for summary judgment in part and later granted defendants' motion to dismiss the remaining counts. Plaintiff appeals. For the reasons that follow, we affirm in part, reverse in part, and remand.

¶ 3 I. BACKGROUND

¶ 4 The facts and issues in this appeal are not complicated. Plaintiff and defendants were each ⅓ members of three LLCs: Steelmen Group LLC, Cass Series; Steelmen Group LLC, Chicago Series; and Steelmen Group LLC, Crystal Series (collectively, the Steelmen Group) that owned and leased three commercial properties in Joliet. Plaintiff was also employed by the Steelmen Group as the property manager until September 2017, when he was terminated as both a member and property manager.

¶ 5 Plaintiff filed a three-count complaint against Czarnowski, Jeyaraj, and the Steelmen Group, seeking relief for breach of fiduciary duty, recission of promissory notes, and to dissolve the Steelmen Group. Specifically, count I alleged defendants breached their fiduciary duty by failing to keep accurate business records, failing to collect rents, executing two promissory notes in their favor on behalf of the Steelmen Group, and diverting assets. Count II sought recission of promissory notes, alleging plaintiff never signed the notes and one of the defendants signed plaintiff's name instead. Count III sought dissolution of the Steelmen Group pursuant to the Limited Liability Company Act (805 ILCS 180/35-1(a)(5)(A), (B) (West 2018)), based on the same alleged conduct underlying count I.

¶ 6 In July 2018, defendants filed a combined motion to dismiss (735 ILCS 5/2-619.1 (West 2018)). The court denied the motion in November 2018 and continued the case on several occasions so the parties could conduct written and oral discovery.

¶ 7 In April 2020, Defendants then filed a motion for summary judgment (735 ILCS 5/2-1005 (West 2020)), alleging plaintiff did not have any evidence to support the allegations in his verified complaint. Plaintiff filed a response in July 2020, requesting leave to pursue additional discovery and to deny defendants' motion as premature. He attached an unsigned Rule 191(b) affidavit (Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013)), which he supplemented with a signed affidavit on September 3, 2020. In the affidavit, plaintiff alleged he could not adequately respond to defendants' motion without additional discovery, and he needed the assistance of a licensed accountant for a forensic accounting.

¶ 8 On September 8, 2020, the court granted the motion for summary judgment on count I but denied it as to counts II and III. The court found plaintiff's Rule 191(b) affidavit lacking the specificity required to avoid summary judgment and noted the case was not in its early stages. The court was not persuaded that a forensic accountant could obtain information not already available to plaintiff and noted that plaintiff's counsel could not even identify an accountant he hoped to retain. The court noted, moreover, that defendants' evidence was largely, if not completely, unrebutted. Still, the court found a question of material fact remained as to whether plaintiff executed the promissory notes, and that a limited evidentiary hearing may be necessary.

¶ 9 In August 2021, defendants filed a motion to dismiss (735 ILCS 5/2-619 (West 2020)) counts II and III. They stated defendants wished to release plaintiff from any liability or encumbrance with respect to the promissory notes at issue. Czarnowski signed an affidavit stating the Steelmen Group released plaintiff from any liability, which made moot the issue of whether

plaintiff signed the notes. The court granted the motion, dismissing with prejudice counts II and III. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, plaintiff raises two issues: whether the court erred in (1) granting summary judgment to defendants as to count I and (2) later dismissing counts II and III. Defendants raise three preliminary issues—jurisdiction, "waiver," and failure to comply with Illinois Supreme Court Rule 341 (eff. Oct. 1, 2020)—before responding to the merits. Defendants also request, as a sanction under Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994), their attorney fees and costs incurred in connection with this appeal. We will first address the preliminary issues raised by defendants and then turn to the merits.

¶ 12 A. Jurisdiction and Waiver

¶ 13 Defendants note that plaintiff did not file a motion to reconsider the circuit court's orders granting their summary judgment motion on count I or granting their motion to dismiss counts II and III. They argue plaintiff's failure to file a motion to reconsider is significant in two respects. First, it deprived this court of jurisdiction to consider the appeal. Second, it resulted in their waiver of the issues raised in this appeal. We disagree on both points.

¶ 14 As to the first point, our jurisdiction is not contingent on the filing of a motion to reconsider in the trial court. All final orders in civil cases may be appealed and a party confers jurisdiction on the appellate court when he or she files a notice of appeal within 30 days of the judgment being appealed. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994), R. 303(a)(1) (eff. July 1, 1997). "No other step is jurisdictional." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994).

¶ 15 Here, the court's judgment became final on February 9, 2022, when it dismissed with prejudice counts II and III. That order finally disposed of all claims in plaintiff's complaint. See

Ill. S. Ct. 304(a) (eff. Mar. 8, 2016). Plaintiff filed his notice of appeal 30 days later, on March 11, 2022. No step, other than timely filing the notice of appeal, was jurisdictional. Accordingly, we reject defendants' argument that we lack jurisdiction.

¶ 16 As to defendants' second point, plaintiff did not forfeit the issues raised in this appeal. It is well settled, in a nonjury case, like here, the failure to file a postjudgment motion, by itself, does not result in forfeiture of issues raised on appeal. *Childress v. State Farm Mut. Auto. Ins. Co.*, 97 Ill. App. 2d 112, 121 (1968); *Arient v. Shaik*, 2015 IL App (1st) 133969, ¶¶ 25-28; see 735 ILCS 5/2-1203 (West 2020); Ill. S. Ct. R. 366(b)(3)(ii) (eff. Feb. 1, 1994) (In a nonjury case, "[n]either the filing of nor the failure to file a post-judgment motion limits the scope of review."). Accordingly, we reject defendants' contention that plaintiff, by failing to file a postjudgment motion, "waived his right to appeal" or forfeited the issues on appeal.

¶ 17 B. Plaintiff's Noncompliance with Rule 341

¶ 18 Defendants also argue plaintiff's brief does not comply with Rule 341 and we should therefore strike plaintiff's brief and dismiss the appeal. See *Gwozdz v. Bd. of Educ. of Park Ridge-Niles Sch. Dist. No. 64*, 2021 IL App (1st) 200518, ¶ 27 (the appellate court has discretion to strike an appellant's brief and dismiss an appeal for noncompliance with Rule 341). Such a harsh sanction is generally warranted only when the noncompliance has hindered our review. *Vandenberg v. RQM, LLC*, 2020 IL App (1st) 190544, ¶ 30. While we agree plaintiff's brief leaves room for improvement, we decline to strike it or dismiss the appeal. *In re S.F.*, 2020 IL App (2d) 190248, ¶ 16.

¶ 19 C. Summary Judgment

¶ 20 Plaintiff does not directly challenge the merits of the circuit court's summary judgment order. Rather, he argues the court erred when it denied his request to continue the motion so he

could conduct additional discovery under Rule 191(b). Defendants argue the court properly granted summary judgment, correctly found plaintiff's Rule 191(b) affidavit deficient, and plaintiff had ample time to conduct discovery before summary judgment was entered.

¶ 21 We review the decision to permit additional discovery under Rule 191(b) for an abuse of discretion. *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1150 (2005). However, we review *de novo* the ultimate issue of whether defendants were entitled to summary judgment. *Id.* at 1145.

¶ 22 "A defendant may, at any time, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part of the relief sought against him or her." 735 ILCS 5/2-1005(b) (West 2020). "The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2020). "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42–43 (2004). "The use of the summary judgment procedure is encouraged as an aid to expedite the disposition of a lawsuit; however, it is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt." *Hayward v. C.H. Robinson Co.*, 2014 IL App (3d) 130530, ¶ 31.

¶ 23 Here, defendants filed a *Celotex*-type summary judgment motion. This court has previously described the distinction between "traditional" and *Celotex*-type motions:

> "For a defendant who does not have the burden of proof at trial on the issue(s) on which it moves for summary judgment, there are two recognized ways that the defendant can succeed in securing judgment as a matter of law: (1) by affirmatively

> disproving an element of the nonmovant's case—or, in other words, proving something that the defendant would not be required to prove at trial—often referred to as a 'traditional' motion for summary judgment; and (2) by establishing that the nonmovant's evidence is insufficient to avoid judgment as a matter of law, which is a *Celotex*-type motion." *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 25.

This distinction is significant because "when a defendant files a '*Celotex*-type motion,' strict compliance with Rule 191(b)'s affidavit requirement is not automatically necessary, whereas strict compliance is required with a traditional motion." *National Tractor Parts Inc. v. Caterpillar Logistics Inc.*, 2020 IL App (2d) 181056, ¶ 68.

¶ 24 "Illinois Supreme Court Rule 191(b) specifies the procedure to be followed where additional discovery is needed in regard to summary judgment proceedings." *Brummel v. Grossman*, 2018 IL App (1st) 170516, ¶ 91. The rule provides,

> "If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn

copies of documents so furnished, shall be considered with the affidavits in passing upon the motion." Ill. S. Ct. Rule 191(b) (eff. Jan. 4, 2013).

Thus, the Rule 191(b) affidavit must state the name of the person whose affidavit cannot be obtained, the reason the affidavit cannot be obtained, what the affiant believes this person would testify to, and the reasons for this belief.

¶ 25 Plaintiff's Rule 191(b) affidavit filed September 3, 2020, two months after his response to defendants' summary judgment motion, is sparse. The affidavit states,

"8. I cannot adequately respond to this motion without additional discovery.

9. I am not a trained or licensed accountant, and as such I require an expert to review the books and records [of] the entities.

10. Depending upon the results of this forensic accounting, additional subpoenas may need to be issued.

11. It is expected that a forensic accounting will bolster my claims and show that monies have been diverted."

¶ 26 The court entered a written order on September 8, 2020, in which it addressed both plaintiff's Rule 191(b) affidavit and defendants' motion for summary judgment. The court rejected "plaintiff's position relative to Rule 191(b)," finding the affidavit lacked the specificity required to avoid summary judgment. The court also addressed the issue of a *Celotex*-type motion:

"Although a plaintiff must comply with Rule 191(b) when a defendant has affirmatively shown that it is entitled to judgment, it is quite another matter to require such compliance when defendant, at an early stage, merely suggests that plaintiff is unable to prove his case. At that time, a plaintiff may not know what the witnesses will testify to before discovery is taken and accordingly be unable to

comply with Rule 191(b). Rule 191(b) was adopted before *Celotex*-type motions were widely used and was never intended to apply to them. *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 692 (2000).

But the distinction here is that we are not at an 'early stage' in this case. The case was filed nearly 2½ years ago. And, at oral argument, plaintiff's counsel was not able to even identify a forensic accountant that he hoped to retain. Further, the case is not particularly complicated; the Court is not at all persuaded that a forensic accountant can obtain information not already available to plaintiff. If plaintiff was able to identify specific red flags or matters that necessitated a forensic accountant, perhaps the Court would have reached a different conclusion."

¶ 27 Regarding the propriety of summary judgment, the court found defendants submitted evidence that was largely unrebutted, and defendants were entitled to summary judgment on claims based on the failure to keep accurate records, failure to collect rents, and diversion of assets. Plaintiff, during his deposition, testified that he was employed as the Steelmen Group's property manager, and his job duties included keeping accurate business records and collecting rents. He also testified he closed the Steelmen Group bank accounts defendants had access to and opened different accounts that he alone could access without defendants' knowledge or permission.

¶ 28 In *Crichton*, 358 Ill. App. 3d 1137, the plaintiff appealed the court's order granting summary judgment in favor of the defendant and argued the court erred in refusing to permit additional discovery under Rule 191(b). There, the Rule 191(b) affidavit was deficient because it failed to state material facts known by persons whose affidavits the affiant was unable to procure, and it failed to state specifically what the affiant believed the prospective witnesses would testify to and the reasons for such belief. *Id.* at 1151-52. "The plaintiff's failure to comply with Rule

191(b) defeats his objection on appeal that the circuit court allowed insufficient time for discovery." *Id*. at 1152. The plaintiff also argued the defendant filed a premature *Celotex*-type motion, so the plaintiff was not required to comply with Rule 191(b). *Id.* But the plaintiff mischaracterized the defendant's motion as a *Celotex*-type motion when it was instead a traditional-type motion. *Id.* at 1153.

¶ 29 Here, as the circuit court pointed out, defendants did not file their motion at an early stage of discovery. Rather, discovery had been pending for over two years and plaintiff had ample time to gather evidence to support his claims. Further, plaintiff's affidavit was deficient. Although strict compliance with Rule 191(b) is not automatically necessary on a *Celotex*-type motion, plaintiff's affidavit fails to minimally meet any of its requirements. It fails to identify the name of the person whose affidavit cannot be obtained, the reason the affidavit cannot be obtained, what the affiant believes this person would testify to, and the reasons for this belief. Under these circumstances, we cannot say the trial court's decision was unreasonable. *In re Marriage of Heroy*, 2017 IL 120205, ¶ 24. Accordingly, we conclude the trial court did not abuse its discretion by rejecting plaintiff's request for additional discovery under Rule 191(b).

¶ 30 We also find that summary judgment was proper on count I. Plaintiff's contention that defendants breached their fiduciary duties by failing to keep accurate business records, failing to collect rents, and diverting assets was rebutted by plaintiff's own deposition testimony, where he acknowledged that he diverted assets, failed to keep accurate business records, and failed to collect rents. And plaintiff has not raised any argument challenging the merits of the circuit court's decision. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (points not argued are forfeited). Accordingly, we affirm the circuit court's grant of summary judgment on count I.

¶ 31 D. Motion to Dismiss

¶ 32 Plaintiff next argues the circuit court erred by dismissing with prejudice counts II and III. Specifically, he argues that "defendants' actions in deciding to no longer attempt to collect on a promissory note that plaintiff alleges was fraudulently obtained left plaintiff in the position of being unable to proceed on a remaining count," and plaintiff should have been permitted to pursue his claim. Defendants, on the other hand, argue plaintiff does not provide a legitimate reason to overturn the trial court's decision granting defendants' motion to dismiss. According to defendants, the affidavit acts as a release, and once the affidavit was filed, the promissory notes were uncollectible, with no way to be resurrected, rendering plaintiff's remaining counts moot.

A defendant may, within the appropriate time for pleading, file a motion to dismiss on the basis that the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619(a)(9) (West 2020). "The phrase 'affirmative matter' refers to a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *McIntosh v. Walgreens Boots Alliance, Inc.*, 2019 IL 123626, ¶ 16. "When the circuit court decides a section 2-619(a)(9) motion to dismiss, all pleadings and supporting documents are construed in the light most favorable to the nonmoving party." *Chung v. Pham*, 2020 IL App (3d) 190218, ¶ 39. "The propriety of a dismissal under section 2-619(a)(9) of the Code presents a question of law that we review *de novo*." *McIntosh*, 2019 IL 123626, ¶ 17.

¶ 33 1. *Count II*

¶ 34 The circuit court dismissed count II on the basis that it was made moot when defendants purportedly released plaintiff from any liability or encumbrance on the note. "When the issues have ceased to exist and there is no longer an actual controversy between the parties, the alleged cause of action has been negated and should be dismissed as moot." *Hanna v. City of Chicago*,

382 Ill. App. 3d 672, 676–77 (2008) "Mootness, as a doctrine, stems from the concern that parties to a resolved dispute lack a sufficient personal stake in the outcome to assure that there is an adversarial relationship that sharpens the presentation of issues upon which the courts largely depend for illumination of difficult questions." *Fisch v. Loews Cineplex Theatres, Inc.*, 365 Ill. App. 3d 537, 539 (2005). "Mere voluntary cessation of allegedly unlawful conduct cannot moot a case, as defendant would then be free to resume the practices complained of, unless it became absolutely clear that wrongful behavior could not reasonably be expected to recur." *Fryzel v. Chicago Title & Tr. Co.*, 173 Ill. App. 3d 788, 794 (1988).

¶ 35 Count II of plaintiff's complaint sought recission of, that is, to make void, two notes on the basis that plaintiff did not, in fact, sign the notes as manager of the Steelmen Group. On one note, the Steelmen Group promised to pay Czarnowski, the lender. On the second note, the Steelmen Group promised to pay Jeyaraj, the lender. Both notes contained the signatures of plaintiff, Czarnowski, and Jeyaraj. According to Czarnowski's affidavit,

> "3. Steelmen Group, LLC releases the plaintiff, Steve Maielli, from any liability or encumbrance associated with the two promissory notes at issue in 18 MR 1466, specifically attached to plaintiff's Verified Complaint as Plaintiff's Group Exhibit B, and dated July 28, 2016, and in the amount of $344,634.45 and $311,837.55, respectively."

Czarnowski's affidavit does not moot plaintiff's claim.

¶ 36 We note defendants offer no citation of authority for their assertion that Czarnowski's affidavit acts as a release. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (parties must cite authority to support their contentions). Even if we assume an affidavit can act as a release, the affidavit purported to release plaintiff only of any liability to the Steelmen Group. Neither Czarnowski nor

Jeyaraj—the persons entitled to enforce the notes—released plaintiff. See 810 ILCS 5/3-604(a)(ii) (West 2020) ("A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument *** by agreeing not to sue or otherwise renouncing rights against the party by a signed writing."). Simply put, the purported release, as it currently stands, does not impede Czarnowski, Jeyaraj, or their assignees from later seeking to enforce the notes. His claim that he did not sign the promissory notes has not been barred by this purported release, and the court erred by granting the motion to dismiss on count II. Accordingly, we reverse the court's dismissal of count II and remand for further proceedings.

¶ 37 2. *Count III*

¶ 38 In count III, plaintiff sought dissolution of the Steelmen Group under the Limited Liability Company Act (805 ILCS 180/35-1(a)(5)(A), (B) (West 2018)). Plaintiff asserted that the same alleged misconduct supporting his claim for damages in count I supported his request for dissolution in count III. Accordingly, plaintiff's dissolution claim was entirely dependent on plaintiff's ability to prove the alleged misconduct underlying count I. The circuit court, when it entered summary judgment on count I, found plaintiff could not prove those allegations. Because plaintiff cannot prove the conduct underlying his request for dissolution, we find count III was properly dismissed.

¶ 39 In reaching this conclusion, we recognize the circuit court determined, at summary judgment, that count III survived because there was a factual question as to whether plaintiff in fact signed the notes and the alleged forging of the notes could serve as a basis for dissolution. Be that as it may, plaintiff never pleaded that theory or sought leave to amend his complaint to do so. " 'It is axiomatic that a party must recover, if at all, on and according to the case he has made for himself in the pleadings.' " *Schultz v. Schultz*, 297 Ill. App. 3d 102, 106 (1998) (quoting *Lempa v.*

Finkel, 278 Ill. App. 3d 417, 424 (1996)). As pleaded, count III was entirely dependent on the success of count I, and because defendants were entitled to judgment on count I, they were also entitled to judgment on count III. Accordingly, we affirm the circuit court's dismissal of count III. See *People v. Bailey*, 2019 IL App (3d) 180396, ¶ 30 ("[A] reviewing court is concerned with the circuit court's judgment, not its reasoning, and can therefore affirm on any basis found in the record.").

¶ 40 E. Sanctions

¶ 41 In their brief, defendants request, as a sanction, attorney fees and court costs because "this appeal constitutes a colossal waste of judicial resources." They describe the appeal as baseless and frivolous.

¶ 42 Under Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994), this court may impose an "appropriate sanction," such as attorney fees and costs, if we determine "the appeal *** is frivolous, or that [the] appeal was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." An appeal is frivolous when "it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." *Id.*

¶ 43 We find this appeal was neither frivolous nor taken in bad faith. Accordingly, we deny defendants' request for sanctions.

¶ 44 III. CONCLUSION

¶ 45 The judgment of the circuit court of Will County is affirmed in part, reversed in part, and remanded for further proceedings.

¶ 46 Affirmed in part, reversed in part, and remanded.