2021 IL App (5th) 200233-U

NO. 5-20-0233

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CAPITAL ONE BANK (USA), N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 19-LM-135
	)	
KATHY TUCKER,	)	Honorable
	)	Mark W. Stedelin,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Barberis and Vaughan concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's second notice of appeal was timely filed because a motion to vacate the judgment tolled the deadline for filing the notice of appeal and the first notice of appeal was ineffective because the motion to vacate was pending, making the defendant's motion to voluntarily dismiss her first appeal a nullity. The circuit court did not err in entering judgment against the defendant on a credit card debt because there were no errors in the admission of evidence, there was no evidence of judicial bias, and the judgment was not against the manifest weight of the evidence.

¶ 2 The defendant, Kathy Tucker, appeals the January 7, 2020, judgment of the circuit court of Marion County that ordered her to pay the plaintiff, Capital One Bank (USA), N.A. (Capital One) $10,913.68 plus court costs of $196 for the defendant's breach of her customer agreement. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 22, 2019, Capital One filed a complaint against the defendant in the circuit court of Marion County, alleging that the defendant refused to pay her credit card debt in the amount of $10,913.68 as required by their credit card agreement, and requesting that the circuit court enter judgment in that amount plus court costs. The circuit court held a bench trial on the complaint on January 6, 2020, and the defendant appeared *pro se* throughout the proceedings. At the bench trial, the following relevant evidence was submitted.

¶ 5 Kayla Campbell testified that she is a litigation specialist with Capital One, and it is her responsibility to research the accounts associated with cardmembers who are in active litigation. In that position, she is familiar with the business records that are regularly created and maintained by Capital One. Ms. Campbell authenticated the customer agreement that applies to the defendant's account with Capital One, and the customer agreement was admitted into evidence. Ms. Campbell testified that at the time the defendant opened the credit account, a copy of the customer agreement was mailed to her at her address. Page two of the customer agreement includes the following language under a section titled "Authorized Users":

> "If you ask us to issue a card to any other person, they are an authorized user. We may require certain information about them. We may limit their ability to use your card. They may have access to certain information about your account. You will be responsible for their use of the account and anyone else that they allow to use your account even if you do not want or agree to that use."

¶ 6 Ms. Campbell testified that Natasha Tucker was listed as an authorized user on the defendant's account, and a card was issued to both her and the defendant. Regarding the removal of an authorized user, the customer agreement states as follows:

> "If you want to remove an authorized user from your account, you must contact customer service and request their removal. You also must immediately destroy all cards in their possession and cancel any arrangements they may have set up on your account. They will be able to use your account until you have notified us that you are removing them from your account. During this time you will still be responsible for all amounts they charge to your account. You will be responsible even if these amounts do not appear on your account until later. Authorized users may remove themselves from your account upon request."

¶ 7 Ms. Campbell testified that, based on Capital One's business records, the defendant never contacted Capital One requesting that Natasha Tucker be removed as an authorized user. She further testified that it is Capital One's regular business practice to send customers a monthly statement itemizing all the transactions made on the card, and Capital One mailed these statements monthly to the defendant from November 2015, when the account was opened, until April 2016, when the defendant elected to receive online statements only. Ms. Campbell authenticated the monthly billing statements for the defendant's account, with a date range from November 22, 2015, until July 19, 2018, which were admitted into evidence. The billing statements itemize the charges by user, with each user's charges listed under their respective names. Based on the itemization of these billing statements, reflecting purchases and payments that were made, the balance on the account was $10,913.68 at the time the account was closed by Capital One for nonpayment on July 19, 2018.

¶ 8 Ms. Campbell testified that, in August 2018, the defendant contacted Capital One indicating that she believed there was fraud on the account. However, records indicate that the claim for fraud was denied because the defendant never provided the information required to

investigate her fraud claim. A second investigation was initiated in May 2019, but the defendant again failed to provide documentation regarding which charges she was indicating were fraudulent. On cross-examination, the defendant inquired as to Capital One's methods for researching fraudulent purchases, and Ms. Campbell indicated that she did not have the knowledge to answer that question. The defendant pointed to two charges from Dr. Gautam Jha in the amount of $3.90 and $3.60, and asked Ms. Campbell how Capital One concluded that those were her charges, and not the result of fraud. Again, Ms. Campbell stated that she just authenticated the records, and was not in charge of investigating the charges.

¶ 9 The defendant's daughter, Natasha Tucker testified on the defendant's behalf. She testified that she would never let anyone else use her credit card. She testified that she did not know anything about the charges under her name for Microsoft, and although she bought a couple of things off Amazon, she did not buy as much as what is on the statements. She did not own a car between 2012 and 2017, and so would have no reason to charge anything to the Secretary of State. She testified that the family's vehicle registrtations expire in April, September, and November, and these dates are different than the Secretary of State charges on the statements. As to PayPal charges on the account, she testified that she does not have a PayPal account. She never had medical care from Dr. Jha and she never used her card in Missouri. Natasha admitted to some big charges on the account, such as buying furniture for $1500. However, she denied many of the other charges.

¶ 10 On cross-examination, Natasha testified that her family owns property in Missouri.

¶ 11 After hearing and viewing the evidence, the circuit court ruled from the bench that it found that the defendant was bound by the customer agreement. The court found Natasha's testimony was disingenuous. The circuit court found that the defendant and/or Natasha had

access to the statements and were under an obligation under the customer agreement to report fraudulent transactions and did not until after the card was closed in July of 2018. Accordingly, the circuit court found that the denials of charges were not credible. On January 7, 2020, the circuit court entered judgment in favor of Capital One in the amount of $10,913.68 plus court costs, which were $196, according to an account status report from the circuit clerk.

¶ 12 The defendant initially filed a *pro se* notice of appeal from the judgment on January 17, 2020, which was docketed in this court as No. 5-20-0028. While the appeal was pending, on February 5, 2020, Capital One filed a motion in the trial court to vacate the judgment and to set the matter on the circuit court's status call, because "[Capital One]'s counsel ha[d] been informed that [the d]efendant is claiming fraud on this account." On February 7, 2020, the defendant filed a motion in the trial court stating that she did not want the judgment vacated because she wanted "to take the case to appeal." However, at a hearing on March 10, 2020, she indicated to the circuit court that she would like to vacate the judgment to have time to prove the fraudulent charges to Capital One. When asked by the circuit court whether it still wished to vacate the judgment, counsel for Capital One indicated that it would like to continue the motion to vacate to give it time to consider the evidence of fraud that the defendant wished to present to Capital One. The motion was reset for hearing on May 5, 2020.

¶ 13 An April 28, 2020, docket entry states the motion to vacate was again reset for hearing on July 14, 2020. Nevertheless, on May 18, 2020, the defendant filed a motion to voluntarily dismiss her appeal, stating "Capital One has vacated the judgment against me." This court granted the defendant's motion to voluntarily dismiss the appeal on May 20, 2020. On July 14, 2020, the circuit court entered a docket entry stating that Capital One was present by counsel and that the defendant was present *pro se*. The docket entry noted "appeal dismissed" and indicated

"NFS at this time."[1] On August 5, 2020, the defendant filed a new notice of appeal, which was docketed as the current appeal, No. 5-20-0233. In that notice of appeal, the defendant lists July 14, 2020, as the date of the judgment appealed from, but asks that this court reverse the judgment finding her "guilty of the charges." On September 17, 2020, Capital One filed a motion to dismiss this appeal for a lack of appellate jurisdiction, which this court took with the case.

¶ 14 II. ANALYSIS

¶ 15 1. Appellate Jurisdiction

¶ 16 In its motion to dismiss, Capital One argues that the July 14, 2020, order is not appealable, and the defendant's "second appeal does not revive the issues presented in the first appeal." For these reasons, Capital One argues that this court lacks jurisdiction over the defendant's appeal. Capital One's argument fails to recognize that at the time the defendant requested to voluntarily dismiss her appeal, the notice of appeal had been rendered ineffective due to Capital One's filing of a motion to vacate the judgment. Illinois Supreme Court Rule 303(a)(2) (eff. July 1, 2017) provides that, when a timely postjudgment motion has been filed by any party, a notice of appeal filed before the entry of an order disposing of the motion becomes effective when the order disposing of the motion is filed. Thus, the defendant's first appeal became ineffective on February 5, 2020, when Capital One filed a motion to vacate the judgment. Accordingly, when the defendant filed a motion to voluntarily dismiss her appeal on May 20, 2020, mistakenly believing the judgment had been vacated, there was no effective appeal to voluntarily dismiss. Thus, we find that we have jurisdiction to review the judgment based on the defendant's August 5, 2020, notice of appeal, which was timely filed within 30 days of July 14, 2020, the date the circuit court noted "NFS," indicating that Capital One had

[1]By convention, we presume NFS stands for "No Further Settings."

abandoned its motion to vacate the judgment. See Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017) (if a timely postjudgment motion directed against the judgment is filed, the notice of appeal must be filed within 30 days after the entry of the order disposing of same).

¶ 17 Although the defendant listed July 14, 2020, as the order she is appealing, rather than January 7, 2020, we find the notice of appeal was sufficient to confer our jurisdiction over the January 7, 2020, judgment because the defendant's prayer for relief, which is set forth in the notice of appeal, clearly requests that this court reverse the judgment, rather than a docket entry indicating "NFS." See *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433-34 (1979) (notice of appeal is to be liberally construed and will confer jurisdiction on appellate court if, when considered as a whole, it fairly and adequately sets out the judgment complained of, and the relief sought so that the successful party is advised of the nature of the appeal). Here, Capital One is fully apprised that the defendant is seeking an appeal of the judgment against her in this case. For these reasons, we deny Capital One's motion to dismiss.

¶ 18 2. The Defendant's Appeal

¶ 19 The defendant's *pro se* brief does not meet the requirements of Illinois Supreme Court Rule 341(h) (eff. May 25, 2018), which governs the form and contents of an appellant's brief. The provisions of Rule 341(h) "are not mere suggestions," and the "failure to comply with the rules regarding appellate briefs is not an inconsequential matter." *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. The purpose of supreme court rules, including Rule 341(h), "is to require parties before a reviewing court to present clear and orderly arguments so that the court can properly ascertain and dispose of the issues involved." *Id.* We may strike a brief that is not in substantial conformity with the pertinent rules. *Id.* However, because striking a brief is a harsh sanction, we will do so only when the violations hinder our review. *Gruby v. Department*

of Public Health, 2015 IL App (2d) 140790, ¶ 12. Here, because the record of the bench trial is short, and the defendant has stated the issues she wishes to raise on appeal, we elect to address the issues on their merits.

¶ 20 The defendant first argues on appeal that the circuit court erred in allowing Kayla Campbell to testify "as an expert witness" for Capital One. We note that the defendant did not object to Ms. Campbell's testimony at trial. In a nonjury civil case, an issue not presented to the trial court is waived. *People v. A Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon County, Illinois*, 217 Ill. 2d 481, 503-04 (2005). Waiver aside, Capital One did not call Ms. Campbell as an expert witness, but rather, as a lay witness to provide information necessary to authenticate the customer agreement and account statements that were admitted into evidence. See *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 366 (2011) (setting forth the difference between lay and expert testimony). For these reasons, we find no error in the admission of Ms. Campbell's testimony.

¶ 21 Second, the defendant argues that the circuit court erred by "coming into the courtroom with preconceived ideas because of an unrelated case." We interpret the defendant's argument as one complaining of judicial bias. Again, the defendant did not raise this issue in the circuit court and thus it is waived. See *A Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon County, Illinois*, 217 Ill. 2d at 503-04. Waiver aside, a trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice. *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). As such, the party making the charge of prejudice must present evidence of prejudicial trial conduct and evidence of the judge's personal bias. *Id.* Here, the defendant has presented neither. Accordingly, we cannot reverse the circuit court's ruling based on judicial bias.

¶ 22 Finally, the defendant argues that the circuit court erred in not recognizing that there were fraudulent charges on Capital One's billing statements and finding Natasha Tucker's testimony to be "disingenuous." The circuit court, when sitting as the trier of fact in a bench trial, makes findings of fact and weighs all the evidence in reaching a conclusion. *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35. When a party challenges the circuit court's ruling after a bench trial, we defer to the circuit court's factual findings unless they are against the manifest weight of the evidence. *Id.* Under this standard of review, we give great deference to the circuit court's credibility determinations, and we will not substitute our judgment for that of the circuit court because the fact finder is in the best position to evaluate the conduct and demeanor of the witnesses. *Id.* Further, a factual finding is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent or the finding is arbitrary, unreasonable, or not based in evidence. *Id.* We will not disturb the findings and judgment of the trier of fact if there is any evidence in the record to support such findings. *Id.*

¶ 23 Here, we cannot conclude that the circuit court's judgment was against the manifest weight of the evidence. The defendant's claims of fraud hinge on the credibility of Natasha Tucker in denying she made the charges at issue, and it was within the circuit court's province to determine her credibility. See *id.* The circuit court found Ms. Tucker's claims that she did not receive the online statements to be not credible because Ms. Tucker was making payments on the card during the periods in which she claimed she did not receive the statements to recognize and dispute the fraudulent charges. This observation by the circuit court is supported by the evidence in the record. Because the defendant's claims of fraudulent charges hinged on Ms. Tucker's credibility, we find that an opposite conclusion than that reached by the circuit court is not

clearly apparent. Accordingly, the standard of review requires us to affirm the circuit court's judgment.

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we deny Capital One's motion to dismiss this appeal and affirm the January 7, 2020, judgment of the circuit court of Marion County that ordered the defendant to pay Capital One $10,913.68 plus court costs in the amount of $196 for her breach of the customer agreement.

¶ 26 Motion denied; judgment affirmed.