2018 IL App (2d) 170307-U

Appellate Court of Illinois, Second District.

Dorota JASINSKA, Plaintiff–Appellant,

v.

BRIAR HILL II CONDOMINIUM ASSOCIATION, and Illinois Farmers Insurance Company, Defendants–Appellees.

No. 2–17–0307

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Order filed January 26, 2018

Appeal from the Circuit Court of Du Page County. No. 16–SR–24, Honorable Peter W. Ostling, Judge, Presiding.

ORDER

JUSTICE SPENCE delivered the judgment of the court.

***1** ¶ 1 *Held*: The circuit court did not err in finding in favor of the condo association in a breach of contract suit where plaintiff presented no evidence that a leaking water pipe was part of the common elements. Also, the invited-error doctrine precluded plaintiff's argument on appeal against her insurer. Therefore, we affirmed.

¶ 2 Plaintiff, Dorota Jasinska, appeals from final orders of the circuit court affirming an arbitration award in favor of Illinois Farmers Insurance Company, and granting Briar Hill II Condominium Association's motion for a directed finding at the close of plaintiff's evidence. Because plaintiff's claim against Illinois Farmers Insurance Company was precluded by the invited-error doctrine, and because plaintiff failed to present a *prima facie* case of breach of contract against Briar Hill II Condominium Association, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff filed a two-count small claims complaint against defendants, Briar Hill II Condominium Association (Briar Hill), and Illinois Farmers Insurance Company (Farmers), following damage her condominium incurred in locating and repairing a leaking water pipe beneath the floor of her second floor condominium unit. Count one alleged breach of contract, and argued that Briar Hill was responsible for the repairs under the "Declaration of Condominium Ownership" (declaration) because the pipe served several units and was thus part of the "common elements." In the alternative, count two sought relief from plaintiff's homeowners' insurance provider, Farmers, for breach of the insurance policy. She argued that if the court determined that the damage was caused by a pipe that served plaintiff's unit exclusively, Farmers was obligated to cover the loss under the insurance policy. Plaintiff sought damages of $6304, plus costs.

¶ 5 On August 3, 2016, the matter proceeded to a mandatory arbitration hearing. The arbitration panel awarded plaintiff $9940 from Briar Hill, and denied her claim as to Farmers. Briar Hill thereafter filed a timely rejection of the arbitration award.

¶ 6 At a status hearing before the circuit court on September 14, 2016, Farmers made an oral motion to confirm the arbitration award between it and plaintiff, noting that only Briar Hill had filed a notice of rejection of the award. The court then asked plaintiff whether there was any objection to affirming the award as to Farmers, and her counsel replied, "[n]one, your Honor." The circuit court accordingly entered an order confirming the award as to Farmers, and set the matter for a bench trial on plaintiff's claim against Briar Hill.

¶ 7 Plaintiff thereafter filed a timely motion to reconsider, wherein she argued that the circuit court misapplied Illinois Supreme Court Rule 93 (eff. Jan. 1, 1997) in confirming the award in favor of Farmers after Briar Hill filed a notice of rejection of the arbitration award. She also stated that the attorney who represented her in court on September 14, 2016, was a "coverage attorney" who "made an incorrect response" and was unaware that Farmers would move to confirm the award. The circuit court denied the motion to reconsider on the basis that plaintiff had no objection to the motion at the time the order was entered.

***2** ¶ 8 A bench trial was held on March 27, 2017, between Plaintiff and the remaining defendant, Briar Hill. With the aid of a Polish language interpreter, plaintiff testified as follows. She had lived in her unit for 22 years. In October 2014, she received a phone call from her upstairs neighbor, who stated

that the neighbor living below plaintiff's unit complained about a water leak from her unit. Plaintiff also received a letter from Briar Hill regarding a water leak from her unit into the unit directly below hers. She checked her unit, and informed Briar Hill that she found no evidence of a leak. Briar Hill sent a plumber, Jeremy Huelsman, to inspect her unit and to search for the source of the leak. Plaintiff was not informed that any leak was found.

¶ 9 In January 2015, plaintiff received another letter from Briar Hill concerning the leak. She again checked for evidence of a water leak, found none, and informed her property manager, Dawn Roth. Huelsman was again sent to plaintiff's unit to search for the source of the leak. During his inspection, Huelsman moved plaintiff's stove and took photographs behind it. Plaintiff did not receive any written reports from Huelsman.

¶ 10 On April 23, 2015, just before she left for a trip to Poland, plaintiff received another letter from Briar Hill regarding the leak. After she returned from her trip, she contacted her insurance company, Farmers, and explained what had happened. Farmers sent an insurance adjuster to Plaintiff's residence on May 11, 2015. Farmers provided no coverage for the loss.

¶ 11 On May 11, 2015, Briar Hill again sent Houlsman to plaintiff's unit. During his inspection, Houlsman removed the toilet from a bathroom and cut an opening in the wall behind it. He also cut an opening in a closet wall. Plaintiff received no report from Houlsman after this inspection. Later that day, plaintiff met with Roth and Houlsman to discuss the leak. Though Roth had previously indicated that Briar Hill would cover the cost of the repairs, Roth stated that plaintiff was responsible for repairing the damage caused by the water leak.

¶ 12 The neighbor residing in the unit below plaintiff's hired a contractor to search for the source of the leak, and plaintiff agreed to allow the contractor to remove the wooden floor in her kitchen and break through the concrete below it on July 4, 2015. The contractor made a temporary weld on a cold water pipe in an attempt to stop the leak. Plaintiff and Roth had a phone conversation on July 7, 2015, wherein Roth said that Briar Hill would cover the cost of replacing the pipes and repairing the wall in the bathroom because it was responsible for any repairs behind the wall and under the floor.

¶ 13 Plaintiff coordinated with Roth to get the repairs scheduled and, on August 4, 2015, a plumber from Ray's Plumbing repaired the leak by replacing a cold water pipe beneath plaintiff's kitchen floor. After the pipe was replaced, it did not follow the exact same path, but rather, it "went a different way."

¶ 14 Afterward, plaintiff received an invoice for the repair from Briar Hill's management company, Williams Management. The invoice contained no itemized billing detail, and plaintiff did not receive an invoice directly from Ray's Plumbing. On August 6, 2015, plaintiff called Briar Hill to report that the new concrete that had been poured in her kitchen floor had begun to crack. Roth told plaintiff that Briar Hill would cover the cost of the repair. Ray's Plumbing repaired the concrete, and plaintiff was not billed for this work.

¶ 15 After the pipe was repaired, Roth told plaintiff that she had spoken with Briar Hill's board of directors, and plaintiff was responsible for the cost of the repairs. To date, no one had re-laid her hardwood floor, repaired the holes that were cut into the walls, or reinstalled the toilet, despite plaintiff's requests of Briar Hill.

***3** ¶ 16 On cross examination, plaintiff testified that she received a copy of the declaration when she purchased her unit. She had no background in plumbing. All of the letters she received from Briar Hill concerning the water leak stated that she was responsible for the repairs under Section 9.1(a) of the Illinois Condominium Property Act, and that such repairs were the owner's responsibility. Plaintiff understood that any plumbing that served her unit exclusively was her responsibility under the declaration. When plaintiff received each of the letters from Briar Hill, she was unaware of the location of the leak. At no point did she hire her own plumber to investigate the leak. Plaintiff rested her case in chief.

¶ 17 Briar Hill then moved for a directed verdict, [1] and argued that there was no testimony that the leaking pipe was part of the common elements such that Briar Hill was responsible. After brief oral argument, the circuit court granted the motion, entered judgment in favor of Briar Hill. Plaintiff timely appealed.

¶ 18 ANALYSIS

¶ 19 We begin by addressing Briar Hill's request that plaintiff's statement of facts be stricken because it cites various documents and reports of proceedings contained in

the appendix which are not part of the record on appeal. Briar Hill also points out that the appendix fails to include the judgment appealed from and the notice of appeal as required by Supreme Court Rule 342.

¶ 20 In total, plaintiff's appendix consists of a table of contents to the appendix, eleven documents proffered as trial exhibits, and transcripts from the trial and the hearing on plaintiff's motion to reconsider the arbitration award in favor of Farmers. These documents were not part of the original record. During the briefing stage on appeal, plaintiff moved to supplement the record with the above-referenced transcripts, and we granted the motion. The reports of proceedings in plaintiff's appendix are therefore part of the record, and we may consider them in reviewing this case.

¶ 21 The other documents included in the appendix are a different matter. Plaintiff identifies them as trial exhibits, but they appear nowhere in the common law record, and she did not move to supplement the record with them. Also, the parties have not stipulated to include these materials in the record on appeal. It is well settled that the record on appeal cannot be supplemented by simply attaching documents to a brief or to a separate appendix. *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826 (2001). A reviewing court will not supplement the record with documents attached to the appellant's brief on appeal as an appendix where there is no stipulation between the parties to supplement the record and there was no motion in the reviewing court to supplement the record with the materials. *Pikovsky v. 8440–8460 North Skokie Boulevard Condominium Ass'n*, 2011 IL App (1st) 103742, ¶ 16. As such, these materials are not part of the record on appeal. Plaintiff cites these materials only sparingly in her brief, and we therefore decline to strike plaintiff's statement of facts. We will, however, disregard any portion of plaintiff's brief that relies on materials included in the appendix that are not part of the record on appeal. We also agree that the appendix itself does not conform to the requirements of Illinois Supreme Court Rule (eff. July 1, 2017), in that it fails to include the judgment appealed from and the notice of appeal. Supreme Court Rules are not advisory suggestions, but rules to be followed. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57. While this noncompliance provides us with the authority to strike portions of plaintiff's brief (see *Fender v. Town of Cicero*, 347 Ill. App. 3d 46, 51 (2004)), such a sanction here would be unduly harsh given that the record is small and the issues are straightforward (see *Merrifield v. Illinois State Police Merit Board*, 294 Ill. App. 3d 520, 527 ("Where violations of supreme court rules are not so flagrant as to hinder or preclude our review, the striking of a brief in whole or part may be unwarranted.")). We now turn to the merits.

***4** ¶ 22 Plaintiff's first claim of error is that the circuit court erred in allowing Farmers' request to confirm the arbitration award entered in its favor in light of the notice of rejection filed by Briar Hill. Plaintiff disputes that the order was entered by agreement, and states that her "coverage attorney was blindsided" by Farmers' motion and "made an incorrect response" when he indicated that there was no objection to the motion. She also asserts that the relief sought by Farmers was a "legal impossibility" because Briar Hill's notice of rejection caused the entire award—including that which was entered in Farmers' favor, to be rejected. Plaintiff directs our attention to a portion of Supreme Court Rule 93(a), which provides that "the filing of a single rejection shall be sufficient to enable all parties * * * to proceed to trial on all issues of the case without the necessity of each party filing a separate rejection." Ill. S. Ct. R. 93(a) (eff. Jan. 1, 1997). Plaintiff contends that the effect of the circuit court's order was to split the arbitration award into two separate awards, notwithstanding well-settled authority that "[o]nce the arbitration panel has made its award, the parties must accept or reject the award in its entirety" (*Cruz v. Northwestern Chrysler Plymouth Sales*, 179 Ill. 2d 271, 279 (1997)), and "any rejection of any part of an arbitration award applies to the entire award (*Busch v. Mison*, 385 Ill. App. 3d 620, 625 (2008)).

¶ 23 In response, Farmers asserts that plaintiff agreed to the order, and she therefore could challenge it only by demonstrating that it was fraudulent or against public policy, which plaintiff did not do. See *In re Marriage of Nau*, 355 Ill. App. 3d 1081, 1086 (quoting *People ex. Rel. Gibbs v. Ketchum*, 284 Ill. App. 3d 70, 78 (1996)).

¶ 24 Regardless of whether the order confirming the arbitration award as to Farmers was an "agreed order," the September 14, 2016, report of proceedings makes clear that plaintiff—at a minimum—acquiesced to the entry of the order. The transcript reveals that, after the parties identified themselves for the record, the attorneys for plaintiff (Mr. Stern) and Farmers (Ms. Wetterer) had the following colloquy regarding the award:

> "[Ms. Wetterer]: Your Honor, we wanted to move to get an order affirming the award as to Farmers. Only defendant Briar Hill rejected the award. Plaintiff didn't reject the award. So, it's our position that, because plaintiff didn't

reject the award, and we didn't reject the award as to the claims against Farmers, the award should stand."

[The Court]: Any objection as to that?

[Mr. Stern]: None, your Honor.

[The Court]: Okay. Good. Done."

¶ 25 In spite of plaintiff's argument that the circuit court erred when it "allowed [Farmers] to affirm the arbitration award," the above exchange demonstrates that it was plaintiff—not the circuit court—who allowed it. The order plaintiff now complains of was not the result of a judicial determination made after evaluating opposing arguments, but rather was the expected result of plaintiff's clear acquiescence to the motion. The rule of invited error or acquiescence is a form of procedural default that is sometimes described as estoppel. *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). "Simply stated, a party cannot complain of error which that party induced the court to make or to which that party consented." *Id.* Such is the case here, and plaintiff cannot now be heard to complain that Farmers' award should not have been confirmed. To the extent that plaintiff argues that the order confirming the award as to Farmers was a "legal impossibility," we observe that a judgment is void only if the court that entered it lacked jurisdiction. See generally *People v. Castleberry*, 2015 IL 116916. As plaintiff makes no argument that the circuit court lacked jurisdiction to confirm the arbitration award as to Farmers, we reject the assertion that the order was a "legal impossibility."

¶ 26 We now turn to whether the circuit court erred in entering judgment in favor of Briar Hill at the close of plaintiff's evidence.

¶ 27 Section 2–1110 of the Code of Civil Procedure (735 ILCS 5/2–1110) (West 2016)) allows a defendant to move for a judgment in its favor at the close of plaintiff's case in a bench trial. In ruling on such a motion, the circuit court engages in a two-step analysis. *Barnes v. Michalski*, 399 Ill. App. 3d 254, 263 (2010). First, the court determines, as a matter of law, whether plaintiff has established a *prima facie* case by proffering at least some evidence on each element of the cause of action. *527 S. Clinton, LLC v. Westloop Equities, LLC.*, 403 Ill. App. 3d 42, 52 (2010). If the plaintiff has not, the court should grant the motion and enter judgment in the defendant's favor. *Barnes*, 399 Ill. App. 3d at 263; *In re Foxfield Subdivision*, 396 Ill. App. 3d 989, 992 (2009). Such a decision is reviewed *de novo* on appeal. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003).

***5** ¶ 28 If, however, plaintiff has presented a *prima facie* case, the court must then move to the second step and consider the totality of the evidence presented and draw reasonable inferences therefrom. *Sherman*, 203 Ill. 2d at 276; *Baker v. Jewel Food Stores, Inc.*, 355 Ill. App. 3d 62, 66 (2005). In so doing, the circuit court does not view the evidence in the light most favorable to the plaintiff, as would be the case in a motion for a directed verdict in a jury trial. *Kokinis v. Kotrich*, 81 Ill. 2d 151, 154 (1980). This weighing process may result in the negation of some of the evidence necessary to the plaintiff's *prima facie* case, in which case the court should grant the defendant's motion and enter judgment in his or her favor. *Barnes*, 399 Ill. App. 3d at 263. The second step "recognizes that even though the plaintiff has presented some evidence on every element of the cause of action, the trial court, as the weigher of evidence, might not necessarily find the evidence as to one or more of the elements to be convincing enough to qualify as proof by a preponderance of the evidence." *Barnes*, at 264. When the circuit court has granted the motion in the second step of the analysis, we will not disturb its ruling on appeal unless it is against the manifest weight of the evidence. *Sherman*, 203 Ill. 2d at 276; *Barnes*, 399 Ill. App. 3d at 264.

¶ 29 The circuit court granted the motion at the first step in the analysis, as it found that plaintiff presented no evidence that Briar Hill breached the declaration by failing to maintain a common element. Because the circuit court's ruling was predicated on plaintiff's failure to establish a *prima facie* case, we review that decision *de novo.*

¶ 30 The essential elements of a breach of contract claim are: (1) the existence of a valid and enforceable contract; (2) the performance of its conditions by the plaintiff; (3) breach of the contract by the defendant; and (4) injury to the plaintiff as a result of the breach. *Babbit Municipalities, Inc. v. Health Care Services Corp.*, 2016 IL App 1st 152662, ¶ 27; *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 30. Here, the instant dispute hinges on whether plaintiff proffered any evidence on the third element of her breach of contract claim against Briar Hill, namely whether the subject pipe was part of the common elements under the declaration. Plaintiff and Briar Hill agree that if the pipe served plaintiff's unit in addition to others, it would be part of the common elements for which Briar Hill is responsible. They further agree that if the pipe served only plaintiff's unit, it would be an "exclusive limited

common element," and plaintiff would be responsible for the cost of the repairs.

¶ 31 We observe that plaintiff's argument is somewhat muddled. She argues that "the facts confirm that the pipes [*sic*] that were damaged were not damaged by [plaintiff] and were [*sic*] not a pipe solely servicing [plaintiff's] unit." Nevertheless, plaintiff also seems to suggest that she was not required to proffer any evidence that the pipe was part of the common elements, and instead argues that Briar Hill bore the burden of establishing that the pipe was an exclusive limited common element as an affirmative defense.

¶ 32 Our review of the trial transcript leads us to conclude that the circuit court did not err in granting judgment in favor of Briar Hill at the close of plaintiff's evidence. Contrary to her assertion, plaintiff proffered no testimony at trial that the subject pipe served units in addition to her own such that it was part of the common elements. She directs our attention to several portions of the trial transcript in support thereof—none of which contain testimony that the pipe served multiple units. Indeed, the only cited portion of the transcript that relates to this issue is composed entirely of argument by plaintiff's own counsel in opposition to Briar Hill's motion, wherein he incorrectly claimed that plaintiff testified that the pipe served six units. Plaintiff offered no such testimony.

¶ 33 As the circuit court correctly noted, plaintiff's testimony demonstrated only that the pipe was located under her kitchen floor, that some sort of repair was performed on the pipe, and that it "went a different way" following the repair. Importantly, there was no testimony as to the exact location of the leak or the nature of the repair, nor was there any testimony concerning which or how many units the pipe served before or after the repair. Simply put, plaintiff provided no testimony that the pipe was part of the common elements under the declaration.

***6** ¶ 34 We also are not persuaded by plaintiff's assertion that the pipe's potential status as an exclusive limited common element is an affirmative defense. As part of her *prima facie* case, plaintiff was required to proffer evidence of breach of contract by Briar Hill. See *Babbit Municipalities, Inc. v. Health Care Services Corp.*, 2016 IL App (1st) 152662, ¶ 27. Here, the alleged breach was Briar Hill's failure to maintain the common elements under the declaration, but plaintiff put forth no evidence that the subject pipe was part of the common elements, as discussed above. Plaintiff's argument inappropriately attempts to shift her burden of proof to defendant, and we therefore reject it.

¶ 35 CONCLUSION

¶ 36 For the above reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 37 Affirmed.

Justices Jorgensen and Schostok concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2018 IL App (2d) 170307-U, 2018 WL 582323

Footnotes

1 Although Briar Hill requested a "directed verdict," it is clear that it actually moved for a judgment in its favor at the close of plaintiff's case pursuant to section 2–1110 of the Code of Civil Procedure (735 ILCS 5/2–1110 (West 2016)). See *Barnes v. Michalski*, 399 Ill. App. 3d 254, 262–65 (2010) (explaining the difference between a directed verdict, which is available in jury trials, and a judgment in defendant's favor at the close of plaintiff's evidence, applicable to bench trials).