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IN THE
COURT OF APPEALS OF INDIANA

THE EDUCATION RESOURCES INSTITUTE,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-1007-CC-899
	)	
DOUGLAS L. KRASNOFF,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John F. Hanley, Judge
Cause No. 49D11-0408-CC-1450

August 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

The Education Resources Institute ("TERI") sued Douglas L. Krasnoff ("Krasnoff"), alleging that Krasnoff failed to pay a debt he owed to TERI. At a bench trial, TERI sought admission into evidence of an affidavit of counsel and a settlement agreement to establish Krasnoff's liability for the debt and to enforce the settlement agreement. The trial court denied admission of either document into evidence, TERI rested its evidence, and Krasnoff moved for involuntary dismissal of the case under Indiana Trial Rule 41(B). The trial court granted the dismissal of TERI's action, and TERI now appeals.

We reverse and remand.

Issues

TERI presents several issues for our review. We restate these as:

I. Whether the trial court abused its discretion when it refused to admit into evidence the affidavit of TERI's counsel and the attached settlement agreement; and

II. Whether the trial court erred when it granted Krasnoff's motion for involuntary dismissal of TERI's cause under Trial Rule 41(B).

Facts and Procedural History

We note at the outset that we have a very sparse record upon which to conduct our review. TERI submitted its brief to this court, but did not submit an Appendix as required by Appellate Rules 49 and 50.[1] Krasnoff did submit an Appellee's Appendix; notably missing

[1] Our Appellate Rules state that "[t]he appellant shall file its Appendix with its appellants' brief." Ind. Appellate Rule 49(A). While failure to include an item in an Appendix does "not waive any issue or argument," App. R. 49(B), neither are we readily able to review matters for which materials are not submitted. We therefore remind counsel of the requirements set forth for Appendices submitted for civil appeals as stated in Appellate Rule 50(A).

from Krasnoff's Appendix is TERI's complaint, though the trial transcript and Krasnoff's brief both discuss the allegations in the complaint, making that document arguably "necessary for the Court to decide the issues presented" by the parties. App. R. 50(A)(1). Thus, we surmise the facts from the briefs of the parties and the relatively sparse record before us.

The facts relevant to our decision in this case are procedural rather than substantive. On August 6, 2004, TERI filed a complaint in the Marion Superior Court for collection of a debt allegedly owed by Krasnoff. On July 13, 2009, the parties, through counsel, allegedly executed an agreement regarding payment of the debt in lieu of entry of judgment.

On January 11, 2010, a bench trial was scheduled in the matter for June 29, 2010. At the trial, TERI submitted as its sole evidence an affidavit of its counsel, Howard Howe ("Howe"), averring that Krasnoff's outstanding debt to TERI, inclusive of principal and interest, amounted to $11,623.73, and that Howe's own fees in the matter greatly exceeded $1,500. In support of Howe's affidavit was a copy of an executed "Agreement of the Parties," which bore the signature of Krasnoff's attorney and was purportedly a settlement agreement between TERI and Krasnoff which TERI claimed evidenced the debt and the settlement agreement. (Ex. 1.)

Krasnoff objected to the introduction of the affidavit and the settlement agreement, arguing that these were inadmissible as hearsay, testimony by counsel, and an attempt to introduce evidence of settlement negotiations as evidence of liability. The trial court sustained Krasnoff's objection, observing that "Well it occurs to me Mr. Howe; you're trying

to take the short cut route to your destination. If you had a representative of Plaintiff present who could testify that would certainly simplify matters." (Tr. 12.) TERI rested its case without introducing any additional evidence, and Krasnoff moved for involuntary dismissal of TERI's action under Trial Rule 41(B). The trial court took Krasnoff's motion under advisement and adjourned.

On June 30, 2010, the trial court granted Krasnoff's motion for involuntary dismissal. On July 20, 2010, the trial court entered judgment for Krasnoff.

This appeal followed.

Discussion and Decision

Exclusion of the Affidavit and Settlement Agreement

TERI contends that the trial court abused its discretion when it denied admission of TERI's sole evidence at the bench trial, an affidavit executed by its counsel that in turn proffered an attached settlement agreement as evidence for the fact and extent of Krasnoff's debt.

We review a trial court's decision on whether to admit proffered evidence for an abuse of discretion. In re Paternity of H.R.M., 864 N.E.2d 442, 445 (Ind. Ct. App. 2007). An abuse of discretion occurs when a trial court's decision is against the logic and effect of the facts and circumstances before it. Id. When a decision on the admission of evidence is in error, we reverse only when that decision affected a party's substantial rights. Id.

At trial, Krasnoff objected to the affidavit and its supporting agreement on several bases. Krasnoff first objected to the affidavit as constituting testimony by counsel for a

party, which he argued was impermissible under Indiana Rule of Professional Conduct 3.7.[2] He also contended that the substantive averments in the affidavit constituted impermissible hearsay under Evidence Rule 801.[3] Finally, he argued that the agreement of the parties attached to and supporting the averments in the affidavit was inadmissible under Evidence Rule 408.[4] The trial court agreed with Krasnoff and excluded the entirety of the affidavit and the agreement from evidence.

TERI argues on appeal that it was entitled to enforce the settlement agreement, which it claims was admissible as the statement of a party-opponent under Evidence Rule 801(D)(2)—that is, that the settlement agreement is an admission of liability for the underlying debt, and TERI sought at trial to enforce that agreement. TERI also contends that the affidavit submitted by its counsel was admissible, which affidavit sets forth foundational information as to the execution of the settlement agreement by counsel on behalf of Krasnoff,

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[2] Rule of Professional Conduct 3.7 states, in relevant part:

> A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

Ind. Professional Conduct Rule 3.7(a).

[3] "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid. R. 801(c).

[4] Indiana Rule of Evidence 408 states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution.

the amount Krasnoff still owes on the underlying obligation, and TERI's attorney's fees. TERI further argues that the settlement agreement itself is enforceable and that it had reason to rely upon Krasnoff's representations therein. TERI then asks this court to order entry of judgment in its favor. TERI does not address Krasnoff's other objections to admission of the affidavit and settlement agreement.

Krasnoff, for his part, defends the trial court's reliance upon his objections at trial, insists that TERI had no basis for reasonable reliance upon the agreement, and argues that in any event TERI could not enforce the agreement without proving his default, for which the only evidence was an inadmissible affidavit of counsel.

We address first the admissibility of the affidavit of TERI's counsel. Whether an affidavit may be admitted into evidence at trial is left to the discretion of the trial court. Affidavits are not ordinarily admissible at trial. Reeder v. Harper, 788 N.E.2d 1236, 1241 (Ind. 2003) (citing Winskunas v. Birnbaum, 23 F.3d 1264, 1268 (7th Cir. 1994)). In Reeder, our supreme court considered whether an affidavit of a decedent could be used at summary judgment, and quoted at length and with approval Oto v. Metro. Life. Ins. Co., 224 F.3d 601 (7th Cir. 2000), in which an insurance dispute centered on the authenticity of a decedent's signature on a change of beneficiary form. See Reeder, 788 N.E.2d at 1241. Distinguishing between whether an affidavit would be admissible at trial or subject to being stricken from designated evidence at summary judgment, the Seventh Circuit in Oto noted that whether

> the affidavit should not have been considered by the District Court on the motion for summary judgment because [the decedent] is now unavailable to testify, is actually a challenge to the affidavit's admissibility at trial. To mix

> the two would require us to read a "cross-examination" requirement into [Federal] Rule [of Civil Procedure] 56 that is not there.

Oto, 334 F.3d at 604.

Thus, the crucial question to determining the admissibility of an affidavit at trial—as opposed to its proper use at summary judgment—is whether the opposing party will be afforded an opportunity to cross-examine the affiant. That opportunity was afforded to Krasnoff; indeed, TERI indicated in response to Krasnoff's objection to admission of the affidavit that "[i]f [Krasnoff] wants to cross then he could do that." (Tr. at 9.) Thus, the bare fact that TERI sought to introduce an affidavit into evidence did not warrant its exclusion.

To the extent that Krasnoff's objection to the affidavit was that it constituted hearsay, we turn to the definition of hearsay in our Rules of Evidence. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Hearsay is inadmissible except as provided by law or the rules of evidence. Evid. R. 802. The purpose for excluding hearsay is to allow for cross-examination of a statement's declarant. Powell v. State, 714 N.E.2d 624, 628 (Ind. 1999). Thus, prior out-of-court statements by a party opponent or by a declarant who is available for cross-examination are outside the scope of the rule. Evid. R. 801(d).

Here, TERI's counsel was the source of the affidavit, and was thus available for cross-examination. Further, TERI's counsel represented to the court that the affidavit, which he prepared and executed, was the result of his personal knowledge, making him the best source for this evidence. He further expressed willingness to submit to cross-examination by

Krasnoff. Thus, introduction of the affidavit does not transgress the fundamental purpose of excluding hearsay from evidence at trial. To the extent the affidavit might constitute testimony of counsel amounting to a violation of Professional Conduct Rule 3.7(a), which generally precludes an attorney for a party from both representing the party and testifying as to matters in controversy, Krasnoff's remedy was to seek disqualification of TERI's attorney, as Professional Conduct Rule 3.7(a) does not determine the admissibility vel non of an attorney's testimony. TERI's affidavit was admissible, and the trial court's exclusion of the affidavit on hearsay grounds or on the basis of Professional Conduct Rule 3.7(a) was an abuse of discretion.

We turn now to the settlement agreement. At trial, TERI sought both to enforce the 2009 settlement agreement and to obtain judgment on the underlying promissory note that gave rise to the 2005 complaint. Excluded from the hearsay rule are verbal acts, that is, "verbal conduct to which the law attaches duties and liabilities" so long as the out-of-court statement is offered for its legal significance and not for the truth of the matter asserted. Consolidated Rail Corp. v. Thomas, 463 N.E.2d 315, 320 (Ind. Ct. App. 1984).

The settlement agreement which TERI attached to its counsel's affidavit purportedly bears the signature of Krasnoff's attorney. TERI represented to the trial court both verbally and in the affidavit that Krasnoff's attorney signed on Krasnoff's behalf to bind him to the settlement agreement in order to avoid the entry of judgment. Krasnoff introduced neither evidence nor argument that might call into question either the authenticity of his attorney's signature on the agreement or the purpose for which the agreement was entered into. Thus

constituting a verbal act, we cannot agree that the settlement agreement should have been excluded as hearsay.

Nor can we agree that the settlement agreement should have been excluded as evidence of settlement negotiations introduced for the purpose of establishing liability for the underlying debt. As TERI notes in its brief, the law of this state "strongly favors settlement agreements, and if a party agrees to settle a pending action, but then refuses to consummate the settlement agreement, the opposing party may obtain judgment supporting the settlement." MH Equity Managing Member, LLC v. Sands, 938 N.E.2d 750, 757 (Ind. Ct. App. 2010), trans. denied.

TERI sought to enforce either the underlying debt or the settlement agreement. The agreement was admissible into evidence for the purposes of enforcing the settlement, though pursuant to Evidence Rule 408 the agreement might not be admissible to establish liability for the underlying debt. Indeed, affirming the trial court here would result in a determination that would undermine the ability of any litigant to enforce any settlement agreement, as it would preclude proof of the execution of a valid settlement agreement into evidence. Thus, we conclude that both the affidavit and the attached settlement agreement were admissible; the trial court's exclusion of the settlement agreement was therefore an abuse of discretion.

Whether the Trial Court Erred when it Granted Krasnoff's Motion for Involuntary Dismissal

Having thus determined that TERI's evidence was improperly excluded from evidence, we turn now to TERI's request that we enter judgment in its favor against Krasnoff. The trial court dismissed TERI's case pursuant to Trial Rule 41(B), which permits

involuntary dismissal of an action where "the weight of the evidence and the law" show no right to relief.

When reviewing a trial court's decision to grant a motion for involuntary dismissal under Rule 41(B), we consider only the evidence most favorable to the decision and the reasonable inferences therefrom. City of Marion v. Taylor, 785 N.E.2d 663, 664-65 (Ind. Ct. App. 2003), trans. denied. We do not reweigh evidence or assess credibility. Id. We will reverse a trial court's decision to grant a motion for involuntary dismissal of a case under Trial Rule 41(B) only when that decision is clearly erroneous, Harco Inc. of Indianapolis v. Plainfield Interstate Family Dining Assocs., 758 N.E.2d 931, 938 (Ind. Ct. App. 2001), that is, when "the evidence is not conflicting and points unerringly to a conclusion different from the one reached by the lower court." City of Marion, 785 N.E.2d at 665 (citing Chemical Waste Management of Indiana, L.L.C. v. City of New Haven, 755 N.E.2d 624, 635 (Ind. Ct. App. 2001)).

Here, the only evidence TERI presented to the trial court were the affidavit and settlement agreement, both of which the trial court excluded. Had this evidence been properly excluded by the trial court, we would likely affirm the Rule 41(B) dismissal for failure to produce evidence showing a right to relief. But because we have concluded that TERI's evidence was improperly excluded, we necessarily conclude that the trial court erred when it granted Krasnoff's motion for involuntary dismissal.

Though TERI requests that we order the trial court to enter judgment in its favor, our reversal of the trial court's decision to dismiss the case is only that—reversal of the dismissal

and its attendant restoration of TERI's suit. See Redmond v. United Airlines, Inc., 165 Ind. App. 395, 332 N.E.2d 804, 808 (1975) (holding that denial of a defendant's motion for involuntary dismissal "presupposes the defendant's right, in the absence of waiver, to present his evidence"). Upon remand, TERI will have the opportunity to proceed to trial. Just as TERI was entitled to the presentation of evidence at trial, so too is Krasnoff entitled to challenge that evidence. We therefore decline TERI's invitation to order the trial court to enter judgment in its favor, and instead remand the matter for a new trial.

Reversed and remanded.

MATHIAS, J., and CRONE, J., concur.