

No. 1-12-1919

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARINA TOWERS CONDOMINIUM)	Appeal from the Circuit Court of
ASSOCIATION, an Illinois Not-For-Profit)	Cook County, Illinois.
Corporation,)	
)	
Plaintiff-Appellant,)	
)	
v.)	11 M1 700849
)	
EDIE MATHERS, JOSEPH MATHERS,)	
UNKNOWN OWNERS, NONRECORD)	
CLAIMANTS and UNKNOWN TENANTS,)	The Honorable Leonard Murray,
)	Judge Presiding.
Defendants-Appellees.)	

Justice Simon delivered the judgment of the court.
Justice Harris and Justice Pierce concurred in the judgment.

ORDER

- ¶ 1 *HELD:* Following jury verdict in an action under the Forcible Detainer Act, trial court's grant of judgment notwithstanding the verdict on the issue of possession was in error because, viewing the evidence at trial in a light most favorable to plaintiff, there was not a total failure to present evidence that proper notice was sent and the jury's verdict on this factual issue should not have been disturbed.
- ¶ 2 Plaintiff Marina Towers Condominium Association (Association) filed the underlying

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verified complaint against defendants Edie and Joseph Mathers pursuant to the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq.* (West 2010)). Plaintiff sought a personal judgment against defendants for unpaid charges and fees and for possession of defendants' three condominium units. Following a jury trial, the jury returned a verdict for plaintiff, awarding plaintiff a \$39,937.39 monetary judgment and possession of defendants' three condominium units.

¶ 3 However, during jury deliberations the trial court indicated to the parties that it was concerned there was an issue of whether plaintiff laid a proper foundation for proof that the 30-day demand notices were properly served under the Act. The trial court briefly discussed the issue with the parties while the jury deliberated and indicated that it might affect any possible judgment for possession. Following the jury's deliberations and announcement of its verdict, the trial court entered the monetary judgment. The trial court continued for two weeks the issue of whether the judgment of possession should be entered.

¶ 4 Plaintiff filed a response brief to the trial court's "*sua sponte* Motion for Judgment Notwithstanding the Verdict." Defendants subsequently filed a "Joinder of Motion for Judgment Notwithstanding the Verdict." Following a hearing, the trial court entered judgment notwithstanding the verdict (judgment *n.o.v.*) in favor of defendants on the issue of possession. Plaintiff filed the instant appeal. For the following reasons, we reverse the trial court's grant of judgment *n.o.v.* and remand for further proceedings consistent with this order and the Act.

¶ 5 I. BACKGROUND

¶ 6 The Association is comprised of 896 condominium units located at 300 North State Street, Chicago, Illinois, and has approximately 1,600 residents. Sandra Magdaleno, assistant

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property manager for Draper and Kramer, the management company for Marina Towers Condominiums, testified that she had worked for plaintiff for 10 years. She testified to her responsibilities and the rules applicable to the Association and owners and residents of the condominiums. Magdaleno testified that the building and owners were subject to the Act and the Illinois Condominium Property Act (765 ILCS 605/1 *et seq.* (West 2012)) as well as the rules and regulations, declaration and by-laws of the building.

¶ 7 An Association board of managers is elected by residents to conduct and direct the affairs of the Association. One of the responsibilities of the board of managers is to pass an annual budget to cover common expenses for the residents. These expenses cover common area utilities, water, insurance and general upkeep of the buildings. The Association's budget is funded through a monthly assessment paid by the owners of each condominium unit. Under the Act and the by-laws, the Association is authorized to bring an action against a unit owner who fails to pay their assessments and fees. In addition, if legal action is required related to a condominium unit, the Association may seek reasonable attorney fees.

¶ 8 Magdaleno testified that defendants owned three condominium units and were delinquent on the payment of assessments and fees for all three units. Specifically, she testified that defendants had not paid their assessments and fees for Units 3808 and 3809 since March 2011, for balances of \$14,320.80 and \$11,439.66, respectively. With respect to Unit 3906, defendants had not paid assessments and fees since September 2010 for a balance of \$14,176.93.

Magdaleno explained the ledgers and budgets and amounts due from November 2010 through April 2012. Attorney fees related to foreclosure actions for all three units, with Marina Towers a named defendant that required representation in each action, were included.

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¶ 9 Magdaleno testified that, pursuant to standard practice, 30-day demand letters related to the past due amounts for each unit starting from November 2010 were sent to defendants after they were past due. The letters were prepared by plaintiff's counsel on the letterhead of his law firm and addressed to defendants individually. Magdaleno testified that she knew and recognized counsel's signature on each letter. Each letter contains the legend "Certified Mail Return Receipt Requested, Regular Mail." The letters presented were: one 30-day demand addressed to both defendants for Unit 3803 and dated November 4, 2011; two 30-day demands addressed to defendants individually for Unit 3809 and dated May 25, 2011; and two 30-day demands addressed to defendants individually for Unit 3906 and dated January 25, 2011.

¶ 10 In addition, counsel presented copies of the addressed envelopes for each letter and mail receipt slips for the letters sent concerning Units 3809 and 3906. Magdaleno testified that each had envelopes with certified mail indication slips. Magdaleno testified that the 30-day notices were the letters sent to defendants and that defendants had not made payments on the amounts demanded. There was no foundational objection to the exhibits. Each exhibit was entered as evidence following cross-examination by defendants, who did not present any questions concerning the 30-day demands or object to the introduction of the exhibits.

¶ 11 Both defendants testified by presenting a narrative with only brief cross-examination of Edie by plaintiff. While defendants asserted that they did not receive any notices concerning anything from the Association, including notices for board elections, construction activities, water shut off times, and similar notices, they testified at length to the various bills and notices they received from Draper and Kramer on behalf of the Association. Edie also testified that she always paid the assessments, but stopped paying because she received a bill from Draper and

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Kramer that had a typed note on the bottom informing defendants not to pay the amount due. She testified that she "paid them right up until I received these letters from Draper & Kramer. Of course, I was surprised and happy at the same time because I'm thinking that, oh, someone wants to make restitution with us, someone is trying to, you know, help us. So from November to March we were paying the assessments, and then we received these in April. Well, we're real busy. I didn't call anyone, like I never called anyone. I just take care of business, until now I'm standing here before you."

¶ 12 During closing argument, plaintiff's counsel explained that the action for possession did not mean that plaintiff would take ownership of defendants' condominium units. He explained that possession meant plaintiff would rent the units to new tenants until past due amounts have been paid off and then defendants would have possession returned. Both defendants also presented closing arguments and the trial court then instructed the jury. Of note, the court instructed the jury that a fact may be proven by circumstantial evidence or "proof of facts or circumstances which leads to a reasonable inference of the existence of other facts sought to be established." In addition, for the possession claim, based on section 102(a)(7) of the Act (735 ILCS 5/9-102(a)(7) (West 2012)), the trial court instructed the jury that a party is entitled to possession when:

"(1) The property is subject to the provisions of the Condominium Property Act;

(2) The owner of a unit fails or refuses to pay when due his or her proportionate share of the common expenses of such property, or any other expenses lawfully agreed upon or any unpaid fine; and

(3) The Board of Managers or its agents have served demand and the unit owner has failed to pay the amount claimed within the time prescribed in the demand."

¶ 13 After the jury retired to the jury room for deliberations, the trial court stated "[t]here is an issue regarding this notice. There is no evidence that it was served." The trial court expressed concern that no proper foundation had been laid for the service of the 30-day demand letters. It highlighted that there was no evidence of receipt or affidavit or testimony from the person who sent the letters, plaintiff's counsel. Plaintiff's counsel stated that he could not testify and that, as it was a trial, there was no affidavit. Counsel argued that, without objection by defendants, rejecting the evidence for lack of foundation was improper, especially when done *sua sponte* by the trial court.

¶ 14 The jury verdict granted judgment for plaintiff on both the money and possession claims. The trial court entered the money judgment but questioned plaintiff further about the issue of whether a foundation was laid for service of the 30-day demands. The trial court continued the matter two weeks for consideration of this issue. Plaintiff filed a response brief to the trial court's "*sua sponte* Motion for Judgment Notwithstanding the Verdict." Defendants subsequently filed a "Joinder of Motion for Judgment Notwithstanding the Verdict."

¶ 15 At the posttrial hearing, Edie argued that they did not receive any notice or 30-day demands. Edie asserted that plaintiff committed mail fraud and wire fraud and were trying to steal defendants' property. Joseph argued that he specifically testified that they did not receive the 30-day demands and claimed that defendants' attempts to correct the transcripts would show that. The trial court rejected that claim outright and stated that Joseph never testified to a failure

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to receive notice.

¶ 16 Plaintiff's counsel argued that the standard for review of a motion for judgment *n.o.v.* is very high and must be considered in a light most favorable to the nonmoving party. Counsel argued that the foundational issue was waived and the trial court's raising the issue after the jury retired to deliberate was improper. Counsel asserted that this was a question of fact that, as the jury was instructed, could be proven by circumstantial evidence and the jury's decision should not be disturbed. Counsel argued that the letters, envelopes, certified mail labels and Magdaleno's testimony supported the jury's finding of fact.

¶ 17 The trial court questioned plaintiff's counsel about the basis for Magdaleno's testimony that the letters were sent. The court rejected plaintiff's arguments, finding that service was necessary under the Act to gain possession. The trial court concluded "the court probably made a mistake in not - - or in allowing the notices to be considered by the jury because there was no foundation for those notices at trial, no testimony by anyone that they put the notice in the stream of commerce, if you will, that being the U.S. Postal Service, because the statute specifically says that all the association must do is mail it certified mail. Actual receipt is not required. *** All they are required to do is send it certified mail. All right. But the problem here is that there was no evidence, I believe, that the notice was served. And because of that, I'm going to grant the motion with respect to the issue of possession."

¶ 18 Plaintiff filed the instant appeal seeking reversal of the trial courts order of judgment *n.o.v.* Plaintiff timely filed its appellant brief on October 18, 2012. Defendants, appearing *pro se*, sought extensions to file their response brief but failed to do so. Plaintiff filed a motion to take the case on the record and its appellant brief on February 5, 2013, and March 25, 2013. On

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April 4, 2013, this court granted the March 25, 2013, motion and on May 7, 2013, ordered defendant Edie Mathers to return the record, which she been withdrawn on January 18, 2013, for the purposes of considering this appeal. The record was returned to the clerk's office on May 17, 2013. On May 21, 2013, defendants filed a motion to reconsider and set aside the April 4, 2013, order, claiming that the record had been stolen from their condominium. Defendants asserted that they had suffered numerous break-ins as well as damage to their vehicles and this court should grant them the opportunity to protect their interests and grant leave to file their brief, *instanter*. Defendants subsequently moved to insert missing pages from their brief, again contending that they had suffered additional break-ins and alluded to foul play concerning their missing pages. Plaintiff filed responses to these motions and argued the order granting the motion to take the case on the record should stand. While we agree with plaintiff that defendants' extended delay provides a proper basis for rejecting the appellee brief, taking defendants' averments as true, we granted their motions and considered their arguments in considering this appeal.

¶ 19

II. ANALYSIS

¶ 20 A trial court may only enter a judgment *n.o.v.* where all the evidence, viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). A motion for a judgment *n.o.v.* presents a question of law as to whether there was a total failure to present evidence to prove a necessary element of the plaintiff's case. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006). This standard is a "high one" and "judgment *n.o.v.* is inappropriate if 'reasonable minds might differ as to

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inferences or conclusions to be drawn from the facts presented.' " *Id.* quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995). We review the circuit court's ruling on such a motion *de novo*. *Id.* In so doing, we do not weigh the evidence or credibility of witnesses or substitute our judgment for that of the jury. *Id.*

¶ 21 As addressed by the trial court, effective service under the Act requires only that the 30-day demand be sent by certified mail, return receipt requested, the demand need not be received for proper service. 735 ILCS 5/9-104.1(c) (West 2012). It is incumbent on a party to assert that proper notice was not sent during the course of trial. *National City Mortgage v. Hillside Lumber, Inc.*, 2012 IL App. (2d) 101292. Likewise, it is well established that a party that objects to evidence must make a specific objection during trial if that objection may be obviated or remedied by the adverse party. *Bradfield v. Illinois Central Gulf R.R. Company*, 115 Ill. 2d 471, 475 (1987). Failure to make such a timely objection to evidentiary issues at trial waives that issue on appeal. *Snelson v. Kamm*, 204 Ill. 2d 1, 25 (2003).

¶ 22 In this case, the evidence of record viewed in a light most favorable to plaintiff does not so overwhelmingly favor defendants such that the jury's verdict cannot stand. Plaintiff presented evidence in support of the proper service by certified mail that was admitted without objection. Plaintiff presented copies of the letters that were sent to defendants with notation that they were sent via certified mail, return receipt requested, as well as the postmarked and labeled envelopes for two of the letters. Magdaleno reviewed these letters and testified that they were sent to defendants by plaintiff's counsel. She testified that the letters were sent under her direction pursuant to the Association and Draper and Kramer's standard procedures when amounts are past due.

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¶ 23 Defendants did not object to the introduction or admission of this evidence. Accordingly, they waived any objection to that evidence for an alleged lack of foundation. The jury was properly instructed on the use of circumstantial evidence as well as the elements for possession under the Act. The jury weighed the evidence and testimony and credibility of the witnesses and determined that plaintiff properly sent the 30-day demands via certified mail. The evidence at trial does not overwhelmingly favor defendants to support judgment *n.o.v.* Accordingly, we reverse the trial court and remand this matter for further proceedings consistent with this order and the Act.

¶ 24

III. CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the trial court is reversed and the matter remanded for further proceedings.

¶ 26 Reversed and remanded.