

No. 1-13-1892

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

CRONIN & COMPANY, LTD.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	13 L 002436
)	
RICHIE CAPITAL MANAGEMENT, LLC.,)	
RICHIE SPECIAL CREDIT INVESTMENTS, LTD.,)	
RHONE HOLDINGS II, LTD, YORKVILLE)	
INVESTMENTS I, LLC., RICHIE CAPITAL)	
STRUCTURE ARBITRAGE TRADING, LTD.,)	
ADVANCED AEROFOIL TECHNOLOGIES, INC.,)	
ADVANCED AEROFOIL TECHNOLOGIES, GMBH,)	
ADVANCED AEROFOIL TECHNOLOGIES, AG,)	
FLEX DISCOVERY, LLC (d/b/a LANDMARK LEGAL)	
SOLUTIONS))	Honorable
)	Brigid Mary McGrath,
Defendants-Appellants.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Lampkin and Justice Rochford concurred in the judgment.

ORDER

HELD: Defendants had standing to prosecute this appeal. The circuit court had subject matter jurisdiction to grant the injunctive relief it granted. However, because we cannot determine, on the record before us, whether the court abused its discretion in granting the injunctive relief, we vacate the court's order granting this relief and remand for further proceedings.

¶ 1 In this interlocutory appeal, defendants-appellants, who are various companies owned and controlled by hedge fund manager Mr. Thane Ritchie (collectively, defendants), appeal a circuit court order granting a temporary restraining order/preliminary injunction in favor of plaintiff-appellee, the law firm of Cronin & Co., Ltd. (Cronin). The appeal arises out of a dispute over legal fees between Cronin and defendants. For the reasons that follow, we vacate and remand with directions.

¶ 2 We provide a brief background of the parties and facts giving rise to this appeal. In 2008 and 2009, defendants lost approximately \$180 million as a result of certain failed investments made by Tom Petters, a Minnesota businessman. In 2009, a jury convicted Petters of operating an elaborate Ponzi scheme that defrauded investors out of tens of millions of dollars. See *In re Polaroid Corp.*, 472 B.R. 22, 28 (Bkrtcy. D. Minn. 2012); *United States v. Petters*, 663 F. 3d 375, 379 (8th Cir. 2011). Defendants hired several law firms to assist in recouping as much of the investment losses as possible. One of the law firms hired was Cronin, retained in June 2009.

¶ 3 Cronin was initially hired on an hourly-fee basis. However, in March 2010, the parties negotiated a new fee agreement. The parties entered into a contingency agreement whereby Cronin agreed to charge a reduced hourly rate in exchange for the opportunity to receive a 10% contingency fee on any amounts recovered for the benefit of defendants, less the amount of fees

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already paid. In October 2011, the parties subsequently amended the hourly-fee portion of the contingency agreement. Under the amendment, defendants agreed to pay Cronin a flat fee of \$50,000 per month.

¶ 4 In early July 2012, defendants authorized Cronin to retain the services of third-party vendor Flex Discovery, LLC (d/b/a Landmark Legal Solutions) (Landmark). Landmark provides electronic discovery (e-discovery) and hosting services to law firms, corporations, and government agencies.¹ Acting on behalf of defendants, Cronin retained Landmark to operate a "hosting program" that would enable attorneys to access electronic databases containing documents produced in connection with the subject litigation, using software called "Relativity."

² Defendants provided Cronin with the money to pay for Landmark's services.

¶ 5 Sometime in late January or early February of 2013, the attorney-client relationship between Cronin and defendants was terminated. Upon termination of the attorney-client relationship, a dispute over legal fees arose between Cronin and defendants. Cronin advised Landmark of the dispute and asked it to "hibernate" the database it was hosting (take it off-line), so it could not be accessed. Cronin claimed it was asserting a retaining lien over its former clients' litigation file, which it argued included the database. In February 2013, Landmark agreed to hibernate the database.

¹ "Hosting" involves holding databases or digital information in a central computer that controls and permits access by remote computers in a network.

² "Relativity" is a web-based document review and management software used by corporations and law firms during the discovery phase of litigation.

¶ 6 Shortly thereafter, Landmark informed Cronin that defendants were pressuring it for access to the database. Cronin allegedly made an offer to Landmark to pay its outstanding bills and any additional fees and costs necessary in order to have Landmark terminate the database, archive it on a portable disk drive, and return all materials the law firm had provided to Landmark. According to Cronin, Landmark agreed to the offer in a series of e-mails. Cronin then wired Landmark the sum it had requested for outstanding amounts and additional archiving fees. Cronin claimed that Landmark hand delivered a portable hard drive, which it represented contained the entire archived database. Cronin argued that contrary to Landmark's representations, it retained an electronic version of the database.

¶ 7 On March 7, 2013, Cronin filed a one-count complaint against defendants in *quantum meruit* or unjust enrichment. At this time, Landmark had not yet been named a defendant in the lawsuit. Landmark informed Cronin that defendants were still pressuring it for access to the database and it was considering giving defendants the retained copy of the database.

¶ 8 Landmark eventually agreed to give the retained copy of the database to defendants in exchange for their agreement to indemnify Landmark for any legal fees it might incur as a result of having provided defendants with the database. On March 20, 2013, defendants entered into an indemnification agreement with Landmark. On the same date, Landmark informed Cronin that it had decided to provide defendants with a copy of the database, and would do so in seven days, unless Cronin sought a court order barring the transfer.

¶ 9 On March 27, 2013, Cronin filed a first amended complaint adding Landmark as a defendant.³ The amended complaint asserted causes of action against Landmark for declaratory relief, fraud, and breach of contract. The amended complaint requested the circuit court to declare that Cronin had a valid retaining lien on the database and on all other materials in Landmark's possession, and it sought an order requiring Landmark to immediately return to Cronin all versions of the database in its possession, whether they existed in electronic or hard format. The amended complaint further alleged that Cronin had entered into a contract with Landmark in which the law firm agreed to pay all of Landmark's current and past due amounts as well as archiving fees in exchange for Landmark's promise to return to the law firm all materials in its possession related to the defendants' project. Cronin alleged that Landmark breached the contract by retaining a copy of the materials. The amended complaint also alleged that Landmark falsely represented to Cronin that it would archive and return all versions of the database materials to Cronin, provided the law firm paid Landmark's outstanding invoices, fees, and costs of archiving.

¶ 10 Also on March 27, 2013, Cronin filed a motion for a temporary restraining order/preliminary injunction against Landmark. The motion sought injunctive relief on the same grounds raised in Cronin's first amended complaint. Thereafter, the parties agreed to an extended

³ On April 30, 2013, the circuit court granted a joint motion for leave to seal portions of the filed complaints. Accordingly, a redacted copy of the first amended complaint was filed on May 22, 2013.

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briefing schedule, and a hearing was set for May 21, 2013. The parties subsequently filed supporting briefs, including sworn affidavits, in favor of their respective positions.

¶ 11 On May 21, 2013, the circuit court held a hearing on Cronin's motion for the temporary restraining order/ preliminary injunction. Counsel for Landmark appeared at the hearing. However, counsel for defendants presented argument on behalf of Landmark. At the conclusion of the hearing, the court entered an order setting a ruling date of June 14, 2013. On June 14, 2013, the court entered an order granting Cronin's motion. The court ordered Landmark to turn over to Cronin "all versions of the database in its possession in either electronic or hard format." The court agreed to stay enforcement of its order pending appeal, provided that Landmark not release any of the subject materials during the pendency of the stay.

¶ 12 Defendants filed a timely notice of interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (Ill. S. Ct. R. 307(a)(1) (eff. Feb 26, 2010)), seeking reversal of the court's order. We denied defendants' motion to place the interlocutory appeal on an accelerated docket pursuant to Illinois Supreme Court Rule 311(b) (Ill. S. Ct. R. 311(b) (eff. Feb 26, 2010)). On July 9, 2013, defendants' filed an amended notice of interlocutory appeal.

¶ 13 ANALYSIS

¶ 14 Before we address the merits of this interlocutory appeal, we first address Cronin's argument that defendants lack the standing to prosecute this appeal. Standing in Illinois requires "some injury in fact to a legally cognizable interest." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 (1988). "The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit," and "assures that issues are raised only

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by those parties with a real interest in the outcome of the controversy." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). Cronin argues that the circuit court's order granting its motion for a temporary restraining order/preliminary injunction, was directed at Landmark rather than defendants. Cronin claims that since defendants are not directly or adversely affected by the motion, they lack standing to appeal the order.

¶ 15 Cronin has waived this argument by failing to raise it in the circuit court. Under Illinois law, lack of standing is an affirmative defense that is waived if not raised in a timely fashion in the trial court. *Greer*, 122 Ill. 2d at 508; *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010). Moreover, even if Cronin had properly raised the standing issue in the circuit court, defendants would still have standing to appeal the court's order because the subject matter of the controversy concerns documents in which defendants claim an ownership interest.

¶ 16 Defendants have a direct interest in having the subject documents returned to it and having access to the database it paid Landmark to create and host. "Even non-parties have standing to appeal provided they have a direct, immediate and substantial interest in the subject matter of the litigation which would be prejudiced by the judgment or benefit by its reversal." *St. Mary of Nazareth Hospital v. Kuczaj*, 174 Ill. App. 3d 268, 271 (1988).

¶ 17 In addition, defendants have standing, as an indemnitor, to appeal the circuit court's order. See *Drennan v. Bunn*, 124 Ill. 175, 188 (1888). Although Landmark was a necessary party to the lawsuit, it was a nominal party, with the real party in interest being defendants, it's indemnitor. Defendants agreed to indemnify Landmark for claims arising out of defendant's request that Landmark return the subject documents. Defendants had an obligation under the

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indemnification agreement to indemnify Landmark in the preliminary injunction proceeding, and as Landmark's indemnitor, defendant's continue to have an interest in challenging the circuit court's order granting Cronin's motion for the temporary restraining order/preliminary injunction.

¶ 18 Turning to the merits, defendants contend that since a retaining lien cannot actively be enforced in a judicial proceeding, the circuit court lacked subject matter jurisdiction to adjudicate Cronin's claims relating to the lien. We must disagree because the injunctive relief the circuit court granted Cronin did not serve to actively enforce the law firm's retaining lien.

¶ 19 Subject matter jurisdiction refers to the court's power to both adjudicate the general issues involved and to grant the particular relief requested. *In re Estate of Gebis*, 186 Ill. 2d 188, 192 (1999). Whether the circuit court had subject matter jurisdiction over a claim is a question of law we review *de novo*. *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 2011 IL 111611, ¶ 26.

¶ 20 Contrary to defendants' assertion, the circuit court's order granting Cronin's motion for temporary restraining order/preliminary injunction did not serve to enforce Cronin's retaining lien. Rather, the court's order merely determined which documents were subject to the lien and then found that for purposes of the lien, Cronin had maintained possession of the documents, even though it transferred them to Landmark for scanning into its computers. The circuit court specifically stated:

"I'm finding that by transferring the documents at issue to Landmark, a third party vendor, for scanning into a computer – for scanning into a computer. I can't read my last

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– In any event, Cronin did not surrender possession of the documents for purposes of its retaining lien. They still remained in its possession for those purposes.

And I am ordering that Landmark provide to Cronin all versions of the database in its possession in either electronic or hard format.

In so ordering, I don't believe I am enforcing the lien; I am merely determining what documents are properly subject to the lien."

¶ 21 A retaining lien gives the attorney the right to retain possession of the client's documents and files which come into the attorney's hands during the course of employment until the balance due for the attorney's services is paid. See *In re Liquidation of Coronet Insurance Co.*, 298 Ill. App. 3d 411, 415 (1998). Possession of the property against which the retaining lien is asserted is essential to the creation and existence of the lien. As a possessory lien, a retaining lien's existence is dependent upon the attorney's continued possession of the client's property and is lost if the attorney surrenders possession of the property. *Twin Sewer & Water, Inc.*, 308 Ill. App. 3d at 667. "[P]ossession is indispensable to the lien." *Nichols v. Pool*, 89 Ill. 491, 494 (1878).

¶ 22 The evidence in this case indicates that during the course of its employment with defendants, Cronin came into possession of the documents at issue. See *Upgrade Corp. v. Michigan Carton Co.*, 87 Ill. App. 3d 662, 664 (1980) (citing *McCracken v. City of Joliet*, 271 Ill. 270 (1915) for the proposition that a retaining lien attaches to any property belonging to the client which the attorney received professionally). The evidence shows that, acting on behalf of defendants, Cronin retained Landmark to operate a "hosting program" that would enable its attorneys to access electronic databases containing documents produced in connection with the

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subject litigation, using software called "Relativity." And although Landmark contracted to work as a vendor for defendants, Landmark took its directions from Cronin and it created and hosted the database at Cronin's direction. Therefore, for purposes of Cronin's retaining lien, Landmark's possession of the documents at issue was properly imputed to the law firm.

¶ 23 In addition, contrary to defendants' assertion, Cronin did not surrender possession of the subject documents when it transferred them to Landmark for scanning into its computers. See, e.g., *Stewart & Irwin v. Johnson Realty, Inc.*, 625 N.E.2d 1305, 1307-08 (Ind. App. 1993) ("[A]n act of an attorney, as an officer of the court, in depositing a check payable to a client with the Clerk of the court in connection with the attorney's claim against the client for legal fees, is not a release of possession which destroys the attorney's retaining lien.") Even though the instant case is not on all fours with *Stewart & Irwin*, its reasoning applies here. Cronin's conduct in transferring the subject documents to Landmark for scanning into its computers was not a release of possession which destroyed the law firm's retaining lien. Accordingly, we find the circuit court had subject matter jurisdiction to hear Cronin's motion and grant injunctive relief concerning the subject documents because the injunctive relief the court granted did not serve to actively enforce the law firm's retaining lien.

¶ 24 Defendants finally argue the circuit court abused its discretion in finding that Cronin was entitled to a preliminary injunction against Landmark. Because there is no record that the circuit court analyzed the case under the factors required for a preliminary injunction, we cannot determine whether the court abused its discretion in granting the injunctive relief.

¶ 25 The circuit court ordered Landmark to turn over to Cronin "all versions of the database in its possession in either electronic or hard format." The court agreed to stay enforcement of the order pending appeal, provided Landmark not release any of the subject materials during pendency of the stay. It is not clear from the circuit court's order whether the injunctive relief it granted Cronin was in the nature of a temporary restraining order or more in the nature of a preliminary injunction.

¶ 26 A preliminary injunction is distinguished from a temporary restraining order by the difference in notice to the nonmoving party and the duration of injunction. *Bullard v. Bullard*, 66 Ill. App. 3d 132, 135-36 (1978). However, where as here, the parties are afforded notice and a hearing, there is no practical difference in results between a temporary restraining order and a preliminary injunction. See *Mister v. A.R.K. Partnership*, 197 Ill. App. 3d 105, 110 (1990). "A temporary restraining order issued with notice and a preliminary injunction issued with notice are the same type of relief and, whether referred to under either term, require the same elements of proof." *Jacob v. C & M Video, Inc.*, 248 Ill. App. 3d 654, 664 (1993) (citing *Kable Printing Co. v. Mount Morris Bookbinders Union*, 63 Ill. 2d 514, 524 (1976)).

¶ 27 Whether considering a request for a temporary restraining order or a motion for a preliminary injunction, the movant must establish by a preponderance of the evidence: (1) a protectible right; (2) it will suffer irreparable harm if injunctive relief is not granted; (3) its remedy at law is inadequate; and (4) there is a likelihood of success on the merits. *Jacob*, 248 Ill. App. 3d at 664. The court must also determine if the balance of hardships supports granting the injunctive relief. *Keefe-Shea Joint Venture v. City of Evanston*, 332 Ill. App. 3d 163, 169 (2002).

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The grant or denial of a temporary restraining order or preliminary injunction is within the sound discretion of the trial court whose decision will not be overturned absent an abuse of that discretion. *Citizens Utilities Company of Illinois v. O'Connor*, 116 Ill. App. 3d 369, 378 (1983). An abuse of discretion occurs where the circuit court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the court. *Bovay v. Sears, Roebuck & Co.*, 2013 IL App (1st) 120789, ¶ 26.

¶ 28 In this case, there is no record the circuit court made any findings as to the factors required to obtain temporary/preliminary injunctive relief and therefore, we cannot determine whether the court abused its discretion in granting Cronin's request for injunctive relief. In addition, the circuit court made no findings on the balance of hardships. A preliminary injunction is a provisional, extraordinary remedy grounded in equity, which should be granted only pursuant to the utmost care and should not issue unless the need is clear. *Schnepper v. American Information Technologies, Inc.*, 136 Ill. App. 3d 678, 680 (1985); *Gold v. Ziff Communications Co.*, 196 Ill. App. 3d 425, 430-31 (1989).

¶ 29 At this juncture, we decline to address the potential merits of Cronin's request for temporary/preliminary injunctive relief because our role is to review the circuit court's exercise of its discretion in applying and weighing the factors required to obtain such relief. See, e.g., *Bojangles, Inc. v. City of Elmhurst*, 39 Ill. App. 3d 19, 26-27 (1976); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (remanding to allow district court to address the equitable elements of a preliminary injunction); *Acumed LLC v. Stryker Corp.*, 483 F. 3d 800, 811 (Fed. Cir. 2007) (citing *eBay Inc.*, and remanding case to district court, explaining that "[i]f we were to

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weigh the evidence ourselves to reach a conclusion on injunctive relief, we would effectively be exercising our own discretion as if we were the first-line court of equity"). It is for the circuit court, in the first instance, to make findings on each of the four preliminary injunction factors, and to make findings with respect to the balance of hardships.

¶ 30 In conclusion, we find defendants had standing to prosecute this appeal; the circuit court had subject matter jurisdiction to grant the injunctive relief it granted; however, on this record, we cannot fairly assess whether the court abused its discretion in granting Cronin's request for injunctive relief.

¶ 31 Accordingly, because we cannot determine whether the circuit court abused its discretion on the record we have before us, we vacate the court's order granting Cronin's motion for injunctive relief and remand for further findings. We remand with directions that the court enter into the record findings on the preliminary injunction factors and findings with respect to the balance of hardships.

¶ 32 Vacated and remanded with directions.