2015 IL App (1st) 142800-U

No. 1-14-2800

SIXTH DIVISION
August 7, 2015

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IVAN D. IVANOV, Plaintiff-Appellant, v. KRASI INVEST HOLDING, LLC, an Illinois Limited Liability Company d/b/a Serdika Foods, Defendant-Appellee/Cross-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 2013 M1 714591 The Honorable Diann K. Marsalek, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶1 *HELD*: In this forcible entry and detainer action, the trial court properly entered a judgment ordering defendant to pay $8,150 after offsetting defendant's security deposit of $4,622. Defendant's counterclaim for reimbursement of repairs was properly denied. Neither party presented a sufficient record to reverse the trial court's judgment. Plaintiff's post-judgment motion was properly denied.

¶2 Following a bench trial, the trial court entered an order of possession, for property located at 9439 W. Irving Park, in Schiller Park, Illinois, in favor of the plaintiff and awarded $8,150 in damages after offsetting defendant's security deposit of $4,622. On appeal, plaintiff contends the trial court erred in: (1) finding the property was surrendered by defendant to plaintiff in July of 2013; (2) determining the amount to be recovered; (3) finding that defendant paid plaintiff a security deposit; and (4) denying its motion to vacate, modify, and reconsider the order of possession. Defendant filed a cross-appeal contending that: (1) the trial court erred in only giving partial credit for a portion of payments it made to plaintiff; and (2) the trial court erred when it denied defendant's counterclaim for reimbursement of repairs. Based on the following, we affirm the judgment of the trial court.

¶3 I. BACKGROUND

¶4 On June 26, 2013, plaintiff, Ivan Ivanov, filed a complaint for forcible entry and detainer, rent and damages pursuant to section 9-101 of the Code of Civil Procedure. 735 ILCS 5/9-101 *et seq*. (West 2012). Ivanov alleged that defendant, Krasi Invest Holding LLC (Krasi), had ceased paying rent and was unlawfully possessing the subject property, which Krasi was operating as Serdika Restaurant. The complaint alleged that Krasi owed Ivanov rent for the months of May and June of 2013. Ivanov claimed that Krasi owed $14,364.00 in rent and damages. Ivanov filed an amended complaint on July 29, 2013, which gave an itemized list of the relief sought and increased the amount by $3,383.50. Ivanov claimed he was entitled to: (1) $9,900 in rent; (2) $247.50 in interest, at a rate of 2.5%; (3) $1,000 in attorneys' fees and costs; and (4) $6,600 in the security deposit allegedly unpaid. Ivanov filed a second amended complaint on October 10, 2013, that

does not change the nature of this case. The second amended complaint merely increased the amount of damages sought by alleging rent due up to September 30, 2013.

¶5 Krasi filed an answer and presented a number of cancelled rent checks totaling $36,116.81 as evidence of overpayment of rent.

¶6 The lease agreement between Ivanov and Krasi was attached to plaintiff's complaints. The lease provided that Ivanov was a co-owner of 9439 W. Irving Park in Schiller Park, Illinois. Ivanov rented the property in question to Krasi. The lease was executed on September 10, 2012. The lease term, as dictated by section 2 of the lease, was to commence on the date that Krasi notified Ivanov that Krasi had obtained all the required "approvals." The lease was then to be terminated on the one-year anniversary of the commencement date. Section 5(a) of the lease stated, "The monthly gross rent for the Term shall be $3,050.00." Section 5(a) also provided that in the event the term commenced on a day other than the first day of the month, the monthly payment "shall be prorated on a per diem basis for such partial calendar months." Section 5(b) further stated that the lease is a "Flat Fee Gross Lease" and the tenant shall have no additional monetary obligations other than rent, liability insurance, and utilities. In addition, section 5(c) stated that a security deposit for $4,662 was paid to the lessor on the date of the lease. Section 5(d) provided that a late fee of 2.5% would be incurred if the rent was not paid within ten days after due. Section 7 allowed for the tenant, with or without lessor's consent, to become a hold over tenant after the expiration of the lease. Section 9(a) dictated that the lessor was under an obligation to maintain the entire premises. Moreover, section 9(b) stated that if lessor should neglect unreasonably to maintain the premises, the tenant could make the repairs and deduct any reasonable costs for the

repairs from its rent. Section 8 provided that the tenant could also make improvements to the property at his own discretion and those improvements shall be defined as modifications for which the tenant was financially responsible.

¶7 On November 21, 2013, Ivanov filed an affidavit. In it, he stated that Krasi stopped paying rent May 1, 2013, but maintained possession of the premises. In his affidavit, Ivanov claimed that Krasi owed him $30,442.50 plus costs. He claimed that Krasi owed, as of November 21, 2013: (1) $22,110 in unpaid rent; (2) $1,732.50 in interest, at a rate of 2.5%; and (3) $6,600 for the unpaid security deposit. On November 27, 2013, Ivanov filed a second affidavit. In it, he stated that he also sold to Krasi Serdika Restaurants in a separate transaction. According to Ivanov's affidavit, as part of the restaurant transaction, Krasi paid Ivanov $13,642.11 on September 9, 2012. Ivanov also stated that the monthly rent was raised from $3,050 to $3,300 on March 1, 2013, to which he alleged that both parties agreed. Furthermore, he claimed that the agreed increase was evidenced by Krasi's increased monthly payments for the months of January through April 2013.

¶8 On December 9, 2013, Krasi filed a verified counter-complaint alleging that Ivanov failed to maintain its obligations of maintenance under the lease. Krasi alleged that it made Ivanov aware of the maintenance needs, but Ivanov refused to respond. In its conclusion, Krasi stated that Ivanov owed him in excess of $22,357 in compensation for repair work performed and alleged that Krasi paid all rent due under the lease agreement.

¶9 According to the parties, a bench trial was held on March 27, 2014. No transcript or acceptable substitute appears in the record before us. See Illinois Supreme Court Rule

323 (eff. Dec. 13, 2005). Also on March 27, 2014, the trial court entered a judgment of possession in favor of Ivanov. The order of possession reads as follows:

> "IT IS THEREFORE ORDERED AND ADJUDGED:
>
> 1. That the Plaintiff(s) have and recover of and from the Defendant(s), Krasi Invest Holding LLC, the possession of the following described premises: Address: 9439 W. Irving Park City – State- Zip: Schiller Park, IL 60176.
>
> 2. That the plaintiff(s) have and recover of and from the Defendant(s), Krasi Invest Holding LLC the sum of $8,150.00 dollars and costs.
>
> 3. Enforcement of this judgment is stayed until April 3, 2014. The court finds that a security deposit of $4,662.00 and that the judgment of $8,150.00 may be offset by the deposit refundable to Defendant."

¶10 On April 24, 2014, Ivanov filed a verified motion to vacate, modify, and reconsider the March 27, 2014, order of possession. In that motion, Ivanov argued the trial court erred on a number of bases. Ivanov claimed that Krasi continued using the premises up until April 4, 2014, which the court failed to account for. He also claimed that Krasimira Valnev, Krasi's owner and manager, committed perjury during the trial when she testified that the restaurant stopped being used by Krasi in July of 2013 and that Krasi paid the security deposit. Ivanov argued that the final order of possession was based on the false testimony, to which he objected. He further claimed that the court's damage award failed to include the agreed upon increased rent as of January of 2013. Ivanov further claimed that new damages were discovered after trial. These damages consisted of the disassembling by Krasi of the restaurant's wooden paneling, a toilet plate,

and a sink in the men's restroom. Ivanov concluded by asking the court to vacate the sum plaintiff was awarded; to rehear the issue regarding rent and damages; to grant time to amend the complaint to reflect the newly discovered damages; and to modify the amount of rent and damages awarded. In support of Ivanov's motion, he attached another affidavit of his own, an affidavit of Ivan Hrystak, a photographer, accompanied by pictures and video, and an estimate of new damages.

¶11 In Ivanov's attached affidavit, he attested that he and Krasi agreed that the monthly payment of rent would be equal to the mortgage loan monthly payment that Ivanov made to his bank. Ivanov further stated that he watched the subject premises in August 2013, October 2013, and March of 2014, which revealed that Krasi was still using the restaurant to cook food to be delivered to Krasi's other restaurants. According to Ivanov's affidavit, Valnev's trial testimony stating that the subject property was no longer a working restaurant and kitchen was clearly false and should not have been taken into consideration. Ivanov further alleged that Valnev's testimony regarding the payment of the security deposit was also false. Ivanov stated that he did not read English very well and even though the lease provided that the deposit was paid it was incorrect. Furthermore, Ivanov stated that on March 29 and March 30, 2014, Hrystak took photos of the kitchen still in use. He further stated on April 4, 2014, two cooks were cooking and two construction workers were dissembling the wooden paneling within the restaurant when he arrived. However, the cooks and workers vacated and Ivanov took possession on that date.

¶12 Krasi also filed a motion for reconsideration. In the motion, Krasi alleged the total sum of rent due was $35,583.33 for the period of September 10, 2012, through

August 31, 2013. Krasi argued that it paid $36,116.81 in rent during the lease term, thus overpaying. Krasi also alleged that the trial court erred in denying its counterclaim for reimbursement of the maintenance and repairs performed. According to Krasi's motion to reconsider, the trial court erred in classifying the repairs as "tenant alterations." Krasi presented evidence, in the form of receipts, that it paid $23,357.05 for the alleged repair costs.

¶13 The trial court denied Ivanov's motion to vacate, modify, and reconsider and held that the March 27, 2014, order of possession shall stand. The trial court also denied Krasi's motion for reconsideration.

¶14 Plaintiff and defendant filed timely cross-appeals.

¶15 II. ANALYSIS

¶16 A. Violation of Rule 341(h)

¶17 As a threshold matter, we first address Krasi's contention that Ivanov's statement of facts should be stricken as a violation of Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013).

¶18 Illinois Supreme Court Rule 341(h) governs the content of what is required in an appellant's brief. Rule 341(h)(6) requires that a statement of facts must not contain argument or comment and shall only consist of the facts necessary to an understanding of the case.

¶19 Here, Ivanov's brief failed to comply with subsection (h)(6) of Rule 341 by including argumentative comments throughout its statement of facts. However, the severity of the infractions does not demand this court to strike the appeal. We further note that Ivanov failed to strictly comply with subsection (h)(1) of Rule 341 where his

"points and authorities" section does not contain headings and subpoints. Notwithstanding, using our discretion, we decline to penalize appellant so severely for these lapses; rather, we will consider the merits of the case. See *First National Bank v. Loffelmacher*, 236 Ill. App. 3d 690, 692 (1992).

¶20 B. Ivanov's Appeal

¶21 Ivanov contends the trial court erred in denying his motion to reconsider. Ivanov argues that new evidence not available during trial demonstrated Krasi failed to vacate the subject premises until April 4, 2014, when Ivanov finally took possession pursuant to the trial court's March 27, 2014, possession order. Ivanov contends that the trial court, therefore, erred in awarding damages for rents payable only up until July 2013 and for deducting the security deposit from his award. In maintaining he is entitled to holdover rent from May 2013 through April 2014, Ivanov relies on the two affidavits he attached to his motion to reconsider for support, one from himself and one from Ivan Hrystak, the photographer that took pictures after trial evidencing Krasi's continued use of the subject premises.

¶22 "Section 2-1203 of the Illinois Code of Civil Procedure governs motions made after judgment in nonjury cases." *Federal Kemper Life Assurance Co. v. Eichwedel*, 266 Ill. App. 3d 88, 97 (1994). Section 2-1203 allows for any party, within 30 days after the entry of the judgment, to "file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief." 735 ILCS 5/2-1203 (West 2012). A reviewing court must only determine whether the trial court's decision to grant or deny a section 2-1203 motion was an abuse of its discretion, "subject only to an inquiry as to

whether substantial justice is being done between the litigants." *Babcock v. Wallace*, 2012 IL App (1st) 111090, ¶ 23.

¶23 "The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of existing law." *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627 (1991). Newly discovered evidence consists of evidence that was not available during the trial. *GMAC v. Stovall*, 374 Ill. App. 3d 1064, 1077 (2007). A trial court must not "allow litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling." *Id.* at 1078.

¶24 A forcible entry and detainer proceeding's purpose is to determine which party has the right to possession over the property in question. *S & D Service, Inc. v. 915-925 W. Schubert Condominium Association*, 132 Ill. App. 3d 1019, 1021 (1985). "The standard of review in an action brought under the Forcible Entry and Detainer Act to recover possession is, generally, whether the verdict was against the manifest weight of the evidence." *Id.* A judgment is against the manifest weight of the evidence only if the opposite conclusion is apparent or where the findings are unreasonable, arbitrary, or not based upon any of the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). It is the landlord's burden to prove its allegations are true by a preponderance of the evidence standard. 735 ILCS 5/9 -109.5 (West 2012). The preponderance of the evidence standard is met if the evidence presented would incline "an impartial and reasonable mind to one side rather than the other." *Moss-American, Inc. v. Fair Employment Practices Commission*, 22 Ill. App. 3d 248, 259 (1974).

¶25 Ivanov's challenge to the trial court's March 27, 2014, order of possession assumes that the court's damages award was based on a finding that Krasi paid rent through May 2013. The trial court's March 27, 2014, possession order, however, provides no explanation as to how the $8,150 damage award was calculated. As stated, the appellate record does not contain a report of proceedings or an acceptable substitute.

¶26 It is the appellant's burden to present a complete record of the proceedings and, in the absence of such record, any doubts will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). A presumption arises when there is no record of the proceedings that an order entered by the trial court "was in conformity with law and had a sufficient factual basis." *Id.* at 92. "Where it is alleged that the evidence presented was actually insufficient to support the court's finding, the burden of preserving said evidence rests with the party who appeals from said order." *Id.* at 395.

¶27 In this case, we must assume, absent any evidence in the record stating otherwise, the trial court acted properly, its judgment was in conformity with the law, and the judgment was supported by the facts. Because the record before us lacks any indication of the trial court's determination regarding when the subject property was vacated or any calculations for determining the damage award, the issues raised in this appeal dealing with the amount awarded are affirmed, including the trial court's determination that Krasi paid Ivanov the security deposit. The payment was evidenced in the lease. Ivanov failed to present any evidence other than his own affidavit to contradict the contents of the signed lease. The trial court was aware of Ivanov's challenge to the payment of the security deposit *vis a vis* his November 21, 2013, affidavit, yet found that Krasi was entitled to credit for the security deposit. Simply stated, based on the record before us,

we cannot say the trial court's March 27, 2014, order of possession was against the manifest weight of the evidence. We, therefore, conclude the trial court did not abuse its discretion in denying Ivanov's posttrial motion.

¶28 C. Appellee's Cross-Appeal

¶29 In his cross appeal, Krasi contends the trial court erred in awarding Ivanov $8,150. Specifically, Krasi alleges that he overpaid rent by $533.48. Krasi additionally contends that the trial court erred in denying his counterclaim. Specifically, Krasi alleges that he made several repairs that were Ivanov's responsibility for which Krasi was entitled to credit.

¶30 A defendant, in a forcible entry and detainer action, may raise the issue of whether excess rent has been paid to resist the action. *Kelley/Lehr& Associates, Inc. v. O'Brien*, 194 Ill. App. 3d 380, 388 (1990). A defendant may also resist the action by raising the issue of whether he is entitled to credit for services rendered. *Id.* at 389.

¶31 As we have previously stated, the record lacks any explanation of how the trial court determined the judgment awarded or why the counterclaim was denied. Therefore, we must assume it was proper and, absent any evidence to show otherwise, affirm its judgment. See *Foutch*, 99 Ill. 2d at 391-92.

¶32 III. CONCLUSION

¶33 We affirm the judgment of the trial court.

¶34 Affirmed