

No. 1-14-2868

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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STEEL CITY LANDSCAPE, INC.,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff and Counterdefendant - Appellee,	)	
	)	
v.	)	No. 14 M1 135053
	)	
SMS ASSIST, LLC,	)	Honorable
	)	Israel Desierto,
Defendant and Counterplaintiff - Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court, with opinion.  
Justices Lampkin and Rochford concurred in the judgment and opinion.

**ORDER**

- ¶ 1 *Held:* The failure of the appellant to file an adequate record prevented a review of the circuit court's denial of the appellant's motion to conduct pre-trial discovery in this small claims action. By reason of the appellant's failure to prove recoverable damages, the circuit court's judgment in favor of the appellee on the breach of contract claim pled as count I of the counterclaim is not against the manifest weight of the evidence. The appellant forfeited any claim of error in the circuit court's judgment in favor of the appellee on count II of the counterclaim.
- ¶ 2 The defendant and counterplaintiff, SMS Assist, LLC (SMS), appeals from an order of the circuit court denying its motion to conduct pre-trial discovery in this small claims action and

from the judgment entered in favor of the plaintiff and counterdefendant, Steel City Landscape, Inc. (Steel City), on its counterclaim. For the reasons that follow, we affirm.

¶ 3 Steel City filed this small claims action seeking \$5,110.50 in damages against SMS for its failure to pay for certain landscaping and snow-removal services rendered by Steel City to clients of SMS. Count I of Steel City's complaint was predicated on a claim for breach of an Affiliate Contract Service Agreement entered into between Steel City and SMS on December 20, 2011 (hereinafter referred to as the Contract). Count II of Steel City's complaint set forth an action for unjust enrichment based upon the same factual allegations as count I .

¶ 4 On July 9, 2014, SMS filed its appearance. Thereafter, on July 21, 2014, SMS filed both a motion for leave to conduct pre-trial discovery and a motion for leave to file a counterclaim.

¶ 5 On July 31, 2014, the circuit court entered an order granting SMS leave to file its counterclaim and denying its motion to conduct pre-trial discovery. On that same day, SMS filed a two-count counterclaim against Steel City. Count I was an action for breach of the Contract, alleging that Steel City violated the forum-selection clause in the Contract by filing an earlier action against SMS in Allegheny County, Pennsylvania (hereinafter referred to as the Pennsylvania action) and sought \$4,736.22 in damages. Count II of the counterclaim sought the same damages based on an indemnification clause contained within the Contract.

¶ 6 The case was tried as a non-jury matter on September 4, 2014. Following trial, the circuit court entered: a judgment against SMS in the sum of \$4,325.50 plus costs and pre-judgment interest on count I of Steel City's complaint; a judgment in favor of SMS on count II of Steel City's complaint; and a judgment in favor of Steel City on both counts of SMS's counterclaim. On September 15, 2014, SMS filed its notice of appeal.

¶ 7 Before addressing the issues raised by SMS, we take note that Steel City has not filed a brief with this court. However, as we have found that the errors claimed can be disposed of without the aid of an appellee's brief, we have elected to resolve this appeal based upon the record and SMS's brief alone. *See First Capitol Mortgage Corp. v. Talandis Const. Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 8 For its first assignment of error, SMS argues that the circuit court abused its discretion when it denied the motion for leave to conduct pre-trial discovery.

¶ 9 Pre-trial discovery in a small claims action, such as this, is governed by Supreme Court Rule 287(a), which provides that "[n]o depositions shall be taken or interrogatories or other discovery proceeding or requests to admit be used prior to trial in small claims except by leave of court." Ill. S. Ct. R. 287(a) (eff. Aug. 1, 1987). Whether to allow pre-trial discovery in a small claims case is a matter committed to the discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of that discretion. *See Northern Illinois Gas Co. v. Murphy Excavating*, 212 Ill. App. 3d 486, 491 (1991).

¶ 10 In this case, unfortunately, we have not been provided with a transcript of the proceedings before the trial court which resulted in the order denying SMS's motion to conduct pre-trial discovery, and the bystander's report contained in the record sheds no light on the issue. SMS, as the appellant, had "the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of a sufficient record, we have no means of knowing the reasons upon which the circuit court based its denial of SMS's motion to conduct pre-trial discovery, and as a consequence, we are unable to

meaningfully review the trial court's exercise of its discretion in the matter. We presume, therefore, that the trial court's order was in conformity with the law, and we reject the assertion that it abused its discretion.

¶ 11 SMS next argues that the circuit court's judgment in favor of Steel City on its counterclaim is against the manifest weight of the evidence. As noted earlier, count I of SMS's counterclaim was an action for breach of contract predicated upon Steel City having filed the Pennsylvania action in violation of the forum-selection clause contained within the Contract. The \$4,763.22 in damages sought by SMS in count I of the counterclaim is the amount that it paid in attorney fees in defending the Pennsylvania action. Count II of the counterclaim was based upon an indemnification clause in the Contract and again sought recovery for the attorney fees SMS paid in defending the Pennsylvania action.

¶ 12 In its brief before this court, SMS addresses only the propriety of the circuit court's judgment in favor of Steel City on count I of the counterclaim, the cause of action for breach of contract. SMS has made no argument claiming error in the circuit court's judgment in favor of Steel City on count II of the counterclaim based upon the indemnification clause. As a consequence, any argument as to the propriety of the circuit court's judgment in favor of Steel City on count II of the counterclaim has been forfeited. Ill. S. Ct. R. 341(h) (eff. Feb. 6, 2013); *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010).

¶ 13 We turn finally to SMS's argument that the circuit court's judgment in favor of Steel City on the claim for breach of contract pled in count I of its counterclaim is against the manifest weight of the evidence.

¶ 14 The clause in the Contract at issue provides, in relevant part, as follows:

"This Agreement shall be governed by and construed in accordance with the internal law, and not the law of conflicts, of the State of Illinois. By executing this Agreement, the

parties hereto consent to sole jurisdiction of the courts of Cook County, Illinois or the U.S. Federal District Court for the Northern District of Illinois with respect to any disputes which may arise out of this Agreement."

The evidence of record established that, in derogation of the Contract's forum-selection clause, Steel City filed the Pennsylvania action against SMS, seeking damages for breach of the Contract. However, based upon the forum-selection clause, the Court of Common Pleas of Allegheny County, Pennsylvania, entered an order dismissing the Pennsylvania action without prejudice to Steel City's right to file its complaint in the Circuit Court of Cook County. Thereafter, Steel City filed the instant action.

¶ 15 As stated earlier, count I of SMS's counterclaim was a breach of contract action, alleging that Steel City breached the Contract by filing the Pennsylvania action in violation of the forum-selection clause contained within the Contract. The \$4,763.22 in damages which SMS sought to recover as a result of Steel City's alleged breach consisted of the attorney fees that SMS paid defending the Pennsylvania action.

¶ 16 To recover in an action for breach of contract, a plaintiff must prove: (1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) resultant damages. *Catania v. Local 4250/5050 of Commc'ns Workers of Am.*, 359 Ill. App. 3d 718, 724 (2005). We focus our analysis in this case on the fourth element, resultant damages.

¶ 17 The only damages that SMS pled, and arguably proved, which resulted from Steel City's breach of the Contract by filing the Pennsylvania Action were the attorney fees that SMS paid in defending that action. Illinois, however, recognizes the "American Rule" which provides that, absent a statute or contractual provision, a successful litigant must bear the burden of its own attorney fees. *Taylor v. Pekin Ins. Co.*, 231 Ill. 2d 390, 398-99 (2008); *Kerns v. Engelke*, 76 Ill.

2d 154, 166 (1979). SMS has not identified any provision in the Contract authorizing an award of litigation expenses or attorney fees to the prevailing party in an action between the parties in an action for breach of the Contract. As SMS's breach of contract claim as pled in Count I of its counterclaim does not fall within an exception to the "American Rule," SMS failed to prove recoverable damages. Stated otherwise, SMS failed to prove that it sustained recoverable damages by reason of Steel City having filed the Pennsylvania action in violation of the Contract's forum-selection clause. We conclude, therefore, that the circuit court's judgment in favor of Steel City on count I of the counterclaim is not against the manifest weight of the evidence.

¶ 18 Based on the foregoing reasons, we affirm both the order of the circuit court which denied SMS's motion to conduct pre-trial discovery and the judgment entered in favor of Steel City on SMS's counterclaim.

¶ 19 Affirmed.