FIRST DIVISION
December 21, 2015

No. 1-15-0872
2015 IL App (1st) 150872-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN A. DORE, MICHAEL C. MOODY, MICHAEL J. O'ROURKE, & A.G. CHENELLE,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 14 L 6815
SWEPORTS LTD.,	)	
Defendant,	)	Honorable John C. Griffin, Judge Presiding.
CHRISTOPHER J. LEISNER,	)	
Appellee.	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

ORDER

Held: Trial court's award of reasonable charges in connection with plaintiffs' request for production pursuant to Rule 204(a)(4) was proper; and trial court's award of attorney fees and expenses pursuant to Rule 209(a), in connection with plaintiffs' cancellation of deponent's deposition was proper.

¶ 1 This case was previously before this court in *Dore v. Sweports, Ltd.*, 2014 IL App (1st) 121980-U. In connection with that underlying case, plaintiffs John Dore, Michael Moody,

Michael O'Rourke, and A.G. Chenelle (collectively, "plaintiffs"), issued and served a subpoena *duces tecum* on Christopher Leisner, the Chief Financial Officer of UMF Corporation, the subsidiary of defendant Sweports Ltd. Leisner filed objections to the subpoena, and objected to document requests on relevance grounds. Leisner was then served with a deposition subpoena, to which he also objected based on attorney-client privilege. Plaintiffs then filed a motion to compel discovery from Leisner. A hearing was held on plaintiffs' motion, and the trial court entered an order granting the motion in part and denying it in part.

¶ 2 The order stated that Leisner was to produce any and all responsive documents in his personal possession with respect to: all documents reflecting valuation of either Sweports or UMF assets; all financial forecast for either UMF or Sweports; copies of all board minutes of meetings held by Sweports and UMF, all documents reflecting UMF's and Sweports' ownership and/or shareholder structure; all documents relating to UMF's interest in intellectual property; all documents relating to actions taken by Leisner in order to procure funding for UMF, Sweports, C2c Innovations, LLC, including equity and/or secured debt financing; and all insurance policies for directors and officers of UMF and Sweports. The order also included the following language: "Pursuant to Supreme Court Rule 204(a)(4), Plaintiffs shall pay the reasonable charges incurred by Mr. Leisner in connection with the production of any of the documents subject to the motion." Sometime thereafter, plaintiffs' attorney sent an email to Leisner's attorney advising Leisner to cease all document production efforts until they could resolve the issue of what was considered "reasonable charges."

¶ 3 Leisner's deposition was set to be taken on December 8, 2010 at noon. On December 7, 2010, Michael J. O'Rourke, counsel for plaintiffs, asked Leisner's attorney for copies of the "investor memoranda" in preparation for the deposition set to take place the next day. Leisner's

attorney responded that this request was "broader" than the earlier requests of "3 prospectuses of C2C successful fundraising," and that he did not believe there was an "investor memorandum" relating to successful financing, but would have to check. At 11:35 a.m. the next day, the day of Leisner's scheduled deposition, Leisner's attorney received an email from Timothy J. Touhy stating, "I am now informed that Mr. Leisner does not intend to produce the requested documents at the deposition. The deposition is cancelled because of this refusal."

¶ 4 Leisner filed a motion seeking reimbursement of reasonable charges he incurred in connection with the document production that he had begun, for his reasonable expenses incurred in connection with the cancelled deposition, and for sanctions against plaintiffs. The trial court denied the sanctions against plaintiff but allowed Leisner leave to file a petition detailing the amounts he sought for charges, expenses, and attorney fees. Leisner filed his petition for charges and expenses seeking $13,500 for time spent by his wife, Ranell Rains, an attorney, in reviewing documents and preparing them for production in response to plaintiffs' document subpoena. Leisner attached a copy of those time records, which amounted to 180 hours. Leisner indicated that the hourly rate applied to Rains' time was consistent with that of a commercially available paralegal, $75 an hour, which was well below her standard billing rate. Leisner requested $11,440 in legal fees for time spent by his attorney in connection with the document production. He also sought legal fees for time spent by his attorney's paralegal, his attorney's courier fees, and court reporter fees. Leisner additionally sought $2,375 for time spent preparing for, and travelling to, the deposition that was ultimately cancelled, and $5,225 in attorney fees related to that cancelled deposition.

¶ 5 On February 24, 2015, the trial court conducted a hearing on Leisner's petition, although no transcript of that hearing appears in the record. The trial court then entered an order, “for the

reasons stated in open court," awarding Leisner $13,500 as "reasonable charges" for time incurred in responding to the document subpoena, $2,375 for Leisner's professional fees related to the cancelled deposition, and $5,225 for Leisner's attorney fees related to the cancelled deposition. The court denied all other relief requested in Leisner's petition. Plaintiffs now appeal.

¶ 6 On appeal, plaintiffs contend that the fees awarded under both Illinois Supreme Court Rule 204(a) (eff. Jul. 1, 2014) and Rule 209(a), were improper. We will address each in turn.

¶ 7 Rule 204(a) Award

¶ 8 Illinois Supreme Court Rule 204(a)(4) states in pertinent part:

> "The notice, order or stipulation to take a deposition may specify that the appearance of the deponent is excused, and that no deposition will be taken, if copies of specified documents or tangible things are served on the party or attorney requesting the same by a date certain. That party or attorney shall serve all requesting parties of record at least three days prior to the scheduled deposition, with true and complete copies of all documents, and shall make available for inspection tangible things, or other materials furnished, and shall file a certificate of compliance with the court. Unless otherwise ordered or agreed, reasonable charges by the deponent for production in accordance with this procedure shall be paid by the party requesting the same, and all other parties shall pay reasonable copying and delivery charges for materials they receive."

¶ 9 Following a hearing that was held on February 24, 2015, a transcript of which does not appear in the record, the trial court issued an order stating that, "for the reasons stated in open court," plaintiffs shall pay to Leisner "$13,500 of reasonable charges and expenses for time

incurred by Ms. Rains related to document production." Because we do not have a transcript to that hearing, we must presume that the trial court's order is in conformity with the law and had a sufficient factual bases. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Because it is the appellant's burden to provide a sufficiently complete record on appeal, any doubts that may arise from the incompleteness of the record will be resolved against plaintiffs in this case. *Id*. at 391-92. Accordingly, we will presume that the trial court had a sufficient factual basis for finding that reasonable charges and expenses for the time incurred by Rains related to document production amounted to $13,500.

¶ 10 Plaintiffs nevertheless contend that this award under Rule 204(a)(4) was improper because the rule does not provide for third party attorney fees unless specifically requested in advance of document production, and because Leisner never produced any documents in connection with the document request issued by plaintiffs. Plaintiffs further contend that the fees were unreasonable, as they were not incurred by Leisner, but rather by Rains. Leisner responds that the award was not for attorney fees, but rather for reasonable costs incurred by Rains in gathering the documents in preparation of production, and that there is no basis in law for the proposition that reasonable charges and expenses may only be paid if documents are actually produced. We agree with Leisner.

¶ 11 The parties dispute the standard of review. Plaintiffs assert that the issue must be reviewed *de novo*, as it presents a question of law, while Leisner maintains that the proper standard of review is abuse of discretion. "As a general rule, a trial court's decision to award fees is a matter of discretion and will not be disturbed on appeal absent an abuse of discretion." *In re Marriage of Nesbitt*, 377 Ill. App. 3d 649, 656 (2007). However, if the facts are not in dispute, and the issue is the trial court's application of the law to the facts, a court of review may

determine the correctness of the ruling independently of the trial court's judgment. *Doe v. Township High School Dist. 211*, 2015 IL App (1st) 140857, ¶ 74. Here, because the parties are discussing the application of the law to the facts of this case, we will review this issue *de novo*. However, we note that under either standard of review, our conclusion would be the same.

¶ 12 Plaintiffs first contend that Rule 204(a) does not define "reasonable charges" and that there are no cases where a third party has been awarded attorney fees as part of reasonable charges unless the party specifically requested them in advance. Plaintiffs rely on *Costa v. Keystone Steel & Wire Co.*, 267 Ill. App. 3d 683, 690-92 (1994) for this proposition. In *Costa*, the court addressed the question of whether a trial court erred in denying a request under section 5/2-1101 of the Code of Civil Procedure (Code) for expenses incurred in responding to a subpoena where the court had previously declined to condition the denial of a motion to quash the subpoena on the advancement of expenses. *Id.* This case makes no mention of Rule 204(a). Rather, it discusses section 2-1101 of the Code, which explicitly allows the court to require the requesting party to advance the reasonable cost of production to the subpoena recipient. No such requirement appears in Rule 204(a). Accordingly, we find *Costa* to be inapposite and this argument to be without merit.

¶ 13 Plaintiffs maintain that Leisner is not entitled to the "attorney fees" because the fees were not incurred by him, and there is no evidence that he paid Rains $13,500 for her time. Plaintiffs rely on *United States v. Claro*, 579 F. 3d 452 (5th Cir. 2009), for the proposition that fees for a spouse's legal services are not compensable because they are not incurred by the party. As Leisner notes, this argument has been advanced for the first time on appeal. Thus, we find that this argument has been forfeited. *CE Design Ltd. v. C & T Pizza, Inc.*, 2015 IL App (1st) 131465, ¶ 14; *Haudrich v. Howmedia, Inc.*, 169 Ill. 2d 525, 536 (1996). Forfeiture aside, there is

no indication in the record that the $13,500 incurred by Rains were "attorney fees." Rather, the trial court specifically denied Leisner's request for attorney fees, in the amount of $11,440, and granted the $13,500 incurred by Rains as "reasonable charges and expenses" incurred in connection with the document production request. Accordingly, we find plaintiffs' argument regarding attorney fees to be without merit under Rule 204(a).

¶ 14 Plaintiffs also make a vague contention that there is no legal authority under Rule 204(a) "or any Illinois case" for awarding attorney fees in connection with a document subpoena where the documents sought were never produced. We reiterate that nowhere in the record is the award under Rule 204(a) designated as "attorney fees." Even assuming plaintiffs meant to argue that no award whatsoever can be given under Rule 204(a) in connection with document production if no documents are produced, this argument fails. Plaintiffs cite to no authority for this proposition, and we can find none. Rather, the rule specifically states that "[u]nless otherwise ordered or agreed, reasonable charges by the deponent for production in accordance with this procedure shall be paid by the party requesting the same, and all other parties shall pay reasonable copying and delivery charges for materials they receive." Ill. S. Ct. Rule 204(a) (eff. Jul. 1, 2014). Here, Leisner enlisted help from his attorneys and from Rains in gathering documents in connection with plaintiffs' document production subpoena. Plaintiffs ultimately withdrew their subpoena, but presumably not before considerable expenses were incurred. Accordingly, the trial court awarded reasonable charges and expenses incurred in connection with Leisner's attempt to abide by such requests.

¶ 15 Rule 209(a) Award

¶ 16 Plaintiffs next argue that the trial court abused its discretion in awarding attorney fees under Rule 209(a) for time spent in connection with Leisner's deposition that was ultimately

cancelled. See *Nesbitt*, 377 Ill. App. 3d at 656 (trial court's decision to award fees is a matter of discretion and will not be disturbed on appeal absent abuse of discretion). Specifically, plaintiffs contend that the trial court made no fact findings justifying the award under Rule 209(a) and that the "undisputed facts show that Leisner refused to produce documents for inquiry at his deposition and refused to testify unless [p]laintiffs agreed to his version of a protective order – a protective order which he did not get approved by the trial court." Plaintiffs also contend that professional fees cannot be awarded to a fact witness, and that the award for attorney fees was excessive. Leisner responds that his attorney incurred considerable costs in preparing for his deposition, that plaintiffs cancelled the deposition on the morning it was set to take place, and that the trial court's award under Rule 209(a) was not excessive. We again agree with Leisner.

¶ 17 Pursuant to Rule 209(a), the trial court awarded Leisner $2,375 for his professional fees, and $5,225 for his attorney fees related to the cancelled deposition. Illinois Supreme Court Rule 209(a) states in pertinent part:

> "If the party serving notice of the taking of a deposition fails to attend or to proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party serving the notice to pay the other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney fees."

¶ 18 Plaintiffs first contend that the trial court made no fact findings justifying any award under Rule 209(a), and that the "undisputed facts show that Leisner refused to produce documents for inquiry at his deposition and refused to testify unless [p]laintiffs agreed to his version of a protective order." This proposition is not accompanied by a citation to the record.

See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (arguments raised on appeal must be supported "with citation of the authorities and the pages of the record relied on").

¶ 19 Moreover, as stated above, the trial court noted that the basis for its award under Rule 209(a) was for "the reasons stated in open court." Because we do not have those reasons due to plaintiffs' failure to provide a transcript from that hearing, we must presume that the trial court's order is in conformity with the law and had a sufficient factual basis; and any doubts arising from the lack of transcript must be construed against plaintiffs. See *Foutch*, 99 Ill. 2d at 392. Accordingly, we are unwilling to find, contrary to the trial court's award of fees and expenses to Leisner, that the cancellation of the deposition was due to Leisner's conduct. This was an issue that was resolved in the trial court and we will not revisit it on appeal without a complete record.

¶ 20 Next, plaintiffs argue for the first time that Leisner is not entitled to professional fees under Rule 209(a) because he was a fact witness, and that there "is no precedent in Illinois to award a fact witness professional fees for time spent in preparation for or attendance at a deposition." It is well established that issues not raised in the trial court are forfeited and may not be raised for the first time on appeal. *Haudrich*, 169 Ill. 2d at 536; *CE Design Ltd*., 2015 IL App (1st) 131465 at ¶ 14. We find that because plaintiffs did not advance this argument in the trial court, they have forfeited it. *Daniels v. Anderson*, 162 Ill. 2d 47, 58-59 (1994) (allowing new theory for first time on appeal would weaken the adversarial process, our system of appellate jurisdiction, and cause prejudice, since opponents may have been able to present evidence to discredit the theory had it been raised in the trial court).

¶ 21 Finally, plaintiffs contend that the award of $5,225 for attorney fees was excessive and unwarranted. Plaintiffs again make this argument for the first time on appeal, and thus we find that the argument has been forfeited. *Haudrich*, 169 Ill. 2d at 536; *CE Design Ltd*., 2015 IL App

(1st) 131465 at ¶ 14. Even if we were to review this argument, we note that it is unaccompanied by any citations to authority. It merely states that Leisner sought attorney fees incurred "long before" the date of his deposition, which included emails and telephone conferences with defendant Sweports' attorneys which "were paid by UMF." It is well established that "[b]are contentions in the absence of argument or citation of authority do not merit consideration on appeal and are deemed waived." *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993).

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.