

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).

2015 IL App (4th) 140807-U

NO. 4-14-0807

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 29, 2015
Carla Bender
4th District Appellate
Court, IL

LEWIS YOCKEY & BROWN, INC.,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	McLean County
OASIS, LLC, an Illinois Limited Liability Company,)	No. 11L45
Defendant-Appellee.)	
)	Honorable
)	Paul G. Lawrence,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Pope and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's decision to vacate a default judgment, concluding that plaintiff, as appellant, presented an insufficient record on appeal to support its claims of error.

¶ 2 In February 2011, plaintiff, Lewis Yockey & Brown, Inc. (Lewis), sued defendant, Oasis, LLC (Oasis), alleging breach of contract. In December 2013, the trial court found Oasis in default for failing to (1) answer Lewis' complaint and (2) complete written discovery. In February 2014, the court entered judgment in Lewis' favor. In July 2014, following a hearing, the court granted Oasis' motion to vacate the default judgment.

¶ 3 Lewis appeals, arguing that the trial court erred by vacating the default judgment because Oasis failed to satisfy the requirements for vacatur under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). For the reasons that follow, we affirm.

¶ 4

I. BACKGROUND

¶ 5 On February 9, 2011, Lewis filed its original complaint against Oasis, alleging breach of contract for nonpayment of engineer design services it performed. Specifically, Lewis alleged that on February 9, 2001, the parties entered into a written "Project Agreement," in which Lewis would provide land survey and engineer design services for Oasis' subdivision development. The agreement consisted of four phases with an estimated cost of \$53,700. The first and second phases generally involved preparation of plat surveys and development plan drawings to be submitted to the town of Normal for approval. The third and fourth phases involved preparation of "construction plans" and "construction layout." The parties' agreement included a late payment provision wherein a monthly service charge of 1 ½% (an annual rate of 18%) would be added to any outstanding balance.

¶ 6 After the parties entered the agreement, Oasis purchased additional land and directed Lewis to incorporate the acquired land into the planned subdivision. Lewis performed the extra design work, but Oasis never paid for those services. Lewis' complaint sought \$107,148.31 in damages, plus attorney fees and costs.

¶ 7 On February 17, 2011, a special process server served Lewis' complaint and summons by leaving a copy with Oasis' registered agent, attorney Mercer Turner. The summons required Oasis to file an answer or appearance within 30 days. Oasis did not comply, and neither party took any action in the case for nearly one year, until the trial court ordered Oasis to answer or otherwise plead by February 1, 2012.

¶ 8 On February 3, 2012, two days after the deadline had passed, Oasis filed a motion to dismiss pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2010)), asserting that Lewis' claim for breach of oral contract was barred by the five-year statute of

limitations (735 ILCS 5/13-205 (West 2012)). After a series of continuances, the matter was rescheduled for a June 12, 2012, hearing. On June 11, 2012, the day before the hearing on Oasis' motion to dismiss, Lewis filed its response memorandum. On June 12, 2012, the trial court granted Oasis' motion to dismiss and gave Lewis 28 days to file an amended complaint.

¶ 9 On July 17, 2012, seven days after the deadline for Lewis to file an amended complaint, Lewis filed an amended complaint, alleging (1) breach of written contract (count I) and (2) breach of contract extras (count II). Thereafter, neither party took any action and the case remained dormant for nearly eight months. On March 15, 2013, Lewis filed a motion for default judgment based on Oasis' failure to answer the amended complaint. On April 1, 2013, the court denied Lewis' motion for default judgment and granted Oasis 28 days to answer or otherwise plead.

¶ 10 Oasis failed to answer the complaint and Lewis again moved for a default judgment. On June 6, 2013, following a hearing on the motion, the trial court granted Oasis more time to plead to the complaint and continued the matter. Later that same day, Oasis filed a motion to dismiss the amended complaint pursuant to section 2-619(a)(5) of the Code, claiming that counts I and II were time-barred by the statute of limitations (735 ILCS 5/13-205 (West 2012)). Oasis also argued that the contract, which was attached to the amended complaint as exhibit A, contained no provisions regarding the collection of interest on late payments. Lewis filed a motion for leave to file a second amended complaint, noting the second page of the contract was inadvertently omitted from exhibit A. On August 23, 2013, the court denied Oasis' motion to dismiss, granted Lewis' motion for leave to file a second amended complaint, and ordered Oasis to answer within 28 days.

¶ 11 Again, Oasis filed no answer, and again Lewis moved for a default. On October 16, 2013, while the motion for default was pending, Oasis filed a motion for summary judgment, asserting that no oral contract existed. On October 18, 2013, with both parties present, the trial court set a briefing schedule and continued the matter to December 20, 2013, for a hearing on Oasis' motion for summary judgment. (The written order and docket entries are silent as to whether the court ruled on Lewis' motion for default.)

¶ 12 On October 29, 2013, Lewis filed a motion to compel discovery, alleging that it served Oasis with written discovery in December 2011 but Oasis had not submitted any answers or responses despite "numerous efforts *** to secure compliance." On November 20, 2013, the trial court granted Lewis' motion to compel and gave Oasis one week to complete all written discovery. By December 12, 2013, Oasis still had not completed written discovery, and Lewis filed a motion for discovery sanctions under Illinois Supreme Court Rule 219(c)(v) (eff. July 1, 2002). (Rule 219(c)(v) allows the entry of the most potent sanction—dismissal against a plaintiff or a judgment by default against a defendant—for unreasonably failing to comply with discovery rules or court orders.)

¶ 13 On December 20, 2013, the trial court held a hearing on Oasis' motion for summary judgment, but Oasis failed to appear. The court (1) denied Oasis' motion for summary judgment and (2) granted Lewis' oral motion for default judgment.

¶ 14 On January 30, 2014, Lewis filed a motion for judgment in the amount prayed for in its second amended complaint and sent a notice of hearing to Oasis, indicating the motion would be heard on February 11, 2014. Oasis failed to appear at the hearing, and the trial court entered judgment in Lewis' favor for \$28,756 on count I and \$102,118 on count II.

¶ 15 Four months later, on May 15, 2014, Oasis moved to vacate the default judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)). In the motion, Oasis alleged it had no notice of the December 20, 2013, and February 11, 2014, hearings. Oasis attached an affidavit from Turner, its attorney.

¶ 16 On July 31, 2014, following a hearing on Oasis' motion to vacate the default judgment, the trial court entered the following order by way of docket entry:

"Atty Marvel for Lewis, Yockey & Brown. Atty Turner for Oasis and Atty O'Day for Oasis (non-appearing). Hearing on Motion to Vacate Orders. Mr. Turner is sworn [and] examined by Mr. O'Day who appears only for the purpose of questioning Mr. Turner. Motion is argued and granted. Judgment Order is vacated. Mr. O'Day files his appearance and Mr. Turner withdraws. [Case management conference] set 9/12/14 [at] 10:00 a.m."

No transcript of that hearing appears in the record on appeal.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, Lewis argues that the trial court erred by vacating the default judgment because Oasis failed to satisfy the requirements for vacatur under section 2-1401 of the Code. Oasis responds that (1) Lewis failed to present an adequate record for review and (2) this court must presume the trial court's order was in conformity with law and had a sufficient factual basis. Alternatively, Oasis claims that the trial court did not abuse its discretion by vacating the default judgment. Because Lewis failed to provide a sufficient record on appeal, we affirm the court's judgment.

¶ 20 The supreme court has long held that to support a claim of error on appeal, the appellant has the burden to present a sufficiently complete record. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984). In fact, "[f]rom the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Foutch*, 99 Ill. 2d at 391, 459 N.E.2d at 959. Where the issue on appeal relates to the conduct of a hearing or proceeding, the issue is not subject to review absent a report or record of the proceeding. Instead, absent a record, "it [is] presumed that the order entered by the trial court [is] in conformity with law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 392, 459 N.E.2d at 959. See also *Webster v. Hartman*, 195 Ill. 2d 426, 433-34, 749 N.E.2d 958, 963 (2001), where the supreme court reaffirmed its holding in *Foutch*.

¶ 21 In this case, Lewis, as the appellant, has failed to present a sufficiently complete record of the proceedings to supports its claim of error. The Clerk of the Appellate Court directed Lewis' attention "to the possibility of using an agreed statement of facts or bystander's report, if appropriate" but Lewis failed to do so. The record on appeal contains no transcript of the July 31, 2014, hearing on Oasis' motion to vacate the default judgment, no report of the proceedings, no bystander's report, and no agreed statements of facts. Ill. S. Ct. Rs. 323(c), (d) (eff. Dec. 13, 2005). In addition, the record does not contain the trial court's written orders, and the docket entries do not state the specific grounds for the court's decision. As such, with regard to the July 31, 2014, hearing, we know only that counsel for both parties were present, the cause was called for hearing on Oasis' "motion to vacate orders[.]" and "Mr. Turner [was] sworn [and] examined by Mr. O'Day[.] who appear[ed] only for the purpose of questioning Mr. Turner." We

do not know what evidence or arguments were presented at the hearing, nor do we know the basis for the court's decision.

¶ 22 We further note that our review of the limited record before us reflects a lack of diligence and failure to follow court orders from both parties. This court has long recognized that "[c]ivil proceedings already suffer from far too many delays" (*Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248, 571 N.E.2d 1107, 1111 (1991)), and "unless and until trial judges clamp down on discovery abuses—be it engaging in stonewalling, foot dragging, obfuscation, or any other shenanigans—little incentive exists for the already recalcitrant party to comply" (*Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 25, 6 N.E.3d 435). To allow a party to defy trial court orders without facing sanctions can be likened to a dog without teeth—all bark and no bite. A pattern of dilatory behavior should not be tolerated because it unfairly hurts the opposing party and is a burden on the court system. Illinois Supreme Court Rules 137 (eff. Feb. 1, 1994) and 219 (eff. July 1, 2002) afford trial judges broad discretion to impose an array of sanctions against any party who refuses to comply with either the rules of the supreme court or orders entered by the trial courts. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120, 692 N.E.2d 286, 289 (1998). On remand, we expect the problems that have heretofore been present in this case will not reappear.

¶ 23 In sum, because Lewis has failed to provide a sufficient report of proceedings, we must presume the orders entered by the trial court were in conformity with law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92, 459 N.E.2d at 959. Accordingly, we find the court did not err by vacating the default judgment.

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we affirm the trial court's judgment.

¶ 26

Affirmed.