FIRST DIVISION
February 29, 2016

No. 1-14-3917
2016 IL App (1st) 143917-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SUHAIL FAKHOURI and DCR MANAGEMENT, LLC,	)	
	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	Cook County.
	)	
v.	)	
	)	No. 11 L 5114
KLYTTA & KLYTTA, JOHN KLYTTA, and ANTHONY KLYTTA,	)	
	)	Honorable
	)	Thomas V. Lyons, II
Defendants-Appellants.	)	Judge Presiding.
	)	

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

ORDER

¶ 1 *Held:* The trial court's judgment order and order denying defendant's post-trial motion were affirmed where defendants failed to include their post-trial motion, a report of proceedings for the trial, and a report of proceedings for the post-trial motion hearing in the record on appeal.

¶ 2 This case stems from a legal malpractice action brought by plaintiffs, Suhail Fakhouri (Fakhouri) and DCR Management, LLC (DCR) (collectively, plaintiffs) against their former attorneys, defendants, Anthony Klytta and John Klytta, and their law firm, Klytta & Klytta (collectively, defendants). Defendants appeal the trial court's order that entered judgment against them after a jury returned its verdict in favor of Fakhouri in the amount of $275,335 and in favor

of DCR in the amount of $17,389. Defendants also appeal the trial court's subsequent order that denied their post-trial motion to vacate judgment and enter judgment notwithstanding the verdict, or in the alternative, for a new trial. We affirm.

¶ 3 BACKGROUND

¶ 4 In order to clearly set forth the history of this case and the parties involved herein, we provide a summary of both the underlying case and the resulting legal malpractice case.

¶ 5 The Underlying Case

¶ 6 The underlying case, *Albany Square, LLC v. DCR Management, LLC and Sukhail [sic] Fakhouri*, case number 09 L 7070, stemmed from the sale of a strip mall located at 4445 North Pulaski Road in Chicago (property), which was owned by DCR and sold to Albany Square, LLC (Albany). According to Albany's complaint, which was filed on June 16, 2009, the closing on the property took place "on or around November 15, 2007." Subsequent to the closing, Albany discovered that one of the strip mall's tenants, Nick's Billiards (Nick's), had not been paying the amount of rent that DCR had previously disclosed. Specifically, Albany's complaint alleged that prior to the property's sale, DCR represented that Nick's was paying $7,000 or more in monthly rent, but Albany later determined that Nick's had, in fact, only been paying $3,000 per month in rent. Albany's complaint in the underlying case alleged breach of contract against DCR and fraud against both DCR and Fakhouri.

¶ 7 Defendants were hired to represent plaintiffs in the underlying case sometime in 2009. On December 10, 2009, plaintiffs[1] were held in default in the underlying case when no one appeared on plaintiffs' behalf and the matter was set for subsequent proveup on January 22, 2010. On January 7, 2010, defendant John Klytta filed a motion to vacate the order of default

[1] In order to remain consistent throughout this order, we refer to Fakhouri and DCR, collectively, as "plaintiffs" in both the underlying case and the resulting legal malpractice case. However, we note that in the underlying case, plaintiffs were actually the defendants, which is why they were capable of being held in default.

and noticed it for hearing on January 25, 2010. No one appeared on plaintiffs' behalf at the January 22, 2010, proveup date and a default judgment in the amount of $1,662,672 plus costs was entered against plaintiffs. On January 25, 2010, the date that defendant John Klytta had noticed his motion to vacate the order of default, the matter was continued until February 5, 2010, because Albany's counsel was not in court and it was unclear whether they had received notice. No one appeared in court on behalf of plaintiffs on February 5, 2010, and the motion to vacate order of default was stricken. On February 10, 2010, defendant John Klytta noticed another motion to vacate for hearing on March 8, 2010. Again, Albany's counsel was not present on March 8, 2010, and the matter was continued to March 16, 2010, on which date it was granted and plaintiffs were given until March 30, 2010, to answer Albany's complaint. Subsequently, due to plaintiffs' failure to file any responsive pleadings and defendants' failure to appear on their behalf, another order of default was entered on May 14, 2010.

¶ 8 However, defendant John Klytta appeared in court on May 14, 2010, after the underlying case had been called, and made an oral motion to vacate that day's default order, which was continued to May 21, 2010. On May 21, 2010, defendant John Klytta failed to appear in court on behalf of plaintiffs, but Albany's counsel informed the court that another attorney intended to file a supplemental appearance on behalf of plaintiffs because the Illinois Supreme Court suspended the law licenses of defendants John Klytta and Anthony Klytta effective June 8, 2010. As a result, the court ordered that any supplemental appearance was to be filed by May 24, 2010, and that any motion to dismiss Albany's complaint was to be noticed for hearing on May 25, 2010. The court continued the motion to vacate the order of default to the same date. On May 25, 2010, another attorney, Nicholas Duric, appeared in court on behalf of plaintiffs, but failed to present a motion to dismiss. The court ordered plaintiffs to file any responsive pleadings by June

15, 2010, and continued the motion to vacate order of default to June 22, 2010. On June 22, 2010, attorney Duric failed to appear in court and no responsive pleadings had been filed. As a result, the court denied plaintiffs' motion to vacate the second order of default and reinstated the judgment in the amount of $1,662,672 plus costs in favor of Albany and against plaintiffs. On October 4, 2010, defendant John Klytta presented a petition brought pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)) which sought to vacate the default judgment entered against plaintiffs. On January 7, 2011, in a six-page written order, the court denied the section 2-1401 petition, finding a lack of any meritorious defense and lack of due diligence, and ordered the June 22, 2010, default judgment against plaintiffs to stand.

¶ 9 The Legal Malpractice Case

¶ 10 On May 19, 2011, plaintiffs filed a legal malpractice complaint[2] against defendants alleging that defendants negligently represented plaintiffs in the underlying case in one or more of the following ways: failed to timely and properly assert a defense on behalf of plaintiffs; failed to advise Fakhouri that they were not defending Albany's complaint; failed to refer plaintiffs to a qualified attorney to defend Albany's complaint; failed to exercise due diligence in following Albany's complaint; failed to keep plaintiffs informed of the status of Albany's complaint; and failed to investigate Albany's claims against plaintiffs. Plaintiffs further alleged that as a result of defendants' negligence, a judgment was rendered against them and that but for defendants' negligence, plaintiffs would have successfully defended against Albany's complaint.

¶ 11 Throughout the next three years, the parties engaged in discovery and motion practice. On January 27, 2014, this case proceeded to trial for the first time, but on January 31, 2014, a motion for mistrial was granted. After a series of motions to continue trial, this matter was reset

[2] Plaintiffs' original complaint also listed attorney Duric as a defendant. However, plaintiffs' claims against Duric were eventually dismissed by agreement on July 31, 2014; thus, he is not a party to this appeal.

for trial on July 28, 2014. On July 29, 2014, this case was assigned to a trial judge. On July 30, 2014, a document signed by defendants' attorney and titled "stipulation of admission of negligence" was filed. Specifically, the admission of negligence stated that defendants stipulated that they "were negligent as alleged by [p]laintiffs in their [c]omplaint at [l]aw in this case." The jury trial in this case commenced on July 30, 2014. No report of proceedings, bystanders report, or agreed statement of facts pertaining to the trial was included in the record on appeal. On July 31, 2014, the jury returned a verdict in favor of plaintiffs and against defendants. DCR was awarded $17,389.68 and Fakhouri was awarded $275,335.00. The court entered judgment on the verdict plus costs.

¶ 12 Sometime after trial[3], defendants filed their post-trial motion for vacation of judgment and judgment notwithstanding the verdict, or in the alternative, for a new trial. Defendant's post-trial motion is not contained in the record on appeal. Plaintiffs filed their response on September 22, 2014, and defendants filed their reply thereafter[4]. On November 20, 2014, the trial court denied defendants' post-trial motion. The court's order stated, "[f]or the reasons stated in open court, the motion is denied." No report of proceedings, bystanders report, or agreed statement of facts pertaining to the hearing on defendants' post-trial motion is contained in the record on appeal. Defendants filed their notice of appeal on December 19, 2014, and were granted leave by this court to file an amended brief[5] on August 4, 2015.

¶ 13 ANALYSIS

[3] We are unable to determine what date defendants filed their post-trial motion because a file-stamped copy of their motion does not appear in the record. We note that in their statement of jurisdiction, defendants assert, "[d]efendant filed a timely post-judgment motion on September 2, 2014." Plaintiffs do not challenge this statement by defendants, but we cannot recognize this purported filing date as accurate where the motion is not in the record before us.

[4] Although a copy of defendants' reply to their post-trial motion appears in the record, it is not file-stamped; thus, we are unsure on which date it was filed with the court.

[5] For purposes of clarity, we note that when we refer to defendants' "brief" throughout this order, we are actually referring to defendants' amended brief.

¶ 14 On appeal, defendants argue that the trial court erred when it denied their post-trial motion to vacate the judgment, judgment notwithstanding the verdict, or in the alternative, for a new trial.

¶ 15 A denial of a motion for judgment notwithstanding the verdict, similar to an adverse ruling on a motion for directed verdict, is reviewed *de novo*. *Evans v. Shannon*, 201 Ill. 2d 424, 427 (2002). Judgments notwithstanding the verdict should only be entered in cases where all of the evidence, when viewed in a light most favorable to the opponent, so overwhelmingly favors the movant that that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). A trial court's decision on a motion for a new trial will not be disturbed unless the trial court abused its discretion. *Ramirez v. FCL Builders*, 2014 IL App (1st) 123663, ¶ 158. "In determining whether a trial court abused its discretion, the reviewing court should consider whether the jury's verdict was supported by evidence and whether the losing party was denied a fair trial." *Id.*

¶ 16 In their response, plaintiffs assert that defendants have waived all arguments on appeal due to their failure to comply with Illinois Supreme Court rules regarding brief writing. Plaintiffs also contend that we are required to presume the facts presented in the trial court are sufficient to support the jury's verdict. We agree.

¶ 17 The supreme court rules governing appellate practice are mandatory, not merely suggestive. *Perona v. Volkswagon of America, Inc.*, 2014 IL App (1st) 130748, ¶ 21. If an appellant's brief violates the supreme court rules, this court has the discretion to dismiss the appeal. *Id.* In this case, defendants' brief violates numerous supreme court rules. We discuss each in turn.

¶ 18 Illinois Supreme Court Rule 342(a) (eff. Jan. 1, 2005) states,

> "[t]he appellant's brief shall include, as an appendix, a table of contents to the appendix, a copy of the judgment appealed from, any opinion, memorandum, or findings of fact filed or entered by the trial judge or by any administrative agency or its officers, any pleadings or other materials from the record which are the basis of the appeal or pertinent to it, the notice of appeal, and a complete table of contents, with page references, of the record on appeal."

Here, defendants' brief lacks a table of contents of the six-volume record on appeal.

¶ 19 Additionally, in violation of Rule 341, neither defendants' statement of facts nor their argument section contain any reference to the page numbers of the record on appeal. Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013) (requiring that the statement of facts contain appropriate references to pages of the record on appeal); Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (requiring that appellant's argument contain pages of the record relied on). Rather, defendants' brief refers to page numbers of an "exhibit book" that was not made part of the record on appeal. Defendants' statement of facts also violates Rule 341 by failing to state the facts in an accurate and fair manner without argument or comment. Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013) ("[s]tatement of [f]acts *** shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment ***"). Specifically, defendants' brief does not include a recitation of facts regarding the trial proceedings or the hearing on the post-trial motion. They also fail to provide any facts regarding the events that led to the legal malpractice claim that is the subject of this appeal. Instead, their facts section only contains information regarding the underlying case brought by Albany against plaintiffs. Additionally, in describing the underlying case, defendants use unfair terms such as "scheme" and "kicking back money." Their statement of facts also contains argument and legal conclusions. For example, in

their statement of facts, defendants state, "[n]either DCR *** nor Fakhouri met their burden." In addition to this being an argument, it is also inaccurate as the jury returned a verdict in plaintiffs' favor. Overall, defendants' statement of facts is inappropriate and does not comport with Rule 341.

¶ 20 Likewise, defendants' argument section is problematic for another reason. Rule 23, in relevant part, reflects that orders entered under subpart (b) are "not precedential and may not be cited by any party, except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011). Defendants' argument section contains numerous citations to nonprecedential cases where the orders were entered pursuant to Rule 23(b). None of the limited circumstances contemplated by Rule 23 are present in this case; thus, many of defendants' citations are improper.

¶ 21 Even putting aside defendants' aforementioned violations of the supreme court rules for brief writing, we cannot review defendants' arguments due to their failure to provide a full record. An appellant has 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). Any doubts that may arise from the incompleteness of the record will be resolved against the appellant. *Id.* at 392.

¶ 22 In this case, the record on appeal does not contain a report of proceedings. Thus, there is no record of either the trial testimony or the court's hearing on defendants' post-trial motion. Defendants' notice of appeal states that they are appealing from the trial court's July 31, 2014, judgment and from the November 20, 2014, order denying their post-trial motion. The trial court's November 20, 2014, order that denied defendants' post-trial motion stated that the motion

was denied "for the reasons stated in open court." The record does not contain a report of proceedings, a bystander's report, or an agreed statement of facts for either the trial or the post-trial motion hearing, any of which would have been acceptable under Rule 323. See Ill. S. Ct. R. 323(a), (c), (d) (eff. Dec. 13, 2005). As a result, it is impossible for this court to know the content of the testimony presented at trial or the "reasons stated in open court" that were referred to in the November 20, 2014, order that denied the post-trial motion. The court in *Foutch* recognized, "[a]s there is no transcript of the hearing on the motion ***, there is no basis for holding that the trial court abused discretion in denying the motion." *Id.* We must presume that the orders entered by the trial court were in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392.

¶ 23 Perhaps most detrimental to defendants' arguments on appeal is the fact that the record does not contain the post-trial motion that defendants claim was erroneously denied. Regarding the scope of our review of post-trial motions in jury cases, Illinois Supreme Court Rule 366 provides, "[a] party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified in the motion." Ill. S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994). Without the post-trial motion, we are unable to determine what points, grounds, or relief were specified and whether the arguments raised on appeal were ever presented to the trial court for its consideration. As stated previously, we must construe any omission in the record against appellant. *Foutch*, 99 Ill. 2d at 392. Therefore, we find that defendants have waived any argument on appeal regarding the court's denial of their post-trial motion by failing to include a copy of it in the record. See *Reed v. Hoffman*, 48 Ill. App. 3d 815, 820 (1977).

¶ 24 As a final matter, we note that on August 4, 2015, this court granted defendants' motion to file an amended appellate brief. In their motion, defendants asserted that they had

"inadvertently failed to attach their [a]ppendix to their brief" and were seeking leave to do so. Although defendants subsequently filed an amended brief with an appendix attached, their appendix did not include a table of contents for the record, and was noncompliant with the supreme court rules. Further, on October 30, 2015, defendants filed a motion to amend the record on appeal to include the complete trial transcript, which was denied by this court for failure to comply with Rule 329. Ill. S. Ct. R. 329 (eff. Jan. 1, 2006). Therefore, defendants previously had the opportunity to correct at least one of their brief's deficiencies - the missing table of contents - when this court granted leave to amend their brief. Similarly, defendants could have supplemented the record had they simply complied with the applicable supreme court rule. In their reply brief, defendants claim that their post-trial motion and "exhibit book" do not appear in the record because they filed those documents with the trial judge's clerk of court in the courtroom, rather than the clerk's office. However, this does not correct their omission.

¶ 25 In sum, defendants had numerous opportunities to present their arguments to this court in a reviewable manner. Yet, they failed to do so. Although defendants argue that the trial court improperly denied their post-trial motion, we are unable to address defendants' substantive arguments for the reasons stated herein. The deficiencies in the record on appeal and defendants' deviations from the requirements of the supreme court rules are overwhelming, and prevent this court from conducting an informed review. As a result, we affirm the trial court's decision.

¶ 26 CONCLUSION

¶ 27 Based on the foregoing, we affirm the judgment of the circuit court.

¶ 28 Affirmed.