2016 IL App (2d) 150812-U
No. 2-15-0812
Order filed June 28, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RICHARD GLASS, Plaintiff and Counterdefendant-Appellee, v. MAXWELL MORA, Defendant and Counterplaintiff-Appellant.	)	Appeal from the Circuit Court of Lake County. No. 15-SC-1379 Honorable Theodore S. Potkonjak, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Appellate court would presume trial court properly denied defendant's post-trial motion in the absence of a complete record. Moreover, given the limited record presented, trial court did not abuse its discretion in denying defendant's motion for a new trial based on newly discovered evidence where the record establishes that evidence in question could have been discovered by defendant before trial through the exercise of due diligence.

¶ 2 Plaintiff, Richard Glass, filed a small claims complaint against defendant, Maxwell Mora, sounding in breach of contract. Defendant filed a counterclaim, seeking unpaid fees. Following a bench trial, the circuit court of Lake County ruled in plaintiff's favor and entered judgment

against defendant in the amount of $2,500 plus $125 as costs of suit. Thereafter, defendant filed a motion for a new trial or, alternatively, to reopen trial for further testimony. The trial court denied defendant's post-trial motion, and he filed a notice of appeal. On appeal, defendant argues that the trial court should have ordered a new trial based on evidence discovered subsequent to trial which shows that plaintiff testified falsely under oath. For the following reasons, we affirm.

¶ 3 On March 24, 2015, plaintiff filed a small claims complaint against defendant in the circuit court of Lake County. Plaintiff's complaint alleged in relevant part as follows. In 2014, plaintiff and defendant entered into an agreement whereby defendant agreed to produce an advertisement video for a product plaintiff was developing. Plaintiff submitted a down payment to defendant in the amount of $2,500. Due to delays in the development of the product, plaintiff requested a refund of the down payment, but defendant refused. Plaintiff then agreed to move forward with the video shoot and notified defendant of a revised schedule. Defendant refused to perform the video shoot without additional funds being forwarded to him. Plaintiff again asked for a refund of the down payment, but defendant denied the request. Plaintiff sought damages in the amount of $2,500 plus attorney fees and court costs.

¶ 4 On April 28, 2015, defendant filed a response and counterclaim. According to the counterclaim, plaintiff agreed to pay defendant $4,500 for his services, including the down payment of $2,500. Thereafter, defendant did extensive work on the project, including writing a script, hiring a crew to shoot the video, obtaining equipment, and choosing venues for the shoot. The parties intended to shoot the video during the first week of August 2014. However, plaintiff failed to communicate with defendant for a period of over six weeks, extending into early September 2014. When plaintiff finally communicated with defendant, he requested a full

refund, which defendant refused. Plaintiff then offered to proceed with the video if defendant would reduce his fee by $1,000, pay for out-of-pocket costs himself, and not charge plaintiff for any additional work required of defendant. Defendant declined plaintiff's offer. In his counterclaim, defendant requested that plaintiff pay him $2,000 (the difference between the full contract price and the down payment) plus costs.

¶ 5 The matter proceeded to a bench trial on June 16, 2015. Both plaintiff and defendant testified at the trial. At the conclusion of the proceeding, the trial court entered judgment in plaintiff's favor and awarded him $2,500 plus court costs of $125. On June 30, 2015, defendant filed a "Motion for New Trial or to Reopen Trial for Further Testimony." In his motion, defendant alleged that while he was being cross-examined, plaintiff's attorney began to ask him a question based on an e-mail dated September 1, 2014, but withdrew the question. Defendant's attorney requested an opportunity to review the e-mail, but the trial court refused the request. Subsequent to trial, defendant researched his computer files and found the September 1, 2014, e-mail. According to defendant, the contents of the September 1, 2014, e-mail establish that plaintiff testified falsely under oath at the trial. As a result, defendant asserted that the court should order a new trial or reopen testimony. On July 16, 2015, following oral argument, the trial court denied defendant's post-trial motion. On August 12, 2015, defendant filed a notice of appeal.

¶ 6 Defendant's sole argument on appeal is that the trial court should have ordered a new trial based on the discovery of the September 1, 2014, e-mail, because it established that plaintiff testified falsely under oath.

¶ 7 As an initial matter, we note our ability to review this appeal is severely hampered by the lack of a transcript from the June 16, 2015, trial, or the July 16, 2015, hearing on defendant's

post-trial motion. While Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005) authorizes an appellant to supplement the record with either a bystander's report or an agreed statement of facts, defendant has failed to do either. As the appellant, defendant has the burden to present this court with a sufficiently complete record on appeal. *In re Marriage of Gulla & Kanaval*, 234 Ill. 2d 414, 422 (2009); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001). As our supreme court has stated, "[a]n issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." (Internal quotation marks omitted.) *Gulla*, 234 Ill. 2d at 422. Accordingly, absent an adequate record preserving the claimed error, the reviewing court must presume the circuit court had a sufficient factual basis for its action and that it conforms to the law. *Gulla*, 234 Ill. 2d at 422*; Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). This principle is equally applicable to appeals from judgments in small claims cases. *Landau & Associates, P.C. v. Kennedy*, 262 Ill. App. 3d 89, 92 (1994).

¶ 8 As noted above, defendant asserts that the trial court should have ordered a new trial based on the discovery of the September 1, 2014, e-mail, because it established that plaintiff testified falsely under oath at trial. Based on the limited record before us, however, we find that defendant's argument lacks merit. To warrant a new trial, newly discovered evidence: (1) must be of such conclusive character that it would likely change the result on retrial; (2) must be material to the issue but not merely cumulative; and (3) must have been discovered since the trial and be of such character that it could not have been discovered sooner through the exercise of due diligence. *People v. Smith*, 177 Ill. 2d 53, 82 (1997); *Kaster v. Wildermuth*, 108 Ill. App. 2d 288, 291-92 (1969). A motion seeking a new trial based on newly discovered evidence "is addressed to the discretion of the trial judge and denial of such a motion shall not be disturbed upon review absence a showing of an abuse of discretion." *Smith*, 177 Ill. 2d at 82; see also

Herrington v. Smith, 138 Ill. App. 3d 28, 31 (1985). A court abuses its discretion only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view. *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 9 Here, without a transcript or sufficient substitute, we are unable to determine whether the September 1, 2014, e-mail is of such conclusive character that it would likely change the result on retrial, or whether the e-mail is cumulative to other evidence presented at trial. Accordingly, we must presume that the trial court had an adequate basis for denying defendant's motion for a new trial or to reopen proofs. See *Foutch*, 99 Ill. 2d 389, 391-92 (1984) (noting that a court of review will resolve any doubt arising from an incomplete record against the appellant). However, even given the limited record before us, one thing is clear—defendant failed to establish that the September 1, 2014, e-mail could not have been discovered sooner through due diligence. In this regard, defendant admitted in his post-trial motion that, after trial, he searched his computer and located a copy of the September 1, 2014, e-mail in his own files. This evidence clearly shows that defendant had possession of the e-mail prior to trial and that he could have located it through the exercise of due diligence. Based on this record, we cannot say that the trial court's ruling on the post-trial motion was arbitrary, fanciful, or unreasonable, or that no reasonable person would adopt the court's view. Indeed, we note that in his brief before this court, defendant concedes that the September 1, 2014, e-mail "was not literally 'new' evidence."

¶ 10 Alternatively, defendant argues that, in the interests of justice, this court could order the trial court to reopen this case for additional testimony, including the introduction of the September 1, 2014, e-mail into evidence. In light of the foregoing analysis, we decline defendant's request.

¶ 11 For the reasons set forth above, we find that the trial court did not abuse its discretion in denying defendant's motion for a new trial or to reopen the trial for further testimony. Accordingly, we affirm the judgment of the circuit court of Lake County.

¶ 12 Affirmed.