

No. 1-11-3311

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RANDY FRANKS,)
) Appeal from the
) Circuit Court of
 Plaintiff-Appellant,) Cook County
 v.)
) No. 07 M1 120421
 SHELDON BRODER,)
)
 Defendant-Appellee.)
) Honorable
) Sidney A. Jones, III
) Judge Presiding.
)

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Connors concurred in the judgment.

ORDER

¶ 1 *HELD:* As plaintiff has not included a report of the trial proceedings or an acceptable substitute in the appellate record and defendant's admissions are alone insufficient to establish plaintiff's conversion and wrongful eviction claims, this court must presume that the circuit court's decision to grant judgment *n.o.v.* in favor of defendant on those claims had a sufficient factual basis and conformed with the law. The circuit court did not err by awarding defendant attorney fees because defendant was entitled to attorney fees under the fee-shifting clause of the lease as he became involved in the litigation through or on account of the lease and through no fault of his own. The circuit court did not abuse its

discretion by denying plaintiff's motion for sanctions because plaintiff did not establish that defendant's motions to disqualify counsel for plaintiff were brought in bad faith where it appeared prior to trial that counsel might be called to testify; defendant did not admit all relevant facts prior to trial; and plaintiff did not establish that the facts set forth in defendant's counterclaim were contradicted by his own admissions.

¶ 2 Plaintiff, Randy Franks, appeals from orders of the circuit court of Cook County granting judgment *n.o.v.* in favor of defendant, Sheldon Broder, on plaintiff's conversion and wrongful eviction claims, denying plaintiff's motion for sanctions, and awarding defendant \$42,471.47 in attorney fees, plus costs. On appeal, plaintiff contends that the court erred by granting judgment *n.o.v.* in favor of defendant on the conversion and wrongful eviction claims, awarding defendant attorney fees, failing to rule on plaintiff's posttrial motion to amend the jury verdict, and denying plaintiff's motion for sanctions. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 Plaintiff filed a complaint alleging claims of breach of contract, conversion, and wrongful eviction against defendant. Plaintiff asserted that, on March 30, 1996, the parties entered into a written commercial lease agreement for a property to be used as a retail store and that plaintiff paid defendant a security deposit of \$4,012.00. Plaintiff was required to pay \$2,300.00 per month in rent, plus an amount equal to one-third of the real estate taxes for the property, until rent was raised to \$3,900.00 per month in September 2004. Plaintiff made all rental payments in a timely manner throughout the life of the lease.

¶ 5 On November 28, 2006, plaintiff sent defendant a letter relating that plaintiff planned to terminate the lease on January 15, 2007, and that he wanted to use his security deposit to cover the remaining one and one-half months of rent. Defendant responded that the lease provided that

1-11-3311

the security deposit could not be applied toward rent and required plaintiff to pay rent for the months of December 2006 and January 2007. On December 1, 2006, plaintiff paid defendant \$3,900.00 for that month's rent. At some point in December 2006, plaintiff informed defendant that he was going to be out of the country until January 31, 2007, and defendant agreed to allow plaintiff to use the property as a storage space until February 15, 2007. On January 14, 2007, plaintiff's maintenance crew cleaned up the property, but left behind some of plaintiff's personal property to be dealt with by plaintiff when he returned to the country.

¶ 6 On January 15, 2007, defendant sent plaintiff an e-mail relating that plaintiff's personal property would be removed from the store if it was still there on January 22, 2007. On January 18, 2007, defendant sent plaintiff an e-mail relating that a cleanup crew was going to be at the store the next day and that the crew was going to dispose of any of plaintiff's property that was still on the premises. On January 20, 2007, defendant removed the majority of plaintiff's personal property from the store, and much of the property was lost or damaged beyond repair. On January 20, 2007, defendant changed the locks to the store and barred plaintiff's entry to the premises.

¶ 7 In the breach of contract count, plaintiff alleged that defendant breached the lease by failing to return his security deposit or provide an itemized list of deductions taken from the security deposit. In the conversion count, plaintiff alleged that defendant removed his personal property from the premises without his consent or the authority of law and damaged the property. In the wrongful eviction count, plaintiff alleged that defendant violated the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.* (West 2006)) when he entered the premises and removed

1-11-3311

plaintiff's personal property thereby assuming a duty to reasonably protect plaintiff's personal property when he did so and breached that duty and acted in reckless disregard of plaintiff's rights such that punitive damages were warranted. Plaintiff requested the court enter a judgment in his favor of at least \$18,015.00, plus costs and punitive damages.

¶ 8 A jury trial ensued. At the close of plaintiff's case-in-chief, defendant filed a motion for a directed finding, asserting that plaintiff failed to establish which pieces of personal property were converted or removed from the premises or damages resulting from the alleged conversion or wrongful eviction. Upon the conclusion of trial, the jury returned a verdict in favor of defendant on the breach of contract claim and in favor of plaintiff on the conversion and wrongful eviction claims. The jury awarded plaintiff \$6,000.00 in compensatory damages on the conversion claim and \$5,000.00 in punitive damages on the wrongful eviction claim. The jury also answered two special interrogatories finding that plaintiff did not abandon the premises and that defendant removed plaintiff's personal property without his consent. The court entered judgment on the jury's verdict and denied defendant's motion for a directed finding *nunc pro tunc*.

¶ 9 Defendant filed a posttrial motion pursuant to section 2-1202 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1202 (West 2010)), asking the court to set aside the jury's verdict and enter a directed verdict in defendant's favor on the conversion and wrongful eviction counts and to set aside the punitive damages award. Defendant also filed a petition for attorney fees, asserting that he was entitled to attorney fees pursuant to a fee-shifting clause in the parties' lease. Plaintiff filed a motion requesting the imposition of sanctions against defendant and defense counsel, asserting that they filed bad-faith motions to disqualify counsel for plaintiff,

1-11-3311

forced a jury trial despite having admitted all the material facts regarding plaintiff's allegations, and filed, then later dropped, a meritless counterclaim for the sole purpose of increasing the costs of litigation. The court denied plaintiff's motions for sanctions, granted judgment *n.o.v.* in favor of defendant on the conversion and wrongful eviction counts, and awarded defendant \$42,471.47 in attorney fees, plus costs.

¶ 10

ANALYSIS

¶ 11

I. Judgment *N.O.V.*

¶ 12 Plaintiff contends that the circuit court erred by granting defendant judgment *n.o.v.* on his claims for conversion and wrongful eviction. A court may only enter judgment *n.o.v.* when all the evidence, viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict could stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). A motion for judgment *n.o.v.* presents a question of law as to whether there was a total failure to present evidence to prove a necessary element of the plaintiff's case and, therefore, we review the circuit court's ruling on such a motion *de novo*. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006).

¶ 13 Plaintiff asserts that the court could not grant judgment *n.o.v.* in favor of defendant because it had already denied defendant's motion for a directed finding and submitted the case to the jury. However, under section 2-1202(b) of the Code, a court may enter judgment *n.o.v.* after trial "if under the evidence in the case it would have been the duty of the court to direct a verdict without submitting the case to the jury, even though no motion for directed verdict was made *or if made was denied* or ruling thereon reserved." (Emphasis added.) 735 ILCS 5/2-1202(b) (West

1-11-3311

2010)). As such, the court was not precluded from granting judgment *n.o.v.* in favor of defendant by its denial of defendant's motion for a directed verdict or by its submission of the case to a jury.

¶ 14 Plaintiff also asserts that defendant was not entitled to judgment *n.o.v.* because the jury's verdict was supported by the evidence presented at trial and defendant's own judicial admissions. The record in this case does not contain a report of trial proceedings or an acceptable substitute, such as a bystander's report or an agreed statement of facts (see Ill. S. Ct. R. 323(b), (c) (eff. Dec. 13, 2005)). Plaintiff, as the appellant, bears the burden of presenting a sufficiently complete record on appeal to support his claims of error. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001). As an issue relating to the circuit court's factual findings and the basis for its legal conclusions cannot be reviewed absent a report or record of the proceedings, we will presume that the court's holdings had a sufficient factual basis and conformed with the law. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156-57 (2005).

¶ 15 The record shows that defendant admitted in his verified answer to plaintiff's complaint and his verified answer to plaintiff's requests for admissions of fact pursuant to Illinois Supreme Court Rule 216 (eff. Aug. 1, 1985) that he removed some items from the premises on January 20, 2007. Defendant, however, did not admit that the items he removed were owned by plaintiff or that he agreed to allow plaintiff to use the store as a storage space until February 15, 2007. As such, defendant's admissions are alone insufficient to establish plaintiff's claims for conversion or wrongful eviction. We must presume that the court's decision to grant judgment *n.o.v.* in favor of defendant on the conversion and wrongful eviction counts had a sufficient factual basis and conformed with the law because we cannot review the court's decision absent a report or record

1-11-3311

of the relevant proceedings, which deprives this court from knowing what evidence was presented at trial or the basis upon which the court granted judgment *n.o.v.*

¶ 16

II. Attorney Fees

¶ 17 Plaintiff contends that the court erred by granting defendant's petition for attorney fees, and defendant responds that he was entitled to attorney fees under the fee-shifting clause of the parties' lease. While the losing party in a lawsuit will not ordinarily be required to pay attorney fees to the winning party, an exception exists for contractual fee-shifting provisions agreed to by the parties. *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC*, 403 Ill. App. 3d 234, 254 (2010).

¶ 18 Plaintiff first asserts that defendant should not have been awarded attorney fees because he did not request attorney fees until after the trial had already concluded. However, a claim for attorney fees, whether made pursuant to contract or statute, may be filed after entry of judgment (*Brown & Kerr, Inc. v. American Stores Properties, Inc.*, 306 Ill. App. 3d 1023, 1028 (1999)) and, therefore, defendant's request for attorney fees was not untimely.

¶ 19 Plaintiff next asserts that defendant was not entitled to attorney fees under the terms of the fee-shifting clause of the lease. The "costs and fees" provision of the parties' lease provides that:

"Lessee shall pay upon demand all Lessor's costs, charges and expenses, including fees of attorneys, agents and others retained by Lessor, incurred in enforcing any of the obligations of Lessee under this lease or in any litigation, negotiation or transaction in which Lessor shall, without Lessor's fault, become

1-11-3311

involved through or on account of this lease."

¶ 20 Plaintiff maintains that defendant was not entitled to attorney fees because defendant was not seeking to enforce plaintiff's obligations under the lease, the litigation did not arise from the lease, and the intentional torts which gave rise to this case did not occur without defendant's fault. Defendant responds that the attorney fees award was proper because he became involved in the litigation on account of the lease and through no fault of his own.

¶ 21 Plaintiff alleged and proceeded to trial on three claims against defendant. The breach of contract claim was based on plaintiff's allegations that defendant breached the lease by failing to return plaintiff's security deposit or provide an itemized list of deductions taken from the deposit. Therefore, defendant became involved in this litigation through or on account of the lease where one of the claims against defendant was based on the lease. Also, while plaintiff maintains that defendant cannot claim that the intentional torts giving rise to this case occurred through no fault of his own, because defendant was granted judgment *n.o.v.* on those counts we determine that defendant became involved in this litigation through no fault of his own. Accordingly, defendant was entitled to attorney fees under the fee-shifting provision in the parties' lease.

¶ 22 Plaintiff further asserts that the fee-shifting clause of the lease is unenforceable because that provision, as interpreted by defendant, is substantively unconscionable as it would require plaintiff to pay for defendant's attorney fees incurred in litigation arising from meritorious claims against defendant. However, under the terms of the fee-shifting clause, defendant is only entitled to attorney fees if he becomes involved in the litigation through no fault of his own. Therefore, if the circuit court had entered judgment on the jury's verdict in favor of plaintiff instead of granting

judgment *n.o.v.* in favor of defendant, defendant would have become involved in the litigation through his own fault and would not have been entitled to attorney fees. As such, the fee-shifting clause is not substantively unconscionable.

¶ 23 To the extent plaintiff also asserts in his reply brief that the award of attorney fees is unreasonable because defense counsel did not itemize or describe the use of her time or the fees being requested, defendant has forfeited that claim by failing to include it in his appellant's brief and raising it for the first time in his reply. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 24 III. Motion to Amend the Jury Verdict

¶ 25 Plaintiff next contends that the court erred by failing to rule on his posttrial motion to amend the jury verdict to include a \$1 damages award on the wrongful eviction claim. However, as we have already determined that the court did not err by granting judgment *n.o.v.* in favor of defendant on the wrongful eviction claim, we need not also determine whether the court should have modified the jury's verdict to include a \$1 damages award on that claim as there is no underlying liability to support a damages award.

¶ 26 IV. Sanctions

¶ 27 Plaintiff further contends that the court abused its discretion by denying his motion for sanctions against defendant. Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994) provides that a court may impose sanctions on a party and/or his attorney for filing pleadings or motions that are not grounded in fact and warranted by existing law or a good-faith argument for the extension,

1-11-3311

modification, or reversal of existing law and are filed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. As Rule 137 is penal in nature, it will be strictly construed. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 487 (1998). The party requesting the imposition of sanctions bears the burden of proving each element of the alleged violation with specificity, and a court should only impose sanctions in the most egregious cases. *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007, 1032 (2006). The decision of whether to impose sanctions under Rule 137 is committed to the sound discretion of the circuit court and will not be disturbed on appeal unless it represents an abuse of that discretion. *Dowd & Dowd*, 181 Ill. 2d at 487.

¶ 28 Plaintiff contends that sanctions were appropriate in this case because defendant twice filed motions to disqualify plaintiff's counsel and both motions were brought in bad faith. Defendant responds that the motions were not filed in bad faith because counsel for plaintiff was a potential witness regarding plaintiff's allegation in his complaint that counsel contacted defendant on January 19, 2007, about the parties' alleged agreement allowing plaintiff to use the premises as a storage space and defendant denied any such contact in his verified answer to the complaint.

¶ 29 The record shows that on May 21, 2008, defendant filed a motion to disqualify counsel for plaintiff pursuant to Rule 3.7 of the Illinois Rules of Professional Conduct (210 Ill. 2d R. 3.7), asserting that counsel would be called upon to testify regarding his alleged communication with defendant on January 19, 2007. The court denied the motion, finding that disqualification was not warranted because it was not convinced that counsel was likely to be a necessary witness. On

1-11-3311

October 17, 2010, defendant filed a motion to disqualify counsel for plaintiff pursuant to Rule 3.7 of the Illinois Rules of Professional Conduct (Ill. R. Prof. Conduct R. 3.7 (eff. Jan. 1, 2010)), asserting that the applicable rule had been amended since the court's denial of his prior motion to disqualify counsel for plaintiff and that a different result was warranted under the new language of the rule, and the court denied the motion. In addition, the record includes a transcript of the hearing conducted on defendant's petition for attorney fees in which the court briefly referenced its prior denials of defendant's motions to disqualify counsel for plaintiff and stated that "even though [counsel for plaintiff] in his filings did set forth the possibility of him having to testify in court in support of laying some foundation on some letter *** that was not such an important matter that necessarily required his disqualification." As it appeared prior to trial that counsel for plaintiff might be called to testify regarding his communications with defendant, we determine that the court did not abuse its discretion by failing to impose sanctions on the basis of those motions.

¶ 30 Plaintiff next asserts that sanctions were appropriate because defendant forced the case to go to trial despite having admitted to all relevant facts. However, as stated earlier, defendant's admissions were alone insufficient to establish the conversion or wrongful eviction claims. In addition, the jury found in favor of defendant on the breach of contract claim and the circuit court granted judgment *n.o.v.* in light of the evidence presented at trial on the conversion and wrongful eviction claims. As such, defendant did not admit to all relevant facts prior to trial.

¶ 31 Plaintiff further asserts that sanctions were appropriate because defendant filed, then later dropped, a meritless counterclaim for the purpose of needlessly increasing the costs of litigation.

1-11-3311

The record shows that on September 25, 2009, defendant filed a counterclaim against plaintiff alleging that plaintiff created a tenancy in sufferance by continuing to occupy the premises after the termination of the lease on December 31, 2006, and that plaintiff failed to return the property to defendant in good condition, causing defendant to incur expenses in cleaning and repairing the premises. Defendant subsequently non-suited his counterclaim.

¶ 32 Plaintiff maintains that the factual allegations set forth in defendant's counterclaim were untrue and contradicted by defendant's own admissions where defendant admitted in his answer to plaintiff's complaint that he had agreed to allow plaintiff to use the premises as a storage space until February 15, 2007. The record shows that plaintiff alleged in paragraph 10 of his complaint that "[i]n or around December 2006, the Plaintiff informed [defendant] that he was going to be out of the country until January 31, 2007. [Defendant] agreed to allow the Plaintiff to use the store as storage space until February 15, 2007." Defendant stated in his answer to plaintiff's complaint that he admitted the first sentence of paragraph 10, except that he denied knowing how long plaintiff would be out of the country, and that he denied the second sentence of paragraph 10 "in its entirety." As such, defendant did not admit to allowing plaintiff to use the premises as a storage space until February 15, 2007, and we, therefore, conclude that the circuit court did not abuse its discretion by denying plaintiff's motion for sanctions.

¶ 33

CONCLUSION

¶ 34 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.