2014 IL App (1st) 132320-U

FIFTH DIVISION
June 27, 2014

1-13-2320

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL JACOBS, Plaintiff-Appellee, v. DONNA P. McKINNEY, AS TRUSTEE OF DONNA P. MCKINNEY DECLARATION OF TRUST DATED AUGUST 15, 1990, AS AMENDED JUNE 20, 2002, Defendant-Appellant (and 1242 NORTH LAKE SHORE DRIVE CORPORATION, JOHN PACHOLICK, JAMES MARTELL, DR. PETER MCKINNEY, WILLIAM TOBEY, WILLIAM GARDNER, MICHAEL SMITH, MICHAEL MURPHY, JOHN GIBBONS, JOHN BRENNEN, HELEN MELCHIOR, Defendants).	)	Appeal from the Circuit Court of Cook County 09 CH 15811 Honorable Leroy K. Martin, Jr., Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

Held: Arguments that were inadequately presented were waived and could not serve as basis for reversal.

¶ 1 At issue is the disposition of a $50,000 appeal bond after 18 months of unsuccessful

appeals to the appellate and supreme courts of Illinois. The party that lost the appeals and its $50,000 bond contends the circuit court erroneously construed the bond as a measure of damages for the appellee's inability to use and occupy the real estate at issue during the appellate process, and further erred by denying a motion to reconsider the ruling.

¶ 2 The subject premises are an apartment unit in a lakefront cooperative building built at 1242 North Lake Shore Drive, Chicago. In order to reside in the 27-story building, one must become a shareholder of the corporation that owns the building–the aptly named 1242 North Lake Shore Drive Corporation–and then execute a lease with the corporation. Michael Jacobs took these steps in 2007 and took up residence in the 22nd floor unit. His 4,000 square foot apartment was originally the upper half of a two-story unit. When the building was erected in 1929, the 21st and 22nd floors were connected as a single unit by a small service staircase at the north end of the building and a large curving staircase at the south end of the building. In the late 1960's, however, the corporation divided the duplex unit by removing the large staircase and walling off both stairwells. The new interior walls reduced the space on the 22nd floor and created two rather tall mechanical closets accessible only to the 21st floor unit. Jacobs assumed the lease the corporation first executed in 1968 for the 22nd floor unit shortly after the walls were erected, and Peter and Donna McKinney had assumed the 1967 lease for the 21st floor unit in 1979 and then subsequently transferred their interests to a trust bearing Donna's name.

¶ 3 In 2008, Jacobs' architect proposed removing the walls and extending the floors of Jacobs' unit to take up the full expanse of the 22nd floor. The corporation's board of directors, which at the time included Peter, would not approve the renovation plans, so in 2009, Jacobs sued the corporation, the board, and the McKinney trust. In his fourth amended complaint, Jacobs sought,

among other things, a declaratory judgment that the 1968 lease he assumed entitled him to use the former staircase space.

¶ 4 In December 2011, the circuit court ruled in Jacobs' favor on this issue, due in part to a handwritten notation on the 1968 lease conveying to the lessee of the 22nd floor apartment the use and occupancy of "SPACE EQUIVALENT TO 11 ROOM TYPICAL" and records indicating that when the building was constructed, a typical 11-room apartment was a single story unit that did not have stairwells and took up a full floor. The circuit court also ordered the McKinney trust to pay costs of $327.95 to Jacobs.

¶ 5 The McKinney trust filed a notice of appeal to this appellate court and then asked the circuit court to stay execution of its judgment order on grounds that even if the appeal was successful, it would be impractical to undo Jacobs' intended "invasive construction" into the "personal living space" the McKinneys had occupied for more than 30 years. The trust also argued that a stay would result in no meaningful hardship to Jacobs because there was no time-sensitive need to renovate. The trust cited Illinois Supreme Court Rule 305(b) as authority for the court to enter a stay with "just" terms. Ill. 2d R. 305(b) (eff. July 1, 2004).

¶ 6 In Jacobs' written response opposing the motion for a stay of enforcement, he pointed out that he had been vindicated after four years of disagreement and that a stay would prevent him from finally using and occupying space that had been leased to the occupants of Apartment 22 since 1968. He asked that the stay be denied, or at least written narrowly so that he could proceed with pre-construction efforts such as inspecting the area, gaining work estimates, and coordinating with the co-op board for approval of his renovation plans. He also argued that the rule which authorized the court to enter a stay specified that the appellant was "required [to put up a bond] to

protect [the] appellee's interest in [the] property." Ill. S. Ct. R. 305(b) (eff. July 1, 2004). As for the amount of the appeal bond, he contended there was a quantifiable impact on the value of his apartment without the renovation and reconfiguration, his expert concluded the "value lost by not being able to configure the subject [area]" was approximately $400,000, and the trust's expert indicated the renovations would increase the value of Jacobs' apartment by the similar figure of $300,000.

¶ 7 The McKinney trust did not file a reply.

¶ 8 The circuit court convened a hearing on January 5, 2012, however, we are unable to describe what occurred in court that day. The parties agree that the trust orally argued for no bond, but the court determined a bond was necessary and that the appropriate amount was $50,000. The court's written order states (1) the motion to stay is "granted in part," (2) "[p]hysical alteration of the subject spaces is stayed during the pendency of the appeal, and (3) the "[a]ppeal bond is set at fifty thousand dollars ($50,000) over moving defendant's objection." Thus, the order does not specify the court's reasoning, and although the current appeal concerns the purpose of and rights to the $50,000, the McKinney trust has not given us a verbatim transcript or bystander's report of the hearing.

¶ 9 The following month, the trust secured a surety bond from Liberty Mutual Insurance Company. The trust then filled in the blank spaces on a form provided by the clerk of the circuit court for recording an appeal bond and then filed the completed document. The underlined words below were the ones filled in by the trust on the preprinted form:

> "On December 14, 2011, judgment for $ zero dollars (declaration only) and costs was entered for [Jacobs] against [the McKinney trust] from which [the

McKinney trust] has appealed to the Appellate Court of Illinois.

We jointly and severally agree to pay to the above judgment creditor any part of the judgment which is not reversed, and interest, damages and costs.

The obligation of this bond is limited to $ 50,000."

¶ 10 As we indicated above, the trust lost its appeal to this intermediate court and its petition for leave to appeal to the supreme court was denied by that court.

¶ 11 Within days after the parties' return to the circuit court in May 2013, appellee Jacobs filed "Plaintiff's Motion to Release Appeal Bond and Pay Balance to Plaintiff Michael Jacobs." He argued the full $50,000 should be paid to him to satisfy the outstanding award of costs and "to compensate him for the delay in full/free use and occupancy of the Subject Spaces [that are] part of his apartment," and that any other outcome "would be contrary to the purposes of [the] appeal bond."

¶ 12 The trust did not file a response. According to Jacobs, this was intentional. He contends, "The motion was first [presented] on May 28, 2013, which, at that time, the McKinney Trust chose not to file a response and proceed[ed] to argument." Jacobs also states that the court took the motion under advisement for three days and "[w]hen the parties reconvened and the trial court heard additional arguments, the trial court released the Appeal Bond and ordered $50,000 to be paid to [Jacobs] as the fair value for the loss of use of the Subject Spaces during the 18-month appeal." The trust characterizes the proceedings differently. The trust states that the order was entered "without the opportunity for this Defendant to file a written response" and "without [the circuit court] receiving any evidence whatsoever that any damage to the subject property had occurred." Then, citing its own motion for reconsideration of the ruling, rather than citing

transcripts or bystander's reports from the proceedings on May 28, 2013 (when the motion was taken under advisement), and May 31, 2013 (when the appeal bond was released and the McKinney trust was ordered to pay the $50,000), the trust now states "the trial court recognized the unfairness of ruling on the issue without offering this Defendant an opportunity to file a written response" and, therefore, "invited Counsel to file a written response, in the form of a motion to reconsider." According to Jacobs, what actually occurred is that after the court heard final arguments and announced its ruling, the trust informed the court of its intention to file a motion to reconsider in which it would ask the court to convene a hearing on the value of Jacobs' loss of use.

¶ 13 It is undisputed that a hearing was convened on June 17, 2013, on the trust's motion for reconsideration and that the court denied the motion. Here again, the handwritten order does not specify the court's reasoning and the trust has not provided us with either a transcript or bystander's report of what occurred or was apparently persuasive to the court. In fact, the trust omits any description of the oral arguments or the court's stated rationale and tells us only that the motion was denied. Jacobs tells us that the judge "found that he, in his discretion, set the value of the mandatory bond back in January 2012 for the loss of use of space based on the evidence presented at the time and based on the typical length of an appeal. Therefore, the $50,000 was the maximum value [that might be subsequently awarded] for the loss of use of the Subject Spaces."

¶ 14 The McKinney trust appeals from the order granting Jacobs' motion to release the bond and the order denying the trust's motion for reconsideration. The trust first argues an appeal bond is a contract and that the court misconstrued the terms of this particular appeal bond as an agreement that the trust would pay $50,000 to Jacobs if the trust's appeal was unsuccessful. The trust supports its description of this appeal bond with a case that discusses the purposes of the public construction

payment bond law, *Carroll Seating Co. J.J.L. v. Verdico*, 369 Ill. App. 3d 724, 727-30, 861 N.E.2d 1045, 1047-49 (2006). The trust's second argument is that the court should have conducted an evidentiary hearing on the value of Jacobs' loss of use and occupancy for the former stairwell space for 18 months. For this argument, the trust relies on *Barreto v. City of Waukegan*, 133 Ill. App. 3d 119, 128-29, 478 N.E.2d 581, 587-88 (1985), which indicates that it is within a court's discretion to decide whether to hold an evidentiary hearing on whether a settlement between a plaintiff and one defendant has been made in good faith, or to resolve that question on the basis of arguments, affidavits, deposition transcripts, and other discovery materials of record. Based on these arguments, the trust asks for reversal of the $50,000 award and that we either order the trust to satisfy the previous award of Jacobs' costs of $327.95, with perhaps the addition of 9% statutory interest per annum (735 ILCS 5/12-109 (West 2010)), or we remand for an evidentiary hearing on Jacobs' subsequent damages.

¶ 15 Jacobs responds with many arguments, including that the trust's decision to present its own subjective opinion of what happened in the circuit court proceedings, rather than the neutral recitation that would be conveyed in transcripts or bystander's reports, is problematic and warrants affirmance of the challenged rulings. On the merits, Jacobs cites *Rhodes v. Sigler*, 44 Ill. App. 3d 375, 357 N.E.2d 846 (1976), for the proposition that when an appeal delays the transfer of possession of real property, (a) the appeal bond secures not only the judgment but also damages incurred during the appeal due to the failure of the unsuccessful party to surrender possession, and (b) the measure of damages is generally the value of the use and occupation of the premises or its fair rental value. Jacobs also contends that if this bond was intended to secure only Jacobs' court costs of $327.95, then the court would never have ordered the much larger bond of $50,000. In

addition, Jacobs contends it was not an abuse of discretion to deny the motion to reconsider in which the trust asked for the first time for an evidentiary hearing, given the fact that the trust had previously chosen to proceed on oral arguments alone without taking the time to prepare a written response to Jacobs' motion for the full $50,000.

¶ 16 The trust replies that transcripts or bystander's reports are unnecessary because we need only enforce the terms that it wrote onto the form provided by the circuit court for recording an appeal bond, these terms do not entitle Jacobs to any compensation for withheld use or occupancy, and, in any event, the trust should get its evidentiary hearing.

¶ 17 We reject the contention that we can decide whether the $50,000 award was proper by limiting our analysis to the terms the trust wrote onto a fill-in-the-blanks form for recording an appeal bond. In order to review the propriety of the $50,000 award, we need to analyze the facts and the law that entered into the court's decision. The court's orders which fixed that amount and then awarded that amount state the rulings without further explanation. Whatever the trust may have intended when it secured and recorded the bond is irrelevant and perhaps even contrary to the court's reasons for requiring such a substantial bond and subsequently awarding its full amount to Jacobs.

¶ 18 The trust wants us to conclude that the court's reasons for compensating Jacobs were wrong, however, the record tendered is insufficient for us to review what occurred. We do not need an explanation of the court's specific thought process, but we do need to know the facts that entered into the decision. It is inappropriate for us to guess at the basis for the court's rulings and then decide whether those potential grounds were sound. This is not what a court of "review" does. "This court has previously stated that it will not reverse on the basis of speculation and conjecture,

and that any doubt arising from an incomplete record shall be resolved against the appellant." *In re Estate of Jacobs*, 189 Ill. App. 3d 625, 629, 545 N.E.2d 502, 504 (1989). It was the trust's burden as the appellant to submit a record that fully and fairly presented all the information necessary and material to the issues raised by its appeal. *Estate of Jacobs*, 189 Ill. App. 3d at 629, 545 N.E.2d at 504. When a record is lacking crucial facts, we presume that the circuit court acted properly by entering the challenged order and that the order is supported by whatever was omitted from our consideration. *Coleman v. Windy City Balloon Port, Ltd.*, 160 Ill. App. 3d 408, 419, 513 N.E.2d 506, 514 (1987). We presume that sufficient evidence was presented to support the ruling. *Coleman*, 160 Ill. App. 3d at 419, 513 N.E.2d at 514. We find that we are unable to address the merits of the McKinney trust's arguments about the $50,000 award and we summarily affirm that ruling.

¶ 19 Moreover, even if we had the necessary record before us, the McKinney trust has forfeited its primary argument because it has failed to cite and discuss precedent about appellate bonds. As we noted above, the trust supports its argument with a case that discusses the public works payment bond statute, instead of appellate bonds. The rules of appellate practice state that an appellant waives any argument it fails to support with relevant legal authority and adequate legal reasoning. *Rosier v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 568, 855 N.E.2d 243, 252 (2006) (by failing to offer supporting legal authority or "any reasoned argument," plaintiffs waived consideration of their theory for reversal); *Ferguson v. Bill Berger, Associates, Inc.*, 302 Ill.App.3d 61, 78, 704 N.E.2d 830, 842 (1998) ("it is not necessary to decide this question since the defendant has waived the issue" by failing to offer case citation or other support as Supreme Court Rule 341 requires); Ill. S.Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (argument in appellate brief must be

supported by citation to legal authority and factual record).

¶ 20 The McKinney trust's argument about its motion for reconsideration is also lacking. The trust contends the court should have convened an evidentiary hearing on Jacobs' request to be awarded the $50,000 as damages, but the trust does not disagree with Jacobs' recollection that the trust deliberately did not file a written response opposing his request, orally acquiesced to no hearing, and then (only after the award was entered) sought reconsideration on grounds that the procedure it had endorsed was unfair and inappropriate. There is no order or transcript or bystander's report that discloses why the court heard the arguments of counsel, took Jacobs' request under advisement for three days, and then announced the $50,000 award, instead of conducting an evidentiary hearing. Phrased another way, the record lacks an adequate description of what occurred. For this reason, we find the McKinney trust has waived this theory of reversal. *In re Estate of Jacobs*, 189 Ill. App. 3d at 629, 545 N.E.2d at 504; *Coleman*, 160 Ill. App. 3d at 419, 513 N.E.2d at 514. Furthermore, if it is true the trust requested the hearing as an afterthought, then it would be unfair to reverse the court's award and send the parties back for that evidentiary hearing. *Forest Preserve District v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 27, 961 N.E.2d 775 ("A party may not urge a trial court to follow a course of action, and then, on appeal, be heard to argue that doing so constituted reversible error.") Also, the trust has failed to cite authority indicating the court should have held an evidentiary hearing instead of relying on the written request, the arguments of the experienced counsel, and the thought or research the court engaged in while having Jacobs' request under advisement. *Rosier*, 367 Ill. App. 3d at 568, 855 N.E.2d at 252; *Ferguson*, 302 Ill. App. 3d at 78, 704 N.E.2d at 842. For this additional reason, we find the McKinney trust has waived its second argument.

¶ 21 For the reasons stated, the circuit court's judgment in favor of Jacobs is affirmed.

¶ 22 Affirmed.