

No. 1-14-2228

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).

JOHN R. O'BRIEN, P.C.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 14 M1 112386
)	
JOSEPH CONSTRUCTION COMPANY,)	Honorable
)	Dennis M. McGuire,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Hyman concur in the judgment.

ORDER

¶ 1 *Held:* Trial court's order directing a verdict is affirmed in part and reversed in part.

¶ 2 BACKGROUND

¶ 3 In March 2014, plaintiff filed this action to recover unpaid legal fees from defendant. On May 19, 2014, plaintiff filed an amended complaint which contained two counts: one for breach of an oral contract and one for account stated. Relevant to those counts plaintiff alleged that its president and sole shareholder, John R. O'Brien, provided defendant with legal representation for over 30 years. Through the course of this representation, plaintiff invoiced defendant periodically

for the legal services and received payment. However, in July 2012 plaintiff sent defendant an invoice for \$15,055.54 which has not been paid in full. As of February 20, 2013, a balance of \$9,055.54 remained. Defendant's president, Robert Brack, did not dispute the amount of the bill, and expressed an intention to pay the amount in full. After unsuccessful attempts to receive complete payment, plaintiff filed this action to recover the amount owed.

¶ 4 Attached to the amended complaint were three exhibits. Exhibit A was a July 1, 2012 statement sent by plaintiff to defendant showing an incurred charge for ".3 hours" of work and a total remaining balance due of \$15,055.54. Exhibit B was a February 21, 2013 letter from attorney O'Brien to defendant on plaintiff's letterhead. In the letter, O'Brien "confirm[ed]" his understanding from a recent conversation with Brack that defendant would pay \$6,000 in fees immediately and the "remaining \$9,000 [would] be paid within six (6) weeks, or by approximately April 15 [2013]." Exhibit C, an untitled document, listed the name of defendant at the top of the page and appears to reflect a February 20, 2013 payment to plaintiff of \$6,000 for legal fees.

¶ 5 Defendant answered the amended complaint and denied all material allegations. On May 21, 2014, the case proceeded to a bench trial. The common law record does not contain a transcript of the trial proceedings. To supplement the common law record, plaintiff filed a bystander's report pursuant to Rule 323(c) (eff. Dec. 13, 2005), which was certified by the trial court. The bystander's report contains a summary of the documentary and testimonial evidence presented to the trial court.

¶ 6 The report states that according to "[p]laintiff's recollection," Exhibits A and B to the amended complaint were admitted into evidence by the trial court over defendant's objection.

However, the report also informs us that "[d]efense counsel's recollection is that the [c]ourt reserved ruling until the close of [p]laintiff's case, and never made a ruling admitting or denying the exhibits" and "[t]he [c]ourt has no recollection, one way or the other, as to its ruling on the admission of the [p]laintiff's exhibits."

¶ 7 The bystander's report also includes a summary of the testimony of plaintiff's president, John R. O'Brien, who was the only witness to testify at trial. O'Brien testified that: (1) he is the sole shareholder and attorney for his professional corporation; (2) he provided legal representation to defendant for over 30 years; (3) he recently represented defendant in a lawsuit against Governors State University (GSU), which included the filing of a complaint and later the filing of an appeal; (4) except for several invoices sent to defendant in 2011 and 2012, defendant always paid plaintiff's monthly invoices; (5) during the pendency of the GSU litigation, plaintiff sent defendant several invoices "about which detailed testimony was provided"; (6) in July 2012, a balance owed by defendant for O'Brien's work on the aforementioned lawsuit was \$15,055; (7) in 2011, plaintiff received a check owed to defendant from GSU in the amount of \$21,000; (8) after several successful attempts to contact defendant, on February 20, 2013, O'Brien spoke with defendant's president who agreed that in exchange for the GSU check, defendant would immediately pay plaintiff \$6,000 and pay the remaining balance within 45 days; (9) the remaining \$9,055 was not paid within 45 days. "On-cross examination, O'Brien testified that a small portion of the amount billed in July 2012 was for services on another matter, but the majority of the amount due was for work on the [GSU] litigation."

¶ 8 According to the report, defendant's counsel objected to O'Brien's testimony arguing it was impossible to determine when O'Brien was speaking as an advocate or as plaintiff. Plaintiff

did not call the defendant's president to testify as an adverse witness. After plaintiff rested its case-in-chief, defendant moved for a directed verdict.

¶ 9 Next appearing in the record is the written motion for a directed verdict filed by defendant, arguing that plaintiff failed to establish the required elements of account stated with evidentiary support. Specifically, that plaintiff failed to furnish any documentary evidence or testimony of detailed facts regarding the services performed, the monetary computations and reasonableness of the fees invoiced.

¶ 10 After a hearing on defendant's motion, the trial court entered a judgment for defendant "after trial by Directed Verdict." There are no transcripts of this hearing and the order does not inform us of the trial court's reasoning, its findings or any argument put forth by the parties at the hearing. The certified bystander's report informs us that although defendant argued in its motion that a directed verdict should be entered on the account stated claim, the trial court, after oral argument, found "that there had been no testimony of 'an offer, acceptance, and consideration' to support a contract claim" and then entered a directed verdict in favor of defendant on both of plaintiff's claims.

¶ 11 Thereafter, plaintiff filed a motion for a new trial requesting the trial court reconsider and vacate the directed verdict. Plaintiff argued defendant's motion was based on the erroneous presumption that plaintiff was required to establish that its legal fees were reasonable and the method used to calculate those fees. Plaintiff asserted O'Brien's trial testimony established: (1) the parties had worked together for 30 years; (2) defendant's account was delinquent in the amount of \$15,055.54; and (3) based on a conversation with defendant's president in February 2013, defendant agreed to pay the balance owed within 45 days. Plaintiff contended this

testimony established a *prima facie* case for account stated, and because defendant offered no contrary evidence, it was improper to enter a directed verdict in favor of defendant.

¶ 12 Plaintiff also argued that although defendant moved for a directed verdict solely on plaintiff's account stated claim, the directed verdict was entered on both the account stated and breach of contract claims. Plaintiff contended that it established a *prima facie* case for breach of contract through O'Brien's testimony and therefore, the trial court improperly entered a directed verdict on this claim in favor of defendant.

¶ 13 After hearing, the trial court denied plaintiff's motion for a new trial. There are no transcripts of this hearing and the order does not inform us of the trial court's reasoning, its findings or any argument made by the parties at the hearing. This timely appeal followed.

¶ 14 ANALYSIS

¶ 15 On appeal, plaintiff asserts the trial court erred in finding plaintiff failed to establish a *prima facie* case for breach of contract and account stated. Defendant did not respond to this appeal. Although we are without an appellee brief, we are nonetheless able to consider the appeal under the standards enunciated in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).

¶ 16 Section 2-1110 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1110 (West 2012)) governs motions for a directed verdict in non-jury cases. It provides that "[i]n all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered. If the

ruling on the motion is adverse to the defendant, the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived." 735 ILCS 5/2-1110 (West 2012).

¶ 17 Where, as here, the trial court granted a directed finding in favor of the defendant, a reviewing court must determine whether the trial court erred in deciding that the plaintiff failed to present a *prima facie* case. *Kokinis v. Kotrich*, 81 Ill. 2d 151, 155 (1980). A plaintiff establishes a *prima facie* case if he has proffered at least some evidence to support each element of the asserted cause of action. *In re Foxfield Subdivision*, 396 Ill. App. 3d 989, 992 (2009). If the plaintiff has failed to establish a *prima facie* case, then the trial court should grant the motion for a directed verdict in favor of defendant. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003). Where the plaintiff has presented a *prima facie* case, the court must consider the evidence offered by plaintiff, to determine whether the *prima facie* case survives. *Minch v. George*, 395 Ill. App. 3d 390, 398 (2009). "A directed verdict is improper where there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." (Internal quotation marks omitted.) *Caruso v. M & O Insulation Co.*, 345 Ill. App. 3d 345, 348 (2003). In fact, the court must consider the evidence and any inferences to be drawn therefrom, in the light most favorable to the nonmoving party. *Serrano v. Rotman*, 406 Ill. App. 3d 900, 908 (2011).

¶ 18 Generally, a trial court's decision to enter a directed verdict under section 2-1110 of the Code should not be reversed unless the decision is against the manifest weight of the evidence. *Chicago Title & Trust Co. v. Ceco Corp.*, 92 Ill. App. 3d 58, 68 (1980). However, where the trial

court's makes a determination that the plaintiff failed to establish a *prima facie* case, as a matter of law, that decision is reviewed *de novo*. *Cyrns*, 203 Ill. 2d at 275; *Foxfield*, 396 Ill. App. 3d at 992.

¶ 19 Here, the trial court entered a directed verdict in favor of defendant finding plaintiff failed to proffer evidence of "offer, acceptance, and consideration" to support the breach of contract claim. Because the trial court's decision was predicated on plaintiff's failure to establish a *prima facie* case, we review the court's decision *de novo*. *Cyrns*, 203 Ill. 2d at 275; *Foxfield*, 396 Ill. App. 3d at 992.

¶ 20 Plaintiff argues the trial court erred in finding plaintiff failed to establish a *prima facie* case for breach of contract.

¶ 21 To establish a *prima facie* case for breach of contract, a plaintiff must prove the existence of a contract, performance of by plaintiff, breach of the contract by defendant and the resultant damages or injury. *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1014 (2007). "It is well established that a contract forms when there has been an offer, acceptance of that offer, and consideration." *Chicago Limousine Service Inc. v. City of Chicago*, 335 Ill. App. 3d 489, 495 (2002). Basic contract law requires that in order for an oral contract to be binding and enforceable, its terms must be definite and certain. *Downs v. Rosenthal Collins Group, L.L.C.*, 2011 IL App (1st) 090970, ¶ 49.

¶ 22 In the instant case, a transcript of the trial was not prepared and is not part of the record. However, a certified bystander's report was prepared by plaintiff and is part of the record on appeal. A certified bystander's report, as part of the record on appeal, "shall be taken as true and correct unless shown to be otherwise" (Ill. S. Ct. R. 329 (eff. Jan. 1, 2006)) and is generally an

"adequate substitute for a verbatim transcript" of the trial court's proceedings (*Hall v. Turney*, 56 Ill. App. 3d 644, 649 (1977)). The bystander's report provides us with a summary of O'Brien's testimony. Summarized briefly, the bystander's report informs us that O'Brien testified to providing legal services to defendant on an ongoing basis for over 30 years, including his representation of defendant in the GSU litigation. Plaintiff sent defendant several invoices over the course of the litigation that were routinely paid. Although agreeing to pay the final amount owed for the fees incurred in the GSU litigation, defendant did not tender plaintiff full payment.

¶ 23 In the appellate brief, plaintiff generally argues, without citation to the record or relevant legal authority, that: the parties had an ongoing relationship for representation, consisting of a series of contracts, most recently for representation in the GSU matter; defendant breached the contract by failing to pay the fees incurred; and this testimony is sufficient to establish a *prima facie* case for breach of contract. As the appellant, plaintiff was required to support its argument with citations to the record and relevant legal authority, and plaintiff's bare contentions do not merit consideration on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); see also *Wasleff v. Dever*, 194 Ill. App. 3d 147, 155-56 (1990). Furthermore, we find the record does not support plaintiff's assertions. The testimony summarized in the certified bystander's report does not contain any reference to testimony supporting the required elements of offer, acceptance and consideration. Furthermore, there is no indication from the report that the terms of the oral agreement were definite and certain. Without such evidence, plaintiff cannot prove its breach of contract claim. Therefore, we agree with the trial court, that plaintiff failed to establish a *prima facie* case for breach of contract.

¶ 24 Next, plaintiff argues the trial court erred in directing a verdict in favor of defendant on

the account stated claim.

¶ 25 "An account stated has been defined as an agreement between parties who have had previous transactions that the account representing those transactions is true and that the balance stated is correct, together with a promise, express or implied, for the payment of such balance." (Internal quotation marks omitted). *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 56. An action for an account stated is founded upon a promise to pay the debt and not the original promise to pay under a contract. *Id.* The agreement must manifest the assent of both the debtor and creditor, "although such assent may be inferred from the retention by one of the parties of a statement of account, rendered by the other, for an unreasonable time and without objection." *Canadian Ace Brewing Co. v. Swiftsure Beer Service Co.*, 17 Ill. App. 2d 54, 60 (1958). Generally, the existence of an account stated is a fact question. *Motive Parts Co. of America, Inc. v. Robinson*, 53 Ill. App. 3d 935, 940 (1977).

¶ 26 Defendant's motion for a directed verdict argued plaintiff's claim for account stated is "insufficient at law" because plaintiff did not establish the legal fees were reasonable and did not present detailed records thereof. In an action by an attorney to recover legal fees, under the theory of account stated, the attorney has the burden of showing that the agreement with the client is fair and reasonable and must furnish detailed facts upon which the claimed fee was predicated. *Laff v. Chapman Performance Products, Inc.*, 63 Ill. App. 3d 297, 306 (1978); *Lieberman v. Stollman*, 230 Ill. App. 3d 203, 207 (1991). Once a claim has been established by the attorney, "the client is allowed to prove that the attorney's charges are excessive, not justified by custom and usage, or otherwise unreasonable." *Lieberman*, 230 Ill. App. 3d at 207.

¶ 27 The certified bystander's report establishes O'Brien testified that he provided legal

services for defendant on an ongoing basis over 30 years, which included filing a complaint and later an appeal in the GSU matter; during the pendency of the GSU litigation, plaintiff invoiced defendant for the legal fees incurred "about which detailed testimony was provided"; after resolution of the GSU litigation, plaintiff invoiced defendant for the remaining balance owed; during a conversation with O'Brien, defendant agreed to pay the remaining balance on a certain date; but defendant failed to pay the full amount owed. Viewing the evidence in the light most favorable to the plaintiff, our review of the record leads us to conclude plaintiff sufficiently established a *prima facie* case for account stated to withstand the motion for a directed verdict. See *Serrabi*, 406 Ill. app. 3d at 908. Therefore, we find the trial court erred in directing a finding and entering judgment in favor of defendant on the account stated claim. We remand this case to the trial court with directions to proceed as if the motion had been denied. Ill. S. Ct. R.

366(b)(3)(iii) (eff. Feb. 1, 1994).

¶ 28

CONCLUSION

¶ 29 For the foregoing reasons, we affirm the trial court's directed verdict on plaintiff's claim for breach of contract and reverse the trial court's directed verdict on plaintiff's claim for account stated.

¶ 30 Affirmed in part and reversed in part; cause remanded.