FIRST DIVISION
March 9, 2015

No. 1-14-2283
2015 IL App (1st) 142283-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| MONDHER SMIDA,<br><br>Plaintiff/Counter-Defendant/Appellant,<br><br>v.<br><br>LAKE RIDGE BUILDING COMPANY and ED NOLAN,<br><br>Defendant/Counter-Plaintiff/Appellee. | ) | Appeal from the Circuit Court of Cook County<br><br>No. 14 M3 442<br><br>The Honorable Sandra Tristano, Judge Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

**ORDER**

*Held:* Trial court properly found in favor of defendants on their counterclaim against plaintiff for breach of contract; affirmed.

¶ 1 Plaintiff Mondher Smida filed a complaint against defendants Lake Ridge Building Company (Lake Ridge) and Ed Nolan (Nolan), alleging breach of contract concerning the repair and remodeling of plaintiff's property. Defendants filed a small claims counterclaim for breach of contract against plaintiff, alleging plaintiff owed them $10,000 for work performed on the

subject property. The trial court dismissed plaintiff's complaint and granted judgment in favor of defendants on their counterclaim, awarding them $7,000. Plaintiff now appeals.

¶ 2 On February 14, 2014, plaintiff filed his breach of contract claim against Lake Ridge and Nolan, alleging that defendants owed him $8,382 for unnecessary expenses, loss of property, remedial work, and court costs. Plaintiff attached an addendum from defendants to his complaint, dated May 28, 2013, which stated that there was a "labor allowance of $15,000.00" and that all "[r]eceipts for material(s) purchased by us will be submitted directly to you for reimbursement." At the bottom of the addendum, there was a handwritten note which stated: "Agreed with the understanding that labor includes finishing the work of the previous contractor started and the installation of the kitchen cabinets." Plaintiff signed the addendum on May 29, 2013.

¶ 3 Also attached to plaintiff's complaint was an email exchange between plaintiff and Nolan which took place in December 2013. An employee of Lake Ridge originally sent an email to plaintiff requesting payment for the "labor owed." Plaintiff responded asking for a final invoice with the following: (1) all donation tags for old appliances, (2) total due on labor, and (3) total due on materials. Plaintiff indicated that the total due on materials "must include all the receipts for the entire work ***." Plaintiff stated that on June 20, he had requested to see the receipts for the payment of $9,412.43 that he made towards the billing on this job and he still had not received those.

¶ 4 Nolan responded to plaintiff's email stating that the fiscal year ended the previous week, and that it was important for the labor bill to be paid immediately so the job would not be shown as a loss with the accountant. Nolan claimed that the invoices were "with the accountant" and that they "have to be gone thru [*sic*] and separated from other job invoices and copies will be

given then. As of right now the additional is the crown moldings which was not in the contract and you new [*sic*] that which is $1,150.00." Nolan stated that he could not let the lien waiver "go into 2014" and requested the signed contract funds immediately. Nolan further stated: "you will get copies of all the original receipts as per contract when the accountant is done with the fiscal year paperwork."

¶ 5 Plaintiff responded to Nolan's email with a lengthy email stating that he was terminating Nolan's services "immediately" and asked Nolan to comply with seven points: (1) plaintiff demanded a "written statement, under oath or verified affidavit, of the names and address of all parties that furnished labor, services, material, fixtures, apparatus or machinery, forms or form work that all sets forth the amounts due or to become due to each," (2) plaintiff told Nolan to revise the final invoice to deduct from the total the work that was not performed including "correcting the defects in the installation of the crown molding, installing the bedroom ceiling light and installing the iPhone-capable thermostat," (3) plaintiff requested that his deposit of $9,412.43 be applied towards labor since Nolan failed to provide him with receipts for work performed over six months prior, and demanded submission of all receipts and tags before asking to be paid, (4) plaintiff demanded that the amount of $2,750 that he paid to ARS Rescue Rooter be deducted from the total final invoice since the plumber Nolan hired to help install appliances and bathroom fixtures were part of the scope of work, (5) plaintiff requested names of HVAC contractors to fix plaintiff's heater that had been working when defendants began remodeling, but was not working when plaintiff moved in on November 25, and stated that the cost of repair would be deducted from defendants' invoice, (6) plaintiff stated that he would be sending a bill to defendants for the hotel room he had to secure while defendants completed work on his place after the six weeks that was agreed to, and (7) plaintiff requested the amount of $1,150 for crown

molding be deleted from his final invoice because the discussion he and Nolan had about the crown molding happened before Nolan submitted the proposal.

¶ 6 On March 28, 2014, defendants filed a small claims counterclaim, stating that plaintiff was indebted to them in the sum of $10,000 for construction and remodeling materials and services rendered at plaintiff's property from April 2013 to December 2013. Defendants attached to their counterclaim a bill dated February 7, 2014, that was submitted to plaintiff, which stated that the cost of labor was $15,000, that plaintiff had paid $7,500 on July 9, 2013, and that he still owed $7,500. The bill also indicated that the cost of materials was $3,529.31, and that plaintiff had paid $1,547.78 on July 9, 2013, and that he still owed $1,981.53. The bill also stated that plaintiff owed $1,150 for crown molding. The bill indicated that there were no donation tags and that "the items were discarded with the cabinets and deconstruction debris." The bill stated that the total due was $10,631.53.

¶ 7 On April 21, 2014, the trial court found in favor of defendants and issued a judgment of $7,000 against plaintiff. It is unclear from the record whether there was a hearing, as no transcript appears in the record.

¶ 8 On May 8, 2014, plaintiff filed a motion for a new trial, indicating that he had obtained the following newly discovered evidence: (1) a receipt from Sherwin-Williams, dated September 12, 2013, for $89.82, (2) a quote for merchandise purchased from Home Depot for a smoke and carbon monoxide alarm for $47.97, (3) a quote for merchandise purchased from Home Depot for a supply line for $3.98, (4) a copy of a check paid to ARS Rescue Rooter in the amount of $2,250, and (5) a copy of a money order in the amount of $500 signed by plaintiff and endorsed by Nolan. Plaintiff argued that without this newly discovered evidence, he was denied the ability to prove his case and defend himself from the counterclaim because it prevented him from

asserting "several affirmative claims," performing forensic accounting work on certain exhibits before trial, and from disputing or refuting defendants' claims as to the nature and origin of certain exhibits at trial.

¶ 9 It appears from the record that a hearing was set on plaintiff's motion for a new trial on July 1, 2014. An order was entered on July 1, 2014, which states: "the court having reviewed the motion and arguments presented by parties; and further noting that the trial lasted several hours, and fully reviewed the evidence presented; the court finds that there was no newly discovered evidence and [plaintiff] presents evidence that could have been obtained at trial. Accordingly, [plaintiff's] motion to reconsider and [for a] new trial is denied." However, there are is not a transcript of the hearing in the record on appeal. Plaintiff filed a *pro se* notice of appeal on July 23, 2014.

¶ 10 On appeal, plaintiff has three main contentions: (1) the trial court erred in awarding a judgment of $7,000 to Lake Ridge, (2) the trial court erred in awarding a judgment of $7,000 to Nolan, and (3) defendants did not properly establish their rights to recovery. In support of plaintiff's first contention that the trial court erred in awarding $7,000 to Lake Ridge, plaintiff argues that: Lake Ridge is barred from maintaining a contract claim against plaintiff pursuant to section 5 of the Mechanics Lien Act (770 ILCS 60/5(a) (West 2012)) (the Act), the trial court chose an arbitrary number when deciding how much defendants were owed on materials used, Lake Ridge did not contract with plaintiff to do the crown molding, and plaintiff should not have had to pay Lake Ridge for work performed by an outside plumber.

¶ 11 Plaintiff first argues that the trial court's judgment in favor of Lake Ridge on its counterclaim for breach of contract was improper because Lake Ridge was barred from bringing

a contract claim against plaintiff pursuant to section 5 of the Act. Section 5(a) of the Act states in relevant part:

> "(a) It shall be the duty of the contractor to give the owner, and the duty of the owner to require of the contractor, before the owner or his agent, architect, or superintendent shall pay or cause to be paid to the contractor or to his order any moneys or other consideration due or to become due to the contractor, or make cause to be made to the contractor any advancement of any moneys or any other consideration, a statement in writing, under oath or verified by affidavit, of the names and addresses of all parties furnishing labor, services, material, fixtures, apparatus or machinery, forms or form of work and of the amounts due or to become due to each." 770 ILCS 60/5(a) (West 2012).

¶ 12 Defendants contend that this argument is waived because plaintiff never referenced the Act at trial. See *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 121 (2004) (issues not raised in the trial court are waived and may not be raised for the first time on appeal). While it is true that there is no direct citation to the Act in any of plaintiff's pleadings, we note that plaintiff specifically requested in his email communications with defendants "a written statement, under oath or verified by affidavit, of the names and addresses of all parties that furnished labor, services, material, fixtures, apparatus or machinery, forms or form work that all sets forth the amounts due or to become due to each," which was attached to his complaint. While not specifically referencing the Act, it appears that plaintiff was invoking section 5 of the Act in this request. Plaintiff contends that Lake Ridge never provided the names and addresses requested, and that therefore Lake Ridge was barred from bringing a breach of contract claim against plaintiff. Plaintiff cites to *Ambrose v. Biggs*, 156 Ill. App. 3d 515 (1987) and *Malesa v. Royal*

*Harbour Management Corp*., 187 Ill. App. 3d 655 (1989) in support of his contention. In both *Ambrose* and *Malesa*, the Second District held that a contractor could not recover against an owner on a breach of contract claim if the contractor had not provided a sworn statement pursuant to section 5 of the Act. However, not long after *Ambrose* and *Malesa* were decided, this court rejected those holdings. We found in *National Wrecking Co. v. Midwest Terminal Corp*., 234 Ill. App. 3d 750 (1992), that nothing in section 5 of the Act indicated any intent on the part of the legislature to bar contract actions for failure to give a sworn statement.

¶ 13 In *National Wrecking*, the plaintiff contractor brought suit against the defendant, a property owner who hired the plaintiff to perform work on the property. *Id*. at 756. The contractor claimed that it had performed work on the owner's property pursuant to a contract and that the owner had not made the agreed-upon payments. *Id*. Count I of the complaint sought to foreclose on a mechanics lien and count II asserted a breach of contract claim. *Id*. On appeal, the property owner argued that the contractor's failure to provide a sworn contractor's statement as provided by section 5 of the Act barred the contractor from recovering on its breach of contract claim. *Id*. at 763. This court found that the failure to provide the sworn contractor's statement did not bar recovery on the breach of contract claim. *Id*. at 763-64. Other cases have recognized that the failure to provide a sworn statement would bar a mechanics lien claim, but not a contract claim. *Cityline Const. Fire and Water Restoration, Inc. v. Roberts*, 2014 IL App (1st) 130730, ¶ 21 (the question in *National Wrecking* was whether the failure to provide the sworn contractor's statement barred recovery of a breach of contract claim, not if it barred recovery of a mechanic's lien claim).

¶ 14 Here, defendants brought a breach of contract counterclaim against plaintiff, not a mechanic's lien claim, and thus their claim was not barred by defendants' failure to provide a sworn statement pursuant to section 5 of the Act.

¶ 15 Plaintiff's next argument is that the trial court's judgment was against the manifest weight of the evidence because it awarded defendants $529.31 for materials used. In the bill attached to defendants' counterclaim, it stated that the cost of materials was $3,529.31, and that plaintiff had paid $1,547.78 on July 9, 2013, and that he still owed $1,981.53. Plaintiff claims that there were inconsistencies in the receipts submitted by defendants, and that the trial court "knocked off" $3,000 of the $3,529.31 owed in reaching the "arbitrary" number of $529.31 to account for those inconsistencies. However, plaintiff cites to nothing in the record that supports that contention. In fact, we can find nothing in the record that indicates what portion of the trial court's $7,000 judgment accounted for materials used at all. Rather, the judgment of the court merely states that it found in favor of defendants for $7,000. Plaintiff has failed to include a transcript of the proceedings below, and thus we do not know the basis for the trial court's judgment.

¶ 16 As the appellant asserting error, plaintiff bears the burden of providing a sufficient record for us to assess the trial court proceedings. This principle is expressly stated in both the Supreme Court Rules and our case law. Our supreme court "has long held that in order to support a claim of error on appeal the appellant has the burden to present a sufficiently complete record." *Webster v. Hartman*, 195 Ill. 2d 426, 431 (2001) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). Supreme Court Rule 321 (eff. Feb. 1, 1994) provides that the record on appeal shall include any report of proceedings prepared in accordance with Rule 323. Rule 323(a) requires the report of proceedings to include all the evidence pertinent to the issues on appeal. Ill. S. Ct.

R. 323(a) (eff. Dec. 13, 2005). These rules are requirements, not guidelines. *In re Marriage of Thomsen*, 371 Ill. App. 3d 236, 241 (2007).

¶ 17 Our supreme court has recognized that an 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." *Corral v. Mervis Industries*, Inc., 217 Ill. 2d 144, 156 (2005) (affirming denial of motion since "we do not know what evidence or arguments were presented at that hearing" and thus "we cannot review the claimed error to determine whether the trial court's factual findings were against the manifest weight of the evidence"). As we cannot speculate as to the proceedings below, we will assume that the trial court acted appropriately where the record is insufficient to review its reasoning. See *Corral*, 217 Ill. 2d at 157 (without an adequate record preserving the claimed error, the reviewing court must presume the circuit court had a sufficient factual basis for its holding and that its order conforms with the law). Accordingly, any doubts which may arise from the incompleteness of the record will be resolved against the appellant. *Id*. (citing *Foutch*, 99 Ill. 2d at 392). Here, because the record does not clarify how the $7,000 judgment was determined, we are foreclosed from reviewing the merits of the judgment.

¶ 18 Plaintiff's remaining two arguments pertaining to Lake Ridge relate to the $7,000 judgment as well. Plaintiff argues that: (1) the $1,150 award for additional crown molding work should be "reversed" and that (2) the $2,750 award for work performed by ARS Rescue Rooter must also be reversed, and that the $7,000 judgment must be vacated. However, for the reasons stated above, without an adequate record indicating how the trial court reached its judgment, we must presume the trial court had a sufficient factual basis for its holding and we are foreclosed from reviewing the merits of that judgment. *Id*.

¶ 19 Plaintiff's final contentions on appeal are that (1) Nolan was barred from maintaining a contract claim against plaintiff pursuant to section 24 of the Act (770 ILCS 60/24 (West 2012)), which states that subcontractors must provide written notice of their claims and the amount due, (2) plaintiff had no obligation towards Nolan pursuant to section 15 of the Home Repair and Remodeling Act (815 ILCS 513/15 (West 2012)), and (3) the judgment of $7,000 against plaintiff, without indicating "the exact *pro rata* amount awarded" to each defendant, was in violation of section 28 of the Act, which states that the owner shall be liable for no more than the *pro rata* share that such person would be entitled to with other subcontractors out of the funds due to the contractor from the owner. 770 ILCS 60.28 (West 2012). Each of these arguments has been waived on appeal, as they were not argued in the trial court. *Stokovich*, 211 Ill. 2d at 121 (issues not raised in the trial court are waived and may not be raised for the first time on appeal).

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.