2011 IL App (2d) 110299-U
No. 2-11-0299
Order filed November 30, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

INTERNATIONAL PROFIT ASSOCIATES, INC.,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 09-AR-358
ROBERT CHAMBERLAIN, Individually and d/b/a A-1 Factory Direct,	)	Honorable Diane E. Winter,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: Trial court did not abuse its discretion in limiting defendant to filing an answer only and in denying as untimely defendant's section 2-619(a)(3) motion to dismiss or stay where the initial time for pleading had expired, default judgment had been entered against defendant and subsequently vacated, defendant did not seek leave of court to file the motion, and court order directed defendant to file his answer before a specified date, not to "answer or otherwise plead."

¶ 1 Defendant appeals from the trial court's order denying his motion to dismiss or, alternatively, to stay the action pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Code) (735 ILCS

5/2-619(a)(3) (West 2008)), and from the trial court's order entering judgment against him and in plaintiff's favor following a bench trial. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Pursuant to the parties' written contract entered into in 2007, plaintiff was to provide management consulting services to defendant. During the contractual relationship, defendant paid plaintiff $57,746.94. After plaintiff had provided consulting services for eight weeks, defendant exercised his right under the contract to "recess" the consulting project. Defendant also stopped payment on several post-dated checks, which plaintiff had previously accepted as payment for services rendered. Defendant never resumed the consulting project.

¶ 4 In February 2009, plaintiff filed a one-count breach of contract complaint against defendant in the circuit court of Lake County. Plaintiff sought to recover the remaining $38,011.63 allegedly owed to it by defendant under the contract. The summons, which was personally served on defendant on February 28, 2009, directed defendant to appear in court in person or by attorney on March 16, 2009. Defendant did not appear on that date, and, on April 30, 2009, the trial court entered a default judgment in plaintiff's favor against defendant. On June 18, 2009, on defendant's motion, the trial court vacated the default judgment.

¶ 5 On November 23, 2009, the trial court granted defendant's attorney leave to withdraw. In the same order, the court directed that "[d]efendant shall filed [*sic*] its answer by December 28, 2009," and set the case for an arbitration hearing on February 11, 2010.

¶ 6 On December 28, 2009, rather than filing an answer, defendant filed a motion to dismiss or, alternatively, to stay the action pursuant to section 2-619(a)(3) of the Code. The motion was based on the pendency of a 2007 federal suit filed by defendant and others against John Burgess and other principals of plaintiff (*Amari Co. v. Burgess*, No. 07-C-1425). The federal case alleged that Burgess

and others were engaged in a consulting services scheme that violated the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 *et seq*. (West 2010)).

¶ 7 Plaintiff subsequently filed a motion for default judgment, arguing that defendant did not have leave of court to file the section 2-619(a)(3) motion and requesting that default judgment be entered against him for failure to file an answer. On January 14, 2010, the trial court denied defendant's motion to dismiss or stay as untimely and ordered defendant to file his answer by January 25, 2010. Defendant subsequently filed an answer to plaintiff's complaint, in which he alleged as an affirmative defense that plaintiff had fraudulently induced him into signing the contract.

¶ 8 On February 11, 2010, both parties participated in a mandatory arbitration hearing. The arbitration panel entered an award of $38,011.63 plus costs in plaintiff's favor and against defendant. Defendant subsequently moved to reject the award, which the trial court allowed.

¶ 9 The matter proceeded to a two-day bench trial on June 15, 2010. Following the bench trial, both parties filed memoranda of law in support of their positions. On February 22, 2011, the trial court issued a written order in which it entered judgment in the amount of $19,005.81 in plaintiff's favor. The trial court found that plaintiff had not fraudulently induced defendant to enter into the contract for consulting services. However, the court found that plaintiff had not provided all of the services it had promised defendant under the contract. Consequently, the judgment amount represented half of the unpaid balance that plaintiff claimed defendant owed it. Defendant timely appealed.

¶ 10 ANALYSIS

¶ 11 Defendant's notice of appeal indicates that he appeals from both the January 14, 2010, order denying his section 2-619(a)(3) motion to dismiss or stay the action and from the February 22, 2011, order entering judgment in plaintiff's favor. However, in his opening brief, defendant offers argument with respect to the January 14, 2010, order only. To the extent that defendant has failed to make any argument regarding the final order of February 22, 2011, he has forfeited that issue. See *Pace Communications Services Corp. v. Express Products, Inc.*, 408 Ill. App. 3d 970, 981 (2011) (holding that the appellant's failure to provide argument in its appellate brief resulted in forfeiture under Supreme Court Rule 341(h)(7) (eff. July 1, 2008)). We decline to overlook defendant's forfeiture of the issue and to *sua sponte* research the issues, formulate arguments, and then decide the issues. See *Skidis v. Industrial Commission*, 309 Ill. App. 3d 720, 724 (1999) (stating that "this court will not become the advocate for, as well as the judge of, points an appellant seeks to raise").

¶ 12 Nonetheless, defendant requests that this court vacate the final judgment, reverse the January 14, 2010, order, and remand to the trial court with directions to dismiss or stay the action. Defendant argues both that the trial court erred by denying his section 2-619(a)(3) motion as untimely, and also that the trial court should have granted the motion on the merits. Because we affirm the trial court's denial of defendant's 2-619(a)(3) motion as untimely, we need not address defendant's arguments regarding the merits of the motion.

¶ 13 Defendant argues that the trial court erred in denying his motion as untimely because the Code provides that a motion filed under section 2-619 must be filed "within the time for pleading." 735 ILCS 5/2-619 (West 2008). Defendant contends that he filed his motion within the time for pleading, because the trial court granted him until December 28, 2009, to answer plaintiff's

complaint. Defendant asserts that "the time for filing a [s]ection 2-619 motion is synonymous with the time for [filing] the defendant's answer."

¶ 14 Because this was an action for money, plaintiff served a summons on defendant in compliance with Supreme Court Rule 181(b)(1) (eff. Feb. 10, 2006). The rule provides:

> "Unless the 'Notice to Defendant' (see Rule 101(b)) provides otherwise, an appearance in a civil action for money in which the summons requires appearance on a specified day may be made by appearing in person or by attorney at the time and place specified in the summons and making the appearance known to the court, or before the time specified for appearance by filing a written appearance, answer, or motion, in person or by attorney. *** When a defendant appears in open court, the court shall require him to enter an appearance in writing. When an appearance is made in writing otherwise than by filing an answer or motion, the defendant shall be allowed 10 days after the day for appearance within which to file an answer or motion, unless the court, by rule or order, otherwise directs." Ill. S. Ct. R. 181(b)(1) (eff. Feb. 10, 2006).

Here, the summons that plaintiff served on defendant required him to appear in court in person or by attorney on a specified day—March 16, 2009. Had defendant appeared in court on that day, Rule 181(b)(1) would have required the court to allow him 10 days within which to file an answer or motion. Ill. S. Ct. R. 181(b)(1) (eff. Feb. 10, 2006). However, defendant did not appear in court on March 16, 2009, or otherwise file his appearance before that date. As a result, the trial court entered a default judgment against him.

¶ 15 On June 18, 2009, when the trial court vacated the default judgment against defendant, the initial time for pleading provided by Rule 181(b)(1) had expired, and it was then within the trial court's discretion whether to permit a defendant to file an answer or motion. See Ill. S. Ct. R.

181(b)(1) (eff. Feb. 10, 2006) (the defendant shall be allowed 10 days *after the day for appearance* [that is specified in the summons] within which to file an answer or motion) (emphasis added); *Inland Real Estate Corp. v. Lyons Savings & Loan*, 153 Ill. App. 3d 848, 853 (1987) ("it was within the trial court's discretion to consider multiple motions for dismissal and to permit the filing of subsequent motions to dismiss beyond the initial time for pleading"); *Silberstein v. Joos*, 59 Ill. App. 3d 293, 295 (1978) (reasoning that, although Supreme Court Rule 181(a) (eff. Jan. 1, 1970) permits a party in certain cases to file its appearance by filing a motion within 30 days after service of summons, "the trial court may in its discretion permit filing of tardy pleadings"); *Greenlee Brothers & Co. v. Rockford Chair & Furniture Co.*, 107 Ill. App. 2d 326, 332 (1969) ("[t]he trial court has discretion to permit the filings of tardy pleadings"). Accordingly, we review the trial court's decision to limit defendant to filing an answer for an abuse of discretion. See *Inland Real Estate*, 153 Ill. App. 3d at 853; *Silberstein*, 59 Ill. App. 3d at 295; *Greenlee Brothers*, 107 Ill. App. 2d at 332.

¶ 16 Here, in its November 23, 2009, order, the trial court directed defendant to file his answer by December 28, 2009. It did not give defendant leave to file any other pleading or motion. Nothing in the record before us indicates that the court abused its discretion in limiting defendant to filing an answer. We do not have the report of proceedings from the hearing on November 23, 2009, nor do we have anything that would indicate why the trial court ordered defendant to file his answer only, not to "answer or otherwise plead." The appellant has the burden to present a sufficiently complete record to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts that may arise from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99

Ill. 2d at 392. Accordingly, we hold that the trial court did not abuse its discretion in limiting defendant to filing an answer only. *Cf. Wilson v. Molda*, 396 Ill. App. 3d 100, 105 (2009) (declining to conclude that defendant-appellee's section 2-619 motion was untimely where it was plaintiff-appellants's burden on appeal to present a sufficient record to support its claim that motion was untimely, and where record did not reveal whether motion was filed within the time for pleading).

¶ 17 The issue becomes whether the trial court's order directing defendant to file his answer implicitly permitted him to file a section 2-619(a)(3) motion. Defendant asserts that "the time for filing a [s]ection 2-619 motion is synonymous with the time for [filing] the defendant's answer," and that his motion was therefore not untimely. However, the cases defendant cites do not support this proposition and are distinguishable. In *American Service Insurance Co. v. City of Chicago*, 404 Ill. App. 3d 769 (2010), the appellate court concluded that the defendant's section 2-619 motion was timely; however, the trial court had "issued a written order directing [the defendant] to 'answer or otherwise plead.' " *American Service*, 404 Ill. App. 3d at 777. Likewise, in *River Plaza Homeowner's Ass'n v. Healy*, 389 Ill. App. 3d 268 (2009), the appellate court concluded that the defendants' section 2-619 motion was timely; however, the trial court had "ordered [the] defendants to answer or otherwise respond to the second amended complaint." *River Plaza*, 389 Ill. App. 3d at 270, 275. In contrast to these cases, the trial court here ordered defendant to file his answer only, not to "answer or otherwise plead."

¶ 18 Furthermore, based on the record before us, it appears that defendant did not seek leave of court to file the section 2-619(a)(3) motion to dismiss or stay, which would have been the proper procedure. See Ill. S. Ct. R. 183 (eff. Jan. 1, 1967) ("T[he] court, for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration

of the time."). Accordingly, we cannot conclude that, when the trial court ordered defendant to file his answer by December 28, 2009, the court was implicitly granting defendant leave to file his section 2-619(a)(3) motion to dismiss or stay.

¶ 19 While the portion of the November 23, 2009, order granting defendant's attorney leave to withdraw was typed—revealing that it was prepared prior to the hearing on defense counsel's motion for leave to withdraw—the portion of the order directing defendant to file his answer was handwritten—revealing either that the court *sua sponte* directed defense counsel to add the language to the order or that, at a minimum, some discussion was had concerning defendant's filing an answer. Again, because we do not have the report of proceedings from November 23, 2009, we do not know what transpired. Nonetheless, it is clear from the plain language of the order that the court did not direct defendant to "answer or otherwise plead," but to file his answer by December 28, 2009. Moreover, defendant's new attorney, Merle Royce, filed his appearance on December 1, 2009, and thus had ample time prior to December 28, 2009, to seek leave of court to file the section 2-619(a)(3) motion to dismiss or stay, which he did not.

¶ 20 Based on the foregoing, we cannot conclude that the trial court abused its discretion in limiting defendant to filing an answer only and in denying defendant's 2-619(a)(3) motion to dismiss or stay as untimely.

¶ 21 CONCLUSION

¶ 22 For the reasons given, we affirm the judgment of the circuit court of Lake County.

¶ 23 Affirmed.