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2013 IL App (3d) 120268-U

Order filed January 4, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

MW LEASING COMPANY LLC,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois,
	)	
v.	)	
	)	
G&G STUDIOS/BROADWAY	)	
PRINTING,	)	
	)	Appeal No. 3-12-0268
Defendant-Appellant,	)	Circuit Nos. 11-LM-215
	)	11-LM-216
MARTIN WHALEN OFFICE	)	
SOLUTIONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
G&G STUDIOS/BROADWAY	)	
PRINTING,	)	
	)	Honorable Kenneth Leshen,
Defendant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Wright and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Appellant forfeited arguments concerning the admission of trial exhibits by failing to include the exhibits in the record on appeal. Appellant further forfeited its argument that the judgment was against the manifest weight of the evidence by failing to support its argument with citation to authority. Affirmed.

¶ 2 Plaintiff, in case No. 11-LM-215, MW Leasing Company, LLC (MW Leasing), brought a breach of contract action against defendant, G&G Studios/Broadway Printing (G&G), claiming defendant failed to pay monies due and owing under a lease agreement for a photocopy machine. Plaintiff, in case No. 11-LM-216, Martin Whalen Office Solutions, Inc. (Office Solutions), brought a separate breach of contract action against the same defendant seeking monies due and owing under a maintenance agreement for the photocopy machine. The circuit court of Kankakee County consolidated the two cases. Following a bench trial, the trial court entered judgment for the plaintiffs in the amount of \$18,161. Defendant appeals, claiming it was prejudiced by the entry of certain exhibits, which lacked a proper foundation and that the judgment is against the manifest weight of the evidence.

¶ 3 BACKGROUND

¶ 4 MW Leasing's complaint alleges that defendant failed to pay \$11,318.93 due and owing "on office equipment and finance charges pursuant to the Equipment FMV Lease Agreement." Attached to the complaint are three pages. The first page is titled "Equipment FMV Lease Agreement. The second page is titled "Total Copy Coverage Agreement." The third page is titled "Terms and Conditions" and indicates it applies to "maintenance service as described below."

¶ 5 Office Solutions' complaint, filed the same day as MW Leasing's, alleges that defendant

"owes for services pursuant to the Equipment FMV Lease Agreement" and attaches the same Equipment FMV Lease Agreement. This complaint also attached the Total Copy Coverage Agreement but did not include the third page of terms and conditions.

¶ 6 The Equipment FMV Lease Agreement is dated March 26, 2004. It calls for G&G to make monthly payments of \$315 for 48 months. The Total Copy Coverage Agreement was signed by an agent of the plaintiffs on March 15, 2004, and an agent of the defendant on March 26, 2004. The Total Copy Coverage Agreement allows for 7,000 copies a month, an excess copy charge of \$.014 per page and institutes a \$98 monthly charge. In exchange for those fees, Office Solutions made certain guarantees of service such as a four-hour emergency response time and loaner equipment in the event of untimely repairs.

¶ 7 G&G filed an affirmative defense, claiming the parties modified the Equipment FMV Lease agreement "in practice in that the plaintiff accepted payment on the lease by the provisions of printing services by defendant to plaintiff for which plaintiff did not make monetary payment, but instead gave credit on the lease ***." G&G also filed a counterclaim, alleging that on or before June 13, 2006, the parties entered into an agreement whereby G&G would provide printing services for the plaintiffs/counter-defendants and the plaintiffs/counter-defendants would pay for the services. G&G claimed the MW Leasing and Office Solutions had not paid for services outlined in invoices attached to the counterclaim.

¶ 8 The counter-defendants filed an affirmative defense, claiming that "any services provided to the Plaintiff/Counter-Defendant were deducted from the gross amount due and owing prior to filing of the complaint." The affirmative defense further states that counter-defendant has the

right to set-off any amounts G&G owes them.

¶ 9 Following continuances requested by both sides, the matter proceeded to a bench trial. At trial, the plaintiffs called Jim Gifford, the comptroller for Office Solutions, as a witness. Gifford testified that he is familiar with the plaintiffs' accounting and business records. He authenticated the lease agreement and referred to various invoices during his testimony. Gifford stated that in 2006 and 2007, the plaintiffs paid defendant \$7,686.15 for services rendered.

¶ 10 Referring to plaintiff exhibit No. 4, Gifford testified that G&G sent plaintiffs invoices totaling \$42,133.37 for work G&G performed for plaintiffs. Gifford identified plaintiff exhibit No. 5 as "a statement from Martin Whalen Office Solutions to G& G Studios ***." Gifford stated the exhibit included "all the invoices that go to the statement behind it." Gifford then identified plaintiff exhibit No. 6 as a "statement for MW Leasing to G&G Studios. Again, it's the same date as the other, 9/20 of '10 when we turn it over and it's a summary statement plus all the individual invoices that make up this behind it."

¶ 11 Gifford continued his testimony, noting that the total due and owing listed on exhibit No. 5 is \$11,318.93 and the total on exhibit No. 6 is \$13,882.55. These totals took into consideration the "credit for bartering service" and "any payments" made by G&G. Gifford noted the first invoice attached to exhibit No. 5 is dated February 29, 2008, and the first invoice attached to exhibit No. 6 is dated March 31, 2008.

¶ 12 Gifford identified plaintiffs' exhibit No. 7 as "a summary of Martin Whalen Office Solutions barter." Exhibit No. 7 showed \$14,948.81 in credits. Plaintiffs' exhibit No. 8 is a similar barter statement for MW Leasing. Exhibit No. 8 showed \$14,292.94 in credits.

¶ 13 Defendant began its cross-examination of Gifford by discussing exhibit No. 5. Gifford reiterated that exhibit No. 5 "is the statement of amount *** due to us from G&G *** as of 9/28/2010." Defendant then noted that the lease agreement began in March of 2004 and that the first invoice in exhibit No. 5 is dated February 29, 2008. Defendant asked where the invoices starting in 2004 were and why they were not attached to exhibit No. 5. Gifford responded by noting that they are "not in there because that's only the amount that was open. They're either paid or bartered." Gifford further explained that exhibit Nos. 7 and 8 contained invoices that had not yet been paid for by G&G or satisfied by barter.

¶ 14 Gifford acknowledged that he prepared exhibit No. 5 "for this litigation" after September 28, 2010, which was the date plaintiffs decided to turn the matter over to a collection agency. Gifford testified that from 2006 until the time of the trial, November 9, 2011, both plaintiffs provided \$42,133.37 in product and services to G&G.

¶ 15 On redirect examination of Gifford, plaintiffs began by moving to enter nine exhibits into evidence. Defendant objected to exhibit No. 5 "on the grounds that this is -- there's not a document in its composite form that was kept in the ordinary course of business. There's no testimony to that fact. It was, according to testimony, prepared by the witness for the litigation. It was -- it excludes the -- it excludes a large amount of invoices from '04 through '08 -- to '08 and is based on assumptions that the court is asked to assume are correct, in other words, that the parties were even to this particular date and then they ran a deficit." The court informed defendant that it was unfamiliar with that specific form of objection and inquired if the objection was for lack of foundation. Defendant ultimately agreed that the objection pertained to exhibit

No. 5's foundation.

¶ 16 The trial court sustained the objection, noting that Mr. Gifford was still on the stand and, as such, plaintiffs may still attempt to lay a proper foundation. The trial court then sustained "the same" objection to exhibit No. 6.

¶ 17 On redirect, Gifford explained his familiarity with the specialized computer system and program used by plaintiffs to track invoices and payments. Gifford explained that the reason exhibit Nos. 5 and 6 do not contain invoices prior to 2006 is that no outstanding invoices existed prior to 2006. He noted the records contained within the two exhibits are the kind customarily kept for not only G&G but all plaintiffs' customers in the normal course of plaintiffs' business.

¶ 18 Defendant again objected to admission of exhibit Nos. 5 and 6. The trial court overruled the objection, finding that Gifford had knowledge of how the records are made, that they are made in the normal course of business and that Gifford generated the records. The trial court found that the records were a "snapshot" of the business transactions between the parties made within a reasonable time thereafter.

¶ 19 The plaintiffs' second witness to testify at trial was Marty Whalen, president of Office Solutions and president of MW Leasing. Whalen stated there were two contracts between the parties; one covers the leasing of the photocopier and the other the maintenance of the copier. The barter system between the parties was never reduced to writing.

¶ 20 Whalen discussed language in the contracts and which appeared on invoices relating to late fees and attorney fees. He further explained the history between the parties, as well as the process by which plaintiffs generate invoices. Whalen stated that the market value of the

machine defendant rented totaled approximately \$14,000. After Whalen's testimony, the plaintiffs rested.

¶ 21 Defendant called April Cross to testify. She noted that she is the defendant's office manager and has care, custody and control of its records. She noted the services rendered by defendant to plaintiffs "under these agreements" totaled \$41,397.37. Ms. Cross calculated the combined obligation of the defendant to the plaintiffs pursuant to the lease and maintenance agreement totaled \$34,659.64.

¶ 22 The trial court found "that the accounting of the plaintiff is accurate, provided, however, that the court finds that no finance charges or interest should be allowed." The court reduced the amount MW Leasing claimed was due and owing by the finance charges and entered a judgment in MW Leasing's favor for \$7,943.73. The trial court made similar findings with respect to Office Solutions, reducing the amount it claimed was due and owing from G&G by the finance charges. The trial court then entered a judgment in favor of Office Solutions for \$10,217.68. Defendant filed a timely motion to reconsider, which the trial court denied. This timely appeal followed.

¶ 23 ANALYSIS

¶ 24 Defendant raises two claims of error. Initially, defendant argues the trial court erred by admitting plaintiffs' exhibit Nos. 5 and 6, claiming there was "insufficient foundation for their admission." Defendant further argues that the judgments in favor of the plaintiffs were against the manifest weight of the evidence as they "rely totally on plaintiffs' evidence in plaintiffs' exhibits 5 and 6." The plaintiffs filed no response.

¶ 25 A court of review may still address the merits of an appeal in instances where no responsive brief has been filed by the appellee and "the record in the case is simple and the issues are such that we can easily resolve them without the aid of an appellee's brief." *In re Keri B.*, 327 Ill. App. 3d 1068, 1069-70 (2002); see also *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).

¶ 26 A. Exhibit Nos. 5 and 6

¶ 27 Again, defendant's initial claim of error is that the trial court admitted plaintiffs' exhibit Nos. 5 and 6 without a proper foundation for doing so. We find defendant has forfeited this argument.

¶ 28 Defendant has failed to include exhibit Nos. 5 and 6 in the record on appeal. It is well established that an appellant has the burden of presenting a reviewing court with an adequate record concerning the claimed error. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 546-47 (1996). In *Redlin v. Village of Hanover Park*, 278 Ill. App. 3d 183 (1996), the appellant claimed the trial court committed reversible error by admitting plaintiffs' exhibit Nos. 16 and 17. *Id.* The appellate court held that given "the [appellant's] failure to include the disputed exhibits in the record on appeal, we must presume that the trial court did not commit reversible error and conclude that the [appellant] has waived the argument on appeal." *Id.* at 193; see also *Perez v. Hartmann*, 187 Ill. App. 3d 1098 (1989); *Snyder v. Tanner*, 18 Ill. App. 3d 456 (1974); *Wyman-Gordon Co. v. Bernardi*, 135 Ill. App. 3d 685, 689 (1985) ("Where the evidence is not all thus brought before this court, we are required to assume that it is sufficient to support the judgment appealed from. [Citations.] It follows necessarily that it is the duty of this court to affirm the

judgment appealed from.").

¶ 29 B. Manifest Weight of the Evidence

¶ 30 Defendant's second claim of error is that the trial court's judgments are against the manifest weight of the evidence. Defendant claims the "judgments entered in favor of the plaintiffs and against defendant rely totally on plaintiffs' evidence in plaintiffs' exhibits 5 and 6. The court rendered its judgment by simply accepting the bottom line of plaintiffs' exhibits 5 and 6 and subtracting interest or finance charges which were not due under the barter agreement that the parties entered into, ignoring the problem that the exhibit did not show all of the finance charges in the missing data for two years." Defendant continues by reasserting its prior complaints against exhibit Nos. 5 and 6. Finally, defendant asserts that the judgments are absurd as evidence indicated the fair market value of the photocopy machine leased totaled \$14,000 yet the judgments totaled \$18,161.

¶ 31 As noted above, any arguments made by appellant based upon the inclusion or reliance upon plaintiffs' exhibit Nos. 5 and 6 are forfeited. We cannot determine whether a judgment is against the manifest weight of the evidence without the benefit of all the evidence. We hold defendant has also forfeited this argument, by failing to include the exhibits in the record on appeal.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgments of the circuit court of Kankakee County are affirmed.

¶ 34 Affirmed