

No. 1-10-3589

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).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

RADHA K. NAIR and PRASHANT NAIR,)
) Appeal from the
) Circuit Court of
 Plaintiffs-Appellees,) Cook County
)
 v.) No. 05 CH 18338
)
 MADHU NAIR,) Honorable
) Mary Anne Mason,
 Defendant-Appellant.) Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

ORDER

Held: Judgment of the circuit court of Cook County affirmed where *pro se* appellant, who violated Supreme Court Rules 341 and 342, failed to meet burden of overcoming the assumption that the circuit court's judgment was correct and demonstrating that the decision of the circuit court was against the manifest weight of the evidence. Appellant also waived review of issues on appeal due to violations of the supreme court rules.

¶ 1 Following a bench trial, the circuit court entered judgment in favor of plaintiffs, Radha K. Nair and his son, Prashant Nair, for breach of contract, conversion, and an accounting against defendant, Madhu Nair. The court appointed a receiver, and awarded defendants \$331,436.

Defendant *pro se* now appeals. We affirm.

¶ 2 ILLINOIS SUPREME COURT RULES

¶ 3 At the outset, it is necessary to address defendant's failure to comply with Illinois Supreme Court Rule 341(h) (eff. July 1, 2008) and Rule 342 (eff. January 1, 2005). A party's failure to comply with Rule 341 is grounds for this court disregarding the party's arguments on appeal. *Burmac Metal Finishing Co. v. West Bend Mut. Ins. Co.*, 356 Ill. App. 3d 471, 478 (2005). Defendant has failed to state the standard of review and has failed to include citation to any authority in his brief. Defendant's *pro se* status does not excuse him from complying with the appellate procedures required by our supreme court rules. *Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 825 (2010), citing *Lill Coal Co. v. Bellario*, 30 Ill. App. 3d 384, 385 (1975) (while some deference is afforded to *pro se* litigants, the orderly administration of the appellate court requires that the rules of appellate procedure be followed). Nonetheless, although defendant's failure to comply with the rules hinders our review, to the extent that we are still able to understand the issues raised on appeal, we will consider their merits. *Id.* Our only alternative is to dismiss this appeal.

¶ 4 Plaintiffs did not file a response brief in this appeal. We may reach the merits of an appeal even without an appellee's brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 5 We further note defendant's failure to comply with Rule 341(h)(6) which requires an appellant's brief to include a "Statement of Facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with

appropriate reference to the pages of the record on appeal." Although defendant's brief contains a Statement of Facts, with references to the record, it does not contain the facts necessary to an understanding of the case. As this court has explained:

¶ 6 "Failure to comply with the rules regarding appeal briefs is not an inconsequential matter. [Citation.] An appellate court has the right to strike an appellant's brief and dismiss the appeal as a result of the appellant's failure to provide a complete statement of facts. [Citation.] A party's failure to comply with Rule 341 is grounds for disregarding its arguments on appeal. [Citation.]" *Burmac Metal Finishing Co. v. West Bend Mutual Ins. Co.*, 356 Ill. App. 3d 471, 478 (2005).

Although defendant has included a copy of the original complaint that was filed on October 27, 2005, it appears that the record does not include a copy of the amended complaint filed on June 1, 2006, upon which the trial court's judgment was based. We have nonetheless chosen to address defendant's arguments rather than dismiss this appeal but the following background was constructed from our independent review of the record.

¶ 7 BACKGROUND

¶ 8 In 2004, defendant was unemployed and was married to plaintiff Radha K. Nair's sister. On January 4, 2005, the parties entered into a business proposition regarding the purchase of a BP Amoco gas station in North Chicago for \$425,000. The parties disagree on the nature of the transaction and offered different versions in the trial court.

¶ 9 *Plaintiffs' Version*

¶ 10 Plaintiffs' contended in the trial court that they purchased the business for themselves and invested money with defendant so that defendant would have a job and the ability to support his

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family but, alternatively, contended that the parties had an oral agreement to form an association to carry on as co-owners of a business for profit.

¶ 11 Plaintiffs presented the affidavit of Attorney Mark T. Hickey who filed the original complaint. In the affidavit, Attorney Hickey stated that he had been representing plaintiff Radha for ten years when, in 2005, Radha retained him "in connection with his efforts to buy a BP Amoco gas station being sold by Phillip E. Mass and Mass Automotive, Inc." All of Attorney Hickey's conversations were with Radha who told Mr. Hickey that although he would be purchasing the gas station, it would be operated by Madhu, and that Radha would take over from Madhu approximately one year after the purchase. Attorney Hickey stated that the first time he met Madhu or had any communications with him was at the closing for the sale of the gas station in early July 2005. He sent Radha a set of closing documents on July 14, 2005 and he was never instructed by either Radha or Madhu to form a corporation that would hold title to the gas station in Madhu's name. Attorney Hickey stated that shortly before August 16, 2005, he received a call from Madhu requesting a copy of the closing documents. Attorney Hickey informed Madhu that he had sent them to Radha, that Radha would provide them to Madhu, and that Madhu did not object. Shortly afterwards, Attorney Hickey received a letter, dated August 16, 2005, from Madhu's attorney. The content of the letter is not discussed in Attorney Hickey's affidavit (or in defendant's appellate brief) but, with Attorney Hickey's agreement, he was subsequently disqualified from representing plaintiffs in this action based on a conflict of interest due to his prior dual representation of the parties.

¶ 12 The record also contains an affidavit of Mohamed Ould Sidi Mohamed, stating he was

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employed by Radha in January 2005 to manage a gas station located in Highland Park. Mohamed worked under the supervision of Imran Syed Shah. In January 2005, at Radha's request, Mohamed and Imran met with Phillip Mass, who owned the subject BP Amoco gas station, to evaluate the business. In mid-March 2005, Radha told Mohamed that he intended to buy the gas station for his son, Prashant, and to help Madhu become a licensed gas station dealer. Upon Radha's request, Mohamed trained Madhu in March 2005 on the day-to-day operations of the Highland Park gas station and worked with Madhu in running the subject gas station. According to Mohamed's affidavit he informed Mass that he would represent Radha at the closing. Mohamed also stated that, when the closing date was delayed, Radha and Mohamed reached an agreement with Mass that: (1) they would run the gas station under Mass's name until the official closing; (2) they would pay all business liabilities; (3) they would use Mass's lottery and other business licenses until their own licenses were approved; and (4) Radha would pay for the inventory over a three-week period. An "initial" closing took place on July 6, 2005, at which Madhu was present and Mohamed attended on behalf of Radhu and Prashant. The "official" closing took place in late July 2005. At that time, the gas station was paying Madhu \$800 per week plus free gasoline. Mohamed stated in his affidavit that, in the first week of August 2005, Madhu told him he was not happy with the arrangement he had reached with Radha, and that Madhu and his wife had met with Radha to reach a new agreement, but were unsuccessful. According to Mohamed, Madhu denied Imran access to the gas station on August 8, 2005, and changed the office locks and the combination to the safe. Mohamed also stated in his affidavit that Madhu told him that Madhu wanted to take over the gas station so that his wife would not

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divorce him.

¶ 13 *Defendant's Version*

¶ 14 Defendant's position is that he "never had any agreement with Radha K. Nair" and that Radha instead "offered to help Madhu Nair to set up Madhu Nair's *own* business with the help of Radha K.. Nair's and his attorney Mark T. Hickey." (Emphasis added.) In his counterclaim filed in the circuit court, defendant asserted that "Radha offered to loan [defendant] one hundred twelve thousand two hundred dollars (\$112,200) which [defendant] could combine with his own funds to *independently* purchase a gas station." (Emphasis added). Defendant took out a mortgage on his home for \$315,300. Defendant contended that he did so "[i]n order to consummate his *independent* purchase of the gas station." (Emphasis added.) He concedes, however, that "[l]ater on, Radha K. Nair came with the balance of the money." Defendant also claimed that "Radha, a former business owner, additionally offered to advise and assist [defendant] during the start up of the gas station." Defendant contended that Radha convinced defendant, "his unsuspecting brother-in-law," that plaintiffs should have access to the gas station's accounts only to "assist" defendant in the operation of "*his*" gas station. (Emphasis added.) Defendant also states that Radha, "having further offered his small business acumen to [defendant], then assisted [defendant in] screening and hiring employees."

¶ 15 *Chronology of Events*

¶ 16 BP Amoco required that any gas station owner be an approved dealer. In February 2005, defendant took training courses through BP so that he could run the gas station as a BP enterprise after the purchase was complete.

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¶ 17 On February 15, 2005, an Agreement for Purchase and Sale of Assets of the BP Amoco gas station was entered into between defendant and the seller, Mass Automotive, Inc. However, from January 4, 2005 through the date of the closing on July 28, 2005, plaintiffs apparently contributed substantial funds to the business. The original complaint contained a breakdown of the expenses which included the following: escrow (earnest money) paid to the seller (\$25,000); cashier's check to seller (\$84,700); check for defendant's BP training (\$2,500); car wash (\$95,110.95); soap and wax (\$15,000); attorney fee (\$4,000); loan payments for Madhu claim by corporation (*sic*) (\$13,600); electrician for car wash (\$15,600); commission money for "Imran" who apparently generated a lead for a special discount on the carwash for the garage (\$10,500); payment to seller for beginning inventory (\$26,600); insurance payment (\$1,500); another payment to "Imran" for financials/accounting services (\$25,000); brokerage fee paid to "Imran" (\$42,500); ATM (\$3,500); deposit from Highland Park BP (\$54,266); paint job at North Chicago (\$980); and payments to employees (\$8,235). In this appeal, defendant does not address these payments other than his assertion that he contributed \$15,000 of his own funds towards Radha's \$25,000 earnest money payment to the seller. He asserts, however, that "[d]espite [defendant's] suggestion to drop from the business deal for lack of funding Radha K. Nair told [defendant] to go ahead with the proposal and agreed to help with the balance of the amount."

¶ 18 On March 23, 2005, plaintiff Radha formed an Illinois corporation known as North Chicago BP, Inc. According to plaintiffs' original complaint "said corporation was set up for the purpose of transferring the assets of the partnership into the corporation." The name of the corporation was subsequently changed to North Chicago A-One, Inc. (North Chicago).

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Defendant apparently used North Chicago in the operation of the gas station including use of North Chicago's Federal Employer Identification Number, Illinois Business Tax number, lotto license and business license, and used North Chicago's bank accounts to pay sales tax, payroll taxes and payroll. In his counterclaim, however, defendant alleged that "Radha never disclosed to [defendant] that he intended to use North Chicago to try and take the gas station right out from under [defendant]." Defendant further alleged that "Radha completed the formation of North Chicago through [Attorney Hickey, the same attorney to whom Radha had referred defendant,] and neither disclosed its true ownership, its agenda or that Hickey was in fact concurrently representing [plaintiffs]."

¶ 19 On July 15, 2005, an "initial" closing of the purchase of the gas station took place. Attorney Hickey sent defendant a copy of his invoice of \$1653 for legal services. Although the invoice included an entry stating "7/14/2005 Letter to client with closing document package," the closing documents were not included with the invoice. Defendant paid the invoice in full on July 25, 2005. In his counterclaim, however, defendant alleged that the closing took place without his knowledge or consent. He additionally claimed that he "had been operating the gas station for two months per his arrangement with [the seller], and *** believed it was soon to be his own."

¶ 20 As noted earlier, according to plaintiffs, the "official" closing took place in late July 2005. On July 28, 2005, the transfer of the franchise agreement between defendant and the seller, Phillip Mass, took place. The record also contains a document, "Mutual Operational Agreement, BP Amoco North Chicago," dated July 28, 2005 which is signed by defendant and plaintiff Radha K. Nair. The document states, in relevant part, that defendant acknowledged and accepted

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the professional services rendered and investment made to purchase the gas station by Prashant S. Nair, that the employees of North Chicago A-One, Inc. were the employees of the gas station and would not unreasonably deny access to the facility, the corporation would pay defendant approximately \$10,600 per month (for "the loan against [defendant's] house, plus a salary of \$800 per week and \$300 worth of gasoline), and at the renewal of the contract by BP, the gas station would be sold to Prashant S. Nair.

¶ 21 Defendant contends on appeal, however, that he contacted plaintiff Radha K. Nair and Attorney Hickey's office several times during July 2005 to get the closing documents but was unsuccessful. Defendant further asserts that Attorney Hickey refused to meet with him and that plaintiff Radha K. Nair told defendant that defendant had "no right in the business." In their original complaint, plaintiffs asserted that defendant "refused to allow access to the checkbooks; changed the locks on the gas station and changed the combination to the safe, all without the consent or knowledge of plaintiffs." This claim is consistent with Mohamed's affidavit.

According to defendant's counterclaim, however, on August 22, 2005, he attempted to open the gas station, discovered that *he* had been locked out, and plaintiff Prashant Nair told defendant the gas station was closed. Defendant further claimed that, on the same day, he regained access to the gas station through the assistance of the North Chicago Police Department and "determined that Radha and/or Prashant had stolen \$23,900 from the gas station in the form of cash and credit card transactions and that Radha and/or Prashant had obtained a cashier's check drawn on funds from the gas station accounts."

¶ 22 Plaintiffs alleged in their original complaint that defendant formed a new corporation,

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which was holding monies and assets belonging to the partnership, and that defendant refused access to the books and records of the partnership and refused to return the money that plaintiffs invested. Defendant concedes that he created the new corporation, Nava and Madhu, Inc., d/b/a North Chicago BP, but claims he did so "with the advice of [an] attorney after learning that North Chicago was owned by plaintiff Prashant Nair." According to defendant, plaintiff Radha Nair had previously told defendant that North Chicago was in defendant's name. Defendant further concedes that, on August 22, 2005, he transferred the gas station to the new corporation that he created, and also opened up new bank accounts, but asserts that he did so "in order to protect the gas station assets from further theft." Defendant asserts that, on August 23, 2005, all of the employees of the gas station quit or refused to show up for work and told defendant that Radha had fired them.

¶ 23 The record contains a letter dated October 18, 2005 to defendant's counsel from plaintiffs' attorney, Mark T. Hickey. According to the letter, the parties met in August in an attempt to resolve their differences. At the meeting, plaintiffs presented "information and documents supporting their investments in the purchase of the BP Amoco station." The letter noted that, following the meeting, defendant's counsel had failed to return several telephone calls from Mr. Hickey. A formal demand was made for an accounting, as well as a demand to allow plaintiffs to review "all financial books and records of the partnership and any other entity which currently holds the assets of the [gas station.]" On October 27, 2005, plaintiffs filed a three-count complaint alleging breach of oral partnership agreement, breach of oral agreement, and for an accounting. Plaintiffs sought an order dissolving the partnership with the appointment of a

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receiver or, in the alternative, "an amount equal to fifty percent (50%) of the profits earned by the partnership *** in the amount of \$428,591.95."

¶ 24 Defendant has failed to include any discussion in his brief of the process that occurred in the trial court over the following five years and has failed to provide an appendix to the brief as required by Illinois Supreme Court Rule 341(h)(9) and Rule 342. Although the record apparently does not contain a copy of the amended complaint, the court order entered September 28, 2009 is directed towards an amended complaint. Based on this court order, as well as the Cook County Clerk's website, we take judicial notice of the fact that, on June 1, 2006, plaintiffs filed an amended complaint. The court entered judgment in favor of plaintiffs on Count II (breach of contract), Count III (breach of operating agreement), Count IV (conversion), and Count VII (accounting), and ruled in favor of defendant on the other three counts. In the September 28, 2009 order, the circuit court noted that its ruling was "following a bench trial on August 17 and 18, (2009)." Nonetheless, defendant has failed to include a transcript of proceedings of the bench trial. The September 28, 2009 order also notes that the court's rulings were based on "the reasons stated in open court." It is unclear if this reference is to the bench trial or to a hearing that took place on September 28, 2009 but, if the latter occurred, the record contains no transcript. The September 28, 2009 court order further (1) directed plaintiffs to submit to the court the name and qualifications of an independent receiver to market the property for sale and conduct an accounting, (2) set the matter for status on October 16, 2009, and (3) noted that entry of final judgment would await the outcome of the accounting.

¶ 25 On October 16, 2009, the court appointed Mr. Ratti Singh as a receiver to perform a

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preliminary evaluation of the subject gas station and submit a written evaluation to the court by November 4, 2009. On November 6, 2009, having determined that plaintiffs established a *prima facie* case for the appointment of a receiver, and having considered Mr. Singh's preliminary report, the court appointed Mr. Singh as the receiver of the subject gas station. Approximately one year later, on November 5, 2010, judgment was entered in favor of the plaintiffs in the amount of \$331,436. This appeal followed.

¶ 26 ANALYSIS

¶ 27 The first issue defendant raises is "whether the circuit court correctly concluded judgment based on documents presented by Radha K. Nair which contradicts with (*sic*) other documents and facts." Defendant's argument in support of this issue consists of two pages, and contains no citation to authority. Defendant apparently contends that the evidence was insufficient to show the existence of an agreement between the plaintiffs and defendant. He apparently claims that one of the documents presented by plaintiffs, the "Mutual Operational Agreement, BP Amoco North Chicago, dated July 28, 2005 which is signed by Madhu Nair and Radha K. Nair, was not authentic. It appears that defendant asserts that his signature on the document is a forgery ("There is no way Madhu Nair will sign any documents after July 16, 2005 either with Mark T. Hickey or Radha K. Nair where the written agreement showing a date July 28, 2005 which Madhu Nair never signed."). Defendant also appears to argue that the closing was invalid because Attorney Hickey failed to disclose to defendant that he was representing plaintiff, Radha K. Nair. We restate this first issue as whether the trial court's judgment was against the manifest weight of the evidence.

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¶ 28 "[T]he issues of whether a contract existed, the parties' intent in forming it, and its terms are all questions of fact to be determined by the trier of fact." *Prignano v. Prignano*, 405 Ill. App. 3d 801, 810 (2010). This court reviews the trial court's findings of fact with deference and we will reverse only if the findings are against the manifest weight of the evidence, *i.e.*, if "the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." [Citation]. *Id.* The fact that an opposite conclusion may be reasonable or that the reviewing court might have ruled differently based upon the same evidence will not justify a reversal. *Bergman v. Vachata*, 347 Ill. App. 3d 339, 348 (2004). It is not the role of this court to retry factual issues. *Id.*

¶ 29 A party who brings an appeal bears the burden of overcoming the assumption that the circuit court's judgment is correct and demonstrating that the decision of the circuit court was against the manifest weight of the evidence. *Frisch Contracting Service Co. v. Personnel Protection, Inc.*, 158 Ill. App. 3d 218, 222 (1987). As noted earlier, defendant has not provided this court with a copy of the transcripts of any of the proceedings in the circuit court. In the absence of an adequate record, it is presumed that the trial court's judgment conformed with the law and had a sufficient basis in fact, and any doubts resulting from the incomplete record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984); see also *In re Marriage of Frazier*, 205 Ill. App. 3d 621, 625 (1990) (affirming award of attorney fees where appellant failed to include a transcript of the hearing). Defendant has failed to supply this court with any evidence that demonstrates that a conclusion opposite to the one reached by the circuit court is clearly evident. Thus, we cannot say on the record before us that the decision of the circuit court

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was against the manifest weight of the evidence.

¶ 30 Defendant next argues that the receiver's report was "full of mistakes" and that the receiver was "never able to show the source of all figures." As noted earlier, the trial court appointed Mr. Ratti Singh as a receiver on November 6, 2009. "The appointment of a receiver is an extraordinary and drastic remedy and is appropriate only in cases of urgent necessity when there is a present danger to the interests of the investors, consisting of a serious suspension of the business and an imminent danger of waste or dissipation of corporate assets." *Witters v. Hicks*, 335 Ill. App. 3d 435, 440 (2002). Although defendant states that the receiver was an acquaintance of plaintiff, Radha K. Nair, he has not challenged the appointment of the receiver *per se*. Defendant claims that Mr. Singh "could not provide all documents as well as give an explanation and show from where Ratti Singh got the figures in his report." He also claims that Mr. Singh "refused to give copies of monthly and yearly report from ruby system, ATM tape, air pump commission and all payments including sales tax, federal tax, employee payroll, bank statement and check book stubs." Interestingly, defendant cites to an email to him from plaintiff's counsel, dated July 20, 2010, which states:

"I have asked Ratti to provide you with access to all of the financial records since he has become receiver for the gas station. I do not know what other documents you want to see, nor do I know where those documents are located. If you let me know if you and Ratti can not work out a time to view (and copy at your own expense) the records from 11/09 to date (*sic*). *As we discussed all of the historical documents pre November of 2009 came from you. So what are you*

looking for?" (Emphasis added.)

Defendant has failed to discuss what actions were taken subsequent to his receipt of this email.

¶ 31 On August 30, 2010, defendant filed a request for invalidation and removal of documents from judgment. On September 29, 2010, the circuit court allowed plaintiffs time to respond to the request and set the matter for final entry of judgment on November 5, 2010. Defendant now argues that the concern he raised in his request "is legitimate and never got resolved or taken into consideration" but he fails to address what transpired in the circuit court and again, the record contains no transcript of any hearing on the matter. Although we understand that defendant is challenging the receiver's report, he has failed entirely to present a cogent argument as to the issue he attempts to raise. "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R 341(h)(6). Thus, we decline to further address this issue.

¶ 32 The last issue raised by defendant, similar to the previous one, involves the receiver's report. Specifically, defendant claims that Mr. Singh failed to accurately consider defendant's investments, payments and inventories. It is unclear, however, whether defendant is arguing that Mr. Singh failed to correctly set-off those amounts or whether the circuit court failed to consider them as evidence in support of defendant's sole "ownership" of the business.

¶ 33 As noted earlier, it is not the role of this court to retry factual issues. *Bergman*, 347 Ill. App. 3d at 348. Defendant has listed, in his brief, his numerous investments and payments and contends that these should be "considered towards judgment." He fails, however, to discuss the circuit court's decision on this argument or whether these items were brought to the attention of

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the circuit court in the first instance. Although we have painstakingly attempted to address defendant's arguments in view of his *pro se* status, "[t]he appellate court is not a depository onto which a litigant may dump the burden of research and review of the record." *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177 (2002). Again, "[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R 341(h)(6). Thus, as with the prior issue, defendant has waived review of this issue.

¶ 34 CONCLUSION

¶ 35 Based on the foregoing, we conclude that defendant has failed to meet his burden of showing that the trial court's judgment was against the manifest weight of the evidence.

Defendant has waived review of the additional issues raised in this appeal. We therefore affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.