2017 IL App (1st) 161241-U

FIFTH DIVISION
Modified order filed March 3, 2017

No. 1-16-1241

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

GOLDSTEIN FINANCIAL CORPORATION, Plaintiff-Appellee, v. EDWARD N. ZUREK and ASSURANCE AGENCY, LTD., Defendants (Tressler L.L.P., Appellant).	)	Appeal from the Circuit Court of Cook County. No. 2010 CH 37346 The Honorable Anne H. Demacopolous, Judge, presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: This appeal must be dismissed—a second time—for the lack of a valid record, since there was—again—no authenticated supporting record filed, as required by Supreme Court Rule 328, and for the failure—again—to follow other supreme court rules. In addition, even if we were to exercise our discretion to review the underlying issue despite the lack of a valid record, we would have to agree with the trial court that appellant also failed to follow the rules required to perfect an attorney's lien.

¶ 2 In this appeal, appellant Tressler L.L.P., a Chicago law firm, appeals the trial court's August 27, 2015, order which denied Tressler's petition to adjudicate an attorney's lien. Tressler had represented Goldstein Financial Corporation (GFC), which was the prevailing party in the underlying matter between GFC[1] and defendants Edward N. Zurek and Assurance Agency, Ltd. (Assurance). Neither Zurek nor Assurance have filed briefs in this appeal.

¶ 3 The trial court denied Tressler's petition on the ground that Tressler had failed to perfect the lien and, thus, it was not a valid lien under the Illinois Attorneys Lien Act (770 ILCS 5/1 (West 2012)).

¶ 4 On August 28, 2015, Tressler filed a notice of appeal asking this court to reverse the trial court's August 27, 2015, order, and to remand the matter to the trial court for further proceedings. On March 31, 2016, this court dismissed Tressler's appeal both for lack of jurisdiction and for lack of a valid record,

[1] Although GFC was the plaintiff in the underlying action, it is defending against the attorney's petition in the instant appeal. Thus, we refer to GFC as simply GFC, rather than plaintiff, and Tressler as simply Tressler, rather than defendant, in order to avoid confusion.

since there was not an "express written finding" by the trial court as required by Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), and no authenticated supporting record filed, as required by Illinois Supreme Court Rule 328 (eff. Feb. 1, 1994). *Goldstein Financial Corp. v. Zurek*, 2016 IL App (1st) 152459-U, ¶ 1.

¶ 5 On April 6, 2016, the trial court entered an order which denied Tressler's "Emergency Motion for Rule 304(a) Finding," on the ground that: "Pursuant to Illinois Supreme Court Rule 303, this order finds that all claims and issues in this matter are resolved." On May 4, 2016, Tressler filed a notice of appeal appealing both the order entered on August 27, 2015, and the order entered on April 6, 2015.

¶ 6 For the following reasons, we dismiss this appeal a second time for the lack of a valid record and for the failure to follow other supreme court rules, such as the requirement for an appellant's brief to include a table of contents to the record. In addition, even if we were to exercise our discretion to review the underlying issue despite the lack of a valid record, we would have to agree with the trial court that appellant also failed to follow the rules required to perfect an attorney's lien. We observe that dismissal here will not leave Tressler without the potential for a remedy since, according to the parties, there is another pending action between the same parties concerning the same issue, captioned

Tressler, LLP v. Goldstein Financial Corp., No. 15-CH-13739 (Cir. Ct. Cook Co.). *People v. Philip Morris, Inc.*, 198 Ill. 2d 87, 98 (2001) ("it is settled that, outside of the [Illinois Attorneys Lien] Act, attorneys can still sue their clients to recover for their services").

¶ 7 BACKGROUND

¶ 8 This court permitted, upon Tressler's motion, the filing of a limited supporting record. As we explain in our Analysis section below, the supporting record was not authenticated and thus not a valid record. *Infra* ¶ 46 *et seq.* However, we provide here a summary of its contents for completeness' sake. Since the record was limited, the following statement of facts is also limited, and we also draw upon the statement of facts provided in our prior Rule 23 order in this same case. *Goldstein Financial Corp*, 2016 IL App (1st) 152459-U, ¶ 1.

¶ 9 I. The Attorney's Lien

¶ 10 Tressler, a Chicago law firm, represented GFC in an action brought by GFC on August 27, 2010,[2] against: (1) one of its former employees, Edward Zurek; and (2) Zurek's new employer, Assurance.

[2] Tressler stated in its petition to adjudicate its lien that GFC's complaint was filed on August 27, 2010.

¶ 11 On November 14, 2012, Tressler filed a notice of attorney's lien with the trial court.[3] The attached "Certificate of Service" states:

> "The undersigned, an attorney, certifies that the foregoing *Notice of Attorneys' Lien* was served upon the parties to whom such service was directed by facsimile before 5 p.m. on November 14, 2012." (Emphasis in original.)

¶ 12 Tressler sent a notice of the lien to defendants Assurance and Zurek by faxing a copy to Samuel Harrod IV, of Meltzer, Purtil & Stelle L.L.C., who represented both defendants. In an affidavit, dated August 7, 2015, Harrod averred that he received the notice on November 16, 2012, and that, on November 20, 2012, he sent defendants Zurek and Assurance a copy.

¶ 13 Tressler admits: (1) that it did not make service by registered or certified mail, but instead faxed the notice; and (2) that it faxed the notice to the opposing party's attorney, rather than to the party itself.[4] For its part, GFC does not dispute that defendants Assurance and Zurek received actual notice.

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[3] In its notice, Tressler stated that it "represents" GFC. See *Pedersen & Houpt, P.C. v. Main Street Village West, Part I, L.L.C.*, 2012 IL App (1st) 112971, ¶ 41 ("[a]ttorneys must exercise their lien rights *** while they are still acting as the attorney for their client and prior to the final judgment being satisfied").

[4] With respect to service, the Act provides that "service may be made" by the attorneys "[(1)] by registered or certified mail, [(2)] upon the party against whom their clients may have such suits." 770 ILCS 5/1 (West 2012).

¶ 14 II. Posttrial Proceedings

¶ 15 On June 27, 2013, after a bench trial, the trial court entered judgment in favor of GFC and jointly and severally against Zurek and Assurance in the amount of $195,328.

¶ 16 After the trial court's decision and award in favor of GFC, Tressler withdrew as counsel, and Cronin & Co., Ltd. (Cronin), represented GFC. Since the parties filed a limited record, Cronin's notice of appearance in the trial court is not in the record before us, and thus we do not know the exact date that Cronin's representation began.[5]

¶ 17 However, the record does contain the transcript for March 19, 2015, and Cronin represented GFC on that date. On March 19, 2015, at the argument on defendants' motion to reconsider before the trial court, defendants Zurek and Assurance argued, among other things, that GFC could recover only what it had actually paid. In response, Thomas Cronin, GFC's then-attorney, stated:

> "There is a lien for the remaining [$]220[,000] filed by Mr. Tressler's firm. We submit to your Honor that the fees incurred–the entire fees incurred are what's at issue. And the fact that Mr. Goldstein has not yet

[5] Tressler stated in its petition to adjudicate its lien that it represented GFC from the filing of GFC's complaint on August 27, 2010, through the trial judge's decision in GFC's favor on June 27, 2013, and "beyond."

paid $220,000, to which is subject to a lien on this matter, is in evidence and demonstrates the reasonableness of those fees."

¶ 18 On March 26, 2015, the trial court entered an order awarding GFC $522,463.41 in attorney fees and $43,255.11 in costs, totaling $565,718.52.

¶ 19 Defendants Zurek and Assurance filed a motion to reconsider the March 26, 2015, order, which the trial court subsequently denied on May 5, 2015. On May 15, 2015, Samuel Harrod, attorney for defendants Zurek and Assurance, sent an email both to Thomas Cronin, GFC's attorney, and to Kenneth Sullivan, Tressler's attorney, stating:

"Assurance will be paying the monetary judgment of $195,238 (plus interest). The funds are in our trust account. Per the attorney lien, the check will be made payable to Tressler LLP and Goldstein Financial Corp.

Please advise immediately as to whose attention the check should be sent. If I do not receive confirmation from you by close of business on Monday, I will be overnighting the checks to Tom Cronin [GFC's attorney]."

¶ 20 In response, on May 15, 2015, Kenneth Sullivan, Tressler's attorney, asked Samuel Harrod to send the check to Tressler's office. Similarly, on May

15, Thomas Cronin, GFC's attorney, asked for the check to be sent to him. Cronin stated:

> "I must disagree with Ken [Sullivan, Tressler's attorney]. Goldstein is the party who was awarded judgment, not Tressler. The lien protects Tressler as well as the manner in which you have identified both payees. Sending the check to Tressler is inappropriate. Please send the check to me, as counsel for GFC, at the address below. I will deposit in my trust account pending a resolution of the lien issue."

¶ 21 Although defendants Zurek and Assurance appealed, the appeal was dismissed in July 2015 after GFC and defendants Zurek and Assurance reached a settlement agreement concerning attorney fees and costs.

¶ 22 In an email dated July 14, 2015, from Samuel Harrod, defendants' attorney, to Kenneth Sullivan, Tressler's attorney, Harrod stated:

> "We have settled the rest of the Goldstein case. As you recall, we previously paid the money judgment to both GFC and Tressler and sent the check to Tom Cronin [GFC's attorney] for holding in trust.
>
> We have now settled the fee judgment for $530,000. Once again, Assurance will be cutting a check payable to both GFC and Tressler. As before, I will be sending this check to Tom Cronin for handling in trust to be settled between Tressler and GFC."

¶ 23 In a letter to Thomas Cronin, GFC's new counsel, dated July 16, 2015, Samuel Harrod, defendants Zurek and Assurance's counsel, stated, in relevant part:

> "Pursuant to our agreement today, I am enclosing herewith the two checks, one payable to GFC and Tressler for $61,437.67, and the other payable to GFC and Cronin, for $468,562.33, in payment of the agreed settlement amount of $530,000, along with a Release Satisfaction of Judgment."

¶ 24 On July 21, 2015, Tressler filed a petition to adjudicate its attorney's lien. On July 31, 2015, GFC filed a response in which it asserted for the first time that Tressler's notice was "legally insufficient to establish a lien under the [the Illinois Attorneys' Lien Act (770 ILCS 5/1 (West 2012))], for at least two reasons. First, it was not served on Defendants [Zurek and Assurance] but on their counsel ***. Second, the Notice was not served by registered or certified mail or by personal service." In an affidavit, dated August 18, 2015, Thomas Cronin, GFC's new counsel, swore that: "It was not until July 16, 2015, *** that I realized that Tressler did not in fact have a valid lien."[6]

[6] The Act did not require service of the notice on GFC, which was then Tressler's client. 770 ILCS 5/1 (West 2012) ("attorneys shall serve notice in writing *** upon the party *against* whom their clients may have such suits" (emphasis added)).

¶ 25 On August 27, 2015, the trial court issued a written order which stated in full:

> "This matter coming before the Court for Hearing on Tressler's Petition to Adjudicate Attorney's Lien and Goldstein's Notice to Strike Reply, Or For the Alternative For Leave to File Surreply, the parties have appeared, argued and been heard and the Court fully advised in the premises. It is hereby ordered:
>
> 1.) Tressler's Petition to Adjudicate Attorney's Lien is denied for reasons stated on the record in open court; and
>
> 2.) [GFC's] Motion to Strike Reply Or For Leave To File Surreply is Denied for Reasons stated on the record in open court."

¶ 26 On August 27, 2015, GFC and Tressler had appeared in open court. Defendants Zurek and Assurance were not present, in person or by their attorneys. Tressler's attorney stated: "it's undisputed at this point in time that Tressler is currently owed $259,402.60 in unpaid fees and costs. The reason I'm saying it's undisputed is we have in the papers before your Honor with respect to the lien an affidavit signed by me with respect to those dollars. So I haven't heard the defendant say 'No, no, no. they're not owed $259,000.' "

¶ 27 GFC's attorney replied that "much of what [Tressler's attorney] says really is not relevant ***. He began by telling you how much he's owed and all

this other stuff. The only issue before this Court is whether or not a valid lien exists. *** As we explained in our papers, GFC has already filed an action against the Tressler firm seeking damages for negligence." GFC's attorney argued: "So Tressler loses none of its contract rights, none of its arguments, nothing about what it's paid. That case is about damages arising from Tressler's negligence ***." GFC argued: "What we're looking at here is whether or not Tressler is—either has or is deemed to have satisfied the very specific statutory requirements in order to assert a valid lien. That's it." GFC further argued that the statutory lien "is an extraodinary remedy that requires strict compliance. It doesn't mean that they're not going to get paid, your Honor. It doesn't mean that at all. What it means is that we have a pending case; that they get the benefit of the lien, which is an extraordinary remedy, but that we have a pending case in which these issues can be addressed and should be addressed."

¶ 28 GFC identified two violations of the Illinois Attorneys' Lien Act (770 ILCS 5/1 (West 2012)) which, it argued, barred enforcement of the lien: (1) service "on the party's attorney"; and (2) "service by facsimile."

¶ 29 Tressler replied: "So as far as an unfair benefit, that clearly would be an unfair benefit to GFC for it to be awarded attorney's fees and then not pay the lawyers that basically incurred those fees on behalf of" GFC.

¶ 30 After listening to the arguments, the trial court ruled:

"What's before the Court is really rather discrete, and it's perhaps not as broad as all of us have made it. And so, for example, I agree that the fact that there's a pending case is of no import here. All that's important, really, is whether or not we have an enforceable lien, and that's really what it comes down to. And to make that determination, obviously, the Court begins by looking at the statute and what the statute requires for a valid lien. And, of course, the Court considers the argument that [Tressler's attorney] raises why he believes the lien to be valid despite what appear to be some defects in the lien.

I'm of this opinion, gentlemen: I agree, [GFC's attorney], that Tressler has the ability, other than a lien, to collect its fees; maybe not in the pending lawsuit. And to be honest with you, gentlemen, it's really not important for this determination. But ultimately, I'm convinced that the lien act has to be complied with. And unfortunately for the Tressler firm, I don't believe it has been, really, for the reasons that you've articulated much better than I this morning, [GFC's attorney], again, not addressing what's going on in another courtroom, but only because the lien act has to be perfected in a certain way, and it just doesn't appear to me that those sections of the lien act have been complied with. And because they have not, I don't believe that there is an enforceable lien here. I don't believe

that there's a lien that I can adjudicate in favor of Tressler because of these technical—what we've—what has been termed technical difficulties, I suppose.

I appreciate the fact that there are other methods for Tressler to attempt to collect what it says is owed it. But again, gentlemen, we're just here concerned with whether or not there's a valid lien here for the Court to adjudicate. "

¶ 31 On August 27, 2015, Tressler filed an emergency motion to stay enforcement of the trial court's August 27 order pending appeal. In its written motion, Tressler stated its intention to file an appeal. On August 28, Kenneth Sullivan, Tressler's attorney, and Thomas Cronin, GFC's new counsel, appeared before the trial court. Sullivan informed the court that the checks from defendants Zurek and Assurance had not been cashed:

"The checks are sitting there made payable to [GFC] as well as Tressler. So I anticipate—Yesterday or today, I anticipate that Mr. Cronin was going to call Mr. Harrod, who represents Assurance that cuts the check, and he's going to tell him, listen, recut the checks. Take Tressler's name off them. [The trial court] has ruled. They do not have a valid lien.

> And what I'm saying is if down the road the appellate court decides that this is a valid lien, that money is going to be gone. The actual party that will be on the hook will be Mr. Harrod, who is representing defendants who is actually served with the lien.
>
> So the appellate court makes that ruling: The party that receives the lien notice is the party that's going to be on the hook."

¶ 32 Cronin informed the trial court that he had "received an email yesterday from Mr. Harrod[, Zurek and Assurance's attorney,] saying that he would hold off any performance of the settlement agreement pending further orders of the Court."

¶ 33 On August 28, 2015, the trial court issued a written order which stated in full:

> "This Matter Coming before The Honorable Court on Tressler LLP's Emergency Motion to Stay Enforcement of Appeal of August 27, 2015 Order Pending Appeal due notice having been given and The Court having taken Argument in the Premises. IT IS HEREBY ORDERED:
>
> 1. Tressler's Emergency Motion is Granted in Part and Denied in Part.
>
> 2. Defendants Zurek and Assurance are Ordered to Replace the $197,964.93 and $64,437.67 Checks Payable to Tressler LLP and

Goldstein Financial with one Check in the Amount of $269,402.60 Payable to Cronin and Company on behalf of Goldstein Financial.

3. The Cronin Counsel for Goldstein Financial is Ordered by the Court to secure and hold the $259,402.60 for The Benefit of Tressler and Goldstein Financial pending Resolution of Tressler's Appeal of This Court's August 27, 2015 Order.

4. Goldstein shall be entitled to interest at The Judgment Rate of Interest until Tressler's Appeal is Resolved By the Appellate Court.

5. Tressler is Ordered to Post a $50,000 Bond pursuant to Rule 305.

6. The $259,402.60 Referenced in Par. 3 of The Instant Order shall be held in Cronin and Co.'s IOLTA Trial Account pending resolution of Tressler's Appeal."

¶ 34 On August 28, 2015, Tressler filed a notice of appeal asking this court to reverse the trial court's August 27, 2015, order, and to remand the matter to the trial court for further proceedings. The first appeal followed.

¶ 35 III. The First Appeal

¶ 36 On September 2, 2015, Tressler moved this court to enter orders (1) placing this appeal on an accelerated docket pursuant to Illinois Supreme Court Rule 311(b) (eff. Feb. 26, 2010) and (2) permitting the filing of a limited

supporting record pursuant to Illinois Supreme Court Rule 328 (eff. Feb. 1, 1994). On September 17, 2015, this court issued both those orders.

¶ 37 As noted above, on March 31, 2016, this court dismissed Tressler's first appeal for both lack of jurisdiction and lack of a valid record, since there was not an "express written finding" by the trial court as required by Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), and no authenticated supporting record filed, as required by Illinois Supreme Court Rule 328 (eff. Feb. 1, 1994). *Goldstein Financial Corp*, 2016 IL App (1st) 152459-U, ¶ 1.

¶ 38 IV. The Second and Instant Appeal

¶ 39 On April 4, 2016, Tressler filed an emergency motion in the trial court for a Rule 304(a) finding. On April 6, 2016, the trial court entered an order which denied Tressler's "Emergency Motion for Rule 304(a) Finding," on the ground that: "Pursuant to Illinois Supreme Court Rule 303, this order finds that all claims and issues in this matter are resolved." On May 4, 2016, Tressler filed a notice of appeal appealing both the order entered on August 27, 2015, and the order entered on April 6, 2015, and this second appeal followed.

¶ 40 After filing the notice of appeal, Tressler filed motions both to extend its time to file the record and to expedite the case. On July 20, 2016, this court ordered Tressler to "file an affidavit with this court to illustrate how this court can grant an expedited appeal when appellant obtains a 30-day extension to file

a limited supporting record. When this court expedites an appeal in the interest of justice, the party normally must make their filings in a timely manner."

¶ 41 Tressler also moved this court on July 5, 2016, for "leave to submit a limited record on appeal supported by attorneys' affidavit pursuant to Illinois Supreme Court Rule 328," which this court granted on July 20, 2016.

¶ 42 On August 3, 2016, Tressler filed a second motion for extension of time "to submit a Limited Supporting Record on Appeal supported by attorneys' affidavits pursuant to Illinois Supreme Court Rule 328," which this court also granted on August 9, 2016. However, on August 9, 2016, this court denied Tressler's motion for an expedited appeal, because counsel's conduct in handling this case did not demonstrate that an expedited appeal was in order. On September 21, 2016, this court did permit an expedited briefing schedule.

¶ 43 ANALYSIS

¶ 44 On this appeal, Tressler claims that the trial court erred in denying its petition to adjudicate its attorney's lien, where (1) defendants Zurek and Assurance received actual notice of Tressler's lien; and (2) GFC is judicially estopped from denying the enforceability of Tressler's lien.

¶ 45 For the reasons explained below, we find that Tressler failed to follow Supreme Court Rules, which results in our lacking, again, a valid record to decide its claims. In addition, even if we were to exercise our discretion to

review the underlying issue despite the lack of a valid record, we would have to agree with the trial court that appellant also failed to follow the rules required to perfect an attorney's lien. As we observed above, today's dismissal will not leave Tressler without the potential for a remedy since, according to the parties, there is another pending action between the same parties concerning the same fees, captioned Tressler, LLP v. Goldstein Financial Corp., No. 15-CH-13739 (Cir. Ct. Cook Co.).

¶ 46 I. Supporting Record

¶ 47 In the instant appeal, we granted Tressler's motion to allow a limited supporting record. Supreme Court Rule 328 provides, in relevant part:

> "The supporting record must be authenticated by the certificate of the clerk of the trial court or by the affidavit of the attorney or party filing it. The supporting record shall bear a cover page with a caption of the appeal. The cover page shall be clearly labelled 'Supporting Record.' The numbering of volumes and pages of the supporting record shall conform to the requirements of Rule 324." Ill. S. Ct. R. 328 (eff. Feb. 1, 1994).

¶ 48 In the instant appeal, Tressler specifically moved for permission "to submit a Limited Supporting Record on Appeal supported by attorneys' affidavits pursuant to Illinois Supreme Court Rule 328," and this court granted this motion. However, the record is not authenticated by either a certificate of

the trial court or by the affidavit of the attorney or party filing it, as required by Supreme Court Rule 328. Ill. S. Ct. R. 328 (eff. Feb. 1, 1994). There is no Rule 328 affidavit attached to the record itself or in the clerk's office's file.[7] Thus, the record is not a valid record for the second time.

¶ 49 The record is entitled a "Stipulated Supporting Record." Supreme Court Rule 321 provides for a stipulated record and it provides, in relevant part, that: "The record on appeal shall consist of the judgment appealed from, the notice of appeal, and the entire original common law record, *unless the parties stipulate for*, or the trial court, after notice and hearing, or the reviewing court, orders less." (Emphasis added.) Ill. S. Ct. R. 321 (eff. Feb. 1, 1994). However, nowhere does Rule 321 state that it relieves the appellant of the obligations imposed by Rule 328 to authenticate the resulting record. In addition, Tressler expressly moved this court for leave to file the limited record "supported by attorneys' affidavits pursuant to Illinois Supreme Court Rule 328," and that is what we granted. Further, there is no stipulation attached to the record. Thus, we are once again faced with the lack of a valid record from the same appellant in the same case.

[7] In a petition for rehearing to this court, filed by Tressler on January 12, 2017, Tressler stated that "Kenneth M. Sullivan's Rule 328 Affidavit" was "attached hereto as Exhibit 'A'. " The petition stated that a table of contents for the supporting record was also "in Exhibit A." However, there was no exhibit attached to the petition.

¶ 50 II. No Table of Contents

¶ 51 Tressler's brief also fails to include a table of contents to the record on appeal. We can dismiss the appeal on this basis alone.

¶ 52 "Where an appellant's brief fails to comply with supreme court rules, this court has the inherent authority to dismiss the appeal." *Epstein v. Galuska*, 362 Ill. App. 3d 36, 42 (2005) (citing *In re Marriage of Gallagher*, 256 Ill. App. 3d 439, 442 (1993)). "[A] party's failure to comply with basic rules is grounds for disregarding his or her arguments on appeal." *Epstein*, 362 Ill. App. 3d at 42.

¶ 53 Under Supreme Court Rule 342(a), an appellant's brief must include, in "an appendix, *** a *complete* table of contents, with page references, of the record on appeal." (Emphasis added.) Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005). Plaintiff's appellate brief does not contain *any* table of contents with page references to the record. The brief includes only a table of contents to its own appendix. To the extent that Tressler would argue that the table of contents to the appendix is the equivalent to a table of contents to the record, we would observe that the appendix is 107 pages and the record is more than three times that length.

¶ 54 Supreme court rules are not advisory suggestions, but rules to be followed. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57; *In re Estate of Michalak*, 404 Ill. App. 3d 75, 99 (2010). Since Tressler's appellate

brief fails to follow the provisions set forth in Supreme Court Rule 342(a), we may, within our discretion, dismiss this appeal for failure to do so. *Hluska*, 2011 IL App (1st) 092636, ¶ 57; *Fender v. Town of Cicero*, 347 Ill. App. 3d 46, 51 (2004) (citing *Collier v. Avis Rent A Car System, Inc.*, 248 Ill. App. 3d 1088, 1095 (1993)).

¶ 55 Where this court has held *pro se* litigants to adherence to Illinois Supreme Court rules, we must, at the least, hold practicing attorneys to the same standard. *Epstein*, 362 Ill. App. 3d at 43 (dismissing an appeal by *pro se* litigants "for violations of supreme court rules").

¶ 56 III. Not a Valid Attorney's Lien

¶ 57 In addition, even if we were to exercise our discretion to review the underlying dispute despite the lack of a valid record, we would have to agree with the trial court that appellant also failed to follow the rules required to perfect an attorney's lien.

¶ 58 With respect to service, the Illinois Attorneys' Lien Act (770 ILCS 5/1 (West 2012) (the Act) provides that "service may be made" by the attorneys "[(1)] by registered or certified mail, [(2)] upon the party against whom their clients may have such suits." Tressler admits: (1) that it did not make service by registered or certified mail, but instead faxed the notice; and (2) that it faxed the notice to the opposing party's attorney, rather than to the party itself. On

this appeal, Tressler argues that this court should disregard the express statutory requirements for perfecting an attorney's lien, because: (1) defendants Zurek and Assurance received actual notice of Tressler's lien; and (2) GFC is judicially estopped from denying the enforceability of Tressler's lien. For the following reasons, we do not find these arguments persuasive.

¶ 59 A. Actual Notice

¶ 60 In its brief to this court, Tressler argues that, this court should rule in its favor "despite the language of the Act," and permit actual notice to substitute for the notice requirements actually provided in the act itself. The Act states, in relevant part:

> "Attorneys at law shall have a lien upon all claims *** which may be placed in their hands by their clients for suit *** for the amount of any fee which may have been agreed upon[.] ***
>
> To enforce such lien, such attorneys shall serve notice in writing, which service may be made by registered or certified mail, upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action. Such lien shall attach to any verdict, judgment or order entered and to any money or property which may be recovered, on account of such suits, claims, demands or

causes of action, from and after the time of service of the notice. On petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than 5 days' notice to the adverse party, adjudicate the rights of the parties and enforce the lien." 770 ILCS 5/1 (West 2012).

¶ 61 The interpretation of a statute is a question of law that we review *de novo*. *Maschek v. City of Chicago*, 2015 IL App (1st) 150520, ¶ 42. *De novo* consideration means that we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). With statutory interpretation, our primary goal is to ascertain the legislators' intent, and the best indication of their intent is the plain and ordinary meaning of the words which they chose to use. *People v. Chatman*, 2016 IL App (1st) 152395, ¶ 30 (citing *MD Electrical Contractors, Inc. v. Abrams*, 228 Ill. 2d 281, 287 (2008)).

¶ 62 However, there is not really an argument here about statutory interpretation. Both parties are clear on what the notice requirements of the Act are, and that these requirements were not followed. Tressler makes no argument that any word, phrase or term in the statute is ambiguous, and cites no case which took the action that it is asking us to take.

¶ 63 In fact, Tressler forthrightly admits in its reply brief to this court that it "never argued any aspect of the Illinois Attorneys Lien Act ('the Act') was ambiguous or required interpretation, or that this Court would need to consider principles of statutory interpretation. [Citation to record.] Indeed the issue of statutory construction was never argued by either party in the trial court proceedings, and so would have been waived on appeal. GFC's argument [that Tressler failed to provide authority in support of its statutory interpretation argument] must be rejected as Tressler never made a statutory construction argument in the trial court proceeding."

¶ 64 Instead, Tressler is making an equitable argument about why we should disregard the statute's express language. As both parties agree, the trial court's refusal to apply judicial estoppel is a decision that we review only for an abuse of discretion. *Seymour v. Collins*, 2015 IL 118432, ¶ 41. An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court. *Seymour*, 2015 IL 118432, ¶ 41.

¶ 65 In support, Tressler claims that the notice requirements of the Act do not accomplish its purpose in this instance; and Tressler argues, in effect, that the statute should be rewritten to include actual notice. Tressler cites in support *dicta* in *TM Ryan Co. v. 5350 S. Shore, L.L.C.*, 361 Ill. App. 3d 352, 357

(2005). In *Ryan*, the trial court held that the attorney's lien was not properly perfected because it was "not served by registered or certified mail, and there was no evidence of actual notice." *TM Ryan*, 361 Ill. App. 3d at 356. In this section, which is entitled "Facts," we merely described what the trial court held. Our decision is in the next section, entitled "Decision." In the "Decision" portion of our opinion, we stated that the Act must be "strictly construed" and that attorneys "who do not strictly comply with the Act have no lien rights." *TM Ryan*, 361 Ill. App. 3d at 356. Applying that ruling to the facts in front of us, we observed that the two letters which purportedly created the lien were not "sent by certified or registered mail." *TM Ryan*, 361 Ill. App. 3d at 357. We thus held: "Because neither letter complied with the statute's service requirements, a valid attorney's lien was not created." *TM Ryan*, 361 Ill. App. 3d at 357. This holding supports the trial court's decision in the case at bar.

¶ 66 In *Ryan*, we did observe that: "In cases where courts have upheld the validity of a lien despite a lack of proper service of notice, there was proof of actual notice." *TM Ryan*, 361 Ill. App. 3d at 357. Although we went on to distinguish these "cases," we had cited only two cases in support of this statement: one case involving a physician's lien, and thus not involving the Act; and a 1941 case where, although it was not specifically alleged that service was

by registered mail, the defendant acknowledged receipt of the notice by return mail.

¶ 67 The case law on the other side, however, including from our supreme court, has found that the requirements of the statutory attorney's lien must be strictly construed. *People v. Philip Morris, Inc.*198 Ill. 2d 87, 95 (2001). This makes sense since Illinois has no common law attorney's lien for fees, and the Act " 'creates new rights which have heretofore not been recognized in this State.' " *People v. Philip Morris, Inc.*, 198 Ill. 2d 87, 95 (2001) (quoting *Standidge v. Chicago Railways*, 254 Ill. 524, 533 (1912)). As a result, our supreme court has held: "Since the attorney's lien is a creature of statute, the Act must be strictly construed, both as to establishing the lien and as to the right of action for its enforcement." *Philip Morris*, 198 Ill. 2d at 95 (citing *Haj v. American Bottle Co.*, 261 Ill. 362, 366 (1913); *DeKing v. Urban Investment & Development Co.*, 155 Ill. App. 3d 594, 597 (1987); *Unger v. Checker Taxi Co.*, 30 Ill. App. 2d 238, 241-42 (1961)). Our supreme court could not have been more clear when it stated: "Attorneys who do not strictly comply with the Act have no lien rights." *Philip Morris*, 198 Ill. 2d at 95. As Tressler forthrightly concedes, *Philip Morris* involved a case where a client was trying to avoid paying its own attorney.

¶ 68 Following the dictates of both the statute and our supreme court, "[a] majority of the cases construing the Act have held a lien arises under the statute only if notice is served by personal service or certified or registered mail on the party against whom the lien is sought" – which did not happen here. *TM Ryan*, 361 Ill. App. 3d at 357 (providing a list of cases). See also *Kovitz Shifrin Nexbit, P.C. v. Rossiello*, 392 Ill. App. 3d 1059, 1064-66 (2009) (claim for fees failed due to the attorney's failure to "strictly adhere to the procedural requirements prescribed by the Act").

¶ 69 With unambiguous statutory language and statements from our supreme court on one side and mere *dicta* on the other, we cannot find that the trial court abused its discretion by not using its equitable powers to rescue a law firm that failed to follow the rules.

¶ 70 B. Judicial Estoppel

¶ 71 Tressler also argues that GFC is judicially estopped from arguing that Tressler failed to comply with the Act because on March 19, 2015, GFC's attorney stated: "There is a lien *** filed by Mr. Tressler's firm."

¶ 72 As we observed above, the standard of review for this claim is whether the trial court abused its discretion. *Seymour*, 2015 IL 118432, ¶ 41.

¶ 73 However, as *TM Ryan* observed, whether or not an attorney's client had notice is irrelevant under the Act. *TM Ryan*, 361 Ill. App. 3d at 357-58. The

only issue is what notice was received by the defendant or the source of the proceeds. *TM Ryan*, 361 Ill. App. 3d at 357-58.

¶ 74 In *Seymour*, our supreme court set forth a two-step process for our trial courts to follow in order to determine when to exercise their discretion to apply judicial estoppel. *Seymour*, 2015 IL 118432, ¶ 47. The first step is to examine the following five factors:

> "First, the trial court must determine whether the prerequisites for application of judicial estoppel are met. In this respect, the party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *Seymour*, 2015 IL 118432, ¶ 47.

¶ 75 However, satisfaction of these five factors is not enough to justify the exercise of judicial estoppel because, as our supreme court explained, "even if all factors are found, intent to deceive or mislead is not necessarily present, as inadvertence or mistake may account for positions taken and facts asserted." *Seymour*, 2015 IL 118432, ¶ 47. As a result, our supreme court required a second step:

"Second, if all prerequisites have been established, the trial court must determine whether to apply judicial estoppel—an action requiring the exercise of discretion. Multiple factors may inform the court's decision, among them the significance or impact of the party's action in the first proceeding, and, as noted, whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake." *Seymour*, 2015 IL 118432, ¶ 47.

¶ 76 In the case at bar, GFC's attorney submitted an affidavit explaining what led him to make the disputed comment at the March 19, 2015, hearing:

"5. At the time that I made those statements, I believed that Tressler's lien was valid because I was told by Kenneth Sullivan, who I know to be a Tressler partner that he had filed an attorney's lien which he had properly served on the Defendants in this case.

6. Kenneth Sullivan never provided me with a copy of the actual lien notice.

7. It was not until July 18, 2015, months after matters before this Court were concluded, when I received a copy of Tressler's actual lien notice from Defendants' counsel, Samuel Harrod, that I realized that Tressler did not in fact have a valid lien.

8. Looking at the face of the actual lien notice provided to me by Mr. Harrod, the defects are obvious in that the notice is addressed to Defendant's counsel and not to Defendants themselves and that the notice was served by facsimile transmission and not by registered or certified mail."

¶ 77 Based on this affidavit, GFC's attorney argued before the trial court that, "if there's anything that should be estopped here, it should be Tressler. Tressler should be estopped from receiving an unfair benefit of getting the benefit of a valid lien when it incorrectly asserted that it had a valid lien when no such lien existed."

¶ 78 After considering this affidavit and all the evidence and arguments, the trial court exercised its discretion to find that judicial estoppel was not warranted on the facts before it. In light of the affidavit of GFC's attorney averring that his misstatement was inadvertent and not out of any intent to deceive or mislead, we cannot find that the trial court abused its discretion.

¶ 79 CONCLUSION

¶ 80 In sum, Tressler has not followed Supreme Court Rule 342(a) which required a complete table of contents to the record in its brief; or Supreme Court Rule 328, which required the filing of an authenticated supporting record. As this court has stated repeatedly, Supreme Court Rules are not advisory, but

are written to be followed. *Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, ¶ 7 ("our supreme court rules are not advisory suggestions, but, rather, rules to be followed"); *Menard, Inc. v. 1945 Cornell, L.L.C.*, 2013 IL App (1st) 121422, ¶ 7; *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57; *In re Estate of Michalak*, 404 Ill. App. 3d 75, 98-99 (2010) (" 'the rules promulgated by the supreme court are, in fact, rules, and not advisory suggestions for conduct of the lower courts and the bar' " (quoting *Roberson v. Liu*, 198 Ill. App. 3d 332, 335 (1990))).

¶ 81 In a case such as this, where the appellant is asking this court to excuse its prior omissions with respect to procedural rules, one would hope that the appellant would pay particularly close attention to them on this appeal. When an appellant "fails to follow the provisions set forth" in the Supreme Court Rules which govern the briefs and the record, "we may, within our discretion, dismiss his appeal for failure to do so." *Hluska*, 2011 IL App (1st) 092636, ¶ 57; *Fender*, 347 Ill. App. 3d at 51 ("A party's failure to comply with Supreme Court Rules 341 and 342 justifies dismissal of an appeal."); *Collier*, 248 Ill. App. 3d at 1095 (" 'Where an appellate brief fails to comply with the rules, this court has inherent authority to dismiss the appeal for noncompliance with its rules.' " (quoting *Zadrozny*, 220 Ill. App. 3d at 292-93)). In the case at bar, the

failure to follow the rules deprives this court of a record upon which we may rely, and thus requires dismissal of this appeal.

¶ 82 In addition, even if we were to exercise our discretion to review the underlying dispute despite the lack of a valid record, we would have to agree with the trial court that appellant also failed to follow the rules required to perfect an attorney's lien.

¶ 83 Appeal dismissed.