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FIFTH DIVISION
September 22, 2017

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GARRETT REALTY & DEVELOPMENT, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 14 L 10390
)	
TOM LIVADITIS,)	The Honorable
)	Margaret Ann Brennan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶1 *HELD:* The trial court did not abuse its discretion in denying defendant's unsupported second request to continue trial. The trial court's judgment finding defendant breached the parties' agreement for commission on the leasing of the subject property was not against the manifest weight of the evidence.

¶2 The parties dispute the content of an agreement establishing commission for the lease of a property owned by defendant, Tom Livaditis. Defendant appeals the trial court's order denying his posttrial motion to vacate the court's judgment in favor of plaintiff, Garrett Realty &

Development, Inc. Defendant contends: (1) the trial court abused its discretion in denying his motion to continue the parties' scheduled trial; and (2) the trial court's judgment finding that he breached the parties' agreement was against the manifest weight of the evidence. Based on the following, we affirm.

¶3

FACTS

¶4 Defendant owns commercial property located at 4810-4820 N. Western Avenue in Chicago, Illinois. Plaintiff is a commercial real estate firm. On January 15, 2013, the parties entered into a "Non-Exclusive Registration and Commission Agreement" (Commission Agreement) providing:

"Garry Realty & Development, Inc. as real estate broker shall procure Prospective Tenants or Buyers for the Referenced Property. It is agreed by you [Livaditis] on behalf of the ownership of this property, that if a sale or lease is entered into by any of these prospects, or any entity which they may control, direct, arrange or become a part of, you will pay or cause the property ownership to pay Garrett Realty & Development, Inc. a real estate brokerage commission in the amounts and at the time indicated on the attached Schedule of Commission Payments."

¶5 The "Schedule of Commission Payments" appears in the record. The document provided that, "at the time a lease was executed," defendant would pay plaintiff a broker's commission equaling 6% of the total gross rent for the full term of the lease. The language additionally provided that, if plaintiff procured a buyer, defendant agreed to pay plaintiff a broker's commission of 5% of the gross sales price. Defendant's initials appear at the bottom of the document, as well as next to the subparagraph detailing the terms of the broker's commission in the case of a sale. The term "ok" appears next to defendant's initials in the margin next to the

broker's sale commission subparagraph. Two question marks also appear in the margin of the document—one next to the timing detailed for payment of the commission and one next to the definitions subparagraph.

¶6 A second Commission Agreement dated February 13, 2013, also appears in the record. The property referenced in the second Commission Agreement is 56-60 E. Chicago Avenue in Chicago, Illinois, which is not at issue in this appeal, but which the parties seemingly agree is owned by defendant. The second Commission Agreement contains the same language as the first agreement for the 4810-4820 N. Western Avenue property. The second Commission Agreement is signed only by defendant. The record also contains a second "Schedule of Commission Payments" document. In the second "Schedule of Commission Payments," defendant's initials again appear in the margin with the term "ok" next to the subparagraph detailing the terms of the broker's commission in the case of a sale. The subparagraph detailing the terms of the broker's commission in the case of a lease, namely, the 6% of total gross rent for the lease term, however, is crossed out and in the margin appears "\$20,000" and defendant's initials.

¶7 The parties do not dispute that plaintiff procured Pathways Management Group (Pathways) as a tenant for defendant's Western Avenue property. On June 12, 2014, Pathways signed a 10-year lease for the subject property. The lease term began on June 15, 2014, and was to end on June 14, 2024. The monthly rent for the lease was \$17,000 per month for the first year and increased each year thereafter. The total gross rent for the lease was \$2,393,303.14. The lease contained clauses allowing the cancellation of the lease if Pathways was unable to obtain a special use permit from the City of Chicago or if, after five years, Chicago Public Schools did not renew its contract with Pathways.

¶8 Plaintiff filed the underlying lawsuit, claiming defendant breached the parties' agreement by failing to pay the agreed upon real estate commission for the lease of the Western Avenue property to Pathways. Plaintiff subsequently filed a motion for summary judgment, arguing it was entitled to \$143,598.17 in real estate commission based on the terms of the parties' agreement. In his response to that motion, defendant argued that he never accepted the terms of the agreement. Moreover, defendant argued that he had an oral agreement with plaintiff's real estate agent, Christopher Kriticos, that defendant would not pay more than \$20,000 in commission for the leasing of the property. Finally, defendant argued that plaintiff was not entitled to 6% of the gross net of the ten-year Pathways lease because the lease was guaranteed only for 5 years. On January 22, 2016, the trial court granted summary judgment in favor of plaintiff and entered judgment against defendant in the amount of \$143,598.00.

¶9 Defendant responded by filing a motion to reconsider the trial court's January 22, 2016, order. In that motion, defendant provided evidence demonstrating that Pathways was terminating its lease because it failed to acquire a special use permit from the City of Chicago. On March 29, 2016, the trial court granted defendant's motion to reconsider and vacated its January 22, 2016, order and judgment. The court set the matter for trial on June 1, 2016.

¶10 On May 26, 2016, defendant filed an emergency motion to continue trial. In the motion, defendant stated that he was a nearly 85-year-old man suffering from "positional vertigo, which is causing dizziness and gait abnormality" and that "it would be difficult for him to come to the courthouse and take part in this trial." In a letter attached to the motion, Doctor Patrick Lay confirmed that defendant had been seen by him for positional vertigo. The doctor requested "any assistance and accommodation," noting that defendant "cannot drive and cannot walk without supervision and assistance from another person." In a May 31, 2016, written order, the trial court

granted defendant's requested continuance, over plaintiff's objection, and continued the trial to July 7, 2016.

¶11 Then, on July 1, 2016, defendant filed a second motion to continue trial, requesting that the trial be continued until August 8, 2016. In the motion, defendant stated that he had traveled to Greece for treatment of his vertigo malady and would not return to the United States until July 27, 2016. Attached to the motion was a letter from a Greek doctor noting that defendant had been seen on June 22, 2016, and had no dizziness or vertigo. The letter provided that defendant "has performed exquisitely at my presence, the home exercise program that he has already been taught."

¶12 On July 7, 2016, the trial court denied defendant's requested continuance and proceeded with the trial as scheduled in defendant's absence. No transcript from the trial appears in the record. The court's July 7, 2016, written order, however, provides that two exhibits were admitted into evidence, the Commission Agreement for the Western Avenue property and the Pathway lease for that property. The trial court denied defendant's¹ motion for a directed verdict and granted judgment in favor of plaintiff in the amount of \$138,000, plus costs and attorney's fees related to the arbitration of the matter.

¶13 Defendant then filed a motion to vacate the court's July 7, 2016, judgment, arguing that the trial court erred in denying his motion to continue trial, erred in construing the parties' agreement solely to benefit plaintiff, and erred in awarding damages based on "mere speculation." More specifically, defendant argued that his motion to continue was based on "valid reasons" and a continuance would not have unduly prejudiced plaintiff. Defendant additionally argued that the trial court interpreted the parties' agreement unfairly, in a manner

¹The parties agree that defendant was not present for the trial; however, based on the trial court's July 7, 2016, order, it appears that defendant's attorney was present.

that produced absurd results. Defendant finally argued that the parties' agreement was improperly admitted into evidence and, therefore, plaintiff had no basis upon which to establish damages. On August 22, 2016, the trial court denied defendant's motion to vacate. This appeal followed.

¶14

ANALYSIS

¶15 Defendant first contends the trial court abused its discretion in denying his second motion requesting to continue the scheduled trial.

¶16 A party does not have an absolute right to a continuance. *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 927 (1997). Rather, the decision whether to grant a continuance is within the sound discretion of the trial court. *Id.* In making its decision, the trial court must consider whether the moving party has exercised diligence in proceeding with the case. *Id.* Moreover, “[w]here a party bases a motion for continuance upon the absence of a witness, there must be a showing as to the materiality of the facts expected to be proven through the absent witness and the failure to do so, *** warrants the exercise of the trial court’s discretion.” *Feder v. Hiera*, 85 Ill. App. 3d 1001, 1002-03 (1980). Illinois Supreme Court Rule 231(a) instructs:

“If either party applies for a continuance of a cause on account of the absence of material evidence, the motion shall be supported by affidavit of the party so applying or his authorized agent. The affidavit shall show (1) that due diligence has been used to obtain the evidence, or the want of time to obtain it; (2) of what particular fact or facts the evidence consists; (3) if the evidence consists of testimony of a witness his place of residence, or if his place of residence is not known, that due diligence has been used to ascertain it; and (4) that if further time is given the evidence can be procured.” Ill. S. Ct. R. 231(a) (eff. Jan. 1, 1970).

¶17 On review, we will not disturb a trial court's decision denying a motion for continuance absent an abuse of discretion. *Id.* This court must balance the interest of the prompt disposition of the case with the interest of obtaining justice. *Id.* A trial court abuses its discretion only where its decision is unreasonable or arbitrary or where no reasonable person would take the same view. *Gulino v. Zurawski*, 2015 IL App (1st) 131587, ¶ 64.

¶18 Based on the record before us, we cannot say the trial court abused its discretion in denying defendant's second motion for a continuance. The record does not support defendant's argument that he operated diligently in proceeding with this matter. While true that he defended the underlying lawsuit against plaintiff's summary judgment motion and was awarded a motion to reconsider, defendant failed to honor his first request to continue the trial. Instead, defendant, after having been granted that continuance, left the country and, according to his attorney, made no plans to return until after the continued trial date. In his second motion for a continuance, defendant failed to include an affidavit in violation of Rule 231(a). Moreover, neither the motion nor the attached doctor letter provided a reason for his absence—in fact, the doctor stated that defendant did not have vertigo or dizziness and “has performed exquisitely at my presence, the home exercise program that he has already been taught.” See *Needy v. Sparks*, 51 Ill. App. 3d 350, 358-59 (1977) (“Illinois case law requires that a motion for continuance based upon the illness of a party be supported by competent medical testimony stating the nature of the illness and the reasons that the party is unable to attend or participate in trial.”) Therefore, defendant not only failed to provide an affidavit containing facts to which he would testify as a material witness, but also failed to provide a reason to support his absence from trial. See *Westlake v. Moffitt*, 30 Ill. App. 3d 597, 599 (1975) (finding the trial court did not abuse its discretion in denying the defendant's requested continuance where his motion, which alleged he had a sudden

heart attack, was a material witness, and was not at fault in delaying trial, failed to provide specific facts to which he would testify and failed to state when he would be available for trial).

We, therefore, conclude that the trial court did not abuse its discretion in denying defendant's second motion for a continuance of trial.

¶19 We find the cases cited by defendant are distinguishable. See *Recey v. Recey*, 132 Ill. App. 2d 1024, 1027-28 (1971) (finding the trial court abused its discretion in denying a motion for continuance where the newly appointed counsel only had 16 days to prepare for trial, that counsel was confined to bed with influenza on doctor's orders, there was no evidence of an intentional delay brought by the plaintiff, and the matter concerned the custody of minor children); *Bethany Reformed Church of Lynwood v. Hager*, 68 Ill. App. 3d 509, 511 (1979) (finding the trial court abused its discretion in denying a motion for continuance where the defendant's hospitalization during trial, which was supported by affidavits, would cause minimal delay); *Jack v. Pugeda*, 184 Ill. App. 3d 66, (1989) (finding the trial court abused its discretion in denying a motion for continuance where the plaintiff substantially complied with Rule 231's affidavit requirement and the requested continuance was for one day to contact an expert).

¶20 Defendant next contends that the trial court's judgment in favor of plaintiff was against the manifest weight of the evidence. More specifically, defendant argues that the evidence demonstrated he never agreed to provide commission of 6% for the length of a lease.

¶21 Following a bench trial, our standard of review of a trial court's judgment is manifest weight of the evidence. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 12. In order for a finding to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Valasquez v. Yellow Cab Co.*, 32 Ill. App. 3d 934, 936 (1975).

¶22 As previously stated, no transcript appears in the record from the July 7, 2016, trial. The trial court's order and judgment following the trial reveal that two exhibits were entered into evidence, the Commission Agreement for the Western Avenue property and the Pathway lease for that property. According to plaintiff, it called two witnesses and defendant presented no evidence.

¶23 The supreme court has instructed:

“[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial 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 the law and had sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶24 Defendant did not present a report of the trial proceedings or an acceptable substitute pursuant to Illinois Rule 323 (eff. Dec. 13, 2005). In absence of a sufficient record, we must assume the evidence heard by the trial court fully supported its finding that plaintiff was entitled to \$138,000, plus costs and attorney's fees related to the arbitration of the matter.

¶25 Moreover, based on our review of the record before us, we conclude the trial court's findings were not against the manifest weight of the evidence. Simply stated, defendant signed the Commission Agreement and initialed the “Schedule of Commission Payments,” which contained the disputed language. We recognize that defendant also initialed next to the subparagraph detailing the commission in the event the property was sold and included the term “ok;” however, there were no modifications or amendments made to the disputed language regarding the commission in the event of the lease, such as what occurred with Pathways. The

“Schedule of Commission Payments” that was modified was attached to a different property not at issue in this case and that document was not admitted at trial. In sum, we find the record supported the trial court’s judgment.

¶26

CONCLUSION

¶27 We affirm the judgment of the trial court.

¶28 Affirmed.