

NOTICE
Decision filed 02/23/17. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2017 IL App (5th) 160031-U

NO. 5-16-0031

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

FIRST SOUTHERN BANK, a State Chartered Bank,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 14-LM-363
)	
WHITEHOUSE BUSINESS GROUP,)	
INCORPORATED, an Illinois)	
Corporation, and JUNE PAGE CROSS,)	
)	
Defendants,)	
)	
and)	
)	
ALFRED CROSS,)	Honorable
)	Ralph R. Bloodworth III,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Where the civil defendant's continuance motion apparently was not filed until after the circuit court had conducted a prove-up hearing and had entered a default judgment in favor of the plaintiff, the court did not err in not ruling on the motion.

¶ 2 This appeal is from a default judgment in a debt collection action. Defendant Alfred Cross argues *pro se* that the circuit court abused its discretion by not granting his

motion to continue the bench trial in this case. However, the continuance motion was not before the court until after the court had conducted a prove-up hearing and had entered the default judgment in favor of plaintiff First Southern Bank. By that time, the continuance motion was moot, and the circuit court did not err in not ruling on it. The judgment of the circuit court must be affirmed.

¶ 3

BACKGROUND

¶ 4 On March 18, 2014, First Southern Bank (First Southern) extended an unsecured loan to Whitehouse Business Group, Inc. (Whitehouse), to fund business operations. The principal sum was \$35,074.18, and the maturity date was June 18, 2014. The loan agreement was signed, on behalf of Whitehouse, by defendants June Page Cross and Alfred Cross, who served as Whitehouse's president and secretary, respectively. In conjunction with the loan agreement, Whitehouse contemporaneously executed, again by June Page Cross and Alfred Cross, a promissory note in favor of First Southern in the amount of \$35,074.18. The note specified that Whitehouse would repay the loan in one principal payment of \$35,074.18, plus interest as specified, on the maturity date of June 18, 2014. At the same time, June Page Cross and Alfred Cross each entered into a commercial guaranty of the loan agreement and promissory note.

¶ 5 On August 14, 2014, First Southern filed a complaint against Whitehouse, June Page Cross, and Alfred Cross, jointly and severally. The complaint alleged that all three defendants had failed to pay any portion of the principal and interest on the promissory note. The complaint prayed for judgment in the amount of the principal sum plus interest, as well as late charges, attorney fees, and other collection costs. Attached to the

complaint were copies of the loan agreement, the promissory note, and the two commercial guaranties.

¶ 6 In February 2015, an attorney entered her appearance on behalf of Whitehouse and Alfred Cross. By this attorney, Whitehouse and Alfred Cross filed answers to the complaint, wherein they admitted to executing the promissory note but denied failing to make the required payment thereon. (June Page Cross never filed an answer, or any other document, in the circuit court. No attorney ever entered an appearance on her behalf. Furthermore, she is not involved in this appeal.)

¶ 7 In August 2015, the attorney filed a motion to withdraw as the attorney for Whitehouse and Alfred Cross, citing a breakdown in the attorney-client relationship. Via certified mail, the attorney sent copies of her withdrawal motion to Whitehouse and Alfred Cross, but these mailings were returned to her with "return to sender—unclaimed—unable to forward" stickers affixed thereto. A hearing on the withdrawal motion was scheduled for October 5, 2015. In September 2015, the attorney sent to Whitehouse and Alfred Cross, again via certified mail, notices of the hearing, but these notices were returned to her with the same type of "return to sender" stickers affixed thereto. On October 5, 2015, the circuit court entered a written order granting the attorney's motion to withdraw and granting Whitehouse and Alfred Cross time to hire substitute counsel. The attorney mailed copies of the order to Whitehouse and Alfred Cross. No substitute counsel ever entered an appearance on behalf of Whitehouse or Alfred Cross.

¶ 8 On November 3, 2015, the circuit court made a docket entry indicating that "plaintiff" (presumably an attorney for First Southern) and "defendant" (presumably

Alfred Cross) were present in court and that the cause was set for "prove-up" on December 16, 2015, at 10 a.m. The docket entry further indicated, "NGIC", which presumably indicates that notice of the prove-up hearing was given in court.

¶ 9 On December 16, 2015, First Southern's attorney filed an affidavit wherein he averred that First Southern had incurred attorney fees and costs of certain stated amounts.

¶ 10 According to the docket entry of December 16, 2015, "plaintiff" and a "witness" appeared in court on that date, but "defendant" failed to appear. (The record on appeal consists solely of the common law record.) According to the docket entry, "Any faxed motion to continue which is later received is denied. No motion to continue has been received." The docket entry further noted that the affidavit of fees and costs was approved and that judgment was entered. The December 16, 2015, docket entry ended with this notation: "Motion for a 60 day continuance filed." Also on December 16, 2015, the court entered a written judgment in favor of plaintiff First Southern and against defendants Whitehouse and Alfred Cross (though not against June Page Cross), with damages assessed at \$44,003.67. Damages included the principal sum plus interest, attorney fees, and costs. In the written judgment, the court noted that it had "heard testimony presented by the plaintiff." The court made specific findings regarding the promissory note, etc., all of which were consistent with First Southern's complaint and its attorney's affidavit. On December 18, 2015, First Southern's attorney mailed Alfred Cross a notice of entry of default judgment. See 735 ILCS 5/2-1302(a), (b) (West 2014).

¶ 11 The common law record includes a "motion for 60 day continuance" file-stamped by the clerk of the circuit court on December 16, 2015, at 10:39 a.m. An envelope and a

proof of service suggest that Alfred Cross, on December 14, 2015, in Mount Vernon, mailed his continuance motion to the "Jackson County Courthouse/Office of the Clerk" in Murphysboro and also mailed a copy of the motion to First Southern's attorney. In his continuance motion, Alfred Cross noted that a bench trial had been set for December 16, 2015, but he averred that he and First Southern were "negotiating to redo the loan" and needed additional time for negotiation.

¶ 12 Alfred Cross did not file a motion to vacate or set aside the default judgment. See 735 ILCS 5/2-1301(e) (West 2014) (after the entry of a default judgment, the party against whom the judgment was entered has 30 days in which to file a motion to set aside the judgment, and the court may set it aside upon any reasonable terms or conditions). He did file a notice of appeal from the judgment. The notice stated that the circuit court "never addressed" his motion for a 60-day continuance.

¶ 13

ANALYSIS

¶ 14 On appeal, Alfred Cross proceeds *pro se*. His sole contention is that the circuit court abused its discretion by not granting his motion to continue the scheduled bench trial. First Southern has not filed an appellee's brief. Because the claimed error can easily be decided without an appellee's brief, and given the simplicity of the record on appeal, this court will decide the appeal's merits. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). This court cannot agree with Alfred Cross's contention.

¶ 15 As previously mentioned, the record on appeal consists solely of the common law record. There is no report of proceedings, no bystander's report, and no agreed statement

of facts. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). As the appellant here, Alfred Cross had the duty to provide this court with a sufficient record of the trial proceedings to support his claims of error. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts arising from an incomplete record will be resolved against him. See *id.* at 392.

¶ 16 The prove-up hearing held on December 16, 2015, was scheduled 43 days in advance—on November 3, 2015. Alfred Cross was in court on November 3, 2015, and he was given notice of the hearing's date and time—December 16, 2015, at 10 a.m. Just two days before the scheduled hearing, Alfred Cross mailed his continuance motion to "the office of the clerk" at the Jackson County Courthouse. (Alfred's envelope did not specify the clerk of the circuit court, as opposed to the county clerk, creating a risk of delaying the motion's arrival at the circuit clerk's office.) The circuit clerk file-stamped the motion December 16, 2015, at 10:39 a.m., which was 39 minutes after the scheduled start of the prove-up hearing. At the hearing's start time, no motion to continue was before the court, as the court noted in its docket entry. Considering that only one party, *i.e.*, plaintiff First Southern, was present at the hearing, that only one witness testified, and that the complaint's factual allegations were simple, the hearing may very well have concluded by the time Alfred Cross's continuance motion was file-stamped by the circuit clerk. The docket sheets certainly give the strong impression that the court was unaware of the continuance motion until after the trial had been held and the judgment had been entered.

¶ 17 The circuit court cannot be faulted for not ruling on a motion to continue a hearing where the motion was not before the court, and the court could not have known of its existence, until after the court had concluded the hearing and entered judgment. A court

cannot consider or rule upon a motion that is not before it. By the time the motion was filed and before the court, the motion was moot. The decisions cited by Alfred Cross as authorities in his brief are inapposite, for in each of those decisions, a party moved for a continuance, and the court was aware of the motion, prior to or during the courtroom proceeding that the movant sought to continue. In other words, in all of those prior cases, there was something for the circuit court to rule upon. Here, there was nothing for the circuit court to rule upon prior to or during the hearing. After the hearing concluded, of course, the continuance motion was moot, and no ruling was necessary.

¶ 18 The circuit court did not err in regard to the continuance motion. Its judgment must be affirmed.

¶ 19 Affirmed.