2019 IL App (2d) 180507-U
No. 2-18-0507
Order filed March 26, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EDUARDO BENITEZ and LENA W. BENITEZ,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellees,	)	
v.	)	No. 16-AR-328
MARCIN POLEK and BEATA PARDEJ,	)	Honorable Stacey L. Seneczko,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Birkett and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* Although defendants had a legal basis to petition for fees and costs, the incomplete record required us to presume that the trial court had a legal and factual basis to deny their petition.

¶ 2 Plaintiffs, Eduardo Benitez and Lena W. Benitez, filed a complaint against defendants, Marcin Polek and Beata Pardej. After a bench trial, the court found for defendants. Defendants then moved for a finding that they were the prevailing party and were thus entitled to petition for attorney fees. Ultimately, the court denied them relief, and they appeal. We affirm.

¶ 3 On April 12, 2016, plaintiffs filed a four-count complaint. Count I did not plead a claim but alleged the following facts. In 2014, defendants purchased residential real estate that was sold "as is." They then became aware of numerous defects but made only cosmetic repairs. In February 2015, they listed the property for sale and described it as in new condition although they knew otherwise. Defendants presented a real-estate disclosure report to their broker. Plaintiffs received the misleading report and relied on it to offer to purchase the property. The contract that they signed with defendants warranted that all fixtures, systems, and personal property were in operating condition. After taking possession in April 2015, plaintiffs discovered numerous serious defects. They spent $11,063.95 on repairs and demanded reimbursement from defendants, but defendants refused.

¶ 4 Counts II through IV of the complaint pleaded causes of action for (respectively) fraudulent misrepresentation, negligent misrepresentation, and violation of the Residential Real Property Disclosure Act (Act) (765 ILCS 77/1 *et seq.* (West 2014)).

¶ 5 On October 3, 2016, after a default judgment against them had been vacated, defendants filed an answer. In addition to responding to plaintiffs' claims, the answer prayed that the court dismiss the complaint and "for such further relief as the [c]ourt [found] necessary and just." It did not specifically request attorney fees.

¶ 6 On June 30, 2017, an arbitrator found for plaintiffs and awarded them $4324.70. On July 26, 2017, defendants rejected the award. On February 2, 2018, after a bench trial, the court found in favor of defendants on all claims. The record contains no transcript of the trial or any substitute for a transcript. The court's order stated, "The court does not award any cost [*sic*] or attorneys [*sic*] fees to Defendants but Defendants shall have the option to petition for leave to request said costs and attorneys [*sic*] fees within 30 days."

¶ 7 On March 2, 2018, defendants filed a "Motion to Determine Defendants as Prevailing Parties and Request for Leave to File Petition for Attorney's Fees and Costs." The motion alleged that defendants were entitled to attorney fees under both the real-estate contract and the Act. The contract stated in pertinent part, "In any action with respect to this Contract, the Parties are free to pursue any legal remedies at law or in equity and the prevailing party in litigation shall be entitled to collect reasonable attorney fees and costs from the non-prevailing party as ordered by a court of competent jurisdiction." Defendants contended that, under *Erlenbush v. Largent*, 353 Ill. App. 3d 949 (2004), the quoted language included the present suit. They requested that the court find that they were the prevailing party and "grant [their] request for leave to file a petition for attorney fees and costs."

¶ 8 Defendants' motion also invoked section 55 of the Act:

> "If the seller fails or refuses to provide the disclosure document prior to the conveyance of the residential real property, the buyer shall have the right to terminate the contract. A person who knowingly violates or fails to perform any duty prescribed by any provision of this Act or who discloses any information on the [disclosure report] that he knows to be false shall be liable in the amount of actual damages and court costs, and the court may award reasonable attorney fees incurred by the prevailing party." 765 ILCS 77/55 (West 2016).

Defendants contended that they were the prevailing party, the court having found in their favor on all plaintiffs' claims, including the one under the Act.

¶ 9 Defendants' motion requested leave to petition for attorney fees. It did not include a proposed fee petition or any statement of what fees defendants had incurred.

¶ 10 On March 21, 2018, the court held a hearing. The record contains no transcript or other report of the hearing. The court gave defendants until April 2, 2018, "to file an amended Motion to Determine Defendants as prevailing party and for leave to file a Petition for Attorneys [*sic*] Fees and Costs"; gave plaintiffs until April 30, 2018, to respond; gave defendants until May 14, 2018, to reply to the response; and set the motion for a hearing on May 31, 2018.

¶ 11 On April 2, 2018, defendants filed their amended motion. It reiterated the original motion and contended further that defendants' failure to include a prayer for attorney fees in any prior pleading did not preclude them from seeking fees now. See *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 97 (2009). The motion also stated that after entering judgment for defendants on February 2, 2018, the court had responded to their oral motion for attorney fees and costs by permitting them to file a petition. Alternatively, defendants argued, the general prayer for relief in their answer was sufficient to authorize an award.

¶ 12 On April 30, 2018, plaintiffs responded to defendants' amended motion. They contended that defendants had forfeited their request by failing to plead it specifically in their answer. Plaintiffs contended further that neither the contract nor the Act allowed defendants to recover attorney fees. The former was inapplicable because the complaint sounded in tort, not contract. The latter was inapplicable under *Miller v. Bizzell*, 311 Ill. App. 3d 971, 975-76 (2000), because plaintiffs had brought their complaint in good faith.

¶ 13 On May 14, 2018, defendants replied to plaintiffs' response. They contended first that, under *Suburban Auto Rebuilders*, they had not needed to include a prayer for fees and costs in their answer. They contended second that the contract provided a basis for attorney fees, because the complaint alleged that plaintiffs had signed the contract in reliance on defendants'

representations. Defendants contended third that the Act did not require proof of bad faith and that in any event the court in its discretion could find that plaintiffs had knowingly put defendants through a meritless lawsuit.

¶ 14 On May 31, 2018, the court held a hearing. Again, there is no transcript of the hearing or any substitute therefor. That day, the court entered an order stating that "based upon the findings and Illinois law as orally expressed by the court[,] it is hereby ordered that Defendants' ~~Motion for leave to petition this court for [illegible]~~ Petition for Fees and Costs as a prevailing party or otherwise under Illinois law, is hereby denied." Defendants filed a timely notice of appeal.

¶ 15 On appeal, defendants contend primarily that the trial court erred in refusing to hold that they were the prevailing party and that, as such, they were entitled to petition for and ultimately recover attorney fees and costs from plaintiffs. Defendants assert that both the contract and the Act are sufficient bases for an award. Defendants contend secondarily that their right to fees and costs was not forfeited by their failure to raise the matter in their answer; that section 5-109 of the Code of Civil Procedure (Code) (735 ILCS 5/5-109 (West 2016)) also entitled them to costs; and that they are entitled to fees and costs incurred in this appeal.

¶ 16 We note that, although defendants claim that the trial court erred in various respects, the record on appeal provides an incomplete account of what the trial court did, or why. As the appellants, defendants must provide a record that is sufficient to support their claim of error, and, lacking such a record, we must presume that the court's order conformed to the law and had a sufficient factual basis. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts arising from the incompleteness of the record must be resolved against the appellants. *Id.* at 392.

¶ 17 Here, we lack any reports of proceedings of (1) the trial, including not only the evidence heard on plaintiffs' complaint but defendants' oral motion relating to fees and costs; (2) the

March 21, 2018, hearing that resulted in the order granting defendants leave to file an amended motion; and (3) the May 31, 2018, hearing that resulted in the order that defendants challenge. As we shall explain, these deficiencies are crucial.

¶ 18 First, we shall consider the issues of law that can be decided even on this limited record. The primary one is whether either the contract or the Act affords a legal basis for recovering attorney fees and costs. The construction of the contract is a question of law that we review *de novo* (see *Fontana v. TLD Builders, Inc.,* 362 Ill. App. 3d 491, 510 (2005)), as is the construction of the Act (see *Kleczek v. Jorgensen*, 328 Ill. App. 3d 1012, 1019 (2002)).

¶ 19 We agree with defendants that the contractual provision, which allows a court to award fees and costs to the "prevailing party" in "any action with respect to this Contract," is legally sufficient to apply here. Directly on point is *Erlenbush*, in which the plaintiff prevailed on a claim of common-law fraud alleging that the defendant had induced her to buy real estate by failing to inform her that the house was infested with termites and affirmatively telling her that there was no such problem. *Erlenbush*, 353 Ill. App. 3d at 950. The plaintiff then petitioned for attorney fees and costs, relying on a contract provision identical to the one here. The trial court denied the petition. *Id.* at 951. The appellate court reversed, holding that the fraud claim had been " 'with respect to' the contract." *Id.* at 950. The court reasoned that the quoted language included more than merely actions for breach of the contract; thus, it was sufficient that the defendant's material misrepresentations were intended to, and did, induce the plaintiff to enter into the contract. *Id.* at 952-53.

¶ 20 This case is indistinguishable from *Erlenbush*. Plaintiffs relied in part on the same theory of recovery: fraud in the inducement to sign the real-estate contract. Also, because defendants

received a favorable judgment on all plaintiffs' claims, there can be no doubt that they were the "prevailing party."

¶ 21 We turn to the Act. Here, we agree with plaintiffs that *Miller* defeats defendants' reliance on section 55, at least on this incomplete record. In *Miller*, the court held that an award to either party under section 55 of the Act requires a showing of knowing misconduct on the part of the other party. *Miller*, 311 Ill. App. 3d at 976. The court reasoned that the purpose of fee-shifting provisions such as section 55 is to "curb abuses" (*id.* at 974) by deterring frivolous pleadings and bad-faith conduct (*id.* at 976). In agreement with this reasoning, and in the interest of a consistent body of law, we adopt this standard.

¶ 22 Defendants contend that, even if they were required to show bad faith or misconduct by plaintiffs, they did so, because plaintiffs "drag[ged] Defendants through litigation for over two years" without "having any meaningful evidence for their claims." But the trial court apparently disagreed, and we are in no position to say that it abused its discretion (see *id.).* Given that we have no record of the trial, defendants' assertion that no meaningful evidence supported the complaint's claims obviously fails under *Foutch*. Moreover, the record, incomplete as it is, does undermine the assertion. The arbitrator found in plaintiffs' favor and awarded them a substantial sum. Thus, defendants cannot rely on the Act as a basis for recovering attorney fees or costs.[1]

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[1] Also, we note that, although defendants blame plaintiffs for "drag[ging]" them through a two-year lawsuit, much of the "drag" was the result of defendants' actions. Not only did they reject the arbitrators' award, which was entered March 30, 2017, but they were responsible for much of the further prolongation of the suit by moving for fees and costs. Although defendants obviously had every right to undertake both of these actions, it makes little sense to blame plaintiffs for the time added to this suit, especially as the court's apparent dissatisfaction with

¶ 23 We hold next that defendants did not forfeit any right they had to petition for and receive attorney fees. They did not need to raise this claim in their answer. See *Suburban Auto*, 388 Ill. App. 3d at 97 (we held that trial court erred in concluding that it lacked jurisdiction to hear petition for fees, and we reversed order striking the fee petition). Here, the trial court allowed defendants to file their postjudgment motion, and we see no basis to disturb that decision.

¶ 24 Defendants also contend that, under section 5-109 of the Code, they were entitled to recover their costs. Defendants did raise this claim in their motion and amended motion. Section 5-109 states in pertinent part, "[i]f *** judgment is entered against the plaintiff, then judgment *shall* be entered in favor of [the] defendant to recover [the] defendant's costs against the plaintiff." (Emphasis added.) 735 ILCS 5/5-109 (West 2016). Thus, although the scope of an award under section 5-109 is within the trial court's discretion (*Riley Acquisitions, Inc. v. Drexler*, 408 Ill. App. 3d 397, 408 (2011)), "costs are mandatory under section 5-109" upon a proper application (*Employees' Retirement System of the State of Hawaii v. Clarion Partners, LLC*, 2017 IL App (1st) 161480, ¶ 30; see also *People v. Thomas*, 171 Ill. 2d 207, 222 (1996) (use of " 'shall' " in statute ordinarily means mandatory obligation)). Defendants' motion requested costs and thus they did not forfeit this issue.

¶ 25 We now consider where the foregoing leaves us. There was a legal basis for awarding both attorney fees (the contract) and costs (section 5-109 of the Code). However, the record contains no actual petition for either one. Although the trial court denied defendants relief on this matter, we do not know the basis of this decision.

¶ 26 Indeed, on this record, we hesitate to say precisely what the court denied. Defendants contend that the court refused to find that they were the "prevailing party," which they assert was

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defendants' original fee-related motion prolonged the case.

a prerequisite to granting leave to file an actual petition for attorney fees and costs. The record, such as it is, casts doubt on this. It is not merely that we do not know anything that was said at any of the pertinent hearings. A further problem is the challenged order itself. It is inconsistent with defendants' characterization of it.

¶ 27 The order originally stated, "Defendants' motion for leave to petition this court for [illegible] & Attorney's Fees And Costs as a prevailing party or otherwise under Illinois law is hereby denied." However, the court revised the order to read, "Defendants' Petition for Attorney's Fees And Costs as a prevailing party or otherwise under Illinois law, is hereby denied." The original draft supports defendants' contention that the court did no more than deny their motion to find a basis to file an actual petition for fees and costs. But the revised order refutes this contention. It states that the court denied defendants' "*Petition* for Attorney's Fees And Costs." (Emphasis added.)

¶ 28 If the court intended to do no more than deny defendants' postjudgment motion, with no actual fee petition before it, why did it intentionally strike out language that said so and substitute language that plainly implied the opposite? Despite defendants' strenuous contentions otherwise, we must conclude that they did submit, and the court did consider, an actual petition for fees and costs and found it insufficient. Of course, there are many possible reasons why the petition was found insufficient even if defendants had had a legal basis on which to file it. See *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 985-90 (1987).

¶ 29 Even if our reading of the court's order is not compelled, it is at least plausible. Thus, the best that defendants can claim is that the record is ambiguous. Under *Foutch*, we must resolve the ambiguity against them and presume that the court's order was consistent with the law and whatever facts it heard. Therefore, we cannot disturb the judgment.

¶ 30 As we deny defendants any relief from the trial court's judgment, we also deny them any attorney fees or costs associated with this appeal.

¶ 31 The judgment of the circuit court of Lake County is affirmed.

¶ 32 Affirmed.