2019 IL App (1st) 180476

SIXTH DIVISION
March 29, 2019

No. 1-18-0476

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TIM'S SNOWPLOWING, INC.,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 15 M1 131759
	)	
SOUTHPOINT NURSING AND REHABILIATION	)	
CENTER, LLC,	)	Honorable Daniel P. Duffy,
	)	Judge Presiding.
Defendant-Appellee.	)	

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held***: In this breach of contract case, we affirm the judgment entered in favor of the defendant following trial. The plaintiff-appellant failed to submit a sufficient record on appeal for this court to review the issues presented. Additionally, the appellant's brief omitted material required by the Illinois Supreme Court Rules.

¶ 2 In November, 2014, plaintiff Tim's Snowplowing, Inc. and defendant Southpoint Nursing and Rehabilitation Center, LLC entered into a three-year contract under which Tim's would provide snowplowing services for Southpoint's nursing home property in Chicago. The base cost for the services was $11,475 per year. Tim's would charge Southpoint additional amounts if

snowfall was especially severe and extra plowing was required. The contract specified that Tim's would plow Southpoint's property whenever a specified amount of snow had fallen and would continue until the snowfall had stopped.

¶ 3 The relationship between the parties soured and Tim's sued Southpoint for breach of contract. According to the single-count amended breach of contract complaint at issue in this appeal (complaint), Southpoint failed to pay the monthly base charge for the first two months of the contract, November and December, 2015. Notwithstanding this lack of payment, Tim's alleged it removed snow from the Southpoint property during a blizzard which began on January 31, 2015. A few days later, Southpoint sent a "written complaint" to Tim's, expressing its dissatisfaction with Tim's services during the blizzard and providing notice of its unilateral termination of the contract. Tim's responded, stating that Southpoint's termination was ineffective because Southpoint failed to provide a "Corrective Action Request" as required by the contract. The complaint alleges that the parties did "schedule" a Corrective Action Request meeting and that Tim's provided snowplowing services to Southpoint during the remainder of the winter season despite Southpoint's non-payment. In October, 2015, Tim's sent a notice of termination to Southpoint asserting that Southpoint owed $33,244.88, which was significantly higher than the amount past due. Tim's alleged that Southpoint's early termination of the three-year contract triggered various penalty and liquidated damage clauses in the contract.

¶ 4 Southpoint's answer contained six affirmative defenses. Two are relevant to this appeal: (1) liquidated damages were inappropriate because Tim's damages were "easily discernible"; and (2) the contract was "a commercially unreasonable contract of adhesion, and containing essential terms, conditions and provisions in its printed contractual documents that are completely illegible and unintelligible." After the parties engaged in motion practice and

exchanged discovery, the circuit court conducted a bench trial on the complaint. The court later issued a memorandum order stating that the "principal issue in contention is whether the liquidated damages provision of the contract is enforceable in light of Southpoint's attempt to terminate the contract." The court explained that both the liquidated damages clause and cancellation provision were set out on an attached page in 2-point type "much too small to be termed 'fine print' " such that "reading all but the headers is nearly impossible." The court noted that the clauses "had to be enlarged—substantially—to permit [a witness] to read it" while testifying. The court found that the illegibility of these clauses raised a valid defense of unconscionability, such that Tim's was not entitled to the portion of damages attributable to them. More specifically, the court found that there could not have been a meeting of the minds of the parties with respect to provisions which were illegible and incomprehensible.

¶ 5 The court then considered whether Southpoint owed anything to Tim's for services actually provided under the basic contract, stripped of the invalid penalty provisions. The court stated—in summary—that the evidence demonstrated that Tim's had subcontracted plowing on Southpoint's property to a subcontractor, and that no evidence was adduced that "the subcontractor (who was not called during the trial) *ever* provided services of any kind at the facility." (Emphasis in original.) Additionally, the court found that there was conflicting evidence regarding "whether service of any kind was provided during the snowstorm (or otherwise)" and resolved that conflict in favor of Southpoint, "finding credible Southpoint's proofs as to the failure of Tim's Snowplowing to perform under the contract." Therefore, the court found that plaintiff failed to meet its burden of proof that it performed its duties under the contract and rendered judgment for Southpoint. Tim's moved for reconsideration as to both issues, but the court denied that motion. This appeal followed.

¶ 6 On appeal, Tim's asserts that the circuit court erred by finding that the contract provisions were unconscionable, and that the court's finding that there was insufficient evidence to demonstrate a breach was against the manifest weight of the evidence.

¶ 7 Illinois Supreme Court Rule 342 (eff. July 1, 2017) requires an appellant to set forth a number of items in an appendix. Tim's brief, however, contains no appendix at all. Therefore, this court has no index to the appellate record. The appendix also must contain copies of the orders being appealed and a copy of the notice of appeal. While these can be located in the 790-page record, they are not in an appendix. Tim's brief contains parallel citations to the appellate record and to something designated as "A.". No appendix appears in the electronic record, and the appendix would have been filed after the transition date when all pleadings, including the appendix, were required to be filed electronically in this court. We requested that the clerk of this court review the paper files to ensure that the appendix was not mis-filed or that Tim's had not somehow filed the appendix on paper, but the search was not successful.

¶ 8 More crucial, though, is the omission of a valid copy of the report of proceedings—commonly called the transcript—of the trial. Supreme Court Rules 321 and 324 require an appellant to provide a complete record on appeal. See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994); Ill. S. Ct. R. 324 (eff. July 1, 2017). Our supreme court "has long held that in order to support a claim of error on appeal the appellant has the burden to present a sufficiently complete record." *Webster v. Hartman*, 195 Ill. 2d 426 (2001) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). "In fact, '[f]rom the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant.' " *Id.* (quoting *Foutch*, 99 Ill. 2d at 391). "Where the issue on appeal relates to the conduct of a hearing or proceeding, this issue is not subject to review absent a report or record of

the proceeding." *Id.* Instead, we must presume that the orders entered by the court were in conformity with the law and had a sufficient factual basis. *Id.*

¶ 9 Under Supreme Court Rule 323(a), the report of proceedings consists of "evidence, oral rulings of the trial judge, a brief statement of the trial judge of the reasons for his decision, and any other proceedings that the party submitting it desires to have incorporated in the record on appeal." Ill. S. Ct. R. 323(a) (eff. July 1, 2017). Further, the report of proceedings "shall include all the evidence pertinent to the issues on appeal." *Id.* If a verbatim transcript is unavailable, the appellant may file an acceptable substitute, such as a bystander's report or an agreed statement of facts. Ill. S. Ct. R. 323(c) (eff. Dec.13, 2005). "A post-trial motion is not a substitute for a report of proceedings." *Altek, Inc. v. Vulcan Tube and Metals Co.*, 79 Ill. App. 3d 226, 229 (1979).

¶ 10 The Illinois Supreme Court rules establish strict protocols regarding transcripts included in an appellate record. Before a transcript is made part of the court record, the court reporting personnel must "notify all parties that the report of proceedings has been completed and filed with the clerk of the circuit court." Ill. Sup. Ct. R. 323(b) (eff. July 1, 2017). Under this rule, only the court reporter, not a litigant or a litigant's counsel, may submit a transcript to the clerk of the circuit court for inclusion in the appellate record. The transcript, exhibits, and common law record are each filed separately. The court reporter files the transcript; the clerk of the circuit court prepares the other sections and transmits them to this court. See Ill. Sup. Ct. R. 325 (eff. July 1, 2017). However, before sending the court reporter's submitted transcript to this court, the clerk of the circuit court certifies it as having been duly filed under Rule 324. If a party objects to the accuracy of the transcript, Rule 329 provides a mechanism for the circuit court to resolve that dispute and correct the record if necessary. Ill. Sup. Ct. R. 329 (eff. July 1, 2017). Nothing in

Rule 323(b) allows a party to rely on copies of transcripts which are simply contained in the record because they were exhibits to motions.

¶ 11 There is a transcript of the trial included in the common law record, as an attachment to the motion to reconsider. However, this transcript was not submitted by the court reporter herself to the circuit court, and they were not filed pursuant to Rule 323(a). As such, it is insufficient for review of the evidentiary issues raised on appeal. See *W.E. Mundy Landscaping and Garden Center, Inc. v. Hish*, 187 Ill. App. 3d 164, 166 (1989) ("A properly authenticated report of proceedings is essential to the presentation of a record of sufficient completeness to permit a challenge to the evidence on the issues raised at trial.").

¶ 12 Every issue presented on appeal relates directly to the testimony presented at trial. From our review of the parties' submissions and the record, it is evident that we cannot review the issues relating to whether the evidence supported the court's findings and the bases for the circuit court's rulings on evidentiary issues without a proper record of those proceedings. See *Corral v. Mervis Industries*, 217 Ill. 2d 144, 156 (2005).

¶ 13 Compounding the problem is the fact that the trial exhibits are completely missing from the record. The unofficial trial transcript reflects that six exhibits, including the actual contract containing the allegedly illegible text and spreadsheets containing calculations of damages, were proffered at trial. While a copy of the contract is attached to the complaint in the record and various motions, we cannot be certain that it is the same contract admitted at trial, or that the trial exhibit has the same reproduction quality as the specimens in the record. The copy attached to the complaint in the record is essentially an array of pixels, and is almost completely illegible even when enlarged to 400% of the original size. The trial transcript contains a notation indicating that "EXHIBITS [were] RETAINED BY COUNSEL", but at the end of the trial, the

court stated that it would retain the exhibits. Exhibits admitted at trial should be kept by the court, not by counsel. Supreme Court Rule 324 specifically provides that the clerk of the circuit court shall prepare a *separate* section (volume) of record containing only trial exhibits. For these reasons, we are compelled to affirm the judgment below for lack of an adequate record.

¶ 14 This result might seem hypertechnical and harsh, but we note that the history of this appeal justifies it. On June 1, 2018, Tim's filed a motion in this court "for leave to incorporate transcript into the report [sic] of proceedings." The transcript at issue was not the crucial trial transcript, but the transcript of the arguments on the motion to reconsider. This court denied the motion, noting that it should be re-filed after being certified by the clerk of the circuit court. Thus, this court put Tim's on notice regarding the need to follow the Supreme Court rules' requirements for reports of proceedings. On June 22, 2018, Tim's filed the same motion, this time containing a letter on the letterhead of the court reporting agency addressed to the Clerk of the Circuit Court, stating that the agency had electronically filed the transcript of the hearing on the motion to reconsider with the clerk. Again, this court denied the motion, noting there was no separate certified record presented, "only attached to motion as exhibit." On September 18, the transcript of the arguments on the motion to reconsider was finally filed in the proper manner, bearing the certification of the clerk of the circuit court of Cook County and a stipulation signed by both attorneys stating that they agreed that the transcript could be filed without further notice or certification by the court itself.

¶ 15 Based on this history, Tim's should have realized that it could not rely on the trial transcript attached to the motion to reconsider to demonstrate error on appeal. We must therefore reject plaintiffs' claims of error and affirm the judgment below. *Foutch*, 99 Ill. 2d at 391-92.

¶ 16 As an aside, we note that: (1) based on the copies in the record, the page of the contract containing the liquidated damage provisions at issue was, as the circuit court found, so illegible as to preclude its enforcement; and (2) notwithstanding Tim's assertion that a witness for Southpoint admitted that several months' invoices were valid, the unofficial transcript reveals that Tim's never did produce evidence that its subcontractor actually plowed the Southpoint property. Resolving the conflict in this evidence was the province of the trial court, which we do not disturb. See *In re Marriage of Durante*, 201 Ill. App. 3d 376, 382 (1990) ("*** it is the circuit court's function to resolve conflicting testimony by assessing the credibility of witnesses and the weight to be accorded to their testimony. A court's finding will not be disturbed unless it is against the manifest weight of the evidence.").

¶ 17 Affirmed.