

No. 1-10-2455

**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).

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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R & J CONSTRUCTION SUPPLY COMPANY, INC.,	)	Appeal from the
	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09 M1 102620
	)	
TOM NEWCOMER and LINDA NEWCOMER, each individually and d/b/a Glenar Construction,	)	Honorable
	)	Sidney A. Jones,
	)	Judge Presiding.
Defendant-Appellee.	)	

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JUSTICE STERBA delivered the judgment of the court.  
Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in overruling plaintiff's objections at trial where the testimony offered during trial did not contradict the facts deemed admitted pursuant to Illinois Supreme Court Rule 216. The trial court's finding that no contract existed between plaintiff and defendant was not against the manifest weight of the evidence because defendant did not participate in the business of the company that ordered and accepted goods from plaintiff.

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¶ 2 Plaintiff R&J Construction Supply Company, Inc. (plaintiff) brought a one count complaint against Tom Newcomer (Tom) and his wife, Linda Newcomer (defendant), individually and doing business as Glenar Construction (Glenar), to recover damages it suffered from their breach of contract for the sale of goods. Tom received a discharge in bankruptcy, and was dismissed as a defendant. Plaintiff appeals the trial court's entry of judgment in defendant's favor. On appeal, plaintiff contends that the trial court erred by refusing to acknowledge the facts deemed admitted under Illinois Supreme Court Rule 216 (Ill. S. Ct. R. 216 (eff. Aug. 1, 1985) (hereinafter Rule 216)). Plaintiff also contends that the trial court erred in failing to find that a contract existed between it and defendant. Defendant filed a cross-appeal claiming that the trial court erred in denying her motion for an extension of time to certify her response to plaintiff's request to admit facts. For the reasons that follow, we affirm the trial court's judgment.

¶ 3 *Background*

¶ 4 On January 12, 2009, plaintiff brought this breach of contract action against defendant seeking damages in the amount of \$21,222.69, plus 1½% interest per month on unpaid balances. Plaintiff is in the business of selling and renting tools, supplies, equipment and materials to customers in the construction, building and remodeling businesses. In the complaint, plaintiff alleged that defendant performs construction, repair and remodeling work. According to the complaint, on April 9, 2008 and thereafter defendant purchased from plaintiff tools, equipment and supplies, and rented equipment and tools. Plaintiff delivered these items to defendant and her agents and employees. Plaintiff alleged that defendant promised to pay the agreed charges

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relating to these purchases and rentals and plaintiff billed and invoiced defendant accordingly.

Defendant did not remit payment.

¶ 5 On May 26, 2009, defendant filed an answer denying the allegations set forth in the complaint and alleging insufficient knowledge to address the assertions relating to the nature of plaintiff's business. On May 6, 2010, plaintiff issued its Rule 216 Request to Admit Facts and Genuineness of Documents (RTA). Defendant filed a response bearing a date of May 22, 2009, but the response did not contain a file stamp indicating that it was filed with the circuit court. Plaintiff filed a motion to strike defendant's response to the RTA because the response was not verified as required by Rule 216, and the response did not bear a file stamp. On July 10, 2009, defendant filed a response to the motion to strike alleging that the failure to file a response to the RTA is not grounds to deem the requested facts admitted, and she further filed a motion for extension of time to certify her response to plaintiff's RTA. The trial court granted plaintiff's motion to deem the facts contained in the RTA admitted. As a result of the trial court's ruling, the following facts were deemed admitted:

1. "Exhibit A attached hereto constitutes true and accurate copies of invoices sent to Newcomer by Supply.
2. Exhibit B attached hereto constitutes true and accurate copies of delivery tickets confirming the delivery of goods and supplies to Newcomer, her agents, or employees, from Supply.

3. Supply prepared and delivered the following, presented in Exhibit A, to Newcomer, her agents, or employees, for payment on or about the dates indicated:

<u>Date</u>	<u>Invoice Number</u>	<u>Amount</u>
4/15/2008	708299	\$2,990.86
6/9/2008	725717	\$1,864.61
6/9/2008	725718	\$6,836.64
6/26/2008	731407	\$4,281.71
7/17/2008	737801	\$5,039.04
7/20/2008	738440	\$209.83

4. Representatives of Supply contacted Newcomer for the payment of outstanding unpaid invoices on the following dates:

September 25, 2007; September 28, 2007; October 16, 2007; October 29, 2007; October 30, 2007; November 9, 2007; December 10, 2007; December 11, 2007; January 29, 2008; February 20, 2008; February 27, 2008; March 3, 2008; March 17, 2008; April 2, 2008; August 20, 2008; September 15, 2008; September 20, 2008.

5. Newcomer has not denied personal liability for Supply's outstanding unpaid invoices in any phone conversation with a representative of Supply.
6. Newcomer has not denied personal liability for Supply's outstanding unpaid invoices in any letter or other writing delivered to Supply."

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¶ 6 Defendant filed a motion for summary judgment, which the trial court denied. Prior to trial, plaintiff filed a motion *in limine* to bar evidence contradicting the facts deemed admitted. The trial court denied plaintiff's motion stating, "if something is inconsistent with what they did before, you can hit them over the head with it." Plaintiff and defendant each called a witness to testify at trial.

¶ 7 Leigh Hamm (Hamm) testified on plaintiff's behalf. Hamm was plaintiff's general manager and was responsible for supervising the sale of goods, delivery of sold goods and the collection and payment of invoices. Hamm explained the normal procedures used in plaintiff's business. A customer telephones plaintiff and places an order for a type and quantity of goods, and provides a delivery address for the goods. Plaintiff delivers the goods along with a delivery ticket, which typically is signed by the customer. After delivery, the delivery ticket is returned to one of plaintiff's locations. Based on the information on the delivery ticket, plaintiff generates and issues an invoice to the customer.

¶ 8 During cross-examination, Hamm stated that he did not know why the name on the delivery tickets was changed from "Glenar Construction" to "Glenar Construction, Tom or Linda." Hamm also testified that he had no knowledge of ever taking an order from defendant, defendant ever asking for the goods to be delivered, or defendant ever saying she would send payment for the delivered goods. Hamm stated that the invoices and delivery tickets are the contracts plaintiff maintains with its customers. Plaintiff entered "Exhibit A" into evidence. Hamm indicated that "Exhibit A" represented delivery tickets that were delivered to Glenar at 1766 Long Valley Road. Unless a customer picks up the ordered materials, delivery tickets are

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always delivered to the job site. Hamm acknowledged that defendant did not sign any of the delivery tickets in "Exhibit A." Plaintiff's counsel objected to the following question: "Now, referring to Plaintiff's Group Exhibit A, is it your testimony today that these invoices were delivered to Linda Newcomer?" Plaintiff's counsel objected on the grounds that the question was already admitted to in RTA 3, which stated that "Supply prepared and delivered the following [invoices] to Linda Newcomer, her agents, or employees, for payment on or about the dates indicated." The trial court overruled the objection. Hamm responded to the posed question by stating: "They were to Glenar Construction." Regarding the information on the invoices, Hamm stated that an employee would have changed "Glenar Construction" to "Glenar Construction, Tom or Linda" in plaintiff's computer. Hamm did not make that change and he did not know who did make the change. Plaintiff's counsel also objected to the following question: "Mr. Hamm, how are the - what is the basis upon your belief that these invoices were delivered to Mrs. Newcomer?" Plaintiff's counsel objected because the question contradicted RTA 3, which again stated "Supply prepared and delivered the following [invoices] to Linda Newcomer, her agents, or employees, for payment on or about the dates indicated." The trial court overruled the objection because the question asked Hamm about his belief, which was not addressed in the RTA. Hamm responded that he believed the invoices were delivered to defendant because they were addressed to her and then placed in the mail.

¶ 9 At the close of plaintiff's evidence, defendant moved for a directed verdict claiming that plaintiff failed to establish a *prima facie* case for a breach of contract claim. The trial court denied defendant's motion.

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¶ 10 Tom testified that he was at all times the sole shareholder, officer and director of Glenar, and at no time was defendant a shareholder, officer or employee. Tom testified that he was the only individual ever to order goods from plaintiff. The ordered goods would then be shipped to job sites around Chicago and the suburbs, but the goods would not be shipped to his home. Tom would meet plaintiff's delivery truck at a job site and he would unload the ordered goods. Tom verified that whatever he ordered was delivered. He would also sign plaintiff's delivery tickets and receipts. Occasionally, Tom would authorize someone else to sign the delivery tickets. Defendant was never on any job site to sign a delivery ticket, and she did not know where the job sites were located. Plaintiff's counsel objected to the following question posed to Tom: "To the best of your knowledge, did Linda ever accept goods from R & J?" Plaintiff's counsel objected to the question because it contradicted RTA 2, which stated that "Exhibit B attached hereto constitutes true and accurate copies of delivery tickets confirming the delivery of goods and supplies to Newcomer, her agents, or employees, from Supply." The trial court overruled the objection because the RTA "establishes that the delivery tickets, themselves, are true and accurate copies." The trial court also referenced the RTA's "confirming the delivery" language by stating that "even though the delivery tickets confirm delivery in the mind of the generator of the documents, they do not stand by themselves as an acknowledgment of defendant having received the items." Tom responded to the question by answering, "No." To the best of Tom's knowledge, defendant never accepted goods from plaintiff.

¶ 11 On cross-examination, Tom stated that if he asked defendant for money, she would give him checks. If defendant issued checks to Tom's employees, she would have done so at his

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specific request. Tom testified that he would use defendant's debit card to purchase business materials if he was short on money. He also testified that defendant loaned him money for the business when he was running short on money, but he never told defendant the purpose for which the checks were being cashed, and he issued all of the checks himself. When defendant loaned money to Tom, Glenar would repay the loan to defendant. Defendant gave Tom more than 20 checks for an amount totaling approximately \$30,000. Defendant would provide Tom with a blank signed check and he would complete the remainder of the check, including the payee and the dollar amount. After completing the check, Tom would tell defendant the dollar amount of the check. Tom never gave defendant any information as to why he was issuing a check. Tom stated that defendant has a son who is also in the construction business, and when he was short on money, he would ask defendant for money. Tom never called plaintiff to question why defendant's name appeared on the invoices.

¶ 12 The trial court held that based on the totality of the circumstances, plaintiff failed to show that defendant was an active participant in Glenar's management and affairs, and therefore, no contract existed between plaintiff and defendant. Specifically, the trial court reasoned that neither the RTA, nor Hamm's testimony, established a contract between plaintiff and defendant. The trial court also stated that it was not unusual in a marriage for one spouse to loan money to the other spouse, and the loaning of money by itself is not enough to indicate active participation in a business. Thus, the trial court entered judgment in defendant's favor. Plaintiff timely appealed. Defendant timely filed a cross-appeal alleging that the trial court erred in denying her

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motion for an extension of time to verify her response to the RTA and deeming the facts in the RTA admitted.

¶ 13

*Analysis*

¶ 14 Plaintiff first contends that the trial court erred by not acknowledging the facts deemed admitted in the RTA during the course of the trial. Plaintiff objected three times at trial to testimony that plaintiff believed contradicted the RTA, but the trial court overruled the objections. First, plaintiff objected to defense counsel asking Hamm whether the invoices in “Exhibit A” were delivered to defendant because the question sought to elicit testimony that contradicted RTA 1 and 3, which plaintiff claims state that the invoices were delivered to defendant. Second, plaintiff objected to defense counsel asking Hamm what the basis was for his belief that the invoices were delivered to defendant because the question sought to elicit testimony that contradicted RTA 3, which plaintiff claims states that the invoices were prepared and delivered to defendant. Third, plaintiff objected to the trial court allowing Tom to testify that defendant did not accept goods from plaintiff because the testimony contradicted RTA 2, which plaintiff claims confirmed delivery of the goods to defendant. Plaintiff contends that the trial court erred by ignoring and misconstruing the RTA's plain language when it overruled its three objections at trial. Plaintiff claims that the facts deemed admitted establish that it delivered goods to defendant, invoiced defendant at her home address for the goods, identified defendant as a contracting party, contacted defendant 17 times for payment, and received no denial of liability from defendant. Thus, plaintiff claims that the facts deemed admitted establish a contract between it and defendant and defendant's breach of the contract.

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¶ 15 Although plaintiff contends the trial court ignored the facts in the RTA, the essence of plaintiff's contention is that the trial court misinterpreted the facts that were deemed admitted. Thus, on review, we must determine what facts set forth in the RTA were deemed admitted. In doing so, we will employ a *de novo* standard of review. See *Robertson v. Sky Chefs, Inc.*, 344 Ill. App. 3d 196, 199 (2003) (reviewing requests to admit to determine whether the statements are facts or legal conclusions requires a *de novo* standard of review).

¶ 16 Contrary to plaintiff's assertion, RTA 1 and 3 do not bar defense counsel's questioning of Hamm about whether the invoices in "Exhibit A" were delivered to defendant. RTA 1 states that the documents attached as "Exhibit A" are true and accurate copies of invoices that plaintiff sent to defendant. RTA 1 only establishes the genuineness of the documents attached as "Exhibit A." RTA 3 does not state that the invoices were delivered only to defendant, but instead, also states that the invoices were delivered to either defendant's "agents" or "employees." Thus, RTA 3 is unclear about whether the invoices were delivered to defendant, her "agents" or her "employees". It is also unclear whether defendant actually had any agents or employees, and, if so, what the duties were for an agent or employee. Moreover, plaintiff did not present evidence supporting the existence of an agency relationship involving defendant. Due to the uncertainty in RTA 3 regarding who the invoices were actually delivered to, the plain language of RTA 3 was not contradicted by asking Hamm whether the invoices were delivered specifically to defendant.

¶ 17 As to plaintiff's second objection, Hamm's answer addressing the basis for his belief that the invoices were delivered to defendant did not contradict RTA 3's plain language. RTA 3's language did not clearly state that the invoices were, in fact, delivered to defendant. Thus, the

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question to Hamm attempted to clarify to whom plaintiff delivered the invoices. Additionally, as the trial court stated, RTA 3 does not address Hamm's beliefs or the basis for his beliefs whereas the question posed to Hamm during trial specifically asked him "what is the basis upon your belief that these invoices were delivered to defendant." As a result, RTA 3's language was not contradicted by the admission of Hamm's testimony addressing the basis for his belief that the invoices were delivered to defendant.

¶ 18 Finally, allowing Tom to testify that defendant did not accept goods from plaintiff did not contradict RTA 2. The language of RTA 2 states: "Exhibit B attached hereto constitutes true and accurate copies of delivery tickets confirming the delivery of goods and supplies to Newcomer, her agents, or employees, from Supply." The trial court's interpretation of RTA 2 as stating only that the delivery tickets were true and accurate copies does not contradict RTA 2's plain language. RTA 2 does not state, as argued by plaintiff, that defendant accepted the goods. RTA 2's language stating "confirming the delivery" does not mean "confirming the receipt" or "confirming the acceptance." As the trial court noted, "even though the delivery tickets confirm delivery in the mind of the generator of the documents, they do not stand by themselves as an acknowledgment of defendant having received the items." The language in RTA 2 simply describes the delivery tickets' contents, but it does not state that defendant accepted or received the goods. The delivery of goods is not the equivalent of the receipt of goods. As a result, Tom's testimony that defendant never accepted goods from plaintiff does not contradict RTA 2's language.

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¶ 19 Also, RTA 4, 5 and 6 do not deem admitted the content of any conversations between plaintiff and defendant. RTA 4 states that plaintiff "contacted" defendant for payment of the invoices, but it does not state that a conversation ensued. RTA 5 and 6 only state that defendant has not denied personal liability for plaintiff's outstanding unpaid invoices in any phone conversation or in any writing. None of the facts deemed admitted establish that defendant admitted liability for the outstanding balances. Contrary to plaintiff's assertion, the trial court did not ignore admitted facts relating to plaintiff's conversation with defendant to arrange for payment of the invoices because such facts were not set forth in the RTAs. According to the RTA 4, plaintiff merely "contacted" defendant, but it is unknown whether plaintiff and defendant ever engaged in a discussion. Thus, the trial court did not ignore the facts deemed admitted in RTA 4, 5 and 6 when it ruled in defendant's favor.

¶ 20 In sum, the trial court did not err in overruling plaintiff's objections to the testimony offered during the trial. RTA 1 and 3 did not address Hamm's belief about whether the invoices were actually delivered to defendant, and they also were unclear as to whether defendant actually received the invoices. RTA 2 states the delivery tickets attached as an exhibit are true and accurate copies of delivery tickets confirming the *delivery* of the goods. Therefore, the trial court did not err in allowing Tom to testify that defendant did not *accept* goods from plaintiff. Also, the delivery of goods is not synonymous with the acceptance and receipt of goods. RTA 4, 5 and 6 do not detail the contents of any conversation taking place between plaintiff and defendant, and, in fact, do not even indicate that a conversation ever occurred. Here, the trial court adhered

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to the law of the case by reviewing and considering the RTA's language during the trial when it ruled on plaintiff's related objections and entered judgment in defendant's favor.

¶ 21 Plaintiff next contends that the trial court's finding that no contract existed between it and defendant was against the manifest weight of the evidence. Plaintiff claims that it proved it delivered goods to defendant, and prepared and delivered invoices to defendant after the goods were delivered to her. Plaintiff contends that defendant never provided a written objection to the shipped goods, which effectively resulted in an acceptance of the contract's terms that were set forth in the invoices and delivery tickets sent to her. Plaintiff also claims that Tom's testimony was not credible because, as defendant's husband, he had an inherent bias to minimize her involvement in the business. Plaintiff contends that Tom misrepresented defendant's involvement in the business because she funded the business, issued checks for materials, union benefits, and employee wages, and no record exists of Glenar or Tom repaying to her the borrowed money. Plaintiff further claims that the trial court erred in making assumptions regarding Tom's discharge in bankruptcy and Tom and defendant's marital relationship.

¶ 22 A contract for the sale of goods may generally be made in any manner sufficient to show an agreement between the parties. 810 ILCS 5/2-204(1) (West 2008). To form a valid contract, an offer, acceptance and consideration must be present. *A. Epstein & Sons Intern., Inc. v. Epstein Uhen Architects, Inc.*, 408 Ill. App. 3d 714, 720 (2011). An offer arises from the language parties use, and is present when an individual orders or offers to buy goods for prompt shipment. 810 ILCS 5/2-206(1) (West 2008). Acceptance occurs when the buyer “(a) after reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he

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will take or retain them in spite of their non-conformity; or (b) fails to make an effective rejection (subsection (1) of Section 2-602) after reasonable inspection; or (c) does any act inconsistent with the seller's ownership." 810 ILCS 5/2-606(1) (West 2008). Thus, if a plaintiff can prove by a preponderance of the evidence that the defendant ordered goods, accepted goods, agreed to pay for goods, or signed a contract for goods, then a contract for the sale of goods may exist. 810 ILCS 5/2-606, 810 ILCS 5/2-206, 810 ILCS 5/2-204. To bring a breach of contract claim, a plaintiff must show "the existence of a valid and enforceable contract, performance of the contract by the plaintiff, breach of contract by the defendant, and resulting injury to the plaintiff." *Carlton at the Lake, Inc. v. Barber*, 401 Ill. App. 3d 528, 531 (2010).

¶ 23 This court reviews the trial court's finding regarding the existence of a contract adopting a manifest weight of the evidence standard. *In re Gibson-Terry & Terry*, 325 Ill. App. 3d 317, 322 (2001). A finding is "against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence." *Hye Ra Han v. Holloway*, 408 Ill. App. 3d 387, 389 (2011). Here, the trial court's finding that no contract existed between plaintiff and defendant was not against the manifest weight of the evidence.

¶ 24 As a preliminary matter, we must determine whether the statute of frauds applies to the case at bar. The sale of goods falls within the scope of article 2 of the Uniform Commercial Code (UCC). *Jannusch v. Naffziger*, 379 Ill. App. 3d 381, 385 (2008). Under the UCC, "contracts for the sale of goods in excess of \$500 [must] be in writing." *Id.* This requirement is commonly known as the statute of frauds. See *Id.* An exception to the statute of frauds exists for

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oral contracts that have been fully performed. The full performance doctrine " 'provides that where one party completely performs a contract, the contract is enforceable and the statute of frauds may not be used as a defense.' " *Anderson v. Kohler*, 397 Ill. App. 3d 773, 785 (2009), quoting *Greenberger, Krauss & Tenenbaum v. Catalfo*, 293 Ill. App. 3d 88, 96 (1997). When a party performs his portion of an alleged oral contract, courts recognize that the performance strongly indicates the existence of a contract. *Id.* In the instant case, even though the value of the goods shipped on each of the invoices exceeded \$500, the statute of frauds is inapplicable. Hamm stated that customers place telephone orders for plaintiff's goods, and delivery tickets are generated for the ordered goods. Based on the information on the delivery tickets, plaintiff generates an invoice. Tom testified that he ordered goods on behalf of Glenar from plaintiff and that either he signed the delivery tickets or he authorized another individual to sign the delivery tickets acknowledging delivery of plaintiff's goods. Tom also stated that he helped unload the ordered goods from plaintiff's delivery truck and verified the delivered items against his order. Tom accepted plaintiff's goods. Thus, plaintiff performed its obligations under the oral contract for the purchase of goods made by Tom when plaintiff delivered and Tom accepted the ordered goods. As such, enforcement of the oral contract will not be barred by the statute of frauds. 810 ILCS 5/2-201(3) (West 2008). This court must determine, however, whether the liability associated with the goods ordered, delivered and accepted by Tom on behalf of Glenar may be attributable to defendant.

¶ 25 The trial court's holding that plaintiff did not meet its burden of showing that defendant was "an active participant in the management and affairs of Glenar Construction" was not against

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the manifest weight of the evidence. Defendant's only association with Glenar was loaning money to her husband so that he could continue to operate the company. Tom testified that he issued all company checks and defendant was never involved in the business, but she occasionally loaned him money. Defendant issued checks to Tom's employees only upon Tom's specific request. Tom stated that even though defendant's steady monthly income was \$1,100 in disability payments, she received funds from other sources. Tom also testified that he was the only one to order goods from plaintiff, and that the goods he ordered would be delivered to Glenar's job site, but never to defendant's home. Tom further testified that defendant was never at a job site to sign a delivery ticket and defendant did not know where Glenar's job sites were located. When plaintiff's delivery truck arrived at a job site, Tom unloaded the ordered goods and signed the delivery tickets or authorize another individual, who was not defendant, to sign the delivery tickets. Tom stated that he, at all times, was the sole shareholder, officer and director of Glenar.

¶ 26 Plaintiff presented Hamm's testimony to support its claim that a contract existed between plaintiff and defendant. Hamm's testimony failed to establish that defendant ever ordered goods from plaintiff, received goods from plaintiff, accepted goods from plaintiff, agreed to pay for goods from plaintiff, or signed any document submitted by plaintiff. Moreover, Hamm stated that he did not know why defendant's name was added to the invoices and delivery tickets. Thus, Hamm's testimony fails to establish the elements of either offer or acceptance as they relate to actions undertaken by defendant. Without the existence of a contract, there can be no breach of a contract. The trial court's entry of judgment in defendant's favor regarding plaintiff's breach

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of contract claim is supported by the fact that the record is devoid of facts establishing that defendant in any way ordered or accepted goods from plaintiff.

¶ 27 Moreover, the facts deemed admitted do not establish the existence of a contract. RTA 1 and 3 establish that the invoices attached as an exhibit bearing defendant's name were true and accurate copies, and were delivered to either her, her agents, or her employees. Mere delivery of an invoice, however, does not create an enforceable contract, unless there is some evidence of an oral agreement. Here, plaintiff has not offered a scintilla of evidence that an oral agreement existed between it and defendant. In fact, Hamm testified that he never took an order for goods from defendant. RTA 2 establishes that the delivery tickets containing defendant's name were true and accurate copies. RTA 2 states that the delivery tickets confirmed the delivery of the goods and supplies to defendant, her agents or employees, but this RTA does not state that defendant herself actually received or accepted the goods. RTA 4, 5, and 6 establish that plaintiff contacted defendant 17 times, and that defendant has not denied liability for outstanding unpaid invoices, either orally or in writing. As the trial court noted, the mere absence of a denial does not create liability. The trial court did not ignore the facts in the RTA, which do not establish the elements of an enforceable contract between plaintiff and defendant. Moreover, the delivery tickets and invoices do not identify defendant as d/b/a Glenar. Rather, the delivery tickets and invoices list "Tom or Linda" underneath "Glenar Construction." Listing defendant's name below Glenar fails to establish that defendant operated Glenar or was actively involved in the business by ordering and accepting goods from plaintiff, or by any other means.

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¶ 28 Plaintiff contends that Tom's testimony was unreliable and that he was biased toward defendant based on their marital relationship, and his testimony that he was the only one who issued checks on behalf of the company was impeached. Consequently, plaintiff contends the trial court erred in relying on Tom's testimony to find defendant was not actively involved in Glenar's operations. We disagree.

¶ 29 In a bench trial, the judge determines the credibility of the witnesses as the court is in a unique position to observe the demeanor of the witnesses, assess their credibility, and determine whether they have any motivation to be less than truthful. *People v. Welacha*, 186 Ill. App. 3d 860, 864 (1989). This court does not have the same opportunity to observe the witnesses and should not substitute its judgment for that of the trial court unless the determination of credibility is improbable or implausible. *People v. Kradenych*, 83 Ill. App. 3d 547, 552 (1980). Here, the record does not support a conclusion that the trial court's determination of Tom's credibility was improbable or implausible. Tom's marital relationship with defendant does not automatically render his testimony unreliable. Plaintiff also attempted to impeach Tom by showing that he was not the only individual who issued checks on behalf of Glenar. The trial court recognized plaintiff's attempt to question Tom regarding checks that defendant wrote, and allowed plaintiff to question him about the checks plaintiff deemed most significant. We defer to the trial court's determination of Tom's credibility and the weight it afforded to his testimony.

¶ 30 Finally, although the trial court mentioned defendant's marriage to Tom and Tom's personal bankruptcy before rendering its ruling, there is no indication that these considerations were determinative factors in the trial court's ruling in defendant's favor. Also, defendant's failure to testify was not a determinative factor for the trial court in reaching its decision and the

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trial court did not make adverse inferences against plaintiff on the basis that defendant did not testify. The trial court merely noted that defendant was available to testify, even as an adverse witness, regarding her alleged liability for the outstanding balance. The trial court's entry of judgment in defendant's favor was based on the totality of the circumstances. Given the lack of evidence presented by plaintiff establishing a contractual relationship between it and defendant, the trial court's ruling in defendant's favor was not against the manifest weight of the evidence.

¶ 31 In conclusion, the trial court did not misinterpret the plain language of the RTA and it did not err in overruling plaintiff's related objections at trial. The trial court's finding that there was no contract between plaintiff and defendant was not against the manifest weight of the evidence. Accordingly, we affirm the trial court. Since the trial court's judgment is affirmed, we need not address defendant's cross-appeal seeking review of the trial court's order striking her response to the RTA and deeming the facts admitted.

¶ 32 Affirmed.