

2011 IL App (2d) 100547  
No. 2-10-0547  
Order filed December 7, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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JOSEPH DAHER and KATINA DAHER,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiffs and Counter-defendants-	)	
Appellees,	)	
	)	
v.	)	No. 08-MR-305
	)	
HORIZON CONSULTING GROUP, INC.,	)	
	)	Honorable
Defendant and Counter-plaintiff-	)	Raymond J. McKoski,
Appellant.	)	Judge, Presiding.

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JUSTICE BOWMAN delivered the judgment of the court.  
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment

**ORDER**

*Held:* The trial court's judgment that defendant breached the parties' contract was not against the manifest weight of the evidence because plaintiffs did not unequivocally terminate the contract prior to the expiration of defendant's 10-day period to cure the alleged breach.

¶ 1 Following a bench trial, plaintiffs, Joseph and Katina Daher, were awarded \$58,629 on their breach-of-contract claim against defendant, Horizon Consulting Group, Inc. The trial court denied defendant's breach-of-contract counterclaim. Defendant appeals, arguing that the trial court erred

in finding that defendant breached the contract and that plaintiffs did not breach the contract. For the reasons that follow, we affirm.

¶ 2

## I. BACKGROUND

¶ 3 The evidence presented at trial tended to prove the following. In August 2007, the parties entered into a contract under which defendant would serve as the general contractor for a project that included tearing down an existing house and building a new one on property owned by plaintiffs.

¶ 4 The relevant portion of the contract provided the following with respect to payment: “For the

first 4 Draws, Contractor shall provide sworn statements and supporting documentation, appropriate lien waivers of sub-contractors as reasonably required by Owner’s Lender and the title company, for completed work.” In addition, the contract provided, “Owners shall authorize the construction lender to make payments \*\*\* directly to the Contractor.”

¶ 5 In mid-December 2007, defendant submitted its third draw request to plaintiffs’ lender and title company. The total amount requested was \$65,451.93. On December 20, plaintiffs authorized the release of \$65,451.93 from escrow, subject to an inspection. That same day, the inspector recommended release of \$30,976.93. The inspector did not recommend releasing the requested \$32,000 for the roof, as the roof had not been completed. Upon learning that the roof had not been completed, plaintiffs withdrew their authorization for the entire request. In January 2008, after observing that some work on the roof and plumbing had been done, plaintiffs released \$44,000 to defendant, composed of \$32,000 for the roof and \$12,000 for the plumbing. Plaintiffs subsequently stopped payment on \$32,000 of the \$44,000.

¶ 6 On January 23, 2008, defendant sent plaintiffs an e-mail stating that it would be unable to

continue work on the project unless the third draw request was paid in full. On the same day, plaintiffs responded that they believed defendant was in default under the contract. According to the terms of the contract, plaintiffs were required to abide by the following procedure in the case of defendant's default.

“Upon Contractor’s default of any term or provision of this Contract, Owners shall provide written notice to Contractor describing that provision of the Contract that Contractor has breached. If, after ten (10) business days following notice to Contractor, Contractor has not cured said default, Owners may terminate this Contract and pursue all rights and remedies.”

In accordance with that procedure, plaintiffs told defendant that they believed it was in default for two reasons: (1) the third draw request submitted by defendant included items that had not been completed and was not supported by appropriate documentation, and (2) defendant had indicated that it would not put in the windows as specified by the plans. Plaintiffs e-mail stated that:

“You are hereby given notice of these defaults and per the Contract, you have 10 business days to cure the same. If you do not, this notice shall serve as termination of the Contract immediately at the expiration of the 10 business days, on February 6. In order for you to remedy your defaults, you need to revise your draw request to include only those items that have been completed, or to complete the items requested and provide the supporting paperwork.”

¶7 Later that day (January 23), defendant sent plaintiffs an e-mail insisting that plaintiffs release the funds in order to continue the project. That same night, plaintiffs responded with an e-mail detailing what defendant needed to do in order to receive the full amount of the third draw request. In particular, plaintiffs requested the appropriate lien waivers because plaintiffs had received a lien

on the house from a gravel company. The next day, January 24, the parties exchanged two more e-mails that reiterated the parties' previously stated positions.

¶ 8 On January 25, defendant sent an e-mail threatening to stop all work at 5 p.m. that day "due to lack of funds." Defendant agreed to resume operations upon release of the third draw. At trial, the owner of defendant general contractor testified that he was aware that the contract stated that he would be in default for abandoning the project or otherwise ceasing operations. Defendant also admitted that he never provided plaintiffs with the requested documents.

¶ 9 In response to defendant's e-mail, plaintiffs sent the following e-mail to defendant that same day (January 25):

"It has become clear to me that we cannot resolve this conflict and I am not comfortable with you remaining on this project. So I am holding to my previous email [*sic*] when I informed you that the Contract is terminated. Given that you are not working on the project anyway, I propose immediate termination. Do you agree? I will be engaging a new contractor to finish this project. Our only task at this point then is tying up the loose ends of our relationship. Please advise."

¶ 10 At trial, plaintiff Joe Daher testified that "holding to my previous email" referred to his January 23 e-mail giving defendant 10 days to cure the default. By proposing immediate termination, plaintiff Daher testified that that was a "suggestion," and he "had a very precise question about that." Plaintiff Daher explained:

"I wanted to see if [defendant] wanted to leave or not. I wanted to make sure that if he wanted to save himself the ten days and save myself the ten days if he's willing to leave and he wanted to leave then he has these plans. Let's get on with it."

When asked if he was terminating the contract with this e-mail, plaintiff Daher answered no.

¶ 11 Defendant did not respond to plaintiffs' January 25 e-mail. Plaintiff Daher testified that based on defendant's earlier e-mail that he would stop work at 5 p.m. that day, he secured the site that night by changing the locks. Plaintiff Daher testified that he "locked everybody out because [defendant] abandoned the premises" and "because anybody could have gone in and it was my responsibility at that point." The owner of defendant general contractor offered contrary testimony, stating that although he had stopped working due to plaintiffs' failure to release the funds in the third draw, he had not "abandoned" the project on January 25 because his sign and permits were still hanging at the site.

Two days later, on January 27, plaintiffs sent defendant a follow-up e-mail that stated: "By way of this email [*sic*] I would like to confirm that the 10 day notice pursuant to your contract was initiated by my prior email [*sic*] to you dated January 23[,] 2008[,] will expire on February 6th 2008 [*sic*]. Be sure to provide all documents as previously requested by that date. It is our understanding that no work will be performed until the issue is resolved."

Plaintiff Daher testified that the January 27 e-mail was "just like a reset button. We're back to square one. You don't want to answer, you don't want to tell me what you want to do."

¶ 12 Defendant performed no further work on the project, and in April 2008, plaintiffs retained another contractor to complete the project.

¶ 13 The trial court awarded judgment to plaintiffs, reasoning as follows. Beginning with terms of the contract, the court noted that: (1) defendant was required to permit plaintiffs to view all documents related to the project upon plaintiffs' request; (2) defendant would be in default if it failed to perform any of the obligations under the contract; and (3) plaintiffs had to give defendant written notice of any default and 10 days to cure. The court then focused on the e-mail exchanges. On January 23, plaintiffs sent an e-mail demanding documents and giving defendant 10 days to cure.

On January 25, plaintiffs sent another e-mail stating that they were holding to their previous January 23 e-mail and proposing an immediate termination of the contract. On January 27, plaintiffs sent defendant another e-mail stating that the 10-day cure period would expire on February 6, 2008, and that they were still requesting the documents referred to in the January 23 e-mail. According to the court, defendant's failure to provide the requested documents violated its obligation under the contract and placed defendant in default. By failing to produce the documents within 10 days as requested in the January 23 e-mail, defendant failed to cure the default, which gave plaintiffs the right to terminate the contract. The court went on to say that the "e-mails taken together, altogether, indicate that the 10-day cure period was not ended" by plaintiffs' "January 25 e-mail, nor was the contract terminated on that date. If the defendant had produced the documents requested by February 6, 2008, the default would have been cured."

¶ 14 Defendant timely appealed.

¶ 15 **II. ANALYSIS**

¶ 16 On appeal, defendant argues that the trial court erred in finding that he breached the contract and in not finding that plaintiffs breached the contract. According to defendant, plaintiffs breached the contract by failing to tender payment on the third draw request and anticipatorily repudiated the contract by their e-mail of January 25, 2008, and by locking the property. The supreme court has summarized the doctrine of anticipatory repudiation as follows:

"The doctrine of anticipatory repudiation requires a clear manifestation of an intent not to perform the contract on the date of performance. The failure of the breaching party must be a total one which defeats or renders unattainable the object of the contract. [Citation.] That intention must be a definite and unequivocal manifestation that he will not render the promised performance when the time fixed for it in the contract arrives. [Citation.]

Doubtful and indefinite statements that performance may or may not take place are not enough to constitute anticipatory repudiation.” *In re Marriage of Olsen*, 124 Ill. 2d 19, 24 (1988).

When one party repudiates the contract, the other party is excused from further performance under the contract. *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1032 (2007). Moreover, a party’s repudiation may be used as a defense to a claim by the repudiating party that the nonrepudiating party breached the contract by failing to perform. *Tower Investors*, 371 Ill. App. 3d at 1032. Whether a party has anticipatorily repudiated the contract is a question of fact that must be determined on a case-by-case basis, and the determination of the trial court on the issue will not be disturbed unless it is against the manifest weight of the evidence. *Timmerman v. Grain Exchange, LLC*, 394 Ill. App. 3d 189, 201 (2009).

¶ 17 The central issue in this case is the effect of plaintiffs’ January 25, 2008, e-mail; namely, whether it served to anticipatorily repudiate the contract between the parties. For two reasons, we agree with the trial court that it did not. First, the language of the January 25 e-mail did not manifest a clear and unequivocal intent not to perform the remainder of the contract. Second, the context of this e-mail, when viewed in conjunction with the other e-mails and the parties’ testimony, supports the trial court’s determination.

¶ 18 The January 25 e-mail began by acknowledging the conflict in the relationship, and plaintiffs expressed discomfort in defendant remaining on the project. It stated that plaintiffs were holding to their previous e-mail, which had advised defendant that the contract would be terminated as of February 6 if the stated defaults were not cured. The January 25 e-mail then went on to say that because defendant was not working on the project anyway, plaintiffs *proposed* immediate termination, followed by the question, “Do you agree?” Recognizing that the parties would still

need to tie up the “loose ends of the relationship,” plaintiffs concluded the e-mail by again eliciting defendant’s input as to how to proceed: “Please advise.” By *proposing* immediate termination, and then asking if defendant agreed, and to please advise, plaintiffs’ e-mail did not manifest a clear, definite, and unequivocal intent to terminate the contract. Instead, as we explain, plaintiffs were attempting to figure out how defendant wished to proceed.

¶ 19 The context of the January 25 e-mail is important in this case. The exchange of e-mails started with defendant’s e-mail that it would be unable to continue work on the project unless plaintiffs honored its third draw request. Having reservations about what items had been completed on the house as well as which subcontractors had been paid, plaintiffs demanded supporting documentation for the third draw request, as was their right under the contract. Also pursuant to the contract, defendant was given 10 days to cure these defaults. It is undisputed that defendant never provided the requested documents. After two more e-mails were exchanged between the parties the next day, defendant e-mailed plaintiffs on January 25 and threatened to stop work at 5 p.m. that day, unless plaintiffs released the funds for the third draw. It was in response to this e-mail that plaintiffs sent the January 25 e-mail.

¶ 20 At trial, plaintiff Daher testified that by proposing immediate termination, it was a “suggestion” to determine if defendant wanted to waive the 10-day cure period referenced in the previous e-mail and simply walk away. See *Olsen*, 124 Ill. 2d at 25 (the party’s testimony and actions were relevant in determining whether the party intended to repudiate the contract). Plaintiff Daher explained that he was not terminating the contract with this e-mail but rather trying to ascertain defendant’s plans as to how to proceed. Plaintiff Daher’s explanation of the January 25 makes sense in relation to the e-mail he sent two days later. After defendant did not respond to plaintiffs’ January 25 e-mail, defendant sent a follow-up e-mail on January 27 again aimed at

ascertaining defendant's wishes regarding the contract. In this last e-mail, plaintiffs reiterated that the 10-day cure period would expire on February 6, unless defendant supplied the requested documents. For this reason, the trial court determined that the "e-mails taken together, *altogether*, indicate that the 10-day cure period was not ended by" the January 25 e-mail, "nor was the contract terminated on that date." (Emphasis added.)

¶ 21 The fact that plaintiffs changed the locks on the property does not alter this result. Plaintiff Daher testified at trial that he changed the locks in response to defendant's decision to stop work on the project on January 25. Because defendant had essentially "abandoned" the project, plaintiff Daher stated that it became his responsibility to protect the property at that point.

¶ 22 Based on the record in this case, the trial court's finding that plaintiffs did not anticipatorily repudiate the contract, and that defendant did breach the contract, was not against the manifest weight of the evidence. Therefore, we affirm the court's decision finding in favor of plaintiffs and denying defendant's breach-of-contract counterclaim.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 25 Affirmed.