No. 2—10—0794
Order filed June 16, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PARAMOUNT MEDIA GROUP, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09—AR—441
	)	
BACCI PIZZA GROUP, INC.,	)	Honorable
	)	Bruce R. Kelsey,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

Held: The trial court's judgment for defendant on plaintiff's breach-of-contract action was not against the manifest weight of the evidence: plaintiff did not prove that it had performed its contractual obligation to run defendant's ads for 10 seconds of every minute for 3 months; defendant did not effectively admit, per Rule 133(c), that plaintiff had performed, as defendant pleaded insufficient knowledge and thus that rule did not apply.

Plaintiff, Paramount Media Group, Inc., filed a breach-of-contract action against defendant, Bacci Pizza Group, Inc., to recover money due for placing defendant's advertising on a digital billboard. After a bench trial, the court held for defendant. Plaintiff appeals, arguing that (1) the

judgment is against the manifest weight of the evidence; and (2) the trial court erred in refusing to bar defendant's defense to the action. We affirm.

On February 11, 2009, plaintiff filed its one-count complaint, alleging as follows. On August 7, 2008, plaintiff, which provides highway sign advertising, and defendant, which owns and operates restaurants, signed a contract providing that, for three months starting August 15, 2008, defendant would pay $8,500 to run its ads on an electronic sign on Interstate 290 at 17th Avenue. According to paragraph 9 of the complaint, plaintiff "performed all of the contract" that it was required to perform. Defendant had paid nothing. The complaint requested damages, interest, attorney fees, and costs.

The contract was signed by David Quas, plaintiff's president, and Robert Didiana, defendant's president. It stated in part that the agreed-upon "Daktronics 16 mm Digital LED Advertising Display" would be "illuminated 24 hrs. per day" and that defendant's ads would run for 10 seconds of every minute of the contractual period. Paragraph 5 of the contract's second page provided, "[Plaintiff] will provide advertiser/agency with certified Daktronic's [*sic*] 'Proof of Play' report once per month."

On May 1, 2009, defendant filed an answer. In response to paragraph 9 of the complaint, the answer read, "Defendant lacks sufficient knowledge of the facts contained in paragraph 9 of Plaintiff's Complaint and, therefore, neither admits nor denies same but demands strict proof thereof." The answer attached Didiana's affidavit, stating that, "with respect to those answers in which Defendant states that it lacks sufficient knowledge of the facts contained in such paragraph [*sic*], he states that such answers are true and accurate to the best of his knowledge."

On May 26, 2010, the cause proceeded to trial. Plaintiff first called Didiana. After he testified that he had signed the contract with plaintiff, the examination continued:

"Q. And after you signed the contract, you had the opportunity to see Bacci's advertisement on that billboard, didn't you?

A. Yes.

Q. And you thought those advertisements looked good, didn't you?

A. Yes.

Q. And you were satisfied with the work performed by Paramount, weren't you?

A. Yes."

Didiana then testified that defendant had not paid plaintiff any money.

Quas testified on direct examination as follows. On August 8, 2008, the parties signed a contract to display defendant's ads on plaintiff's billboard on the north side of the Eisenhower Expressway at 17th Avenue. Starting late in August, plaintiff displayed defendant's advertising, although the term actually began September 1. Quas let defendant know that the ads were up and running. He took photographs of the ads and sent the photographs to defendant.

Asked how he knew that the ads were running, Quas explained that Daktronics, which manufactured the display, has a proprietary software that can monitor around the clock "what they call 'proof of play,' which is the sequential uploading and downloading of the digital files on the display and the time allotment." Quas could use Daktronics' software to "pull up the display 24 hours a day" to look at the images changing on the billboard. Also, he routinely drove by each of his digital billboards three or four times weekly to make sure that it was functioning properly. In

defendant's case, Quas checked the billboard every weekday. By driving by the site regularly and using the software, Quas ascertained that defendant's ads were actually running.

Quas testified that a "proof of play" is an internal document, created by Daktronics, that shows that ads actually ran. Daktronics makes these documents available to customers upon request. Quas identified Plaintiff's exhibit No. 9 as a Daktronics "proof of play" report. He had downloaded the report from Daktronics' website on March 10, 2009, but he had never requested it from Daktronics, and nobody had asked him to provide it. Quas also identified a series of photographs that he had taken of the billboard late in August 2008. Plaintiff moved to admit Plaintiff's exhibit No. 9. Defendant objected that plaintiff had not laid a proper foundation. The court sustained the objection, as the report had been prepared by Daktronics, not by plaintiff. The court then admitted the photographs and invoices showing that plaintiff had billed defendant a total of $25,500.

Quas testified that he had never received any complaints about the ads for defendant. Didiana called him to say that "he liked the billboards." However, defendant had never paid plaintiff.

Quas testified on cross-examination that defendant's ads were supposed to run 10 seconds of every minute, 24 hours a day, 7 days a week, for 3 months. Quas had personally driven past the billboard three or four times a week to make sure that the ads were running; on occasion, he parked and watched for a minute to make sure that all 6 10-second ads played. Also, twice a week, Quas pulled over at 17th Avenue, parked under the sign, and looked at it for "many minutes."

Defendant's attorney asked Quas to read paragraph 5 of the contract. Plaintiff objected that defendant was "starting towards an anticipated affirmative defense" that had not been raised by the pleadings or during discovery. Defendant responded that any plaintiff in a breach-of-contract action

must prove that he complied with all of his contractual obligations, and defendant was merely using plaintiff's own exhibit to prove that plaintiff had not done so. Plaintiff's attorney replied in part that whether plaintiff had materially breached the contract was "an affirmative matter that ha[d] to be raised in the pleadings and was not raised." The judge allowed the questioning but added that later the parties could argue whether "the defense in this case" went to plaintiff's burden or had to be raised as an affirmative defense. Cross-examination ended as follows:

"Q. Now, it's true that Paramount never provided certified proof of play of documents to Bacci; is that correct?

A. It was never requested.

Q. So you didn't. The answer is no?

A. That's correct.

Q. Okay. And Daktronics, to your knowledge, never provided certified proof of play records to Bacci; is that correct?

A. I would not know that."

On redirect examination, Quas testified that nobody from defendant had ever requested "the proof of play" from plaintiff.

After plaintiff's attorney testified about his fees in the case, plaintiff rested. Defendant called Didiana. He testified that defendant had never received any proof-of-play reports. Defendant rested.

In arguments, plaintiff contended that defendant's entire defense was based on "a minor breach of the contract" that was never raised in defendant's answer or in discovery. The answer did not deny that plaintiff had fully performed its contractual obligations. Further, Didiana had testified that he was satisfied with the work, and he did not testify that he had ever been dissatisfied by

plaintiff's failure to provide proof-of-play reports. Defendant had never pleaded the affirmative defense on which it now relied, so the court ought not entertain it. In any event, there was no evidence that defendant had ever invoked paragraph 5 or that the contract would not have been signed without paragraph 5. There was no proof that defendant was harmed because plaintiff did not comply with paragraph 5. Yet defendant had never paid plaintiff anything under the contract.

Defendant argued as follows. Plaintiff's action was solely for breach of contract, not recovery in *quantum meruit* or some other theory. Therefore, to recover at all, plaintiff had to prove by a preponderance of the evidence that it had performed all of its contractual obligations. Among these was displaying defendant's ads for "10 seconds a minute every hour every day, 24/7 for 3 months." Plaintiff had not met this burden. The only way to do this was through proof-of-play reports, which had not been admitted into evidence. Further, paragraph 5 required plaintiff to provide these reports to defendant once per month, whether or not defendant requested them. Plaintiff had not done this either. Thus, plaintiff had not proved that it had performed "a condition precedent to any liability."

The judge asked defendant's attorney whether Didiana's affidavit complied with section 2—610 of the Code (735 ILCS 5/2—610 (West 2008)). Defendant's attorney stated that, in support of the answer's response to paragraph 9 of the complaint, Didiana had properly stated his lack of knowledge. Asked whether the affidavit was sufficient, plaintiff's attorney said that it was not; he reasoned that, as defendant's president, Didiana had to explain how he did not know about a matter within his knowledge.

At the judge's request, plaintiff argued that, even without having complied with paragraph 5, it had substantially performed under the contract. According to plaintiff, the breach of paragraph

5 was not material, because there was no evidence that, without paragraph 5, the parties would not have entered into the contract. Also, defendant had failed to plead the defense as required.

The judge stated that the case came down to whether defendant had met the pleading requirements; if so, plaintiff would lose, whether or not defendant's ads had actually run as promised. In the judge's view, "[W]hether I suspect or believe that the ad ran every 10 seconds 24/7 for 3 months in this case is not the issue. It may very well have happened, and [defendant] may very well have gotten free advertising for three months." Plaintiff's attorney requested that the parties have the opportunity to "brief these issues, particularly the issue raised on the affidavit." The judge allowed plaintiff to file a brief "in support of [its] position" and defendant to file a response brief.

Plaintiff's brief argued first that defendant had not satisfied Illinois Supreme Court Rule 133(c), which reads:

> "In pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party performed all the conditions on his part; if the allegation be denied, the facts must be alleged in connection with the denial showing wherein there was a failure to perform." Ill. S. Ct. R. 133(c) (eff. Jan. 1, 1967).

According to plaintiff, its performance of its contractual obligations was a "condition precedent" under the rule; thus, defendant, which had neither satisfied Rule 133(c) nor raised plaintiff's nonperformance as an affirmative defense, could not use the defense.

Plaintiff's brief argued second that plaintiff had not materially breached the contract. Plaintiff reasoned that only a material breach will defeat an action for breach of contract and that there had been no evidence that plaintiff's failure to provide defendant with proof-of-play reports

either mattered to Didiana or caused defendant any damages. Plaintiff contended that allowing defendant three months of free advertising would be fundamentally unjust.

In response, defendant contended first that plaintiff's material-breach argument was outside the scope of the issues that the trial judge had requested the parties to brief, and that, in any event, plaintiff had failed to prove that it had met its obligations (1) to run defendant's ads every 10 seconds of every minute for 3 months; and (2) to provide defendant with monthly proof-of-play reports. Defendant argued second that plaintiff's Rule 133(c) argument lacked merit. Defendant reasoned that the rule applies only to denials and that defendant had not denied paragraph 9 of the complaint but had pleaded insufficient knowledge to admit or deny paragraph 9. Also, plaintiff's contractual obligations were not a condition precedent; taken to its logical conclusion, plaintiff's reasoning would replace a plaintiff's burden to prove that it performed all its contractual obligations with a burden on the defendant to prove that the plaintiff did not do so. Also, defendant argued that plaintiff had waived any defects in defendant's pleadings, as plaintiff had proceeded at trial as though defendant's response to paragraph 9 had been legally sufficient.

Plaintiff replied first that plaintiff's performance was not in dispute, as Quas had testified that he had confirmed that plaintiff had displayed defendant's ads as agreed, and, moreover, Didiana had admitted being satisfied with plaintiff's work. Second, plaintiff argued, Rule 133(c) applied to defendant's answer's equivocal response to paragraph 9 of plaintiff's complaint.

On January 15, 2010, the judge announced his decision and explained it as follows. Defendant did not need to comply with Rule 133(c). The proof-of-play reports, which could have established that plaintiff met its obligation to run defendant's ads once every minute for three months, had not been admitted into evidence. Thus, an "essential element" of plaintiff's action was unproved. The court entered a written judgment for defendant. Plaintiff timely appealed.

On appeal, plaintiff contends that (1) the judgment is against the manifest weight of the evidence; and (2) the judgment is legally erroneous, because, by failing to comply with Rule 133(c), defendant admitted that plaintiff had performed its contractual obligations.

We turn to plaintiff's first argument. Plaintiff contends that the judgment is against the manifest weight of the evidence, which, plaintiff argues, proved that plaintiff did not materially breach any of its contractual obligations and that defendant did breach the contract by failing to pay plaintiff. Plaintiff asserts that the sole basis on which the trial court held for defendant was that plaintiff did not provide defendant proof-of-play reports per paragraph 5 of the contract; plaintiff reasons that, because defendant neither invoked its right to the reports nor suffered harm from plaintiff's failure to provide them, denying plaintiff any relief was grossly inequitable.

Defendant responds that the trial court found not only that plaintiff breached paragraph 5, but, more important, that plaintiff failed to prove that it satisfied its obligation to display defendant's ads for 10 seconds of every minute of the contractual period. Defendant notes that the trial court refused to admit the proof-of-play reports into evidence and that, on appeal, plaintiff does not contest this ruling. Defendant argues that the other relevant evidence did not compel the trial court to find that the ads ran for 10 seconds of every minute of the contractual period, as required. Thus, defendant concludes, the court correctly held that plaintiff failed to prove that it fulfilled its obligations.

We shall not reverse the judgment unless it is against the manifest weight of the evidence. *First Baptist Church of Lombard v. Toll Highway Authority*, 301 Ill. App. 3d 533, 543 (1998). To recover in breach of contract, a plaintiff must prove that (1) a valid contract existed; (2) the plaintiff substantially performed all of its obligations; (3) the defendant breached the contract; and (4) the plaintiff suffered damages. *Action Construction & Restoration, Inc. v. West Bend Mutual Insurance Co.,* 322 Ill. App. 3d 181, 182 (2001).

Here, the trial court found that plaintiff failed to prove the second element. Specifically, the court held that plaintiff did not prove that it ran defendant's ads for 10 seconds of every minute during the 3-month contractual period. The trial court also found that plaintiff failed to provide defendant any monthly proof-of-play reports, in violation of paragraph 5 of the contract.

Plaintiff advances a number of reasons why, in its view, the judgment is against the manifest weight of the evidence. Several of these address matters not in dispute, *i.e.*, that there was a valid contract and that defendant never paid plaintiff. As pertinent here, plaintiff relies on the evidence that Didiana was satisfied with the ads that plaintiff provided and that Quas checked that defendant's ads were running regularly. The first type of evidence is irrelevant: merely that Didiana liked the ads did not establish that the ads ran 10 seconds of every minute for 3 months. Obviously, without having received the proof-of-play reports, Didiana had no way of knowing whether the ads ran as scheduled.

The second type of evidence is relevant, but the court could have found it insufficient. Having failed to get the proof-of-play reports admitted, plaintiff had limited evidence of how regularly defendant's ads ran. Quas did visit the site regularly, but those visits constituted only a small percentage of the total time involved. Quas also testified that he sometimes watched the display via web camera, but the probative effect of this viewing suffers from the same limitation. Finally, plaintiff can scarcely rely on the evidence that Quas read the proof-of-play reports; the trial court barred these reports as inadmissible hearsay, and plaintiff may not get them in by the back door.

We hold that the trial court did not err in holding that plaintiff failed to prove that it fulfilled it contractual obligation to run defendant's ads for 10 seconds of every minute during the contractual period. Thus, we need not decide whether plaintiff also materially breached the contract by failing

to provide defendant monthly proof-of-play reports. To the extent that this result could be seen as a windfall for defendant, we note that the windfall was of plaintiff's making. The contract held plaintiff to a high standard of performance; plaintiff could still have met its burden by taking more care to lay a foundation for the proof-of-play reports; and plaintiff decided to seek recovery solely for breach of contract, not for *quantum meruit,* which may have set up a less stringent burden of proof.

We turn to plaintiff's second argument on appeal: that the trial court erred in refusing to hold that defendant's answer effectively admitted that plaintiff fulfilled all of its contractual obligations. Plaintiff relies on Rule 133(c):

> "In pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party performed all the conditions on his part; if the allegation be denied, the facts must be alleged in connection with the denial showing wherein there was a failure to perform." Ill. S. Ct. R. 133(c) (eff. Jan. 1, 1967).

Plaintiff argues that, because paragraph 9 of its complaint sufficiently pleaded that plaintiff had performed its contractual obligations, defendant could not contest this allegation unless its answer alleged specific facts to show plaintiff's failure to perform. Plaintiff asserts that defendant's answer responded only generally to paragraph 9 and was supported solely by Didiana's conclusional affidavit. Defendant makes a number of responses, but we need consider only one, which we find dispositive: Rule 133(c) simply does not apply here, because defendant did not deny paragraph 9.

Plaintiff's argument turns on the meaning of Rule 133(c). In construing a supreme court rule, we follow the same principles applicable to construing statutes. *Longstreet v. Cottrell, Inc.*, 374 Ill. App. 3d 549, 552 (2007). Our goal is to ascertain and effectuate the intentions of the rule's drafters.

People v. Hill, 402 Ill. App. 3d 903, 910 (2010). If the language is unambiguous, we must apply it as written. *Id.* at 910. Our review is de *novo*. *Longstreet*, 374 Ill. App. 3d at 551-52.

We agree with defendant that Rule 133(c) does not apply here. The part of the rule on which plaintiff relies is limited to where an allegation is "denied," and it sets out requirements for supporting any "denial." Here, defendant did not deny that plaintiff had performed all of its contractual obligations; it pleaded insufficient knowledge upon which to admit or deny. Moreover, we should avoid a construction that leads to an absurd or impractical result. *Hubble v. Bi-State Development Agency of Illinois-Missouri Metropolitan District*, 238 Ill. 2d 262, 283 (2010). Once Rule 133(c) is triggered, the defendant must allege facts "showing wherein there was a failure to perform." Ill. S. Ct. R. 133(c) (eff. Jan. 1, 1967). If a defendant's answer does not assert a failure to perform, then logically it should not have to allege facts showing a failure to perform—that would require the defendant to contradict himself. And, if the defendant asserts that he does not know enough to admit or deny whether the plaintiff performed, then it would be equally illogical to require him to allege facts showing that the plaintiff did not perform. We shall not assume that the drafters of Rule 133(c) intended such preposterous consequences—especially as to do so would also require us to disregard the plain language of the rule. Therefore, we reject plaintiff's second claim of error.

The judgment of the circuit court of Du Page County is affirmed.

Affirmed.