

2011 IL App (2d) 101136-U  
No. 2-10-1136  
Order filed September 7, 2011

**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  
SECOND DISTRICT

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PYRAMID DEVELOPMENT, LLC,	)	Appeal from the Circuit Court
	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09—CH—2015
	)	
POWER MART REAL ESTATE	)	
CORPORATION,	)	Honorable
	)	Bonnie M. Wheaton,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BOWMAN delivered the judgment of the court.  
Justices Hutchinson and Zenoff concurred in the judgment.

**RULE 23 ORDER**

*Held:* The trial court properly allowed Pyramid to amend its complaint, and it also properly determined that Pyramid performed “extra” work that was outside the scope of the agreement.

¶ 1 In this case, Pyramid Development, LLC, a general contractor, agreed to renovate a commercial building owned by Power Mart Real Estate Corporation. It was a “handshake agreement,” in which Pyramid agreed to perform the work for \$100,000. Pyramid subsequently filed suit against Power Mart, alleging that Power Mart owed it money for “extra” work performed outside

the scope of the agreement. The trial court agreed and entered judgment in favor of Pyramid in the amount of \$34,100. Power Mart appeals, and we affirm.

¶ 2

#### I. BACKGROUND

¶ 3 On April 1, 2010, Pyramid filed its first amended complaint against Power Mart, which alleged as follows. Samer Odeh, the president of Power Mart, approached Ramy Saif, the principal of Pyramid, to furnish interior demolition to an existing building and to build out new offices for \$100,000. Pyramid performed this work. After that, Odeh asked Saif to perform additional labor and to furnish additional materials. In particular, Saif installed concrete for \$10,000 and installed underground wiring for \$15,000, both of which were outside the scope of the original agreement. Saif performed all of his obligations under the agreement, with the exception of some minor landscaping and blacktop sealer that could not be completed due to the weather. To “off-set the \$10,000 change order for the concrete” as well as the work he did not complete, Saif agreed to give Odeh a credit of \$10,000. After allowing all “just” credits, deductions, and set-offs, Odeh still owed Saif \$25,000 for his work under the agreement. Although Saif had made numerous demands for payment, Odeh refused to pay.

¶ 4 Count I alleged breach of contract and asked the court to enter judgment in the amount of \$25,000. Count II sought a mechanic’s lien in the same amount.

¶ 5 A two-day bench trial occurred in October 2010. The overall project entailed creating office space, a mini-mart, a car wash, and a drive-thru window out of two buildings.

¶ 6 During opening argument, counsel for Saif argued as follows. Odeh wanted Saif to work on the interior build-out so that he could relocate his offices there. After the project began, however, it was discovered that the underground electrical wiring in the building had been removed. Saif

discussed this issue with Odeh, who then agreed to pay \$15,000 for the wiring because it was an unforeseen circumstance. The \$15,000 cost was an “extra” to be added to the original \$100,000 contract. In addition, Saif installed a drive-thru window pursuant to the agreement, but Odeh did not like the distance that customers would have to reach to access the window. As a result, some concrete curbs needed to be removed. Moving the concrete cost an additional \$10,000 that Odeh agreed to pay. Counsel for Saif continued that “[t]here were some additional items that [Saif] did, and I won’t go into detail now. You will hear Mr. Saif talk about those.” In the end, Saif was paid “\$90,000 out of an adjusted contract of \$125,000.” Counsel stated that “[t]here were some other additional items that [Saif] agreed not to bill [Odeh] for based upon [the promise of] payment, but then [Saif] never did get paid.” For count I alleging breach of contract, counsel argued that Saif was entitled to extras in the amount of \$25,000.

¶ 7 Counsel for Odeh took the opposite position regarding the underground wiring and the removal of concrete. According to counsel, there were no “change orders” in this case, meaning that there was no evidence that Odeh agreed to pay anything more than the agreed-upon price of \$100,000 to resolve those issues. Counsel for Odeh further argued that after the “handshake” lunch, Odeh sent Saif a document detailing the scope of work that he wanted Saif to complete, and that this written scope of work controlled in this case.

¶ 8 Saif of Pyramid testified as follows. Saif met Odeh through a mutual friend, and the two had worked together on a project the year before, which was building a gas station in Elmhurst. After that project, Odeh asked Saif to do the current job in Downers Grove, and they discussed the project at a local restaurant. Mike Carey, Odeh’s construction manager for Power Mart, was also present. At the meeting, Odeh presented Saif with a set of architectural plans for the Downers Grove project,

so that Saif could formulate a bid. Saif, Odeh, and Carey then walked through the site in Downers Grove, which was an old gas station that Odeh wanted to turn into office space. After the walk-through, Saif proposed a price of \$117,000. The bid, which contained general line items of the work Saif would perform, was sent via email to Odeh and Carey on October 4, 2008. The next day, the three met at the same restaurant to discuss Saif's bid. At that meeting, Odeh did not accept Saif's offer because he had a lower bid from someone else. Saif then agreed to do the job for \$100,000, and they "shook hands on it."

¶ 9 Saif began work the next day. After the building was cleaned out, which was about one week later, Saif discovered that there was no power coming to the building. It turned out that the electrical wires, which were buried deep in the ground, were missing. Saif testified that there was no way that he could have known that there would be a problem with the underground wires. Odeh and Carey came to the building to discuss the situation, and Saif explained that it would cost \$15,000 to run new underground wiring. Odeh said to " 'go ahead and do it.' " Saif told Odeh that the electrician would not do it without payment, so Odeh gave Saif a check for \$15,000 to cover the cost, and the work was done. On cross-examination, Saif admitted that he did not have anything in writing indicating that the \$15,000 was on top of the contract price. However, his communication with Odeh and Carey was face-to-face when on site and not by email.

¶ 10 Odeh asked Saif to put in a drive-thru window, which he did. After the job was done, Odeh thought that the cars using the drive-thru needed to be closer to the window, and he asked Saif for a solution to that problem. Saif recommended cutting out the sidewalk. Odeh thought that this was a good idea and wanted to know how much it would cost. Saif estimated that it would cost about \$5,000 or \$6,000 to remove it, and Odeh said to do it right away. The job, however, ended up being

more expensive due to a steel plate inside the concrete. The steel plate broke two of the blades that they had rented to cut through the sidewalk. Instead of being able to remove a small area of the sidewalk, they had to start from scratch and remove the entire sidewalk. Carey and Odeh both witnessed this problem on-site. Saif advised them that the cost was already up to \$10,000; that he did not know how much the job would end up costing; and that they would have to take it “day by day.” Odeh agreed to pay Saif an additional \$10,000 for concrete work on the drive-thru window. On cross-examination, Saif conceded that there were no documents or emails memorializing this expense as an “extra” on top of the agreement. Saif explained that this was because everything was done “there on site when [Odeh] was there to inspect and see for himself what was being done and how much was being done for him.”

¶ 11 Saif understood the scope of the work as being the office-build out, along with some exterior jobs such as filling holes in the asphalt, applying a seal coat, and some landscaping. All of the work on the office build-out had been completed by the time of occupancy, and Odeh was able to occupy the office building in December 2009. However, due to weather, Saif was unable to apply the seal coat over the entire lot. When asked if the seal coat was part of the scope of the agreement, Saif answered that it was in addition to the agreement. Yet, Saif admitted testifying during his deposition that the blacktop and blacktop seal coat were part of the scope of the agreement. Saif also agreed that he gave Odeh a \$10,000 credit at the end of the job because he did not finish certain items.

¶ 12 With respect to the car wash, which was still under construction in December 2009 and January 2010, Odeh hired someone else to perform that work. Even though the car wash had nothing to do with the original agreement, Carey and Odeh asked Saif to do work related to that project. Saif

did these jobs because Odeh still owed him money from the last job and because he was supposed to receive future jobs from Odeh.

¶ 13 In February 2010, Saif sent Odeh an email stating that his work on the project was complete except for a few outstanding items like car wash painting, landscaping, and asphalt that would be completed as soon as the weather permitted. In his email, Saif indicated that he had completed several additional items that were not part of the original agreement at his sole expense. Saif then listed six items related to the car wash that were completed but not billed to Odeh in order to ensure Odeh's satisfaction. These items included cutting the old sidewalk and building a new sidewalk for the drive-thru window (\$6,500)<sup>1</sup>; repairing an underground heater for the car wash (\$2,500); roof repairs (\$500); electrical work for the mini mart, which required bringing in 220 lines to the drive-thru window (\$3,500); window insulation (\$1,200); and plumbing repairs of frozen pipes (\$500). Saif stated in his email that he was not billing Odeh for these extras in an effort to offset the \$15,000 Odeh agreed to pay for the underground wiring.

¶ 14 Saif explained why he sent this email to Odeh and Carey. According to Saif, Carey told him that Odeh was looking for something for nothing, and that Odeh would give Saif a \$35,000 check the next day if Saif could show Odeh that he was getting something for nothing. Saif told Carey, "I'll do that." Saif then sent the email to Odeh to show that "[t]here is a bunch of items that we are giving you that we're not going to bill you for to offset approximately \$10,000 and whatever issues you might have in order for us to get our money." Saif testified that the \$10,000 credit also served to off-set the jobs that he had not completed on the project. Odeh agreed to the \$10,000 off-set but never paid the \$35,000.

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<sup>1</sup>The \$6,500 cost was on top of the \$10,000 cost for removing the concrete.

¶ 15 Saif testified that the original agreement was \$100,000, minus the \$10,000 credit, plus the \$15,000 for underground electrical wiring, plus the \$10,000 for the concrete. In total, Saif had received \$75,000 for the project. On cross-examination, Saif was questioned about how much money he was seeking. Saif responded that the lien claim was for \$25,000, but that that was a mistake he “made when [he] gave the paperwork to the attorney.” Saif explained that there was confusion regarding the \$15,000 that was paid, whether that payment was for the electrical work by itself or whether it was part of the agreement. Saif testified that he was owed \$35,000 on the agreement rather than \$25,000. Saif was also questioned whether he received checks from Odeh totaling \$90,000. Saif reiterated that the \$15,000 check was not part of the agreement, but for the underground wiring issue, which was paid for “on the spot.” On the agreement itself, Saif was owed \$25,000, “plus the extras.”

¶ 16 Also during cross-examination, Saif testified that about two weeks into the project, Odeh wanted Saif to sign a document that he had drafted detailing the scope of work on the project (proposed scope). Odeh brought the proposed scope, dated October 10, 2008, to the restaurant where they typically met. Carey told Saif to read the proposed scope before signing it. Because Odeh was inserting items that they had not agreed upon, Saif refused to sign it. Saif’s understanding of the scope of the project was the one-page plan by the architect and what was talked about during the walk-through.

¶ 17 Carey, Power Mart’s construction manager, testified as follows. Saif was hired to completely renovate two buildings, the main building and the car wash building. The project entailed doing a build-out, fixing whatever electrical, heater, and water problems arose, and providing new doors and walls. Exterior work included miscellaneous painting, patching, lighting, some landscaping, removal

of a canopy, and handling some parking lot issues. Different prices were discussed, and the parties agreed on a price of \$100,000.

¶ 18 Carey identified the October 10, 2008, proposed scope drafted by Odeh as Odeh's "detailed version of his expectations of" Saif. Odeh wanted Saif to sign the proposed scope at the restaurant, but Saif responded that he understood what Odeh needed done. Saif said that " '[a] handshake's good by me.' " Saif's original proposal or bid was very general whereas Odeh's proposed scope was more detailed. There were some "things on [Odeh's proposed scope] that I'm not sure [Saif] was expecting," which is why Carey told Saif to read it before signing. Carey "had some concerns" that Odeh's proposed scope might contain "a little bit more detail" than Saif was expecting. Carey explained that "Odeh tends to want all his I's dotted and T's crossed and [he] gets a little more detailed in it. And [Saif] is a little bit comfortable doing a handshake and agreeing upon things and taking a person for their word and face value, and that's where the problem" arose. When asked if Saif agreed to do everything outlined in Odeh's proposed scope for \$100,000, Carey answered, "I think [Saif] agreed to do what he believed was a complete job for \$100,000, and what [Odeh] agreed was a \$100,000 [job] ended up being two different things." Carey did not believe that Saif agreed with everything contained in Odeh's proposed scope, which is "why he did not sign it."

¶ 19 Odeh and Saif disagreed regarding the removal of an old canopy, which required a demolition company to remove. According to Carey, the demolition work to the canopy was part of the original scope of the agreement. Carey explained to both parties that their going back and forth was hindering progress, when he could hire a contractor at a reasonable price to do the work. Then, Odeh and Saif could "work that out after the fact." Saif agreed to give Odeh a credit for the cost of the demolition, which was \$5,600.

¶ 20 Regarding the underground wiring issue, Odeh thought that Saif should have discovered this issue when he looked at the original scope of the work. However, Carey thought that this issue could go either way because there was no way of seeing that those wires were missing. “Under normal situations, most would have just assumed [the wiring] was there.” Based on the inspection of the property before the work began, “there was no way that I could see it, and I don’t think [Odeh] or [Saif] seen [*sic*] it.” Odeh paid the \$15,000 in order to avoid delaying the project. Carey never heard Odeh say that the \$15,000 was above and beyond the contract, but he also never heard Saif say that “he didn’t expect that.”

¶ 21 In terms of removing the concrete near the drive-thru window, Odeh agreed to pay some additional costs to get that work done and in order to work with Saif. Both Odeh and Saif were surprised at how expensive that job turned out to be. Saif was willing to discount what he felt he was owed, as long as Odeh agreed to pay him and resolve any other situations that arose. When asked if it was Saif’s responsibility to determine whether the placement of the drive-thru window was appropriate in terms of space, Carey answered that he, Saif, and Odeh all “looked at it, and I think it would have been a difficult call on anybody to actually see it.” Neither Saif nor Odeh came to an agreement on a dollar amount for the concrete, and the discussion of \$10,000 was “way after the work was complete.”

¶ 22 Carey testified regarding Saif’s February 2010 email listing the six items that Saif felt were unforeseen and thus not part of the original scope of the agreement. First, the frozen pipes were never discussed until the issue was discovered when the car wash equipment was turned on. Second, the issue of insulating the windows was not part of the original scope of the agreement. On the other hand, redoing the electrical work for the mini-mart was part of the scope, and Carey did not know

what work for \$3,500 Saif was specifically referring to in his email. Fourth, no one knew of the roof leak until later, so it was not discussed beforehand. Fifth, Odeh expected Saif to repair the underground heaters for the car wash, and it was something they all discussed. However, nobody realized the extent to which the heater system was damaged. Finally, the need to cut the old concrete curbs and build a new sidewalk for the drive-thru was not realized until after the drive-thru window was installed.

¶ 23 Carey explained the context of Saif's email. Because both parties were disagreeing towards the end of the project, Carey suggested that Saif spell out some of the details that he *did* do for Odeh, and how he was willing to adjust the bill in good faith. Carey would then try to get Odeh to pay the balance in good faith. Odeh, however, refused to pay the balance due on the agreement because he was unhappy that Saif had not completed work that was within the original scope of the agreement. When asked if Saif completed what he agreed to do under the original scope of work, Carey answered that "agreed is a gray area here." Saif did not complete everything he agreed to do, such as blacktopping or landscaping. Also, Carey was not aware of any written agreement signed by both parties or any change orders.

¶ 24 Saif's counsel called Odeh (Power Mart) as her final witness, and he testified as follows. Power Mart was in the business of acquiring real estate and then developing it into gas stations. The current project also involved creating office space so that offices affiliated with Power Mart could relocate there. At the restaurant where they met for lunch, Odeh and Saif agreed to a price of \$100,000 for the project, and they shook hands on it. Odeh then told Saif that he would follow up with an email detailing his expectations, and Saif responded that he looked forward to it. Odeh sent his proposed scope on October 10, 2008.

¶ 25 With respect to the underground wiring issue, Saif claimed that it was an unforeseen cost, but Odeh disagreed and thought that Saif should have caught this issue. On the other hand, Odeh conceded that insulating the windows for the workers' warmth was not discussed by the parties and thus was not included in his proposed scope.

¶ 26 At this point, the parties adjourned for the day. The next day, when the parties appeared in court, Saif's counsel sought leave to amend the complaint, making it a second amended complaint, to conform with the evidence. The trial court decided to wait until the completion of Odeh's testimony to rule on that request. Saif's counsel resumed questioning Odeh for a brief period and then rested.

¶ 27 Odeh testified on his own behalf as follows. During the walk-through of the site, Odeh, Carey, and Saif discussed the scope of the work in both specific and general terms, depending on what part of the project it was, such as the car wash or drive-thru window. Odeh's proposed scope included all of the items he expected Saif to perform on the project. Saif agreed to perform all of the items listed on the scope sheet, and he never voiced any concerns to Odeh about not being able to do so. On multiple occasions, Odeh wanted Saif to sign his proposed scope, but Saif said several times not to worry about it, " 'You know, just get it done. You can trust me on this.' " Odeh used his proposed scope as a checklist during the construction, and he discussed the items on the list with Carey and Saif. Saif did not complete all of the items that were within the scope of the agreement.

¶ 28 Regarding some specific jobs, Saif and Carey agreed that Saif would credit Odeh with the cost of the demolition of the canopy (\$5,600), which would be applied against the \$100,000 gross price of the agreement. In terms of the underground wiring, Odeh went to the site and was advised by Carey that Saif, as general contractor, had not used due diligence to determine whether or not the

electrical was operational. Odeh never agreed to pay the \$15,000 over and above the price of \$100,000. Odeh issued the following checks to Saif: \$25,000 on November 4, 2008; \$15,000 on November 10, 2008; and \$40,000 plus \$10,000 on December 5, 2008, for a total of \$90,000.

¶ 29 After the parties rested, Saif's counsel again moved to amend the complaint. Odeh's counsel objected to this motion, arguing that Saif was adding new allegations after the trial was over. The trial court stated it would determine whether the amended complaint conformed to the proof at trial.

¶ 30 During closing argument, Saif's counsel argued that the following items were "extras" outside of the \$100,000 agreement: the underground wiring (\$15,000), the concrete removal for the drive-thru window (\$10,000), plus the items listed in Saif's February 2009 email, which included cutting the old curbs and building a new side walk for the drive-thru window (\$6,500) repairing the underground heater for the car wash (\$2,500), roof repairs (\$500), electrical work for the mini-mart (\$3,500), window insulation (\$1,200), and frozen pipes (\$500). These extras totaled \$139,700. Counsel went on to say that there were some items that Saif did not complete under the agreement, so Saif agreed to give Odeh a \$10,000 credit, which reduced what was owed to \$129,700. Because Odeh had paid Saif \$90,000 under the agreement, what was owed was \$39,700, which was the amount now sought for breach of contract in the second amended complaint.

¶ 31 In making its ruling, the trial court reasoned as follows. Beginning with Saif's request for leave to file an amended complaint, to which Odeh had objected, the court allowed Saif to do so. According to the court, there was no dispute that the work in question had been performed, and that the amended complaint conformed to the proofs. The dispute was not over whether the extras had been performed, but whether or not they were part of the scope of the work. What Saif denominated as extras to the oral agreement and what Odeh claimed was part of the scope of the work differed.

To this end, Carey offered the most credible testimony, and his testimony that Saif and Odeh had different views of the scope of the work was “absolutely correct.” Saif felt that the general scope of the work, as set forth on the one-page architectural plan, was what he needed to complete, whereas Odeh believed that his proposed scope controlled what Saif was obligated to perform. Consequently, the court found that “there was no real meeting of the minds as to what this contract was to contain.”

¶ 32 The court then went through the claimed extras one by one. First, regarding the underground wiring, the court found persuasive Carey’s testimony that it “could not have been discovered and that he would not have looked to see that the wiring was connected, given the condition of the electrical box that had been vandalized with the wiring coming out.” As a result, the \$15,000 charge was “certainly unforeseen and could not possibly have been part of the original scope of the oral contract.” Second, “the concrete curb problems were necessitated by the change that was agreed to and the window and certainly the fact that there was a steel plate underneath this area was something that was totally unforeseen and, therefore, would be a proper extra, as was the \$10,000 in the additional concrete.” Third, the court found that “all of the others that are set forth by [Saif] are proper as extras for the roof repairs, the mini mart, electrical, the frozen pipes.” Though the court could not read its notes regarding the other claimed extra, which most likely was the cost of the window insulation, the court found that to be a proper extra as well. The \$139,700 amount was therefore correct, minus the \$10,000 credit that Saif offered for the work that was not completed, and a \$5,600 deduction for the demolition of the canopy. In the court’s view, this was a proper deduction based on Carey’s testimony that it was “a part of the oral agreement in the scope of the work.” Subtracting \$10,000 and \$5,600 from \$139,700 resulted in \$124,100. Then, subtracting the \$90,000

that Odeh had already paid from \$124,100, resulted in Odeh owing Saif \$34,100. The court thus entered judgment in favor of Saif on count I for breach of contract in the amount of \$34,100.

¶ 33 Regarding count II, which sought a mechanic's lien, the court dismissed that count because it did not believe that there was "a sufficient contract agreed to since I - as I previously stated, there was not a meeting of the minds."

¶ 34 Odeh timely appealed.

¶ 35 II. ANALYSIS

¶ 36 A. Finding of "Extras"

¶ 37 Odeh's primary argument on appeal is that the trial court erred by awarding Saif "extras" in this case. First, Odeh argues that the trial court erred as a matter of law by ruling in favor of Saif on the extras when it also ruled that there was no meeting of the minds. Essentially, Odeh argues that once the trial court determined that there was no meeting of the minds, then it follows that there was no enforceable contract to begin with that could support a breach of contract claim. For this argument, Odeh relies on *Quinlan v. Stouffe*, 355 Ill. App. 3d 830 (2005), which sets forth general contract principles. In *Quinlan*, the court stated that oral agreements are binding so long as there is an offer and acceptance to compromise and there is a meeting of the minds as to the terms of the agreement. *Id.* at 837. It further stated that an enforceable contract must include a meeting of the minds or mutual assent as to the terms of the contract, and that the essential terms of the contract must be definite and certain. *Id.* at 837-38.

¶ 38 At first glance, Odeh's argument sounds persuasive, given the trial court's finding that there was no meeting of the minds regarding the scope of the work in this case. However, the issue in *Quinlan* did not involve the scope of the work, it concerned the underlying issue of whether or not

an oral contract had been formed. These are distinct issues. As the trial court recognized in this case, Odeh and Saif did not dispute that an oral agreement existed or that work had been performed, the dispute centered on the scope of the work. In a sense, this case is not much different than a written contract with ambiguous terms, in which the court looks to the intent of the parties at the time they entered into the contract to determine whether the work was within the bounds of the contractual agreement or outside the scope of the contract. See *Duncan v. Cannon*, 204 Ill. App. 3d 160, 167 (1990).

¶ 39 Odeh next argues that the trial court's finding of "extras" was against the manifest weight of the evidence. Case law is settled that when a contractor seeks "extras," it is his burden to prove, by clear and convincing evidence, that: (1) the extra work performed or materials furnished was outside the scope of the original contract; (2) the extras were furnished at the owner's request; (3) the owner, by words or conduct, agreed to compensate the contractor for the extra work; (4) the contractor did not undertake the extra work voluntarily; and (5) the extra work was not made necessary through the fault of the contractor. *Wingler v. Niblack*, 58 Ill. App. 3d 287, 289 (1978). We will not reverse the trial court's finding on this issue unless it is against the manifest weight of the evidence. See *Duncan*, 204 Ill. App. 3d at 164. In order for a finding to be contrary to the manifest weight of the evidence, the opposite conclusion must be clearly apparent. *Duncan*, 204 Ill. App. 3d at 164.

¶ 40 Regarding the elements for establishing "extras" set forth above, Odeh argues that Saif did not prove elements one and three by clear and convincing evidence. On the first element, Odeh argues that Saif's failure to establish the contours of the agreement prevented him showing that the

work was outside the scope of the agreement. Odeh argues that the evidence at trial showed only that the parties had diametrically opposed versions of the scope.

¶ 41 While we agree that the parties presented conflicting opinions as to the scope of the agreement, an undisputed scope is not critical to a finding of extras. Otherwise, a contractor would be precluded from being paid for extras every time there was an oral contract and the parties disagreed as to the scope of the work. Though the parties had different versions of the scope, this did not prevent the trial court from making a determination that certain work fell outside of the parties' original agreement. Again, this case may be likened to a case involving a written contract with ambiguous terms as to the scope.

¶ 42 In terms of scope, Saif prepared a scope/bid in very general terms, which was based on the one-page architectural report and the parties' walk-through. Saif's general scope consisted of the interior build-out for the office building and a few, exterior items. Odeh, on the other hand, prepared a very detailed scope that Saif testified contained more items than initially contemplated. According to Saif, the "extras" he sought were either unforeseen or requested after he completed the office build-out and Odeh had taken occupancy. Presented with these divergent views as to the scope, it was up to the trial court to assess the credibility of the witnesses and determine whether the work specified by Saif fell outside of the scope. To this end, the court found Carey, the construction manager hired by Odeh, to be the most believable.

¶ 43 With the exception of the \$3,500 claimed extra for electrical work on the mini-mart, Carey's testimony supported Saif's claims of "extra" work. In terms of the \$15,000 underground wiring, Carey testified that there was no way of seeing beforehand that the wires were missing, and that under normal circumstances, "most" would have assumed that the wiring was there. Carey also

testified that none of them realized that there would be an issue with the location of the drive-thru window until after it was installed. Odeh, Saif, and Carey were all surprised at how much it cost to remove the concrete based on the steel plate. The evidence showed that instead of having to remove only a portion of the sidewalk, they had to start from scratch and build a new sidewalk (\$10,000 plus \$6,500). Likewise, Carey testified that: (1) the frozen pipes and leaking roof were not discussed until the problems were discovered later (\$500 plus \$500); (2) insulating the windows was not part of the original scope of the agreement, which Odeh himself conceded (\$1,200); and (3) though Odeh and Saif discussed repairing the underground heaters for the car wash, no one realized the extent to which the heater system was damaged (\$2,500). Relying on Carey's testimony, the court determined that the \$15,000 charge of the underground wiring was "certainly unforeseen" and not part of the original of the oral agreement; that the steel plate in the concrete was unforeseen as was the additional concrete (\$10,000, plus \$6,500); and that the other work specified by Saif in his February 2010 email fell outside the scope of the original agreement (totaling \$8,200). Based on this evidence, we cannot say that the trial court's finding that the work was outside the scope of the original agreement was against the manifest weight of the evidence.

¶ 44 Odeh next argues that Saif failed to prove, by clear and convincing evidence, element three, which is that the owner, by words or conduct, agreed to compensate the contractor for the extra work. We disagree. The testimony at trial revealed that Carey was on-site constantly; that Odeh was on-site often to resolve problems such as the underground wiring and the drive-thru window; that Carey and Saif were constantly in communication with Odeh; that either Carey or Odeh told Saif what work needed to be done; that Saif estimated how much each job would cost; and that either Odeh or Carey ordered Saif to complete the work. See *Wingler*, 58 Ill. App. 3d at 289 (by permitting

the construction to proceed on his property, under his very eyes, the defendant impliedly agreed to pay a reasonable price for the extras). Accordingly, the trial court's finding of extras was not against the manifest weight of the evidence.

¶ 45 B. Amended Complaint

¶ 46 Odeh's final argument is that the trial court abused its discretion by allowing Saif to amend his complaint by seeking recovery for the six extras in Saif's February 2010 email. Odeh argues that he was prejudiced by the amendment because he had no notice that Saif would seek these extras when preparing for trial, and because he did not defend against the extras during the trial. In addition, Odeh points out that Saif was aware of these extras all along and offered no good cause for withholding "these new allegations" until the close of all testimony.

¶ 47 Whether to permit an amendment of a complaint is a matter within the discretion of the trial court, and we will not overturn the court's decision absent an abuse of discretion. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 331 (2008). An abuse of discretion occurs only where no reasonable person would take the view adopted by the trial court. *Id.* at 331-32.

¶ 48 Illinois law supports a liberal policy of permitting amendments to the pleadings so as to enable parties to fully present their alleged cause of action. *Grove v. Carle Foundation Hospital*, 364 Ill. App. 3d 412, 417 (2006). At any time before final judgment, the court may allow amendments on just and reasonable terms to enable the plaintiff to sustain the claim brought in the suit. 735 ILCS 5/2—616(a) (West 2010). Furthermore, "[a] pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs \*\*\* that may be just." 735 ILCS 5/2—616(c) (West 2010). In considering whether the trial court abused its discretion in ruling on a motion for leave to file an amended complaint, we consider the following

factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleadings could be identified. *Compton*, 382 Ill. App. 3d at 332. Reviewing these factors, we find no abuse of discretion in allowing Saif to amend his complaint.

¶ 49 First, the amendment did not serve to cure a defective pleading, so factor one is not relevant here. Turning to the third factor of timeliness, “because amendments may be allowed at any time before the entry of a final judgment [citation], the timeliness of plaintiff’s amendment is not at issue.” See *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 468 (1992).

¶ 50 Regarding factor two, we do not find that Odeh was prejudiced by the amendment. On direct examination, counsel examined Saif extensively about his February 2010 email listing six jobs that were allegedly outside the scope of the agreement. Then, on cross-examination, Saif was questioned about the amount of money he sought in this lawsuit, and Saif answered that he was seeking \$15,000 for the underground wiring, plus \$10,000 for the concrete, plus the extras (approximately \$10,000), for a total of \$35,000. According to Saif, there had been a mistake in the paperwork he gave his attorney. Therefore, Odeh was aware of the additional amounts that Saif was seeking and had the opportunity at trial to defend against those six extras.

¶ 51 Not only was Odeh on notice, the six extras in the amendment were inextricably intertwined with the evidence relating to the other two extras of the underground wiring and the concrete, meaning they did not alter the nature of proof for Odeh to defend himself. As the trial court recognized, the amendment conformed to the evidence at trial. See *Grove*, 364 Ill. App. 3d at 418 (amendments conform the pleadings to the proofs, and are allowed pursuant to section 2—616(c),

if the evidence that supports the amendments is inextricably intertwined with evidence relating to other alleged acts and omissions already alleged in the original complaint; the focus is on whether the amendment alters the nature and quality of proof for the defendant to defend himself); see also *Lee*, 152 Ill. 2d at 469 (because the plaintiff's amendment did not alter the nature and quality of the proof required for the defendant to defend itself, the court found no prejudice).

¶ 52 With respect to Odeh's argument that Saif was aware of the extras in the amendment at the time of the original complaint, he is correct that "[o]rdinarily, once a trial has begun, an amendment should not be permitted to set up matters of which the pleader had full knowledge at the time of interposing the original pleading and no excuse is presented for not putting its substance in the original pleading." *Lee*, 152 Ill. 2d at 469. However, this is a concern when the amendment is prejudicial or would alter the nature and quality of the proof required to defend. *Id.* Where prejudice is *not* likely to result, the trial court may permit the amendment. *Id.*

¶ 53 Finally, we turn to factor four, which is whether previous opportunities to amend the complaint could be identified. In this case, counsel moved for leave to amend the complaint before the close of her case-in-chief, during the questioning of her third witness, Odeh. Rather than rule on the motion at that time, the trial court opted to wait until Odeh's testimony was completed, which ended up being the end of the trial. Thus, Odeh's assertion that Saif's counsel added new allegations after the trial was over is not entirely accurate. In any event, the supreme court has allowed such an amendment where the plaintiff did not move to amend her complaint until right before closing argument. *Lee*, 152 Ill. 2d at 467, 469. Given that the defendant was not prejudiced by the amendment, the supreme court stated that "we are unable to conclude, based upon this factor alone, that the trial court abused its discretion in permitting the amendment." *Id.* at 469. We reach the

same result here. Accordingly, the trial court did not abuse its discretion by allowing Saif to amend his complaint.

¶ 54

### III. CONCLUSION

¶ 55 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 56 Affirmed.