

NOTICE

Decision filed 07/25/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 110239-U
NO. 5-11-0239
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

KENNETH P. SHEVLIN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	
)	No. 09-SC-622
BLOMENKAMP EXCAVATING & CONSTRUCTION,)	
INC.,)	Honorable
)	Ellen A. Dauber,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justice Goldenhersh concurred in the judgment.
Justice Welch dissented.

ORDER

¶1 *Held:* The circuit court properly found that the defendant did not fulfill its obligation to repair the dam. The trial court's decision is not against the manifest weight of the evidence. The trial court did not abuse its discretion when it denied the defendant's motion for relief from the judgment and to reopen the case to present newly discovered evidence.

¶2 The plaintiff, Kenneth P. Shevlin, brought an action against the defendant, Blomenkamp Excavating & Construction, Inc. (Blomenkamp Excavating),¹ which is a

¹We note that, in the small claims complaint and all subsequent pleadings, the defendant is listed as "Blomenkamp Excavating & Construction, Inc. (Gregg Blomenkamp)," as if the corporation and Mr. Blomenkamp were a single legal entity. Since they are separate legal entities, we will refer to Blomenkamp Excavating as the defendant and to Mr. Blomenkamp as the individual owner of the corporation.

corporation owned and operated by Gregg Blomenkamp. In his complaint, the plaintiff alleged breach of an oral agreement to repair a dam on the plaintiff's property after two attempts. The plaintiff paid the defendant \$2,380 and \$4,780 in April 2004 and in November 2005, respectively. The plaintiff sought recovery of \$5,000. After a bench trial, the circuit court granted recovery to the plaintiff in the amount of \$4,780. The defendant now appeals on the grounds that it did not breach the terms of the February 2005 agreement, that the circuit court's order dated April 7, 2010, is against the manifest weight of the evidence, and that the circuit court abused its discretion when it denied the defendant's motion for relief from judgment and to reopen the case to submit newly discovered evidence (posttrial motion).

¶ 3

BACKGROUND

¶ 4 Gregg Blomenkamp has owned and operated Blomenkamp Excavating since 1977. He previously worked for Peabody Coal Company (Peabody), where he was a continuous miner operator. He stated that he was familiar with repairing areas affected by mine subsidence. Mine subsidence is a situation caused when coal is mined underground, leaving open spaces into which material above may sink and fill in the open spaces.

¶ 5 In 2004, the plaintiff contacted the defendant about performing some work on a dam on the plaintiff's property. The plaintiff had a problem with the dirt that was on the backside of the dam sloughing off. Sloughing occurs when the underground support of the surface is weakened or removed and causes a downward shift in the surface features. Mr. Blomenkamp testified that he told the plaintiff about the possibility of a sinkhole due to mine subsidence, that the plaintiff just said he wanted it fixed, and that the plaintiff suggested how he wanted it done. The defendant performed a repair on the dam that consisted of removing the dirt that had sloughed off the back of the dam, replacing it with dirt moved from a neighboring hill, and leveling the top.

¶ 6 Shortly after the 2004 repair, the dirt on the dam began to slough again. At this time, Mr. Blomenkamp stated that mine subsidence might be the cause and suggested the plaintiff contact Peabody concerning the existence of a mine under the property. The plaintiff testified that the person he talked to at Peabody told him there was no mine under his property. Mr. Blomenkamp began working on the dam again in February 2005. This work consisted of having 800 to 900 tons of dirt hauled in. The plaintiff expressed concern that this method had not worked before. Mr. Blomenkamp testified that he told the plaintiff that he had done this several times successfully, although he would not guarantee the results because different amounts of fill could be required to fix problems of mine subsidence. Mr. Blomenkamp also stated that the only way to ensure permanent repair of the dam would be to tear down the existing dam and rebuild it with fresh dirt. Mr. Blomenkamp testified that he and the plaintiff never discussed the cost of this option.

¶ 7 After the second attempted repair, the plaintiff notified the defendant that the dam had settled on top and that he needed some more fill dirt. The defendant delivered 90 to 96 tons of fill dirt from another job site, and the plaintiff said he would take care of it. The defendant did not charge for these deliveries. Also after the second attempted repair, the relationship between the parties deteriorated, and the plaintiff hired Heet Excavating (Heet) to repair the dam. Heet opened the dam, took the dirt off, allowed it to dry, and rebuilt the dam.

¶ 8 In a written order dated April 7, 2010, the trial court found that the defendant failed to fulfill its obligations under the agreement it had with the plaintiff to repair the sloughing on the dam and awarded damages to the plaintiff in the amount of \$4,780, which was the amount paid for the second repair. The trial court based its order on the finding that Mr. Blomenkamp selected the method of repair and that the plaintiff relied on Mr. Blomenkamp's expertise and assurance that the problem would be corrected.

¶ 9 On April 19, 2010, the defendant filed a posttrial motion. In the posttrial motion, the

defendant alleged that the dam had failed again "as a result of mine subsidence" and requested the court to "re-open" the case for the defendant to present newly discovered evidence regarding the failure of the dam repair performed by Heet and regarding the existence of mine subsidence. The trial court denied the motion. The defendant now appeals.

¶ 10

DISCUSSION

¶ 11

A. Whether the Defendant Fulfilled the Agreement

¶ 12 The defendant argues that it fulfilled the agreement with the plaintiff because there was no specific agreement to break the dam open and rebuild it the way that was done by Heet. The defendant argued that it did what the plaintiff asked it to do when Mr. Blomenkamp attempted to repair the dam the second time and when he later delivered additional dirt to fill in the dam.

¶ 13 The appropriate standard of review for a ruling after a bench trial is whether the trial court's decision is against the manifest weight of the evidence. *People ex rel. Department of Labor v. 2000 W. Madison Liquor Corp.*, 394 Ill. App. 3d 813, 817 (2009). This only occurs when " 'the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.' " *Id.* at 817-18 (quoting *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001)). A reviewing court will not replace the trial court's judgment with its own except where the trial court's judgment is against the manifest weight of the evidence. *Id.* at 817. "In a bench trial, the trial court must weigh the evidence and make findings of fact. In close cases, where findings of fact depend on the credibility of witnesses, it is particularly true that a reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence." *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). The central issue here concerns the terms of the parties' agreement. The testimony of the plaintiff indicates that he relied on Mr.

Blomenkamp's judgment and expertise in deciding how to proceed with the repairs and that Mr. Blomenkamp assured him he would take care of the problem. The plaintiff had no knowledge or experience with mine subsidence or sloughing. He relied on information he received from the defendant and from the Peabody representative recommended by the defendant.

¶ 14 Mr. Blomenkamp testified that he offered no guarantee that his repair would work if the problem with the sloughing was due to mine subsidence because that was outside of his control. When asked about the time necessary for an area to settle and stop subsiding, Mr. Blomenkamp testified that it could take several years. Mr. Blomenkamp later testified that mine subsidence is unpredictable and could take tens of years until the floor and ceiling of the mine squeeze together. There is no indication that Mr. Blomenkamp knew how much open space existed underground below the dam structure. However, when M. Blomenkamp told the plaintiff he would take care of it, the plaintiff relied on that statement and authorized the work based on that reliance.

¶ 15 The trial court is in the best position to determine the credibility of witnesses and consider the testimony given. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004). The court found that the defendant gave no guarantee concerning the success of the first repair but that the second repair job was under different circumstances because the plaintiff relied on Mr. Blomenkamp to select the best method of repair. Although Mr. Blomenkamp testified that he was not sure of the amount of dirt or the length of time it would take to stabilize the dam, the court was justified in relying on his statement that he would take care of the problem. The court found that the defendant failed to fulfill its agreement to fix the dam at the time of the second repair because Mr. Blomenkamp promised to fix the dam, the plaintiff authorized the defendant to perform the second repair, and in doing so, he relied on Mr. Blomenkamp's knowledge and expertise. Therefore, the trial court's ruling that the defendant

did not fulfill its agreement is not against the manifest weight of the evidence.

¶ 16 B. Whether the Trial Court Ignored Evidence

¶ 17 The defendant also argues that the trial court's judgment is against the manifest weight of the evidence either because the court ignored evidence in the record or because the judgment is unsupported by evidence in the record. The appropriate standard of review for this question is whether the court's decision is against the manifest weight of the evidence. *People ex rel. Department of Labor*, 394 Ill. App. 3d at 817. In this case, both parties relied on their own testimony, and neither party called any other witnesses in support of their position. The trial court is in a superior position to assess the credibility of each witness. *In re Marriage of Bates*, 212 Ill. 2d at 516.

¶ 18 The plaintiff testified that the defendant made the first repair after they mutually agreed that the defendant would bring in dirt from a nearby hill. Prior to the second repair, the plaintiff expressed reservations about using the same method again due to its lack of success before. The plaintiff testified that he discussed the possibility of breaking the dam with Mr. Blomenkamp and that Mr. Blomenkamp did not want to do that. Mr. Blomenkamp stated that it is difficult to seal a dam once it is broken open. The plaintiff later agreed with performing the repair in the same way as before based on the conversation with the Peabody representative and Mr. Blomenkamp's assurance that he would repair the dam. The plaintiff also testified that, due to the conversation with the Peabody representative and the fact that the water in the nearby pond and creek did not drain, he did not believe that mine subsidence was an issue with his property.

¶ 19 Mr. Blomenkamp's testimony indicated that he was experienced with the excavating business and that he believed the problem with the plaintiff's dam was caused by mine subsidence. He formed this belief based on his observation of the plaintiff's dam as well as his experience with mine subsidence at other sites. Therefore, Mr. Blomenkamp was aware

of the possibility that the area under the plaintiff's dam had been undermined and that the sloughing was potentially due to mine subsidence when he made the statement that he would take care of the problem with the dam. Even though Mr. Blomenkamp stated that he would not guarantee his work if mine subsidence was causing the sloughing, he also told the plaintiff that he would remedy the sloughing problem with the dam. No independent proof was offered that mine subsidence caused the problem. The trial court found that the plaintiff relied on Mr. Blomenkamp's suggestions of how to fix the dam. The court made a distinction between the first and second repairs, saying the first was performed as agreed. The court found that the method of the second repair was chosen by Mr. Blomenkamp who promised to fix the sloughing on the dam but that the sloughing continued after the second repair and subsequent dirt deliveries. The court found that the subsequent deliveries indicated that Mr. Blomenkamp intended to fulfill the obligation to fix the sloughing problem until the "relationship soured," and that finding is supported by the evidence. The trial court did not ignore evidence and was justified when it found that the defendant had agreed to fix the sloughing problem with the dam.

¶ 20 C. Whether the Trial Court Abused Its Discretion in Denying the Posttrial Motion

¶ 21 The defendant argues that the trial court abused its discretion when it denied its posttrial motion. The defendant argued in its motion that it had only recently become aware of the failure of the dam repair performed by Heet and that the failure was caused by mine subsidence. The defendant also provided photographs of the dam purporting to show where the level of the dirt had dropped 18 inches and that the water in the pond was ready to overflow. In support of its motion, the defendant cited section 2-1301 of the Code of Civil Procedure (735 ILCS 5/2-1301 (West 2008)), which governs default judgments. However, we will consider the trial court's decision pursuant to section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2008)), which governs motions made within 30 days

after judgments in nonjury cases. Subsection (a) of section 2-1203 states as follows: "In all cases tried without a jury, any party may, within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief." 735 ILCS 5/2-1203(a) (West 2008).

¶ 22 The standard of review for a motion filed under section 2-1203 is "whether the trial court abused its discretion and whether substantial justice between the parties was done." *In re Application of the County Treasurer*, 292 Ill. App. 3d 310, 313 (1997). An abuse of discretion exists when the trial court acts arbitrarily, and no reasonable person would take the same position. *Jacobo v. Vandervere*, 401 Ill. App. 3d 712, 715 (2010).

¶ 23 The trial court was presented with evidence that Mr. Blomenkamp made two conflicting statements. Mr. Blomenkamp told the plaintiff that he would not guarantee the repair if the cause of the sloughing was mine subsidence. However, he also told the plaintiff that he would fix the sloughing problem with the dam. The trial court found that the plaintiff, at least in part, relied on this statement in making his decision to allow the defendant to attempt to repair the dam by bringing in additional dirt. The plaintiff originally asked for \$5,000, and the trial court only awarded \$4,780, which was the amount paid to the defendant for the second repair when Mr. Blomenkamp said he would fix the dam. This amount is reasonable because it only restores the plaintiff's financial condition before the agreement to make the second repair.

¶ 24 Also, the introduction of evidence regarding the subsequent failure of the Heet repair of the dam would not negate the fact that Mr. Blomenkamp promised to take care of the problem with the dam. The defendant did not present any evidence or arguments to show how this new evidence would be likely to result in a different decision by the trial court. Further, the allegations in the posttrial motion that the dam had failed again due to mine

subsidence was supported only by the affidavit of Mr. Blomenkamp. No independent "newly discovered evidence" was offered. The trial court's decision was reasonable, and it did not abuse its discretion when it denied the defendant's posttrial motion.

¶ 25

CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the trial court ordering the defendant to pay the plaintiff \$4,780 and the order denying the defendant's motion for relief from judgment and to reopen the case to present new evidence.

¶ 27 Affirmed.

¶ 28 JUSTICE WELCH, dissenting:

¶ 29 I disagree with my colleagues on the issue of whether the trial court abused its discretion when it denied the defendant's motion for relief from judgment and to reopen the case to submit newly discovered evidence. I believe that the defendant should have been allowed to present newly discovered evidence concerning the unsuccessful attempt by Heet Excavating to fix the dam.

¶ 30 Although this issue is a matter of discretion by the trial court, the record indicates that the court was under the impression that Heet Excavating was able to fix the problem by rebuilding the dam. In fact, the trial court's written order of April 7, 2010, stated that the defendant chose the wrong method of repairing the dam and that it was significant that the plaintiff's suggestion of breaking the dam ultimately worked.

¶ 31 Contrary to the trial court's determination, the defendant has presented evidence that the problem with the dam was caused by mine subsidence. Because of the newly discovered evidence concerning the sloughing off of the dirt on the dam, I would reverse the trial court's denial of the defendant's motion for relief from judgment and to reopen the case to submit

newly discovered evidence. I would therefore remand this cause to the trial court for further proceedings. The defendant deserves an opportunity to present this newly discovered evidence. Even a small claims matter is a search for the truth, and in this case, it might not have been found.