

No. 1-11-2150

CORDECK SALES, INC.,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff,)	
)	
v.)	
)	
CONSTRUCTION SYSTEMS, INC.,)	No. 03 CH 6309
)	
Defendant/Counter-Plaintiff and Appellee,)	Honorable Lisa Curcio,
)	Judge Presiding.
v.)	
)	
FIRST MIDWEST BANK,)	
)	
Counter-Defendant, Appellant.)	
)	

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Lampkin and Justice R. Gordon concur in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying FMB's motion for sanctions and motion to reconsider. The trial court's judgment is affirmed in favor of Construction Systems, Inc. under section 7 of the Mechanics Lien Act (770 ILCS 60/7 (West 2010)).

¶ 2 This case has been well traveled through our courts. At this stage of the journey, the third appeal, only two parties remain privy to the action, Construction Systems, Inc. (CSI) and

First Midwest Bank (FMB). FMB presents two narrow issues on appeal. The first is whether the trial court erred in denying a motion for sanctions and a motion to reconsider. Both motions centered around FMB's request for the trial court to enter sanctions pursuant to Illinois Supreme Court Rule 219(c)(eff. July 1, 2002) against CSI for failing to preserve and produce relevant electronic and paper documents evidencing work done on the project at 520 N. Halsted Street in Chicago between May 25, 2003, and June 18, 2003. The second issue on appeal, after remand from this court in *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 394 Ill. App. 3d 870 (2009) (*Cordeck II*), is whether the trial court erred in finding CSI's mechanics lien claim was timely under section 7 of the Mechanics Lien Act (the Act)(770 ILCS 60/7 (West 2010)). For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 On April 7, 2003, Cordeck Sales, Inc. filed this action seeking foreclosure of its Mechanics lien and damages from CSI. Count II alleged CSI breached its contractual obligation to pay Cordeck for steel erection work it preformed on the residential condominium building located at 520 N. Halsted Street in Chicago (the project). Thereafter, on September 25, 2003, CSI filed a mechanics lien claim pursuant to the Act for the fabrication and erection of steel it provided for the project. CSI claimed it was owed an unpaid balance of \$1,979,412, as it had substantially performed all of its work on the project as of June 18, 2003. Title to the property was in a land trust by North Star Trust Company, as Trustee under Trust no. 1903 (North Star). North Star entered into an agreement for construction management services with AMEC

1-11-2150

Construction Management, Inc. (AMEC) and for general construction with Construction Services International, Inc., the entity that hired CSI to produce the steel for the project. On April 30, 2001, North Star, as trustee, obtained a \$16,736,960 mortgage on the property through CoVest Banc, National Association, FMB's predecessor-in-interest. The mortgage contract was subsequently modified and the loan amount increased to \$23,145,981. The mortgage was recorded on May 11, 2001.

¶ 5 The first appeal in this case resolved a number of subcontractor liens and was adjudicated and remanded by this court in *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334 (2008)(*Cordeck I*). Subsequently, Cordeck and CSI settled their claims in the trial court and the only remaining parties were CSI and FMB. CSI moved for and was granted summary judgment on the issue as to the validity of the mechanics lien claim. FMB appealed and the decision in *Cordeck II* followed. The *Cordeck II* court reversed the grant of summary judgment in favor of CSI, finding there were issues of fact requiring further proceedings on the complaint and that summary judgment was improper. In particular, the court stated the absence of CSI in the project manager's logs on the days it was allegedly at the project performing work created an inference the lien was untimely. The court also reversed the denial of FMB's motion to compel production of the CSI-Cordeck settlement agreement, however, the latter issue is not before us on this appeal.

¶ 6 This matter went to trial on the issue of the timeliness of CSI's mechanics lien claim. Michael Baumann (Baumann) testified he was employed by CSI in 2003 as a shop foreman in

1-11-2150

charge of fabrication, quality, painting and delivering steel. Baumann came to Chicago on two separate occasions to complete work on the project, once for two weeks commencing June 2, 2003, and for another week beginning June 16, 2003. On the first sojourn, Baumann brought a three man crew with him to the project. Baumann was the most senior CSI employee present and therefore was the foreman on the job. His duties included recording the time the crew worked on the project and turning in the time log to the accounting department. He was also responsible for submitting expense receipts to the accounting department. He did not, however, purchase any gas on the first trip from Minneapolis to Chicago, stating he traveled to Chicago and back on one tank of gas. Baumann further testified he remembered being away from June 2, 2003, through June 9, 2003, because he missed his parents' anniversary, his mother's birthday, and his only son's second birthday, which was on the ninth of June. On June 16, 2003, he traveled to Chicago with Perry Haberer, vice president of CSI, and with his crew members to work on the project, including the installation of roof frames and welding in the garage. Baumann recalled being at the project on June 18, 2003, because he was dropped off at the project in the morning by Haberer who was "very upset" because he had not received a check. As a non-union member, Baumann testified he was told by Haberer to "keep a low profile" so as not to create any problems with the union. He did not check in with Lee Wesol, the project supervisor, at the project site. He did notice Wesol at the job site and testified Wesol was aware he was present.

¶ 7 Perry Haberer (Haberer) testified he traveled to Chicago on June 16, 2003, to finish the

1-11-2150

project. He was joined by Baumann and his three man crew. While there, Haberer was responsible for keeping track of the crew members' time. Neither Haberer nor the crew members were required to check in with Wesol. On Wednesday of that week, Haberer recalled speaking with Wesol regarding the urgency to finish the job and also inquired where he could take his crew out for lunch. Wesol directed him to a sandwich shop and the crew continued working until 9:00 p.m. Haberer was aware of the issue with the union at the job site.

¶ 8 Haberer further testified either in 1999 or 2000, CSI began to transition to a paperless office. CSI attempted to scan the documents from all jobs into the system. Haberer was not familiar with nor aware of CSI's procedure for disposing of the documents after they were scanned. In 2004, CSI's computer hard drive became corrupted and it could not be repaired. Haberer did not personally attempt to recover the data from the hard drive, though some information was eventually recovered.

¶ 9 Lee Wesol (Wesol) testified he was employed by AMEC in 2003 as a project superintendent. As part of his regular practice to determine what trade-workers were on site, Wesol would walk through the job site during the day. He noted, however, the building was large and it was possible he may have overlooked some individuals who were present. No one on site was required to check in with him. When asked whether he could overlook a trade being onsite for a week, he responded "absolutely not." He further testified he kept a daily log of what he observed on the job site.

¶ 10 Wesol did recall meeting Baumann on site "certainly more than twice." He noted in his

1-11-2150

log he "met with Perry Haberer of CSI" on June 13, 2003. He further explained, "the gist of that entry was there were problems with money and it was hard to rally the troops, and that's what this was about." As a result, he believed Haberer would have someone at the project site from CSI the following week. Though he could not specifically recall what day he met with Haberer, he said it was possible they met on the eighteenth of June. Additionally, he remembered recommending the sandwich shop to Haberer, but not does not recall on which day. Further, Wesol remembered "absolutely" observing Haberer curing and grading on the site at some point, as he recalled being surprised Haberer was helping his people "get the job done." After reviewing his notes, Wesol determined he probably saw Haberer during the week of June 16, 2003, because "that's what they were working on."

¶ 11

ANALYSIS

¶ 12

I. The Motion for Sanctions and the Motion to Reconsider

¶ 13

FMB filed two separate motions before the trial court seeking sanctions, namely the dismissal of count I of CSI's counterclaim. The first motion for sanctions was filed May 19, 2010, and brought pursuant to Illinois Supreme Court Rule 219(c)(eff. July 1, 2002). FMB asserted CSI had a duty to preserve the hard drive, because it contained evidence specifically related to the timeliness of CSI's mechanics lien claim. The second motion for sanctions was brought as an oral motion during trial and was reiterated in FMB's written posttrial motion to reconsider. The movant sought sanctions because of CSI's failure to produce a paper record created by Baumann and tendered to the accounting department detailing his and the other

1-11-2150

employees' hours and expenses incurred while working in Chicago on the project in June of 2003. FMB asserted sanctions should be imposed because this was the only document created by CSI's employees relating to the work done in June of 2003. Therefore, it was a crucial piece of evidence to the timeliness of CSI's mechanics lien claim.

¶ 14 The imposition of sanctions is within the discretion of the trial court and this court will not disturb a trial court's decision on appeal absent a clear abuse of discretion. *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305, 313 (1993). "A trial court abuses its discretion when it acts arbitrarily, without conscientious judgment, or, in view of all of the circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice." *In re Marriage of Haken*, 394 Ill. App. 3d 155, 160 (2009). The trial court has the power to impose discovery sanctions in civil cases pursuant to Illinois Supreme Court Rule 219(c)(eff. July 1, 2002). The trial court has the discretion to strike a party's pleading where the party's noncompliance with discovery has been unreasonable. *Pickering v. Owens-Corning Fiberglas Corp.*, 265 Ill. App. 3d 806, 820 (1994). In determining whether a party's noncompliance has been unreasonable, the standard is whether the party's conduct is characterized by a wilful and deliberate disregard of the discovery rules or the trial court's authority. *People v. Schambow*, 305 Ill. App. 3d 763, 767 (1999).

¶ 15 In the first motion, FMB argued CSI's failure to tender documents and records relating to the completion date was sanctionable under Rule 219(c)(eff. July 1, 2002). CSI tendered an affidavit stating the document production was complete, however CSI did not produce any

1-11-2150

payroll or other records which would demonstrate when it last performed work on the project. FMB argued CSI had a duty to preserve the hard drive, especially since litigation had already commenced. CSI responded the hard drive was destroyed by a "worm virus" and it did not deliberately or contumaciously destroy the hard drive. CSI supported its response with an affidavit from Haberer. We are unable, however, to consider the affidavit as a whole on appeal because only the first page was included in the record. FMB was granted leave to depose Haberer for the purpose of the motion and filed a supplemental reply brief.

¶ 16 The trial court, ruling on the first motion for sanctions, denied the request stating, "the court does not find evidence of conduct which was 'deliberate or contumacious or evidences an unwarranted disregard of the court's authority'; however, the court expresses no opinion on whether Construction Systems' conduct was negligent, such matter being reserved for future proceedings, if future proceedings are brought." Our review of the record does not support FMB's argument the trial court erred when it denied FMB's motion for sanctions. Particularly, Haberer's deposition does not indicate whether the destruction of the hard drive was related to deliberate or contumacious conduct. No evidence was presented to the trial court regarding CSI deliberately destroying the hard drive knowing it was in the middle of litigation. There is also no evidence in the record to support the assertion the trial court acted arbitrarily, without conscientious judgment. Therefore, we find no abuse of the trial court's discretion in denying FMB's motion for sanctions.

¶ 17 Regarding the second motion, during closing argument, FMB made an oral motion to

1-11-2150

strike stating, "[w]e would actually move to strike the testimony on that issue and ask to have Count I stricken from the complaint because there's no question that CSI knew that the timing of their lien was going to be an issue." It is unclear from the record what testimony FMB sought to strike. In the motion to reconsider, FMB clarified its prior oral motion, claiming Baumann testified to the existence of paper records, namely time records for himself and his crew and expense receipts, which were previously undisclosed by CSI in June of 2003 when this lawsuit was pending and this violated Rule 219(c). CSI responded to the motion stating the existence of these records was disclosed during Baumann's deposition. Further, the paper records contained only the time work commenced each day, when he was on the site, if they took lunch, if they left the site, and when work was finished for the day. There was no information included in the specific paper records Baumann referenced as to the location or name of the job site.

¶ 18 The trial court denied the motion to reconsider, finding it did not meet the criteria required under Rule 219(c). Citing *Adams v. Bath and Body Works, Inc.*, 358 Ill. App. 3d 387 (2005), the trial court first considered whether the conduct of CSI was "deliberate, contumacious, or [an] unwarranted disregard of the court's authority." *Id.* at 394. The trial court interpreted the case law in this area to require a showing of contumacious or deliberate behavior, explicitly rejecting contumacious conduct could be inferred from the testimony or evidence to uphold a motion for sanctions. The trial court did not find any evidence to support a showing of wilful behavior as suggested by FMB.

¶ 19 The trial court also cited to *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 125 (1998), which held that timeliness of the motion is one factor the court should consider in deciding whether to grant a Rule 219(c) motion for sanctions. The court found the issues presented in the motion to reconsider to be untimely, as nothing was presented to the court prior to trial and this issue was first raised during closing arguments.

¶ 20 The *Adams* case cited by the trial court concisely differentiates two similar arguments FMB makes on appeal which are not persuasive. In *Adams*, this court discussed negligent versus wilful and deliberate destruction of relevant evidence. The former could be used as a basis for a claim for negligent spoliation of evidence, whereas the later is used to support a motion brought under Rule 219(c). *Adams*, 358 Ill. App. 3d at 394. Here, the trial court found FMB's motion to reconsider was being submitted under Rule 219(c). Rule 219(c) is cited at length in FMB's brief and the case law referenced also pertains to Rule 219(c). Further, the relief sought, namely the dismissal of count I of CSI's counterclaim, is relief which is provided under Rule 219.

¶ 21 Therefore, for FMB to prevail it needed to demonstrate CSI's non-production of the paper record created by Baumann was due to a deliberate, contumacious, or unwarranted disregard of the court's authority. *Adams*, 358 Ill. App. 3d at 395. To determine if the trial court abused its discretion, we must look to the criteria upon which the trial court relied upon in making its determination. *Shimanovsky*, 181 Ill. 2d at 123. After weighing the credibility of the witnesses and viewing first hand their testimony, the trial court determined the witnesses

were credible and there was no sanctionable action by CSI. Upon review of the record, we find a lack of evidence that CSI deliberately destroyed or contumaciously refused to produce the paper records. FMB claims there is an inference the conduct was wilful which is not sufficient to support a granting of sanctions under Rule 219(c). We cannot say that the trial court abused its discretion. Therefore, the decision of the trial court in denying the motion to reconsider is affirmed.

¶ 22 II. Mechanics Lien Judgment in Favor of CSI

¶ 23 On appeal, FMB argues the trial court's judgment on the mechanics lien claim was improper for two reasons. First, that the trial court failed to use the proper standard in deciding the credibility of CSI's witnesses. Second, FMB asserts portions of Haberer and Baumann's testimony were "beyond the limits of human belief" and thus the trial court's judgment was against the manifest weight of the evidence. Findings of fact are reviewed under the manifest weight of the evidence standard. *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 542 (2007). This standard is satisfied only where the opposite conclusion is clearly evident or where the findings are unreasonable, arbitrary, and not based upon any of the evidence. *Cyclonaire Corp. v. ISG Riverdale, Inc.*, 378 Ill. App. 3d 554, 559 (2007). "A reviewing court should not overturn a trial court's finding merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the fact finder." *Clean World Engineering, Ltd. v. MidAmerica Bank, FSB*, 341 Ill. App. 3d 992, 997 (2003). "The trial judge, as the trier of fact, is in a position

superior to a reviewing court to observe witnesses while testifying, to judge their credibility, and to determine the weight their testimony should receive." *Id.* at 997.

¶ 24 FMB asserts the ruling of the trial court improperly shifts the burden of proof onto FMB. The basis for this conclusion is predicated on the use of the phrases "not incredible" and "does not defy common sense" in the trial order. The trial court's ruling did follow the proper standard despite the use of the phrase "not incredible." Taking into consideration the totality of the evidence and the trial court's ability to observe the witnesses, their memory, manner, interest and bias, the trial court concluded, "CSI has proved by a preponderance of the evidence that its lien was timely filed." "It is the burden of the party seeking to enforce a mechanic's [*sic*] lien to satisfy the elements necessary to establish the lien." *Doornbos Heating and Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 483 (2010). We cannot say the trial court applied an improper standard in making this determination.

¶ 25 FMB further argues the trial court's judgment was against the manifest weight of the evidence because portions of Haberer and Baumann's testimony were "contrary to the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief." We disagree. The trial court set forth its reasoning for finding the testimony of Haberer and Baumann credible. The trial court determined Wesol's testimony did not refute the testimony of Baumann and Haberer as it found CSI "could have been on the job without him [Wesol] making a note of it." The trial court found the project was busy and complex and CSI could have been on site without Wesol making a written record of their presence.

1-11-2150

Additionally, the court concluded Wesol "saw Mr. Harberer on the job during the week of June 16, 2003, and he knows he saw Baumann more than twice, although he did not know when." Wesol further testified he remembered recommending a restaurant to Haberer, which could not have been done if CSI was not on the project site.

¶ 26 FMB next contends Haberer's testimony CSI lacked a computer back-up system and Baumann's testimony he drove from Minnesota and back on one tank of gas is beyond the limits of human belief. First, Haberer admitted he was not computer oriented therefore we defer to the trial court's judgment as to the testimony of the witness. Second, though the trial court did not state whether this portion of Baumann's testimony was credible, it ultimately found the totality of Baumann's testimony to be credible. We find the trial court's finding as to the credibility of Baumann's testimony was neither unreasonable nor arbitrary.

¶ 27 It is the function of the trial court, as the trier of fact, to determine the weight to be afforded the evidence, and the court's decisions in this regard will not be overturned on appeal unless they are against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). The trial court did consider all of the statements FMB challenges along with the entirety of the testimony and evidence presented at trial and rendered a decision in favor of CSI. Under the facts of this case, we conclude that the trial court employed the proper standard and its findings were not against the manifest weight of the evidence.

¶ 28 CONCLUSION

¶ 29 The judgment of the trial court was not against the manifest weight of the evidence,

1-11-2150

and the trial court did not abuse its discretion in denying the motion for sanctions or the posttrial motion to reconsider. Thus, we affirm the judgment of the trial court.

¶ 30 Affirmed.