

No. 1-12-1090

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(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RIVER CITY CONDOMINIUM ASSOCIATION,)	Appeal from the
an Illinois not-for-profit corporation,)	Circuit Court of
)	Cook County.
Plaintiff-Counter-Defendant-Appellant,)	
)	
v.)	10 CH 21100
)	
RIVER CITY FACILITIES MANAGEMENT)	
COMPANY, LLC, an Illinois limited liability company,)	Honorable
)	Franklin Valderrama,
Defendant-Counter-Plaintiff-Appellee.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court dismissed an action for accounting because the court believed the defendant's evidence that it eventually met its fiduciary obligations and provided to the plaintiff all the documents the plaintiff requested. The appellate court affirmed the judgment, holding the trial court's findings were not contrary to the manifest weight of the evidence. In an action for breach of a contract to pay monthly assessments, when the plaintiff must credit the defendant for assessments collected in excess of actual expenses, the plaintiff may recover only the proven expenses, and not the assessments based on projected expenses.

¶ 2 The residential association of a group of condominium owners sued the property's manager for an accounting to explain a sudden drastic increase in assessments the manager demanded. The association later stopped paying monthly assessments and the manager cut back sharply on services. The manager countersued for payment of the assessments it had demanded. The parties' contract required both the payment of assessments, based on anticipated expenses, and a credit to the association of the amount by which the assessments exceeded expenses.

¶ 3 Following a bench trial, the trial court held that the association failed to prove that the manager owed it a fiduciary duty that could require an accounting. The court awarded the manager a judgment requiring the association to pay all of the assessments, with an adjustment for specific services the manager admitted it did not provide. The association appeals.

¶ 4 We hold that the manifest weight of the evidence does not contradict the trial court's findings that the association failed to prove a breach of fiduciary duties or the need for discovery, and therefore we affirm the decision to deny the demand for an accounting. However, the contract restricts the manager's recovery to the amount it spends on the association's behalf, without any presumption that the assessments correctly project those expenses. Therefore, we vacate the award of damages and remand for further proceedings in accord with this order.

¶ 5 **BACKGROUND**

¶ 6 River City Holdings, LLC (RCH), a developer, owned property which included a building 18 floors high with about a million square feet of floor space. RCH divided the property into four separate parcels: a commercial parcel, mostly near street level, a residential parcel, with 448 condominiums on the floors above the commercial parcel, an outdoor parking parcel, and a marina.

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RCH created a reciprocal easement agreement (REA) to govern the relationship between the owners of the four parcels.

¶ 7 The REA establishes that the owners must make some decisions by majority vote. The REA allocates 3 votes to the owner of the commercial parcel, 2 votes to the owner of the residential parcel, and no votes to the owners of the parking lot and the marina. The REA directs the owners, by majority of the 5 votes, to select a facilities manager to manage the shared portions of the total property and to provide certain services to all of the owners of the parcels. The REA provides:

"With respect to each calendar year ***, the Facilities Manager shall prepare and submit to the Owners a budget *** setting forth the items and amounts of expense the Facilities Manager anticipates to incur in such calendar year in providing the services and otherwise fulfilling its obligations ***. The Facilities Management Budget shall be prepared by the Facilities Manager and delivered to all Owners not later than September 1 of any other calendar year with respect to the ensuing calendar year. The Facilities Management Budget shall be subject to review by all of the Owners and to approval by an Ownership Majority ***.

*** All costs and expenses incurred by Facilities Manager in connection with the provision of the services and the performance of the other obligations required of Facilities Manager *** shall be paid by the Owners in accordance with the allocations stated [in another

section of the REA] or, if not stated therein, in reasonable proportion to the benefits derived by each Owner from those services and activities. Each Owner shall be obligated to remit to Facilities Manager each month an amount *** based upon the approved Facilities Management Budget in effect from time to time and estimated and determined by Facilities Manager to be sufficient to provide Facilities Manager with the funds necessary to pay the costs of provision of the services and performance of the obligations of the Facilities Manager for the ensuing month ***. *** All funds received by Facilities Manager in payment of the Monthly Facilities Assessment, any Supplemental Assessment, and the Annual Reserve Assessment shall be held by Facilities Manager as fiduciary for all the Owners ***. Facilities Manager shall have full authority to expend the funds held in the Facilities Account in accordance with the Facilities Management Budget ***. *** Facilities Manager shall also prepare annual operating statements showing the costs and expenses and allocation thereof for each year within sixty (60) days following the end of each calendar year, and shall reconcile and adjust with each Owner all assessments paid by it during such prior year. Such year end adjustments shall include, as applicable, a Supplemental Assessment billing to any Owner determined to have underpaid its

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obligation in the prior year, or a notice of credit to be given against Monthly Facilities Assessments next coming due for any Owner that is determined to have overpaid its obligation in the prior year."

¶ 8 RCH sold the commercial parcel to WRT-Marc RC LLC (WRT), and it sold the residential parcel to the River City Condominium Association (Association). In November 2007, WRT chose River City Facilities Management Co. (Management) as the facilities manager. Because the Association had only 2 votes, it had no influence on the choice of the facilities manager.

¶ 9 Management did not have an opportunity to prepare a timely budget for 2008. Management hired Christopher Jakubowski to manage the property. He sent to the owners a budget summary for 2008 in October 2008. He did not comply with the contractual requirement that he submit a budget for 2009 by September 1, 2008. He finally sent the Association the 2009 budget in September 2009, and in October 2009, he delivered to the Association the 2010 budget.

¶ 10 The Association promptly requested documentation from Jakubowski to explain the 2008, 2009 and 2010 budgets. The Association especially sought documents supporting the 29% increase in the assessments from 2009 to 2010. Jakubowski wrote back that "Reserve/Cap X items" required the increase, and he claimed he had already given the Association all necessary documents.

¶ 11 On May 17, 2010, the Association filed a complaint against Management and others, seeking an accounting and charging Management with breaching its fiduciary duties to the Association. The Association stopped paying the monthly assessments in October 2010. Management stopped providing several of the services the REA required. For example, shuttle bus service for the complex stopped in May 2011, and Management cut security services in 2011. Management countersued the

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Association for breach of contract, seeking payment of the monthly assessments it charged based on its budget for 2010 and 2011.

¶ 12 Four witnesses testified at the bench trial. Tanay Gladnay-Johnson, who worked for the Association, testified that the Association did not receive from Management adequate documentation for the assessments. Management did not fill many of the Association's document requests until some time after the Association filed its complaint. Gladnay-Johnson forwarded the documents she received from Management to Christina Nyborg, an accountant. The documents Jakubowski gave the Association did not permit the Association to verify the charges. Gladnay-Johnson admitted that Jakubowski responded promptly to her specific questions about the bills.

¶ 13 Nyborg testified that she never received from Management sufficient documents for her to verify many of the charges. Some of the amounts charged to the Association paid for repairs to the marina and the commercial parcel. She detailed in her report \$458,000 worth of charges she found questionable due to the lack of supporting documentation.

¶ 14 Michelle Magharious, president of the Association, testified that the owner of the commercial parcel approved the annual budgets Jakubowski prepared. Because the owner of the commercial parcel had three votes and the Association got only two votes, the Association's objections to the budgets had no effect. Management denied the Association's requests for reallocation of several expenses.

¶ 15 Jakubowski testified that he continued to allocate expenses in accord with allocation percentages applied by managers for the property who preceded him. He explained his decisions to charge the Association for the contested amounts. In 2011, months after the Association sued for

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an accounting, Jakubowski sent the Association the documents it requested.

¶ 16 The trial court found that by May 2011 Management sent the Association all of the documents the Association requested, and that Management correctly allocated between the owners of the parcels all of the charges Nyborg found questionable. The trial court held that the "Association failed to establish the existence of any special relationship that would give rise to a fiduciary duty between the Facilities Manager and the *** Association that would entitle the *** Association to an accounting," and the Association failed to prove that Management breached its "fiduciary duty as it pertains to the common expenses." The court entered a judgment in favor of Management on the complaint and on the counterclaim, finding that the Association owed Management the full amount of assessments Management charged, less an adjustment for services Management chose to discontinue.

¶ 17 At a posttrial hearing, Jakubowski testified about the estimated cost of the shuttle service and discontinued security. After deducting those adjustments from the assessments charged, Management determined that the Association owed it more than \$1,450,000. The Association again protested that Management did not explain and provide documents to support its accounting.

¶ 18 The trial court entered a judgment against the Association for \$1,454,420.26. The court added a finding of no reason to delay enforcement or appeal from the judgment, because the judgment did not completely dispose of claims against other parties the Association named as defendants. The Association now appeals.

¶ 19 ANALYSIS

¶ 20 Accounting

¶ 21 Because the trial court entered its judgment following a bench trial, we will not reverse the trial court's judgment unless it is against the manifest weight of the evidence. *Carey v. American Family Brokerage, Inc.*, 391 Ill. App. 3d 273, 277 (2009).

¶ 22 To show a right to an accounting, a plaintiff must show one of the following: (1) a fiduciary relationship and a breach of fiduciary duties, (2) a need for discovery, (3) fraud, or (4) complex mutual accounts. *Mann v. Kemper Financial Cos.*, 247 Ill. App. 3d 966, 980 (1992); *People ex rel. Hartigan v. Candy Club*, 149 Ill. App. 3d 498, 501 (1986). The Association argues that it showed both a breach of fiduciary duties and a need for discovery.

¶ 23 The REA establishes that Management has fiduciary duties to the Association with respect to the disbursement of funds collected as assessments. A breach of those duties would provide grounds for an accounting. See *Kurtz v. Solomon*, 275 Ill. App. 3d 643, 653 (1995). At the time the Association filed its complaint, several months before Management provided documents responsive to the Association's requests, the Association needed discovery to determine how Management was spending its funds. Gladnay-Johnson and Nyborg testified that the documents Management provided did not permit them to verify the expenditures. The Association needed access to Management's records and receipts to determine the propriety of the ways Management spent the Association's money. See *Cumis Insurance Society, Inc. v. Peters*, 983 F. Supp. 787, 797 (N.D. Ill. 1997); *Mutuelle Generale Francaise Vie v. Life Assurance Co.*, 688 F. Supp. 386, 400-01 (N.D. Ill. 1988); *In re American Home Mortgage Holding Co.*, 458 B.R. 161, 171 (Bankr. D. Del.

2011). However, the trial court found credible Jakubowski's testimony that he responded to all of the Association's requests for documents and the Association did not inform him that his responses did not completely answer the Association's needs. We cannot say that the trial court's finding that the Association has not proved a need for discovery that warrants an accounting is contrary to the manifest weight of the evidence.

¶ 24 Neither can we say that the trial court's finding that the Association failed to prove a breach of fiduciary duties that requires an accounting is contrary to the manifest weight of the evidence. While the REA imposes on Management fiduciary duties with respect to the disbursement of funds collected as assessments, Jakubowski testified to the steps he took to make appropriate disbursements and allocations of expenses, and he explained the expenses Nyborg listed as questionable. We see no basis in this record for overturning the trial court's findings of credibility. See *Cosmopolitan National Bank v. County of Cook*, 103 Ill. 2d 302, 315 (1984). The trial court seems to have contradicted itself, stating both that Management had fiduciary duties related to common expenses, and that the Association failed to prove a special relationship of the kind that could entitle the Association to an accounting. But the inconsistency does not affect the validity of the trial court's judgment that the Association did not prove the need for an accounting because it failed to prove either a need for discovery or a breach of fiduciary duties. See *Crowell v. Parrish*, 159 Ill. App. 3d 604, 609-10 (1987). We affirm the trial court's judgment denying the Association's claim for an accounting.

¶ 25 Counterclaim

¶ 26 The trial court awarded Management a judgment against the Association for \$1,454,420.26

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for breach of contract, because the Association refused to pay the assessments after October 2010. For a breach of contract claim, the plaintiff must prove damages to a reasonable degree of certainty. *Carey*, 391 Ill. App. 3d at 277. "The basic principle for the measurement of contract damages is that the injured party is entitled to recover an amount that will put him in as good a position as he would have been in had the contract been performed as agreed." *Collins v. Reynard*, 154 Ill. 2d 48, 51 (1992).

¶ 27 The REA requires Management to reconcile assessments with expenses each year, and to credit to the Association, each year, the amount by which the assessments exceed Management's actual expenses, if the assessments exceed expenses. That is, under the REA, the Association ultimately pays only the legitimate, documented expenditures Management makes on behalf of the Association, without any presumption that the assessments, based on forecasts and projections, accurately predict Management's expenditures. The court here used a strong presumption that the assessments Management demanded in the budget presented in 2010 accurately projected Management's expenditures for 2011, but with an adjustment for budgeted services Management admitted it did not provide. If the assessments exceeded actual expenditures, the court's order gives Management a windfall of payments in excess of the Association's expenditures. Because Management has now completed its expenditures for 2011, the court has no reason to rely on Management's old projection of its anticipated expenses, reflected in the assessments it charged the Association. The court must instead measure Management's damages by its proven expenditures. Accordingly, we vacate the award of damages and remand for calculation of the proven, legitimate expenditures Management made on behalf of the Association in accord with the terms of the REA.

¶ 28

CONCLUSION

¶ 29 The REA establishes that Management has fiduciary duties to the Association related to the handling of the assessments it receives from the Association. The trial court's finding that the Association failed to show a breach of fiduciary duties or a need for discovery is not contrary to the manifest weight of the evidence. Therefore, we affirm the judgment entered in favor of Management on the claim for an accounting. Management may recover from the Association, on Management's claim for breach of contract, only the legitimate expenditures it made for the Association, without any presumption that the estimates that generated its assessment demands correctly predicted those expenditures. Accordingly, we vacate the award of damages on the counterclaim and remand for calculation of the amount by which proven expenditures Management made on behalf of the Association exceed amounts received from the Association.

¶ 30 Affirmed in part, reversed in part, and remanded.