

No. 1-12-1803

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 under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANCHOR MECHANICAL,)	Appeal from the Circuit
)	Court of Cook County,
Plaintiff-Appellee,)	
)	
v.)	
)	No. 10 L 1547
COUNTY OF COOK, D/B/A as PROVIDENT)	
HOSPITAL,)	
)	
Defendant-Appellant.)	The Honorable
)	Joan E. Powell,
)	Judge Presiding.
)	

JUSTICE TAYLOR delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court properly granted summary judgment in favor of plaintiff in a breach of contract action where plaintiff introduced the affidavit of its president, who attested that plaintiff performed the services and defendant failed to pay the invoices, and where the only counteraffidavit filed by defendant did not refute plaintiff's affidavit and included mere conclusions. Further, a "no delay damages"

clause in the contract between the parties did not bar plaintiff from seeking statutory damages for defendant's failure to pay for the services.

¶ 2 Defendant County of Cook appeals from an order of the circuit court of Cook County granting summary judgment in favor of plaintiff Anchor Mechanical in an action for breach of contract, and awarding plaintiff statutory interest pursuant to the Illinois Prompt Payment Act (Act) (50 ILCS 505/1 *et seq.* (West 2008)). Defendant contends that the court erred in granting summary judgment in favor of plaintiff because a counteraffidavit submitted by defendant created a genuine issue of material fact. It further contends that the circuit court improperly awarded interest to plaintiff because the Act does not apply to the contract between the two parties.

¶ 3 BACKGROUND

¶ 4 Plaintiff, who is in the business of installing, servicing and repairing heating, venting and air conditioning (HVAC), filed a complaint against defendant on February 3, 2010, for failure to pay for work performed by plaintiff under a contract for the maintenance and repair of HVAC at Providence Hospital of Cook County. According to the complaint, the contract was for the period from February 5, 2009 through February 4, 2011, and was in the gross amount of \$654,719. Plaintiff alleges in the complaint that, pursuant to the terms of the contract, plaintiff performed all the services required in a timely, good and workmanlike manner, which defendant accepted and did not complain. The complaint further alleged that plaintiff forwarded invoices to defendant for work completed plus supplies and materials, in accordance with the contract. However, while plaintiff demanded payment from defendant at various times for amounts due

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and owing, defendant failed to pay a total of \$129,316.39 for services provided to, and accepted by, defendant. Based on those allegations, plaintiff sought payment for the unpaid services, as well as interest in the amount of 1% per month pursuant to the Act, which provides for such an interest penalty for each month until the vendor is paid in full. 50 ILCS 505/2, 505/4 (West 2008)). Attached to the complaint were copies of plaintiff's invoices reflecting the amount billed to defendant.

¶ 5 On March 11, 2010, defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2008)). In support of that motion, defendant alleged that pursuant to the contract between the parties, plaintiff was required to submit any disputes to the defendant's purchasing agent before filing a complaint at court. According to the motion, since plaintiff failed to submit its dispute regarding payment to that agent, plaintiff was barred from pursuing that claim in court. In its response, plaintiff argued that since defendant never disapproved or disputed any of plaintiff's invoices, but merely refused to pay them, there was no actual dispute to be resolved by the purchasing agent. Plaintiff further alleged that, even though there was no real dispute to be solved, it still provided a written notice to the purchasing agent advising her that certain invoices had not been paid. According to plaintiff, the agent never responded. On January 26, 2011, the circuit court denied defendant's motion to dismiss.

¶ 6 Defendant subsequently filed an answer and affirmative defenses to plaintiff's complaint. While defendant admitted that plaintiff has demanded payments, which defendant has not made, defendant denied all allegations that plaintiff performed all services required in the contract, and

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that defendant accepted those services without complaint. As its first affirmative defense, defendant alleged that plaintiff failed to perform services for which defendant was billed.

According to defendant, four invoices were submitted for work that was not performed at all, and "several" other invoices were billed for work which plaintiff failed to "fully perform." Further, defendant alleged that it received duplicate invoices for services that had been previously billed. As its second affirmative defense, defendant argued that it was not subject to statutory interest under the Act because plaintiff had agreed, pursuant to the terms of the contract, not to seek damages for any delays in connection with the services performed. In doing so, defendant points to paragraph 14 of the contract, which states:

"Contractor [plaintiff] agrees that no charges or claims for damages shall be made by contractor for any delays or hindrances from any cause whatsoever during the progress of any portion of the contract."

¶ 7 Plaintiff, in its response to defendant's affirmative defenses, denied that the work related to the invoices submitted to defendant had not been fully performed, and that defendant ever disputed any of those invoices at any time prior to filing its affirmative defenses. Further, while plaintiff admitted the existence of paragraph 14 in the contract, it denied that its delay provisions related to prompt payment under the Act, or to a failure to pay bills.

¶ 8 On August 2, 2011, plaintiff filed a motion for summary judgment, arguing that the pleadings on record, along with admissions and affidavits, demonstrated that there was no genuine issue of material fact. According to plaintiff, the affidavits on record showed that defendant had approved the invoices in question and was, therefore, in default. Plaintiff alleged

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that once it sent notice to defendant's purchasing agent and counsel that invoices remained unpaid, it was incumbent on defendant to notify plaintiff that the invoices were not approved. Plaintiff explained that not only did defendant's purchasing agent not respond to plaintiff's notice, but defendant later advised plaintiff that the invoices had been approved. Once defendant failed to pay those invoices, it breached the terms of the contract, and consequently, plaintiff had the right to pursue all appropriate legal and equitable remedies. As of the time of the filing of that motion, a balance of \$94,657 remained due and owing, and with the accrued interest pursuant to the Act was a total of \$113,588.40.

¶ 9 In support of its motion, plaintiff cites to a previously filed affidavit of its president Michael Rosner, who attested that plaintiff performed all of the work for which it submitted invoices in a good and workmanlike manner, and that defendant accepted plaintiff's services without ever notifying plaintiff of any problems with the work or the invoices. According to Rosner, plaintiff notified defendant on or about October 7, 2009, that certain invoices had not been paid, after which time defendant's attorneys notified plaintiff that the invoices had been signed off on and would be paid within one month. Defendant, however, refused to make those payments. Attached to the affidavit is a letter to defendant's purchasing agent Triche-Colvin, which states that plaintiff was attempting to obtain payments on invoices that had not been paid. Also attached were the outstanding invoices describing the services and materials for which defendant was billed.

¶ 10 Another affidavit on which plaintiff relied was signed by plaintiff's counsel John Conway, who attested that he personally contacted defendant's counsel, William Motto, on October 7,

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2009, and forwarded all the unpaid invoices. Conway stated that he received a response from Motto that the invoices were signed off upon and would be paid. A subsequent letter inquiring about those payments was not answered. Conway's fax to Motto was attached. Both Rosner and Conway attested in their respective affidavits that defendant had previously failed to make payments on invoices submitted for other work performed, and according to Rosner, it was a "repeated practice" of defendant to wait until a lawsuit is filed before paying plaintiff any amounts due and owing.

¶ 11 In its response to plaintiff's motion, defendant argued that genuine issues of material fact existed because in its answer and affirmative defenses, defendant denied that plaintiff fully performed its obligations under the contract and "disputed" its obligation to pay plaintiff.

Plaintiff replied that since defendant failed to provide any counteraffidavits or other evidence that contradicted the affidavits submitted by plaintiff, the facts contained in those affidavits must be taken as true.

¶ 12 On December 19, 2011, the circuit court granted summary judgment in favor of plaintiff in the sought amount of \$113,588.40. In its written order, the court did not state its reasoning for the ruling or the submissions on which its decision was based.

¶ 13 Defendant filed a motion to reconsider, alleging that defendant's counsel attempted to file a counteraffidavit at the time of the hearing, which the circuit court improperly denied. Plaintiff noted in its response that defendant failed to include a draft of such counteraffidavit or even mention its contents.

¶ 14 Defendant filed a reply, to which it attached, for the first time, the affidavit of Thomas

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Whelan, the director of operations for Provident Hospital. In his affidavit, Whelan stated that defendant "disputes" that plaintiff performed all of the services required of it in the contract in a timely and workmanlike manner. With respect to four of the invoices at issue, Whelan similarly states that it is defendant who asserts that "no work was ever performed and documented" under those invoices. Further, in regard to an additional invoice, as well as several other unspecified invoices, Whelan attests that the work was not "fully performed pursuant to the contract."

Regarding the unspecified invoices, he also stated that defendant "should not have been billed for additional services," or "plaintiff's tabulation of the invoices are incorrect."

¶ 15 On May 16, 2012, the circuit court denied defendant's motion to reconsider, stating that, in reaching its decision, it considered Whelan's affidavit, which defendant was granted leave to file. The court further noted in that order that the Act applies to this matter.

¶ 16 ANALYSIS

¶ 17 On appeal from that order, defendant first contends that the circuit court erred in granting summary judgment in favor of plaintiff and improperly denied defendant's motion to reconsider that order. In doing so, defendant again asserts that its answer and affirmative defenses created a genuine issue of material fact and that Whelan's affidavit contradicts plaintiff's contention that the work performed at Provident hospital was completed in accordance to the contract.

Defendant further contends, as in the court below, that the statutory interest penalty under the Act is inapplicable to the case at bar because plaintiff waived, in paragraph 14 of the contract, its right to damages resulting from delays.

¶ 18 As a preliminary matter, we observe that the record on appeal is incomplete.

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Specifically, transcripts of the hearings on plaintiff's motion for summary judgment and on defendant's motion to reconsider do not appear in the record, and only the common law record containing the parties' pleadings and the circuit court's written orders are present. We note that it is the burden of the appealing party to provide a sufficiently complete record of the proceedings in the trial court to allow for meaningful appellate review. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984); *Lewandowski v. Jelenski*, 401 Ill. App. 3d 893, 902 (2010). Accordingly, in the absence of a sufficiently complete record on appeal, a reviewing court will resolve all insufficiencies apparent therein against the appellant and will presume that the order entered by the trial court was in conformity with the law and had a sufficient legal and factual basis. *Foutch*, 99 Ill. 2d at 392.

¶ 19 The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact actually exists. *Northern Illinois Emergency Physicians et al. v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). Summary judgment is appropriate when "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2011). A trial court's ruling on a motion for summary judgment is reviewed *de novo*. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009). However, a trial court's decision on a motion to reconsider an order will not be disturbed absent abuse of discretion. *Woolums v. Huss*, 323 Ill. App. 3d 628, 639 (2001).

¶ 20 To prevail on a breach of contract action, a plaintiff must show the existence of a valid

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and enforceable contract, performance of that contract by the plaintiff, breach of the contract by the defendant, and resulting injury to the plaintiff. *Carlton at the Lake, Inc. v. Barber*, 401 Ill. App. 3d 528, 521 (2011). Furthermore, when the contract in question is for the rendering of services to a local government entity, payment for those services is governed by the Act, which provides that such an entity has 30 days to approve or disapprove a bill, starting from receipt of the service or the bill, whichever is later. 50 ILCS 505/3 (West 2008). Should the government entity fail to either approve or disapprove that bill in a timely manner, the entity will be assessed with interest in the amount of 1%, which begins to accrue after 60 days from the receipt of the service or the bill. 50 ILCS 505/5 (West 2008).

¶ 21 Although the plaintiff does not need to prove its entire case at the summary judgment stage, it must at least present a factual basis that could arguably entitle it to judgment in its favor. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1086 (2009). Further, while summary judgment has been considered "a drastic means of disposing of litigation" (*Purtill v. Hess*, 111 Ill. 2d 229, 240 (1989)), it is nevertheless an appropriate mechanism to expeditiously dispose of a lawsuit when the moving party's right to a judgment in its favor is clear and free from doubt (*Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001)). See *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, **690, ¶23 (March 22, 2012). In fact, while the pleadings, depositions, admissions and affidavits on file must be construed against the movant and in favor of the opponent, the opponent of a motion for summary judgment cannot simply rely on its complaint or answer to raise an issue of fact when the movant " 'supplies facts, which if not contradicted, would entitle such a party to judgment as a matter of law.' " *Addison v.*

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Whittenberg, 124 Ill. 2d 287, 294 (1988) (quoting *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974)).

¶ 22 Moreover, Illinois Supreme Court Rule 191 provides that affidavits offered in support of, or in opposition to, a motion for summary judgment, must be based on personal knowledge and shall not consist of legal conclusions, but of facts admissible in evidence. S. Ct. R. 191 (eff. July 1, 2002). Therefore, unsupported assertions, opinions, and self-serving or conclusory statements made in depositions are not admissible on review of a motion for summary judgment. See, e.g. *Davis v. Times Mirror Magazines, Inc.*, 297 Ill. App. 3d 488, 495 (1998).

¶ 23 In this case, plaintiff introduced the affidavit of its president, Rosner, who attested, as noted above, that all of the work that was billed to defendant had been fully performed in a timely and workmanlike manner, and that defendant accepted that work. He further stated that while defendant advised him that it had signed off on those invoices, plaintiff never received any of the payments. Plaintiff's counsel confirmed, in his own affidavit, that he was advised by defendant's counsel that the invoices submitted by plaintiff had been signed off upon. Plaintiff also filed copies of the invoices in question, which describe the work performed and amount owed, as well as the notice sent to defendant that the amount in those invoices remained due and owing. Thus, plaintiff met its burden of presenting sufficient evidence to show defendants' breach of a contract which plaintiff was entitled to enforce, and therefore, it was entitled to judgment as a matter of law. See, e.g. *Peoples Gas Light & Coke Co. v. Flisk*, 97 Ill. App. 3d 1123, 1125-26 (1981) (plaintiff entitled to summary judgment where it presented the contract and guaranty between plaintiff and defendant, an affidavit explaining how the debt was calculated

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and an order requiring defendant to pay arrearages).

¶ 24 It is undisputed that when the circuit court entered summary judgment in plaintiff's favor, defendant had not filed any affidavits to contradict or refute the assertions made by Rosner. Since it is well established that facts contained in an affidavit offered in support of a motion for summary judgment which are not contradicted by a counteraffidavit are thereby admitted and must be taken as true for purposes of the motion (*Purtill*, 111 Ill. 2d at 241) and, as noted above, defendant could not have merely relied on its complaint or answer to raise an issue of fact (*Addison*, 124 Ill. 2d at 294), the circuit court did not err in granting plaintiff's motion. While defendant later filed Whelan's affidavit, which the circuit court took into consideration in ruling on defendant's motion to reconsider, that affidavit does not appear to have sufficiently refuted the facts contained in Rosner's statement. With respect to the first four invoices, for maintenance and repair of the cooling system, Whelan merely states that "Cook County [defendant] disputes and alleges that no work was ever performed and documented," and does not purport to have personal knowledge as to whether the work was, in fact, performed. Further, those statements show only that defendant disputed those invoices when it filed an answer to plaintiff's complaint, but does not refute Rosner's assertion that defendant never challenged the invoices in a timely manner, or disputed them at any time prior to the present action. With respect to the remaining invoices, Whelan stated that "plaintiff failed to fully perform the work pursuant to the contract," that its "first attempt to perform the work on [invoice] 1030-7 failed," and that there were invoices where "defendant should not have been billed for additional services" or plaintiff's "tabulation of the invoices are incorrect." He does not attempt to explain or describe any

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shortcomings of plaintiff's work, whether plaintiff made any additional attempts with regard to invoice 1030-7, or why defendant was improperly billed. Those statements in Whelan's affidavits are merely conclusory, and therefore, insufficient to demonstrate a genuine issue of material fact so as to preclude summary judgment in plaintiff's favor. See, e.g., *Davis*, 297 Ill. App. 3d at 495.

¶ 25 Moreover, the circuit court's order granting summary judgment states only that plaintiff's motion was granted in the amount of \$113,588.40, and similarly, the order denying defendant's motion to reconsider stated simply that the motion was denied, having considered Whelan's affidavit. The court does not indicate its reasoning for concluding that the evidence before it sufficiently established that the plaintiff was entitled to summary judgment. While the court acknowledges that it took Whelan's affidavit into consideration, it does not indicate whether any additional evidence was presented at either the hearing on plaintiff's original motion for summary judgment, or on the hearing on defendant's motion to reconsider. Since it appears that defendant's sole counteraffidavit merely states that defendant now challenges plaintiff's invoices and concludes that plaintiff did not fully perform its duties, the circuit court may have reasonably concluded that defendant does not deny that it failed to dispute the invoices within 30 days as required by the Act, and that the remainder of Whelan's affidavit is conclusory. As such, we must resolve all doubts against the appellant and presume that the circuit court's ruling had a sufficient factual basis and was in conformity with the law. See *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); see also *Foutch*, 99 Ill. 2d at 392; *Coleman*, 160 Ill. App. 3d at 419.

¶ 26 Next, with regard to defendant's contention that the circuit court improperly awarded

plaintiff statutory interest, we note that, as mentioned above, the Act provides:

"Any bill approved for payment [or not disapproved within 30 days] shall be paid within 30 days of the date of approval. If payment is not made within such 30 day period, an interest penalty of 1% of any amount approved and unpaid shall be added for each month or fraction thereof after the expiration of such 30 day period, until final payment is made." 50 ILCS 505/4 (West 2008).

¶ 27 According to Rosner's affidavit, defendant failed to provide plaintiff with any notice that it disapproved the bill within 30 days, and yet did not make any payments on the invoices in question.

¶ 28 In support of its argument that the penalty provision of the Act does not apply to the contract in question, defendant relies, as it did at the court below, on paragraph 14 of the contract, which, as noted above, provides that plaintiff will not make claims for damages caused by "delays or hindrances from any cause." According to defendant that language applies to delays in payments, and therefore, bars plaintiff from seeking the interest penalty under the Act.

¶ 29 It is well established that while "no delay damages" clauses are enforceable, they are strictly construed against the party who seeks their benefit. *Asset Recovery Contracting, LLC v. Walsh Construction Company of Illinois*, 2012 IL App (1st) 101226, ¶ 92 (citing *J & B Contractors, Inc. v. C. Iber & Sons, Inc.*, 162 Ill. 2d 265, 276 (1994)). Furthermore, our supreme court, and subsequently this court, have explicitly held that "delay damages," for the purposes of contractual clauses waiving such damages, are those damages caused by delay in the completion of a project. See *Bates & Rogers Construction Corp. v. Greely & Hansen*, 109 Ill. 2d 225, 230

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(1985); *Asset Recovering Contracting*, 2012 IL App (1st) 101226, ¶ 92. In light of this definition, it appears that paragraph 14 of the contract between the parties in this case, which makes no mention of the Act or payments, does not bar plaintiff from seeking statutory interest on missed payments by defendant. Accordingly, we conclude that the circuit court did not err in awarding plaintiff with such interest pursuant to the Act.

¶ 30 Although defendant goes through great lengths to argue that it has the authority to enter into agreements that bar imposition of the Act's penalty provisions, such assertion does not change our conclusion. Having concluded that the "no delay damage" clause of the contract in question refers to delays in completion of a project, and not to payment delays, we need not address the issue of whether defendant would be authorized to enter into a contract containing a clause that would bar plaintiff from seeking statutory interest under the Act.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.