2013 IL App (2d) 120831-U
No. 2-12-0831
Order filed June 11, 2013



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| 209 N. WALNUT, L.L.C. and DR. MARIE C. SCHLUND, | ) | Appeal from the Circuit Court of Du Page County. |
| Plaintiffs-Appellants, | ) | |
| v. | ) | No. 07-L-1150 |
| ORIGIN FIRE PROTECTION, INC., | ) | |
| Defendant | ) | |
| (Changes Home Builders, Inc., Defendant-Appellee). | ) | Honorable Dorothy French Mallen, Judge, Presiding. |

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JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's findings and rulings on plaintiffs' complaint and defendant's counterclaim were not against the manifest weight of the evidence. The trial court properly found that the parties agreed to extra work beyond the scope of the written contract and that the trial court properly calculated the amount of the extra work. The trial court was also within its discretion to allow a witness to read from a summary exhibit and admit the summary exhibit into evidence. We affirmed the judgment of the trial court.

¶ 2 This appeal involves a suit for an alleged breach of a construction contract. In November 2007, plaintiffs, Dr. Marie Schlund and 209 N. Walnut, L.L.C., filed an action for breach of contract against Origin Fire Protection, Inc. and Changes Home Builders, Inc., seeking damages following the installation of a water sprinkler system to the building. Both Origin Fire Protection and Changes Home Builders, Inc., filed a counterclaim for breach of contract. Prior to trial, plaintiffs and Origin Fire Protection resolved their dispute and the litigation involving Origin Fire Protection was dismissed; Origin Fire Protection is not a party to this appeal. The trial court conducted a bench trial on the remaining complaint and counterclaim, and the trial court entered a judgment in favor of defendant on its counterclaim in the amount of $98,633 plus costs. The trial court later modified its judgment, reducing the judgment in favor of defendant to $61,633. Plaintiffs timely appealed, challenging evidentiary matters and the trial court's judgment. We affirm.

¶ 3 The July 2004 contract reflects that Schlund entered into a written contract with defendant, wherein plaintiffs agreed to pay defendant $560,000 for the remodeling, rehabilitation, and restoration of a building located at 209 North Walnut Street in Itasca. Count I of plaintiffs' complaint, as amended, alleged a breach of contract. Count I was brought on behalf of plaintiff Schlund and alleged that the work done by defendant was not completed in a workmanlike manner and did not comply with the specifications; defendant's delay in the job caused a delay in obtaining a certificate of occupancy; the delay resulted in Schlund having to rent alternative office space; defendant caused a functional and aesthetic mess; defendant destroyed antique wood trim; defendant left light bulbs dangling throughout the property; the floors were left without coverings for an extended period of time; and defendant failed to file detailed drawings and plans. Count II was brought on behalf of plaintiff 209 N. Walnut L.L.C. and sought damages as a result of defendant's

alleged destruction of antique wood trim. Defendant, Changes Home Builder, Inc., filed a two-count counterclaim against plaintiffs. Count I alleged breach of contract and sought payment for the work performed pursuant to the original contract, written change orders, and verbal change orders. Count II of the counterclaim was alleged in the alternative and based on a theory of quantum meruit for the work performed.

¶ 4 At trial, Schlund testified that 209 N. Walnut, L.L.C. purchased the building in April 2004. According to Schlund, the building was built in 1874 and had not been well maintained. Schlund wanted to rehabilitate the building, but wished to keep certain antique fixtures in place. Schlund intended to maintain her podiatric practice on the lower level and utilize the upper level as her residence. Schlund contacted Vito Miulli, the owner of Changes Home Builders Inc., after being referred to him by a friend.

¶ 5 Schlund testified that she specifically told Miulli which antique fixtures she wished to retain. Defendant was to submit bills with written documentation to the bank for direct payment as the work was performed. After demolition had begun and the first floor was nearly completed, Schlund was informed that a sprinkler system needed to be installed before an occupancy permit could be granted. Schlund claimed that she was not previously aware of this fact and contracted with Origin Fire Protection to complete the work, as it was not a part of defendant's contract. Origin Fire Protection installed and tested the sprinkler system in April 2006, resulting in leaks causing significant damage to the building and the work already completed by defendant. Defendant subsequently resumed work on the building and eventually informed Schlund that the work was complete in October 2006.

¶ 6 Schlund testified that, contrary to defendant's representation that the work had been completed, portions of the building remained unpainted, certain electric and plumbing fixtures were

not installed, and certain antique fixtures were left in the basement. Schlund further testified that various windows, doors, and walls were not installed in a satisfactory manner, the kitchen was left unfinished, a handicap ramp had been built incorrectly, and orange PVC (Polyvinyl Chloride) pipes were left exposed in several closets.

¶ 7 On cross-examination, Schlund admitted authorizing several verbal and written change orders that were not reflected in the contract or in the plans. Schlund could not specifically recall the discussions involved with various change orders, but admitted telling Miulli to do whatever needed to be done to complete the project and "make it right." Schlund also admitted that much of the work at issue was not a part of the original contract. Although defendant refused to perform work on the sprinkler heads, defendant built boxes around them at Schlund's request. Schlund admitted that she hired a different contractor to move a sprinkler after defendant had ceased working on the building. This other contractor broke the sprinkler head, causing a flood of water that caused further damage to the building.

¶ 8 Judith Manley, Schlund's office administrator, testified that she handled billing matters regarding the building and that defendant was paid a total of $544,976 for the remodeling work. Plaintiffs rested.

¶ 9 Miulli testified on behalf of defendant. Miulli testified that Schlund requested and approved numerous verbal and written change orders totaling $106,394, but he could not recall the specific charges for all of the change orders. Defendant introduced a summary exhibit itemizing the change orders and the corresponding costs. Plaintiffs initially objected to Miulli reading from the summary exhibit, at which point the trial court stated that Miulli could use the exhibit to refresh his recollection after establishing that his recollection was exhausted. After Miulli established that his

recollection was exhausted regarding the extra demolition work, plaintiff stipulated that Miulli could use the exhibit to refresh his recollection regarding any items he could not independently recollect.

¶ 10 Miulli testified that he was not aware of the need for the sprinkler system until after a meeting with the architect and that the architectural plans contained printed language stating the need for the sprinkler system. Miulli claimed that Schlund never complained and was very appreciative of defendant's work, but that the problems began after the issues with the sprinkler system. Miulli also testified that Schlund made an initial deposit of $40,000 for the extra work but that Schlund still owed defendant $168,000.

¶ 11 On cross-examination, plaintiff questioned Miulli regarding the accuracy of the figures provided in the summary exhibit. Miulli admitted that the exhibit contained some figures from his notes that were not exact, but were based on the blueprint and the lineal feet of walls, cabinets, and flooring, which he considered an accurate method of calculation.

¶ 12 Defendant requested to admit several exhibits at the close of testimony, including the summary exhibit. Plaintiff again objected, arguing that the exhibit was inadmissible hearsay and that proper foundation had not been laid. Defendant replied that the exhibit was merely a demonstrative summary. The trial court overruled plaintiffs' objection and admitted the summary exhibit into evidence.

¶ 13 At the close of evidence, the trial court first addressed Count II of plaintiffs' complaint, which was brought by 209 N. Walnut, L.L.C. and sought damages as a result of defendant's alleged destruction of antique wood trim. The trial court noted that the evidence reflected that defendant removed the existing trim and placed it in the basement. After that, the trial court noted, "the evidence is murky as to what happened to it." The trial court found that plaintiff failed to prove that

defendant was the party that threw out the trim, failed to prove the value of the trim, and failed to prove the cost of replacement. For Count II, the trial court found in favor of defendant and against plaintiff.

¶ 14 The trial court next addressed Count I of plaintiffs' complaint, which was brought by Schlund and sought damages based on defendant's breach of contract. The trial court found that the written contract consisted of a photocopied document attached to plaintiff's verified complaint, stating that "[a]ny additional changes need a change order submitted and will be an extra cost item over and above the contract price." The trial court found that this clause provided for the modification of the contract but did not specifically state that the modifications needed to be in writing and signed by the parties. The trial court further found that "the custom and practice was to accept verbal change orders and thus, the work could be performed and the cost approved by verbal consent."

¶ 15 The trial court rejected all of Schlund's claims. Among those claims relating to timeliness, the trial court found that there was "no clear evidence" as to how long the work had to be stopped due to the installation of the sprinkler system or how long the damages caused by the sprinkler test delayed the project. The trial court found that defendant had no responsibility regarding any of the damages with respect to the water sprinkler or the subsequent flooding. Plaintiffs failed to present any evidence that Schlund rented alternative office space or its cost. The trial court further rejected the claim that defendant caused a "functional and aesthetic mess," finding that plaintiffs failed to provide the court "with any method by which it could award damages." The trial court found that Schlund had no personal standing to make a claim for damages to the destruction of the antique wood trim and, in any event, she failed to provide any evidence of its value. Plaintiffs failed to

present any evidence regarding the allegations pertaining to the dangling light bulbs, the floor coverings, or the detailed drawings and plans.

¶ 16 The trial court next discussed, and then rejected, the additional claims plaintiffs presented at trial that had not been a part of the complaint. Although plaintiffs provided evidence of work done by subsequent contractors as part of the claim that the work was required because defendant failed to perform in a "workmanlike manner," the trial court found that it was not clear what subsequent work was required by the original contract and what subsequent work was due to the change orders. The trial court further found that there was "no attempt" by plaintiffs "to separate out those items" that were a result of defendant's work and those that were the result of the sprinkler issue or additional changes by Schlund, or the cost of the work performed as a result of the alleged breach. The trial court found that plaintiffs "failed to provide that to the Court and the Court cannot speculate on what the cost might have been."

¶ 17 Regarding the defective condition of the hallways, the trial court found "more probably true than not, that this condition was more likely caused by the flood in October of 2006, than any work of [defendant]." The trial court also found that there was "insufficient evidence to prove more probably true than not that [defendant] caused the damage to the floor which required the repair." The trial court explained that there was no evidence "as to what part of the floor was damaged, when, and by whom." In finding in favor of defendant on Count I, the trial court found that (1) plaintiffs "failed to prove more probably true than not" that defendant breached the contract, and (2) plaintiffs also failed to prove damages.

¶ 18 With respect to defendant's counterclaim for breach of contract, the trial court found a valid contract existed between the parties that governed their agreement; it thus determined that quantum

meruit did not apply. Thus, as to Count I, the trial court found in favor of defendant, additionally finding that Schlund agreed to the change orders and "did not offer any contrary evidence as to the value of the work performed." The trial court stated that "Miulli testified that he has the experience to estimate the cost based on his years of being in the trades." The trial court concluded that it had "no contrary evidence" to Miulli's testimony valuing the change orders and found that the total value of the contract with the change orders was $696,989. The trial court found that Schlund made an original deposit of $40,000 and a separate payment of $11,000, along with the payments totaling $544,976 as testified by Manley, totaling payments of $595,976. After deducting a $2,380 credit for the cost of certain materials, the trial court found in favor of defendant in the amount of $98,633. During a posttrial motion, the parties agreed that Schlund had previously made an additional payment of $37,000 that was unaccounted for during the trial, thereby reducing the amount of the trial court's judgment to $61,633.

¶ 19 On appeal, plaintiffs contend that the trial court's findings regarding its decisions on their complaint and defendant's counterclaim were against the manifest weight of the evidence. Plaintiffs challenge the trial court's finding that the parties agreed to extra work beyond the scope of the written contract and argue further that the trial court miscalculated the amount of any extra work. Plaintiffs also challenge the trial court's decision to allow Miulli to read from the summary exhibit and claim that the trial court relied on the summary exhibit to determine defendant's damages on its counterclaim for breach of contract.

¶ 20 The standard of review applied to a challenge following a bench trial is whether the trial court's judgment is against the manifest weight of the evidence. *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1071 (2007). A judgment following a bench trial is against the

manifest weight of the evidence only when an opposite conclusion is apparent or when the judgment is unreasonable, arbitrary, or not based on evidence. *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 177 (2004); *Avenaim v. Lubecke*, 347 Ill. App. 3d 861, 283 (2004). The decision to admit or exclude evidence rests within the sound discretion of the trial court, and that decision will not be disturbed absent an abuse of that discretion. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 28. An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Peeples v. Village of Johnsburg*, 403 Ill. App. 3d 333, 339 (2010). Moreover, we cannot substitute our judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn therefrom (*In re D.F.*, 201 Ill. 2d 476, 498-99 (2002)), and we must draw from the evidence all reasonable inferences in support of the judgment (*H&H Press, Inc. v. Axelrod*, 265 Ill. App. 3d 670, 679 (1994)).

¶ 21 Plaintiffs contend that the trial court's finding was against the manifest weight of the evidence, first challenging the trial courts' finding that the parties agreed upon the extra work that defendant was to perform. Plaintiffs assert that defendant made a judicial admission pertaining to the contract, referring to the following allegation in their third verified complaint:

> "After the meeting, Plaintiff Schlund and Defendant Changes entered into a written agreement whereby changes would complete the remodeling, rehabilitation, and restoration of Property in a timely manner. The service was to provide labor and specified materials necessary to complete the project. Plaintiff Schlund agreed to pay changes FIVE HUNDRED SIXTY THOUSAND DOLLARS ($560,000), and made a deposit in an escrow

account in First American Bank. True and accurate copies of the contract and all subsequent agreements are attached hereto as Exhibit A."

¶ 22 Defendant answered with the following statement:

"Defendant CHANGES admits the allegation set for the in paragraph 12 of Count I of Plaintiff's Third Amended Complaint."

¶ 23 Plaintiffs argue that this admission precluded defendant's counterclaim for breach of contract, asserting that defendant admitted the exhibit constituted "the contract and all subsequent agreements." Thus, plaintiffs' argument follows that defendant contradicted a judicial admission by offering evidence of subsequent agreements between the parties beyond the scope of those presented in Exhibit A to plaintiffs' complaint. Defendant counters that plaintiffs waived this argument by failing to ask the trial court to take judicial notice of an admission in a pleading, subsequently introducing evidence of whether change orders existed, and failing to object when defendant offered evidence of change orders. We agree with defendant.

¶ 24 A judicial admission is a "deliberate, clear, unequivocal statement of a party, about a concrete fact, within the party's peculiar knowledge," and whether evidence should be admitted on a conceded fact is subject to the trial court's discretion. *American Service Insurance Co. v. China Ocean Shipping Co. (Americas) Inc.*, 402 Ill. App. 3d 513, 522-23 (2010). Schlund admitted in her testimony that there were change orders made after the initial contract. Plaintiffs attempt to resolve this obvious contradiction with the unsubstantiated assertion that the costs associated with these changes were somehow incorporated into the contract price. Further, plaintiffs did not object or seek judicial notice of defendant's purported admission as defendant offered extensive testimony and evidence pertaining to numerous change orders. Therefore, plaintiffs waived their contention that

defendant's admission precluded the consideration of additional evidence regarding verbal and written change orders. See *Sylvester v. Chicago Park District*, 179 Ill. 2d 500, 507 (1997) (holding that a party waives a contention by failing to present evidence or seek judicial notice of a particular fact in the trial court).

¶ 25 We further note that defendant admitted only to plaintiffs' "allegations" regarding the written contract. However, it does not appear that defendant's admission was a "deliberate, clear, unequivocal statement" about a "concrete fact" to the extent it constituted a judicial admission regarding "all subsequent agreements." Therefore, we cannot find that the trial court's decision to admit evidence on subject of change orders was an abuse of the trial court's discretion.

¶ 26 Plaintiffs next argue that the trial court erred by stating that defendant's burden of proof in establishing change orders to a construction contract was "more probably true that not." Plaintiffs assert that the change orders should have instead been proved by the clear and convincing evidence. Defendant counters it was entitled to a legal presumption of payment for justifiably performed work and that the trial court's finding nevertheless satisfied a clear and convincing standard.

¶ 27 We initially clarify that the trial court found that plaintiffs had "failed to prove more probably true than not" that defendant breached the contract. This finding was in regards to plaintiffs' claim for breach of contract. Plaintiffs incorrectly assert that the trial court used this language with respect to the change orders alleged in defendant's counterclaim for breach of contract.

¶ 28 In addressing defendant's counterclaim for breach of contract, the trial court found as a preliminary matter that defendant "failed to prove" all but $43,989 in written change orders and that Schlund agreed to the verbal change orders. The trial court specifically referenced Miulli's testimony that the cost of the change orders included $5,000 for demolition; $5,000 for added

insulation; $5,000 for enlarging a deck; $8,000 for installing a new floor; $4,000 for raising a ceiling; $8,000 to $10,000 for enlarging and reconfiguring a kitchen; $10,000 for adding sinks and plumbing; $8,000 for extra electrical work; and $40,000 for finishing the attic, totaling changes in the amount of $93,000. Thus, the trial court found that defendant's evidence was sufficient to establish $136,989 in total verbal and written change orders. Finally, the trial court found that plaintiffs did not offer any contrary evidence "to tend to prove that this is not the value of the extra work performed or that it was not agreed to by Dr. Schlund."

¶ 29 Plaintiffs correctly assert that a contractor must prove the following elements by clear and convincing evidence to recover additional compensation for extra work on a construction contract: (1) the work was outside the scope of the construction contract; (2) the extra items were ordered by the owner; (3) the owner agreed to pay extra, either by his words or conduct; (4) the extras were not furnished by the contractor as his voluntary act; and (5) the extra items were not rendered necessary by any fault of the contractor. *A.W. Wendell & Sons, Inc. v. Qazi*, 254 Ill. App. 3d 97, 104 (1993). "The contractor sustains this burden by proving that the extra work was requested by the owner, and there is no evidence indicating that the work was necessary or voluntarily performed due to fault by the contractor." *Id.* at 105.

¶ 30 Plaintiffs argue at length that the parties established a procedure for change orders and that Miulli's extra work was either part of the original contract or was performed to correct Miulli's mistakes. We find these arguments unpersuasive. The trial court weighed the evidence and found that the parties agreed to verbal changes outside the scope of the written contract. The trial court also noted plaintiff's failure to identify the extra work required as a result of the sprinkler issue. The trial court considered defendant's testimony that he "has the experience necessary to estimate the

cost [of the changes] based on his years of being in the trades." After thoroughly explaining the number and dollar value of the verbal and written change orders established by defendant's testimony, the trial court found that plaintiffs provided "no contrary evidence to tend to prove that this is not the value of the extra work performed or that it was not agreed to by Dr. Schlund." Therefore, although it did not specifically articulate a "clear and convincing evidence" standard, the trial court nonetheless established that defendant sustained its burden by proving that the extra work was requested by Schlund and that there was "no evidence indicating that the work was necessary or voluntarily performed due to fault by the contractor." See *id.* As such, the trial court's finding that the parties agreed to unpaid verbal and written change orders in the amount of $136,989 was not against the manifest weight of the evidence because it was not "unreasonable, arbitrary, or not based on the evidence." *Avenaim*, 347 Ill. App. 3d at 283.

¶ 31 Plaintiffs next contend that the trial court erred by allowing Miulli to read from the summary exhibit. The summary exhibit in question contained a list of the extra work items allegedly agreed to between the parties and performed by defendant, as well as defendant's estimations of the corresponding costs. Plaintiffs argue that defendant failed to properly lay the foundation for refreshing its recollection. Defendant counters that plaintiffs waived their objection to the foundation of the exhibit by stipulating to its use.

¶ 32 During the proceedings, plaintiffs initially objected that defendant did not lay the proper foundation to read from the summary exhibit. The trial court stated that defendant could use anything for the purpose of refreshing his recollection, but that defendant first needed to establish that his recollection was exhausted. After defendant established that his recollection was exhausted regarding the first few items on the exhibit, plaintiffs suggested that defendant be asked whether he

had an independent recollection of any of the items on the exhibit and agreed to stipulate accordingly that defendant's recollection was exhausted. Defendant was then asked whether he had an independent recollection of any of the items, to which defendant responded, "Some I do and some I don't." Defendant then stated that the summary exhibit was helpful in refreshing his recollection and proceeded to testify regarding the remaining items on the summary exhibit without further objection from plaintiffs.

¶ 33 A witness may refresh his or her recollection by use of a written memorandum when he or she is unable to recall the relevant facts. *People v. Van Dyk*, 40 Ill. App. 3d 275, 279 (1976). The manner and mode of refreshing a witness's memory, as well as the extent to which a witness may refer to a memory-refreshing document "is within the scope of the court's discretion, and the trial court's ruling in this respect will not be disturbed in the absence of abuse of discretion." *Id.*.

¶ 34 In the present case, the trial court advised that defendant may use the summary exhibit provided that defendant laid the proper foundation by establishing that his recollection was exhausted. Defendant proceeded accordingly by establishing that he did not have an independent recollection of the costs pertaining to the first entries on the exhibit. Regardless of whether plaintiffs' ensuing suggestion constituted a stipulation regarding the foundational requirements of every entry on the summary exhibit, the manner and mode of defendant's testimony regarding the exhibit was solely within the trial court's discretion. Plaintiffs have not shown that the trial court abused this discretion by unreasonably permitting defendant to refresh his recollection through the use of the exhibit.

¶ 35 Finally, plaintiffs contend that the trial court erred by admitting the summary exhibit into evidence and further relying on the exhibit to determine the amount of damages owed on defendant's

counterclaim. Defendant counters that the exhibit was admissible as summary evidence and that the trial court had an independent basis for calculating damages. We agree with defendant.

¶ 36 We first note that Rule 1006 of the Illinois Rules of Evidence (eff. Jan.1, 2011) permits the use of summary documents under the following circumstances:

> "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both by other parties at reasonable time and place. The court may order that they be produced in court."

We also note that, during the proceeding, defendant testified that he was able to estimate the costs of the extra work performed by calculating the lineal feet involved with each item. Defendant testified that this was an accurate method of calculating the costs and that he kept a record of his calculations, although it was not provided in court. At the conclusion of the proceeding, defendant offered the summary exhibit into evidence, at which point plaintiffs objected that the exhibit constituted an inadmissible hearsay document. Defendant responded that the document was a demonstrative summary of what defendant testified to. The trial court overruled plaintiffs' objection without further comment and admitted the summary exhibit into evidence. The trial court subsequently referenced defendant's testimony that he had the "experience to estimate the cost [of the extra work] based on his years of being in the trades." Furthermore, the trial court repeatedly referenced plaintiffs' failure to provide any contradictory evidence disputing the costs of the change orders. With the foregoing principles in mind, we conclude that the trial court's decision regarding the use and admissibility of the summary exhibit did not constitute an abuse of discretion because

it was not arbitrary, fanciful or unreasonable, and a reasonable person could have taken the view adopted by the trial court. See *Peeples*, 403 Ill. App. 3d at 339.

¶ 37 Accordingly, for the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 38 Affirmed.