FOURTH DIVISION
September 24, 2015

No. 1-14-3199

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Terry McCarthy,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant/Cross-Appellee,	)	Cook County.
	)	
v.	)	12 L 7572
	)	
John Podmajersky,	)	Honorable
	)	Leon Wool,
Defendant-Appellee/Cross-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion when it barred plaintiff from testifying on the grounds he did not identify himself as a witnesses in his 213 disclosures; the trial court's ruling piercing the corporate veil to hold plaintiff personally liable for unpaid rent is also reversed because the evidence is insufficient. The trial court's denial of defendant's Rule 137 sanctions is affirmed.

¶ 2 Plaintiff Terrance McCarthy (Terry) filed a complaint in the Circuit Court of Cook County that alleged he conveyed certain real estate to defendant John Podmajersky (John) and in return John signed a promissory note in his favor in the amount of $26,000, payable in periodic payments, for the purchase of that property. When John failed to make payments pursuant to the promissory note, Terry filed a breach of contract claim against John. In response, John filed a counterclaim against Terry for unpaid rent on two separate properties.

¶ 3 Terry did not list himself as a witness in his Illinois Supreme Court Rule 213 disclosures, and on the day of trial, John's counsel made a motion to bar plaintiff from testifying on the grounds that he failed to list himself as a witness. The trial court then barred Terry from calling any witnesses due to his failure to disclose any witnesses in his 213 disclosures and, as a result, entered a directed verdict in favor of John and against Terry on Terry's breach of contract claim.

¶ 4 After hearing evidence and argument on John's counterclaim for unpaid rent, the trial court found Terry was personally liable for unpaid rent on the two properties and ordered that he pay John $60,847.90.

¶ 5 John filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137, and the trial court denied that motion.

¶ 6 Terry now appeals the trial court's rulings: barring him from presenting testimony from undisclosed witnesses in his case-in-chief, granting John's motion for a directed verdict, and ruling in favor of John on John's counterclaim for unpaid rent. John cross appeals the trial court's ruling denying his motion for sanctions. For the reasons that follow, we reverse the trial court's rulings on Terry's claim and John's counterclaim, remand for a new a new trial on both claims, and affirm the trial court's ruling denying Rule 137 sanctions against Terry.

¶ 7 BACKGROUND

¶ 8 Plaintiff, Terrance McCarthy (Terry), was a shareholder of Terry Plumbing, Heating and Supply Co. Inc. (Terry Plumbing Company), a now defunct corporation. On May 31, 2011, Terry sold his remaining assets in Terry Plumbing Company to Matrix Holding LLC Company. Prior to May 31, 2011, Terry Plumbing Company rented two properties from defendant John Podmajersky (John) and/or his business, Podmajersky, Inc. The first property was located at 1936 South Halsted and was used as a storage space. This lease was memorialized in an oral agreement. The parties disagree whether this lease was between Terry and John as individuals or Terry Plumbing Company and Podmajersky, Inc. as business entities. The rent for the storage space was paid for with checks from Terry Plumbing Company, but at the end of the business's life, some checks were paid by Terry individually. The second property was a parking space located at 1947 South Halsted. That property was leased pursuant to a written lease between "Terry Plumbing Company" and “Podmajersky Inc.” and was signed by "Terry McCarthy."

¶ 9 After the remaining assets of Terry Plumbing Company were sold in May 2011, Terry agreed to sell property at 1942 South Halsted to John. In exchange, John would make periodic payments to Terry totaling $26,000. This agreement was memorialized in a promissory note (Note) dated March 16, 2012. The borrower on the Note is "John Podmajersky" and the Lender is "Terry McCarthy." The last sentence in section 4 of the Note states: "All payments to Note Holder shall be subject to any right to set off against claims held by Borrower, or any of his affiliated entities, and against Lender and any of his affiliated entities."

¶ 10 After John failed to make any payments, Terry's counsel sent a demand to John for the amount due under the Note. In response, John's counsel sent Terry's counsel a letter indicating that the Note was subject to any set off that either party or its affiliated entity had against the other. The letter also stated that Terry and/or his business owe John a sum in excess of the

amount owed under the Note for unpaid and overdue rent on the properties located at 1936 South Halsted and 1942 South Halsted—specifically, $40,353 in unpaid rent on the 1936 South Halsted property and $11,725 in unpaid rent on the 1947 South Halsted property.

¶ 11 Following this exchange, Terry filed a breach of contract complaint against John based on his non-payment under the Note for the purchase of the 1942 South Halsted property. Upon being served with the complaint, John's counsel wrote to Terry's counsel stating that the complaint was not well grounded in fact or law and requested that the complaint be withdrawn or risk sanctions pursuant to Illinois Supreme Court Rule 137. When Terry did not withdraw the complaint, the litigation proceeded and John filed his answer to the complaint, three affirmative defenses, and a counterclaim against Terry for the unpaid rent due under the leases for the properties located at 1936 and 1947 South Halsted. Of note, John's first affirmative defense states:

> "The Promissory Note provides for a set off of any debts owed by Plaintiff McCarthy and any of his businesses to the Defendant. Plaintiff McCarthy and/or his businesses owe Defendant in excess of the amount on the Promissory Note. Defendant is allowed a set off of any and all such amounts owed to Defendant."

The original counterclaim was filed on behalf of Podmajersky, Inc., but was later amended to remove Podmajersky, Inc. and insert John Podmajersky as the party making the counterclaim. The counterclaim claims that Terry breached two leases on properties located at 1936 South Halsted and 1947 South Halsted by failing to pay John over $40,000 in rent.

¶ 12 John propounded Illinois Supreme Court Rule 213 interrogatories to plaintiff, which requested the names of all witnesses he planned to call at trial. However, in response to John's

213(f)(1), (f)(2) and (f)(3) requests, Terry answered that those requests were premature and that he would supplement his responses at a later date. These answers were never supplemented.

¶ 13 The complaint was later dismissed for failing to include a necessary party, American Chartered Bank, which had an interest in one-third of the Note, and an amended complaint was filed. That amended complaint contained the same allegations as the initial complaint, but this time alleged that John owed money under the Note to both Terry and American Chartered Bank.

¶ 14 Before proceeding to trial, the parties attempted to settle the matter and submitted pre-trial memoranda to the trial court. Of relevance, Terry's pre-trial memorandum argues that John failed to pay him $26,000 that is owing under the Note, and that John's set off allegations for unpaid rent are baseless where those rental leases were between two businesses, namely Terry Plumbing Company and Podmajersky, Inc. The final paragraph of Terry's pre-trial memorandum sums up his arguments and states:

> "Plaintiff's Complaint seeks payment for the amount owed on the Note, plus the interest of 6% that has been accruing since March 16, 2012. The Note was for $26,000 and nothing has been paid. No set-off is proper and no amounts are owed to Defendant from Plaintiff, as any alleged Note was between the companies, Terry Plumbing and Podmajersky, Inc. Therefore, Plaintiff is owed the full value of the Note, plus interest, with one-third assigned to American Chartered Bank."

¶ 15 The matter preceded to trial on September 17, 2014. At the start of the trial, Terry's counsel called Terry as his first witness, at which time John made a motion to bar Terry from calling any witnesses in his case-in-chief for failing to comply with Illinois Supreme Court Rule

213. The motion that John's counsel presented to the court stated that John issued interrogatories and requests to produce to Terry, and Terry answered John's interrogatories on August 6, 2013. The motion argued that Terry never supplemented those answers and, as a result, never disclosed any witnesses that he would be calling at trial.

¶ 16 In response to John's motion to bar Terry from calling witnesses, Terry's counsel informed the judge that John had issued a notice of deposition to Terry, but John cancelled the deposition on the day it was set to proceed. He further argued that the fact that he intended to call John and Terry at trial should not have been a surprise to John given that any testimony from these witnesses had made up the entirety of the litigation up to that point and their positions had already been argued in a motion for summary judgment, pretrial memoranda, and were contained within the complaint itself. The trial court judge then placed Terry under oath to determine what he intended to testify to at trial. The following exchange then took place on the record:

> MR. McCARTHY: That a debt is owed to me from the sale of the building, the 1942, that has never been paid to me.
>
> MR. ROTH (John's attorney): All right. And what is the basis for that debt?
>
> MR. McCARTHY: The sale of the building.
>
> MR. ROTH: Okay.
>
> THE COURT: Were you aware of the sale of the building?
>
> MR. ROTH: I'm aware of the sale of the building, but there is no debt to the sale of the building. That's not even alleged in the case. It's a promissory note. That's a different issue. So

that's – that's different. To the extent that he's going to testify to, that's outside the disclosure.

Your Honor, let me say this. If he's going to get into any detail about anything about companies he owns or anything else, which I assume they're going to, I don't know, I mean, I'm going to—

THE COURT: Well, we're going to find out. He'll be barred from doing that. What—what is he going to testify to?

MR. MADDEN (Terry's attorney): The creation of the note, the $26,000 note, which arose from the sale of the building.

THE COURT: Which you're aware of?

MR. ROTH: I'm aware of the note, yes. I'm aware of the note.

MR. MADDEN: And he's going to testify that he doesn't have any personal debt between Mr. Podmajersky—

THE COURT: That he doesn't have any what?

MR. MADDEN: That he doesn't have any personal debt between himself and Podmajersky. He's going to testify to the fact that he sold his interest in Terry Plumbing in 2011. He's going to testify to the terms of the lease at 1936, as he understood them and the terms of the lease at 1947 as he understood them.

MR. ROTH: That's never been disclosed at all, your Honor. I mean, here's the point—

MR. MADDEN: It's the basis of all the motions. It's the basis—it's included in our pretrial memorandum. He's provided us with the notice of discovery deposition. He elected not to take the deposition. He is now trying to rely on his own –

THE COURT: Well, he said that he didn't because you didn't comply with 213(f).

* * *

MR. ROTH: When I issued the interrogatories and the request to produce, I sent out a deposition notice for Mr. McCarthy. When they came back and they never identified anyone as witnesses, including Mr. McCarthy, I didn't take the dep of somebody who is not going to testify? That doesn't make sense.

So I didn't—I deliberately did not take the deposition because he was never disclosed as a witness. I mean, that's—

* * *

MR. ROTH: So that's -- the requirement under 213 is not that maybe you have to comply, maybe you don't have to comply. It's a strict requirement under the Illinois Supreme Court case law.

It's strictly construed that if someone asks you what your 213(f)(1) through (3) witnesses are, you have to disclose them.

There's no, you know, I'm sorry we didn't disclose. I inadvertently didn't disclose. If you don't disclose, they can't testify, period, end of story. That's what the rule says. We're

just—you know, that's why I didn't take the deposition. We're prejudiced.

Now we're at trial and he's trying to bring up testimony of a witness that I never deposed and I deliberately didn't depose because he wasn't disclosed.

THE COURT: Okay.

MR. MADDEN: I objected to the request as premature. He has never filed any response to that objection. He never had a motion to compel.

THE COURT: When you say that you objected premature, what are you saying?

MR. MADDEN: We were unaware at the time of witnesses beyond—

THE COURT: What you said was that you will supplement what is necessary and you never did. That's your answer.

MR. ROTH: Actually, there is an affirmative duty to supplement. I don't have to file a motion to compel to tell them to do their job. They have an affirmative duty to supplement.

THE COURT: Mr. Madden, you even stated that in your answer to (2) and answer to (3).

MR. MADDEN: I did intend to supplement with further witnesses.

THE COURT: But you didn’t do that.

MR. MADDEN: Because I didn’t have any witnesses beyond the parties.

THE COURT: That's not good enough."

The trial court judge granted John's motion to bar Terry from calling undisclosed witnesses, stating "I'm going to grant the motion and the plaintiff will be barred from testifying." Terry requested that a short continuance be granted in order for Terry to supplement his disclosures and allow John to depose Terry, but the trial court denied this request, stating "[t]hat motion is denied. We are ready for trial. All people are here. You will proceed. I'm denying the motion."

¶ 17 Terry's counsel proceeded to call John as an adverse witness, and John made the same motion to bar John based on Terry's failure to comply with Illinois Supreme Court Rule 213. The trial court again granted John's motion to bar, stating "[y]ou will not be able to call that witness. You didn't comply with 213(f)." Terry then rested without calling any witnesses.

¶ 18 John proceeded by making a motion for a directed verdict based on the fact that Terry did not present any evidence in support of his breach of contract claim. The trial court granted that motion for a directed finding.

¶ 19 John then presented his case on his counterclaim relating to the unpaid rent that he alleged Terry owed him. John testified that he owns the properties located at 1936 South Halsted and 1947 South Halsted. A company that John solely owns, Podmajersky, Inc., manages those properties.

¶ 20 John testified that he had known Terry for a very long time, and that he rented two properties to Terry. He testified that the first property, located at 1936 South Halsted, was rented to Terry individually pursuant to an oral lease. Terry would pay rent for that premise with

checks from Terry's personal checking account that he shares with his wife. The address on the checks used to pay that rent was Terry's home address.

¶ 21 John introduced a ledger showing the amounts of unpaid rent that he alleged Terry owed John. The ledger showed that all rent was charged to Terry and all payments were made by Terry. The ledger showed that Terry owed John $40,353 in unpaid rent for the property located at 1936 South Halsted.

¶ 22 John also testified that he rented a parking space to Terry located at 1947 South Halsted. This agreement was memorialized in a written lease that was drafted by John. The lease was between "Terry Plumbing Company" and "Podmajersky, Inc." and was signed by Terry individually and not as President or agent of any entity. The invoices for the parking space went directly to Terry Plumbing Company. John testified that it was his understanding that Terry Plumbing was a d/b/a for Terry. John testified that Terry owed him $11,725 in unpaid rent on the property located at 1947 South Halsted.

¶ 23 John then called Terry to testify. Terry testified that no invoices for rent were ever sent to his personal address at 1198 Pride Run. Terry testified that he paid rent for the properties with checks from a business, "Terry Plumbing & Heating Supply Co." Terry testified that he was never the sole owner of Terry Plumbing Company before 2011, but later conceded that he came to own all the shares in the company. Terry further stated that those rent payments that were made with his personal checks to John were loans to Terry Plumbing Company. Terry testified that Terry Plumbing Company closed down in May 2011, and that he has no ownership interest in the newly formed Terry Plumbing Co., which is owned by Matrix Holdings, LLC Company.

¶ 24 After hearing argument and evidence, the trial court rejected Terry's argument that the debt was owed by the company, Terry Plumbing Company, and not Terry individually, because

it found that there was an understanding for years that Terry was renting the properties at issue, and Terry had commingled funds with his claimed business entity. The trial court noted that Terry never challenged the amount of unpaid rent; rather, he just argued that he could not personally be held responsible for those unpaid amounts. Accordingly, the trial court entered judgment in favor of John and against Terry in the amount of unpaid rent—$40,353 for the rent owed on the 1936 South Halsted property and $11,725 owed on the parking space located at 1947 South Halsted—plus costs and interest. The totality of the trial court's ruling was made in the following comments on the record, which were later memorialized in an order:

> "After reviewing all of the evidence and in determining whether to disregard a corporate entity, the Court will not rest its decision on a single factor, but will look at a number of variables, including inadequate capitalization, failure to issue stock, failure to observe corporate formalities, nonpayment of dividends, insolvency of the debtor corporation at the time, nonfunctioning of other officers or directors, absence of corporate records, whether the corporation was a mere façade for the operation of dominant stockholders. The Court must also consider whether the dominant individuals commingled corporate funds or preferred themselves as creditors.
>
> After listening to the evidence, I believe that Mr. McCarthy is personally liable, and that not the company, and there was a commingling and an understanding between the parties that went on for years.

> As far as the damages are concerned, it's uncontested that the damages are as follows: In the 1936 South Halsted, $40,353 and prejudgment interest of $7,324.53 for total of $47,067.35. None of those were attacked.
>
> For 1947 South Halsted, that amount of damages was not attacked. The $11,725 and prejudgment interest of $1,445.55 for a total of $13,170.55.
>
> The total claim for against Terry McCarthy is $60,847.90. That's the decision of the Court. You can write the order."

Counsel for Terry then asked the trial court judge: "Is it your Honor's finding that the debt is held by John Podmajersky personally?" The judge responded: "Yes. He is entitled to it. I—I did not find the argument persuasive that Mr. Podmajersky was not the proper party in this case."

¶ 25 Following the trial, John filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 arguing that there was no possible way that John could have been liable for payment on the Note because Terry or one of his entities owed John more than the amount of the Note, and the parties specifically agreed in the Note to a set off for all amounts that Terry or his affiliated entities owed to John. The motion also argues that Terry's sole defense to the unpaid rent was that the entity that Terry owned should be liable for the unpaid rent and not Terry individually.

¶ 26 On November 24, 2013, the trial court denied John's motion for sanctions finding that the complaint was not so transparently false as to warrant sanctions.

¶ 27 Terry now appeals the trial court's rulings: barring him from presenting testimony from undisclosed witnesses in his case-in-chief, granting John's motion for a directed verdict, and ruling in favor of John on John's counterclaim for unpaid rent. John cross appeals the trial

court's ruling denying his motion for sanctions. For the reasons that follow, we vacate the trial court's rulings on Terry's claim and John's counterclaim, remand for a new trial on both claims, and affirm the trial court's ruling denying Rule 137 sanctions against Terry.

¶ 28 ANALYSIS

¶ 29 A. Terry's Breach of Contract Claim

¶ 30 This litigation commenced when Terry filed a breach of contract complaint against John alleging that John breached the terms of the Note when he failed to make any payments under the Note. The Note states that it is between "Terry McCarthy" and "John Podmajersky." Throughout the course of this litigation, John maintains that he did not make payments under the Note because the Note specifically states that any payments due are to be set off against any debts owed by Terry or his affiliated entities to John or his affiliated entities. John argues that Terry owes him a set off amount that exceeds the amount due under the Note for unpaid rent that is owed on two property leases.

¶ 31 The Trial Court's Ruling Barring The Parties From Testifying in Terry's Case-in-Chief Was an Abuse of Discretion

¶ 32 On the day that trial was set to begin and as Terry called the first of his two witnesses, Terry and John, John's counsel presented to the court a motion to bar Terry from calling any witnesses in his case-in-chief because he failed to disclose any witnesses as required under Illinois Supreme Court Rule 213. See Ill. S. Ct. R 213 (eff. July 1, 2002). The trial court granted this motion and barred Terry from calling any witnesses at trial, which resulted in the trial court entering a directed verdict in favor of John and against Terry on Terry's breach of contract claim. On appeal, Terry argues the trial court abused its discretion when it barred him from testifying and calling John as an adverse witness in his case-in-chief.

¶ 33 "A reviewing court must look to the criteria on which the trial court should rely to determine if the trial court abused its discretion." *Boatmen's National Bank of Bellville v. Martin*, 155 Ill. 2d 305, 314 (1993). The factors a trial court is to use in determining whether exclusion of a witness is an appropriate sanction for a Rule 213 violation are: "(1) surprise to the adverse party; (2) the prejudicial effect of the witness' testimony; (3) the nature of the witness' testimony; (4) the diligence of the adverse party; (5) whether objection to the witness' testimony was timely; and (6) the good faith of the party calling the witness." *Id*. No single factor is determinative, and each case presents a unique factual situation which must be taken into consideration when determining whether a particular sanction is proper. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 620-21 (2007).

¶ 34 Illinois Supreme Court Rule 213(f) states:

> "(f) Identity and Testimony of Witnesses**.** Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:
>
> *(1) Lay Witnesses*. A "lay witness" is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness." Ill. S. Ct. R. 213(f)(1) (eff. July 1, 2002).

¶ 35 Rule 213 "is to be liberally construed to do substantial justice between or among the parties." Ill. S. Ct. R. 213(k) (eff. July 1, 2002). The Committee Comments under paragraph (k) state that Rule 213 "is intended to be a shield to prevent unfair surprise but not a sword to prevent the admission of relevant evidence on the basis of technicalities." Ill. S. Ct. R. 213(k) (eff. July 1, 2002) (Committee Comments); see also *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 377 (2003), *as modified on reh'g* (Feb. 26, 2004). "Rule 213 is designed to give those involved in the trial process a degree of certainty and predictability that furthers the administration of justice and eliminates trial by 'ambush.' " *Copeland v. Stebco Products Corp.*, 316 Ill. App. 3d 932, 946 (2000) (citing *Firstar Bank v. Peirce*, 306 Ill. App. 3d 525 (1999)).

¶ 36 Illinois Supreme Court Rule 219(c) "authorizes a trial court to impose a sanction * * * upon any party who unreasonably refuses to comply with any provisions of this court's discovery rules or any order entered pursuant to these rules." *Cronin v. Kottke Associates, LLC*, 2012 IL App (1st) 111632, ¶ 35 (quoting *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998)); Ill. S. Ct. R. 219(c) (eff. July 1, 2002)). Such sanctions include barring witnesses from testifying when a party fails to comply with the court's orders regarding discovery. Ill. S. Ct. R. 219(c) (eff. July 1, 2002); *Athans v. Williams*, 327 Ill. App. 3d 700, 703 (2002).

¶ 37 Under Supreme Court Rule 219, the trial court must choose a sanction that will promote discovery, not impose punishment on a litigant. *Wilkins v. T. Enterprises, Inc.*, 177 Ill. App. 3d 514, 517 (1988). Sanctions are to be imposed only when the noncompliance is unreasonable, and the order entered must be just. *White v. Henrotin Hospital Corp.*, 78 Ill. App. 3d 1025, 1028 (1979); *Hansen v. Skul*, 54 Ill. App. 3d 1, 11 (1977); *In re Estate of Fado*, 43 Ill. App. 3d 759 (1976). "A just order of sanctions under Rule 219(c) is one which, to the degree possible, insures both discovery and a trial on the merits." *Cronin*, 2012 IL App (1st) 111632, ¶ 35

(quoting *Shimanovsky*, 181 Ill. 2d at 123). Barring a witness from testifying is a drastic sanction and should be exercised sparingly. *Curran Contracting Co. v. Woodland Hills Devopment Co.*, 235 Ill. App. 3d 406, 412 (1992); *Palmer v. Minor*, 211 Ill. App. 3d 1083, 1087 (1991). The imposition of sanctions is within the discretion of the trial court, and the court's decision in fashioning a sanction will not be disturbed on appeal absent a clear abuse of that discretion. *Nedzvekas*, 374 Ill. App. 3d at 620-21.

¶ 38 In *Blakely v. Johnson*, 37 Ill. App. 3d 112 (1976), this court held that the trial court abused its discretion when it barred a physician whose name was not disclosed in 213 disclosures from testifying when that witness was made available for deposition. In coming to this conclusion, the *Blakely* court reasoned:

> "In the case of [*Carlson v. General Motors Corp*., 9 Ill. App. 3d 606 (1972)], the court stated the general rule as to when a witness may be barred from testifying: 'It is the general rule that the appropriateness of imposing sanctions against a party for non-compliance with the discovery rules (if a sanction is to be imposed at all) is within the discretion of the trial judge. [Citation.] Factors to be considered are the surprise of the testimony to the opposing party * * * the prejudicial effect of the testimony, the diligence of the opposing party in seeking discovery, timely objection to the testimony and good faith of the party calling the witness * * *' In the case at bar it appears there was no breach of good faith on the part of the plaintiff in that there was no

> attempt to hide the witness. It also appears there was no surprise to the defendant because it was reasonable for defense counsel to expect that a doctor would testify as to the plaintiff's injuries. There should have been no prejudice to the defendant, particularly if an opportunity was given to the defense counsel to depose the witness." *Blakely*, 37 Ill. App. 3d at 115.

¶ 39 We now turn to the trial court's ruling here. Initially, we note that in its ruling the trial court made no mention of the factors to be considered when determining whether a witness' testimony should be barred for violating Rule 213. When a trial court determines that a 213 violation has occurred, and before ruling to bar a witness from testifying, the trial court is to consider six factors, which include: "(1) surprise to the adverse party; (2) the prejudicial effect of the witness' testimony; (3) the nature of the witness' testimony; (4) the diligence of the adverse party; (5) whether objection to the witness' testimony was timely; and (6) the good faith of the party calling the witness." *Boatmen's National*, 155 Ill. 2d at 314. The trial court made no mention of these factors in its ruling, so we assess them below.

¶ 40 With regard to the first factor—the surprise of the adverse party—we find this factor weighs against barring a party from testifying. Here, the witnesses that Terry intended to call were himself and John, the parties to this litigation, *i.e*. the people who entered into the Note that is now the subject of this litigation. The positions that each party has taken throughout the litigation were well documented in the complaint, the motion for summary judgment and the pretrial memoranda. Further, John called the same two witnesses in his case-in-chief on his counterclaim and, in doing so, actually elicited testimony that John's counsel claimed to be

surprised by when presenting his motion to bar. Specifically, John's counsel claimed that he was not aware that Terry would testify that he did not have any personal debt between himself and John, that he sold his interest in Terry Plumbing Company in 2011, and about his understanding regarding the terms of the leases for the properties located at 1936 and 1947 South Halsted. Yet, when presenting evidence on his counterclaim, John's counsel questioned Terry on these exact topics, including his understanding of the leases located at 1936 and 1947 South Halsted. Given the above facts, we cannot see how allowing Terry and John—the parties to this litigation—to testify could have caused any surprise to John and his counsel. *Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 109 (2004) ("One of the purposes of Rule 213 is to avoid surprise."); *Boatmen's National*, 155 Ill. 2d at 315 ("A party cannot claim surprise or prejudice when he knows of the existence of a witness even where answers to interrogatories are incomplete."). While John may not have taken the deposition of Terry, this alone does not allow him to claim surprise where the testimony sought to be adduced at trial was already well known to the parties and well documented in the record. As such, we conclude that John cannot claim that it was a surprise that Terry would call himself and John as witnesses in his case-in-chief, especially given that John called those parties to testify regarding his counterclaim in the same action.

¶ 41 With respect to the second and third factors—the prejudicial effect of the witness' testimony and the nature of the witness' testimony—we find these factors weigh against barring the parties from testifying as an appropriate sanction for violating Rule 213. Since the parties were barred from testifying in this matter, it is difficult to assess the prejudicial effect and nature of their testimony here. However, we know what Terry planned to testify to since the trial court inquired into his testimony after the motion to bar was presented to the court. Terry stated that he would have testified to the Note and the debt that was due to Terry under the Note for the sale

of the building located at 1942 South Halsted. Terry's counsel further added that Terry would testify that he doesn't have any personal debt between himself and John and that he sold his interest in Terry Plumbing Co. in 2011. He also stated that Terry would testify to his understanding of the terms of the leases on the 1936 and 1947 South Halsted properties. Although John's counsel claimed that he was unaware of this testimony, we find that Terry's proposed testimony was clearly outlined and known throughout the litigation, with much of the information being contained within the documents produced in this litigation, inclusive of the pretrial memoranda. As such, it seems unlikely that the nature of the testimony would fall outside the scope of what had already been revealed during the litigation such that it could have been prejudicial. See *Pancoe v. Singh*, 376 Ill. App. 3d 900, 913-14 (2007) (concluding that a witness' testimony was not prejudicial to defendant where it did not go beyond the scope of any other witness' testimony).

¶ 42 With respect to the diligence of the adverse party—whether objection to the witness' testimony was timely—we find this factor weighs against barring the parties from testifying as a sanction for violating Rule 213. Although John timely propounded interrogatories to Terry, we note that John never moved to compel answers to those interrogatories and did not file a motion to compel answers or motion for sanctions until after trial had commenced. Ill. S. Ct. R 213(d) (eff. July 1, 2002) ("Any objection to an answer or to the refusal to answer an interrogatory shall be heard by the court upon prompt notice and motion of the party propounding the interrogatory."). Further, in the pretrial memorandum, Terry gave John a detailed account of the subject matter of his testimony, and he also made himself available for the deposition. The record shows that John made a conscious decision to cancel that deposition. Additionally, we find no bad faith on the part of Terry such that it could be suggested that he was acting in bad

faith or "attempting to hide witnesses." Upon making the 213 objection, Terry's counsel conceded that the failure to supplement his 213 disclosures was a mere oversight, and requested a continuance of the trial to supplement his disclosures and allow John's counsel to depose Terry. The trial court denied the request for additional time to supplement due to the fact that it was the day trial was set to begin and granted John's motion to bar all witnesses from testifying in Terry's case-in-chief. Based on this record, we do not see anything that suggests that the failure to supplement was in any way purposeful or an attempt to hide witnesses or to partake in any gamesmanship, especially where Terry's counsel sought a continuance of the trial to supplement his disclosures and allow John's counsel to depose Terry and was forthright with Terry's stance on the issues throughout the litigation. Thus, while neither Terry nor John was diligent in supplementing 213 disclosures or timely objecting to those disclosures, respectively, there was no evidence in the record to suggest that Terry's failure to supplement his disclosures was done in bad faith.

¶ 43 In sum, we find that barring Terry from calling any witnesses at trial, which in this case only included the parties to the litigation who were named on the Note that was the subject of this litigation, was an abuse of discretion. Not only do the factors laid out in *Boatmen's National* weigh heavily against barring those witnesses as a sanction for violating Rule 213 (see *Warrender v. Millsop*, 304 Ill. App. 3d 260, 270 (1999) (holding that the trial court abused its discretion in allowing a witness to testify where all six factors weighed in favor of barring that testimony)), but barring the witnesses in this case amounts to punishment that does not align with the purpose of preventing unfair surprise in Rule 213 or insuring discovery in Rule 219. See Ill. S. Ct. R. 213(k) (eff. July 1, 2002) (Committee Comments); *Wilkins*, 177 Ill. App. 3d at 517. Further, the trial court's ruling effectively denied Terry of a trial on the merits on his breach of

contract claim, a claim that defendant does not contest but rather sought to off set, resulting in the entry of a directed finding against Terry. See *Smith v. P.A.C.E., a Suburban Bus Division of Regional Transportation Authority*, 323 Ill. App. 3d 1067, 1077 (2001); *Besco v. Henslee, Monek & Henslee*, 297 Ill. App. 3d 778, 783-85 (1998). Accordingly, we reverse the trial court's ruling on John's motion to bar witnesses, vacate the trial court's ruling on Terry's claim, and remand to the trial court for a new trial on this claim.

¶ 44 We note that the case cited to by John, *Sullivan v. Edward Hospital*, 209 Ill. 2d 100 (2004), is distinguishable from the case at bar. That case involved the testimony of an expert witness. Here, the only witnesses that Terry sought to call at trial were occurrence witnesses—the plaintiff and the defendant. After an analysis of the factors to be considered before barring a witness, the court in *Sullivan* found that all factors weighed in favor of barring the expert witness' testimony. Here, the factors weigh heavily against barring the testimony of the parties, where the position of the parties was always well known, and the content of the testimony was no surprise to either party.

¶ 45 The Trial Court's Directed Verdict

¶ 46 Given that we have reversed the trial court's ruling on the motion to bar witnesses, which resulted in the court's directed verdict finding, it follows that we must reverse the trial court's grant of a directed verdict in favor of John and remand the matter for a new trial. Terry is entitled to a new trial on his breach of contract claim. *Kapsouris v. Rivera*, 319 Ill. App. 3d 844, 852 (2001) ("The appellate court may consider errors in the exclusion of evidence and grant a new trial where the error was serious and prejudicial.").

¶ 47 B. John's Counterclaim for Unpaid Rent

¶ 48 After the trial court found in favor of John and against Terry on Terry's breach of contract claim, the trial proceeded on John's counterclaim. In John's counterclaim, he argued that he had been leasing two properties—1936 South Halsted and 1947 South Halsted—to Terry and that Terry had failed to make rental payments on those properties. John argued that the debt was between two individuals—Terry and John—and not between the company formerly run by Terry and his company. Accordingly, John sought to hold Terry personally liable for the unpaid rent due under the leases. Of note, the counterclaim only involved claims relating to the leases and makes no reference to the Note that was the subject of Terry's claim. Terry, in turn, argued that the leases at issue were between two businesses, Terry Plumbing Company and Podmajersky, Inc., and, as a result, Terry personally could not be liable for the unpaid rent. On appeal, Terry also argues that the trial court erred in finding that he was personally liable for the unpaid rent where it relied on case law relating to piercing the corporate veil arguing that the evidence here is legally insufficient to support a claim to pierce the corporate veil. For the reasons that follow, we vacate the trial court's ruling on John's counterclaim, and remand the counterclaim for a new trial.

¶ 49 After hearing testimony from John and Terry, the trial court found that Terry was personally liable for the unpaid rent under the leases and, accordingly, entered a judgment in the amount of $60,847.90 plus costs against Terry. In his ruling, the trial court made the following findings:

> "After reviewing all of the evidence and in determining whether to disregard a corporate entity, the Court will not rest its decision on a single factor, but will look at a number of variables, including inadequate capitalization, failure to issue stock, failure to

> observe corporate formalities, nonpayment of dividends, insolvency of the debtor corporation at the time, nonfunctioning of other officers or directors, absence of corporate records, whether the corporation was a mere façade for the operation of dominant stockholders. The Court must also consider whether the dominant individuals commingled corporate funds or preferred themselves as creditors.
>
> After listening to the evidence, I believe that Mr. McCarthy is personally liable, and that not the company, and there was a commingling and an understanding between the parties that went on for years."

Given these comments, it is clear that the trial court viewed the debts owed under the leases as corporate debts of Terry Plumbing Company and held Terry personally liable for the unpaid rent by piercing the corporate veil.[1] However, because the evidence was legally and factually insufficient to support piercing the corporate veil, we must vacate the trial court's ruling on John's counterclaim and remand it for a new trial. *Callinan v. Prisoner Review Board,* 371 Ill. App. 3d 272, 277 (2007) (An abuse of discretion will be found where the court applied the wrong legal standard).

¶ 50 Piercing the corporate veil is not a cause of action but, rather, a means of imposing liability in an underlying cause of action. *Peetoom v. Swanson,* 334 Ill. App. 3d 523, 527 (2002). Parties may, however, bring a separate action to pierce the corporate veil for a judgment already obtained against a corporation. *Lange v. Misch,* 232 Ill. App. 3d 1077, 1081 (1992); see also

[1] Notably, John does not address the correctness of piercing the corporate veil in his brief. Instead, John restates the testimony given in the case and concludes that it was sufficient to uphold the trial court's ruling.

Pyshos v. Heart-Land Development Co., 258 Ill. App. 3d 618, 624 (1994) ("[A] judgment creditor may choose to file a new action to pierce the corporate veil to hold individual shareholders and directors liable for the judgment of the corporation.").

¶ 51 A corporation is an entity separate and distinct from its shareholders, directors, and officers. *In re Rehabilitation of Centaur Insurance Co.*, 158 Ill. 2d 166, 172 (1994). Indeed, the primary purpose of corporations is to insulate stockholders from unlimited liability. *Peetoom*, 334 Ill. App. 3d at 526. Courts may pierce the corporate veil, however, where the corporation is so organized and controlled by another entity that maintaining the fiction of separate identities would sanction a fraud or promote injustice. *Id.* at 527. A party seeking to pierce the corporate veil must make a substantial showing that one corporation is a dummy or sham for another. *In re Estate of Wallen*, 262 Ill. App. 3d 61, 68 (1994).

¶ 52 Illinois courts will pierce the corporate veil "where: (1) there is such a unity of interest and ownership that the separate personalities of the corporation and the parties who compose it no longer exist, and (2) circumstances are such that adherence to the fiction of a separate corporation would promote injustice or inequitable circumstances." *Tower Investors v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1033-34 (2007). In determining whether the first prong is satisfied, courts will examine many factors, including "(1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere façade for the operation of the dominant

stockholders." *Buckley v. Abuzir*, 2014 IL App (1st) 130469, ¶ 15.Under the second prong of the veil-piercing test, we must determine whether the circumstances are such that adherence to the fiction of a separate corporation would promote injustice or inequitable circumstances. *Fontana*, 362 Ill. App.3d at 500; *Gallagher v. Reconco Builders, Inc.*, 91 Ill. App. 3d 999, 1004 (1980). Specifically, we must ask whether there is some unfairness, such as fraud or deception, or the existence of a compelling public interest that justifies piercing. *Buckley*, 2014 IL App (1st) 130469, ¶ 34; *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 507 (2005).

¶ 53 First, we note that Terry Plumbing Company is not a party to this litigation. *In re Rehabilitation of Centaur Insurance Co.*, 158 Ill. 2d at 172 (A corporation is an entity separate and distinct from its shareholders, directors, and officers). As such, the trial court's analysis, which relied on the principle of piercing the corporate veil to impose liability on Terry personally, is flawed since the principle is generally used to hold individual shareholders and directors liable for a judgment entered against the corporation. See *Pyshos*, 258 Ill. App. 3d at 624. Because Terry Plumbing Company was not a party here and no judgment has been entered against Terry Plumbing Company, it is unclear how the principle of piecing the corporate veil applies in this case. *Callinan*, 371 Ill. App. 3d at 277 (An abuse of discretion will be found where the court applied the wrong legal standard).

¶ 54 Second, the trial court judge's statements on the record indicate that he pierced the corporate veil where he found that there had been evidence of commingling in the record. However, we find the evidence in the record is insufficient to show wrongdoing which would allow piercing the corporate veil for two reasons. First, a commingling of funds occurs when the dominant individuals commingled corporate funds with personal funds or preferred themselves as creditors. *Ted Harrison Oil Co. v. Dokka*, 247 Ill. App. 3d 791, 795 (1993). John has not

cited any case that allows piercing the corporate veil when an individual pays corporate bills out of his own personal funds. Here, the only evidence of "commingling funds" was Terry writing checks for the company (which he was never paid back for). This the exact opposite of commingling corporate funds with his personal funds or preferring himself as the creditor. Second, the trial court could not pierce the corporate veil where there was no evidence in the record of any wrongdoing as is required under the second prong of the veil-piercing test that could warrant piercing the corporate veil. *Fontana*, 362 Ill. App. 3d at 507 (quoting *Berlinger's, Inc. v. Beef's Finest, Inc.*, 57 Ill. App. 3d 319, 324 (1978)) ("The second prong has been described further as '[s]ome element of unfairness, something akin to fraud or deception, or the existence of a compelling public interest.' "). In fact, we would find quite the opposite to be true as there is evidence in the record that Terry used his personal funds to bail out the corporation at the end of its life. As such, even if the principle of piercing the corporate veil was appropriate here, which it is not, the evidence at trial was insufficient to pierce the corporate veil and hold Terry personally liable for unpaid rent where there was no evidence of commingling funds as defined under the theory of piercing the corporate veil or of any wrongdoing that would be sufficient under the second prong of the veil-piercing test.

¶ 55 We are mindful that a trial court's ruling may be affirmed on any basis appearing in the record. *CITGO Petroleum Corp. v. McDermott International*, 368 Ill. App. 3d 603, 606 (2006) ("we may affirm the circuit court's order on any basis in the record"). John requests that we affirm the trial court's ruling by finding that the record supports his argument that the debts were in fact personal and not corporate debts.

¶ 56 The trial court's ruling on John's breach of contract counterclaim focused on piercing the corporate veil. As such, the trial court did not make any factual findings as to who it found to be

the proper parties on the leases at issue, one oral lease and one written lease, and whether the debt due under those leases was a corporate debt or personal debt. The issue of whether this is a corporate debt is a factual determination that depends on the evidence submitted at trial as well as the demeanor and credibility of the witnesses. *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 976 (2010) ("the trial court was responsible for resolving any factual disputes, judging the credibility of the witnesses, determining the weight to afford their testimony and deciphering contradicting evidence"). That determination of whether this was a corporate debt or an individual debt was never made by the trial court and we will not make such a factual determination on appeal. The testimony elicited from John and Terry on John's counterclaim highlight the discrepancies in the record. John testified that he personally owned the properties subject to the leases, that Terry paid for the leases with personal checks, that John and Terry had a longstanding personal relationship, that the oral lease was entered into by John and Terry individually, the written lease was signed by Terry not as President or Agent of Terry Plumbing Company, and "Terry Plumbing Company" was not the name of a company since Terry's company was called "Terry Plumbing & Heating Supply Co., Inc." Terry, on the other hand, testified that Podmajersky, Inc. manages both properties subject to the leases, the written lease indicates that the parties to the lease are "Terry Plumbing Company" and "Podmajersky, Inc." and, although he did write personal checks for the rent, those checks were loans he made to his business. Despite this contradictory testimony, the trial court never weighed this evidence to make any factual findings as to who the parties to each of the leases were. While the court stated that John was the proper party to file the counterclaim and that Terry personally was liable for the debt under the leases, it also applied the principle of piercing the corporate veil (although erroneously), which conversely suggests that the trial court believed the proper parties to the

leases were John personally and Terry Plumbing Company. Because we cannot guess or surmise what the trial court's findings of facts were, we cannot affirm the court's ruling on John's counterclaim based on other evidence in the record as John requests. See *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 976.

¶ 57 In addition, while the trial court and John focus largely on John's counterclaim, we note that we could have affirmed the trial court's ruling based on John's affirmative defense. "The ordinary structure of a trial is such that the defendant offers his evidence in support of his affirmative defense during his presentation of his case after the plaintiff has rested." *Capitol Plumbing & Heating Supply, Inc. v. Van's Plumbing & Heating*, 58 Ill. App. 3d 173, 175 (1978). Here, John's first affirmative defense states:

> "The Promissory Note provides for a set off of any debts owed by Plaintiff McCarthy and any of his businesses to the Defendant. Plaintiff McCarthy and/or his businesses owe Defendant in excess of the amount on the Promissory Note. Defendant is allowed a set off of any and all such amounts owed to Defendant."

The right of set off is contained within paragraph 4 of the Note, and states: "All payments to Note Holder shall be subject to any right to set off against claims held by Borrower, or any of his affiliated entities, and against Lender and any of his affiliated entities." Thus, pursuant to John's affirmative defense, the relevant question is whether Terry Plumbing Company is an affiliated entity of Terry. Terry argues that Terry Plumbing Company is not an affiliated entity because at the time the Note was created in March of 2012, Terry no longer had any interest in Terry Plumbing Company as he sold his remaining interest in May 2011. However, the Asset Purchase Agreement signed May 31, 2011 states: "Buyer [Matrix] will not assume any liability or be

obligated to pay, perform, or otherwise discharge any liability or obligations of Seller [Terry Plumbing Company] whether known or unknown, absolute or contingent, including, but not limited to accounts payable, customer advances, customer returns, underfunded pensions or other employee benefit programs." However, because the trial court focused on piercing the corporate veil and John's counterclaim, he did not make any findings of fact relating to John's first affirmative defense. *People v. Arroyo,* 328 Ill. App. 3d 277, 287 (2002) ("Reviewing courts should not be required to surmise what factual findings that the trial court made. Instead, the trial court should make clear any factual findings upon which it is relying").

¶ 58 Thus, because we are not in a position to determine any of these factual discrepancies in the record, we cannot affirm the trial court's ruling on John's counterclaim on any other basis in the record. *Dowd & Dowd, Ltd. v. Gleason,* 352 Ill. App. 3d 365, 376 (2004) ("[I]t is for the trial judge to determine the credibility of the witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflict in the evidentiary record."); *Bekele v. Ngo,* 236 Ill. App. 3d 330, 331 (1992) ("The trier of fact, not the reviewing court, must resolve conflicts in the evidence and questions of fact"). Therefore, we vacate the trial court's ruling on John's counterclaim and remand the matter for a new trial.

¶ 59 Because we are vacating and remanding for a new trial on Terry's claim and John's counterclaim, we do not need to address Terry's remaining arguments, including the jurisdiction of the "municipal court."

¶ 60 C. John's Cross Appeal for Rule 137 Sanctions

¶ 61 John filed a cross appeal challenging the trial court's denial of Illinois Supreme Court Rule 137 sanctions against Terry. John argues that the trial court's ruling amounted to an abuse

of discretion where the evidence at trial proved that John could not have been liable under the Note where it was expressly subject to any set off between the parties.

¶ 62 Illinois Supreme Court Rule 137 addresses the signing of pleadings, motions, and other papers in the circuit courts. The rule provides, in pertinent part:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."
> Ill. S. Ct. R. 137 (eff. Jan. 4, 2013).

¶ 63 Because Rule 137 is penal in nature, it will be strictly construed. *Dowd & Dowd, Ltd.*, 181 Ill. 2d at 487. The decision whether to impose sanctions under Rule 137 is committed to the sound discretion of the circuit judge, and that decision will not be overturned unless it represents an abuse of discretion. *Id.* An abuse of discretion occurs only where no reasonable person would take the view adopted by the trial court. *Amadeo v. Gaynor*, 299 Ill. App. 3d 696, 701 (1998).

¶ 64 The judge here denied John's request for sanctions under Rule 137, and we cannot say that his determination was an abuse of discretion. Here, while the Note may have been subject to the set off of any debts pursuant to paragraph 4 of the Note, who exactly owed those debts and who could collect on those debts was, and remains, an issue that is not so clear cut such that

Terry's claim could be seen as being "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." As such, we affirm the trial court's denial of Rule 137 sanctions where we cannot say that no reasonable person would have done the same. *Hess v. Loyd*, 2012 IL App (5th) 090059, ¶ 22 (the trial court abused its discretion only where no reasonable person would take the view adopted by it).

¶ 65 CONCLUSION

¶ 66 For the reasons above, we vacate the trial court's rulings with respect to Terry's claim and John's counterclaim, remand the matter for a new trial on both claims, and affirm the trial court's ruling denying Rule 137 sanctions against Terry.

¶ 67 Judgments reversed in part; affirmed in part; cause remanded for a new trial.