2015 IL App (2d) 140007-U
No. 2-14-0007
Order filed April 28, 2015



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| WILLIAM R. REID and JUDITH REID, | ) | Appeal from the Circuit Court |
| | ) | of Jo Daviess County. |
| Plaintiffs-Appellants, | ) | |
| | ) | |
| v. | ) | No. 10-L-16 |
| | ) | |
| GALENA HILLSIDE HOMES and | ) | |
| WILLIAM J. MILLER, | ) | Honorable |
| | ) | William A. Kelly, |
| Defendants-Appellees. | ) | Judge, Presiding. |

JUSTICE BIRKETT delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's judgment in favor of defendants and against plaintiffs on claims of breach of contract, breach of implied warranty, fraud and deceptive business practices, breach of oral contract, and on defendants' counterclaim for *quantum meruit* was not against the manifest weight of the evidence.

¶ 2 Plaintiffs, William R. and Judith Reid, entered into a contract with defendants, Galena Hillside Homes (Hillside) and William J. Miller, to renovate and build an addition to their home. Plaintiffs filed suit against defendants alleging a number of claims based on defendants' poor performance and improper billing practices. Following a bench trial, the circuit court of Jo Daviess County entered judgment in favor of defendants and against plaintiffs on plaintiffs'

claims of breach of oral and written contract, breach of implied warranty, fraud and deceptive business practices, and fraud in the inducement,[1] and in favor of defendants and against plaintiffs on defendants' counterclaim for *quantum meruit*. Plaintiffs appeal, arguing that they proved their case and that the trial court's adverse judgment on all claims was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We summarize the pertinent facts of record. On July 3, 2008, plaintiffs entered into a written contract with defendants for the renovation of their home. Performance on the contract began approximately one month later.

¶ 5 On September 21, 2010, plaintiffs filed an action against Hillside and Miller, individually, alleging breach of contract, breach of implied warranty, fraud and deceptive businesses practices, and fraud in the inducement.[2] Plaintiffs amended their complaint to include a count for breach of oral contract. Defendants answered and filed a counterclaim, seeking an unpaid balance of $10,036.

¶ 6 On September 30, 2013, the matter proceeded to a bench trial. The evidence at trial established that the total cost for the renovation was $479,525; as of September 11, 2009, plaintiffs had paid a total of $469,489. Hillside's profit for the completion of the home was not

[1]Plaintiffs make no arguments on appeal pertaining to their claim of fraud in the inducement and have, therefore, abandoned this claim. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued [on appeal] are waived"); *Bunting v. Progressive Corp.*, 348 Ill. App. 3d 575, 581 (2004).

[2]As noted, plaintiffs did not pursue this claim on appeal.

specified in the original contract, although both parties testified that they had an oral agreement that the profit would be 15% of the total cost of the renovation.

¶ 7 Judith Reid testified that, throughout the duration of the construction, she and her husband expressed dissatisfaction with many aspects of Hillside's work. Judith testified that there was a list of about "50 items" that she and her husband regarded as incomplete or improperly constructed. These items included the siding for the house, the size of the ice barrier, remediation of the wall behind a wood burning stove, leakage from the outside garage, the clearances for the kitchen cabinetry, the installation of the vanity in the master bathroom, as well as a variety of other problems that plaintiffs alleged did not meet what they contracted for.

¶ 8 On July 23, 2009, plaintiffs met with Miller and stated that they wanted to "take a step back" from further construction on the house due to issues in their personal lives. From that date on, Hillside did not perform any other work on the home. On September 5, 2009, Miller presented plaintiffs with an itemized statement showing that, as of that date, plaintiffs had incurred $479,525 in costs for all of the work to their home, and had paid $469,489, leaving an unpaid balance of $10,036. On September 11, 2009, the parties met to discuss plaintiffs' issues with the home. Miller told plaintiffs to withhold the final payment until they were fully satisfied with every issue. However, the parties were unable to come to an agreement, and the next day, Judith sent an e-mail to Miller, stating that the security codes for the house had been changed, to "not worry about 'finishing' things in our house," and that plaintiffs would "handle all the unfinished items."

¶ 9 Plaintiffs also questioned Miller's charging methods. At trial, plaintiffs introduced bank records purporting to show that Hillside paid the subcontractors a total of $357,392, but received $469,489, thereby violating their oral agreement to a 15% profit by actually receiving $112,142,

or 31% in profit. Specifically, plaintiffs argued that Hillside received "kickbacks" or overcharged plaintiffs, in that Hillside paid several subcontractors less than the total charge for their labor. Through the introduction of bank records, plaintiffs testified that, 1) Hillside charged plaintiffs $24,815 for plastering, but only paid the subcontractor $20,815; (2) that Hillside charged $26,062 for the cabinetry, but then later received a check for $6,000 from the cabinetry subcontractor; (3) that Hillside charged $6,500 for the roofing labor, but only $3,776 was paid by Hillside to the subcontractor; and (4) that Hillside charged $7,328 for dumpster charges, but only $2,305 was actually paid by Hillside. Judith also prepared her own exhibit and introduced it at trial, purporting to show that Hillside charged over $35,000 in labor costs.

¶ 10 Plaintiffs' expert, Harry Allen, testified that there were defects in the construction of the home, such as the measurement of the ice and water shield, peeling paint from the siding, improperly constructed trim pieces over the siding, deterioration of the siding, and building code violations. Allen testified that there were "many issues" with the construction, attributing the defects to "poor workmanship." However, Allen agreed that his opinion of the workmanship would be different if, hypothetically, defendants were prevented by plaintiffs from completing the job.

¶ 11 Miller testified that Hillside was "myself," and that he had built close to 200 homes in the Galena area over a span of 20 years. Miller testified that he agreed to a 15% profit on the project, but that the profit was to be charged on the "entire project."

¶ 12 Miller testified that, at the July 23, 2009, meeting, plaintiffs told him that they wanted to take a "step back" and "deal with issues at home and not have to deal with the Territory house." Miller testified that, at the September 11, 2009, meeting, he told plaintiffs to hold the final payment owed to him until plaintiffs moved into the home and everything was done "100

percent." Miller acknowledged that there were issues with the home, but stated that "they are what I call a punch list." Miller testified that plaintiffs reviewed the punch list at the September 11, 2009, meeting, but that it was never completed because plaintiffs asked him not to come back. Miller also disputed the condition of the siding, but acknowledged responsibility for installing some of the siding incorrectly.

¶ 13 With respect to his charging methods, Miller testified that plaintiffs were entitled to a credit of $1,338.43, but that his practice was not to apply credits until the project was complete. Regarding the discrepancies between what Hillside charged plaintiffs, and what was actually paid to the subcontractors, Miller testified that he frequently leases equipment to his subcontractors and deducts any leasing fees from the amount paid to the subcontractor. Miller also testified that sometimes subcontractors would use his equipment on other jobs, and that they would "work off" the leasing fees on his jobs. Regarding the dumpster charge, Miller testified that the $2,305 paid to the waste company was for "accepting our waste," and that the remaining $5,023 was paid to the driver of the waste removal truck for 24 trips "made down and back," at the rate of $125 per hour. Miller testified that he had receipts for the driver, but threw them away when he transferred the dumpster costs to the invoice that he provided to plaintiffs.

¶ 14 As to the total cost of the project, including the labor charges, Miller testified that the $479,525 cost was the combined total of all of the materials, the "foundation work," and the "set price of labor on the *** new addition." Referring to his September 5, 2009, itemized statement, Miller testified that the "$45,000 figure" for the labor came from the plaintiffs' estimate that they obtained from Bob Wienen Construction. Miller also testified that throughout the project, he would meet with plaintiffs at their house and give them a copy of an invoice for payment, and the parties would "go over" all of the invoices together "with the matched numbers of that

particular statement."

¶ 15 Defendant's expert, Kevin Doyle, testified that, based upon his observations as a home inspector, he disagreed with plaintiffs' expert that all of the siding needed to be replaced, but agreed that portions of the siding needed to be replaced. Regarding the ice and water shield, Doyle testified that he could not observe whether it was the correct measurement, but did remark that the house did not have gutters, and, because of the absence of gutters, the chances of potential ice damage were "remote."

¶ 16 After closing arguments, the trial court held in favor of defendants on plaintiffs' claims. The trial court also held in favor of defendants on their counterclaim for the unpaid balance of $10,036, minus the cost for remediation of the siding and return credits. On December 10, 2013, the trial court entered a written judgment in favor of defendants and against plaintiffs on all claims of plaintiffs' complaint. The order also provided judgment for defendants in the amount of $6,324.57, which represented the plaintiffs' unpaid balance of $10,036, minus $3,000 for "costs to remediate siding," and $711.43 for return credits. Plaintiffs timely appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, plaintiffs argue that the trial court erred in finding in favor of defendants on plaintiffs' claims for (1) breach of contract; (2) breach of oral contract; (3) breach of implied warranty; (4) deceptive businesses practices; and (5) defendants' counterclaim for offset. We address each of plaintiffs' arguments in turn.

¶ 19 A reviewing court will reverse a trial court's judgment following a bench trial only if it is against the manifest weight of the evidence. *C. Szabo Contracting, Inc. v. Lorig Construction Co.*, 2014 IL App (2d) 131328, ¶ 23. A judgment is against the manifest weight of the evidence

only when the opposite conclusion is apparent or when the findings are unreasonable, arbitrary, or not based on evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002).

¶ 20 We first address plaintiffs' argument that the trial court's finding in favor of defendants on plaintiffs' breach of contract claim was against the manifest weight of the evidence. In order to prove a breach of contract, a plaintiff must establish: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff. *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24. It is elementary that a party to a contract may not complain of the other party's nonperformance of the contract where that performance is prevented by his or her own actions. *Barrows v. Maco, Inc.*, 94 Ill. App. 3d 959, 966 (1981).

¶ 21 Here, although there was a valid contract between the parties, as evidenced by their July 3, 2008, agreement, plaintiffs effectively admitted at trial that they prevented defendants' performance. Judith testified that, on September 12, 2009, she sent an email to Miller stating that the security code for the home had been changed, and that plaintiffs would handle all of the unfinished items. At a meeting between the parties on the previous day, Miller expressly told plaintiffs to hold on to the final payment until he was finished with all of the work to their satisfaction. Plaintiffs' patience apparently expired, leading them to immediately change the security code to the house, without providing Miller access. Further, plaintiffs plainly told Miller that they would handle all of the unfinished items, referring to the punch list. We believe that this is a clear example of prevention of performance. *Gamm Construction Co. v. Townsend*, 32 Ill. App. 3d 848, 849-851 (1975) (holding that, where the general contractor caused delays in performance and sent a letter to the subcontractor ordering him off the job, the general contractor's own actions prevented performance). As a result, plaintiffs cannot prove that

damages resulted from Miller's breach, where plaintiffs knew that he could not access the home to complete the work, and more importantly, because he was told not to complete the work. Plaintiffs' conduct essentially deprived them of any claim that they suffered damages as a result of Miller's breach when they terminated defendants' opportunity to complete the job. Therefore, the trial court's finding for defendants on this claim was not against the manifest weight of the evidence.

¶ 22 Plaintiffs argue next that the trial court's judgment in favor of defendants on plaintiffs' claim for breach of implied warranty is against the manifest weight of the evidence. When a person contracts to perform construction work, he or she impliedly warrants that he or she will complete the work in a reasonably workmanlike manner, and the failure to do so results in a breach of contract. *Meyers v. Woods*, 374 Ill. App. 3d 440, 451-52 (2007). A reviewing court will not disturb the trial court's determination unless it was against the manifest weight of the evidence. *Id.* at 452.

¶ 23 Here, there is substantial evidence in the record that, overall, the renovation and addition to the subject property was constructed in a reasonably workmanlike fashion. Plaintiffs pointed to the items on defendant's punch list as evidence of poor workmanship. Miller testified, however, that the punch list items were minor, and he offered to correct the items while allowing plaintiffs to retain the final $10,000 due to defendants until the items were resolved to their satisfaction. Additionally, although plaintiffs' expert opined that the punch list items were the result of "poor workmanship," he agreed that his opinion would be different if, hypothetically, defendants had been prevented from completing the work to resolve the items on the punch list. Significantly, and notwithstanding the items on the punch list, defendants' expert testified the work on the household had been performed in a reasonably workmanlike fashion. Finally, Miller

admitted that some of the siding had been improperly installed and estimated the remediation of the siding to cost $3,000. Thus, Miller's testimony, his frank admission of the defects in defendants' work, and the testimony of both expert witnesses provide ample evidence from which the trial court could conclude that the work on the subject property was completed in a reasonably workmanlike fashion. We reiterate that it was the trial court's province to resolve any conflict in the evidence. *O'Leary v. America Online, Inc.*, 2014 IL App (5th) 130050, ¶ 7. The trial court was in a superior position to observe the conduct of the witnesses while testifying to determine their credibility. *Eychaner*, 202 Ill. 2d at 270-71. We do not reweigh the evidence or substitute our judgment for that of the trier of fact on review. *Id.* at 251-52. Accordingly, we cannot say that the trial court's determination was against the manifest weight of the evidence.

¶ 24 Plaintiffs next contend that the trial court's judgment that defendants did not violate the Consumer Fraud and Deceptive Business Practices Act (Act) (815 ILCS 505/1 *et seq.* (West 2012)) is against the manifest weight of the evidence. The Act authorizes plaintiff to pursue a private cause of action for deceptive commercial conduct. *Crowder v. Bob Oberling Enterprises Inc.*, 148 Ill. App. 3d 313, 315-16 (1986). To establish a violation of the Act, a plaintiff must prove " '(1) a deceptive act or practice, (2) intent on the defendant['s] part that plaintiff rely on the deception, and (3) that the deception occurred in the course of conduct involving trade or commerce.' " (Bracketed change in the original.) *Montgomery v. Nostalgia Lane, Inc.*, 383 Ill. App. 3d 1098, 1111 (2008) (quoting *Siegel v. Levy Organization Development Co.*, 153 Ill. 2d 534, 542 (1992)).

¶ 25 Plaintiffs argue that defendants violated the Act by breaching their promise to charge for "contractor" prices. Plaintiffs contend that defendants charged a higher price than originally

agreed. In addition, plaintiffs argue that defendants took money, in the form of credits, that was actually due to plaintiffs. We disagree.

¶ 26 We have carefully reviewed the record and conclude that the trial court's judgment against plaintiffs on their claim for a violation of the Act was not against the manifest weight of the evidence. The facts, as we have summarized them, do not contain any evidence from which plaintiffs can prove a deceptive act or practice. Miller testified at length regarding how he arrived at the total cost of the project, how subcontractors were paid, and, importantly, how he met with plaintiffs each time he would present an invoice for payment. Accordingly, in the absence of a deceptive act or practice, plaintiffs cannot succeed in proving a violation of the Act. Further, we do not reweigh the evidence or substitute our judgment for that of the trier of fact when reviewing the evidence. *Eychaner*, 202 Ill. 2d at 251-52. There was ample evidence from which the trial court could conclude that defendants provided the services they promised to plaintiffs, including the manner in which they charged for those services. Accordingly, we cannot say that the trial court's determination was against the manifest weight of the evidence.

¶ 27 Plaintiffs argue next that the trial court's judgment in favor of defendants on plaintiffs' breach of oral contract was against the manifest weight of the evidence. Plaintiffs argue that defendants' profit was 31.38% ($112,142) of the total expenses. In arriving at this calculation, plaintiffs rely on plaintiffs' exhibit No. 24, a summary of bank records showing that a total of $357,392 was paid to all involved subcontractors. Plaintiffs argue that defendants' itemized statement, which displays the cost of the project to be $479,525, proves that defendants took $112,142 in profit. We disagree.

¶ 28 While we are not entirely convinced that the profit term of 15% of the total costs can be deemed an oral contract itself, or if it is instead an offer of parol evidence to explain how the

parties interpreted any profit terms contained in the written contract, such a distinction is unimportant because the parties are content to agree that plaintiffs' claim for breach of oral contract centers on the promise that profits for the project would be fixed at 15% of the costs of the renovation. Miller's testimony addressed the issue of excessive profit, albeit in the context of defendant's usual and customary manner of dealing with the subcontractors. Specifically, Miller testified about his equipment rental practices with subcontractors. Miller testified that the subcontractors would rent equipment from him, and that he would deduct the rental fees from what he ultimately paid them. Other times, subcontractors would rent equipment from Miller for other jobs, and they would then "work off" the rental fees on his jobs, thus resulting in a subtraction of the rental fees from the original subcontractor bids. Therefore, Miller fully explained what plaintiffs here characterize as "kickbacks" or "overcharges." From this testimony, the court could reasonably conclude that Miller was neither overcharging nor improperly retaining credits due plaintiffs. Thus, we cannot say that the trial court's conclusion that defendants did not breach the oral contract term referring to profits was against the manifest weight of the evidence.

¶ 29 Leaving aside Miller's testimony, we also believe that plaintiffs' assent to the ongoing costs of the project, indicated by plaintiffs' payments of all of Hillside's invoices as they were presented throughout the renovation, is dispositive of the argument. Absent a final $10,036 payment, plaintiffs paid $469,489 for the work performed on their home. The record supports the conclusion that Miller met with plaintiffs each time he presented an invoice, explained the costs behind each invoice, and plaintiffs' agreed to the costs, as evidenced by their payment of each invoice. Notably, a review of the record shows that Miller charged $65,000 for "profit and

overhead," or a 13% profit.[3] Accordingly, we hold that the trial court's judgment in favor of defendants on plaintiffs' claim for breach of oral contract was not against the manifest weight of the evidence.

¶ 30 Last, plaintiffs contend, by restating their foregoing arguments, that the trial court's judgment in favor of defendants on defendants' counterclaim for *quantum meruit* was also against the manifest weight of the evidence. *Quantum meruit* is an equitable remedy used to provide restitution for unjust enrichment, and it is often pleaded as an alternative claim in a breach-of-contract case so that the plaintiff may recover even if the contract proves to be unenforceable. *Weydert Homes, Inc. v. Kammes*, 395 Ill. App. 3d 512, 522 (2009). Where one party repudiates a contract and refuses to be bound by it, the injured party may treat the contract as rescinded and recover under a theory of *quantum meruit* insofar as he has performed. *Mor-Wood Contractors, Inc. v. Ottinger*, 205 Ill. App. 3d 132, 143 (1990).

¶ 31 Here, defendants provided evidence that plaintiffs had incurred a total cost of $479, 525 for the work performed on their house. Defendants presented evidence at trial establishing that plaintiffs were up to date on their payments, totaling $469,489, and had one remaining payment of $10,036 at the time they told Miller that they would "handle all the unfinished items." As summarized above, plaintiffs prevented defendants' performance when they blocked access to their home and told Miller that they would complete the remaining work. Thus, plaintiffs repudiated the contract, and defendants were entitled to recover under a theory of *quantum*

[3]Miller's itemized statement, showing the project's total cost to be $479,525, contained within it a charge of $65,000 for "profit and overhead."

*meruit* for the work performed. Thus, we hold that the trial court's judgment in favor of defendants on their counterclaim was not against the manifest weight of the evidence.

¶ 32 We also note that Miller testified that plaintiffs should receive $711.43 in credits and $3,000 for remediation of the siding. The trial court, as trier of fact, could reasonably accept this testimony, along with the evidence showing that plaintiff's still owed $10,036 to defendants. Thus, the trial court's judgment of $6,324.57 (representing the application of $3,711.43 in credits and remediation to the outstanding balance) in favor of defendants on their counterclaim was not against the manifest weight of the evidence.

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Jo Daviess County is affirmed.

¶ 35 Affirmed.