2015 IL App (2d) 150184-U
No. 2-15-0184
Order filed November 4, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

INTERNATIONAL CONCRETE PRODUCTS, INC.,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff,	)	
v.	)	No. 10-CH-2601
BJF ESTANCIA II, LLC,	)	
Defendant and Counterdefendant	)	
(Mars Equities, Inc., Defendant and Counterdefendant-Appellant; Otis Elevator Company Midwest Region, Defendant and Counterplaintiff-Appellee; First Midwest Bank, Merrill Lynch Capital, Drilled Foundation, Inc., RKN Concrete Construction, Inc., M.F. Construction Contractors Company, G.E. Kloos Material Company, P. Walker Brothers, Inc., Multiple Concrete Accessories Corporation, Unknown Owners, and Nonrecord Claimants, Defendants).	)	Honorable Terence M. Sheen, Judge, Presiding.

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

ORDER

¶ 1 *Held*: Counterdefendant showed *prima facie* reversible error in the trial court's grant of summary judgment to counterplaintiff on the latter's claims for account stated and

> *quantum meruit*: counterdefendant's employee's affidavit raised questions of fact as to whether it disputed counterplaintiff's invoices and whether it accepted the benefits of counterplaintiff's work.

¶ 2 Defendant and counterplaintiff, Otis Elevator Company Midwest Region (Otis), filed a seven-count third amended counterclaim against defendant and counterdefendants, Mars Equities, Inc. (Mars), and BJF Estancia II, LLC (BJF), seeking $45,738 in payment for work performed by Otis. The trial court granted summary judgment for Otis on two counts against Mars. Mars timely appealed. For the reasons that follow, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On May 7, 2010, International Concrete Products, Inc. (ICP), filed a three-count complaint against BJF, Mars, First Midwest Bank, Merrill Lynch Capital, Drilled Foundation, Inc., RKN Concrete Construction, Inc., M.F. Construction Contractors Co., G.E. Kloos Material Co., P. Walker Bros., Inc., Multiple Concrete Accessories Corp., Otis, unknown owners, and nonrecord claimants. Count I sought a mechanic's lien. Count II alleged a breach-of-contract action against Mars, and count III alleged a *quantum meruit* action against Mars. ICP sought $611,653.50 in payment for materials and services provided by ICP to Mars. A stipulated order of dismissal was entered on April 2, 2012.

¶ 5 On April 29, 2013, Otis filed a seven-count third amended counterclaim against Mars and BJF, seeking $45,738 in payment for work performed by Otis in August and September 2008. Counts I, II, and III alleged breach of contract. Counts V and VII alleged *quantum meruit* and an account stated, respectively, against BJF. Counts IV and VI alleged *quantum meruit* and an account stated, respectively, against Mars. Counts IV and VI are the only counts at issue in the present case.

¶ 6 Count IV of the third amended counterclaim stated a claim for *quantum meruit*. Otis alleged that Mars was the general contractor for a construction project. According to Otis, from August 2008 through early October 2008, Otis delivered materials and provided elevator-installation services to property located at 150 Harvester Drive, Suite 100, in Burr Ridge (the property). Otis alleged that the materials and services improved the property and were not furnished gratuitously. Otis further alleged that Mars accepted and benefited from Otis's materials and services and that it was unjust for Mars to retain the benefit without paying Otis for the reasonable value of the materials and services, which, according to Otis, totaled $45,738.

¶ 7 Count VI of the complaint was a claim for an account stated. Otis alleged that it submitted invoices to Mars on July 10, 2008, for $21,789 and on September 2, 2008, for $23,958 for the materials and services. Otis alleged that Mars did not dispute the invoice amounts and had failed to pay the invoices. According to Otis, Mars's failure to dispute the invoices created an account stated between the parties.

¶ 8 On May 16, 2014, Otis moved for summary judgment on counts III through VI. (Counts I, II, and VII had been previously dismissed.) With respect to its claim for *quantum meruit* against Mars, Otis argued that it produced uncontroverted evidence to support its claim. Otis pointed to an affidavit from Matthew Krause, its account manager. According to Krause, Otis was hired to install two elevators on the property for $121,000. Between June 25, 2008, and July 10, 2008, Otis performed preparatory work and, on July 10, 2008, it submitted an invoice for this work. In August and September 2008, Otis performed elevator-installation work and, on September 2, 2008, it submitted a second invoice. According to Krause, by late September, Otis was owed $45,738. The invoices were attached. Otis also relied on Mars's answer to the complaint, wherein, according to Otis, "Mars admitted that Otis performed elevator installation

services and that Mars accepted the benefits of those services." Otis argued that the reasonable value of its services was $45,738.

¶ 9 With respect to its claim for an account stated against Mars, Otis argued that it presented uncontested evidence to support its claim. Otis argued that it submitted two invoices to Mars, that Mars admitted in its answer that it received the invoices, that Mars did not pay the invoices, and that Mars never objected to the invoices.

¶ 10 Mars and BJF filed a response to Otis's motion. Mars argued that *quantum meruit* cannot be applied to work done by Otis after Otis was informed that the project was halted. Mars attached the affidavit of Timothy Frangella, head of the development division of Mars, who averred that, on or before August 18, 2008, he informed Krause that all work was stopped until further notice. Mars maintained that, although it admitted in its answer to Otis's counterclaim that it accepted some services from Otis, it did not indicate which services were accepted. Mars further argued that Otis had not established the reasonable value of its work, noting that Krause's affidavit did not state that the sum due was reasonable.

¶ 11 With respect to Otis's claim for an account stated, Mars disputed Otis's contention that Mars never objected to Otis's invoices. In support, Mars cited to Frangella's affidavit, wherein Frangella averred that he reviewed the invoices and shortly thereafter stated his objections and disputes to Krause.

¶ 12 On October 15, 2014, the trial court granted summary judgment in favor of Otis on counts IV and VI against Mars. The court denied summary judgment on counts III and V against BJF. The record does not contain a transcript from the hearing or an order detailing the basis of the court's ruling. On January 29, 2015, the trial court granted Otis's motion to nonsuit counts III and V. Mars timely appealed.

¶ 13 II. ANALYSIS

¶ 14 Otis has not filed an appellee's brief. In *First Capital Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976), the supreme court explained the options available to a reviewing court under such circumstances, stating as follows:

> "We do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed."

¶ 15 Thus, in the absence of an appellee's brief, a reviewing court has three options: (1) the court may advocate for the appellee if it determines that justice so requires; (2) the court may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of an appellee's brief; or (3) the court may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record. *Id*. at 133. "*Prima facie*" means "[a]t first sight; on first appearance but subject to further evidence or information" and "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted." Black's Law Dictionary 1228 (8th ed. 2004); see *Talandis Construction Corp.*, 63 Ill. 2d at 132 (similarly defining the term *prima facie*).

¶ 16 Here, the common-law record consists of five volumes. Otis's motion for summary judgment includes over 120 pages of exhibits and its reply includes over 50 pages. We do not

feel that justice requires us to advocate on Otis's behalf or search the record for purposes of sustaining the court's judgment. Nor do we find that the record is simple. Accordingly, we will determine whether Mars's brief demonstrates *prima facie* reversible error.

¶ 17 Mars argues that the trial court erred in granting summary judgment for Otis. Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003). The moving party bears the initial burden of production on a motion for summary judgment. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. If the court finds that the movant has met its burden of production by introducing evidence that, if uncontroverted, would entitle it to judgment as a matter of law, then the burden of production shifts to the nonmovant to present facts that controvert the movant's evidence and show that the nonmovant could arguably be entitled to judgment. *Helfers-Beitz v. Degelman*, 406 Ill. App. 3d 264, 267 (2010). In this analysis, a court must strictly construe the pleadings, depositions, admissions, and affidavits against the movant and liberally construe them in favor of the opponent. *Mashal*, 2012 IL 112341, ¶ 49. Because summary judgment "remains a drastic means of disposing of litigation," it "should be allowed only where the right of the moving party is clear and free from doubt." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007). We review a grant of summary judgment *de novo*. *Hall*, 208 Ill. 2d at 328.

¶ 18 Mars first argues that the trial court erred in granting summary judgment on Otis's claim of account stated, because there is an issue of fact as to whether the amounts were disputed. "An account stated is a method of proving damages for the breach of a promise to pay on a contract." *Patrick Engineering, Inc. v. City of Naperville*, 2011 IL App (2d) 100695, ¶ 52. A claim for an

account stated must allege that the parties had an agreement under which one party was regularly billed for services provided by the other party, the party providing the services billed the other party (or provided other statements of the amounts due on the account), and the party owing the money did not dispute the correctness of the bills but also did not pay. *Id.* ¶ 54. Here, Otis argued in its motion for summary judgment that "Mars never objected to Otis' invoices." In response to Otis's motion, however, Mars submitted Frangella's affidavit, wherein Frangella averred that he reviewed the invoices from Otis and, shortly thereafter, stated his objections and disputes to Krause. Given this affidavit, we find that there is support for Mars's claim that a genuine issue of fact was raised on the issue of whether Mars disputed the invoices. Thus, Mars has established *prima facie* reversible error in the trial court's grant of summary judgment on Otis's claim of an account stated.

¶ 19 Mars next argues that the trial court erred in granting summary judgment on Otis's *quantum meruit* claim, because Otis failed to show that its activities benefited Mars, that Otis had a reasonable expectation that it would be paid, and that the sum Otis claimed was reasonable. The law with respect to a claim under a *quantum meruit* theory is as follows:

> "To recover under a *quantum meruit* theory, the plaintiff must prove that: (1) he performed a service to benefit the defendant, (2) he did not perform this service gratuitously, (3) the defendant accepted this service, and (4) no contract existed to prescribe payment for this service. [Citation.] *Quantum meruit* which literally means 'as much as he deserves,' describes a cause of action seeking recovery for the reasonable value of services nongratuitously rendered, but where no contract exists to dictate payment. [Citation.] However, the mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. [Citation.] Instead, the

> burden is on the provider, who must show that valuable services were furnished by him, that they were received by the defendant, and that the circumstances are such that it would be unjust for the defendant to retain these without paying for them. [Citation.] Accordingly, the measure of recovery is the reasonable value of work [citation] and, in order to recover under this doctrine, the provider must prove that the services performed were of some measurable benefit to the defendant [citation]." (Internal quotation marks omitted.) *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 979 (2010).

¶ 20 Here, Otis argued in its motion for summary judgment that it performed work for Mars, that it did not do so gratuitously, that it expected to be paid, and that "Mars admitted that Otis performed elevator installation services and that Mars accepted the benefits of those services." In response, Mars argued that *quantum meruit* cannot be applied to any work done after Mars informed Otis that the project was halted, as Mars did not accept the benefits of that work. Mars also maintained that Otis had not put forth evidence that the $45,738 claimed due was reasonable. Again, Mars relied on Frangella's affidavit, wherein he averred that he informed Krause on August 18, 2008, that all work was stopped until further notice. Given Frangella's affidavit, we find support for Mars's claim that there is a genuine issue of fact over whether Mars accepted and benefited from Otis's services. Thus, Mars has established *prima facie* reversible error in the trial court's grant of summary judgment on this claim.

¶ 21 III. CONCLUSION

¶ 22 Because Mars has made a case of *prima facie* reversible error, we reverse the order of the circuit court of Du Page County granting summary judgment for Otis, and we remand for further proceedings.

¶ 23 Reversed and remanded.