2015 IL App (5th) 140218-U

NO. 5-14-0218

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

TIMOTHY W. DAUGHERTY and TANYA L. DAUGHERTY,	)	Appeal from the Circuit Court of Monroe County.
Plaintiffs-Appellants,	)	
v.	)	Nos. 13-MR-27 & 13-LM-57
SHRUM, INC., an Illinois Corporation,	)	Honorable Richard A. Aguirre,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justice Schwarm concurred in the judgment.
Presiding Justice Cates concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The circuit court's decision that the appellee, Shrum, Inc., is entitled to additional compensation for extra construction work that was completed, but not explicitly set forth under the parties' written contract, is affirmed. The court's award of attorney fees and interest to Shrum under the written construction contract is affirmed. The cause is remanded where the appellants are entitled to recover additional attorney fees with regard to their action seeking a release of Shrum's mechanic's lien on their property.

¶ 2 The appellants, Timothy and Tanya Daugherty (Daughertys), appeal the order of the circuit court of Monroe County entering judgment in favor of the appellee, Shrum, Inc., for $7,015.31, which represented the unpaid amount that was due following the

completion of construction work on a building owned by the appellants, and awarding the appellee attorney fees and interest under the construction contract. The appellants also appeal an order of the court limiting their award of attorney fees to $500 following its judgment in favor of the appellants on their complaint for declaratory judgment, which requested a declaration that the mechanic's lien filed and recorded by the appellee was invalid. For the reasons which follow, we affirm the decision of the circuit court in part and remand for further proceedings.

¶ 3 This dispute involves a construction contract for improvements to real estate located in Hecker, Illinois, which was owned by the Daughertys and was to be completed by Shrum, Inc. In October 2009, the Daughertys and Shrum entered into a written contract whereby Shrum agreed to provide labor and materials to remove and replace an existing roof on the Daughertys' building for $26,500.

¶ 4 The contract contained the following relevant provisions. Paragraph 2 anticipated the discovery of rotten or deteriorated wood following the removal of the roof and stated as follows: "Contractor is unable to properly inspect the decking surface until the existing materials are removed. If there is decaying wood found, you will be notified. *** The cost of wood fluctuates and will be adjusted accordingly (at current market value) the time the repairs are made. Charges for labor and removal of debris for this additional work will be calculated accordingly, if necessary, and will be added to the Proposal & Acceptance." As for modifications or additions to the written contract, paragraph 3 provided as follows: "Entire Understanding: This contract represents the entire understanding of the parties hereto. There are no written or oral understandings or

representations in addition to or modifying this contract, unless otherwise agreed to in writing by the parties as permitted in paragraph 5 below." Further, paragraph 5 provided as follows: "Minor Variation: No work shall be done nor material furnished except as specified herein or subsequently agreed to in writing. Changes requested by the homeowner or required hereunder shall be put in writing and shall be paid by the homeowner in addition to the previously agreed upon price. Homeowner and Contractor retain all their respective rights and remedies in regard to changes."

¶ 5 Furthermore, the contract provided as follows, in pertinent part, with regard to the homeowner's failure to pay: "In the event the Homeowner's balance is not paid accordingly [*sic*] to the terms set forth in the Acceptance of Proposal, Homeowner agrees to pay a service charge, finance charge of 1.5% per month on the principal balance during the term of the delinquency. If the account becomes more than three (3) days delinquent, and is placed for collection, Homeowner agrees to pay reasonable collection charges, attorneys' fees, court costs and any such other costs incurred in collection efforts." A document titled "Proposal & Acceptance" was attached to the contract, which set forth Shrum's estimate of $26,500 for the roof project.

¶ 6 Thereafter, approximately two months later, the original work was completed as well as some additional work not included in the estimate set forth in the "Proposal & Acceptance." The additional charges for the extra work were as follows: $767 for installation of gutter helmet; $1,250 for additional "22.72 man hours for misalliance [*sic*] labor"; $962 for removal and replacement of second-story decking; $425 for an additional dumpster; $263 for removal and replacement of fascia board on "back side

garage"; $135 for installation of "striping second story"; $2,500 for removal and replacement of decking on garage area; $386 for an additional charge for aluminum coil metal; $142 for installation of fascia board on front garage area; $312 for installation of fascia board on the first story; $375 for rebuilding the rotted wall between the garage and front building; $225 for replacing two rafters on mansard; $84 for replacement of plywood on mansard; $25 for replacement of fascia on mansard; $285 for replacement of the roof flange, storm collar, and cap; $275 for an additional crane charge to lift removed coping tile back on the roof; and $475 for remortaring the brick wall to reset coping tile. After the work was completed, the Daughertys paid the original contract price of $26,500, but refused to pay the entire amount for the extra charges, claiming that they did not authorize all of the extra work.

¶ 7 On November 19, 2010, Shrum filed and recorded a mechanic's lien against the property in the amount of $8,765. Shrum did not file a lawsuit to foreclose the mechanic's lien pursuant to section 9 of the Mechanics Lien Act (the Act) (770 ILCS 60/9 (West 2010)), which gives a lien claimant two years from the date of the completion of its work to file an action to enforce its mechanic's lien. According to section 35 of the Act (770 ILCS 60/35 (West 2012)), whenever a contractor has failed to institute suit to enforce a lien within the two-year time limit, the owner may demand release of the lien. The lien claimant then has 10 days from the date of the demand to release the lien or be subject to a $2,500 penalty as well as the owner's court costs and reasonable attorney fees incurred in bringing an action to clear the lien. 770 ILCS 60/35 (West 2012). More than two years after the filing of the mechanic's lien, on November 28, 2012, the Daughertys

served a demand for release of the mechanic's lien on Shrum in accordance with section 35 of the Act.

¶ 8 On April 26, 2013, the Daughertys filed a complaint for declaratory judgment, requesting that the trial court declare Shrum's mechanic's lien invalid and forfeited because Shrum had failed to file a lawsuit to foreclose the lien prior to the running of the statute of limitations on November 19, 2012. The complaint also alleged that Shrum had failed to "sign or return a release of lien" within 10 days of the date of the lien release demand. From the record, it appears that Shrum faxed a signed copy of the lien release to the Daughertys on January 3, 2013. The signature was not notarized. Thereafter, the Daughertys' counsel informed Shrum that an original notarized signature was required on the release in order for it to be recorded. After the deadline had passed, Shrum sent the original release to the Daughertys' counsel, but the signature was still not notarized. The Daughertys' counsel again attempted to obtain a notarized signature on the release, but was unsuccessful. In the complaint, the Daughertys argued that the release was defective in that the signature was not notarized and therefore it would not be accepted for recording. The Daughertys acknowledged that they did not attempt to record the release with the recorder of deeds office.

¶ 9 On August 12, 2013, Shrum filed a separate action against the Daughertys, seeking payment for the additional construction work in the amount of $8,765. The complaint alleged that the additional work was completed by Shrum "at the request and with the permission of the [Daughertys]." The complaint further alleged that the Daughertys were sent an invoice for the additional work and that, although frequent

demands had been made by Shrum, the Daughertys had refused and continued to refuse to pay the invoice. The two cases were thereafter consolidated for trial, which was held on February 5, 2014.

¶ 10 The following relevant evidence was adduced at the bench trial with regard to the collection case. Greg Shrum testified that he had executed a contract with the Daughertys to replace 7,200 square feet of flat roofing on their building, which was approximately 100 years old. Shrum explained that there was severe damage to the structural decking of the roof and some of the trusses were rotten. He had a discussion with Timothy Daugherty about additional charges that could be incurred if the decking or other components of the roof or structure had to be replaced once the roof was removed. Shrum testified that the "rotten or deteriorated wood" provision was included in the contract because it was difficult to give an accurate estimate on the project until the roof was removed.

¶ 11 Shrum testified that the following additional work was completed but was not set forth in the original estimate. A gutter helmet was installed at the request of Timothy. The second-story roof required the replacement of approximately 350 linear feet of decking and Timothy had verbally agreed that it needed to be replaced. Shrum testified that Timothy was actually on the roof with Shrum when Timothy agreed to this extra work. Shrum explained that there was an additional $1,250 charge for "misalliance [*sic*] labor" for "additional hours that the men had done because [Timothy] wanted *** extra things done that wasn't on the contract." Shrum testified that Timothy was aware of all the rotted and deteriorated wood found once the roof was removed because "I ***

pointed them out and showed him everyday before he left *** his home because he lived there."

¶ 12 Shrum testified that the additional charges consisted of the following work or expenditures: removing coping tiles; installation of 1-by-12 boards on the drain edge of the second-story roof; an additional dumpster charge for the extra debris; replacement of the fascia board on the back side of the garage, which was rotten; additional decking that had to be replaced; additional aluminum that was needed because Timothy requested a change that required removal of the existing aluminum; rebuilding a rotten wall on the front of the building; replacement of two rafters that were rotten or cracked; replacement of fascia and storm collar cap; an additional charge for a crane to put the coping tiles back on the second-story roof at the request of Timothy; mortaring of approximately 20 feet of the brick wall to reset the coping tiles; and the purchase of additional materials necessary for the extra work. He denied that his employees cracked some brick by the roof, which resulted in an additional charge. Instead, he explained that the cracked brick was the result of the deterioration of the 100-year-old building. Shrum testified that he told Timothy that putting the coping tiles back on the roof would incur an extra crane charge.

¶ 13 Shrum believed that all the charges for the additional work were reasonable and necessary to complete the job in a workmanlike manner. Shrum acknowledged that he did not have any signed writing from the Daughertys whereby they agreed to the extra expenditures. However, he testified that he spoke to Timothy "almost regularly everyday." Shrum explained that Timothy had given him a check for $4,370, which

represented the remaining amounts owed under the written contract and the amount that Timothy believed that he owed for the extra work. Timothy had written "paid in full" on the check. Shrum cashed the check, but marked out the "paid in full." Shrum did not agree to accept a lesser amount for the entire project.

¶ 14 Timothy Daugherty testified that he was living in the building and had no outside employment during the time that the construction was ongoing. However, he explained that he was not there every day. He acknowledged that Shrum told him that there would be an additional charge if the decking was damaged and that it would be billed at $40 per sheet. He also acknowledged that Shrum did tell him about the deteriorated fascia board and decking on the second story and that he had authorized those repairs. He testified that he reviewed Shrum's invoice for the additional charges and prepared his own calculation, accepting some of the extra work as authorized and rejecting some as unauthorized. He believed that he owed the following for extra work: $767 for the installation of the gutter helmet; $142 for the installation of the fascia board on the front of the garage; $312 for the installation of the fascia board on the first story; $1,080 for the replacement of 864 square feet of decking at $40 per sheet, which Shrum billed at $2,500; $481 for the replacement of the decking on the second story, which Shrum billed at $962; $263 for the replacement of the fascia board on the back of the garage; and $225 for the repairs to "all area of mansard." He did not agree to pay for anything else.

¶ 15 Timothy did not believe that he owed for the extra crane charge, denying that he told Shrum that he initially wanted the coping tiles taken off the roof and put on the ground and then later changed his mind. He also did not believe that he owed for the

replacement of the fascia board on the second story that had to be replaced after Shrum used the wrong size of board because he had previously told Shrum what size board he wanted. He explained that he deducted $1,400 for damaged brick that was caused by Shrum's employees. According to his calculations, the total cost of the job, which included the original contract price and the additional work that he authorized, was $29,770. He subtracted $14,000 and $10,000 for two payments made in December 2009 and also $1,400 for the repair cost of the damaged brick. He determined that the total amount owed was $4,370. He presented Shrum with a check in this amount dated February 27, 2010. He had written "paid in full roofwork" in the memo line of the check.

¶ 16 On February 12, 2014, the trial court entered a written order, granting the Daughertys' complaint for declaratory judgment. In the order, the court found that Shrum's answer admitted that it did not file suit on its mechanic's lien within the statutory period. Accordingly, the court concluded that the mechanic's lien was invalid and declared it to be null and void. The court then awarded the Daughertys $500 in attorney fees for the fees incurred up until their complaint for declaratory judgment was filed. With regard to the additional work, the court found in favor of Shrum and concluded that the additional charges were reasonable and necessary. The court found that the balance due was "$8,765.00 less the amounts listed beginning with Late Fees and ending with Office Preparation Fees."[1] The court entered judgment in favor of Shrum for "$7,015.31

[1]After questioning Shrum's counsel about the final invoice, which not only included charges for the additional work, but also individual charges for late fees,

plus $2,310.00 in attorney fees and pre-judgment interest of 1.5% per month from October 2010 on $4,015.31 to February 5, 2014."

¶ 17 On February 18, 2014, the trial court entered a supplemental judgment, finding that the mechanic's lien constituted a cloud on the title of the Daughertys' property and was therefore illegal and void. The court ordered the property to be in "fee simple to [the Daughertys] free and clear of any claim of [Shrum], and may be quieted, established, and confirmed in [the Daughertys]."

¶ 18 On March 12, 2014, the Daughertys filed a motion to reconsider, arguing that Shrum failed to produce clear and convincing evidence to support its claim for contractual extras; that the trial court erred in awarding Shrum interest and attorney fees with respect to the contractual extras because the written construction contract limited such relief to the unpaid amounts originally proposed and accepted under the contract; and the court erred in limiting the Daughertys' awarded attorney fees to those incurred prior to filing their complaint for declaratory judgment.

¶ 19 On April 16, 2014, a hearing on the Daughertys' motion to reconsider was held. During the hearing, the trial court indicated, with regard to its decision to limit the Daughertys' award of attorney fees, that counsel's bill had "no differentiation" and that the invoice was for the "full amount for the whole shebang." The court explained that it awarded the Daughertys "a fair portion allocating it to that part of [the] claim that [they]

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interest, attorney fees, a filing fee, and an office preparation fee, the court determined which fees had been proven and eliminated some of the fees for insufficient proof.

won." Regarding the additional work, the court indicated that the parties had "proceeded with known changes" that were not in writing and therefore the writing requirement was waived. The court noted that Timothy did not stop Shrum before the additional work had started to request that the changes be put in writing. Thereafter, the court stated as follows: "My position is that he's waived the requirement, the provision that *** [the] extras had to be in writing. They've both done it. They both waived it. So I'm not gonna sit there and enforce a writing they both ignored *** and, therefore, and I do believe that I can go to *quantum meruit,* which I did kind of, although, I didn't draft the form of this *** Order, but I can do that without pleading it. You know there's quantum meruit." The court also concluded that it did not err by awarding Shrum interest and attorney fees for the contractual extras, interpreting the contract to allow for such relief. Accordingly, the court denied the Daughertys' motion to reconsider. The Daughertys appeal.

¶ 20 The first issue raised by the Daughertys is that Shrum failed to establish by clear and convincing evidence that they consented to pay for the work in question. A contractor seeking to recover additional compensation from an owner for extra work must establish the essential elements of his case as set forth in *Watson Lumber Co. v. Guennewig,* 79 Ill. App. 2d 377 (1967). The contractor must establish that: (1) the work was outside the scope of his contract promises; (2) the extra work items were ordered by the owner; (3) the owner agreed to pay extra, either by his words or conduct; (4) the extras were not furnished by the contractor as his voluntary act; and (5) the extra items were not rendered necessary by any fault of the contractor. *Id.* at 389-90. In a building and construction situation, "[t]he contractor should not be required to furnish items that

were clearly beyond and outside of what the parties originally agreed that he would furnish. The owner has a right to full and good faith performance of the contractor's promise, but has no right to expand the nature and extent of the contractor's obligation." *Id.* at 390-91.

¶ 21 Moreover, the proof that the work items are extra, that the owner ordered it as such and agreed to pay for it, must be by clear and convincing evidence. *Duncan v. Cannon*, 204 Ill. App. 3d 160, 163 (1990). Merely evidence of general discussion is not sufficient to prove the contractor's claim. *Watson*, 79 Ill. App. 2d at 390. Further, recovery for extra work items is only allowed where the contractor has made his claim for extra work clear and certain before furnishing the work, not after. *Cencula v. Keller*, 180 Ill. App. 3d 645, 652 (1989).

¶ 22 Here, after hearing the evidence presented at trial, the trial court revealed that it was finding in favor of Shrum on the issue involving the contractual extras. The court stated as follows to the Daughertys' counsel with regard to its decision: "I don't buy that he does not−the addendum is not a part of that. I don't buy that the extras are proper, whether on an equitable theory or clearly a need theory. He did not put on any extra testimony that this stuff was unnecessary and unauthorized."

¶ 23 The parties differ as to whether the work in question was outside the scope of the original contract. The Daughertys argue that the additional work was outside the scope of the written contract. They argue that the trial court "very clearly found" that the extra work were contractual extras, pointing to several comments made by the court during the hearing where it referenced the "extras" and discussed the fact that the "changes" should

be in writing. Shrum counters that the contractual extras were part of the written contract. In support of its argument, Shrum points to the "rotten or deteriorated wood" provision; his testimony where he indicated that he had a conversation with the Daughertys concerning the extent of the decking and structural damage being unknown until the building's roof was removed; and his testimony that the additional charges were directly related to the deterioration of the approximately 100-year-old building and to the scope of the roof work contained in the written contract.

¶ 24 From our review of the record, it appears that some of the extra work charges fell within the "rotten or deteriorated wood" provision of the contract, some did not fall within that provision, but was discovered after the roof was removed, some resulted from changes made after work was already completed, and the remaining work was the result of additions requested by Timothy, such as the installation of the gutter helmet.

¶ 25 However, assuming *arguendo* that all of the disputed charges for the extra work fell outside the scope of the contract, like the Daughertys argue, we note that the remaining *Watson* elements in dispute are as follows: whether the Daughertys ordered the extra work; whether they consented to pay for such work; and with regard to the brick work, whether the extra work was rendered necessary by any fault of the contractor. After hearing the evidence presented at trial, which included testimony from both Timothy and Shrum, the trial court concluded that the Daughertys had consented to the extra work. Shrum testified that the roof was approximately 100 years old and that there was severe damage to the structural decking of the roof as well as some rotten trusses. He testified that he had discussed with Timothy the fact that there could be additional

charges if the decking or other components of the roof or structure had to be replaced. Timothy acknowledged that this conversation occurred. Paragraph 2 in the construction contract also addressed this situation as follows: "Contractor is unable to properly inspect the decking surface until the existing materials are removed. If there is decaying wood found, you will be notified. *** Charges for labor and removal of debris for this additional work will be calculated accordingly, if necessary, and will be added to the Proposal & Acceptance."

¶ 26 Also, Shrum testified that Timothy was aware of the extra work and had consented to the extra expenditures. Shrum explained that he spoke to Timothy almost "regularly everyday" as Timothy was present at the building almost every day and that he had pointed out the extra work to Timothy.

¶ 27 Further, with regard to the charges for the installation of and moving of the coping tiles and the extra charge for the installation of the fascia board on the second-story roof, Shrum testified that these charges were incurred because Timothy had changed his mind after work was already completed. With regard to the brick work, Shrum testified that the damaged brick was attributable to the deterioration of the old building. Shrum further testified that the additional $1,250 for labor was the result of the extra work that was completed and authorized by Timothy. In contrast, Timothy testified that he only agreed to the extra work set forth in his accounting, which detailed the amount that he believed was owed. "It is well established that where the evidence presented is conflicting, it is the duty of the trial court to listen to the testimony of the witnesses and resolve any conflicts therein on the grounds that credibility of witnesses and the weight to be given to

conflicting evidence are solely matters for the trier of fact." *Duncan*, 204 Ill. App. 3d at 166. The court was presented with conflicting evidence as to whether the Daughertys consented to the extra work and whether the extras were rendered necessary by any fault of the contractor and found in favor of Shrum. Accordingly, we conclude that Shrum presented clear and convincing evidence with regard to the *Watson* elements and that, therefore, Shrum is entitled to recover additional compensation for the contractual extras.

¶ 28 Furthermore, the Daughertys contend that Shrum cannot recover for the extra work as the contract called for written modification or additions only. In response, Shrum argues that the Daughertys waived the writing requirement by consenting to the additional work and not insisting that the additions be in writing. In support of this, Shrum notes that Timothy acknowledged that he had consented and even requested some of the extra work and made payment for that work.

¶ 29 In general, a contract provision that all extra work be performed only upon written orders can be waived orally by the owner. *Duncan*, 204 Ill. App. 3d at 168. However, before a contractor is entitled to compensation for the extras, the waiver must be proved by clear and convincing evidence. *Id.*

¶ 30 In the present case, the trial court concluded that the writing-requirement provision in the contract was a "jointly ignored provision of the contract by both parties." The court stated as follows with regard to waiver: "He acknowledges changes were made in his form. Did he ask for a writing? No. It's a jointly ignored provision of the contract by both parties. Besides, equity speaking, there is proof that all these things needed to be done. That's the ruling of the Court. In other words, it's *** good for the goose, it's good

for the gander. They should, yes, should have complied on this. They should have demanded any changes to be in writing. That should be done."

¶ 31 The evidence is undisputed that Timothy requested some of the additions and also agreed to pay for some of the work that resulted from deterioration of the building. It was disputed as to whether Timothy consented to the work not listed in his accounting. However, as previously stated, Shrum testified that Timothy had consented to all of the extra work, and the court found that Shrum was entitled to compensation for the extra work. The court concluded that both parties waived the requirement to put any additions or modifications in writing by their actions. The court noted that Timothy admittedly requested additions and agreed to pay for some of the extra work and did not require those changes be put in writing. Like the previous issue, it is the trier of fact's duty to listen to the testimony and resolve any conflicts in the evidence. Accordingly, we conclude that Shrum presented clear and convincing evidence to establish that the parties waived the writing-requirement provision in the contract.

¶ 32 The Daughertys next argue that the trial court erred by extending the interest and attorney fees provision in the contract to collection of undocumented contractual extras. The provision in the construction contract with regard to interest and attorney fees stated as follows: "In the event the Homeowner's balance is not paid accordingly to the terms set forth in the Acceptance of Proposal, Homeowner agrees to pay a service charge, finance charge of 1.5% per month on the principal balance during the term of the delinquency. If the account becomes more than three (3) days delinquent, and is placed for collection, Homeowner agrees to pay reasonable collection charges, attorneys' fees, court costs and

any such other costs incurred in collection efforts." The Daughertys argue that because the undocumented extra work was not covered under the written construction contract, it was not subject to the interest and attorney fees provision in that contract.

¶ 33 "The allowance of attorney fees and the amount awarded are matters within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *In re Custody of C.C.*, 2013 IL App (3d) 120342, ¶ 40. An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. *Id.* However, this particular issue requires us to interpret the attorney fees and interest provision contained in the written contract, which is a question of law and subject to *de novo* review. See *Progressive Premier Insurance Co. of Illinois v. Kocher*, 402 Ill. App. 3d 756, 759 (2010) (construction of contract language represents a question of law; thus, the appropriate standard of review is *de novo*).

¶ 34 "A court must construe the meaning of a contract by examining the language and may not interpret the contract in a way contrary to the plain and obvious meaning of its terms." *Dean Management, Inc. v. TBS Construction, Inc.*, 339 Ill. App. 3d 263, 269 (2003). The court must give the contractual language its common and generally accepted meaning unless the contract clearly defines its terms. *Id.* Furthermore, the court must evaluate the contract as a whole. *Id.*

¶ 35 In the present case, the trial court awarded interest and attorney fees on the undocumented extra work that was performed by Shrum. The court found the Daughertys had interpreted the relevant provision of the contract in a "particular and strange way" and that the "whole paragraph [was] to be construed as a whole." The court

concluded that the relevant provision did not limit attorney fees and interest to the amounts defined in the "Proposal & Acceptance under the written contract. After carefully reviewing the record, we agree with the trial court that the plain language of this contract provision did not limit the collection of attorney fees and interest to outstanding charges explicitly set forth in the "Proposal & Acceptance" attached to the written contract. In support of this position, we note that additional work not specifically set forth in the "Proposal & Acceptance" of the written contract was anticipated by Shrum as evidenced by the contract provision titled "rotten or deteriorated wood." Accordingly, we conclude that the attorney's fee and interest provision in the written contract also applied to the entire outstanding balance where the evidence indicated that the Daughertys had consented to pay for the extra work.

¶ 36 Furthermore, the Daughertys argue that the trial court erred in limiting their award of attorney fees to charges incurred prior to the initial filing of the lawsuit, which totaled $500. During arguments of counsel, the court explained that any attorney's fee award to the Daughertys would be limited to up until the complaint for declaratory judgment was filed. Specifically, the court stated as follows: "I'm saying your fees would go to *** try and effect settlement from the satisfaction of the deed. After that, I'm probably not gonna grant it because he's got fees the other way."

¶ 37 According to section 35 of the Act, once a contractor is presented with a written demand to release a lien, the contractor has 10 days to release the lien or be liable to the owner in the amount of $2,500 as well as costs and reasonable attorney fees incurred in bringing an action to clear the lien. In making their argument, the Daughertys noted that

the mechanic's lien remained a cloud on the title of the property until the trial court entered the supplemental judgment following the trial and that Illinois courts have used the phrase "incurred in bringing an action" to cover fees beyond the filing of the action.

¶ 38 In response, Shrum argues that the invoice submitted by the Daughertys' counsel did not "differentiate between fees incurred bringing the suit on behalf of [the Daughertys] as opposed to defending the case which was filed by Shrum, Inc." Upon review of the invoice in question, we agree with Shrum. The invoice does not differentiate between the charges incurred in bringing the suit for the release of the mechanic's lien and the charges incurred in defending against Shrum's action for the outstanding amount due from the extra work. However, we also conclude that pursuant to section 35 of the Act, the Daughertys are entitled to their reasonable attorney fees in bringing the action to release the lien, which should include any attorney fees incurred following the filing of the complaint as the filing of the complaint did not automatically release the mechanic's lien. Accordingly, we believe that the circuit court did not abuse its discretion by awarding $500 in attorney fees to the Daughertys; however, we remand this matter to the circuit court to give the Daughertys' counsel an opportunity to establish the amount of attorney fees that were incurred in bringing the action to release the mechanic's lien from after the time the complaint for declaratory judgment was filed until the mechanic's lien was released in February 2014.

¶ 39 For the foregoing reasons the judgment of the circuit court of Monroe County is hereby affirmed in part and remanded for further proceedings.

¶ 40 Affirmed in part and remanded.

¶ 41 PRESIDING JUSTICE CATES, concurring in part and dissenting in part.

¶ 42 I agree that the trial court erred in limiting the award of the Daughertys' attorneys' fees to those incurred prior to the filing of the declaratory action for release of the mechanics lien, and that this case must be remanded for a hearing to determine the total amount of attorneys' fees incurred in prosecuting the declaratory action. But I do not agree that Shrum, Inc. satisfied its burden to establish, by clear and convincing evidence, that the items listed as "additional charges" in its final invoice, constituted extra work for which it is entitled to recover additional compensation, and so I respectfully dissent from that portion of the order affirming the judgment and award of $7,015.31, plus attorneys' fees and prejudgment interest, in favor of Shrum.

¶ 43 In order to recover additional compensation from an owner for extra work, the contractor must prove, by clear and convincing evidence, that: (a) the work was outside the scope of the original contract promises; (b) the extra work was ordered by the owner; (3) the owner, by words or conduct, agreed to compensate the contractor for the extra work; (4) the contractor did not undertake the extra work voluntarily; and (5) the extra work was not made necessary through any fault of the contractor. *Watson Lumber Co. v. Guennewig*, 79 Ill. App. 2d 377, 389-90, 226 N.E.2d 270, 276 (1967). "Clear and convincing evidence" is evidence that leaves the mind well-satisfied as to the truth of a proposition. *Hotze v. Schlanser*, 410 Ill. 265, 102 N.E.2d 131 (1951). Proof by clear and convincing evidence has been most often defined as "the quantum of proof which leaves

no reasonable doubt *** as to the truth of the proposition in question." *Estate of Ragen*, 79 Ill. App. 3d 8, 13-14, 398 N.E.2d 198, 203 (1979). Although stated in the language of "reasonable doubt," clear and convincing evidence requires a level of proof that is more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense. *Estate of Ragen*, 79 Ill. App. 3d at 14, 398 N.E.2d at 203; *Duncan v. Cannon*, 204 Ill. App. 3d 160, 164, 561 N.E.2d 1147, 1149 (1990).

¶ 44 In this case, the trial court awarded Shrum all of the extra compensation that it claimed was due. After reviewing the record, I do not believe that the evidence supports the award. Shrum had the burden to prove that each item of labor or material under additional charges was an extra, that the Daughertys ordered and agreed to pay for it, and that the Daughertys waived the requirement that all agreed additions or amendments be in writing. *Watson Lumber*, 79 Ill. App. 2d at 390, 226 N.E.2d at 276. Evidence of general discussions is not sufficient to prove all of these elements. *Watson Lumber*, 79 Ill. App. 2d at 390, 226 N.E.2d at 276.

¶ 45 In order to recover for an extra, that item must not be one that was required to be furnished under the original contract. *Watson Lumber*, 79 Ill. App. 2d at 390, 226 N.E.2d at 277. Ordinarily, labor and material which are incidental and necessary to the completion of the contract cannot be regarded as extras for which the contractor may recover, and a contractor cannot recover for increased costs, as extra work, on discovering that he made a mistake on his estimate or that the work is more difficult and expensive than originally anticipated. *Watson Lumber*, 79 Ill. App. 2d at 393, 226 N.E.2d at 278. Additionally, a contractor is required to prove his claim for an extra item

before furnishing the item, not after. *Watson Lumber*, 79 Ill. App. 2d at 395, 226 N.E.2d at 279.

¶ 46 During the trial, Greg Shrum, the owner of Shrum, Inc., identified the final invoice for the roof project. The invoice lists several items under the heading, "additional charges." The invoice identifies an item of material or labor and its corresponding cost, but it does not indicate whether that item falls within the scope of the original agreement or whether it was "extra" work. Greg Shrum testified that he anticipated that there would be rotting or deteriorating wood, requiring additional materials, and that he included a "Rotten or Deteriorated Wood" provision in the contract to cover that contingency. Shrum stated that some additional charges were incurred because other structural damage was discovered upon removing the existing materials, and that others were incurred because Timothy Daugherty had requested additional work during the course of the project. Shrum did not identify which of the items listed under "additional charges" were incidental to the contract and which were extras, and there was no other evidence on this point. Shrum recalled that he had conversations with Timothy Daugherty almost every day about the project. He acknowledged that he did not prepare or present a supplemental contract, specifying the additional work and corresponding costs, for Timothy Daugherty to sign. Timothy Daugherty testified that he ordered and agreed to pay for a gutter helmet. He denied that he had ordered or agreed to pay for any other work beyond the scope of the contract. Daugherty testified that he paid the contract price in full, and that he later tendered a check for $4,370 to cover some additional charges he agreed were owed under the contract due to rotten and deteriorated wood.

¶ 47 In order to be paid for the additional charges, Shrum was required to introduce clear and convincing evidence to prove that each and every item listed as an additional charge was an "extra." The character of an item as an "extra" may not be assumed, it must be established. Shrum failed to do so. Shrum offered no evidence to distinguish between work which was necessary or incidental to the contract and "extra" work. This is significant because Shrum is not entitled to recover additional compensation for work that was incidental and necessary to the execution of the contract, even if the work was more difficult than anticipated. See *Watson Lumber*, 79 Ill. App. 2d at 393, 226 N.E.2d at 277-78. Further, the general discussions between the parties regarding the additional work was insufficient to establish that the work was extra or that it was performed pursuant to the owner's request and agreement to pay. *Watson Lumber*, 79 Ill. App. 2d at 392, 226 N.E.2d at 278. In my view, Shrum failed to present sufficient evidence to establish that the additional charges in the final invoice were for genuine "extras." Some of the items under "additional charges" might have fallen within the "Rotten and Deteriorated Wood" provision of the contract; some might have been considered unanticipated, but incidental to the work; and some might have been work that the Daughertys requested. But this is speculation, not evidence, to prove this element of the claim. In addition, Shrum failed to prove by clear and convincing evidence that the Daughertys waived the provision in the contract that required written approval for changes for the items under "additional charges." In cases where a waiver had been found, the nature and character of the item clearly showed it to be an extra, and there was clear and convincing evidence that the owner verbally requested or consented to the item

and agreed to pay for it. That standard of proof was not met in this case. *Watson Lumber*, 79 Ill. App. 2d at 395, 226 N.E.2d at 279.

¶ 48 Based on the record, I find that Shrum failed to establish that the items for which it sought additional compensation constituted "extra work" that fell outside the scope of the contract, and thus failed to make a *prima facie* case for its extra work claim. Therefore, I would reverse the judgment in favor of Shrum and vacate the award of $7,015.31, plus attorneys' fees and prejudgment interest. As previously noted, I agree that the trial court erred in limiting the award of the Daughertys' attorneys' fees to those incurred prior to the filing of their declaratory action for release of the mechanics lien, and I concur in the decision to remand this case for a hearing to determine the total amount of attorneys' fees incurred in prosecuting the declaratory action.