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2016 IL App (3d) 150845-U

Order filed September 12, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

WILLIAM N. BARNES,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
Plaintiff-Appellee,)	Kankakee County, Illinois.
)	
v.)	Appeal No. 3-15-0845
)	Circuit No. 15-SC-787
LINDA KLETTE,)	
)	Honorable Kenneth Leshen,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court’s judgment in favor of plaintiff is not against the manifest weight of the evidence. Furthermore, the trial court did not violate defendant’s right to a fair trial. We affirm.
- ¶ 2 Plaintiff, William Barnes, filed a small claims complaint against defendant, Linda Klette, in the circuit court of Kankakee County. Plaintiff sought recovery of \$3,040—the cost of removal and cleanup of pipe insulation alleged to contain asbestos in a home he recently purchased from defendant. At trial, plaintiff alleged defendant actively concealed cracks in asbestos-lined pipe insulation in the home. Defendant denied any knowledge of asbestos found

on the property. The trial court found in favor of plaintiff and entered a money judgment. Defendant appeals. We affirm.

¶ 3

BACKGROUND

¶ 4

Plaintiff purchased a house from defendant in October 2014. Before sale, defendant purchased a home inspection completed by Victor Carlile. Carlile inspected the home and issued a report to defendant that noted several problems, including cracks in some of the pipe insulation. Defendant remedied all problems in Carlile's report, save the cracked pipe insulation, which she covered with tape. Prior to Carlile's inspection, there were other segments of cracked pipe insulation already covered with tape.

¶ 5

Before he purchased the property, plaintiff read Carlile's report and observed all of the tape-covered pipe insulation during his personal inspection of the home. He did not pay for another inspection of the property. Plaintiff also read a residential disclosure form completed by defendant, which stated in relevant part that defendant was unaware of any asbestos on the premises.

¶ 6

Approximately four months after he purchased the property, plaintiff suspected the pipe insulation contained asbestos. He hired a contractor who confirmed the pipe insulation did contain asbestos and removed it. Plaintiff paid the cost (\$3,040) and sought reimbursement directly from the defendant and Carlile. Defendant and Carlile both declined plaintiff's request.

¶ 7

In July 2015, plaintiff filed this action, *pro se*, seeking reimbursement from defendant. The matter went to bench trial. Plaintiff testified on his own behalf and alleged defendant and Carlile should have notified him that the pipe insulation contained asbestos. Plaintiff acknowledged he did not purchase his own inspection of the home and that the disclosure form he read pertained to the defendant's knowledge of asbestos in the home at that time.

¶ 8 Defendant testified that during her time in the house, nearly 20 years, her now-deceased husband maintained the property exclusively. After her husband passed away, she hired Carlile to inspect the property in anticipation of sale. Defendant was never informed that the pipe insulation contained asbestos. She maintained that her statement on the residential disclosure form was truthful. Defendant further claimed Carlile told her to cover the cracked pipe insulation with tape and, at that time, she had no knowledge it contained asbestos. She did not remember who specifically taped over the other cracked pipe insulation, but knew someone did so at her direction. The trial court asked plaintiff and defendant direct questions during their testimony.

¶ 9 Plaintiff attempted to call Carlile as a witness, but initially could not. Carlile's subpoena had been returned unserved. The trial court initially stated it did not need to continue proceedings to hear Carlile's testimony. After plaintiff and defendant testified, however, the trial court did continue proceedings to allow plaintiff to resubpoena Carlile. Before court recessed, the trial court described the legal issue at hand and instructed plaintiff to conduct research accordingly.

¶ 10 Once trial resumed, Carlile averred that he had no qualifications in asbestos detection. He was uncertain whether he had gone over the completed inspection report with defendant and did not recall telling defendant to tape over any cracked pipe insulation. Carlile never told defendant he suspected asbestos was present in the home or documented any such suspicions in his report.

¶ 11 During closing arguments, the trial court asked plaintiff and defense counsel questions about why they had not remedied the problem sooner. Plaintiff stated in his closing argument that he believed the presence of tape on the pipe insulation indicated that defendant "knew

something was not correct.” The trial court also asked plaintiff if he was claiming defendant engaged in active concealment. Plaintiff answered in the affirmative; the court announced that it would take the matter under advisement.

¶ 12 In November 2015, the trial court entered a judgment in favor of plaintiff and against defendant in the amount of \$3,040, plus costs. In a docket entry, the trial court stated that it found plaintiff’s testimony more credible than defendant’s due to the contradiction between defendant’s and Carlile’s testimony. This appeal follows.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues: (1) the trial court’s decision in favor of plaintiff was against the manifest weight of the evidence; and (2) the trial court impermissibly favored the plaintiff as a *pro se* litigant, violating her right to a fair trial. In response, plaintiff—still represented *pro se*—asserts nonresponsive arguments: that defendant was not entirely honest in claiming she was unaware of asbestos on the property and further, she “testified to untruths” during the trial about taping the pipe insulation.

¶ 15 In reviewing a trial court’s ruling in a bench trial, we determine if that ruling was against the manifest weight of the evidence. *Carey v. American Family Brokerage, Inc.*, 391 Ill. App. 3d 273, 277 (2009) (citing *Fox v. Heimann*, 375 Ill. App. 3d 35, 46 (2007)). “In close cases, where findings of fact depend on the credibility of witnesses, it is particularly true that a reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence.” *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002) (citing *Chicago Investment Corp. v. Dolins*, 107 Ill. 2d 120, 124 (1985)). A trial court’s ruling is against the manifest weight of the evidence only if the opposite conclusion is apparent or the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Eychaner*, 202 Ill. 2d at 252.

¶ 16 “Silence accompanied by deceptive conduct or suppression of material facts results in *active concealment* and it then becomes the duty of a person to speak. Under such circumstances, if a party to a contract of sale fails to disclose the whole truth, having the requisite intent to deceive, this amounts to fraud, equivalent to an affirmative falsehood. [Citation.]” (Emphasis in original.) *Mitchell v. Skubiak*, 248 Ill. App. 3d 1000, 1005 (1993). After reviewing the record, we cannot say that the trial court’s finding of active concealment by defendant was against the manifest weight of the evidence. “A judgment is not against the manifest weight of the evidence merely because there is sufficient evidence to support a contrary judgment.” *Watkins v. American Service Insurance Co.*, 260 Ill. App. 3d 1054, 1062 (1994).

¶ 17 Defendant asserts on appeal that she did not engage in active concealment and that there is no proof to the contrary. This argument is largely supported by defendant’s assertion that she never represented to plaintiff that asbestos was not in the house. In spite of this, given the evidence presented at trial, the trial court could reasonably have found all of the necessary elements for active concealment. The opposite conclusion is not apparent from the record. Nor do the trial court’s findings appear to be unreasonable, arbitrary, or based on something other than the evidence.

¶ 18 Defendant failed to disclose the presence of asbestos in the home—intentionally or otherwise. Thus, she was silent on the issue. Defendant’s admitted directive to tape over cracks in the pipe insulation could reasonably be interpreted as active concealment and evidence of her knowledge of the presence of asbestos. After all, the tape may have prevented plaintiff from discovering the alleged presence of asbestos in the insulation. Lastly, the trial court’s reference to the contradiction between defendant’s and Carlile’s testimony is sufficient to support its

finding that defendant had the requisite intent to deceive. Thus, the trial court's ruling in favor of plaintiff was not against the manifest weight of the evidence.

¶ 19 Defendant also contends that the trial court impermissibly favored plaintiff, thereby violating her right to a fair trial. She alleges that the trial court erred in: (1) continuing the trial in order to allow plaintiff to call Carlile as a witness; (2) examining plaintiff's witnesses on his behalf; (3) questioning plaintiff and defense counsel during closing arguments as to why they had not taken action earlier to address the cracked pipe insulation; (4) supplying plaintiff with his cause of action at the conclusion of his closing argument; and (5) describing for plaintiff the legal issue at hand and directing him to conduct research on it before trial resumed.

¶ 20 In general, the party seeking reversal—in this case, the defendant—has the burden of establishing prejudice from trial errors. *Halleck v. Coastal Building Maintenance Co.*, 269 Ill. App. 3d 887, 895 (1995). While defendant convincingly asserts that the alleged errors noted above influenced the outcome of the case, defendant has not demonstrated that she was prejudiced by the trial court's actions.

¶ 21 The trial court has discretion to grant or deny a continuance, and its decision will not be disturbed unless it resulted in a palpable injustice or a manifest abuse of discretion. *ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277, ¶ 88. Trial judges are also permitted to ask a witness questions in an effort to elicit the truth and clarify issues. Ill. R. Evid. 614(b) (eff. Jan 1, 2011); *People ex rel. Adams v. Sanes*, 41 Ill. 2d 381, 386 (1968). In bench trials, the trial court is given greater latitude to ask questions since the risk of prejudice to the parties is mitigated; so long as it does not depart from the role of fact-finder and become an advocate for a party, the examination is subject to its own discretion. See *In re N.T.*, 2015 IL App (1st) 142391, ¶ 43. Likewise, the trial court is free to clarify issues during closing arguments and provide

guidance to the parties that appear before it, subject to the same abuse of discretion standard. See generally, *People v. Faria*, 402 Ill. App. 3d 475, 482 (2010) (citing *Eychaner*, 202 Ill. 2d at 280; *People v. Jackson*, 205 Ill. 2d 247, 277 (2001)).

¶ 22 In this case, plaintiff highlights nothing which suggests the trial court abused its discretion in continuing the trial, examining the witnesses, clarifying issues during closing arguments, advising plaintiff to conduct research, or clarifying plaintiff's active concealment claim. Nothing about these events suggests the trial court abused its discretion or engaged in advocacy on behalf of plaintiff.

¶ 23 On the contrary, our review of the record reveals that the trial court's actions assisted it in discerning relevant facts and the legal issue at hand. This helped the trial court make a ruling with no apparent bias. Given the record before us, it is clear the trial court did not violate defendant's right to a fair trial.

¶ 24 **CONCLUSION**

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County.

¶ 26 Affirmed.