2017 IL App (1st) 152846-U

SIXTH DIVISION
MARCH 24, 2017

No. 1-15-2846

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DESIGN SYNERGIES LTD.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 L 2326
	)	
ROBERT V. ROHRMAN,	)	Honorable
	)	Margaret Brennan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Following a bench trial, the trial court's findings that the plaintiff proved its claim of account stated were not against the manifest weight of the evidence. Further, comments by the trial court during its ruling did not indicate prejudice warranting reversal.

¶ 2 Defendant Robert V. Rohrman appeals from a judgment of the circuit court of Cook County, following a bench trial, in favor of plaintiff-appellee Design Synergies Ltd. (DSL). The trial court concluded that, upon a theory of account stated, Rohrman owed certain amounts that were referred to as amounts "to become due" in 2008 billing statements from DSL. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant Rohrman is the owner of numerous automobile dealerships in the Chicago area. The plaintiff, DSL, is an architecture and design firm with experience in designing automobile dealerships. DSL is owned and managed by its president, Andrew Lipowski. It is undisputed that DSL performed certain design services for Rohrman for three projects, including a Chrysler dealership, a Lexus dealership, and a Toyota dealership. Although Rohrman made certain payments, DSL claimed that amounts remained outstanding for its work on the three projects, and that these amounts were reflected in billing statements from March 2008. DSL commenced this lawsuit after Rohrman denied a 2013 demand for payment.

¶ 5 On February 28, 2014, DSL filed a complaint pleading six counts: with respect to each of the three dealership projects, DSL pleaded one count of breach of contract and one count of account stated. That complaint attached three 2006 proposals from DSL discussing the proposed Chrysler, Lexus, and Toyota dealerships.

¶ 6 DSL alleged that, after performing services for Rohrman, on March 13, 2008, the parties had met to review the "final billing from DSL as to all three projects." DSL alleged that Rohrman had made "partial payments" on that date, but that the parties had also agreed that Rohrman owed an additional "final amount" due for each project: $24,730 for the Chrysler project, $23,750 for the Lexus project, and $32,482.88 for the Toyota project. The complaint attached documents that it alleged were the "final account statements" for each project, with handwritten notations that allegedly reflected the amounts due. The initial complaint alleged that DSL had "completed all of the architecture design services as required under its contracts" and had requested the balances due for each project, but that payment had not been made. Each of the counts sought statutory interest at a rate of 5% per annum pursuant to the Interest Act.

¶ 7 On May 2, 2014, Rohrman filed a motion to dismiss the original complaint, arguing that DSL had not alleged a written contract, and that a five-year statute of limitations applied. Rohrman thus argued that the claims were time-barred. On August 5, 2014, the trial court granted the motion to dismiss without prejudice, and directed DSL "to allege the date of demand in its amended complaint."

¶ 8 On August 21, 2014, DSL filed its amended complaint; which included the same six counts for breach of contract and account stated, attached the same exhibits, and sought the same amounts as the original complaint. However, the amended complaint added that, on or about December 20, 2013, DSL had made a payment demand through an email from its president, Lipowski, to Rohrman's agent, Mark Battista.

¶ 9 The court commenced a bench trial on September 10, 2015. The evidence at trial indicated that, in 2006, Rohrman accepted proposals for DSL to design three new dealerships. Rohrman did not negotiate with DSL directly but primarily relied on Mark Battista, who oversees all construction of Rohrman's dealerships. Lipowski, DSL's president, dealt with Battista on behalf of DSL.

¶ 10 Battista testified that he had invited DSL to bid to serve as the architect for Rohrman's planned Chrysler and Lexus dealerships in Arlington Heights. Battista testified that he explained Rohrman's bidding and negotiation style to Lipowski: "Typically, he'll take the lower number, and he'll start from there and use that as ground zero and work onward from there. Kind of like a used car deal. That's the way he does everything. He's a used car guy at heart, and he handles every transaction the same way."

¶ 11 In March 2006, DSL submitted two proposals for the Chrysler and Lexus dealerships. Both proposals indicated that the general contractor would be Custom Facilities, Inc. (CFI), which had previously performed construction work for Rohrman's other dealerships.

¶ 12 The proposal for the Chrysler project stated that DSL would "review the CFI Design and make any revisions required by [Rohrman] or any governing municipalities" and would review Chrysler's standards "to determine what is required by the Manufacturer and then report to Rohrman." Under the heading "Bidding Phase," the Chrysler proposal indicates DSL would answer questions by prospective contractors "and assist [Rohrman] with evaluating the bids."

¶ 13 Under the heading "Construction" the Chrysler proposal stated that DSL, in addition to providing design services, would "participate in the construction of the facility *** by attending progress meetings on site as requested, periodic walk throughs of the construction as it progresses, review of all shop drawing and materials *** submitted to [DSL] and review and approval of all payment applications as submitted by the contractors to [Rohrman]." The proposal contemplated "weekly visits to the site during construction" as well as "a final walk through and punch list for the contractors." DSL was also to provide "12 stamped sets of full Building Plans and 12 bound Spec. Books." The Chrysler proposal stated a "total fee for [DSL]" of $118,000.

¶ 14 DSL's proposal for the Lexus dealership contained similar provisions that DSL would review CFI's design and make any revision required by Rohrman, "governing municipalities," or Lexus's manufacturer's standards. The Lexus proposal specified that DSL would provide various "detailed construction documents for the construction of the building, *** by contractors of your choice. [DSL] will contract directly with, and provide the services for all aspects of the design, including structural engineering, mechanical, plumbing and electrical designs ***."

¶ 15 As in the Chrysler proposal, the Lexus proposal provided that, in addition to designing the dealership, DSL would assist with contractor bidding; would attend "progress meetings on site" during construction, review all "shop drawings"; review payment applications submitted by the contractors; and would provide sets of full building plans and "bound Spec. Books." The Lexus proposal stated a total fee of $145,000.

¶ 16 It is undisputed that in April 2006, pursuant to an invoice submitted by DSL to Battista, Rohrman made payments to DSL representing 10% of the initial proposed contract amounts of $118,000 and $145,000 for the Chrysler and Lexus projects.

¶ 17 Pursuant to a third proposal dated December 22, 2006, DSL offered to design a Toyota dealership to be built in Lafayette, Indiana (the Toyota project). The Toyota proposal included similar provisions as the Chrysler and Lexus proposals regarding DSL's role in design and construction administration; including on-site progress meetings during construction. The Toyota proposal listed the total fee for that project as $149,500.

¶ 18 None of the three proposals was signed by Rohrman or his agents. However, it is undisputed that Rohrman made a number of progress payments on the three projects in 2006 and 2007.

¶ 19 Although DSL provided certain drawings for the projects, it is undisputed that DSL did *not* perform all of the various construction administration tasks, such as periodic on-site progress visits, that were originally contemplated in DSL's 2006 proposals. At trial, Lipowski and Battista gave very different explanations for why this occurred.

¶ 20 Lipowski testified that Rohrman (through Battista) had indicated his desire for Rohrman's general contractor, CFI, to assume the construction administration duties originally described in DSL's 2006 proposals; in consideration of its reduced duties, DSL agreed to a reduced fee.

According to Lipowski, Battista communicated that CFI would assume DSL's responsibilities, except that DSL would remain available for consultation as the "architect of record." Lipowski testified that "[Battista] told me that [CFI] would basically take over the project from this point out; in other words, they would supervise it. They didn't need me, unless something terribly wrong happened because the project was already underway ***. So [Battista] said that you got to reduce your price, and then you'll basically, not have the liabilities as you might have as the full [architect of record] ***." Lipowski testified that the parties agreed on a reduction of "$10,000 per project."

¶ 21 Under this modified arrangement, Lipowski testified, DSL would no longer have to do any "construction administration" such as regular site visits, or provide the "spec books" referenced in the 2006 proposals. However, since DSL remained architect of record, "I would have to do a site visit if it was really *** of some important nature" that required the architect, "like meeting with public officials and so forth."

¶ 22 In his trial testimony, Battista strenuously denied that he ever told Lipowski that DSL would be relieved of any contract administration duties by agreeing to a fee reduction. Battista testified that in August 2007, Lipowski submitted a letter to him in which DSL sought a $10,000 reduction for the Lexus project, in order for DSL to take a reduced role. Battista testified that he never signed that document and would not agree to such a reduction in scope with any architect, because "The job wouldn't get finished. You need [an architect] that can stamp a plan. You need somebody that can review and answer questions."

¶ 23 Nevertheless, the DSL billing documents introduced at trial indicated a $10,000 reduction in DSL's fee for each project. The trial exhibits included "Progress Billing" documents created by DSL for each of the three projects, dated February 15, 2008. Those documents reflect, for

each of the three projects, a "new" contract amount that was $10,000 less than the "original contract" amounts cited in the 2006 proposals.

¶ 24 On February 18, 2008, Lipowski sent an email to Battista's administrative assistant with the subject heading "Total Billing"; the email attached charts purporting to show amounts paid and to become due to DSL under each of the three projects. Lipowski wrote: "This is a 2 sheet summary of the total final billing including extras but subtracting the $30,000 from Toyota Lafayette, Dodge, and Lexus. That is $10,000 each from 3 projects totaling $30,000. The total now due me is $169,005.20 ***. *** I have the full packet and summary of all the final billing to hand to [Battista] completed just w[h]ere should I leave it?"

¶ 25 The charts attached to Lipowski's February 18, 2008 email purport to itemize amounts due to DSL, including amounts owed to various subcontractors. Those charts indicated total amounts due of $74,565.20 for the Toyota project, $38,480 for the Chrysler project, and $41,700 for the Lexus project. The trial evidence does not include any response by Battista to this email.

¶ 26 On February 27, 2008, Lipowski sent a fax to Battista in which Lipowski criticized CFI for its slowness in completing the projects. In the message Lipowski states: "On Toyota I have been doing construction administration with Rick Wertz from Custom Facilities Inc. I have been provided and have been approving" several "shop drawings." With respect to the Chrylser project, Lipowski writes: "This project is over *** 2 years old and as of today I have not received one shop drawing or [request for information]." Lipowski stated that the project was "Going no where!" and asked "Where are all these great drawings from CFI??????" Elsewhere in the fax, Lipowski wrote: "I am still trying to figure out why I accepted a $30,000 pay cut!!!!"

¶ 27 At trial, Lipowski was asked what he meant when he stated he was trying "to figure out why I accepted a $30,000 pay cut." He testified: "I meant that [CFI] required my involvement.

I was supposed to be able to relax and just be the AOR [architect of record], and gloat after the thing was built by these guys. And yet they needed me to be involved. So I marked up those drawings and got them sent back *** so they could keep moving."

¶ 28 In March 2008, the parties reviewed DSL's billings with respect to the three projects. At trial, Battista recalled that DSL bills were faxed to him by Lipowski, and that Battista made handwritten changes to figures on those statements: "I went through the document and struck a line through some of the amounts and circled some of the amounts that needed to be paid with respect to work being done." Battista also testified that he, as well as Lew Neuman of CFI, signed each of the three statements including the handwritten revisions. The handwritten adjusted figures in those March 2008 statements form the basis for the amounts claimed by DSL and awarded by the trial court.

¶ 29 The March 2008 DSL statements edited by Battista contain two charts for each project. The first chart purports to summarize amounts paid and balances remaining on the DSL-Rohrman contract for each project; notably, each reflects a $10,000 reduction from the original contract amount.

¶ 30 A second chart purports to summarize, for both DSL and various subcontractors, the relevant contract amounts, amounts paid to date by Rohrman, and outstanding balances owed by Rohrman. Each chart contains a column for "Amount this Request"; to the right of that column is another column entitled "BALANCE TO BECOME DUE." In each chart, the original typed amounts for "Amount this Request" and "BALANCE TO BECOME DUE" were crossed out and replaced with handwritten figures. Battista testified that he and Neuman signed next to each of the revised "BALANCE TO BECOME DUE" amounts, which form the basis for the trial court's eventual judgment amount.

¶ 31 For the Chrysler project, the adjusted handwritten total "Amount This Request" was $13,750. The handwritten amount for "BALANCE TO BECOME DUE" is $24,730. Battista acknowledged that he and Neuman signed next to this sum, but he testified that this was not due at that time and had never been paid to DSL "[b]ecause the work didn't get finished and the building didn't get built."

¶ 32 The Lexus statement similarly contains a revised handwritten total for "Amount This Request" of $17,950, and a handwritten "BALANCE TO BECOME DUE" amount of $23,750. Battista and Neuman signed next to this sum, and Battista dated the document "3/12/08." At trial, Battista denied that he agreed that $23,750 was "actually due" to DSL at that time.

¶ 33 For Toyota, the adjusted handwritten total for "Amount This Request" was $42,082; handwritten notations indicated this was the sum of $7,615.41 owed to subcontractor Condon Consultants and $34,466.91 owed to DSL. The handwritten amount for "BALANCE TO BECOME DUE" for the Toyota project was $32,402.88. Battista at trial stated that although he signed, he did not intend to approve $32,402.88 as being owed to DSL at that time, because "[t]he work hadn't been done." Thus, for all three projects, Battista denied that the amounts in the "BALANCE TO BECOME DUE" column represented amounts *currently* due as of March 2008, insisting that they represented amounts *to become* due only upon completion of each project.

¶ 34 The trial evidence includes copies of three checks from Rohrman to DSL, each dated March 13, 2008. Notably, the amounts of those three checks correspond to the adjusted, handwritten sums for the "Amount this Request" on the statements signed by Battista and Neuman. Two of these checks, each with a memo line referencing the Toyota project, add to the sum of $42,082--the handwritten total for the "Amount This Request" for the Toyota project.

Rohrman also signed a check in the amount of $31,700, whose memo line indicates that it represents the sum of $17,950 (the handwritten "Amount This Request" on the Lexus statement), and $13,750 (the handwritten "Amount This Request" on the Chrysler statement). In his trial testimony, Rohrman acknowledged that he signed these checks, and that he relied on Battista or Neuman for the amounts of those checks.

¶ 35 On September 24, 2008, Lipowski sent an email to Battista's administrative assistant with the subject "Bills for Mark." That email attaches copies of the March 2008 statements with the handwritten figures signed by Battista and Newman, as well as copies of the checks executed by Rohrman. At trial, Battista did not recall if he had received this email.

¶ 36 Notably, the record is devoid of any communications between 2008 and 2013 regarding any amounts claimed to be owed to DSL. Lipowski did not recall if he sent any bills to Rohrman during that time. Meanwhile, construction on the three projects slowed or, in the case of the Chrysler project, ceased completely. According to Battista, construction of the Chrysler project never proceeded beyond foundation, due to Chrysler's bankruptcy in 2009. The construction on the Lexus and Toyota projects slowed and took several years to complete.

¶ 37 Battista agreed that during this time, DSL remained the architect of record for the Toyota and Lexus projects "from start to finish." However, he testified that Lipowski and DSL had virtually no involvement in the projects after 2008. Asked if Lipowski had actually performed the construction administration duties set forth in DSL's proposals, Battista answered that DSL had done "really none of the *** administrative things that are the duty of the architect," such as regular site visits.

¶ 38 Battista acknowledged that, on one occasion, he had contacted Lipowski to help resolve an issue on the Lexus project. Battista explained that the Arlington Heights fire department had

a concern regarding the fire alarms in the Lexus dealership building, and had requested a meeting including the architect. Battista called Lipowski at that time, and Lipowski "was happy to assist me and come to help work through the problem."

¶ 39 Battista testified that DSL never sent "final bills" or invoices demanding a specific amount due. At the same time, Battista acknowledged that he never sent a letter or email to Lipowski stating that DSL had failed to perform any required construction administration duties. He also acknowledged that "Every time I called [Lipowski], he showed up for me."

¶ 40 Lipowski testified that, after 2008, he was never asked to attend any site meeting or to provide any other form of construction administration. Lipowski again testified that he had given Rohrman a credit of $10,000 in each project since they were "turned over" to CFI, "but only after I completed my duties as the architect of record to build the basic superstructure with the shop drawings."

¶ 41 On December 13, 2013, Lipowski sent an email to Battista, seeking Battista's assistance in obtaining payment for the Toyota project. That email indicated that Lipowski had asked Neuman to communicate with Rohrman, but that Rohrman had resisted: "[Neuman] indicated to [Rohrman] that I was looking to get final payment for Lafayette Toyota. He presented Mr. Rohrman the invoices and copy of his check signed by Mr. Rohrman. It showed clearly the amounts that were due. Rohrman told [Neuman] he would not pay the $32,000.00 (approx. on Lafayette) invoice ***." Lipowski's email to Battista also stated: "I think that over a period of 6 years building the dealership that I have completed my work and that everything I was contracted to do was completed. No one ever contacted me *** of anything missing in my work over the 6 year period. Therefore could you kindly address getting my payment." Battista

recalled at trial that "Neuman told me that Bob Rohrman said he's not going to pay [DSL] because the job was never *** completed."

¶ 42 The court also heard testimony from Neuman, who testified that, until 2010, he had been an employee of CFI. Since 2010, Neuman worked for a company called Praxis, which became the construction manager for the Lexus and Toyota projects, replacing CFI. Neuman acknowledged that he and Rohrman are now co-owners of Praxis.

¶ 43 Neuman testified that typically an architect, such as DSL, is involved in "construction management" including answering requests for information from subcontractors. Neuman denied knowledge of any agreement by which DSL would be relieved of such construction management duties. Neuman also testified that, in emails he wrote in July and September 2007, he expressed his concerns that the drawings provided by DSL did not comply with "fundamental conventions" and were otherwise "incomplete" and "deficient."

¶ 44 Neuman recalled that in 2013, Lipowski had requested his assistance in asking Rohrman to pay DSL for the Toyota project. Rohrman told Neuman that he would not pay DSL.

¶ 45 In Rohrman's trial testimony, he acknowledged that Battista dealt with Lipowski and DSL on his behalf. He recalled seeing the three 2006 proposals from DSL, but stated that he had never signed any agreement. Rohrman could not recall if there was ever a "final written agreement" with DSL about the three projects.

¶ 46 Rohrman acknowledged he had already made payments to DSL, including the March 13, 2008 checks. He testified that he paid "more than what I should have" because DSL "didn’t do all the work on these jobs." On cross-examination, Rohrman testified that either Neuman or Battista had told him how much to pay to DSL. Rohrman never spoke directly to Lipowski regarding DSL's billing.

¶ 47 In addition to the foregoing fact witnesses, the court heard testimony from Norman Arns, an architect, as Rohrman's expert witness. Arns acknowledged that he has worked on approximately six other dealerships for Rohrman. Arns stated that he had reviewed the drawings done by DSL for the three projects, and opined that they were "lacking in detail." Arns also testified regarding an architect's responsibilities for oversight of construction, including performing "site reviews" to ensure that construction conforms to the architect's drawings. Arns agreed with Rohrman's counsel that such site visits constitute a basis for part of the total architect's fee.

¶ 48 In closing argument, DSL's counsel argued that this was a "classic situation of an account stated," "where you render the account statement showing the balance due," and "the parties have retained that document without protests." DSL thus argued that it was entitled to collect the "BALANCE TO BECOME DUE" amounts on each of the three statements signed by Battista in March 2008, plus statutory interest.

¶ 49 At the conclusion of evidence and argument, the trial court entered judgment in favor of DSL. The court agreed that, under an account stated theory, DSL was entitled to each of the handwritten "BALANCE TO BECOME DUE" amounts in the March 2008 statements.

¶ 50 In its ruling, the court found that "there was a continuing agreement of these parties." As a matter of credibility, the trial court noted that "all the witnesses put forth by defendant in this matter have such close affiliations with Mr. Bob Rohrman." The court further remarked:

> "All the contract administration – all they're trying to weave and dodge from the obligations that you were obligated to have on this is just really an embarrassment of Mr. Bob Rohrman to sit there, and, basically, on a large project such as this where the architect['s]

> fees are not even equaling one percent of the total fee. Certainly much lower than the industry standard, that is something that the court was aware."

The court also remarked: "I think that Mr. Battista put it right, at his heart, Mr. Rohrman is a used car salesman, and that certainly was demonstrated here."

¶ 51 The court concluded:

> "[T]his really does come to account stated. And *** besides the agreement in the account stated, but everyone that the defendant kept putting forward saying there was an agreement, it wasn't an agreement as to whether or not the defendants were going to agree to the amount so much billed by Mr. Lipowski, as much as Mr. Lipowski coming back and saying, okay. I'll accept your reduced fees here that you've gone and knocked off of each bill. You sat there where I already gave you a lower amount. You've already undercut my bill. ***
>
> Again, these are design individuals that need to sign off on certain things in order to get the permits. You're going to undercut all those bills, and then you initial them and show your agreement.
>
> And, therefore, at the end of the day, I find the amount owed to the plaintiff is $80,962.88, plus prejudgment interest of five percent."

DSL's counsel subsequently asked the court which date would be used as the starting point for accrual of prejudgment interest; the court responded "the March date. March 12th, 2008."

¶ 52 On September 14, 2015, the trial court entered judgment in favor of DSL on the three counts of account stated (counts IV, V, and VI of the amended complaint) in the amounts of $32,482.88, $23,750.00 and $24,730.00 (the handwritten "BALANCE TO BECOME DUE" amounts on the March 2008 statements). The judgment also specified that DSL was entitled to statutory interest at 5% per annum on each of these counts; notably, whereas the trial court indicated to counsel that interest would be measured from March 12, 2008, the written order reflects that interest is to be measured "from 3-18-08." The court's order otherwise specified that DSL's breach of contract counts (counts I, II, and III) were "dismissed as moot."

¶ 53 Rohrman filed a notice of appeal from the judgment on October 7, 2015.

¶ 54 ANALYSIS

¶ 55 We first note that we have jurisdiction, as Rohrman filed a timely notice of appeal. Ill. S. Ct. R. 303(a) (eff. Jan. 1, 2015).

¶ 56 On appeal, Rohrman asserts that the trial court's finding of an account stated was against the manifest weight of the evidence. Even if there was an account stated, he alternatively argues that the court erred in awarding pre-judgment statutory interest under the Interest Act (815 ILCS 205/2 (West 2014). Separately, he argues that reversal is warranted in light of the trial court's remarks that DSL's fees were "much lower than the industry standard," and its reference to Rohrman as a "used car salesman."

¶ 57 We first address Rohrman's contentions that the court's finding of an account stated was against the manifest weight of the evidence. "[W]here the existence of an account stated is disputed the issue of whether it exists is a fact question which, in a bench trial is properly resolved by the trial court." *W.E. Erickson Construction, Inc. v. Congress-Kenilworth Corporation*, 132 Ill. App. 3d 260, 268 (1985).

¶ 58 We apply a deferential standard of review. "A reviewing court will not substitute its judgment for that of the trial court in a bench trial unless the judgment is against the manifest weight of the evidence. [Citation]. A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." (Internal quotation marks omitted). *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008).

¶ 59 "[W]e may only conclude that the trial court's determination was against the manifest weight of the evidence where, upon review of all the evidence in the light most favorable to *** the prevailing party, an opposite conclusion is clearly apparent or the [trial court's] finding is palpably erroneous and wholly unwarranted, is clearly the result of passion or prejudice, or appears to be arbitrary and unsubstantiated by the evidence." (Internal quotation marks omitted.) *Bernstein and Grazien, P.C. v. Grazian and Volpe, P.C.*, 402 Ill. App. 3d 961, 976 (2010).

¶ 60 In a bench trial, the trial court is "responsible for resolving any factual disputes, judging the credibility of the witnesses, determining the weight to afford their testimony and deciphering contradicting evidence." *Id.* We will not conclude that its findings are against the manifest weight of the evidence "merely because the record might support a contrary decision [citations] and we are not to overturn these simply because we may disagree with them [citation.]." *Id.*

¶ 61 With this standard in mind, we review the requirements of an account stated. "An account stated has been described as an agreement between parties who have had previous transactions that the account representing those transactions is true and that the balance stated is correct, together with a promise, express or implied, for the payment of such balance." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 56. "[A]n account stated is merely a final determination of the amount of an existing debt, and an action for an account stated is

founded upon a promise to pay that debt ***." *Id.* "An account stated cannot be created merely by furnishing an account unless the creditor or debtor specifically intends to establish a balance due or to agree upon a final settlement to date between the parties. [Citation.] " *Id.*

¶ 62 An account stated "has also been defined as an agreement *** which constitutes a new and binding determination of the balance due on indebtedness ***, containing a promise, express or implied, that the debtor shall pay the full amount of the agreed balance to the creditor. [Citation.]" *Motive Parts Company of America, Inc. v. Robinson*, 53 Ill. App. 3d 935, 938-39 (1977). The agreement must "manifest the mutual assent of the debtor and creditor. [Citation.] The meeting of the parties' minds upon the correctness of an account is usually the result of one party rending a statement of account and the other party acquiescing thereto. [Citation.] The form of the acquiescence or assent is immaterial, however, and the meeting of minds may be inferred from the conduct of the parties and the circumstances of the case. [Citation.]" *Id.* Further, our court has held that an account stated must be based on an agreement as to an amount currently due, rather than a "qualified" agreement to pay. *West Lands Construction Co. v. Calhan*, 124 Ill. App. 2d 453, 409 (1970) ("An account stated presupposes an absolute acknowledgement or admission of a certain sum due; if the assent to the amount due is qualified there is not an account stated.").

¶ 63 Rohrman's briefing makes a number of related, overlapping arguments urging that the finding of an account stated was against the manifest weight of the evidence. He asserts that there was a lack of evidence of a "meeting of the minds" or mutual assent that the amounts in the "BALANCE TO BECOME DUE" column of the March 2008 statements were due *at the time* Battista signed them. Relying on the wording of the phrase "to become due," Battista's testimony, and other evidence, he argues that any agreement to pay such amounts was

"qualified" because it was contingent upon performance of additional work by DSL, or the completion of the construction. Similarly, he argues that the "manifest weight of the evidence showed DSL did not perform all its duties," including its "construction administration duties" originally contemplated by the 2006 proposals, that were necessary to entitle DSL to payment of the amounts in question.

¶ 64 We acknowledge the significant gaps and conflicts in the trial evidence with respect to the parties' understanding of their respective obligations, whether the parties' arrangement changed over time, and the parties' intent when Battista signed the March 2008 statements reciting the amounts "to become due." Certainly, had the court believed Rohrman's witnesses instead of Lipowski, it could have ruled against DSL. Nonetheless, under the deferential standard of review, we cannot say that the trial court's findings were against the manifest weight of the evidence.

¶ 65 Significantly, the trial court, as finder of fact, "was in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony." *Chicago's Pizza*, 384 Ill. App. 3d at 859. Although Lipowski's narrative of events differed sharply from those of Rohrman's witnesses, the trial court was entitled to believe Lipowski regarding the circumstances of the parties' arrangement. Given Lipowski's testimony, as well as the documents in evidence, we cannot say the trial court was unreasonable or arbitrary in finding that there was sufficient proof of mutual assent as to the amounts claimed to be due to DSL.

¶ 66 Clearly, the original 2006 proposals contemplated construction administration tasks that DSL, admittedly, did not perform. However, the trial court was entitled to believe Lipowski's testimony that, by March 2008, he and Rohrman had modified their agreement so that DSL was relieved of contract administration duties (which were assumed by CFI), except that DSL would

remain available for consultation as the architect of record. That is, the court could credit Lipowski's testimony that no further performance from him was required in order to entitle him to payment of the "BALANCE TO BECOME DUE" amounts in the March 2008 statements signed by Battista. Moreover, the court could find that Lipowski's testimony was corroborated, at least to some extent, by other evidence. First, the evidence included billing statements from Lipowski reflecting that the contract price for each project had been reduced by $10,000; this was consistent with Lipowski's testimony that the parties agreed to a reduction in DSL's fee, in consideration of his reduced responsibilities.

¶ 67 Furthermore, Battista acknowledged that on or about March 12, 2008, he personally revised and signed the March 2008 billing statements; indeed, Battista testified that he revised the "BALANCE TO BECOME DUE" amounts that formed the basis of the trial court's award. The following day, March 13, 2008, Rohrman issued checks to DSL, in amounts corresponding to the handwritten "Amount This Request" amounts in the billing statements. "In the absence of an objection, a partial payment on account may strengthen an inference that there is an account stated." *Allied Wire Products, Inc. v. Marketing Techniques, Inc.*, 99 Ill. App. 3d 29, 40 (1981). Thus, the trial court could consider the March 13, 2008 checks as support for the proposition (as alleged in DSL's complaint) that the parties intended these checks as partial payments, evidencing Rohrman's acknowledgment of the remaining amounts due.

¶ 68 Further, the trial evidence indicated that on September 24, 2008, Lipowski sent an email to Battista attaching the March 2008 statements signed by Battista and Newman, as well as copies of the checks executed by Rohrman in March 2008. Significantly, there was no evidence that, until December 2013, Rohrman ever made any specific objection to the amounts contained in the billing statements signed by Battista in March 2008 and re-sent in September 2008. The

trial court could determine there was acquiescence by Rohrman to those amounts, supporting a finding of an account stated. "Repeatedly it has been held that where a statement of account is rendered by one party to another and is retained by the latter beyond a reasonable time without objection, this constitutes recognition by the latter of the correctness of the account and establishes an account stated." *Allied Wire Products, Inc.*, 99 Ill. App. 3d at 40. The trial court could certainly find that the failure to object for several years was beyond a reasonable time.

¶ 69 Rohrman relies heavily on the wording of the phrase "to become due" in the March 2008 statements, as evidence that the parties did not agree that payment was already *due at the time that Battista signed*, but rather that payment was merely qualified or contingent upon future events. We acknowledge that the use of the phrase "to become due," (rather than simply "amount due") could be viewed as some evidence supporting Rohrman's position.

¶ 70 However, when viewing the totality of the evidence, we cannot say that the "to become due" phrase is sufficiently conclusive to disprove an account stated, such that the trial court's findings were against the manifest weight of the evidence. In this regard, we note that the informal manner in which Battista revised the figures and signed the March 2008 statements, without further explanation, makes it far from apparent what the parties' understanding was at that time. In other words, had Battista or Rohrman intended that payment to DSL of the amounts "to become due" was contingent on DSL's performance of certain additional tasks, the completion of the construction, or other particular circumstances, they certainly had the opportunity to state such conditions in writing. Having failed to do so, we cannot fault the trial court in declining to find that the phrase "to become due" had the import that Rohrman now attaches to it. The trial court was free to determine that Lipowski's testimony and the other evidence of the parties' conduct was proof of mutual assent supporting an account stated.

¶ 71 Similarly, Rohrman's appellate argument emphasizes the evidence that Lipowski and DSL had little involvement in the construction projects after March 2008. Thus he argues that "the manifest weight of the evidence showed DSL did not perform all its duties," such as regular construction site visits, that were set forth in DSL's original 2006 proposals. Rohrman cites the proposition that a party's failure to substantially perform its contractual duties bars or limits recovery of the contract amount. He argues that since "there was no evidence of the value of the work performed by Lipowski and DSL after" March 2008, "the award of the full amounts *** was against the manifest weight of the evidence." Citing the evidence that the Chrysler dealership was never actually constructed, he argues that the award to DSL "should have been reduced by at least $24,730," the amount awarded in connection with the Chrylser project.

¶ 72 To the extent Rohrman relies on DSL's failure to perform the construction administration tasks referenced in the 2006 proposals, this argument ignores Lipowski's testimony—which the trial court could and apparently did believe—that the parties had *modified* their agreement to eliminate DSL's obligation to perform such duties, in consideration of a $10,000 per project reduction in its fee. Further, Lipowski testified that as of March 2008, Lipowski had already performed all work that entitled him to both the "Amount This Request" and "BALANCE TO BECOME DUE" amounts reflected by the March 2008 billing statements. Based on this testimony the court could find that the parties had agreed that DSL did not need to perform any additional work (and that the construction of the dealerships did not need to progress further) to entitle DSL to payment. Moreover, the court could additionally note the lack of evidence that Rohrman had ever accused DSL of failing to perform any requested construction administration services. To the contrary, Battista agreed that Lipowski was available whenever Battista requested his assistance.

¶ 73 Viewing the evidence in the light most favorable to DSL, (*Bernstein & Grazian*, 402 Ill. App. 3d at 976) we conclude that the trial court could find that the parties had assented to the "BALANCE TO BECOME DUE" amounts as due and owing when Battista signed the March 2008 statements. Again, we acknowledge the sharply contrasting testimony between Lipowski and Rohrman's witnesses, and we note that the documentary evidence is far from clear in explaining the terms of the parties' arrangement. Were we sitting as fact finders, we might not have reached the same conclusion as the trial court in this case. However, this does not mean that the "opposite conclusion is clearly apparent or the [trial court's] finding is palpably erroneous and wholly unwarranted." *Id.* at 976. That is, we cannot say that the finding of an account stated was against the manifest weight of the evidence.

¶ 74 We now turn to Rohrman's argument that the court erred in applying the Interest Act and awarding pre-judgment interest on the account stated amounts. Section 2 of the Interest Act provides: "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; *** on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; *** and on money withheld by an unreasonable and vexatious delay of payment." 815 ILCS 205/2 (West 2014).

¶ 75 "This court generally accords deference to a trial court's decision on a request for interest on a judgment. [Citation.] The Act allows considerable discretion for determination of whether an unreasonable delay warrants an award of prejudgment interest." *Milligan v. Gorman*, 348 Ill. App. 3d 411, 415 (2004). "This court will not dispute the trial court's findings of fact pertinent to prejudgment interest unless those findings are contrary to the manifest weight of the evidence. [Citation.] But we review issues of law *de novo*." *Id.*

¶ 76 Rohrman primarily argues that the March 2008 statements signed by Battista cannot be construed as an "instrument in writing" so as to qualify for pre-judgment interest under the Act. This argument ignores the additional statutory language that interest may be awarded on "money due on the settlement of account"; or "on money withheld by an unreasonable and vexatious delay of payment." 815 ILCS 205/2 (West 2014). Regardless of whether the March 2008 statements qualified as an instrument in writing, we conclude that interest could properly be awarded pursuant to either of these additional provisions.

¶ 77 As explained above, the trial court could credit Lipowski's testimony and other evidence suggesting that the March 2008 statements represented an agreement as to the final amounts due to DSL for its work with respect to the three projects, under a theory of account stated. Under the same evidence, the court could conclude that the March 2008 statements indicated "money due on the settlement of account." Alternatively, given that more than five years elapsed between submission of these bills and this lawsuit, the court could reasonably find that the sums were "withheld by an unreasonable and vexatious delay of payment."

¶ 78 As an alternative challenge to the interest award, Rohrman argues that statutory interest cannot be permitted because "the invoices do not have a specified due date, and do not have an inherent date by which the indebtedness created comes due." He proceeds to reiterate his argument that the phrase "to become due" in the March 2008 statements indicates that the amounts would not be due until some future, unspecified date. These arguments ignore that the court, as finder of fact, could rely on Lipowski's testimony that the parties understood these amounts to be *already* due as of March 12, 2008. Just as we do not find that it was against the manifest weight of the evidence for the court to find proof of an account stated, we cannot say

that it was against the manifest weight of the evidence for the court to find that the circumstances justified an award of interest under the Act.[1]

¶ 79 Finally, we address Rohrman's independent arguments that two comments by the trial judge constituted reversible error. First, Rohrman takes issue with the trial court's remarks, that DSL's "architect fees are not even equaling one percent of the total fee" and were "[c]ertainly much lower than the industry standard." Noting the lack of trial evidence regarding "industry standard" fees, Rohrman argues that he was prejudiced, as the trial court "evidently believed that Rohrman had violated industry standards in paying DSL and Rohrman should pay now for his violation of a standard not in evidence or relevant in the case."

¶ 80 Second, Rohrman argues that the trial court indicated its bias against him, citing the court's remarks that: "I think that Mr. Battista put it right, at his heart, Mr. Rohrman is a used car salesman, and that certainly was demonstrated here." Rohrman argues that the court based its ruling on Rohrman's background as a car salesman, which was irrelevant. He argues that when such "unnecessary findings, make their way into the court's ruling *** the presumption that the trial court judged the credibility of the parties fairly is absent."

¶ 81 We do not find that these comments, individually or together, warrant reversal. "For comments by a trial judge to constitute reversible error, the defendant must show that the remarks were prejudicial and that he was harmed by the comments. [Citation.] In the absence of a showing of animosity, hostility, ill-will or distrust toward the defendant, proof falls short of establishing the actual prejudice which would interfere with a fair trial. [Citations.] Moreover,

[1]We again note the apparent inconsistency between the trial court's statement on the record that it would award interest from March 12, 2008, and the content of the written order, which indicates interest is to be calculated from "3-18-08." Although the six-day discrepancy in these dates appears to be the result of an inadvertent clerical error, because the parties do not address it, we have no reason to disturb the order as written.

during a nonjury trial comments by a trial judge are allowed greater latitude ***." *K4 Enterprises, Inc. v. Grater, Inc.*, 394 Ill. App. 3d 307, 323 (2009).

¶ 82 Viewing the challenged remarks in the context of the trial evidence and the court's other comments in its ruling, we find nothing to suggest prejudicial error. We acknowledge the lack of trial evidence regarding whether DSL's fees were below "industry standard;" this appears to have been a general observation by the court not based on evidence. Nonetheless, there is no indication that the trial court relied on its understanding of the "industry standard" in deciding the amounts awarded to DSL. To the contrary, the judgment amounts were clearly premised on the "BALANCE TO BECOME DUE" amounts contained in the March 2008 billing statements.

¶ 83 We similarly decline the suggestion that the court's reference to Rohrman as a "used car salesman" indicated prejudice against him. First, we note that the trial court was echoing the testimony of Battista, Rohrman's agent, regarding Rohrman's negotiating style. As argued by DSL's brief, this comment suggests that "the trial court simply agreed with Mr. Battista that Rohrman was treating this transaction like a used car deal." That is, the trial court's "used car salesman" reference may have been a comment on the lack of formal documentation setting forth the terms of the parties' agreement. However, that is not equivalent to a showing of prejudice against Rohrman due to his profession, and we find nothing in the record suggesting that the trial court did not weigh the evidence fairly before determining that Rohrman's witnesses were less credible than Lipowski.

¶ 84 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 85 Affirmed.