2017 IL App (1st) 153424-U

FIFTH DIVISION
June 23, 2017

Nos. 15-3424 & 15-3535 (cons.)

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

JEFF GERLICK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee and Cross-Appellant,	)	Cook County
	)	
v.	)	No. 09 M1 151344
	)	
ANDRZEJ POWROZNIK and MARTA POWROZNIK,	)	Honorable
	)	Lisa R. Curcio,
Defendants-Appellants and Cross-Appellees.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming judgment of circuit court of Cook County in favor of plaintiff pool installer on breach of contract and mechanics lien claims; affirming denial of plaintiff's claims for alleged additional work and for attorney fees under the Mechanics Lien Act; denying plaintiff's request for sanctions under Illinois Supreme Court Rule 375.

¶ 2 After a bench trial, the circuit court of Cook County entered a judgment in favor of pool installer Jeff Gerlick (Gerlick) on his breach of contract and mechanics lien claims against Andrzej Powroznik (Andrzej) and Marta Powroznik (Marta) in the amount of $20,712.00, plus interest and costs. The trial court rejected Gerlick's claim for $4,200 relating to alleged additional work and denied Gerlick's request for attorney fees pursuant to section 17(b) of the

Mechanics Lien Act (Act) (770 ILCS 60/17(b) (West 2014)). On appeal, the Powrozniks contend that the rulings in favor of Gerlick were erroneous and that the trial court abused its discretion in barring them from introducing the testimony of any Rule 213(f)(2) (Ill. S. Ct. R. 213(f)(2) (eff. Jan. 1, 2007)) witnesses. In a consolidated cross-appeal, Gerlick argues, in part, that the trial court erred in failing to grant him attorney fees or any compensation for his "extra" work. Gerlick also seeks sanctions under Illinois Supreme Court Rule 375, asserting that the Powrozniks filed a frivolous appeal and willfully failed to comply with the "appeal rules." Ill. S. Ct. R. 375 (eff. Feb. 1, 1994). For the reasons discussed herein, we affirm the judgment of the trial court in its entirety and deny Gerlick's request for Rule 375 sanctions.

¶ 3 BACKGROUND

¶ 4 Marta and her father Andrzej resided in a single-family residence on Driftwood Lane in Northbrook, Illinois (the premises), which Marta owned. The Powrozniks retained Gerlick to install an inground pool at the premises. The pool installation was one component of a larger renovation project of the premises. Although there was no signed contract, a written proposal from Gerlick dated February 1, 2006, listed the total amount for labor and materials as $55,712. Gerlick commenced work in spring 2006, and the Powrozniks made a partial payment of $35,000.

¶ 5 When the Powrozniks failed to pay the balance after the purported completion of the work, Gerlick filed an action asserting breach of contract and mechanics lien foreclosure. Gerlick sought $24,912.00 – representing the remainder due ($20,712) plus $4,200 in additional charges – and attorney fees and costs. The Powrozniks filed a four-count counterclaim against Gerlick, asserting breach of contract, common law fraud and fraudulent misrepresentation, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2

(West 2006)), and negligent damage to property.[1] The Powrozniks alleged, in part, that Gerlick installed the pool and constructed a concrete deck in a careless and unworkmanlike manner, failed to install deck drains, and failed to obtain the required local government permits. In their affirmative defenses, the Powrozniks asserted, in part, that Gerlick failed to perform the work in accordance with their contract, the pool manufacturer's plans and specifications, industry standards, or the Village of Northbrook municipal code.

¶ 6 Gerlick testified at trial that he first met with Andrzej – who had a brick masonry business – after Andrzej had moved into the premises. Andrzej hired Gerlick to address certain issues relating to an outdated inground concrete pool on the premises which failed to maintain proper water chemistry. Andrzej, however, began to consider replacing the entire pool. During a February 2006 meeting, Gerlick submitted a proposal for a new fiberglass pool.

¶ 7 The Powrozniks selected the "King Shallow" pool model. Gerlick testified that he advised the Powrozniks that he was not a electrician and would not run the electricity to the pump for the pool heaters. Gerlick further testified that he informed the Powrozniks that they would be required to apply for the construction permits. Although Andrzej represented to Gerlick that he had secured the necessary permits, however, following a visit to the premises by a Northbrook inspector during the installation process Gerlick learned that Andrzej had not obtained the permits.

¶ 8 Gerlick testified that Andrzej had previously paid $35,000, and had agreed to remit the remainder on the date the concrete was poured. After that date passed, Andrzej had "excuses" for his non-payment. Gerlick testified that Andrzej initially asked for a pool cleaning and a demonstration that the auto-cover functioned properly. Andrzej subsequently expressed

[1] The Powrozniks ultimately did not pursue or dismissed each of the counterclaims.

concerns regarding the lien waiver prepared by Gerlick. Gerlick offered that Andrzej, as a contractor himself, could prepare the lien waiver, but Andrzej never produced one.

¶ 9 Gerlick testified that Andrzej requested that Gerlick travel to the premises in June 2006 to clean the pool and retrieve the check. When Gerlick did so, Andrzej was not at the premises. Although Andrzej stated that a neighbor had complained that the pool equipment was too loud, the neighbor informed Gerlick that he had never met Andrzej. Gerlick further testified that Andrzej stated he would make payment if the "crooked" pool was fixed. Using a video camera he carried in his truck, Gerlick videotaped himself measuring the pool, which was "perfectly straight." After Andrzej complained about the auto-cover on the pool, Gerlick discovered that one of Andrzej's workers or employees had run "new electric or something and they didn't hook the control box right to the auto cover." Gerlick remedied the issue.

¶ 10 According to Gerlick, Andrzej first raised a concern that the pool was "too high" in July 2006. They had previously discussed pool height – *e.g.*, the height required for the King Shallow and for the pool cover selected by Andrzej, and the fact that the tennis court on the premises was higher than the pool – and Andrzej had agreed to the pool height. Gerlick testified that the Powrozniks could observe the finished height of the concrete surrounding the pool by May 20 or 21, 2006.

¶ 11 Gerlick tracked the hours he expended after completion of the pool, including repeated pool cleanings. Charging his standard rate of $60 per hour, the "extra" work totaled $4,200. On cross-examination, Gerlick acknowledged that his written proposal did not expressly provide that he would charge an hourly rate for performing additional work. He further testified that the proposal did not state that the Powrozniks were responsible for the electrical work, plumbing, or obtaining permits. On re-direct examination, he testified that the work on the pool is not

completed until the handrails are installed and the pool is cleaned. Gerlick testified the final item – installation of a ladder hinge – was completed on July 9, 2006. After Gerlick rested, the trial court denied the Powrozniks' motion for a directed finding on Count II, the mechanics lien count.

¶ 12 Andrzej testified that he had believed that Gerlick would perform all of the work required for the installation of the new pool. After the work had commenced, however, Andrzej learned from Gerlick that he needed to hire an electrician and a plumber. Andrzej further testified that he did not know prior to Gerlick's trial testimony that he expected Andrzej to secure the permits.

¶ 13 When Gerlick requested the balance due, Andrzej refused. He informed Gerlick that he had replaced the pavement, completed additional landscaping and ran an extra sewer line to address issues relating to the pool installation. Andrzej also relayed to Gerlick that, after a heavy rain, overflow water from the pool entered his residence through the patio door and damaged the hardwood floor. Although the old pool posed various difficulties, it did not have water runoff problems. Andrzej testified that one of the components of the pool was not fully installed and that there were immediate problems after the pool cover was installed, which Gerlick failed to address. Andrzej further testified that the pool was installed at the incorrect height.

¶ 14 According to Andrzej, Gerlick did not provide the list of "extras" – billed out at $60 per hour – prior to the litigation. Andrzej never requested that Gerlick perform services on various dates in June and July 2006 and had not entered into a pool cleaning or maintenance agreement with Gerlick for the period after the pool installation.

¶ 15 During cross-examination, Andrzej testified that as the general contractor for the renovation of the house, one of his duties was to pull applications for permits. Andrzej acknowledged that he or his workers – and not Gerlick – performed work in the area between the

house and the concrete apron of the pool. Andrzej was impeached with his prior deposition testimony, wherein he acknowledged that he did not strictly follow the drainage plans prepared by a landscape architect in 2005. Although he stated during the deposition that water had entered the house on only one occasion, he testified at trial that he believed it had occurred repeatedly.

¶ 16 In a memorandum opinion and order entered on November 2, 2015, the trial court granted judgment in favor of Gerlick and against Andrzej[2] in the amount of $20,712.00, plus costs, on his breach of contract claim. The trial court also ruled in favor of Gerlick and against the Powrozniks on the mechanics lien claim in the amount of $20,712.00, plus costs and interest in the amount of $19,164.60, based on a rate of $5.67 per day for 3380 days. The trial court denied Gerlick's claim for $4,200 based on alleged extra work, finding that the primary reason Gerlick performed most of the tasks, *e.g.*, pool cleanings, was because he was attempting to locate Andrzej at the premises to collect the unpaid balance. The trial court also denied Gerlick's request for attorney fees under section 17 of the Act, finding that the Powrozniks' defenses were not "without just cause or right." We entered an order consolidating the appeals filed by the Powrozniks and Gerlick.

¶ 17 ANALYSIS

¶ 18 Rule 341 Violations

¶ 19 Gerlick contends that the brief submitted by the Powrozniks violates Illinois Supreme Court Rule 341. Therefore, he requests that we dismiss their appeal or strike their brief, in whole or in part. Rule 341(h)(6) provides that the statement of facts shall include appropriate reference

[2] Marta filed a Chapter 7 bankruptcy petition in 2014. The record on appeal includes a bankruptcy court order modifying the automatic stay to permit Gerlick to pursue foreclosure of his mechanics lien. Although certain documents in the record were filed by or apply solely to Andrzej, we generally refer to "the Powrozniks," unless otherwise provided herein.

to the pages of the record on appeal. Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016). Rule 341(h)(7) requires proper citation to the record in the argument section of the brief. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 20 Based on our review of the Powrozniks' brief and the record on appeal, it appears that the brief fails to strictly comply with the requirements set forth in Rule 341. For example, certain pages of the record cited in their brief fail to support their statements in the brief. "Although this court has discretion to strike a brief and dismiss an appeal where a party has failed to comply with Rule 341, doing so is a harsh sanction and is appropriate only when the procedural violations interfere with our review." *In re Marriage of Iqbal and Khan*, 2014 IL App (2d) 131306, ¶ 14. The violations of Rule 341 in the instant case are not so severe as to preclude our review of the issues, and we therefore decline to strike the brief provided by the Powrozniks or dismiss their appeal. We will accordingly disregard any improper argument and any facts not supported by the record on appeal. See *id*.

¶ 21 Expert Witness

¶ 22 The Powrozniks contend that the trial court abused its discretion in entering an order on November 15, 2013, which purportedly barred them from introducing the testimony of any Illinois Supreme Court Rule 213(f)(2) independent expert witnesses. See Ill. S. Ct. R. 213(f)(2) (eff. Jan. 1, 2007) (requiring a party to furnish the identity and specified information regarding the testimony of an independent expert witness). According to the Powrozniks, the name of their expert witness and his expert report had been previously disclosed to Gerlick and the trial court, and thus Gerlick was not prejudiced. For the following reasons, we reject their contentions.

¶ 23 As an initial matter, the November 15, 2013, the trial court order does not "bar" the Powrozniks from introducing the testimony of any Rule 213(f)(2) witnesses. The order – which

was prepared by the Powrozniks' attorney – provided, in pertinent part:

> "(1) Defendants are granted leave to disclose 213(f)(3) expert witness by November 30, 2013 (no 213(f)(2) witnesses will be disclosed by Defendants)
>
> (2) Deposition of Rule 213(f)(3) witness shall be completed by January 10, 2013[3]
>
> (3) Defendants' previously disclosed 213(f)(3) witness will not be called to testify at trial"

The Powrozniks apparently did not disclose or depose any Rule 213(f)(3) expert witnesses prior to the deadlines provided in the trial court order. See Ill. S. Ct. R. 213(f)(3) (Jan. 1, 2007) (addressing disclosure obligations regarding controlled – as opposed to independent – expert witnesses). As to Rule 213(f)(2) witnesses, the trial court order suggests that the Powrozniks' counsel had informed the trial court that there would be no independent expert witness. In any event, nothing in the November 15, 2013, trial court order indicates that the Powrozniks were barred from introducing the testimony of any Rule 213(f)(2) witness.

¶ 24 The November 15, 2013, order went unchallenged until August 2014, after the Powrozniks had retained new counsel, Herman Marino (Marino). In an order entered on August 25, 2014, the trial court denied a motion to reconsider the November 15, 2013 order, filed by Andrzej. Although multiple orders entered prior to the trial provided that *all* previous orders would stand, Andrzej filed a second motion styled "Defendant's Renewed Motion to Reconsider Order Barring Defendant's Experts" on September 2, 2014. The motion provided that the Powrozniks had previously retained and disclosed an expert: Todd Lesperance of Highland Engineering, P.C. (Highland). According to the motion, Highland's written report

[3] We presume this should read "January 10, 2014."

from September 2007 had been previously disclosed to Gerlick during the course of the litigation.

¶ 25 Prior to the commencement of the trial on September 9, 2014, the trial court denied the Powrozniks' "renewed" motion. The trial court observed that the Powrozniks' expert – who was apparently a Rule 213(f)(3) witness and not a Rule 213(f)(2) witness – had not been barred but was instead "withdrawn." Pursuant to the November 15, 2013, order, the Powrozniks were provided an additional period of time to substitute the expert, but ultimately failed to do so. Even attorney Marino acknowledged to the trial court that, prior to his involvement, "the Defendant didn't disclose any experts."

¶ 26 The Powrozniks contend on appeal that a trial court must consider certain factors when determining whether the exclusion of a witness is a proper sanction for nondisclosure, *i.e.*, (1) the surprise to the adverse party; (2) the prejudicial effect of the witness's testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timeliness of the objection to the witness's testimony; and (6) the good faith of the party seeking to offer the testimony. See *Smith v. Murphy*, 2013 IL App (1st) 121839, ¶ 25. In the instant case, however, the foregoing factors are inapplicable because there is no indication that any expert witness was excluded by the trial court as a sanction by virtue of the November 15, 2013, order.

¶ 27 We further observe that certain assertions in the "renewed" motion to reconsider the November 15, 2013, order appear inapposite or misplaced. For example, the motion provided that the Powrozniks' former counsel had represented that Highland's fee was not paid. Any failure to pay Highland, however, is consistent with the plain language of the November 15, 2013, order, *i.e.*, that the "previously disclosed 213(f)(3) witness" would not be called to testify at trial and the Powrozniks had a limited period of time to produce another controlled expert

witness. Marino also suggested in the renewed motion to reconsider that the Powrozniks had not known or consented to the agreed order "barring prior experts" on November 15, 2013. As noted herein, such order did not bar any experts. While allegations regarding the purportedly unauthorized actions of the Powrozniks' former counsel may have given rise to other causes of action, such claims are beyond the scope of the instant litigation.

¶ 28 In conclusion, the disclosure requirements of Rule 213 are mandatory and subject to strict compliance by the parties. *Smith*, 2013 IL App (1st) 121839, ¶ 19. Although provided with multiple opportunities, the Powrozniks failed to comply with the rule. The purpose of a motion to reconsider is to bring to the court's attention newly-discovered evidence that was unavailable at the time of the original hearing, changes in existing law, or errors in the court's application of the law. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36. Even if we ignore any questions of the timeliness of any original or "renewed" motion to reconsider, none of the foregoing circumstances were present in this case, and the trial court properly denied reconsideration of the November 15, 2013, order.

¶ 29 Breach of Contract Claim

¶ 30 The trial court ruled in favor of Gerlick on his breach of contract claim in the amount of amount of $20,712.00, which was the unpaid balance after payment of the initial $35,000. The Powrozniks contend that the trial court erred because the evidence did not establish that Gerlick performed his obligations under the contract.

¶ 31 A trial court's determination that a party breached a contract will not be disturbed unless it is against the manifest weight of the evidence. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 72 (2006). A judgment is against the manifest weight of the evidence if the opposite conclusion is clearly evident or if the finding itself is arbitrary, unreasonable, or not based on the

evidence presented. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 43. For the reasons discussed below, we find that the trial court's ruling was not against the manifest weight of the evidence.

¶ 32 The elements of a breach-of-contract cause of action include the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and resultant damages or injury to the plaintiff. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 30. Although there was no signed contract in this case, the parties consider the written proposal from Gerlick as the basis for their agreement. The Powrozniks do not argue on appeal that Gerlick failed to perform any of the tasks listed on the proposal. It is also undisputed that the Powrozniks did not pay the outstanding balance of $20,712.

¶ 33 The parties' disagreement on appeal centers on whether Gerlick constructed the pool in a reasonably workmanlike manner. Under Illinois law, a person who contracts to perform construction work impliedly warrants to do the work in a reasonably workmanlike manner, and the failure to do so results in a breach of contract. *Meyers v. Woods*, 374 Ill. App. 3d 440, 451-52 (2007). Accord *Vicorp Restaurants v. Corinco Insulating Co.*, 222 Ill. App. 3d 518, 524 (1991). "When a contractor represents to someone that he is skilled at performing a particular task and installs the system himself, he warrants that the work done by him will be done in a reasonably workmanlike manner." *Meyers*, 374 Ill. App. 3d at 452.

¶ 34 The Powrozniks contend that Gerlick was aware of the drainage problems – which ultimately resulted in water damage to the residence – but did not install a main drain[4] or deck drains. Gerlick testified, however, that he had informed the Powrozniks that the King Shallow

[4] "Pool main drains do not allow the water to drain to waste but rather connect to the pump for circulation and filtration." See http://www.swimmingpool.com/pool-history-facts-and-terms/glossary-pool-terms (last checked June 21, 2017).

model did not have a main drain, and Andrzej acknowledged that Gerlick had explained his concerns regarding potential safety hazards posed by main drains. Furthermore, as noted by the trial court, "[n]o evidence was ever produced to inform the court as to why the failure to have a main drain should be considered as [an] unworkmanlike installation of the pool." With respect to the deck drains, both parties testified that Gerlick was not retained to perform any work on the space between the Powroznik residence and the concrete border surrounding the pool. Andrzej also acknowledged during his deposition that he had not fully adhered to the drainage plans previously prepared by a landscape architect. Although the Powrozniks further contend that the level of the "lip" of the installed pool resulted in the drainage problems, the trial court noted that photographic evidence demonstrated that the pool lip was lower than the door sill where Andrzej claimed water had entered the residence. As the trial court observed, "[t]here was no other testimony or evidence to show why or how the installation of the pool resulted in water coming into the house."

¶ 35 Based on our review of the record, we cannot conclude that the trial court's determinations regarding Gerlick's performance were arbitrary, unreasonable, or not based on the evidence presented. The decision in favor of Gerlick on his breach of contract count was not against the manifest weight of the evidence. The Powrozniks also challenge the trial court's ruling in favor of Gerlick on his mechanics lien foreclosure count.

¶ 36 Mechanics Lien Claim

¶ 37 The Mechanics Lien Act affords some protection to contractors who contribute labor or materials to a construction project by giving them a lien on the subject property. *LaSalle Bank N.A. v. Cypress Creek 1, LP*, 242 Ill. 2d 231, 237 (2011). A lien claimant must establish that: (1) the lien claimant had a valid contract; (2) with the property owner, the owner's agent, or

someone authorized by the owner to contract for property improvements; (3) to furnish labor services or materials; and (4) the lien claimant performed pursuant to the contract or had a valid excuse for nonperformance. *Doornbos Heating & Air Conditioning, Inc. v. Schlenker*, 403 Ill. App. 3d 468, 483 (2010). The lien claimant in order to enforce the lien bears the burden of establishing that every element required to establish the lien has been established. *Id*. The Powrozniks contend that the standard of review is *de novo* because the dispute turns on the construction of the Act. See, *e.g.*, *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 332 (2008) (providing that the interpretation of a statute is a question of law that is reviewed *de novo*). Regardless of the applicable standard of review, however, our result herein remains the same.

¶ 38 The Powrozniks contend that Gerlick's lien is defective on its face and therefore cannot be enforced. They initially argue that the claimant on the lien was "Jeff Gerlick," whereas the letterhead on the written bid listed "Installation Services & *Coolestpools.Com*," and the Powrozniks' $35,000 check was made payable to "Installation Services." Gerlick testified at trial, however, that he operated "Installation Services" and "Coolest Pools" as a sole proprietor. As our supreme court stated in *Vernon v. Schuster*, 179 Ill. 2d 338, 347 (1997), a sole proprietorship "has no legal identity separate from that of the individual who owns it." The fact that Gerlick conducted business under a fictitious name did not create an entity distinct from him. See *id.*

¶ 39 Like the trial court, we also reject the Powrozniks' reliance on *Candice Co. v. Ricketts*, 281 Ill. App. 3d 359 (1996). In *Candace*, the appellate court affirmed the dismissal of a complaint to foreclose a mechanics lien where the lien named a corporation as the claimant, but the corporation was not a party to the contract. *Id.* at 363. Unlike in *Candice*, Gerlick – as sole proprietor – was the contracting party, and thus his lien was not facially defective.

¶ 40 The Powrozniks further contend that the date of the contract on the lien is erroneous. Although the lien alleged a contract date of April 20, 2006, the written proposal which formed the basis of the parties' agreement was dated February 1, 2006. Such discrepancy, however, has no effect in this case. When the contractor seeks to enforce a lien against a party with an ownership interest, the contractor may record a claim for lien within two years after completion of the contract. *Norman A. Koglin Associates v. Valenz Oro, Inc.*, 176 Ill. 2d 385, 391 (1997); 770 ILCS 60/7 (West 2014). Regardless of whether a claim for lien has been recorded, the contractor must seek to enforce the lien within two years after completion of the contract. *Norman A. Koglin Associates*, 176 Ill. 2d at 391; 770 ILCS 60/9 (West 2014). The Powrozniks do not challenge that the relevant complaint to enforce the lien was filed within two years of the completion of the work.

¶ 41 "Normally under the Act, the contractor must completely perform the contract to enforce its lien for the value of what has been done." *Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill. App. 3d 597, 609 (1999). Notwithstanding the general rule requiring such complete performance, a contractor can still enforce a mechanics lien by proving that he *substantially* performed the contract in a workmanlike manner. *Id.* at 611. Where such substantial performance is established, a contractor is entitled to enforce his mechanics lien for the amount attributed to the work furnished under the contract, subject to any deductions by way of setoff for completing and correcting the work. *Id.* The Powrozniks contend that because Gerlick did not meet his burden to prove his substantial performance under the contract, he cannot prevail on his mechanics lien claim. For the reasons set forth above in the discussion of the breach of contract claim, the record on appeal supports the conclusion that Gerlick substantially performed the contract in a workmanlike manner.

¶ 42 While we recognize that rights under the Act are in derogation of common law, and the steps necessary to invoke those rights must be strictly construed (*Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.*, 2013 IL App (4th) 120547, ¶ 27), Gerlick's lien claim was enforceable for the reasons stated herein. The trial court did not err by ruling in Gerlick's favor.

¶ 43 Attorney Fees Under Mechanics Lien Act

¶ 44 Gerlick contends that the trial court erred in denying his claim for attorney fees under section 17(b) of the Act. The section provides that "[i]f the court specifically finds that the owner who contracted to have the improvements made failed to pay any lien claimant the full contract price, including extras, without just cause or right, the court may tax that owner, but not any other party, the reasonable attorney's fees of the lien claimant who had perfected and proven his or her claim." 770 ILCS 60/17(b) (West 2014). The phrase "without just cause or right" is defined in the statute as a claim "which is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." 770 ILCS 60/17(d) (West 2014). A trial court's decision to award attorney fees will not be disturbed absent an abuse of discretion. *Central Illinois Electrical Services, L.L.C. v. Slepian*, 358 Ill. App. 3d 545, 551 (2005) (concluding that the denial of section 17(b) attorney fees was within the sound discretion of the trial court). Accord *Roy Zenere Trucking & Excavating, Inc. v. Build Tech, Inc*., 2016 IL App (3d) 140946, ¶ 56.

¶ 45 Based on our review of the record, the trial court's denial of Gerlick's request for section 17 attorney fees was not erroneous. Although the trial court ruled in favor of Gerlick on its breach of contract and mechanics lien claims, the record suggests that there were certain misunderstandings and/or disagreements between the parties regarding the scope and quality of Gerlick's work and the division of responsibilities, *e.g.*, which party was responsible for

obtaining the permits. The trial court's finding that the Powrozniks' defenses were not "without just cause or right" did not constitute an abuse of discretion.

¶ 46 The cases cited by Gerlick are distinguishable. For example, in *O'Connor Construction Co. v. Belmont Harbor Home Development, LLC*, 391 Ill. App. 3d 533, 540 (2009), the trial court refused to award attorney fees to a subcontractor under section 17 of the Act. The appellate court noted that the defendants acknowledged that they owed a certain amount to the subcontractor and had offered no reasonable explanation for withholding payment on the undisputed amount. *Id.* at 541. The appellate court thus remanded the matter for the trial court to conduct a hearing on the fee issue. *Id.* Unlike in *O'Connor Construction*, the Powrozniks potentially had a good-faith basis, albeit ultimately erroneous, for failing to make the final payment to Gerlick. The trial court was in the best position to observe the conduct and demeanor of the parties. See, *e.g.*, *Best v. Best*, 223 Ill. 2d 342, 350 (2006). Under such circumstances, we cannot conclude that the trial court abused its discretion in denying Gerlick's request for fees pursuant to section 17 of the Mechanics Lien Act.

¶ 47 Gerlick's "Extra" Work

¶ 48 Gerlick next contends that the trial court erred by failing to grant him $4,200 for his "extra" work, consisting 65 hours of work at $60 per hour, plus $300 in supplies. The standard of review in a bench trial generally is whether the order or judgment is against the manifest weight of the evidence. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 12. As noted above, a judgment is against the manifest weight of the evidence if the opposite conclusion is clearly evident or the finding itself is arbitrary, unreasonable, or not based on the evidence presented. *Law Offices of Colleen M. McLaughlin*, 2011 IL App (1st) 101849, ¶ 43.

¶ 49 Under Illinois law, when a contractor seeks "extras," it is his burden to prove, by clear

and convincing evidence, that: (1) the extra work performed or materials furnished were outside the scope of the original contract; (2) the extras were furnished at the owner's request; (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 the fault of the contractor. *Doornbos Heating*, 403 Ill. App. 3d at 485. Accord *Bulley & Andrews, Inc. v. Symons Corp.*, 25 Ill. App. 3d 696, 699-700 (1975).

¶ 50 The trial court concluded that there was no evidence that Andrzej asked Gerlick to perform the maintenance that Gerlick claims as extra work, *e.g.*, cleaning the pool, inspecting equipment, or fixing the pool cover. Furthermore, Gerlick's own notes demonstrated that a portion of his extra work consisted solely of waiting for Andrzej. There was also no evidence that Andrzej had expressly or impliedly agreed to pay for additional items or services.

¶ 51 As the contractor, Gerlick "carrie[d] the burden of proving that the parties intended that he be paid for such work over and above the agreed original price." *William Ziegler & Son v. Chicago Northwestern Development Co.*, 71 Ill. App. 3d 276, 282 (1979). The trial court's determination that Gerlick had not met his burden of proof on his claim for extra work was not against the manifest weight of the evidence.

¶ 52 Rule 375 Sanctions

¶ 53 Finally, Gerlick argues that we should impose sanctions on the Powrozniks pursuant to Illinois Supreme Court Rule 375 for the fees and costs he incurred in defending their "frivolous" appeal. Rule 375(a) provides that sanctions may be imposed if a party or an attorney for a party is determined to have willfully failed to comply with the appeal rules. Ill. S. Ct. R. 375(a) (eff. Feb. 1, 1994). As noted above, the Powrozniks have failed to fully comply with the appeal rules. We are unable to conclude, however, that the deficiencies in their brief are indicative of *willful*

non-compliance.

¶ 54 Rule 375(b) provides sanctions for frivolous appeals that are not taken in good faith. Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994); *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 87. A reviewing court applies an objective standard to determine whether an appeal is frivolous, *i.e.*, if it would not have been brought in good faith by a reasonable, prudent attorney. *McNally v. Bredemann*, 2015 IL App (1st) 134048, ¶ 24. See also *Pryor v. United Equitable Ins. Co.*, 2011 IL App (1st) 110544, ¶ 14 (determining that appeal was not frivolous where it was based on a good-faith argument for the extension, modification, or reversal of existing law); *Belfour v. Schaumburg Auto*, 306 Ill. App. 3d 234, 244 (1999) (noting that an appeal will be deemed to have an improper purpose under Rule 375(b) where its primary purpose is to delay, harass, or cause needless expense). The purpose of Rule 375(b) is to punish abusive conduct by litigants and their attorneys who appear before this court. *Henby v. White*, 2016 IL App (5th) 140407, ¶ 28.

¶ 55 Rule 375 sanctions are penal and should be applied only to those cases falling strictly within the terms of the rule. *Belfour*, 306 Ill. App. 3d at 244. Although we have ruled in favor of Gerlick on certain issues, we cannot conclude that a reasonable, prudent attorney would not have filed and pursued the Powrozniks' appeal. See, *e.g.*, *RBS Citizens, N.A. v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 194 (2011) (noting that an unsuccessful appeal does not necessarily indicate that the appeal was frivolous, was taken in bad faith, or otherwise requires the imposition of sanctions).

¶ 56 The imposition of sanctions under Rule 375 is left entirely to the discretion of the reviewing court. *Parkway Bank*, 2013 IL App (1st) 130380, ¶ 87. For the reasons stated above, we deny Gerlick's request for sanctions pursuant to Rule 375.

¶ 57 CONCLUSION

¶ 58 In conclusion, the judgment of the circuit court of Cook County is affirmed in its entirety, and Gerlick's request for Rule 375 sanctions is denied.

¶ 59 Affirmed.