2017 IL App (1st) 160080-U
No. 1-16-0080

THIRD DIVISION
April 19, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RONALD J. EVANS, Individually, and on behalf of all others similarly situated, Plaintiff-Appellant, v. NEWCASTLE HOME LOANS, LLC, an Illinois corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 13035 The Honorable Thomas R. Allen, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* circuit court order granting the defendant's motion for a judgment in its favor at the conclusion of the plaintiff's evidence affirmed where its conclusion that the plaintiff failed to present sufficient evidence to support his claims was not against the manifest weight of the evidence.

¶ 2 Plaintiff Ronald Evans, a mortgage loan originator, filed suit against his former employer, Newcastle Home Loans, LLC (Newcastle) following a dispute that arose concerning his compensation. The cause proceeded to a bench trial, where at the close of plaintiff's

evidence, the circuit court granted Newcastle's motion for a finding in its favor in accordance with section 2-1110 of the Illinois Code of Civil Procedure (Code or Civil Code) (735 ILCS 5/2-1110 (West 2010)). Evans appeals the circuit court's ruling. For the reasons explained herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On April 23, 2010, Evans signed an employment agreement with Newcastle, a mortgage broker that provides "real estate financing for the communities in which it operates." Pursuant to the agreement, Evans was employed as a "loan originator." As a loan originator, Evans was tasked with "soliciting" and "closing" residential mortgage loans. The employment agreement specified that upon closing a residential mortgage loan, Evans would be paid a " 'straight' commission." That is, he would "receive an agreed-upon percentage of the revenue from closed and funded loans."[1] During the course of Evans's employ with Newcastle, a dispute arose with respect to his compensation and he ceased working for the company sometime in January 2011. Accordingly, on April 6, 2011, plaintiff filed suit against his former employer. An amended complaint, filed on September 16, 2011, followed.

¶ 5 Pleadings

¶ 6 In his filings, plaintiffs sought "unpaid wages and commissions earned, unpaid overtime, monetary damages, liquidated damages, declaratory and injunctive relief and other equitable and ancillary relief pursuant to the Illinois Wage Payment and Collection Act, 820 ILCS § 115 *et seq*., and the Illinois Minimum Wage Law, 820 ILCS § 105 *et seq*." In support of his claims, Evans alleged, in pertinent part: "[Newcastle] paid its loan officers a straight commission rather than an hourly wage. At times, [Newcastle] failed to pay the loan officers even the required

[1] The contract does not specify the "agreed-upon percentage" that Evans would receive for closing a loan.

minimum wage for all hours worked, including overtime worked in excess of eight hours per day and forty (40) hours per week. Specifically, [Newcastle] regularly required Plaintiff and other loan officers to work more than 8 hours a day and to also work on the weekends. [Newcastle] required Plaintiff and other loan officers to work additional early morning and late evening hours without proper compensation for the hours worked, including overtime hours worked. *** On average, [Newcastle] required its loan officers to work at least 45-50 hours a week." As a result, Evans alleged that Newcastle's "practice of failing to pay Plaintiff and other loan officers for actual hours worked and overtime compensation violate[d] provisions of the Illinois Wage Payment and Collection Act, 820 ILCS § 115 *et seq*., and the Illinois Minimum Wage Law, 820 ILCS § 105 *et seq*."[2]

¶ 7 Plaintiff's original and amended filings were both captioned as "class action" complaints. In those filings, Evans indicated that he sought to serve as class representative for other similarly situated employees who had claims for unpaid wages and commissions, unpaid overtime, monetary damages and declaratory and injunctive relief. Based on the filings and the orders contained in the record, however, it does not appear that a class was ever certified. Rather, the cause ultimately proceeded to trial on Evans's individual claims against his former employer.

¶ 8 Trial

¶ 9 At trial, Evans testified that he began working as a loan originator sometime around 1999 or 2000. As a loan originator, Evans was responsible for finding clients who sought to obtain loans to purchase residential real estate or clients interested in refinancing their existing home

[2] Evans did not explain why he believed the minimum wage and overtime provisions in the Minimum Wage Law applied to him even though he signed an employment agreement in which he agreed to be compensated via " 'straight' commission." As will be set forth in more detail below, we note that the circuit court never explicitly found that the Minimum Wage Law's provisions applied to Evans; rather, the circuit court's decision to grant Newcastle's 2-1110 motion was based on its determination that Evans's testimony lacked specificity and was insufficient to establish his claims.

loans. During the time that he worked in the industry, Evans testified that he was employed by various companies including Patriot Financial and Countrywide Home Loans. At his previous places of employ, he received commission-based compensation. He estimated that he worked "probably about 55 hours" per week and, as a result, was also paid overtime.

¶ 10 Evans testified that sometime in December 2009 or January 2010, he and "some other originators" were contacted by a manager at Newcastle and were invited to join the company and "to move over to their [Lombard] office." Evans agreed to do so and commenced employment with Newcastle in January or February 2010. Although he did not sign an employment contract with Newcastle until April 23, 2010, Evans testified that he "was actually working for [Newcastle] out of their office before [he] signed [his] contract." He stated that he was working as a full-time employee for Newcastle both before and after he signed his employment contract.

¶ 11 Evans testified that when he commenced his employ with Newcastle, he initially worked out of Newcastle's Lombard condominium office; however, the condominium office unit was sold sometime thereafter. As a result, Evans and another Newcastle loan originator "moved" over to the condominium unit located next door that was owned by Professional National Title Network, a title company. He and the other Newcastle loan originator were given computers and a printer/fax machine and began working out of the title company's office. Evans testified that regardless of the office in which he worked, he consistently started his workday at 8 a.m. and would work until 6 p.m. or 8 p.m. Evans estimated that he left the office "[m]aybe once or twice" a week for lunch. Usually, however, he brought his lunch and ate at his desk while he continued working. In addition, Evans testified that he also "usually" worked "three out of four Saturdays" during a given month. His weekend hours were "usually 8 [a.m.] or 9 [a.m.] to 3 [p.m.] or 5 [p.m.], depending on how [his] day or month was going." Evans testified that

Newcastle management was aware that he was putting in weekend hours because he frequently would send emails on the weekend. In addition, Ted Fish, the supervising manager of the Lombard office, was aware that he was working "long hours" during the week. Evans testified that Newcastle did not require him to keep a record of his time. Nonetheless, he estimated that he "probably [worked] around 55 hours a week."

¶ 12 Evans testified that during the course of his employ at Newcastle, he received his commission checks approximately two months after a particular loan was closed and sold. Accordingly, he would not receive his commission check for a loan closed in April until sometime in June.

¶ 13 On cross-examination, Evans acknowledged that his employment agreement did not require him to work out of an office and that he could "probably" have worked from home. On one occasion, he performed work while he was on a cruise in Mexico and answered phone calls and responded to emails while he was out of the office. Although Evans denied that he kept a record of the hours he worked at Newcastle, he had testified during an earlier deposition that he had used a calendar to track his work hours. Those records, however, were in "the garbage." Evans estimated that he earned "maybe [$]60 or [$]70,000" during the time that he worked at Newcastle. He could not recall the specific date on which he ceased his employment with Newcastle.

¶ 14 At the conclusion of Evans's testimony, plaintiff's counsel rested. Newcastle's attorney then moved for a "directed finding."[3] Defendant's attorney disputed Evans's characterization of himself as an "employee" eligible for minimum wage and overtime pay and further argued that

[3] Although Newcastle's attorney used the term "directed finding," when bringing defendant's motion before the circuit court, the proper characterization of Newcastle's motion was actually a motion for a judgment in its favor at the close of plaintiff's case. See 725 ILCS 5/2-1110 (West 2012); see also *Barnes v. Michalski*, 399 Ill. App. 3d 254, 262 (2010) (detailing the differences between motions for directed verdicts applicable to jury trials and motions for a judgment in a defendant's favor at the close of the plaintiff's evidence, which are applicable to bench trials).

Evans's testimony was speculative and insufficient to establish that he eligible for any relief. Defense counsel emphasized that Evans was unsure as to his last day of employment and that he had "destroyed" the records in which he purportedly tracked the hours he had worked.

¶ 15 In response, Evans's attorney acknowledged that the loss of his client's calendar record was "unfortunate," but argued that it did not constitute a sufficient reason to "terminate the case and dismiss [his client's] claims."

¶ 16 After considering the evidence presented and the arguments of the parties, the circuit court granted Newcastle's motion for a judgment in its favor at the conclusion of plaintiff's evidence. The court explained its rationale as follows:

> "[T]he complaint allegation was he worked until January 2011, which is about eight months, and he made about 60 to $70,000 during that time by his own testimony.
>
> And now in order to establish this claim under the Illinois minimum wage law, we have to have some good guidelines in terms of not records, but we need a little something to put on the scales here to tip it in favor of Mr. Evans.
>
> There were other people working in the Lombard office, seven people he said. There's no requirement that he bring any one, two, three or four or none of those persons here to corroborate the hours that he testified that he put in on a regular basis. There's no requirement.
>
> But in building a case, the plaintiff has the burden of proof, and it helps if there's some corroboration.
>
> This is a fast moving business, and I'm sure most of those people are gone or fell by the wayside in the crash that we had and maybe went to other occupations. ***

I mean, Mr. Evans can testify as to his own recollection of his hours. That by itself under certain circumstances could sustain his burden of proof.

But I'm troubled by just the weight or lack of weight of evidence I have here, and that is I'm not blaming Mr. Evans. I mean, when you're working hard, you can't keep track of what your hours are and how many hours a day you work. You just go to work.

He is in this business that by [and] far is compensated by commission, and just based on what I have seen here and the evidence that's presented, the plaintiff has the burden by a preponderance of the evidence to carry the day to proof, and I just don't think that its burden of proof has been met in the light most favorable to the plaintiff here, that there's not sufficient evidence with specificity.

We've just got a generic description of the work, place, the hours. Sometimes he goes to lunch. Sometimes he doesn't, four years ago, five years ago really.

I'm not pointing a finger or blam[ing] Mr. Evans for not having presented corroboration, but it's not corroborated, I don't think, based on what I have seen here that the plaintiff has met his burden of proof. So there's a finding in favor of the defendant on the complaint."

¶ 17 This appeal followed.

¶ 18 ANALYSIS

¶ 19 On appeal, Evans argues that the circuit court erred in granting Newcastle's motion for a finding in its favor at the close of plaintiff's evidence. He argues that his testimony was uncontradicted and, as a result, the circuit court's determination that he did not satisfy his burden of proving that he failed to receive the requisite compensation to which he was entitled is against the manifest weight of the evidence.

¶ 20 Newcastle responds that Evans's challenge to the circuit court's order lacks merit because "[he]did not establish his claims." In pertinent part, Newcastle argues that the "evidence" Evans presented in an effort to substantiate his claims was "not based on actual records of hours he worked;" rather, his evidence merely consisted of estimations and conjecture.

¶ 21 In a bench trial, the circuit court is the trier of fact and is entrusted with evaluating the evidence and, if necessary, resolving any conflicts in the evidence and making credibility determinations. *Bazydlo v. Volant*, 164 Ill. 2d 207, 214-25 (1995); *Barnes v. Michalski*, 399 Ill. App. 3d 254, 262-63 (2010). In accordance with section 2-1110 of the Civil Code, a defendant, may, at the conclusion of the plaintiff's case during a bench trial, move for a finding or judgment in its favor. 735 ILCS 5/2-1110 (West 2012); *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003). When ruling on such a motion, the circuit court must engage in a two-prong analysis. *Sherman*, 203 Ill. 2d at 275; *Barnes*, 399 Ill. App. 3d at 263; *Baker v. Jewel Food Stores, Inc.*, 355 Ill. App. 3d 62, 66 (2005). When employing this analysis, the court must first determine, as a matter of law, whether the plaintiff has established a *prima facie* case. *Sherman*, 203 Ill. 2d at 276; *Baker*, 355 Ill. App. 3d at 66. A plaintiff sustains his burden of presenting a *prima facie* case by proffering "at least 'some evidence on every element essential to [the plaintiff's] underlying cause of action.' " *Sherman*, 203 Ill. 2d at 275 (*quoting Kokins v. Kotrich*, 81 Ill. 2d 151, 154 (1980)). If, upon consideration, the court finds that the plaintiff has not sustained his burden of establishing a *prima facie* case, the court should grant the defendant's motion for a judgment in its favor. *Sherman*, 203 Ill. 2d at 275; *Baker*, 355 Ill. App. 3d at 66. If the court grants the defendant's motion at this stage, the court's ruling will be subject to *de novo* review on appeal. *Sherman*, 203 Ill. 2d at 275; *Barnes*, 399 Ill. App. 3d at 264. That is because

a court's determination as to whether a plaintiff failed to present a *prima facie* case is an issue of law. *Sherman*, 203 Ill. 2d at 275; *Baker*, 355 Ill. App. 3d at 66.

¶ 22 If, however, the circuit court finds that the plaintiff has met his burden of establishing a *prima facie* case, the court will then move to the second-prong of the relevant inquiry, in which the court will weigh the evidence and assess the credibility of witnesses. *Sherman*, 203 Ill. 2d at 276; *Baker*, 355 Ill. App. 3d at 66. "The second phase recognizes that even though the plaintiff has presented some evidence on every element of the cause of action, the trial court, as the weigher of evidence, might not necessarily find the evidence as to one or more of the elements to be convincing enough to qualify as proof by a preponderance of the evidence ***." *Barnes*, 399 Ill. App. 3d at 264. During this stage, the court must consider all of the evidence presented, draw reasonable inferences therefrom, and make credibility determinations. *Sherman*, 203 Ill. 2d at 276; *Baker*, 355 Ill. App. 3d at 66. In doing so, "the court is not to view the evidence in the light most favorable to the plaintiff," and as such, the court's consideration of all of the evidence "may result in a negation of some of the evidence presented by the plaintiff." *Sherman*, 203 Ill. 2d at 276. If, upon consideration of all of the relevant evidence, the court finds that the plaintiff is unable to carry his ultimate burden of proof, then the circuit court should grant the defendant's motion for a judgment in its favor. *Barnes*, 399 Ill. App. 3d at 264. That is because, "[i]f the court already knows, at the close of the plaintiff's case, that it will not find in the plaintiff's favor on the basis of the evidence the plaintiff has presented, because the quality and the credibility of the evidence, in the court's view, fail to satisfy the ultimate burden of proof, there is no point in going on." *Id.* If the circuit court grants the defendant's motion at this stage, its ruling will not be disturbed unless it is against the manifest weight of the evidence. *Sherman*, 203 Ill. 2d at 276; *Barnes*, 399 Ill. App. 3d at 264; *Baker*, 355 Ill. App. 3d at 62. A judgment will only be found to

be against the manifest weight of the evidence where it is unreasonable, arbitrary or not based on the evidence. *Barnes*, 399 Ill. App. 3d at 264-65.

¶ 23 In this case, Newcastle does not discuss the applicable standard of review, whereas Evans submits that the manifest weight of the evidence standard is the applicable standard of review. We agree with Evans. In order to ascertain the appropriate standard of review, a reviewing court must determine which phase of the aforementioned two-pronged inquiry informed the circuit court's ruling. In doing so, a reviewing court should look to the rationale employed by the circuit court when granting the defendant's motion to determine whether or not the court weighed the evidence that the plaintiff presented or made any credibility determinations. See, *e.g.*, *Barnes*, 399 Ill. App. 3d at 265 (reviewing the words used by the circuit court when ruling on the defendant's 2-1110 motion to determine the phase in which the court granted the defendant's motion for a judgment at the close of the plaintiff's case); *Baker*, 355 Ill. App. 3d at 67 (same). Here, during the circuit court's consideration of Newcastle's motion for a judgment in its favor at the close of plaintiff's evidence, the court referenced the preponderance of the evidence standard, the standard that Evans was required to satisfy to substantiate his claims. In addition, the court clearly weighed the evidence, noting that Evans merely provided "a generic description of the work, place, [and] the hours" and no corroborating evidence. Given the circuit court's analysis and its express rationale when granting Newcastle's motion for a judgment in its favor, it is evident that the court reached the second-prong of the analysis and accordingly, the manifest weight of the evidence standard applies. See, *e.g.*, *Barnes*, 399 Ill. App. 3d at 265 (concluding that the circuit court reached the second-prong of the analysis when granting the defendant's 2-1110 motion based on the court's reference to the plaintiff's ultimate burden of proof); *Baker*, 355 Ill. App. 3d at 67 (finding that the circuit court

granted the defendant's 2-1110 motion during the second-prong of the analysis where the court's statements revealed that the court considered and carefully weighed all of the evidence). Keeping this standard in mind, we turn to the merit of Evans's appeal.

¶ 24 The Illinois Minimum Wage Law (Wage Law) sets forth the applicable minimum wage (820 ILCS 105/4(a)(1) (West 2012)) and overtime standards (820 ILCS 105/4a (1) (West 2010)) and is designed to ensure that individuals receive payment at a level consistent with their health, efficiency and general well-being (820 ILCS 105/2 (West 2010); *People ex rel. Department of Labor v. MCC Home Health Care, Inc.*, 339 Ill. App. 3d 10, 21 (2003)). Section 12 of the Wage Law allows an employee who believes he has been "paid by his employer less than the wage to which he is entitled" to file a civil action against his employer or to seek relief through the Illinois Department of Labor. 820 ILCS 105/12 (West 2010).

¶ 25 In this case, the circuit court's decision to grant Newcastle's 2-1110 motion was based on its conclusion that Evans's testimony concerning the hours he worked and his compensation lacked sufficient specificity. As a threshold matter, the circuit court noted that Evans, by his own admission, testified that he was paid $60,000 to $70,000 during his tenure at Newcastle, an amount that exceeds minimum wage standards.[4] In addition, the court, upon reviewing Evans's testimony, observed: "We've just got a generic description of the work, place, the hours." Indeed, when asked to quantify his work hours, Evans's could only provide general estimates, which he prefaced with qualifying language. For example, testified that he "probably" worked around 55 hours per week. When asked to detail his typical work schedule, Evans testified that he worked from 8 a.m. until usually 6 p.m. or 8 p.m. during the work week. Sometimes he went to lunch whereas on other occasions he worked through lunch. In addition, Evans testified that

[4] The minimum wage was $8 per hour from January 1, 2010, until June 30, 2010. The minimum wage increased to $8.25 per hour on July 1, 2010. See 820 ILCS 105/4(a)(1) (West 2010).

he "usually" worked three out four Saturdays per month, but explained that his weekend hours were dependent upon "how [his] day or month was going." He estimated that his weekend hours were "usually 8 [a.m.] or 9 [a.m.] to 3 [p.m.] or 5 [p.m.]." Evans also lacked specificity regarding the length of his tenure at Newcastle. Although his employment contract was signed on April 23, 2010, Evans testified that he actually began working for the company sometime in either January or February of 2010. Moreover, at trial, Evans was also unable to identify the last day that he worked for Newcastle and his complaint simply alleged that he worked for the company "through January 2011."

¶ 26 We acknowledge that Evans was required to provide estimates to quantify the time he spent working at Newcastle because Newcastle did not keep or produce time records. Evans, himself, apparently did keep records, but his records were thrown out prior to trial. We further acknowledge that in instances in which an employee seeks compensation from an employer that did not keep time records, the employee may in certain circumstances satisfy his burden of proving the wages to which he believes he is entitled by providing " 'reasonable and creditable estimates.' " *Gilbert v. Old Ben Coal Corp.*, 85 Ill. App. 3d 488, 494-95 (1980) (quoting *Brennan v. Parnham*, 366 F. Supp. 1014, 1025 (1973)) (analyzing the employee's burden in the context of an action seeking unpaid overtime compensation under the Fair Labor Standards Act).[5] Generally, however, "mere estimates of hours of work performed, without more, are not, one may infer, 'sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.' " *Gilbert*, 85 Ill. App. 3d at 495 (quoting *Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680, 687-88 (1946). Here, the circuit court expressly found that Evans's general estimates were not sufficient, standing alone, to satisfy his burden of proof, and that the

[5] The Illinois Wage Law parallels the federal Fair Labor Standards Act of 1938 (29 U.S.C.A. § 201 *et seq.* (West 2010)) and the same analysis generally applies to both statutes. See *Haynes v. Tru-Green Corp.*, 154 Ill. App. 3d 967, 977 (1987); *Zampos v. W & E Communications, Inc.*, 970 F. Supp. 2d 794, 806 (N.D. Ill.2013).

lack of corroborating evidence was fatal to his claim. Given the record, the circuit court's conclusion that Evans failed to satisfy his burden of proof cannot be deemed unreasonable, arbitrary, or not based on the evidence.[6]

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court is affirmed.

¶ 29 Affirmed.

[6] We note that the circuit court did not address Evans's employment status or Newcastle's claim that Evans was an outside salesman who fell outside of the purview of the Wage Law when it granted Newcastle's 2-1110 motion. Instead, the court's ruling was based solely on its conclusion that Evans failed to present sufficient specific evidence to substantiate his claim that he failed to receive appropriate compensation. Having found that Evans failed to satisfy his burden of proof regarding the wages to which he believed he was entitled, we need not address Newport's claim concerning Evans's employment status under the Wage Law.