2018 IL App (2d) 170394-U
No. 2-17-0394
Order filed April 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIRST FENCE, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 16-SC-2399
	)	
ANTHONY MORELLI,	)	Honorable
	)	Patrick J. O'Shea,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's factual findings failed to resolve the factual and legal issues in this case; the judgment is vacated and the cause is remanded.

¶ 2 Plaintiff, First Fence, Inc., appeals a judgment entered after a bench trial for defendant, Anthony Morelli, in an action to recover on a contract to install a fence. Plaintiff contends that the trial court essentially ignored evidence that plaintiff fulfilled its contractual obligations but was instructed not to do so. Plaintiff argues alternatively that the court should have found that it substantially performed the contract. We vacate and remand.

¶ 3 Plaintiff's complaint alleged as follows. On May 7, 2015, the parties signed a contract for plaintiff to build the fence on defendant's property. The total cost was $4,780 and defendant paid $2,390 down. On September 23, 2015, plaintiff installed the fence. Defendant did not pay the balance due. Plaintiff requested $2,452, which included $62 for the cost of a permit, plus contractual attorney fees and prejudgment interest. The complaint attached a copy of the contract. Defendant signed the contract, but it listed the customer's name as "Samantha Morelli."

¶ 4 At trial, defendant proceeded *pro se*. Plaintiff first called John Buenz, its owner, who testified on direct examination as follows. On September 24, 2015, he sent defendant an invoice for $2,452. Defendant did not pay. A second invoice, dated January 7, 2016, had not been paid either. After the initial installation of the fence, defendant called Buenz and said that he wanted it to extend further. Buenz agreed and sent a crew out to extend the fence.

¶ 5 On cross-examination, defendant asked Buenz whether, "when the crew came out to [extend] the fence *** in September, which was eighteen weeks after the initial installation happened," anybody from plaintiff's office called defendant "to schedule an appointment to come out." Buenz replied that "they called several times, but *** nobody answered the phone." He added that he had not made the calls but was told about them.

¶ 6 Plaintiff next called Roberto Payan, its installation manager. Payan testified that sometime after the initial installation, he learned that defendant's wife wanted the fence to be extended "further down." Plaintiff sent a crew and Payan to examine the property to extend the fence. Ultimately, the fence ended up where it had been originally. Payan testified:

> "When we first came out—I am not sure, but I think she left, and when she came back she saw where the fence ended and she didn't like it.

> So then the crew called me and said, the fence was supposed to go past the window. So I went, I think I came back and looked at the contract and, you know, we did what the contract says.
>
> So then I told her, his wife, that if the fence needs to be moved, I didn't have an extra panel to do it. And she told me to leave it as it is, that she was going to talk to [defendant]. So that is what happened that day."

¶ 7 Payan testified that these events happened on the day of the "original installation."

¶ 8 Payan testified that crews later revisited the property but "never moved the fence where she wanted it." Payan called defendant's wife several times but never got a response, so he sent a crew back to the property. The crew called him and said that they had spoken with defendant's wife. Payan went to the property. His testimony continued:

> "I came again to the property, and when I got there she was getting out of the garage, and we tried to talk to her and she ignored us and walked away.
>
> And I told the crew to move the fence where she wanted it. And they did that. And when she came back the crew told me that she told them to put the fence back where it was after they moved it, you know, to where it was."

Payan added that the crew "put [the fence] back to where it was originally."

¶ 9 On cross-examination, defendant asked Payan whether he recalled "scheduling the crew to come out 18 weeks after the original installation in September of 2015 to move the fence per our discussion." Payan did not so recall. He did not recall defendant being present on September 23, 2015, when the crew came out, or defendant permitting the crew to extend the fence.

¶ 10 On redirect examination, Payan testified that, when the crew returned to extend the fence, it did so at defendant's request. He had not said that he no longer wanted the extension.

¶ 11 Called as an adverse witness, defendant testified as follows. After the initial installation, his only "issue" was that he wanted the fence to be extended four feet, so as to conform to the contract. He contacted plaintiff, which agreed to extend the fence. He "believe[d]" that a crew came out to extend the fence, but he was not present at the time. Plaintiff rested.

¶ 12 Defendant testified as follows. On June 3, 2015, he called Payan and asked whether a crew was going to return and extend the fence. Payan responded that a crew would come out within a few weeks and that he would call defendant to schedule the visit. Over several more weeks, defendant called and left messages with plaintiff. The court admitted records of the calls.

¶ 13 Defendant then introduced defendant's exhibit No. 13, and identified it as "the original diagram" provided by plaintiff's sales representative. It showed "the length of the fence that was supposed to be installed to the left of the gate." On the diagram, defendant had marked "the 12 feet that was actually installed" by plaintiff.

¶ 14 In its closing argument, plaintiff stated as follows. After plaintiff installed the fence, defendant "had an issue with a four-foot section" of "the 177 feet of fence that was to be installed." Defendant asked plaintiff to extend the fence, and plaintiff agreed. On September 23, 2015, a crew extended the fence, thus completing the installation required by the contract. However, defendant's wife told the crew to "move it back," and the crew obeyed her direction. The fence had been installed properly; the only problem had been the four-foot shortfall, which, on September 23, 2015, "was fixed and then *** replaced at the request of the homeowner. The contract was completed at that point" and plaintiff should receive the balance due, attorney fees, and interest, totaling $2893.36.

¶ 15 Defendant argued primarily as follows:

> "The contract *** was with myself. It was not with my wife. My wife had no authority or no knowledge [*sic*] of where the fence should or shouldn't be. I established that from day one with the sales representative when I invited him to the house to walk the property with me. So I feel that all point of contract [*sic*] should have been directed directly [*sic*] with me, and all decisions about what should or should not be done should have been under my ruling [*sic*]."

¶ 16 On questioning by the court, defendant agreed that his "only contention" was that the fence should have been extended four feet. The court did not allow plaintiff any rebuttal closing argument.

¶ 17 The court began its ruling by stating, "[A]s far as moving the fence, obviously, I have heard a lot of testimony regarding that. But that is not really what this is about. This is about the fact that it did not extend an additional 4 feet," as indicated on defendant's exhibit. The court noted next that the case had been tried "on the basis of an all or nothing. In other words, there [was] no quantum meruit requested" and no evidence of what it would have cost to extend the fence four feet. The evidence showed that the contract required the fence to extend 16 feet from the gate near the front door. Defendant had testified that, although he had wanted this distance, the actual distance was only 12 feet. The court continued:

> "[F]orget about the conversations between the plaintiff and defendant and their workers and their wives, the print says 16 feet between that gate *** and the bush, and it's supposed to be 16 feet from the gate to the end of the fence.
>
> * * *
>
> The distance between that fence post and the *** end of the fence is, as the defense claims, 12 feet. However, the contract and print shows [*sic*] 16 feet. ***

* * *

So it does not conform with the contract showing 16 feet. And that is irregardless [*sic*] of what was said, what was agreed. That is exactly what the defendant is claiming. His bone of contention was [that] it was not done pursuant to the contract, it should have been 16 feet; it's more 12 [*sic*]. That is the area.

* * *

Defense claimed that it was not done pursuant to the contract. The Court agrees, finding for the defendant. That is the ruling of the Court."

¶ 18 Plaintiff moved to reconsider. The motion contended that, although the length of the fence did not conform to the contract, plaintiff had nonetheless performed all of its obligations, and that when defendant's wife then directed the crew to undo the extension, she prevented plaintiff from conforming to the contract. Thus, plaintiff should recover the balance due. Plaintiff argued alternatively that it had substantially performed under the contract, because, even with the alleged shortcoming, the contract's essential purposes had been fulfilled. The court denied the motion and plaintiff timely appealed.

¶ 19 On appeal, plaintiff contends that the trial court's judgment was against the manifest weight of the evidence, because the trial court failed to consider the uncontradicted evidence of interference with its completion of the contract. Plaintiff argues alternatively that it should have been awarded a portion of the balance due, based on substantial performance.

¶ 20 Defendant has not filed a brief. However, we may decide the appeal on its merits. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 21 To the extent that the trial court's factual findings are at issue, we will not disturb them unless they are against the manifest weight of the evidence. *Commonwealth Edison Co. v. Elston*

Avenue Properties, LLC, 2017 IL App (1st) 153228, ¶ 12. However, to the extent that the court's application or misapplication of the law is involved, our review is *de novo*. *Id.*; *Guerrant v. Roth*, 334 Ill. App. 3d 259, 262 (2002).

¶ 22 Here, plaintiff contends primarily that the trial court ignored or discounted Payan's testimony that (1) plaintiff's crew extended the fence the required four feet, thus fulfilling its last remaining contractual obligation, and (2) at the unambiguous direction of plaintiff's wife, the crew moved the fence back, leaving it four feet short of the contractually required length. Plaintiff notes that the trial court stated that the failure to conform to the contractual terms required a judgment for defendant, irrespective of the reason for that failure.

¶ 23 We generally agree with plaintiff, albeit in somewhat different terms. Here, plaintiff argued that it fulfilled the contract when it resolved the sole issue by extending the fence to the location specified in the contract—only to have its action frustrated by the command of defendant's wife to return the fence to where it had been. Despite the trial court's lack of interest in "the conversations between the plaintiff and defendant and their workers and their wives," the role of defendant's wife should not have been ignored. While the trial court may have been correct, in the most literal sense, that plaintiff failed to perform as required by the contract, what the trial court failed to consider—and indeed what is the core issue in this case—is *who* were the parties to the contract, and whether Mrs. Morelli was one of those parties.

¶ 24 We are unable to resolve that core question on our own because Mrs. Morelli's role in this case is not easy to discern from the record. There is evidence that Mrs. Morelli may have been a party to the contract, although not to the suit. Assuming that "Samantha Morelli" is defendant's wife and not anyone else, the contract clearly listed "Samantha Morelli" as the "Customer." The contract did not list defendant as a "Customer," but defendant signed the

contract under the label "Buyer." We cannot say as a matter of law that defendant's wife was not a party to the contract or, even were she not a party, that she did not have the authority (actual or apparent) to direct the crew on how and where to install the fence.

¶ 25 We recognize that, in his closing argument, defendant stated that the contract had been between plaintiff and him, not between plaintiff and his wife. Aside from the fact that the written contract appears to say otherwise, plaintiff's statement was not supported by any evidence at the trial. Specifically, neither defendant nor anybody else testified about his alleged conversation with plaintiff's sales representative on "day one." Defendant, proceeding *pro se*, apparently was unaware that closing argument was not his time to testify. While it does not appear that the trial court placed any weight on his testimony in closing argument, we must still note that we cannot treat his unsworn and un-cross-examined remarks as evidence. That being so, *no* evidence compels the inference that defendant's wife was *not* a party to the contract.

¶ 26 Were Mrs. Morelli a party, then it is possible, as plaintiff asserts, that plaintiff's nonperformance might be excused. Under the wrongful prevention doctrine, "a party who prevents the fulfillment of a condition upon which his own liability rests many not defeat his liability by asserting the failure of the condition he himself has rendered impossible." *Cummings v. Beaton & Associates Inc.*, 249 Ill. App. 3d 287, 306-07 (1992); see also *Grill v. Adams*, 123 Ill. App. 3d 913, 918 (1984); *Consumers Construction Co. v. Cook County*, 1 Ill. App. 3d 1087, 1093 (1971). The underpinnings of this doctrine are simple: The law imposes a duty on one party to a contract not to interfere with the other party's completion of the contract (*Hansen v. Johnston*, 111 Ill. App. 2d 88, 95 (1969)), so, when performance has been prevented, the law prohibits the party from profiting through his own wrongdoing (*Cummings*, 249 Ill. App. 3d at 307).

¶ 27 We need not consider plaintiff's argument concerning substantial performance—*i.e.*, that the trial court should have awarded it the balance due, minus the value of the four feet of fence not constructed—since that issue was not directly raised at trial. We note, as the trial court did, that plaintiff apparently went for "all or nothing" and never argued for substantial performance or *quantum meruit* at trial. We may not reverse the trial court on grounds that were not advanced in the trial court. *Kravis v. Smith Marine, Inc.*, 60 Ill. 2d 141, 147 (1975)).

¶ 28 The unanswered question regarding Mrs. Morelli's status under the contract prevents us from either affirming or reversing the trial court's judgment. Therefore, we vacate the judgment and remand for the trial court to provide complete findings that resolve the factual issues underlying plaintiff's theory of recovery. The trial court may permit the parties to amend their pleadings or they may hear additional evidence if it sees fit.

¶ 29 The judgment of the circuit court of Du Page County is vacated, and the cause is remanded.

¶ 30 Vacated and remanded.