

No. 1-10-0337

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FIFTH DIVISION
June 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JULIO HERNANDEZ,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	No. 2007 L 005023
J & B CONSTRUCTION, INC.,)	
)	Honorable
Defendant-Appellee.)	Daniel Pierce,
)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein
concurred in the judgment.

O R D E R

HELD: We reverse the trial court's judgment in defendant's favor because the trial court's findings that defendant did not breach a contract by failing to complete construction of a roof on plaintiff's building, and that plaintiff failed to properly mitigate his damages even if such a breach occurred, were against the manifest weight of the evidence.

Plaintiff Julio Hernandez appeals from an order granting

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judgment in favor of defendant J & B Construction, Inc. (J&B), in a breach of contract action. Following a bench trial, the circuit court held Hernandez failed to establish that J&B did not complete the contracted construction project, failed to show J&B caused damages to the property and failed to mitigate damages. Plaintiff appeals, contending the trial court erred by finding in defendant's favor. For the reasons set forth below, we reverse the trial court's decision and remand for further proceedings consistent with this order.

BACKGROUND

Plaintiff Julio Hernandez filed a complaint on May 17, 2007, alleging that he contracted with the defendant J&B for improvements to a building he owned at 1028 W. Cullerton Ave., in Chicago, at a cost of \$92,500.

The complaint alleged Hernandez paid J&B in excess of \$100,000 but the work performed, and lack thereof by J&B, left the building in a deteriorated condition requiring it to be demolished. The complaint alleged J&B breached its contractual obligation by failing to complete the work pursuant to the contract and its addenda #1 and #2. Hernandez is seeking damages in excess of \$50,000. The complaint also alleged that J&B fraudulently represented the work would be performed with the knowledge that no such performance would occur.

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J&B filed a section 2-615 motion to dismiss the fraud allegation of the complaint (735 ILCS 5/2-615 (West 2006)). J&B then answered the complaint, denying all allegations. The trial court granted J&B's motion to dismiss the fraud count.

At trial, Hernandez testified that in 1993 he purchased a two-unit home at 1028 W. Cullerton in Chicago. He lived on the first floor and rented the second floor. On January 12, 2006, Hernandez contracted with J&B to install a basement, repair the second floor, place siding on the building and replace the roof for a cost of \$92,500. The document representing the contract is one of 24 exhibits that the parties set for admission into evidence by stipulation prior to trial.

The contract states, in part:

"The following constitutes substantial completion of work pursuant to this proposal and contract:

Basement Job: Install new concrete foundation walls with [c]oncrete blocks, install new concrete floor, install new 36" steel front door and 32" steel back door. Install one new full bath room, install wood framing, install drywalls around the walls and ceilings, install necessary electrical

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lights and outlets, paint one coat of primer and two coats of eggshell white in all new drywalls, install laundry room, install new water pipe and drain pipe.

First floor: Relocate the water heater and laundry area, level the sub floor from kitchen to living room area, install new hard wood floor, install new HVAC with complete air duct ***, relocate the entrance door.

Second floor: Level the sub floor, install new HVAC with complete air duct, relocate water heater, [redesign] all the rooms as per code, remodel the kitchen area with new oak cabinets counter tops sink and plumbing fixture and install new hard wood floors, [p]aint all walls and ceilings and install new interior doors.

Sidings and Roof Structure: install new sidings, install new roof, repair all broken roof trusses and re-cap all windows with aluminum metal."

In respect to payment, the contract calls for "Progress Payments" and states:

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"Payments of the Contract Price shall be paid in the manner following: (Specify) Two Thousand Dollars for paper work after signing the contract, 20% after issuing the construction permit and the rest will be progress payment."

Addendum #1 states:

"After signing this proposal we need to collect at least 30% of total additional cost, amount of \$20,000.00 and the remaining balance will be progress payment."

Addendum #2 states:

"[P]ermit fee of this additional job is not include[d], additional cost to provide permit and [s]tructural drawing will be collected if we need to f[i]ll out permits from the [C]ity of Chicago. After signing this proposal we need 30% of the total cost to start the additional job."

The contract did not explain what constituted a proper "progress payment."

The record contains copies of seven cancelled checks from Hernandez to Benedict Bernardo, president of J&B, totaling

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\$105,000. The parties stipulated to admitting the checks into evidence at trial.

Hernandez testified that Bernardo informed him the work would take three to four months to complete. Hernandez testified that Bernardo was responsible for obtaining building permits from the City of Chicago. One week after the contract was signed, Hernandez paid Bernardo \$5,000.

In February 2006, J&B began work on the property. That same month, the south wall of the building collapsed. On March 18, 2006, the parties executed addendum #1 where J&B would rebuild the wall at a cost of \$65,800. Hernandez testified that in April 2006, the drywall in the front part of the house collapsed and the building was no longer liveable. He then moved out and did not return.

Hernandez said the parties executed addendum #2 on September 30, 2006, detailing reinforcement of the structure at a cost of \$38,500. Hernandez testified that Bernardo promised the work would be completed by December 2006. Hernandez testified that very little work had been performed and he had paid Bernardo a total of \$116,000.

At the end of October 2006, J&B removed the roof. The last time Hernandez observed J&B work on his building was in November 2006. The City of Chicago then ordered Hernandez to demolish the

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building on May 13, 2008, stating the structure was unsafe and beyond reasonable repair. Hernandez demolished the building at a cost of \$19,300. Hernandez is currently trying to sell the property.

On cross-examination, Hernandez testified that work was being performed on the building by J&B but very slowly. In September 2006, Hernandez told Bernardo that progress on the building was too slow. J&B had excavated the basement but had not laid the foundation. Hernandez said he did not know the age of the building, and admitted that it leaned to one side.

Hernandez's son, Julio Cesar Hernandez, testified he lived on the property in 2006. Cesar Hernandez testified J&B workers began digging for the installation of a basement in February 2006 and stopped work when the wall collapsed. Hernandez testified his father was in Mexico at this time. He informed him via telephone that work had stopped.

On cross-examination, Cesar Hernandez said the house did not lean, it was uneven. In February 2006, the exterior wall collapsed and in April 2006 the interior wall collapsed. Cesar Hernandez said work then stopped until his dad returned from Mexico.

Architectural and structural engineering consultant Lindsay Anderson, who the parties stipulated was an expert witness,

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testified that he examined the property on May 4, 2007. He observed a "repair and replace permit" issued by the City of Chicago. Anderson said the work performed on the building was outside the scope of the permit. He observed a partially completed foundation constructed of concrete block. In several areas the concrete did not extend up to the underside of the "sill plates." Anderson observed that the walls were extremely wet and water was infiltrating directly through the concrete block walls. Anderson testified:

"Shoring is everything in a project like this. If you don't shore adequately, if you don't make some provision for holding the existing building in place while you're digging, there's a very likely chance of collapsing the entire buildings."

Anderson testified that he observed mold and that the floor and the walls on the first floor of the building were extremely wet because water had been pouring in from the lack of a roof. Anderson said the roof was covered with a tarp containing holes and the second floor was wet like the first floor. Anderson explained the tarp had deteriorated from exposure to the weather.

Anderson said the proper procedure to replace a roof begins with making sure the weather is going to be dry for three to four

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days to a week then have sufficient crew and materials in place.

Anderson testified:

“For a structure of this sort, you’re talking maybe three to five days with a sufficient crew to do the work.

But I mean it’s not something you would ever undertake without making absolutely sure you’ve got everything ready to go, and absolutely sure that the weather is going to be cooperative.”

Anderson explained there was no aspect of the work performed on the building that he would say was substantially complete. He said the value of the work that had taken place was about \$30,000, and that the amount of damage that occurred because the work was not complete “was vastly in excess of that.” Anderson testified that the cost to replace the building would be \$250,000 to \$270,000. Anderson said it would not be economically feasible to attempt to rehabilitate the existing structure.

Anderson testified that the standard industry payment procedure is for the property owner to pay as work is completed. Anderson said:

“Paying in advance is foolhardy. Even if you have a contractor that doesn’t have

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much in the way of wherewithal, you can agree to pay for the materials delivered and then pay for the work as it's put in place. But to pay up front and to pay way, way in front, what we call front-loading the project is just, is ludicrous."

On cross-examination, Anderson testified that walls should not collapse when installing a new concrete foundation. Anderson said:

"That certainly is work that was substandard. Under no circumstances should those walls have collapsed. They should not have been allowed to collapse. They should have been adequately supported."

Anderson explained that the agreement dated March 18, 2006, was insufficient to fix the collapsed walls and "it doesn't make sense."

Bernardo, who the parties stipulated was an expert witness, testified he inspected the property prior to beginning construction and observed that the building was "laying down on the right side" and the basement was flooded. Bernardo testified he informed Hernandez that he could not give him a time-frame for completion of the work "because of the situation of the

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property." He explained a construction job such as this one should take about six months.

Bernardo testified that when he began construction of the basement, he discovered there were no "concrete footings," which is a structure required to hold the concrete foundation wall. As a result, he needed to "secure" the basement before performing any work on the upper floors. Bernardo testified he discussed the matter with Cesar Hernandez because Julio was in Mexico. He stopped work on the building until Julio returned from Mexico.

Bernardo testified that when Hernandez returned from Mexico they discussed the need to secure the building. Bernardo said he told Hernandez the back brick wall would collapse if he attempted to jack up the house. Bernardo testified that the parties then executed the agreement dated March 18, 2006, for the purpose of fixing the back brick wall.

Bernardo testified there was no way to prevent the wall from collapsing. The only thing he could do was protect the neighboring structures from receiving damage once the wall collapsed.

Bernardo's crew began construction on the concrete foundation, placing nearly 30 steel posts to hold the wall. All the digging had to be performed by hand because there was not space large enough to bring in equipment. Bernardo testified he

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spent \$10,000 for a dumpster to hold the debris removed from digging the basement. The record does not contain a receipt or cancelled check for this expenditure.

Bernardo testified that by September 2006, he completed the foundation, first floor framing, and siding on the back of the house. By the end of October 2006, he replaced the sidewalk and upgraded the electrical.

Bernardo testified that he completed more than \$100,000 worth of work on the property by the end of October 2006, when he stopped work on the property, and was paid \$80,000. The parties executed a document on September 30, 2006, which is nearly identical to addendum #2, but does not contain a cost and has language handwritten on the bottom. Bernardo testified that the hand-written note on the agreement reads:

"We try, me and my crew, finish this job
by December, 2006, but we're not liable for
any delay of permit nor weather problem."

Bernardo testified he informed Hernandez that he needed a drawing from a structural engineer before performing any more work on the property. Bernardo testified there were additional problems with the work:

"Every time we jack it up, the wall was
cracking. All the wood framing cracking."

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Even the roof was cracking. So I decide to take it out the shingles, because they have like four layers of shingles there, the old houses."

Bernardo testified he received a payment from Hernandez in October 2006 and continued working until March 2007. He stopped work because he did not receive additional payment from Hernandez. Bernardo testified he submitted an invoice to Hernandez on May 2, 2007, seeking \$55,500 for services performed. Bernardo said Hernandez did not respond to the invoice.

Bernardo testified that the building was in an unsafe condition, and that he did not have the proper permit because he needed to submit a drawing from a structural engineer. The following testimony occurred at trial:

"Q: And when did you mention that to Mr. Hernandez?

A: When I gave this additional job, like about September 30, 2006.

Q: And what did you specifically tell him?

A: I tell him I need to have engineering drawing for this, but they keep telling me to continue the work. So I don't have any

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choice because I already involved. And then if I stop working and then protect or support the house, I'd have a problem too. So I don't have any choice. I need to continue working.

Q: And did he express any frustration at what you were saying to him?

A: Yes. He got frustration because they see the house itself is in really bad shape."

Bernardo said all the work performed on the house was proper and reasonable. He testified that he abandoned the property in March 2007 because he was not being paid.

In regards to the moisture on the property, Bernardo said it was normal because of the weather. In addition, there was already moisture there because the roof was in bad shape. Bernardo testified he did not complete the roof because of lack of funds but he secured it with tarps before he vacated the project.

On cross-examination, Bernardo said he knew the wall was going to fall and informed Hernandez. He placed 12 steel posts in the basement to support the wall.

Bernardo testified he paid out labor costs somewhere between \$25,000 and \$30,000. In interrogatory number 10, Bernardo had

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stated he paid \$7,700 in labor costs. Bernardo testified his answer to interrogatory number 10 did not include labor costs paid to his electrical subcontractor and his plumbing subcontractor. A receipt or invoice regarding the labor costs paid to those subcontractors is not included in the record.

Bernardo testified he visited the site regularly to make sure the tarp on the roof was secure. He testified he completed the basement according to the contract.

The trial court found Hernandez had not met his burden of proof in establishing a breach of contract by defendant. The trial court stated:

"The conflicting evidence as to the cause of the failure to complete the construction project and the substantial issue regarding causation of the claimed damages along with the failure to satisfactorily demonstrate mitigation of damages requires judgment to be entered in favor of Defendant and against Plaintiff."

This appeal followed.

ANALYSIS

I. Breach of Contract

Hernandez contends the trial court erred by ruling in J&B's

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favor because the trial evidence and testimony clearly established a breach of contract by J&B.

Initially, we note defendant-appellee has not filed a brief in this court. However, we find the issues and claimed errors in this case are uncomplicated enough that we can reach the merits of plaintiff's contentions without defendant's opposing brief. See *First Capital Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

The applicable standard of review in a breach of a home repair contract case is whether the ruling of the trial court was against the manifest weight of the evidence. *Meyers v. Woods*, 374 Ill. App. 3d 440, 449 (2007). For a judgment to be against the manifest weight of the evidence it must appear that the conclusions opposite to those reached by the trier of fact are clearly evident. *J.R. Sinnott Carpentry, Inc., v. Phillips*, 110 Ill. App. 3d 632, 636 (1982).

The trier of fact determines the credibility of the witnesses, resolves conflicts in the evidence and attaches relevant weight to the witnesses' testimony. *Career Concepts, Inc. v. Synergy Inc.*, 372 Ill. App. 3d 395, 405 (2007). Accordingly, a trial court's findings of fact are entitled to great deference by this court. *Southwest Bank of St. Louis v. Pouloukefalos*, 401 Ill. App. 3d 884, 891 (2010).

In a breach of contract action, a plaintiff must first show that an offer, acceptance and consideration has been made to establish a valid contract. *Id.* at 450. In the instant case, there is no question as to the existence of a contract.

To succeed on a claim for breach of contract, a plaintiff must plead and prove the existence of a contract, the performance of its conditions by the plaintiff, a breach by the defendant, and damages as a result of the breach. *Kopley Group V., L.P., v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1014 (2007).

The ordinary rule applied in building contract cases is that a builder is held only to a duty of substantial performance in a workmanlike manner, and that failure to perform in a workmanlike manner constitutes a breach of contract entitling the plaintiff to damages. *Woods*, 374 Ill. App. 3d at 453. The "pristine qualities" of the doctrine of substantial performance are substantial performance of the work required by the contract and a good faith performance of the essential points of the contract. *Watson Lumber Co. v. Mouser*, 30 Ill. App. 3d 100 (1975).

Here, we cannot say based on the evidence before us that J&B failed to substantially perform with respect to the work performed on the basement and the first and second floors. Sufficient contradictory evidence was presented through

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Anderson's and Bernardo's expert testimony to create a conflict as to whether those areas were being constructed in a workmanlike manner before J&B abandoned the project for lack of payment. It was the trial court's duty as the trier of fact to resolve those conflicts, and we see no reason to disturb its finding based on those areas of the contract.

With respect to the roof, however, we find that even accepting Bernardo's expert testimony as credible, the totality of the evidence presented below overwhelmingly indicates J&B failed to substantially perform in a workmanlike manner under the contract.

Here, the evidence shows that J&B took off a large portion of the roof by at least early November 2006, placed tarps on the structure for over a four-month period, and then vacated the premises on March 2007 after plaintiff refused to make any additional payments under the contract. The tarps apparently deteriorated under the weather sometime after the roof was removed and the building became engulfed in water, which essentially destroyed the building as evidenced by Anderson's expert testimony and the City's May 2008 demolition order.

Bernardo testified on his own behalf at trial that J&B removed the roof sometime in November 2006 because of other work that had to be done on the property. He explained:

"[Plaintiff] knows that there's no roof. And then he knows there's no way -- there's no way to avoid that to take out the roof because it's too dangerous and risky to the neighborhood. It's falling, because when we pulled out the shingles because they just only -- the roof itself is not -- it looks like there's no rafters at all because they use like two-by-four rafters. And then all this wood is rotted. And then it's only covered by shingles. They keep putting, adding the shingles on top of it. So we don't have no choice to take it out because we already finished this area. To completely finish, we need to take out the roof. And then when we take it out, I tell them that, you know, I need some money additional, need it to demolish the whole thing because I can't -- the reason why we stop also I advise them to demolish the front area, because every time we jack it up, the framing is cracking."

On cross-examination, Bernardo was asked whether, as an

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experienced contractor, it was normal for a roof not to be put on a building for two months or longer. Bernardo responded that in this situation: "It's not really okay not to have a roof there, but we put the tarp there. And then we always visiting during the time that we are still there. We secure the area." When asked what work, if any, was performed in November 2006, Bernardo said: "Securing the property. We put underground pipe for sewer, put the sump pump. And then the sidewalk, the concrete stairs, the electrical service, overhead service." When asked what work was completed in December 2006, Bernardo responded: "At that time we can't even work. Sometimes we just go there to pump out the water because it's snowing. There's a lot of snow in the basement. It's ice." With regards to January, February and March 2007, Bernardo said he worked on the underground plumbing and the concrete stairs. Bernardo's testimony reflects that no work--besides checking and securing the tarp itself--was performed during the four-month period between when J&B removed the roof structure in November 2006 and when it abandoned the property based on a lack of funds in March 2007.

Anderson, plaintiff's expert, opined that when a contractor undertakes the installation of a new roof, he needs to make sure that all the material is lined up, that his labor is ready to go, that the weather report informs of clear weather for several days

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and that the work is completed in three to five days. When asked what the proper protocol is for replacing this type of roof structure, Anderson explained:

"So under those circumstances then, once again you have to find a window of opportunity where the weather is going to be good for at least three or four days to a week, and have sufficient crew in place and materials in place. So that if you're going to do the tear-off of the structure, the roof structure down to the ceiling framing, then you absolutely must be in a position where you're going to have sufficient tarps of sufficient quality to cover in the event of, you know, a thunderstorm coming through. But you must plan the process so that you can close it in as quickly as humanly possible. For a structure this sort [sic], you're talking maybe three to five days with a sufficient crew to work. But I mean it's not something you would ever undertake without making absolutely sure that the weather is going to be cooperative."

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When asked what the time frame should be to get the roof structure built after the old structure was removed, Anderson responded: "[a]ssuming there was going to [be] a good week of weather, one week."

Anderson said that when he examined the property in early May 2007, the roof was covered with a tarp containing holes and the second floor was as wet as the first floor. Anderson explained that the tarp deteriorated from exposure to the weather. Anderson testified that he observed mold, and that the floor and the walls on the first floor of the building were extremely wet because water had been pouring in from the lack of a roof. Anderson said he determined it would not be economically feasible to attempt to rehabilitate the structure due to the existing water damage.

Although Bernardo's testimony established he finally discontinued work on the roof in March 2007 based on Hernandez's refusal to pay for any additional work, his testimony failed to adequately explain why he felt it was acceptable to allow the roof to remain covered by only a tarp for over a four-month period while work continued on other portions of the building. In fact, Bernardo admitted on cross-examination: "It's not really okay not to have a roof there, but we put the tarp there." Accordingly, we note Bernardo's testimony did not directly

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conflict with Anderson's testimony that J&B should have planned the process "so that you can close it in as quickly as humanly possible," and that a reasonable time frame to complete the project should have been "one week."

Moreover, we note the original contract expressly provided J&B would "install a new roof" as part of the work to be performed for \$92,500. Although addendum #2 to the contract--which was created on September 30, 2006--included some additional work that needed to be performed to the building in order to install the new roof structure, the addendum itself did not list an exact figure for what the additional work would cost and only required "30% of the total cost to start the additional job." A May 2, 2007, invoice J&B sent Hernandez after work stopped in March 2007--which is apparently the only invoice from J&B sent to Hernandez introduced at trial--indicates Hernandez owed a total of \$141,500 for the project, with \$86,000 of that total already paid. The invoice demanded a full payment of the remaining \$55,500 within 30 days in order for work to continue, with \$12,600 of that \$141,500 total figure apparently representing the portion of the funds needed to construct the roof structure.

Although we recognize Bernardo also testified at trial that he had only been paid \$86,000 towards the project, we note both parties stipulated to the existence of seven money orders in the

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record that clearly reflect Hernandez paid at least \$105,000 to J&B. While at least a portion of the undisputed \$105,000 paid to J&B was most likely for the additional work outlined in addendum #1 and addendum #2, we find it reasonable to conclude that the remainder of Hernandez's payments to Bernardo constituted "progress payments" under the original contract's terms. Accordingly, we find the stipulated evidence in the record clearly establishes Hernandez had already paid at least \$105,000 of the estimated \$141,500 total under J&B's May 2 invoice. We note Anderson also testified that standard industry practice is for the property owner to withhold payment of at least 10% of the amount owed until the project is complete.

While we recognize Bernardo testified he was ultimately forced to stop working on the roof and the building as a whole in March 2007 because of a lack of funds, we note he provided no real explanation as to why he made little to no progress towards completing the roof structure while still working on other areas of the building between November 2006 to March 2007. We also find Bernardo's explanation that he was forced to abandon the project in March 2007 based on a lack of funds before making any significant progress on the roof structure simply baffling considering the evidence stipulated to in the record reflects Hernandez had already been paid at least \$105,000 by October

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2006, which constituted a payment of over two-thirds of the total project costs outlined in J&B's May 2 invoice. Accordingly, we find the totality of the evidence before us leads to the inescapable conclusion that J&B's failure to take any steps to install a new roof structure during the four-month period prior to abandoning the project constituted a failure to substantially perform in a workmanlike manner under the terms of the agreement.

The parties here clearly contracted for the proper installation of a new roof structure as part of the original agreement. Because installation of a new roof was an essential point of the contract, we find J&B's failure to substantially perform in a workmanlike manner under the contract constituted a breach. Anderson's testimony also clearly established the lack of a roof structure caused significant water damage to the building, which in his opinion rendered the structure economically unsalvageable by early May 2007. Anderson's largely uncontradicted testimony was sufficient to establish plaintiff suffered damages as a result of J&B's breach.

While we recognize great deference should be afforded to the trial court's factual determinations on review, we simply cannot find--based on our review of the evidence presented here as a whole--that the trial court's ultimate finding that no breach occurred with regards to the work performed on the roof was

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warranted. As a result, we must conclude the trial court's ultimate finding that J&B did not breach its contract with Hernandez was against the manifest weight of the evidence.

II. Mitigation of Damages

Because we have determined a breach occurred here, we must consider Hernandez's contention that the trial court erred in determining he failed to mitigate his damages.

A party being damaged cannot stand idly by and allow the injury to continue and increase without making reasonable efforts to avoid further loss. *Nancy's Home of the Stuffed Pizza, Inc., v. Cirrincione*, 144 Ill. App. 3d 934, 941 (1986). However, the burden of proof to establish that an injured party has failed to mitigate damages is clearly on the party who breached the contract. *Pioneer Bank and Trust Co. v. Seiko Sporting Goods, U.S.A. Co.*, 184 Ill. App. 3d 783, 790 (1989). The duty to mitigate will not be invoked as grounds for a hypercritical examination of a plaintiff's conduct. *Amalgamated Bank of Chicago v. Kalmus and Associates, Inc.*, 318 Ill. App. 3d 648, 660-61 (2000).

The burden is on the defendant to prove a failure to mitigate damages. *Seiko Sporting Goods*, 184 Ill. App. 3d at 790. Moreover, new theories or questions should not be considered where proof might have been presented at trial. *Meyers v. Woods*,

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374 Ill. App. 3d 440, 455 (2007). Our supreme court also instructs that litigants should not be deprived an opportunity to present argument. *Hux v. Raben*, 38 Ill. 2d 223, 225 (1967).

Here, the record shows that J&B did not plead the issue of plaintiff's alleged failure to mitigate damages as an affirmative defense in its answer to the complaint. Nor did J&B present any evidence at trial that indicated Hernandez failed to mitigate his damages following the alleged breach.

The trial court questioned Hernandez's counsel *sua sponte* during closing arguments regarding whether plaintiff had attempted to mitigate his damages. The court then based a portion of its finding in defendant's favor on the fact that plaintiff had not apparently attempted to mitigate. The court's decision was reached without the benefit of any direct testimony or evidence regarding whether plaintiff made an attempt to mitigate damages, or any direct testimony or evidence regarding whether mitigation was even feasible in this case.

Based on the record before us, we do not know if Hernandez made any attempt to mitigate his damages. Because of defendant's failure to plead or prove a lack of mitigation as an affirmative defense, the issue was simply not explored in the evidence and testimony presented during the trial. As a result, we cannot say the evidence presented supported the trial court's finding that

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plaintiff failed to mitigate any damages suffered as a result of an alleged breach. Accordingly, we find we must reverse the trial court's judgment in defendant's favor.

Because issues regarding the calculation of damages were not explored in detail below, we find it necessary to remand the cause to the trial court solely for a determination regarding the amount of damages that resulted from J&B's breach of the contract by failing to construct the roof in a workmanlike manner.

CONCLUSION

_____For the foregoing reasons, we reverse the trial court's judgment and remand with instructions.

Reversed and remanded.