2012 IL App (1st) 103553-U

FIFTH DIVISION
December 28, 2012

No. 1-10-3553

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PRIMO CONSTRUCTION & BUILDING, INC., an Illinois Corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee-Cross-Appellant,	)	
v.	)	No. 05 L 02687
DONALD G. PIERINI and PIERINI IRON WORKS, INC., an Illinois Corporation,	)	
Defendants-Appellants-Cross-Appellees,	)	
v.	)	
MARCO CONTI and MARCO CONTI INTERNATIONAL FOODS, INC., an Illinois Corporation,	)	Honorable Charles R. Winkler, Judge Presiding.
Third-Party Defendants.	)	

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *HELD*: The trial court's finding that defendants was a joint venturer was not against the manifest weight of the evidence; defendants waived all affirmative defenses presented for the first time after judgment, therefore, the trial court did not abuse its discretion when it denied defendants' post-judgment motion to amend its pleadings to add affirmative defenses.

¶ 2 After a bench trial, the circuit court entered a judgment finding defendants Donald G. Pierini and Pierini Iron Works, Inc., entered into a joint venture with third-party defendants Marco Conti and Marco Conti International Foods, Inc., for the construction and operation of a restaurant. The court found defendants jointly liable for construction costs owed to plaintiff Primo Construction & Building, Inc. (Primo). The defendants argue that the trial court's finding of a joint venture is against the manifest weight of the evidence.

¶ 3 Primo cross-appeals the trial court's finding that it failed to satisfy its burden of proving it is owed money for extra work it claims it performed in the construction of the restaurant.

¶ 4 For the reasons set forth below, we affirm the judgment of the circuit court.

¶ 5 BACKGROUND

¶ 6 Plaintiff Primo Construction & Building, Inc. (Primo), filed a complaint in the circuit court of Cook County against

defendants Donald G. Pierini and Pierini Iron Works, Inc. (PIW), on March 8, 2005.

¶ 7 In count I of its complaint, titled "Joint Venturer," Primo alleges that in 2002, the defendants formed an "enterprise" with third-party defendants Marco Conti and Marco Conti International Foods, Inc. (Conti Foods), to construct and operate Ferrari Ristorante, 2360 N. Clybourn, in Chicago.

¶ 8 Primo alleges Pierini and PIW contributed a sum in excess of $1 million to the enterprise and had the right and power to direct and govern the activities of the enterprise, including hiring contractors, overseeing construction and paying expenses.

¶ 9 Primo alleges that on February 12, 2002, it issued a proposal to Pierini to demolish store fronts and construct the restaurant for $570,588. Primo alleges it worked at the site into 2003, during that time, additional work orders were authorized for $20,167.08 and $117,100. Primo alleges it is owed an outstanding balance of $277,855. Primo demanded the sum from defendants who refused to pay.

¶ 10 In count II of its complaint, titled "Partnership by Estoppel," Primo makes the same allegations as in count I. In count III of its complaint, titled "Illinois Business Corporation Act Statutory Liability," Primo alleges Pierini issued checks

from an entity by the name of Ferrari Ristorante LLC, which does not exist in Illinois. Primo alleges the defendants are liable for the outstanding construction debt under section 3.20 of the Illinois Business Corporation Act (805 ILCS 5/3.20 (West 2010)).

¶ 11 Pierini answered the complaint, contending that he merely gave Conti a loan for the restaurant project and was never a joint venturer. Pierini and PIW filed a third-party complaint against Conti and Conti Foods for contribution.

¶ 12 At trial, Primo's owner, Nick Mule, testified that he was friends with Marco Conti and Donald Pierini. Mule testified that sometime in early 2002, Conti called him on the telephone and informed him that he and Pierini were going into partnership to open up Ferrari Ristorante (Ferrari) and they wanted to know if Mule was interested in being the general contractor.

¶ 13 Mule testified that Conti told him that he and Pierini were going to close down a restaurant they owned together, along with an adjacent restaurant owned by Conti, then combine the two spaces and reopen as Ferrari. Mule then attended a meeting at Pierini's office with Conti, Pierini and a mechanical engineer where they discussed their ideas for the construction of the restaurant's kitchen.

¶ 14 Mule testified that Pierini told him that he would be the one to pay him and to submit the construction proposal to

him. Mule testified that Pierini hired the architect and oversaw the construction of the restaurant.

¶ 15 Mule testified that he submitted a hand-written proposal to Pierini, who told him to rework it and lower the price. Mule gave Pierini a revised proposal. Pierini then authorized him to proceed with the construction of the restaurant. Pierini did not sign the proposal.

¶ 16 Mule testified:

> "Well, he didn't sign it because he says, 'we are among friends,' he says, 'and no matter what, you are going to get paid. Between us friends we don't need to sign anything. I guarantee you will get paid no matter what.' "

¶ 17 Mule testified that he did not deal with Conti for the construction of the restaurant. He testified that Pierini gave him a check for $150,000 to begin the work. The check was from a bank account titled Ferrari Ristorante LLC and signed by Pierini.

¶ 18 During the construction of the restaurant, Mule submitted five additional work proposals to either Pierini or Conti. Mule received additional checks signed by Pierini. After the completion of the construction, Mule repeatedly asked Pierini and Conti to pay the remaining balance owed to him. Mule

testified that they both told him they were out of funds and that once the restaurant opened they should have money to pay him.

¶ 19 On cross examination, Mule testified that after Ferrari opened, he went to Las Vegas with Conti where he asked Conti to pay the balance owed to him for the construction of the restaurant. Mule testified that Conti told him that he did not have the money.

¶ 20 Mule testified that he partnered with Conti in another business named Primo Management, a real estate investment company. From January 2003 through 2005, Primo Management occasionally distributed profits to Mule and Conti. Mule testified that when profits were distributed, he asked Conti for payment of the unpaid balance from the construction of Ferrari. Each time, Conti claimed he needed the money for other things.

¶ 21 In 2005, Primo Management sold investment real estate it owned for a net profit of $240,000. Mule and Conti evenly split the proceeds. Mule testified that he again asked for payment but Conti told him he needed the money for Ferrari.

¶ 22 Conti now lives in Italy. Mule contacted him there asking for payment but Conti told him he is unable to pay. Mule testified that he never sued Conti or Conti Foods. Mule also did not file a mechanic's lien on the Ferrari property, which was owned by Conti.

¶ 23 Conti's evidence deposition testimony was read into the record at trial. Conti testified that prior to the Ferrari restaurant, he partnered with Pierini in a restaurant named Goodfellas. Conti testified that he engaged in discussions with Pierini about being partners in a new upscale Italian restaurant named Ferrari. The plan was for Conti to manage the restaurant and Pierini to manage the construction of the restaurant.

¶ 24 At the time, Conti owned a restaurant named Marco Restaurant which was located next to Goodfellas. Conti testified that he and Pierini formulated a plan to knock down a wall separating the two restaurants to create a single restaurant space for Ferrari.

¶ 25 Conti testified that he and Pierini agreed to be even partners in Ferrari. Conti testified that Pierini agreed to finance the new restaurant. They agreed that once the restaurant opened, Pierini would be reimbursed for the money he put into the project, then the pair would share the profits from the restaurant.

¶ 26 Conti testified that Pierini hired the architect.

¶ 27 There was no written partnership agreement between Conti and Pierini.

¶ 28 Conti testified that when officials from the City of Chicago (city) halted demolition work on the property, Pierini

hired a company to expedite paperwork with the city for the authorization to continue demolition and construction.

¶ 29 Conti testified that Mule dealt with Pierini regarding all aspects of the construction of the restaurant, including payment.

¶ 30 Once the restaurant opened, business was poor. The restaurant failed after about a year. Conti testified that Pierini was not reimbursed for any of the money he contributed to the restaurant.

¶ 31 Pierini, who has a business degree and has owned and operated PIW since 1978, testified that his involvement in Ferrari consisted of simply loaning Conti money. Pierini testified that the terms of the oral agreement for the loan was that Conti would pay him back with interest once Ferrari opened and was operating.

¶ 32 Pierini testified that on June 12, 2001, he wrote a check to Lieber Cooper, "the architect on Marco [Conti] selected to do his restaurant." Pierini testified that he never had dealings with Lieber Cooper prior to the date he issued the check.

¶ 33 Pierini testified that after Conti told him of his plans for Ferrari, he asked friends for the names of some architects. He gave Conti three names, one of which was Lieber Cooper.

Pierini testified that Conti selected Lieber Cooper.

¶ 34 Pierini testified that he regularly wrote checks per Conti's request to Lieber Cooper, along with another contractor for the purchase of kitchen equipment and to the restaurant's chef Massimo Ferrari.

¶ 35 Pierini testified that to continue financing Ferrari, he took out a line of credit from a bank, placing a building he owned as collateral. The line of credit eventually totaled $600,000. To access the funds, Pierini used a checkbook with the checks titled Ferrari Ristorante. He kept a check register documenting the total of each check and to whom each check was paid.

¶ 36 Pierini testified that each check was written at Conti's direction. He then gave Conti each check, including the checks to Primo Construction. Pierini testified that he never met with Mule at the job site and he did not personally give Mule any checks, except for one occasion when Mule came to his office.

¶ 37 Pierini testified that he never received repayment for his loan to Conti. He asked Conti for repayment of the loan and his attorney wrote Conti a letter requesting payment for the loan. Pierini testified that Conti told him he would repay him as soon as he started making money.

¶ 38 Pierini testified that Conti hired Primo for the

construction of the restaurant. Pierini testified that Conti gave him a copy of Primo's proposal for the construction work. Pierini testified that he advised Conti that the price was too high and the proposal did not contain a breakdown of the work.

¶ 39 Pierini testified the he was not asked by Mule to sign the proposal. Pierini testified that he does not know why the work proposal and the revised work proposal indicate that they were sent to his attention.

¶ 40 He testified that prior to Primo's lawsuit, he had not seen any of Primo's change orders. He did not know the specifics of the work Primo performed for the construction of Ferrari.

¶ 41 Pierini testified that PIW, the company where he is the sole shareholder, installed a steel beam in Ferrari and a steel fire door in the kitchen.

¶ 42 Pierini kept records and a running total of Conti Foods' loan balance on a spreadsheet. He included the cost of the steel beam and steel doors in the loan balance.

¶ 43 Pierini testified that prior to the construction of Ferrari, he met with Conti and Mule together. Pierini testified that he did not tell Mule that he and Conti were partners. Pierini testified that he sold a building he owned to repay the bank for the line of credit. Conti currently owes him $1.2 million, the total of his loan for Ferrari.

¶ 44 On cross examination, Pierini testified that in addition to repayment of the loan with interest, Conti promised him a share in the profits. The following exchange then occurred:

> "THE COURT: Hold on, wait. You were going to split profits with him? I thought you just wanted your money back.
>
> THE WITNESS: Well, I did want my money back.
>
> THE COURT: What's this splitting profits stuff?
>
> THE WITNESS: If the restaurant made any money, he said he would give me some money; he would split the money with me."

¶ 45 Pierini testified that he procured additional funds for Ferrari through a loan from his brother-in-law.

¶ 46 Pierini testified that he gave the chef at Ferrari one of his vehicles to use and that Conti purchased a town home he owned in 2001. Pierini was asked to identify a series of documents, some written to his attention. He had no recollection of any of the documents.

¶ 47 Pierini testified that he attended a meeting with Conti and the architect but could not recall what was discussed.

¶ 48 On February 26, 2010, the trial court found that a joint venture existed and entered judgment against Pierini for $297,990.59.

¶ 49 The trial court stated:

> "[T]his is a case of weighing credibility of the people who are involved in this matter.
>
> ***
>
> Don is the only one who's got the money and Don is the only one who's looked to by Nick, as this is progressing, to pay these bills, and when you get to the end of the line, it looks much more like a deal where Don is in for the ride.
>
> ***
>
> But it looks to me like because of what I've heard earlier about his interest in restaurants and his willingness to get into Goodfellas and take a piece of that action, that most likely, it's more probably true than not that his venturing into the new restaurant, the combination of the two, was to become a partner or joint venturer with Marco at that particular time."

¶ 50 On February 20, 2010, the trial court entered judgment for Primo and against Pierini in the amount of $277,855, the amount Primo claimed it was owed in count I of its compliant including $137,267.08 for extras in change orders, plus pre-

judgment interest in the amount of $20,135.59.

¶ 51 The trial court found that Pierini and PIW entered into a joint venture with Conti and Conti Foods for the construction and operation of Ferrari restaurant. Count II of Primo's complaint was rendered moot by the trial court's finding in favor of Primo for count I. The trial court's order notes that count III of Primo's complaint was withdrawn.

¶ 52 The trial court also found in favor of Pierini for third party contribution from Marco Conti in the amount of $148,995.29, plus costs.

¶ 53 On March 24, 2010, Pierini and PIW filed a Motion to Vacate Judgment and For Other Relief pursuant to section 2-1203 and 2-616(c) of the Illinois Code of Civil Procedure (735 ILCS 5/2-1203, 5/2-616(c) (West 2008)). The trial court granted in part and denied in part Pierini's and PIW's motion and vacated its prior judgment for $137,267.08 in change orders and $20,135.59 in pre-judgment interest, and entered judgment for Primo for $140,587.92. Pierini and PIW filed a timely appeal, and Primo a cross-appeal of the trial court's order.

¶ 54 ANALYSIS

¶ 55 A joint venture is an association of two or more persons or entities to carry out a single, specific enterprise for profit. *Kaporovskiy v. Grecian Delight Foods, Inc.*, 338 Ill.

App. 3d 206, 211 (2003). Whether a joint venture exists is a question for the trier of fact, and the trial court's determination will only be reversed when it is contrary to the manifest weight of the evidence. *Thompson v. Hiter*, 356 Ill. App. 3d 574, 582 (2005). A judgment is against the manifest weight of the evidence only if the opposite conclusion is apparent or if the finding appears to be arbitrary, unreasonable, or not based on the evidence. *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise, Ltd.*, 384 Ill. App. 3d 849, 859 (2008).

¶ 56 The existence of a joint venture may be inferred from facts and circumstances showing such an enterprise was in fact entered into and the intent of the parties is the most significant element. *Holstein v. Grossman*, 246 Ill. App. 3d 719, 737 (1993). Courts look to the substance and not to the form to determine whether there is a joint venture with the most important element being the intention of the parties. *Petry v. Chicago Title & Trust Co.*, 51 Ill. App. 3d 1053, 1057 (1977).

¶ 57 Even in the absence of a formal agreement, the existence of a joint venture may be inferred from circumstances demonstrating that the parties intended to enter a joint venture. *Daniels v. Corrigan*, 382 Ill. App. 3d 66, 80 (2008).

¶ 58 It is well settled law that the following elements are determinative of whether a joint venture exists: (1) an express

or implied agreement to carry on some enterprise; (2) a manifestation of intent by the parties to be associated as joint venturers; (3) joint interest as shown by the contribution of property, financial resources, effort, skill, or knowledge by each joint venturer; (4) some degree of joint proprietorship or mutual right to exercise control over the enterprise; and (5) provision for the joint sharing of profits and losses. *United Nuclear Corporation v. Energy Conversion Devices, Inc.*, 110 Ill. App. 3d 88, 109 (1982).

¶ 59 Pierini and PIW claim the trial court's finding they formed a joint venture agreement with Conti and Conti Foods is against the manifest weight of the evidence and should be vacated. Pierini claims that the evidence shows the money he contributed was a loan. Pierini claims he was simply a creditor of Conti Foods and he was not a joint venturer as a matter of law. To support the claim that a loan precludes a finding that a lender is also a joint venturer, Pierini cites section 206/202(c) of the Illinois Uniform Partnership Act (805 ILCS 206/202(c) (West 2008)). See *Smith v. Metropolitan Sanitary District*, 77 Ill. 2d 313, 318 (1979)(Ordinarily, a joint venture is an association of two or more persons to carry out a single enterprise for profit and the rights and liabilities of its members are tested by the same legal principles which govern

partnerships).

¶ 60 Section 206/202 provides:

"Sec. 202. Formation of partnership.

(a) Except as otherwise provided in subsection (b), the association of 2 or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

***

(c) In determining whether a partnership is formed, the following rules apply:

***

(3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

(i) of a debt by installments or otherwise." 805 ILCS 206/202(a), (c)(3)(i) (West 2008).

¶ 61 Section 206/202 is not helpful to Pierini. Under this section, a debt may be repaid out of a share of the profits and there would be no presumption that a partnership was created. In this case, however, profits from the restaurant were to continue

to be paid to Pierini even after the debt was fully repaid. Accordingly, under section 206/202, a presumption exists that Pierini is a partner because the parties agreed that a share of the profits would continue to be paid to Pierini after the debt was repaid in full.

¶ 62 Pierini also claims a fax dated from July 8, 2004, that he sent to his attorney and where he stated "I am neither a partner, stockholder/investor, and have no legal right, other than as a debtor," and a letter from his attorney to Conti's attorney, are corroborating evidence that Pierini's contribution to Ferrari was merely in the form of a loan.

¶ 63 Pierini's claim is not persuasive. The statement in the fax to his attorney was made long after the restaurant had failed and debt was incurred and is self-serving. The trial court weighed these documents along with the trial testimony in determining Pierini was a joint venturer. The trial court stated that its judgment was a matter of credibility determination. The trial court did not find Pierini credible. The trial court found that the testimony of Mule and Conti established that a joint venture existed. We cannot say the opposite conclusion is apparent or the trial court's finding was unreasonable or arbitrary or against the manifest weight of the evidence. *Chicago's Pizza, Inc.*, 384 Ill. App. 3d at 859.

¶ 64 Pierini argues that the testimony from Mule and Conti was not credible. However, we give great deference to the trial court's credibility determinations and will not substitute our judgment for that of the trial court because the fact finder is in the best position to judge the demeanor of the witnesses. *Samour, Inc. v. Board of Election Commissioners*, 224 Ill. 2d 530, 548 (2007). We examined the record and do not find that the opposite conclusion was apparent or the trial court's finding was unreasonable or arbitrary and against the manifest weight of the evidence.

¶ 65 Next, Pierini claims there must be a "meeting of the minds" to form a joint venture and no such "meeting of the minds" occurred here. In support of this claim, Pierini cites *Richton v. Farina*, 14 Ill. App. 3d 697, 704 (1973).

¶ 66 In *Richton*, defendant Farina and several men referred to as the "Beckman group" expressly agreed to form a joint venture to construct an office building. It was agreed that Farina would own a two-thirds interest and the Beckman group would own a one-third interest. Plaintiff Richton alleged he and Farina had a meeting at which it was agreed that Richton would be a partner in the venture and that Richton would own one-half of the interest held by Farina. *Richton*, 14 Ill. App. 3d at 700.

¶ 67 The trial court found that the plaintiff was part of a

joint venture with Farina and the Beckman group to construct the office building. *Id.* at 703.

¶ 68 The appellate court held that "[e]ssential to the creation of a joint venture is the existence of a contract between the parties." *Id.* at 704. The appellate court stated "[t]he law is well settled that in order for a contract to come into being there must be a meeting of the minds to the contract." *Id.* The contract can be express or implied. *Id.*

¶ 69 The appellate court noted that the testimony from Richton and Farina was conflicting over what was said at the meeting. The court also noted the lack of a written agreement and evidence which showed that Beckman did not know of Richton's participation as a partner. The court determined there was no express agreement to form a joint venture.

¶ 70 The court next determined whether there was an implied agreement. The court noted the lack of participation of Richton in the substantive aspects of the venture such as management, control, contractual matters, finances and rental. Richton, an attorney, claimed his legal advice was a contribution to the venture. However, the court noted Richton neither read nor drafted any contracts and he exhibited a lack of knowledge concerning the development and construction costs of the building. Moreover, on the three occasions when Farina sought

Richton's legal opinion, an associate of Richton's law firm provided the opinion and billed Farina for legal services. In reversing the trial court's finding of an agreement to form a joint venture, the appellate court found Richton's lack of participation demonstrated there was no implied agreement to form a joint venture.

¶ 71 *Richton* is distinguishable from the instant case. In *Richton* one of the alleged joint venturers did not participate in the management or control of the subject of the joint venture. In this case, unlike *Richton*, there is evidence of Pierini's participation, including his loan, supervision and control he exercised over construction, knowingly placing his signature on checks, work orders made to his attention, and an agreement that profits of the restaurant would be shared by Conti and Pierini after Pierini's loan was paid in full. Although the testimony at the trial in this case was conflicting, the trial court heard the evidence and found there was an agreement to create a joint venture. We cannot say the opposite conclusion is apparent or that the trial court's decision is unreasonable and arbitrary or against the manifest weight of the evidence.

¶ 72 Next, Pierini claims that Conti Foods' existence as an Illinois corporation shields him from personal liability for Ferrari's debts. Pierini claims this corporate protection is in

effect because Conti Foods' financial statements prove that Ferrari was owned and operated by Conti Foods. However, we cannot say that Conti Foods' record of Pierini's loan establishes anything other than Pierini contributed funds to the Ferrari project. Pierini has not presented any authority that shows a joint venturer is shielded from the debts incurred during a joint venture between the corporation and other participants in the venture.

¶ 73 Next, Pierini claims the trial court failed to consider its posttrial Motion to Vacate Judgment and For Other Relief. The defendants' claim is not persuasive because the record contains a transcript from two hearings on defendants' posttrial motion where the parties argued the issues at length and the trial court expressly considered the issues. The trial court then issued a written memorandum opinion and order on defendants' posttrial motion where the trial court analyzed the evidence and again found that the defendants were joint venturers in the Ferrari project. Clearly, the trial court considered the evidence, including Conti Foods' financial statements.

¶ 74 The defendants claim the trial court erred by denying its posttrial motion to conform its pleadings to the proof at trial, pursuant to section 2-616(c) of the Code of Civil Procedure (735 ILCS 5/2-616(c) (West 2008)). It is within a

trial court's sound discretion to permit or refuse an amendment to pleadings, and its decision will not be reversed on appeal absent a clear abuse of discretion. See *DiBenedetto v. County of Du Page*, 141 Ill. App. 3d 675, 681 (1986); *Dick v. Gursoy*, 124 Ill. App. 3d 185, 187 (1984). Factors to be considered in evaluating the court's exercise of discretion include the timeliness of the proposed amendment and whether other parties have been prejudiced or surprised by the amendment. *DiBenedetto*, 141 Ill. App. 3d at 681; *Kupianen v. Graham*, 107 Ill. App. 3d 373, 377 (1982).

¶ 75 Here, we are not presented with the case where defendants seek to amend the allegations of a previously pled affirmative defense. Instead, in a posttrial motion, the defendants sought to amend their pleadings to assert for the first time the affirmative defenses of the statute of frauds and laches and to reopen the proofs to submit additional evidence in support of the statute of frauds defense.

¶ 76 Primo responds by claiming the trial court did not abuse its discretion because the defendants have waived these affirmative defenses by waiting five years before asserting them. *First National Bank of Lake Forest v. Village of Mundelein*, 166 Ill. App. 3d 83, 90 (1988).

¶ 77 Under section 2-613(d) of the Code, if the defendant

seeks to assert an affirmative defense at trial, he must specifically plead it so the plaintiff is not taken by surprise. *Id.;* 735 ILCS 5/2-613(d) (West 2008). If the defendant fails to assert the defense, it cannot be considered, even if the evidence suggests its existence. *First National Bank,* 166 Ill. App. 3d at 90. "While a pleading may be amended, even after judgment, to conform the pleading to the proofs, an affirmative defense which is not timely pleaded cannot be considered, even if the evidence suggests its existence." *Carlisle v. Harp*, 200 Ill. App. 3d 908, 916 (1990).

¶ 78 The record shows that the defendants did not assert or plead the affirmative defenses of the statute of frauds and laches until its posttrial motion. Defendants do not offer a reason why these affirmative defenses were not raised in the five years between the time this case was filed and the time judgment was entered. Defendants have waived these affirmative defenses. *Spagat v. Schak*, 130 Ill. App. 3d 130, 134 (1985). We cannot say no reasonable person would take the position of the trial court when it denied defendants' leave to amend its answer after judgment to add affirmative defenses. Therefore, we find no abuse of discretion.

¶ 79 Lastly, Primo has cross appealed on the issue of extras. The trial court reduced its judgment for Primo on defendants'

posttrial motion finding Primo had not shown by clear and convincing evidence that it performed the claimed extra work.

¶ 80 In order for a contractor to recover additional payment from an owner for extra work, he must establish by clear and convincing evidence that: (1) the work was outside the scope of the original contract; (2) the extra items were ordered at the direction of the owner; (3) the owner agreed either expressly or impliedly to pay extra; (4) the extra items were not voluntarily furnished by the contractor; and (5) the extra items were not rendered necessary by any fault of the contractor. *Duncan v. Cannon*, 204 Ill. App. 3d 160 (1990).

¶ 81 Clear and convincing evidence is that quantum of proof that leaves no reasonable doubt in the mind of the fact finder about the truth of the proposition in question. *In re John R.*, 339 Ill. App. 3d 778, 781 (2003). Clear and convincing evidence is considered to be more than a preponderance but less than is required to convict an individual of a criminal offense. *Id.*

¶ 82 The trial court found that there is little evidence that the extra work was ordered by either Conti or Pierini, or that they agreed to pay for the extras prior to incurring the liability. Moreover, Mule testified that some of the extra work was approved by the restaurant chef, whom the trial court found as "a party not even in privity with the original contracting

parties."

¶ 83 Primo claims that it submitted proposals to Pierini, detailing the work and the cost. Primo claims Pierini subsequently authorized the work. However, without Pierini's signature, testimony, or any corroborating evidence that he authorized the work, we cannot say that Primo has met its burden to show by clear and convincing evidence that Pierini ordered the extra work.

¶ 84 Primo claims that Conti authorized the "Phase II" extras. However, Conti testified that Pierini handled all aspects of the construction.

¶ 85 Primo also claims that the chef was authorized by Pierini and Conti to order additional work. However, the trial court determined Primo has not presented clear and convincing evidence that the chef possessed such authorization or that Conti authorized the work.

¶ 86 As a result, we cannot say the trial court erred in finding Primo has not met its burden of showing by clear and convincing evidence that the extras were ordered by the parties.

¶ 87 CONCLUSION

¶ 88 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 89 Affirmed.