2013 IL App (1st) 113229-U

SIXTH DIVISION
June 21, 2013

Nos. 1-11-3229, 1-11-3236, 1-11-3232, 1-11-3235, 1-11-3230
(Consolidated)

CRAIG D. STEPNICKA and JANET ELSON, RICHLIN PARTNERS, LLC, GLENNIE JOHNSON and DENIKA JOHNSON, STEPHEN P BEDELL and CATHERINE L BEDELL, and FRANK ANEMONE,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees,	)	Nos. 09 CH 17508, 09 CH 45657, 09 CH 50877, 09 L 12281, and 10 CH 04102 (Cons.)
v.	)	
GRANT PARK 2 LLC and MP 13TH STREET TOWER, LLC,	)	Honorable Dennis J. Burke,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Lampkin and Justice Gordon concurred in the judgment.

ORDER

¶ 1 Held: The judgments of the circuit court in a consolidated bench trial in favor of plaintiffs on their breach of contract claims against the defendant condominium developer are affirmed. The circuit court did not err in its interpretation of provisions of the condominium sales contracts regarding timely performance of the substantial completion of the condominium units, as extended by allowable delays under the contracts. Defendants failed to demonstrate the circuit court's findings of fact were against the manifest weight of the evidence.

¶ 2 In these consolidated cases, defendants Grant Park 2, LLC and MP 13th Street Tower LLC, appeal from judgments entered in favor of plaintiffs Craig D. Stepnicka and Janet Elson, Richlin Partners LLC, Glennie Johnson and Denika Johnson, Stephen P. Bedell and Catherine L. Bedell, and Frank Anemone, and ordering the release of escrowed funds to plaintiffs, following a bench trial in the circuit court of Cook County on plaintiffs' breach of contract claims. On appeal, defendants argue the trial court misinterpreted the preconstruction sales contracts between defendants and plaintiffs and the trial court's directed findings were against the manifest weight of the evidence. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. Plaintiffs in these consolidated cases executed form preconstruction contracts with Grant Park 2 to purchase condominium units in One Museum Park West, a highrise building located at 1201 South Prairie Private in Chicago, Illinois. The contracts included the following provisions:

> "7. **DEFAULTS**: *** In the event of Seller's default under the terms of this Contract, return of all Buyer's funds shall be the sole and exclusive remedy hereunder ***.
>
> 9. **CLOSING DATE AND TITLE INSURANCE**: (a) the Closing Date shall be on such date following Substantial Completion of the Unit as shall be designated by the Seller or its agent upon not less than seven (7) days prior notice to the Buyer ***. It is estimated that the Unit will be Substantially Completed by _____, subject to extension for delays occasioned by strikes, material shortages, labor shortages, casualties,

inclement weather conditions, acts of God and other causes beyond the reasonable control of Seller ***.

10. **CONSTRUCTION**: *** Seller agrees to proceed diligently with construction work. Seller shall not be liable, and the obligation of Buyer hereunder shall not in any manner be excused or varied, if construction shall be delayed or prevented by war, acts of God, riots, civil commotion, governmental regulation, strikes, labor or material shortage, unseasonable weather conditions, or other causes beyond the control of Seller.

18. **MISCELLANEOUS**: *** (b) Time is of the essence of this Contract ***."

In each of the contracts, the blanks in paragraph 9 have been completed by hand with either a date or a season and a year for the estimated dates of substantial completion of the units. Stepnicka and Elson's contract, signed on February 4, 2006, refers to November 2008. The Johnsons' contract, signed on August 28, 2006, refers to Spring 2009. Richlin Partners LLC's contract, signed on February 4, 2006, also refers to Spring 2009. Anemone's contract, signed on March 27, 2007, refers to July 2009. The Bedells' contract, signed on February 23, 2008, refers to Fall 2009. Plaintiffs paid earnest money to Grant Park 2. The funds were subsequently placed in escrow.

¶ 5 The Units purchased by the buyers were not completed in 2009. Plaintiffs filed their complaints seeking declarations that Grant Park 2 defaulted by failing to substantially complete their units within the time stated in their respective contracts. Plaintiffs also sought the return of their earnest money (and in the cases filed by the Johnsons and the Bedells, the cancellation of

related notes issued to Grant Park 2). The circuit court consolidated plaintiffs' cases in two orders, dated December 23, 2009, and February 22, 2010.

¶ 6 Prior to trial, plaintiffs filed a motion for summary judgment on their contract claims.[1] Defendants filed a response to the motion, arguing plaintiffs incorrectly interpreted the contract to transform the estimated completion date into a firm commitment, require agreement on any extension and to tie the closing date to the estimated completion date. Defendants also argued genuine issues of *force majeure* delays existed.[2] Defendants attached an affidavit from Grand Park 2's development manager, Carl Grosbeck, in support of the latter argument. Grosbeck's affidavit outlines three categories of delay purportedly outside Grant Park 2's reasonable control: (1) building permit delay; (2) groundwater infiltration delay; and (3) weather-related delay. In a memorandum order and subsequent clarifying order, the circuit court denied plaintiffs' motion for summary judgment, ruling plaintiffs' contracts promise times for the substantial completion of their units, but finding a question of material fact regarding the extent to which delays beyond the

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[1] Plaintiffs' motion also sought summary judgment on other issues not relevant to this appeal.

[2] *Force majeure* is generally defined as "[a]n event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (*e.g.*, floods and hurricanes) and acts of people (*e.g.*, riots, strikes, and wars)." Black's Law Dictionary (9th ed. 2009) at 718. In this case, defendants' response defined *force majeure* delays as those identified in paragraph 9 of the agreements.

reasonable control of Grant Park 2 extended timely performance beyond the estimated dates of substantial completion.

¶ 7 At trial, the parties presented the following evidence. Jeffery Allen Renterghem, who worked for the firm of Papageorge Haynes, was the senior architect on the One Museum Park West project and supervised the application for building permits. Renterghem testified he previously worked on the design and construction of 14 highrise buildings, 13 of which were part of the Museum Park development in Chicago. Renterghem was familiar with the City of Chicago's building permitting process prior to this project.

¶ 8 According to Renterghem, the development team decided prior to March 2006 to proceed with the project by seeking more than one permit. In March 2006, Papageorge Haynes submitted a permit application for the foundation and first 7 of the project's 53 stories. Renterghem described this approach as typical for a large structure in Chicago, although the tower at 1600 South Prairie was submitted as a full building permit. Renterghem testified the City generally takes four months to process a foundation permit.

¶ 9 Renterghem also testified that in April 2006, he received comments from the City generated by V3, the City's independent consultant. The City employed peer review by an outside consultant on some, but not all, of the towers in the project. According to Renterghem, the comments generally referred to issues that would arise in a general building permit process, rather than a foundation permit process. Consequently, Papageorge Haynes was required to submit additional documentation that would typically have been provided in a general permit process, which took several additional months of work.

¶ 10 Renterghem further testified the submitted permit was clearly a foundation permit. Renterghem acknowledged, however, comments on the building permit application bore dates of March 1, 7 and 21, 2006 – all prior to the date the application was signed. Renterghem also acknowledged the Mayor's Office of Disabilities appeared to have comments on the project dated March 1, 2006. In addition, Renterghem identified exhibits in which V3 and the City described the project at 1201 South Prairie in late March 2006 as both a foundation permit and a full building permit.

¶ 11 Michael Perry testified he was employed as the permit expediter on the One Museum Park West project. Perry previously expedited between 10 to 15 highrise projects in Chicago. Perry testified regarding email correspondence with Michael Cindric, who was the project manager for V3. Perry testified that email sent by Cindric referred to March 2006 full building proposal. Perry also agreed an email he sent to Cindric referred to a March 2006 proposal which included a full building permit. Perry later testified he never communicated to anyone employed by the City prior to the submission of the permit there was going to be one application for a full building permit. In addition, Perry testified the contract between the City and V3 indicated two reviews, one for the foundation and one for the full building. Perry testified it was unusual for the City to request documents for an entire building when a foundation permit was submitted. According to Perry, the City ultimately issued the permit on March 26, 2007.

¶ 12 Joshua Edward Stark, who held a degree in construction management, testified he was the senior project manager and programming executive with Bovis Lend Lease (Bovis), the general contractor on the One Museum Park West project. Stark testified he ran the daily operations of

the project on-site. According to Stark, construction started immediately after the issuance of the foundation permit.

¶ 13 Regarding the foundation construction, Stark testified work might be shut down on days of heavy rain and lightning, primarily due to the lightning. Wind might also cause work to shut down if the wind speed was high enough to affect ground cranes used to install caissons, which Stark defined as reinforced vertical concrete columns. According to Stark, cold weather generally did not delay foundation construction.

¶ 14 Above ground, temperatures below 10 degrees might preclude pouring concrete. Stark also testified union rules barred work in subzero temperatures. Union rules further preclude ironworkers from working in the rain. In the event of wind or lightning, the crane operator may shut down work for a specific period of time, but work will not necessarily shut down for an entire day. Based on past experience, the One Museum Park West construction used a movable 3 ½ story "cocoon" to shield workers from wind on upper levels of the project.

¶ 15 In addition, Stark testified regarding delay related to groundwater conditions. According to Stark, workers encountered groundwater in sinking two or three caissons, but this did not cause any delay due to prior experience in erecting One Museum East. The crew also encountered groundwater and an active sand layer in constructing secant walls, which Stark described as interlocking series of caissons. This issue had not occurred on the One Museum East project. According to Stark, these conditions required a different method of installing the secant walls which delayed completion of the foundation work by approximately 3 ½ months. In

addition, Stark testified the City required a deeper foundation for One Museum Park West than for One Museum East, because of the western tower's proximity to the Roosevelt Street bridge.

¶ 16 Moreover, Stark testified the original work plan for the building provided for a four-day cycle, which generally related to the time required for workers to pour the concrete and for the concrete to cure, while workers would be framing the next deck. According to Stark, a four-day cycle was typical for a project of this size. Stark testified, however, that the project was changed to a three-day cycle somewhere around the tenth floor, in order to regain time lost during the foundation construction. Changing to a three-day cycle required more workers to install decking and reinforcement, overtime work, and additives to allow the concrete to cure more quickly. Stark estimated 40 working days were saved by the change to a three-day cycle.

¶ 17 Matthew McKenna testified he worked for Bovis and was senior superintendent on-site for the One Museum Park West project. McKenna previously worked on 12 to 15 highrise projects, at least 10 of which were in Chicago. McKenna testified Bovis generally estimated 1 ½ to 2 days per month would be lost due to weather conditions. McKenna acklowledged that One Museum Park West's 34-month construction schedule would result in an estimated 51 to 68 day weather delay. According to McKenna, there had been approximately 100 weather delay days in the construction of One Museum East, primarily due to wind. McKenna acknowledged Bovis included approximately 30 weather delay days in the schedule for One Museum Park West.

¶ 18 McKenna testified Bovis ultimately declared 77 weather delay days for One Museum Park West. McKenna, working with Grosbeck, determined actual weather delay days from the Bovis daily construction log. McKenna testified the weather delay days typically were entire

days, but there were some partial days. McKenna also testified, however, that one weather day also may cause loss of time on the following day. According to McKenna, weather delays have a greater impact when working on a three-day cycle, as opposed to a four-day cycle. McKenna further testified that weather delays may affect some trades while members of other trades may continue working. For example, on May 13, 2010, rain kept curtain wall and glass installers from working, but carpenters, painters and plumbers worked. In addition, McKenna testified only one of the 77 weather delay days Bovis called was unseasonable, involving tornado-like winds on August 23, 2007.

¶ 19 Moreover, McKenna testified regarding an "Agreement Between Owner and Construction Manager," dated January 15, 2007. The agreement carried a substantial completion date of November 30, 2009. McKenna testified Bovis substantially completed its work by that date.

¶ 20 In addition, McKenna testified regarding delays caused by various subcontractors on the project. According to McKenna, there was a gross delay of six to eight months attributable to the subcontractors.

¶ 21 Tony Kiefer of multinational engineering firm AE Com testified he and his firm conducted the geotechnical engineering for the One Museum Park West project, including the design of the secant wall. Kiefer testified designs were submitted to the City more than once between April and October 2006[3], but the City required deeper secants than those proposed. In

[3] Kiefer initially testified to an October 2007 date, but later corrected his testimony in response to a question from the trial judge at the conclusion of direct examination.

addition, as part of the October 2006 submission, the City required AE Com to submit hand calculations, as opposed to the firm's computer-generated finite element studies. As far as Kiefer knew, the dispute over the required calculations arose after Grand Park 2 submitted its application for a foundation permit. Kiefer, who had 20 years of experience with the City's permitting process, acknowledged the City liked to see hand calculations and was not surprised by the City's demand for them.

¶ 22 According to Kiefer, the secant wall was redesigned to satisfy the City's requirements. Kiefer testified that in a February 2007 letter, his firm explained to the City deeper secants would likely hit a saturated sand layer, which would require a more expensive and time-consuming construction method. Keefer added this scenario ultimately occurred during construction.

¶ 23 Ronald B. Shipka, Jr., the president of EDC Management Inc., which is a manager-member of Grand Park 2, testified (out of sequence as part of plaintiffs' case) regarding the financial status and history of the One Museum Park West project. Shipka testified that in December 2009, the FDIC became the receiver for the assets and liabilities of one of the banks lending money to the project. Shipka also testified the FDIC was responsible for a delay of between 60 and 90 days on a draw requested in December 2009. According to Shipka, the funding delay caused contractors to pull off the job, but he could not say how it affected the critical path of construction. Shipka further testified Grant Park 2 did not have funds available to pay its contractors and subcontractors without the bank loan draw when the FDIC became the receiver of the Grant Park 2 loans.

¶ 24 Gordon Cameranesi, a licensed accountant, testified he was the chief financial officer of EDC Development, LLC, a developer of Grant Park 2. Cameranesi was also the chief financial officer for Grant Park 2. Cameranesi testified that each of the Grant Park projects was financed by its own individual loans. One Museum Park West was financed by separate and distinct loans from One Museum East.

¶ 25 Cameranesi also testified Grand Park 2 spent in excess of $30 million in the design, land acquisition and predevelopment phases of One Museum Park West. These funds came from Grand Park 2's investors, as investors, not lenders. One Museum Park West's construction loan was a $175 million revolving facility. According to Cameranesi, in January 2007, Grant Park 2 had no funds of its own outside of loan disbursements with which to continue or perform construction. Cameranesi later added Grant Park 2 could have had prepaid upgrade deposits from buyers, but those deposits were only available for upgrades to specified units.

¶ 26 Cameranesi further testified regarding a January 8, 2007, email he sent to Shipka and Ralph Oliva about the need to clear up delinquent promissory notes on a number of units prior to closing the bank loan. According to Cameranesi, the primary reason the construction loan had not been closed as of that date was the low number of contracts signed (and resulting shortfall in escrow money on deposit). Cammeranesi testified the loan still had not closed as of February 22, 2007, when he was involved in meeting the requirements of the lenders' due diligence report. The construction loan was ultimately funded on March 6, 2007.

¶ 27 In addition, Cameranesi testified regarding the delays in the draws following the FDIC receivership of one of the lending banks. Cameranesi, however, testified he would leave it to Grosbeck to testify about any impact those delays had on the critical path of construction.

¶ 28 On cross-examination, Caramenesi was questioned regarding the documentation supporting Grand Park 2's December 17, 2009 funding request. Caramenesi acknowledged plaintiffs made four requests for a copy of the owner's statement submitted in support of the funding request. Caramenesi initially provided a copy of an owner's statement dated December 17, 2009, but ultimately provided a copy of an owner's statement dated February 25, 2010. Caramenesi testified the draw request was amended. According to Caramenesi, the draw request was funded by the FDIC on March 8, 2010. Caramenesi further testified the two owner's statements differed only in that the final owner's statement dropped line items for developer overhead and general administrative costs, which were rejected by an FDIC loan review committee.

¶ 29 Grosbeck, who holds a master's degree in architecture, testified both in his capacity as Grand Park 2's development manager and as an expert witness. Grosbeck later testified that he guessed he was holding himself out as an expert and had a great deal of experience in construction.

¶ 30 Grosbeck estimated the delay in obtaining the foundation permit was eight months. Grosbeck testified a contractor claimed the groundwater issue resulted in 136 days of delay in erecting the secant wall. Grossbeck later clarified this delay was 136 calendar days and 88 working days.

¶ 31 According to Grosbeck, shortages of aluminum, copper and conduit in late 2007 and 2008 also contributed to delays on the project amounting to approximately 30 days. Grossbeck testified weather conditions accounted for 3 ½ months of delay. Grosbeck also testified problems with the funding of the project caused some subcontractors to essentially cease work, which further delayed construction by approximately one month. Grosbeck estimated that when the building was topped off, the project was 1 ½ years late, but the construction phase by itself was approximately 5 months late. In addition, Grosbeck testified regarding a strike by two unions, which the parties stipulated ran from July 1 through 20, 2010. According to Grosbeck, his delay estimates were conservative; a gross estimate would be closer to 24 months.

¶ 32 On cross-examination, Grosbeck was questioned about a memorandum authored in part by Grosbeck in January or February 2010 and later modified by defense counsel. The memorandum stated the total delay in construction due to inclement weather and other causes beyond defendant's reasonable control was 15 months. Grosbeck testified the net delay was conservatively 20 ½ months. Six months later, Grosbeck signed his affidavit, also drafted by defense counsel, which refers to additional but unspecified *force majeure* delays. The Grosbeck affidavit also states weather delays were beyond defendant's reasonable expectation or anticipation and outside the scope of those foreseen in connection with highrise construction in Chicago.

¶ 33 Following the summary judgment ruling, Grosbeck created a spreadsheet setting forth specific categories of delay with specific durations for each type of delay. The spreadsheet, which added construction material delay, bank failure delay, a strike delay and residual delay,

purported to account for 21 ½ months of delay. Grosbeck considered all of the types of delay recorded in the spreadsheet to be *force majeure* delays. Grosbeck acknowledged the construction material delay occurred prior to his memorandum and affidavit, but was not specifically mentioned in either document. Grosbeck also acknowledged the bank failure delay was not specifically mentioned in his prior affidavit. Grosbeck conceded the strike had no impact on the substantial completion of plaintiffs' units. Grosbeck further acknowledged that he testified regarding delays in obtaining aluminum, copper and conduit, but gave deposition testimony claiming delays were caused by delays related to steel, drywall and studs.

¶ 34 Grosbeck testified there is no accepted practice in the construction industry regarding how the number of weather delay days should be accounted for in a construction schedule. Grosbeck denied double- and triple-counting various weather delay days which purportedly overlapped periods of groundwater delay or bank failure delay. Grosbeck acknowledged that on August 23, 2007, work did not stop due to weather conditions until 4:30 p.m.

¶ 35 Cindric, a mechanical engineer who had worked as the project manager for V3, testified as part of plaintiff's case. Cindric testified the project was initially submitted to the City as a full building permit. Cindric testified he knew the project was submitted as a full building permit because he was responsible for V3's proposal, including the time necessary to complete review of the permit application. According to Cindric, his firm was required to perform additional work after the owner decided to split the project into two separate permits. Regarding an email he received from Perry, Cindric testified changes to the secant wall design during the foundation permit process would also cause his firm to perform additional work. According to Cindric,

there were resubmittals and redesigns during the foundation permit review for One Museum Park West.

¶ 36 On cross-examination, Cindric testified he understood there was an application for a full building permit by Grant Park 2. Cindric, however, acknowledged he never saw such a permit. Cindric also acknowledged the services agreement signed by his superior on March 28, 2006, appeared to refer to a foundation permit plus a full building permit.

¶ 37 Both sides rested their cases. Plaintiffs submitted a motion for a directed finding. On September 13, 2011, the trial court heard argument on the motion for a directed finding.

¶ 38 On September 22, 2011, the trial judge provided an oral ruling on the motion. At the outset, the trial judge stated he did not request a trial transcript, but considered all briefs submitted and considered all of his notes on the trial testimony. The trial judge indicated his decision rested primarily on the factual issues, rather than legal issues.

¶ 39 The trial judge's ruling, however, expressly discusses several legal issues. The trial judge initially noted that he considered both paragraphs 9 and 10 of the agreements at issue to be relevant to the trial. Regarding weather delays, the trial judge stated he looked up the definition of "inclement," which he ruled to mean "physically severe storming," which he considered to be similar to the agreements' subsequent use of "unseasonable" to describe weather delays. Later, in discussing groundwater delays, the trial judge ruled the agreements' general reference to "other causes beyond the reasonable control of Seller" must relate to the specific causes mentioned in paragraph nine.

¶ 40 The trial judge's oral ruling specifically discusses the testimony from Renterghem, Perry, Stark, McKenna, Kiefer, Shipka, Cameranesi, and Grosbeck. The court rhetorically asked whether Grosbeck's credibility was tested where the strike delays he presented were totally irrelevant to the case and his opinions regarding the material shortages changed between his deposition and trial testimony. The trial court observed the number of times Grosbeck's numbers changed and concluded the numbers provided were arbitrary. The trial court also found Grosbeck did not adequately explain overlapping periods of delay.

¶ 41 The trial judge indicated defendants "probably" presented a *prima facie* case of delays. The trial judge, however, indicated his ruling was based on a consideration of the totality of the evidence.

¶ 42 The trial judge further considered the delay issues in particular. Regarding permit delays, the trial judge found the testimony to be vague, but observed the City granted the permits within approximately one month after defendants complied with the City's requirements. The trial court also stated he thought the permit delays were irrelevant because the construction loan had not closed during this period. The trial court observed that construction did not start until after the loan closed, subcontractors ceased work during interruptions in the flow of funds, and the testimony established defendants needed the loan to construct the building.

¶ 43 Regarding the groundwater delay, the trial judge observed that such delays were not included in the language of the contracts at issue. The trial judge also observed that defendants knew they were going to encounter the sandy groundwater, albeit not to the extent it ultimately

occurred. The trial judge concluded these claims for delay failed under not only the terms of the contracts, but also the concept of *force majeure*.

¶ 44 The trial judge found it was impossible to determine the number of weather delay days. In particular, it was impossible to determine the effect of people working partial days. The trial judge specifically commented on August 23, 2007, the purported weather delay day where the evidence showed work did not cease until 4:30 p.m.

¶ 45 Regarding the bank failure delays, the trial judge observed the cross-examination of Cameranesi went into some detail about the documentation regarding the funding requests and indicated that funds were approved within 11 days of defendants submitting a corrected statement. Regarding the material shortages, the trial judge observed Grosbeck's trial testimony conflicted with his deposition testimony. The trial judge added he did not know from the evidence whether defendants recouped any of the time associated with the asserted material shortage delays.

¶ 46 Accordingly, the trial judge concluded judgment was to be entered in favor of plaintiffs and against defendants, or in favor of plaintiffs and against defendants on their affirmative defenses. The trial court directed an order be prepared reflecting these rulings and later indicated the attorneys would discuss the proper order to be entered in accordance with his oral ruling.

¶ 47 On September 29, 2011, the trial court entered orders with a similar format in each of the plaintiffs' cases. These orders granted the plaintiffs' motion for a directed finding, entered judgment in favor of the respective plaintiffs on the breach of contract claims and defendants' affirmative defenses, and ordered the Clerk of the Circuit Court to remit funds held by the circuit

court to each of the plaintiffs. On the same date, defendants filed a motion to reconsider. On October 28, 2011, the circuit court entered an order denying the motion to reconsider. On that same date, defendants filed timely notices of appeal to this court. On November 29, 2011, this court granted defendants' motion to consolidate the appeals, providing that the parties' briefs shall be fully subject to Illinois Supreme Court Rule 341 (eff. July 1, 2008).

¶ 48 DISCUSSION

¶ 49 Prior to addressing the merits of this appeal, we must first direct our attention to plaintiffs' request that we strike defendants' brief and summarily affirm based on defendants' failure to comply with the requirements of Illinois Supreme Court Rule 341(h)(6) (eff. July 1, 2008), which requires the appellant's brief "shall contain [a statement of] the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Supreme court rules " ' "are not aspirational. They are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written." ' " *Rodriguez v. Sheriff's Merit Commission of Kane County*, 218 Ill. 2d 342, 353 (2006) (quoting *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494 (2002) (quoting *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995))). Where an appellant's brief violates the requirements of our supreme court rules, this court has the discretion to strike the brief and dismiss the appeal or disregard appellant's arguments. *Alderson v. Southern Co.*, 321 Ill. App. 3d 832, 845 (2001). We recognize, however, " '[w]here violations of supreme court rules are not so flagrant as to hinder or preclude review, the striking of a brief in

whole or in part may be unwarranted.' " *Hurlbert v. Brewer*, 386 Ill. App. 3d 1096, 1101 (2008) (quoting *Merrifield v. Illinois State Police Merit Board*, 294 Ill. App. 3d 520, 527 (1997)).

¶ 50 Although defendants' brief undoubtedly fails to strictly comply with Rule 341(h)(6), the violations do not preclude review of the appeal. This court, in the exercise of its discretion, chooses to consider this appeal on its merits.

¶ 51 I. The Standard of Review

¶ 52 Initially, we observe the unusual procedural posture in which these cases were decided. The trial court granted plaintiffs' motion for a directed finding after both parties rested. Section 2-1110 of the Illinois Code of Civil Procedure, however, applies to motions made by a defendant in a nonjury case for a finding in the defendant's favor at the close of plaintiff's case at trial. 735 ILCS 5/2-1110 (West 2010). Moreover, "[iIf the ruling on the motion is adverse to the defendant, the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived." *Id.* The procedure followed in this case does not comport with the plain language of section 2-1110.

¶ 53 Defendants, however, have not complained of this procedure, which in any event does not appear to have prejudiced defendants. In Illinois, there is a two-stage process when a trial court rules on a motion for a directed finding at the close of the plaintiff's evidence in a bench trial. First, the judge must determine whether the plaintiff has established a *prima facie* case. *Kokinis v. Kotrich*, 81 Ill. 2d 151, 154-55 (1980). If the plaintiff has established a *prima facie* case, the judge, as the trier of fact, must weigh the evidence, and based on the weighing make a ruling. *Id.* Pursuant to section 2-1110, the court does not view the evidence in the light most favorable to

the plaintiff but rather must "weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence" (735 ILCS 5/2-1110 (West 2010)) and draw reasonable inferences therefrom. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 276 (2003). Since the weighing process involves consideration of evidence favorable to the defendant as well as by the plaintiff, the process "may result in the negation of some of the evidence presented by the plaintiff." *Id*. After weighing the quality of all of the evidence presented by both parties, "the court should determine, applying the standard of proof required for the underlying cause, whether sufficient evidence remains to establish the plaintiff's *prima facie* case." *Id*. If the court finds the plaintiff failed to present sufficient evidence to establish its *prima facie* case, the court should grant the defendant's motion and enter a judgment dismissing the action. *Id*.

¶ 54 In these cases, the trial court entered an order denying summary judgment on the ground genuine issues of material fact remained regarding delays in the substantial completion of the units. Defendants also asserted these delays as an affirmative defense to plaintiffs' claims. After hearing the evidence at trial, the court ruled defendants "probably" presented a *prima facie* case that delays occurred, but considered the totality of the evidence in making its ultimate rulings in favor of plaintiffs.

¶ 55 The trial court, in ruling that the evidence failed to show the delays here were all beyond the reasonable control of the seller, performed the analysis for not only the second prong of a directed finding, but also a judgment. We will not reverse a directed finding unless it is contrary to the manifest weight of the evidence. *People ex rel. Sherman*, 203 Ill. 2d at 276. Similarly, it is well-settled that a trial court's ruling made after a bench trial will not be reversed on appeal

unless it is against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002); *Meyers v. Woods*, 374 Ill. App. 3d 440, 449 (2007); see *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 149 (1972) (use of the manifest error standard when reviewing a bench trial is so firmly established as to require no citation to authority). A ruling is against the manifest weight of the evidence only if it is clearly apparent from the record that the trial court should have reached the opposite conclusion or if the ruling itself is unreasonable, arbitrary, or not based upon the evidence presented. *Best v. Best*, 223 Ill. 2d 342, 350 (2006); *Meyers*, 374 Ill. App. 3d at 449. Under the manifest weight standard, deference is given to the trial court as finder of fact because the trial court is in a better position than the reviewing court to observe the conduct and demeanor of the parties and witnesses. *Best*, 223 Ill. 2d at 350. When the manifest weight standard applies, the reviewing court will not substitute its judgment for that of the trial court on such matters as witness credibility, the weight to be given evidence, and the inferences to be drawn from the evidence. *Id*. at 350-51.

¶ 56 On the other hand, we review *de novo* the court's rulings on legal questions. *Morawicz v. Hynes*, 401 Ill. App. 3d 142, 148 (2010). Indeed, plaintiffs consider the trial court's interpretation of their contracts as subject to *de novo* review because that interpretation first appears in the order on their motion for summary judgment. See *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). *De novo* consideration means we perform the same analysis a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Insofar as the standards of review are identical, we conclude the unusual procedure employed in the circuit

court did not affect the disposition of the litigation. Accordingly, we turn to the arguments defendants raise on appeal regarding both issues of law and issues of fact.

¶ 57 II. Contract Interpretation

¶ 58 Defendants argue the trial judge misinterpreted the contracts at issue in several respects. The interpretation of a contract is a question of law and thus subject to *de novo* review on appeal. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). The primary goal of contract interpretation is to give effect to the intent of the parties. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). In determining the intent of the parties, a court must consider the contract document as a whole and not focus on isolated portions of the document. *Gallagher*, 226 Ill. 2d at 233. If the language of a contract is clear and unambiguous, the intent of the parties must be determined solely from the language of the contract document itself, which should be given its plain and ordinary meaning, and the contract should be enforced as written. *Virginia Surety Co.*, 224 Ill. 2d at 556.

¶ 59 If the contract language is ambiguous, however, the meaning of the contract language must be ascertained through a consideration of extrinsic evidence. *Gallagher*, 226 Ill. 2d at 233. When seeking to determine the intent of the parties to a contract when its terms are in any respect doubtful or uncertain, courts look to the acts and conduct of the parties in carrying out the provisions of the contract. *Olympic Restaurant Corp. v. Bank of Wheaton*, 251 Ill. App. 3d 594, 602 (1993). If a contract is susceptible to two constructions, the construction that makes the contract fair, customary and one likely to be entered into by reasonable men is preferred over the construction that renders the contract inequitable, unusual or unreasonable. *Fox v. Commercial*

Coin Laundry Systems, 325 Ill. App. 3d 473, 476 (2001). It is a well-settled principle of contract construction that the provisions of a contract shall not be interpreted in a way that renders other provisions meaningless. *Atwood v. St. Paul Fire & Marine Insurance Co.*, 363 Ill. App. 3d 861, 864 (2006).

¶ 60 A. The Date of Substantial Completion

¶ 61 Defendants first contend the trial court misinterpreted the "estimated date of substantial completion" in the contracts at issue as firm deadlines. Defendants argue that such an interpretation is contrary to the Illinois Supreme Court's decision in *Siegel v. Levy Organization Development Co.*, 153 Ill. 2d 534 (1992). The *Siegel* court's decision is more complex than defendants suggest. Accordingly, we quote the relevant portion of the decision in its entirety:

> "Finally, plaintiff argues that the failure of the appellate court to consider the breach of contract claims of count III constitutes an independent ground of reversible error. Count III of Siegel's complaint alleged that the defendants were in breach of the purchase agreement in that they did not complete the apartment by August 3, 1983. We feel that, as a matter of law, under the terms of the purchase agreement defendants' performance was not untimely.
>
> The purchase agreement set a date by which unit 48A was required to be completed. According to paragraph 5(a):
>
> 'The purchase and sale of the Unit Ownership shall be closed on a date (Closing Date) following substantial completion of the Purchased Unit and inspection described in Paragraph 3(e) hereof, which date shall be designated by

> Seller or its agent upon not less than fourteen (14) days prior written notice to the Purchaser, or upon such earlier date as may be agreed upon by Purchaser and Seller. It is estimated that the Purchased Unit will be substantially completed by August 3, 1983 (Estimated Completion Date), subject to extension for delays occasioned by strikes, material shortages, labor shortages, casualties, inclement weather conditions, acts of God and other causes beyond the reasonable control of Seller.'

Paragraph 5(a) goes on to provide:

> 'In the event that closing does not occur on or before December 31, 1985 (the "Outside Closing Date"), and Purchaser is not then in default hereunder, upon Purchaser's written notice to Seller of its election to terminate, which must be given prior to notice to Purchaser of the substantial completion of the Purchased Unit and Seller's designation of the Closing Date as provided for above, Seller shall return to Purchaser the earnest money with any interest accrued thereon to which Purchaser is entitled pursuant to Paragraph 2 hereof and this Purchase Agreement shall become null and void without further liability to either Purchaser or Seller.'

It appears clear on the face of the agreement that the August 3, 1983, date was only an 'Estimated Completion Date' and that it was the hope of the Levy Organization to have the unit substantially completed by that time. It is equally clear that the estimated

> date was subject to extension for delays occasioned by strikes, material shortages, labor shortages, inclement weather, etc.
>
> Plaintiff admittedly received a letter dated March 3, 1983, from the Levy Organization notifying him that '[t]he Estimated Completion Date set forth in [the purchase agreement] was delayed due to the adverse winter weather conditions last year [the winter of 1982-83] and other causes beyond our control.' Although plaintiff introduced evidence that the winter of 1982-83 was not more severe than an average Chicago winter, plaintiff could not show that there was no inclement weather that affected construction. In addition, plaintiff failed to present any evidence to contradict the testimony of Gary Marks, the project manager on the OMM building, that labor strikes caused delays in construction. Finally, it is undisputed that the purchased unit was completed prior to the "Outside Closing Date" of December 31, 1985. Thus, defendants timely performed their obligations under the purchase agreement and plaintiff's claim must fall." *Id*. at 547-49.

¶ 62 Defendants focus on the *Siegel* court's discussion of the "estimated completion date" as expressing a "hope" of the substantial completion date as determinative, but the *Siegel* decision is not so limited. The *Siegel* court ruled the purchase agreement set a date by which a unit was required to be completed. *Id*. at 546. In so ruling, the *Siegel* court focused on the language of the agreement similar to the contracts at issue in this appeal. This language includes the estimated date plus allowable delays.

¶ 63 The language in the *Siegel* agreement involving the outside closing date (language not present in these contracts) was set off separately by the *Siegel* court. *Id*. at 548. Moreover, in *Siegel*, our supreme court held there was no question of fact where plaintiffs presented no evidence of impermissible delay and the purchased unit was completed prior to the outside closing date. *Id*. at 548-49. Our supreme court did not rule the outside closing date was determinative, as demonstrated by the court's discussion of the other factors. In this case, unlike *Siegel*, the trial court ruled plaintiffs raised genuine issues of material fact on the issue of delay.

¶ 64 Furthermore, unlike *Siegel*, the trial court read paragraph 9 in light of the contracts' "time is of the essence" clause.[4] The inclusion of a "time is of the essence" clause generally demonstrates the parties' intend the contract be performed as soon as possible. *Guel v. Bullock*, 127 Ill. App. 3d 36, 42 (1984). Defendants assert the "time is of the essence" clause is a nonissue, but the only authority defendants cite states when a time for performance of an obligation under a contract is not specified, a reasonable time will be implied. *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1092 (2003); *Meyer v. Marilyn Miglin, Inc.*, 273 Ill. App .3d 882, 890 (1995); *Murphy v. Roppolo-Prendergast Builders, Inc.*, 117 Ill. App. 3d 415, 418 (1983); *J. J.*

[4] The agreement in *Siegel* also contained such a clause (*Siegel v. Levy Organization Development Co.*, 219 Ill. App. 3d 579, 582 (1991), *aff'd in part, rev'd in part*, 153 Ill. 2d 534 (1992)), but neither this court nor our supreme court discussed it, suggesting it was not raised by the plaintiff in that case as it was by plaintiffs here.

Brown Co. v. J. L. Simmons Co., 2 Ill. App. 2d 132, 140 (1954). None of these cases involve contracts with "time is of the essence" clauses.

¶ 65 Defendants also argue the "time is of the essence" clause applies to the firm deadline actually set by the contracts, *i.e.*, "the firm closing date that is to be set later (after substantial completion) by the seller under the ¶ 9 closing provisions." Paragraph 9 of these contracts contain no firm closing date. Indeed, the portion of defendants' brief just quoted implicitly concedes there is no firm closing date to be found in paragraph 9 of the contracts. Moreover, defendants cite no authority establishing the stand-alone "time is of the essence" clause here applies only to the closing date.

¶ 66 In short, the trial court properly considered the contract as a whole and did not focus on isolated portions of the document. *Gallagher*, 226 Ill. 2d at 233. Given the "time is of the essence" clause requiring performance as soon as possible, the seller was required to substantially complete plaintiffs' units by the estimated dates handwritten into each form contract, as extended by delays allowed under the contract. The trial court denied plaintiffs' summary judgment on their contract claim, requiring a trial on the factual issues regarding allowable delays. Based on this record, we conclude defendants fail to demonstrate the circuit court committed reversible error as a matter of law regarding this aspect of interpreting plaintiffs' contracts.

¶ 67 B. Causes of Delay

¶ 68 Defendants next maintain the trial court erred in its interpretation of the portion of paragraph 9 specifically addressing allowable delays in substantial completion of plaintiffs' units. Defendants assert two particular errors we address in turn.

¶ 69 First, defendants argue the trial court improperly considered whether particular delays were foreseeable. Thus, defendants contend, the trial court improperly confused the express terms of each contract with the concept of *force majeure*. Initially, we observe defendants cite no legal authority in support of their argument. Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) states that the appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." As noted previously, our supreme court's rules have the force of law, and the presumption must be that they will be obeyed and enforced as written. *Rodriguez*, 218 Ill. 2d at 353. One of the most important functions of the appellate court is to determine whether an issue has been forfeited, so as to avoid unnecessary expenditure of judicial resources. See *People v. Smith*, 228 Ill. 2d 95, 106 (2008). A reviewing court is "entitled to have briefs submitted that *** present cohesive legal argument in conformity with our Supreme Court rules." *Eckiss v. McVaigh*, 261 Ill. App. 3d 778, 786 (1994). Accordingly, defendants have forfeited this assertion on appeal.

¶ 70 We observe, however, while the trial judge's oral ruling refers to weather delay days built into the production schedule in summarizing Stark's testimony, the judge's later discussion of weather delays focuses on the lack of clear evidence of the total weather delay. The oral ruling refers in passing to the claimed number of weather delay days for One Museum Park West being fewer than for One Museum Park East, but it is not clear from the transcript whether the trial judge mentioned this from the standpoint of foreseeability or from the standpoint of the vagueness of the testimony. We also observe that when the trial judge specifically referred to *force majeure* during his discussion of groundwater delays, the judge ruled such delays were not

included under *force majeure* or the terms of the contracts. Accordingly, contrary to defendants' suggestion, the record does not suggest the trial judge confused the concept of *force majeure* and the terms of the contracts.

¶ 71 Second, defendants argue the trial court improperly applied the doctrine of *ejusdem generis* in its interpretation of paragraph 9 of the contracts. As explained by the Illinois Supreme Court:

> " 'The doctrine of *ejusdem generis* is that where a statute or document specifically enumerates several classes of persons or things and immediately following, and classed with such enumeration, the clause embraces "other" persons or things, the word "other" will generally be read as "other such like," so that the persons or things therein comprised may be read as *ejusdem generis* "with," and not of a quality superior to or different from, those specifically enumerated.' " *Farley v. Marion Power Shovel Co.*, 60 Ill. 2d 432, 436 (1975) (quoting *People v. Capuzi*, 20 Ill. 2d 486, 493-94 (1960)).

Ejusdem generis, however, is not a rule of mandatory application, but a rule of construction which should not be applied to defeat the unambiguous intent of the legislature or parties to an agreement. See *Citizens Utilities Co. v. Illinois Commerce Commission*, 50 Ill. 2d 35, 40-41 (1971) (as applied to statute).

¶ 72 In this case, the trial judge ruled groundwater delays did not fall within the scope of paragraph 9 because they were unlike the other causes of delay specified in paragraph 9. Defendants maintain this was an improper interpretation, arguing paragraph 9 evinces an intent to refer to a single standard of "beyond the reasonable control of Seller." We agree that any delay

allowed under paragraph 9 must be "beyond the reasonable control of Seller." It does not follow, however, that the phrase "other causes" is not subject to the application of *ejusdem generis*. Had defendants intended all causes beyond the reasonable control of Seller were contained in paragraph 9, it would have been a simple matter for the seller as drafter to have drafted paragraph 9 with that intent by omitting any specific causes of delay. Reading "other causes beyond the reasonable control of Seller" as referring to all causes beyond the reasonable control of the seller would improperly render the specific delays mentioned meaningless surplussage. *Atwood*, 363 Ill. App. 3d at 864.

¶ 73 Moreover, the specified delays themselves are not universally "beyond the reasonable control of Seller." For example, defendants acknowledge a labor strike aimed at and avoidable by a developer may be within the developer's reasonable control. Accordingly, the specified delays cannot be interpreted as mere examples of occurrences or conditions beyond the seller's control. Thus the trial judge did not err by interpreting the contract to require defendants to demonstrate delays within or similar to the classes specified in the contracts.

¶ 74 C. Inclement Weather

¶ 75 Defendants further maintain the trial court erroneously adopted an unduly narrow interpretation of "inclement weather" in paragraph 9. The transcript of the oral ruling indicates the trial judge adopted a dictionary definition meaning "physically severe storming."

¶ 76 Defendants first argue the trial judge's definition is narrower than that given in the Oxford English Dictionary:

> "Inclement *** 1. Of climate or weather: not mild or temperate; extreme; severe (usually applied to cold or stormy weather; rarely of severe heat or drought)." Oxford English Dictionary (1981 Compact Ed.) at 1401.

Defendants also argue the trial judge further defined the phrase to limit it to unforeseeable or unexpected conditions.

¶ 77 The trial judge's definition falls squarely within defendants' preferred Oxford English Dictionary definition, leaving defendants to argue the trial judge improperly excluded weather which was "not temperate" but "not severe." Aside from the fact that neither temperate nor severe are absolutely precise terms, the trial judge interpreted the meaning of "inclement weather" in paragraph 9 in light of the use of the term "unseasonable weather conditions" in paragraph 10. Contracts providing the seller shall not be liable if construction is delayed by unseasonable weather conditions suggest the seller contemplates liability for delays caused by seasonable weather conditions.[5] The trial judge was obliged to consider the contract document as a whole and not focus on isolated portions of the document. *Gallagher*, 226 Ill. 2d at 233. Accordingly, the trial court did not err in interpreting the contracts as referring to weather conditions beyond the range normally encountered.

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[5] Indeed, while defendants generally objected to any consideration of whether various delays (including weather delays) were foreseeable, the plain language of the contracts expressly refers to "unseasonable" weather, a concept inherently compared to weather generally anticipated for a given season.

¶ 78 III. Findings of Fact

¶ 79 Defendants further contend the trial judge's findings of fact were against the manifest weight of the evidence regarding delays caused by: (1) the City permitting process; (2) weather; (3) bank failure; and (4) materials shortages. We address each in turn.

¶ 80 A. Permit Delays

¶ 81 Defendants argue the City's permit delays should be viewed as involving two distinct issues: V3's confusion regarding whether the application was for a foundation permit or full building permit; and the dispute over the engineering calculations. The transcript of the oral ruling indicates the trial judge found the evidence regarding the type of permit originally sought to be vague and confusing. The record on appeal contains an application for a foundation permit. Yet Renterghem testified regarding comments on the building permit application dated March 1, 7 and 21, 2006 – all prior to the date the application was signed. Renterghem also acknowledged the Mayor's Office of Disabilities appeared to have comments on the project dated March 1, 2006. The trial judge's characterization of the evidence on this issue was accurate. Thus, the judge's finding was not against the manifest weight of the evidence.

¶ 82 The transcript of the oral ruling indicates the trial judge found the City issued a permit shortly after defendants complied with the City's requirements. Defendants assert the dispute over whether hand calculations were required was an internal dispute among V3's engineering staff, but fails to cite to the record in support of this assertion. Kiefer, who had 20 years of experience with the City's permitting process, testified the City liked to see hand calculations and was not surprised by the City's demand for them. Accordingly, the trial court's finding on this

point, and the inference compliance was within the seller's control, were not against the manifest weight of the evidence.

¶ 83 The trial judge also considered the permit delay irrelevant in light of the fact construction started shortly after Grand Park 2 closed on its construction loan. Defendants assert this reasoning is "bogus," because there was no evidence Grand Park 2 could not have closed the loan or that the lack of the loan precluded the commencement of construction. Cameranesi, defendants' chief financial officer, testified the primary reason the construction loan had not been closed by January 2007 was the low number of contracts signed. According to Cameranesi, the loan still had not closed as of February 22, 2007, when he was involved in meeting the requirements of the lenders' due diligence report. Cameranesi also testified each of the Grant Park projects was financed by its own individual loans. Cameranesi further testified that in January 2007, Grant Park 2 had no funds of its own outside of loan disbursements with which to continue or perform construction. In addition, Shipka testified subsequent funding delays caused subcontractors to cease work on the project. The trial court's finding on this point was a reasonable inference to be drawn from the record.

¶ 84 B. Weather Delay

¶ 85 Defendants next maintain the trial judge erred in finding the weather delays were not specifically proven. Defendants' sole reference to the record in support of this point is the Bovis construction log included in the record on appeal as a data disc, unsupported by specific references and calculations. Defendants also generally refer to the testimony from Stark, McKenna and Grosbeck on the issue.

¶ 86 Defendants' argument is implicitly premised on the notion any day identified by these witnesses is a valid weather delay day. As previously discussed, the issue was the amount of delay attributed to inclement or unseasonable weather beyond defendants' control. Defendants presented little evidence which weather delays were specifically contemplated by the contracts. Indeed, the trial judge observed that on August 23, 2007, where tornado-like winds occurred, work proceeded until 4:30 p.m. Moreover, Stark testified union rules further preclude ironworkers from working in the rain, but on occasions involving wind or lightning, the crane operator may shut down work for a specific period of time, though not necessarily an entire day.

¶ 87 Defendants maintain the trial judge did not understand how the concrete curing process would produce delays even on days where work did not cease until late in the day. Defendants provide no citation to the record in support of this assertion. Moreover, defendants do not point to testimony in the record specifically indicating the number of days lost to the curing process, which is particularly relevant in light of the testimony Grand Park 2 sped up the concrete curing process during construction. In addition, the transcript of the oral ruling indicates the trial judge's finding on this issue was due in part to his assessment of Grosbeck's testimony. The transcript indicates the trial judge did not find Grosbeck a particularly credible witness. It was the duty of the trial judge, as the trier of fact to consider the credibility of the witnesses and the weight and quality of the evidence and draw reasonable inferences therefrom. 735 ILCS 5/2-1110 (West 2010); see *People ex rel. Sherman*, 203 Ill. 2d at 276. Defendants have failed to show the trial court's finding that any specific amount of weather delay was unproven was against the manifest weight of the evidence.

¶ 88 C. Bank Failure Delay

¶ 89 Defendants further contend the trial court erred in apparently concluding the break in funding the project after one of the project's lending banks was put into FDIC receivership was defendants' fault for not submitting proper paperwork to the FDIC. Defendants asserts the FDIC changed its requirements but failed to inform defendants of this for weeks. Defendants fail to support its assertion by any citation to the record on appeal.

¶ 90 Shipka testified the funding delay caused contractors to pull off the job, but he could not say how it affected the critical path of construction. Cameranesi testified he would leave any testimony on the issue to Grosbeck, whose testimony the trial judge did not find generally credible. On this specific point, Grosbeck acknowledged at trial the bank failure delay was not specifically mentioned in his prior affidavit.

¶ 91 Defendants provide two record citations to support its claim. The first record citation is to "Supp. R. 10077," which does not specify a volume of record and which does not appear in any volume of the supplemental record on appeal. The second record citation is the Bovis construction log included in the record on appeal as a data disc. Defendants refer to a calculation of how many workers were on site at the project before and during the supposed break in funding, based on sampling log entries for Wednesdays. Defendants, however, fail to support their calculation with specificity or indicate where it presented such argument to the trial court. Accordingly, defendants have failed to satisfy their burden of proving the trial judge's finding is against the manifest weight of the evidence.

¶ 92 D. Materials Shortages

¶ 93 Lastly, defendants contend the trial court erred in rejecting the claim regarding an aluminum shortage. Again, defendants cite no relevant portions of the record or legal authority in support of the contention. Rather, defendants merely assert the trial judge had no basis for discounting Grosbeck's testimony. Defendants also assert Grosbeck was not impeached where his opinions regarding the material shortages changed between his deposition and trial testimony. As defendants conclude in their brief, "He wasn't asked; he didn't tell. That is not impeachment."

¶ 94 In this case, Grosbeck testified as an expert witness controlled by defendants. Under Supreme Court Rule 213(f), litigants are required to disclose the subject matter, opinions, and conclusions of controlled expert witnesses who will testify at trial. Ill. S. Ct. R. 213(f) (eff. Jan.1, 2007). Rule 213(g) limits the expert opinions at trial to the information provided in the Rule 213 disclosure and the discovery deposition. Ill. S. Ct. R. 213(g) (eff. Jan.1, 2007). At trial, a witness may elaborate on a disclosed opinion or testify to logical corollaries to the disclosed opinion, but the trial testimony must be encompassed in the original opinion. *Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 914 (2007). The expert disclosure rules are intended to avoid surprise and to discourage strategic gamesmanship. *Spaetzel v. Dillon*, 393 Ill. App. 3d 806, 812 (2009). The admission of evidence pursuant to Rule 213 is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Spaetzel*, 393 Ill. App. 3d at 812; *Bauer*, 377 Ill. App. 3d at 914. "An abuse of discretion occurs when no reasonable person would take the view adopted by the court." *Trettenero v. Police Pension Fund*, 333 Ill. App. 3d 792, 802 (2002). Moreover, even when testimony is not expressly excluded, the trier of fact may

weigh an expert's changing testimony in assessing the expert's credibility. See *York v. El-Ganzouri*, 353 Ill. App. 3d 1, 20 (2004).

¶ 95 Grosbeck opined on delays ostensibly caused by difficulty in obtaining aluminum, copper and conduit, but gave deposition testimony opining on delays supposedly caused by difficulties in obtaining steel, drywall and studs. In light of the well-established law, the trial court's rejection of Grosbeck's novel opinions regarding materials shortages and defendants' "don't ask, don't tell" theory of litigation was not an abuse of discretion. Similarly, in assessing whether the trial judge's finding was against the manifest weight of the evidence, this court will not substitute its judgment for that of the judge on such matters as witness credibility, the weight to be given evidence, and the inferences to be drawn from the evidence. *Best*, 223 Ill. 2d at 350-51.[6]

¶ 96 In short, defendants have failed to demonstrate the trial judge's findings of fact were against the manifest weight of the evidence.

¶ 97 CONCLUSION

¶ 98 In sum, we conclude the trial judge did not err as a matter of law in its interpretation of the contracts at issue in this consolidated appeal. Moreover, defendants failed to establish the

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[6] We observe in passing Grosbeck's varied opinions on material shortages were not the only bases on which the trial judge criticized Grosbeck's testimony. The trial judge also observed the strike delays Grosbeck presented were totally irrelevant to the case and his numbers repeatedly changed over the course of his testimony. The trial court also found Grosbeck did not adequately explain overlapping periods of delay.

trial judge's findings of fact were against the manifest weight of the evidence. Accordingly, the judgments of the circuit court of Cook County are affirmed.

¶ 99 Affirmed.