SIXTH DIVISION
September 5, 2014

No. 1-13-2928

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GREGORY W. FREEHAUF,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 L 002321
	)	
TCB DESIGN/BUILD, LLC and MARK VANDENBERG,	)	
	)	The Honorable
	)	Ronald Bartkowicz,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Rochford and Reyes concurred in the judgment.

O R D E R

¶1 *HELD*: We affirm the circuit court's finding that defendant was not in violation of the Wage Act as an "employer" where the record on appeal failed to show this finding was against the manifest weight of the evidence.

¶2 Following a bench trial, the circuit court held that defendant TCB Design/Build, LLC (TCB)[1] was liable to plaintiff, Gregory Freehauf, for breach of an employment contract and for a violation of the Illinois Wage Payment and Collection Act (Wage Act) (820 ILCS 115/1 *et seq.* (West 2008)). The circuit court, however, held that defendant, Mark Vandenberg, the sole manager of TCB, was not an "employer" that violated the Wage Act. On appeal, plaintiff contends the circuit court erred in finding the evidence supported defendant's belief that TCB was insolvent at the time in question and erred in its interpretation of "employer" as defined by the Wage Act. Based on the following, we affirm.

¶3 FACTS

¶4 According to plaintiff's complaint, he was formerly employed by TCB, which is a manager-managed limited liability company. On April 11, 2006, defendant verbally offered plaintiff a promotion to the position of president of TCB. Plaintiff accepted. In a letter dated August 24, 2006, defendant wrote:

> "This letter will confirm my verbal offer on April 11, 2006[,] of your promotion and new compensation package. As president of TCB Design Build, you will be given 10% ownership in TCB Design Build. Your annual bonus at year end will be equal to 17.5% of the gross profits and guaranteed no less than $200,000.00. Additional benefits will include a golf membership in a country club located near your home."

The letter contained plaintiff's signature of acceptance.

¶5 According to plaintiff's complaint, he earned the minimum $200,000 guaranteed bonus in 2006 and 2007. In December 2006, TCB paid plaintiff $67,702.50 toward his 2006 earned bonus. In March 2007, TCB paid $85,000 for plaintiff's golf membership. In May 2008, TCB

[1] TCB is not a party to this appeal. When we refer to defendant, we are referencing Vandenberg.

paid plaintiff $100,000 toward his 2006 and 2007 earned bonuses. Then, in June 2008, plaintiff resigned from TCB. Plaintiff alleged TCB and defendant owed him $232,297.50 in unpaid bonus earnings.

¶6 On February 22, 2010, plaintiff filed a complaint for breach of contract against TCB and for violation of the Wage Act against TCB and defendant for failing to fully compensate him for his bonus earnings. TCB and defendant filed a joint answer and discovery ensued. On October 27, 2011, plaintiff filed a motion for summary judgment. TCB and defendant responded, alleging there were genuine issues of material fact preventing judgment as a matter of law. On March 21, 2012, the circuit court entered summary judgment in favor of plaintiff as to liability against TCB; however, summary judgment was denied as to liability against defendant and as to damages against TCB and defendant. The case proceeded to trial on July 11, 2013, during which the parties presented witnesses and exhibits; however, no trial transcript appears in the record. The circuit court took the matter under advisement and issued a written order on August 15, 2013.

¶7 In its August 15, 2013, written order, the circuit court found TCB was liable to plaintiff for $474,702.15 pursuant to the terms of the April 11, 2006, employment agreement. With regard to defendant, the circuit court found defendant was not an "employer" pursuant to the Wage Act and, therefore, was not liable thereunder for plaintiff's outstanding bonus earnings. We quote at length from the written order. The circuit court stated:

> "The Illinois Wage Payment Act, 820 ILCS [] 115/13 *** provides: 'Any officer of a corporation or agents of an employer who *knowingly permits* such employer to violate the provision of this Act shall be deemed to be employers of the employees of the corporation.' 820 ILCS [] 115/13 [(West 2008)] ([E]mphasis

added.) Plaintiff is an employee pursuant to the definition of 'employee' contained in [section] 115/2 of the Act: 'the term' "employee" shall include any individual permitted to work by an employer in an occupation.' 820 ILCS [] 115/2 [(West 2008)]. Employees have a private right of action under the Act. Defendant Vandenberg is an officer of TCB. The Act also requires payment of employee wages no 'later than 13 days after the end of the pay period in which such wages were earned.' 820 ILCS [] 115/4 [(West 2008)].

TCB paid Plaintiff $132,000 on 29 December 2006, leaving a balance of $18,000 for 2006. For the year 2007, TCB paid $85,000 on 23 March 2007 and that payment was designated as the golf allowance. An additional $100,000 was paid on 9 May 2008 and applied to the 2007 bonus. No evidence was presented as to any payments made toward the 2008 bonus. In view of the Court's finding that the 11 April 2006 agreement requires a pro-rated calculation, Plaintiff has failed to offer proof that Vandenberg 'knowingly failed' to permit the payment of bonuses for 2006 and 2008. The Court makes a similar finding as to Vandenberg's knowledge of the 2007 bonus requirement: evidence at trial indicated his belief that Plaintiff was entitled to a $200,000 bonus. The Court finds his actions in not rendering the appropriate bonus, did not amount to 'knowingly' under the Act.

As to the 2007 bonus, Plaintiff and Defendant presented conflicting financial documents. Defendant's document shows a negative operating balance for 2007 and Defendant Vandenberg testified to this fact. Plaintiff, on the other hand, produced copies of Defendant TCB's tax return for 2007 showing the profit

> number previously used by the Court to determine TCB's liability. Although the Court relied on the 2007 tax return to support the Court's finding of TCB's liability, Vandenberg's reliance on the financial statement, although erroneous, was reasonable. Therefore, the Court finds Vandenberg did not 'knowingly' fail to permit the 2007 bonus to be paid.
>
> In view of the Court's determination that the Plaintiff's bonus was to be pro-rated to cover the period of time during which Plaintiff performed his promotional duties and that the Defendant's reliance on certain financial documents showing TCB's negative operating balance, the Court finds Defendant Vandenberg did not 'knowingly' permit a violation of the Act for the 2006 and 2008 bonus issue."

This appeal followed.

¶8 ANALYSIS

¶9 Plaintiff contends the circuit court's finding that Vandenberg did not have the requisite knowledge of TCB's finances to support the Wage Act violation claim was against the manifest weight of the evidence.

¶10 When considering a judgment entered after a bench trial, a reviewing court will not disturb the circuit court's findings unless they are against the manifest weight of the evidence. *Butler v. Harris*, 2014 IL App (5th) 130163, ¶ 36. A judgment is against the manifest weight of the evidence when the opposite conclusion is apparent or where the findings appear to be arbitrary, unreasonable, or not based on the evidence. *Id*. The trier of fact is in the superior position to assess the credibility of the witnesses and determine the weight to be given to their testimony. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 21. Unless the

opposite conclusion is apparent from the record, the reviewing court will not substitute its judgment for that of the trier of fact on matters of witness credibility, the weight of the evidence, and the inferences drawn therefrom. *Id*.

¶11 Based on the record before us, we conclude plaintiff has not demonstrated the circuit court's finding was against the manifest weight of the evidence. In its written order, the circuit court made clear that it assessed the credibility of the witnesses, most notably defendant, resolved conflicts in the evidence, and assigned weight to the testimony. Ultimately, the circuit court found that defendant did not "knowingly" fail to render the appropriate bonus to plaintiff. Rather, the circuit court concluded that, based on the evidence and testimony presented, defendant's belief that plaintiff was only entitled to a $200,000 bonus was "reasonable." We find that an opposite conclusion is not apparent from the record, especially where there is no transcript available for our review. The appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error and in the absence of such a record on appeal we will presume that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch v.* O'Bryant, 99 Ill. 2d 389, 391-92 (1984). Without a transcript, we have no means to assess the witness testimony. Nevertheless, in the written opinion, the circuit court explained the bases for its finding and we will not substitute our judgment for that of the circuit court.

¶12 We note that, in violation of Illinois Supreme Court Rule 341(h)(7), plaintiff failed to support his argument that defendant knew TCB was not insolvent and chose to pay other creditors instead of plaintiff. Rule 341(h)(7) requires parties to cite to relevant authority and the pages of the record relied upon (Ill. S.Ct. R. 341(h)(7) (eff. Feb. 6, 2013)). Here, however, plaintiff failed to cite to the record to support the factual assertions. Instead, in his reply brief,

plaintiff relies on section 15-1 of the Limited Liability Company Act (805 ILCS 180/15-1 (West 2008)) to argue that the circuit court's finding was against the manifest weight of the evidence because defendant, pursuant to the statute, had the ability to decide which creditors to pay. Plaintiff further relies on TCB's tax returns showing the company had $3.3 million in income in 2007 to demonstrate that defendant must have had knowledge of the company's ability to pay plaintiff's bonus. Neither section 15-1 of the Limited Liability Company Act, which simply outlined defendant's statutory authority as a manager, nor TCB's tax returns, for which there is no context without having a transcript from the trial, provide factual support making it apparent that defendant knowingly failed to provide plaintiff with the appropriate bonus.

¶13 Plaintiff next contends the circuit court erred in finding that the Wage Act required a demonstration of knowledge in order to establish that defendant was an employer as defined by the statute. Plaintiff maintains defendant was an employer and violated the Wage Act.

¶14 To determine whether defendant was an "employer" within the meaning of the Wage Act, we must apply the familiar principles of statutory interpretation. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature by applying the plain and ordinary meaning of the statutory language. *Andrews v. Kowa Printing Corp*., 217 Ill. 2d 101, 106 (2005). Where the language of the statute is clear and unambiguous, we must apply it as written, considering the statute in its entirety and keeping in mind the subject and the legislature's objective. *Id*. We must presume the legislature did not intend to produce absurd or unjust results. *Id*. at 107. The interpretation of a statute involves a question of law, which we review *de novo*. *Id*. at 106.

¶15 Section 5[2] of the Wage Act provides that "[e]very employer shall pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next regularly scheduled payday for such employee." 820 ILCS 115/5 (West 2008). There is no dispute that TCB owed plaintiff money for his earned bonuses. The question is whether defendant was also liable as an employer.

¶16 Employer is defined twice in the Wage Act. Section 2 of the Wage Act states that "[a]s used in this Act, the term 'employer' shall include any individual, partnership, association, corporation, business trust, employment and labor placement agencies ***, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons is gainfully employed." 820 ILCS 115/2 (West 2008). Then, section 13 of the Wage Act provides that "any officers of a corporation or agents of an employer who knowingly permit such employer to violate the provisions of this Act shall be deemed to be employers of the employees of the corporation." 820 ILCS 115/13 (West 2008).

¶17 Our supreme court has recognized the absurdity of a literal reading of section 2's definition of 'employer.' *Andrews*, 217 Ill. 2d at 107-08. A strict application of the language of section 2 of the Wage Act would "make every supervisory employee strictly and personally liable for payment of his or her subordinates' wages." *Id*. In rejecting a strict application of the language, the supreme court concluded that "section 2 simply confirms that an employer is liable not only for its *own* violations of the Wage Act but also for any Wage Act violations committed by its agents." (Emphasis in the original.) *Id*. at 108. Turning to section 13 of the Wage Act,

[2] We recognize that the circuit court cited section 4 of the Wage Act as the statutory basis for payment; however, we find section 5 is more applicable where, from the limited understanding we can glean from the record, plaintiff earned a bonus on a yearly basis and not during a "semi-monthly or bi-weekly" basis as discussed by section 4 of the Wage Act. 820 ILCS 115/4 (West 2008).

the supreme court concluded that it "defines who, other than an employer itself, may be treated as an 'employer' for purposes of the Wage Act." *Id*. at 109. In so concluding, the supreme court advised that:

> "when considered together, section 2 and section 13 form a coherent and entirely sensible policy. Section 2 confirms that an employer is liable both for its own violations of the Wage Act and for any Wage Act violations committed by its agents. Section 13, in turn, imposes personal liability on any officers or agents who knowingly permitted the Wage Act violation. Unlike a literal reading of section 2, which imposes strict Wage Act liability upon all supervisory employees, this reading reserves personal Wage Act liability for those individual decision makers who knowingly permitted the Wage Act violation." *Id*. at 109.

¶18 Based on the holding in *Andrews*, we conclude that knowledge of the failure to pay the appropriate bonus was required to demonstrate defendant's liability as an employer. In this case, there was nothing in the record which has been provided by plaintiff to establish defendant knowingly permitted the withholding of plaintiff's bonus. *Cf. Zabinsky v. Gelber Group, Inc.*, 347 Ill. App. 3d 243, 250 (2004) (wherein the trial testimony established that the plaintiff was hired by the defendants, the president and chief financial officer of the company; the defendants negotiated the terms of the plaintiff's bonus and salary; and the defendants knowingly refused to pay the plaintiff's first quarter bonus). Rather, the circuit court found that defendant reasonably relied on TCB's negative operating balance for 2007 to conclude that plaintiff only was entitled to a $200,000 bonus. In absence of a record of the trial proceedings, we must presume that the circuit court had a sufficient factual basis for its decision and that it conforms to the law. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶19 CONCLUSION

¶20 In sum, we affirm the circuit court's order following a bench trial that defendant did not violate the Wage Act.

¶21 Affirmed.