2015 IL App (1st) 141718-U

SIXTH DIVISION
February 13, 2015

No. 1-14-1718

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SANFORD RICHMAN, Individually and as Assignee of Adhesive Product Corporation, an Illinois Corporation, Plaintiff-Appellant, v. PURE ASPHALT COMPANY, an Illinois Corporation, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 L 5692 Honorable Margaret Ann Brennan, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirmed the circuit court's award of damages after a prove-up hearing where it was not against the manifest weight of the evidence and the circuit court did not abuse its discretion as to the admission of defendant's evidence, even where defendant had been held in default for discovery violations under Supreme Court Rule 219. We also affirmed the circuit court's refusal to grant plaintiff's request for costs and fees.

¶ 2 Plaintiff-appellant, Sanford Richman, Individually and as Assignee of Adhesive Product Corporation, was the former president of Adhesive Product Corporation (APC), which had been in the business of manufacturing and selling adhesive glue products. Plaintiff brought this suit against defendant-appellee, Pure Asphalt Company, an Illinois Corporation, for allegedly breaching an agreement to pay plaintiff a share of profits for the sales of products to the former

clients of APC and to pay him surcharge fees collected to cover a prior debt owed APC by a former client. Pursuant to plaintiff's motion for sanctions, the circuit court held defendant in default for discovery failures and ordered a prove-up of damages. Plaintiff now appeals from the judgment entered in his favor after the prove-up hearing.

¶ 3 On appeal, plaintiff argues the circuit court erred in allowing defendant to present evidence as to the costs involved in manufacturing and selling products to the former clients of APC and improperly failed to accept the truth of the allegations of his verified complaint as to defendant's failure to collect the debt owed by one of the former clients of APC. Plaintiff also urges error in the circuit court's denial of his request to impose fees and costs against defendant pursuant to Supreme Court Rule 219(a) (eff. July 1, 2002). For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In his verified complaint, plaintiff alleged that in 2010, he and Michael Francis, as a principal of defendant, reached an oral agreement whereby defendant agreed to purchase certain equipment necessary for the production of adhesive glue products, and the right to sell products to APC's existing clients (hereinafter, APC clients). Plaintiff promised to manage sales to APC clients for a period of two years. Under the agreement, defendant was required to: (1) share equally with plaintiff the profits derived from sales to APC clients for a period of two years; (2) pay plaintiff an additional amount of up to $10,000 from business generated from Chemical Concepts, an APC client; and (3) share equally with plaintiff the wages of two APC employees who were to assist defendant with setting up its glue manufacturing operations.

¶ 6 Plaintiff asserted claims of breach of contract (count I), conversion (count II), and accounting (count III) against defendant. In the breach of contract count, plaintiff sought

damages of at least $22,035 by claiming that defendant failed to pay him: (1) his share of profits from sales derived from APC clients over the two-year period of the agreement; (2) "any portion of fees collected from Chemical Concepts;" (3) $3,400 for certain tanks and equipment defendant had purchased as part of the agreement; and (4) $1,640 as defendant's share of the wages paid to two former employees of APC. In count II, plaintiff contended that defendant refused to return certain other equipment, valued at $8,500, which it had borrowed in order to begin manufacturing products for APC clients. In count III, plaintiff contended defendant refused to furnish him with the information necessary to determine whether any profit had been earned on sales to APC clients.

¶ 7 Defendant filed a verified answer and admitted that it had agreed to split all profits derived from sales to APC clients with plaintiff for a period of two years and "purchase paint mixers and related products" from plaintiff. However, defendant denied it had agreed to purchase the other equipment discussed in count II, pay plaintiff up to $10,000 from sales to Chemical Concepts, or split the wages of two employees.

¶ 8 In November 2012, plaintiff served defendant with a first request for production of documents relating to sales of any product to APC clients including, but not limited to: all purchase orders; invoices; receipts; and cost sheets and defendant's raw material costs for products sold to or manufactured for APC clients. Plaintiff also filed a notice to depose Mr. Francis.

¶ 9 On July 2, 2013, plaintiff presented a motion to compel defendant to respond to plaintiff's first request for production of documents and set the deposition of Mr. Francis. Defendant failed

to appear in court on that date.[1] The circuit court entered an order which entered and continued plaintiff's oral motion for default and prove-up to August 6, 2013. The circuit court also entered and continued plaintiff's motion to compel.

¶ 10 On August 6, 2013, the circuit court granted plaintiff's motion to compel, ordered defendant to produce documents responsive to plaintiff's document request by August 13, 2013, and set August 21, 2013, as a status for compliance with written discovery. The circuit court did not rule on plaintiff's oral motion for default.

¶ 11 According to plaintiff, on August 21, 2013, defendant produced documents in court responsive to the request to produce, but did not submit a written response or affidavit of compliance or organize the documents to correspond to plaintiff's document request, as required by Supreme Court Rule 214 (eff. January 1, 1996). In an order entered on August 21, 2013, the circuit court directed the parties to complete the depositions of plaintiff and Mr. Francis by September 30, 2013, and set the matter for trial on November 20, 2013.

¶ 12 However, as a result of defendant's purported failures to produce Mr. Francis for his deposition or amend its response to the document request to comply with Supreme Court Rule 214, plaintiff filed a motion for entry of sanctions pursuant to Supreme Court Rule 219 (Ill. S. Ct. R. 219 (eff. July 1, 2002)), and noticed that motion for hearing on October 28, 2013. Plaintiff argued in his motion that, *inter alia,* defendant had failed to produce any documents containing information about its material costs for products sold to, or manufactured for, APC clients during the relevant two-year period of the parties' agreement. Plaintiff requested that the

[1] In a motion to vacate the July 2, 2013, order, which was later withdrawn, defendant explained that its counsel was absent from the July 2, 2013, hearing because of a family medical emergency.

circuit court strike defendant's answer to the complaint, enter a default judgment in his favor on the issue of liability, and hold a trial solely on the question of damages. Plaintiff also asked the circuit court to find defendant's repeated noncompliance with discovery was without substantial justification and to award plaintiff his reasonable expenses, including attorney fees, under Supreme Court Rule 219(a). Ill. S. Ct. R. 219(a) (eff. July 1, 2002).

¶ 13 On October 28, 2013, defendant appeared in court, served its written response to the document request and tendered documents to plaintiff. Defendant's response included an affidavit of Mr. Francis attesting to the fact that defendant's document production was complete. Defendant's written response to the document request is not contained in the record on appeal.

¶ 14 According to plaintiff, defendant's written response did not comply with Rule 214, and none of the documents produced by defendant contained information which reflected its material costs for products sold to or manufactured for APC clients during the two-year period of the agreement with plaintiff. The circuit court entered an order granting plaintiff's motion for sanctions and holding defendant "in default for failure to comply with discovery." In its order, the circuit court did not strike defendant's answer, include a finding of liability against defendant, or impose costs and fees against defendant. However, the circuit court continued the matter "for prove-up on damages," which was subsequently rescheduled for December 9, 2013.

¶ 15 On November 26, 2013, plaintiff filed a motion for leave to amend his complaint, *instanter*, to increase his *ad damnum* request by an additional $205,000. Specifically, in the proposed amended complaint, plaintiff alleged that defendant had prepared and produced a report showing net sales to the APC clients for the period of July 2010 through July 2012 were approximately $411,000 and, therefore, plaintiff was owed 50% of that amount or $205,000.

Plaintiff noticed the motion for hearing on December 9, 2013, the scheduled date for the prove-up hearing.

¶ 16 Defendant filed a response asking that the motion to amend be denied or, in the alternative if the amendment was allowed, that the default sanction be vacated. Defendant explained that for economic reasons, it had not contested the order of default because plaintiff "sought damages in an amount less than $30,000 (more than $8,000 of which is plaintiff's equipment that defendant has repeatedly instructed plaintiff to collect from defendant's facility)." Defendant asserted that it ultimately had provided discovery responses in good faith.

¶ 17 The circuit court denied the motion to amend the complaint and proceeded to the scheduled prove-up.

¶ 18 Prior to the presentation of evidence, both sides sought to clarify certain issues. First, defense counsel maintained again that, as to plaintiff's conversion claim relating to certain equipment for which plaintiff sought $8,500 (count II), defendant had always been willing to return the equipment at issue. Plaintiff's counsel responded: "That's fine." Defense counsel then stated that the claim proceeding to prove-up was "$30,000 less the $8,500," and the circuit court agreed. Plaintiff did not object.

¶ 19 In response to defendant's opening statement, that a determination of profits from the sales to APC clients must include defendant's costs, plaintiff's counsel made a "standing objection" to defendant's introduction of evidence relating to any documents which had not been produced by defendant through discovery. Defense counsel responded that plaintiff was attempting to prove his damages using only defendant's sales record (later admitted at the prove-up as plaintiff's exhibit number 1), and that defendant had a right to dispute plaintiff's calculation

of profits based on sales figures alone. Defense counsel also asserted that defendant would not introduce as evidence any document which had not been produced during discovery, but would utilize a spreadsheet of costs which defendant had generated for purposes of contesting plaintiff's claim for damages based on the sales figures. The circuit court stated that "you can't go into documents that weren't produced; but if you generate something to try and further explain something at trial, you can bring that before if you're questioning. That's a different story." Plaintiff did not object or respond to the circuit court's ruling.

¶ 20 Plaintiff testified at the hearing that he served as president of APC from 1972 through June 20, 2010. Defendant recently had purchased tanks and mixers from plaintiff and plaintiff had begun to shut down his business. In 2010, he and Mr. Francis began discussions about joining "forces." Ultimately, they reached an overall agreement that defendant would manufacture and sell adhesive products to APC clients and "share profits 50/50" from those sales for a period of two years with plaintiff. Plaintiff was to manage the sales to APC clients. Plaintiff explained that plaintiff's exhibit number 1 established that defendant's net sales to APC clients during the two-year period of the agreement was approximately $411,000. The circuit court admitted plaintiff's exhibit number 1 as a business record, but not as any admission by defendant.

¶ 21 Plaintiff also testified that Chemical Concepts, a client of APC, owed APC $10,000 at the time of the agreement with defendant. Chemical Concepts had agreed to pay APC the past-due amount by paying a surcharge on future purchases. Plaintiff testified that he explained his arrangement with Chemical Concepts to Mr. Francis who then agreed to impose a $2-per-gallon "surcharge" on each gallon of product purchased by Chemical Concepts from defendant.

Plaintiff testified that based on his review of defendant's invoices to Chemical Concepts, defendant included a surcharge on "95%" of its sales to Chemical Concepts, but sometimes the invoices labeled the surcharge as "a freight surcharge." He testified that according to plaintiff's exhibit number 1, defendant sold 6,000 gallons of product to Chemical Concepts, but did not pay plaintiff the $10,000 that he was owed. Plaintiff identified plaintiff's group exhibit number 3 as some of defendant's invoices for products sold to Chemical Concepts. He stated that most of those invoices showed a $2-per-gallon surcharge.

¶ 22 On cross-examination, plaintiff said that he had no knowledge of defendant's material, labor, or freight costs for the products sold to APC clients. He defined profits from the sale of goods as an amount left over after costs are deducted from the sales figures.

¶ 23 Mr. Francis, vice-president and an owner of defendant, was called as a witness by plaintiff. He confirmed that plaintiff's exhibit number 1 was a sales figure report for APC clients during the relevant time period of 2010 to 2012. Mr. Francis stated that during discovery, defendant had produced all existing documents responding to plaintiff's request for documents relating to raw material costs for products sold to APC clients by defendant.

¶ 24 After plaintiff rested, the trial court allowed defendant to present Mr. Francis as a witness in response to plaintiff's damages evidence without objection by plaintiff. Before Mr. Francis gave his testimony, defense counsel showed plaintiff's counsel the documents generated by defendant relating to costs which was identified as defendant's exhibit number 1. Defendant's exhibit number 1 was not admitted into evidence.

¶ 25 Mr. Francis testified that defendant was in the business of manufacturing paints, coatings, and asphalt products. In 2010, defendant purchased equipment from APC, and later, plaintiff's

clients contacted him about defendant making glue products for them. In July 2010, he and plaintiff reached an agreement whereby defendant would begin to produce and sell glue products to APC clients and "split the profits" with plaintiff. Mr. Francis reached the agreement with the understanding that defendant could "make money" and having relied on plaintiff's knowledge of the "profit margins." Defendant's sales to the APC clients constituted a small percentage of its overall business (¾ to 1¼%). Mr. Francis acknowledged that there were sales of about $411,000 to APC clients during the period of the agreement as reflected in plaintiff's exhibit number 1.

¶ 26 Mr. Francis explained that, based on his 20 years of experience in the manufacturing business and his knowledge of the various costs involved and without documenting the actual costs, he had an idea and understanding that over time defendant was losing money on the sales to APC clients. Mr. Francis explained the problems defendant encountered with sales to APC clients. In managing the orders, plaintiff was disorganized and frequently failed to give defendant sufficient advance notice of orders, which caused shipping problems and a "bottleneck." The price of oil increased, thereby causing increases in the cost of manufacturing and shipping certain products, but APC clients did not want to incur price increases for the products. Defendant hired a batch maker who had worked for APC, but this person lacked sufficient experience and did not comply with quality control requirements. Mr. Francis did not quantify the actual cost figures associated with the products sold to APC clients until it was necessary for this litigation. Defendant's exhibit number 1 was the spreadsheet of the costs including raw material costs, fixed costs, taxes, and overhead for the products made for and sold to APC clients.

¶ 27 The number of sales to APC clients in 2012 declined significantly until defendant eventually stopped selling products to APC clients in that year because of the lack of profitability. Mr. Francis stated that defendant earned no profit on the overall sales to APC clients.

¶ 28 Mr. Francis testified that a surcharge was placed on products purchased by Chemical Concepts, but the surcharge was imposed due to the increase in the price of oil and oil derivatives. Defendant did realize a small profit of only $3,700, including the surcharge, from sales to Chemical Concepts but, overall, sales to APC clients had resulted in a loss of over $30,000.

¶ 29 On January 10, 2014, the circuit court entered judgment in favor of plaintiff in the amount of $3,400 based on defendant's failure to pay the agreed-upon purchase price for certain tanks and equipment. The circuit court found plaintiff had failed to present sufficient evidence to prove that defendant earned any profit on the sales to the former clients of APC. Specifically, the circuit court's order stated:

> "It was [p]laintiff's burden to prove each element of his claim. Therefore, it is essential that [p]laintiff establish that there was profit to which he is entitled to. Plaintiff failed to present sufficient evidence to support his claim for 50% of the profits. Plaintiff would have this court suspend all common sense and find that in a business involving raw materials, shipping costs, labor costs, energy costs, etc., that a flat percentage of 50% of net sales is equivalent to 'profit.' That is [p]laintiff's calculation and is a gross oversimplification. Additionally, [p]laintiff, having run APC since 1972 had sufficient

> institutional knowledge that he could have [provided] a reasoned estimate of costs per unit, yet he stayed silent as to the issue and claimed 50% of all sales as pure profit."

The circuit court also found that plaintiff failed to prove that defendant agreed to collect the debt of $10,000 owed to plaintiff by Chemical Concepts.

¶ 30 On February 7, 2014, plaintiff filed a motion for reconsideration and rehearing. Plaintiff argued in his motion, as relevant here, that the circuit court erred in: (1) requiring plaintiff to establish defendant's material costs where defendant failed to produce such information or present Mr. Francis for his deposition; (2) allowing Mr. Francis to testify about matters beyond the scope of the limited set of documents produced by defendant in discovery; and (3) finding that plaintiff failed to prove defendant agreed to pay him up to $10,000 out of business received from Chemical Concepts, where the allegations in plaintiff's verified complaint as to the agreement should have been deemed admitted. Finally, plaintiff asked the circuit court to award plaintiff his reasonable expenses, including attorney fees incurred in connection with preparing and presenting the motion for sanctions pursuant to Supreme Court Rule 219(a).

¶ 31 After briefing and a hearing, the circuit court denied plaintiff's motion for reconsideration in an order entered on May 7, 2014, and stated that a final judgment was entered in the amount of $3,400. Plaintiff now appeals.

¶ 32 II. ANALYSIS

¶ 33 On appeal, plaintiff argues that the circuit court erred in: (1) allowing Mr. Francis' testimony as to costs, thus failing to enforce the sanction order against defendant; (2) failing to accept the allegations of his verified complaint relating to the parties' agreement as to Chemical Concepts; and (3) failing to award plaintiff costs and fees under Supreme Court Rule 219.

¶ 34 Defendant has not filed an appellee's brief. Because the record is short and the issues presented are not complex, we will dispose of the case on its merits. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 35 Supreme Court Rule 219(c) (Ill. S. Ct. R. 219(c) (eff. July 1, 2002)), authorizes a circuit court to impose a sanction against a party who unreasonably refuses to comply with the applicable discovery rules or any order entered pursuant to those rules. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). The rule sets forth a nonexclusive list of sanctions which a court may impose, where just, including the entry of a default judgment. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). A just order of sanctions under Rule 219(c) is one which, to the degree possible, insures both discovery and a trial on the merits. *Shimanovsky*, 181 Ill. 2d at 123 (citing *Wakefield v. Sears, Roebuck & Co.*, 228 Ill. App. 3d 220, 226 (1992), and *White v. Henrotin Hospital Corp*., 78 Ill. App. 3d 1025, 1028 (1979)).

¶ *36* The circuit court has broad discretion to fashion an appropriate sanction depending on the particular facts and circumstances at hand. *Gonzalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460, 464-65 (2006). A sanction of a judgment by default is considered a harsh and onerous result and, thus, should be reserved "for the most recalcitrant and unyielding parties." *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 35 (citing *Shimanovsky*, 181 Ill. 2d at 123). We review a court's decision as to Rule 219 sanctions under an abuse of discretion standard. *Cronin v. Kottke Associates, LLC*, 2012 IL App (1st) 111632, ¶ 42.

¶ 37 Plaintiff first argues that the circuit court erred in failing to award him damages on his claim that he was entitled to a 50% share of the profits generated by sales to APC clients. Plaintiff maintains, in light of the default order, that the circuit court improperly admitted

testimony that defendant's costs relating to the manufacture and sale of products to APC resulted in a loss and not a profit. We do not agree.

¶ 38 If a circuit court, following an order of default under Rule 219, requires a plaintiff to present evidence to prove the allegations of the complaint, plaintiff must present legally sufficient evidence to sustain the cause of action. See *George William Hoffman & Co. v. Capital Services Co.*, 101 Ill App. 3d 487, 494-95 (1981). "The issue of damages is a question of fact and, accordingly, a trial court's finding of damages will not be disturbed on appeal unless it is against the manifest weight of the evidence." *Doornbos Heating and Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 485 (2010).

¶ 39 In considering an award of damages on appeal, this court " 'will not lightly substitute its opinion for the judgment rendered in the trial court.' " *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 247 (2006) (quoting *Richardson v. Chapman*, 175 Ill. 2d 98, 113 (1997)). We will find a damage award to be against the manifest weight of the evidence only where it is apparent that the circuit court's measure of damages was erroneous as a matter of law, or the circuit court ignored the evidence. *Doornbos*, 403 Ill. App. 3d at 385. Furthermore, "[b]ecause the trial court is in a much better position to determine the credibility of the witnesses and the weight to be afforded conflicting testimony, the appellate court will not reconsider the evidence or reassess the witnesses' credibility or demeanor and will not substitute its judgment on such matters unless the trial court's findings are against the manifest weight of the evidence." *Reinneck v. Taco Bell Corp.*, 297 Ill. App. 3d 211, 219 (1998) (citing *Knight's Prairie Hunting Club, Inc. v. Holmes*, 263 Ill. App. 3d 455, 461 (1994)).

¶ 40 "The party seeking damages must prove its damages to a reasonable degree of certainty, and accordingly the evidence it presents must not be remote, speculative, or uncertain." *Doornbos*, 403 Ill. App. 3d at 385. Thus, as to plaintiff's claim that he was entitled to damages for 50% of any profits defendant realized in sales to APC clients for two years as per the agreement, plaintiff had the burden of proof. He submitted only a report showing the dollar amounts of sales to APC clients for the relevant time period. In his testimony, plaintiff acknowledged that the amount of sales was not the true measure of profits as profits are determined by deducting the costs involved in producing and selling the goods. Despite having over 30 years of experience in the manufacturing of the types of goods at issue, and the fact that the sales were to his prior clients, plaintiff testified he had no knowledge of the costs involved. The circuit court found it incredulous that plaintiff could not offer any testimony as to the costs. We will not substitute our judgment on the matter of credibility where this finding was not against the manifest weight of the evidence. *Reinneck*, 297 Ill. App. 3d at 219 (citing *Knight's Prairie Hunting Club, Inc.*, 263 Ill. App. 3d at 461)).

¶ 41 The circuit court, after hearing the testimony and considering the evidence and the demeanor of the witnesses, found defendant did not realize a profit in the sale of products to APC clients. This decision was supported by the testimony of Mr. Francis, which was accepted by the circuit court, that the sale of adhesive products to APC clients was costly, nonprofitable, and resulted in a loss of more than $30,000 over the two-year period of the agreement. Indeed, because of the problem with the sales and the losses, defendant stopped manufacturing and selling glue products to APC clients in 2012. The circuit court's determination as to a lack of profits was not against the manifest weight of the evidence and we will not disturb it.

¶ 42 Plaintiff argues that the circuit court's decision to allow defendant to present the testimony of Mr. Francis as to costs was contrary to the order of default where defendant had failed to comply with requests to produce documents as to costs and produce Mr. Francis for his deposition. We reject this argument for several reasons.

¶ 43 First, the circuit court had broad discretion in fashioning the scope and nature of the sanctions imposed here against defendant (*Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 26), and, thus, to determine any limitation on defendant's presentation of evidence at the prove-up hearing in response to plaintiff's evidence. We do not believe plaintiff has demonstrated by the record that there was an abuse of discretion in allowing Mr. Francis to testify as to the costs. We note that defendant did respond to plaintiff's discovery requests to produce, and Mr. Francis asserted in his affidavit of compliance and at the prove-up that defendant produced all relevant existing documents. Mr. Francis further testified that no documents existed relating to actual costs at the time of discovery.

¶ 44 Plaintiff has also failed to present transcripts of proceedings for: (1) the hearing on his motion to compel; (2) the status date for compliance on discovery where defendant produced documents in response to the motion to compel; and (3) the hearing on his motion for sanctions where the default order at issue was entered and defendant produced further discovery responses. Therefore, we are unaware of what arguments were made by the parties at those proceedings, any reasons given by defendant for its failure to fully comply with discovery, or the circuit court's reasoning and purpose for entering the sanction order.

¶ 45 Furthermore, the record does not include defendant's written response to plaintiff's request for documents or identify the documents which were produced prior to the prove-up.

From the record, we cannot determine what documents were provided by defendant in response to the requests to produce or review defendant's written response and affidavit of compliance. Therefore, we cannot determine the scope of defendant's compliance with discovery requests or the full extent of any prejudice or surprise suffered by plaintiff as to Mr. Francis' testimony relating to costs.

¶ 46 Plaintiff, as appellant, had a duty to present "a sufficiently complete record of the proceedings *** to support a claim of error." *Midstate Siding and Window Co., Inc. v. Rogers*, 204 Ill. 2d 314, 319 (2003) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). In the absence of a complete record, a reviewing court presumes that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Id*. at 392. "In fact, when the record on appeal is incomplete, a reviewing court should actually 'indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted correctly.' " *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (quoting *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985)). Therefore, we presume the circuit court acted properly when it allowed Mr. Francis to testify as to costs despite the sanction order of default.

¶ 47 Furthermore, as a general rule "[t]he admission of evidence is within the circuit court's discretion, and the circuit court's ruling will not be reversed absent an abuse of discretion." *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 377 (2003) (citing *Gill v. Foster*, 157 Ill. 2d 304, 312-13 (1993)). We find the circuit court did not abuse its discretion in allowing defendant to present evidence as to its costs. This evidence was relevant and material to plaintiff's claim for his share of profits, as even plaintiff admitted at trial that profits are determined by deducting costs.

¶ 48 After the circuit court's ruling allowing evidence as to costs, plaintiff proceeded to present his evidence as to damages without objection to the ruling and without seeking a continuance or time to consider the cost spreadsheets or to depose Mr. Francis. Plaintiff did not object when defendant was allowed to call Mr. Francis in defense of his damages evidence. More importantly, plaintiff himself sought the sanction of default, rather than a less severe sanction which would have coerced further discovery, including the deposition of Mr. Francis which would have led to the discovery of his testimony as to the lack of profitability and costs. See *Locasto*, 2014 IL App (1st) 113576, ¶ 41 (plaintiff "went for jugular, default, in the first instance"). Thus, any harm caused to plaintiff was caused by his own failure to act in response to the circuit court's ruling as to the admissibility of the testimony relating to costs and his request for the order of default without compelling further discovery.

¶ 49 Even if the trial court erred in allowing defendant to present testimony relating to its costs, we would not find the damage award was in error. Plaintiff had the burden of establishing the amount of profits from the sales to APC clients. He did not meet his burden of proving profits by simply introducing sales figures without also providing evidence as to the costs related to those sales.

¶ 50 Plaintiff next argues that the circuit court erred in failing to accept his verified allegations as to the parties' agreement relating to Chemical Concepts. The verified complaint alleged as to that agreement that defendant agreed to pay plaintiff "up to ten-thousand dollars ($10,000) out of business received from 'Chemical Concepts,' an APC client that began purchasing product from [defendant]." Plaintiff further alleged that defendant had failed to pay plaintiff "any portion of fees collected from Chemical Concepts." In its answer, defendant denied these allegations.

¶ 51 At the hearing, plaintiff testified that Chemical Concepts had agreed that its $10,000 debt would be repaid by the imposition of a surcharge on future purchases of product from plaintiff. Plaintiff also testified that defendant then agreed to impose a $2-per-gallon surcharge on Chemical Concepts purchases. He offered a group of Chemical Concept invoices in support of his contention as to the surcharge. Although many of the invoices include a $2-per-gallon surcharge, one invoice described a surcharge as a "fuel surcharge," and none of the other invoices identified the nature of the surcharge. Other invoices had no surcharge. Mr. Francis testified that the surcharge to Chemical Concepts was due to the increase in oil prices. He also testified that defendant realized a profit of only $3,400 from sales to Chemical Concepts, including the surcharges but, overall, defendant lost more than $30,000 as to sales to APC clients.

¶ 52 Even accepting plaintiff's verified allegations that defendant agreed to pay up to $10,000 in business it received from Chemical Concepts and failed to do so, plaintiff did not establish by sufficient evidence that defendant agreed to impose a surcharge on Chemical Concepts as the *means* to collect the debt owed to plaintiff and failed to show that the surcharges resulted in sufficient returns to pay back the debt of $10,000 owed by Chemical Concepts. We find no error in the circuit court's decision.

¶ 53 Finally, plaintiff argues that the circuit court erred in denying his request for fees and costs. Again, we disagree with plaintiff.

¶ 54 Rule 219(a) allows a court to impose reasonable fees and costs against the offending party where the noncompliance with discovery rules and orders has been without substantial justification. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). We will reverse a finding that

noncompliance with discovery was justified only where "the record establishes a clear abuse of discretion." *Beale v. Edgemark Financial Corp.*, 297 Ill. App. 3d 999, 1008 (1998).

¶ 55 As discussed, the record here does not contain the transcripts of proceedings for the hearing on the motion for sanctions, which included plaintiff's initial request for the imposition of fees and costs, nor does the record contain defendant's responses to the request to produce documents. We further note that the record does not include a transcript of proceedings from the hearing on plaintiff's motion for rehearing where he renewed his request for a finding that defendant's noncompliance as to discovery was without substantial justification and fees and costs should therefore be awarded. Based on the insufficiency of the record on appeal, we must again presume the circuit court's denial of fees and costs was "in conformity with law" and had a sufficient factual basis. *Foutch,* 99 Ill. 2d at 392.

¶ 56 III. CONCLUSION

¶ 57 In conclusion, we find no error in either the award of damages after a prove-up hearing or the denial of fees and costs relating to plaintiff's attempts to obtain discovery responses, and we therefore affirm the orders of the circuit court.

¶ 58 Affirmed.