2016 IL App (1st) 143110-U
No. 1-14-3110

THIRD DIVISION
March 31, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MELROSE COMMONS LLC, Plaintiff-Counter-Defendant-Appellant, v. SELECTIVE IMPORTS, INC. d/b/a ALLIANCE PRODUCTS, Defendant-Counter-Plaintiff-Appellee.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 11 L 51414 The Honorable Susan F. Zwick, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not abuse its discretion in denying motion to bar testimony of undisclosed witness as a sanction for alleged discovery violations. Commercial tenant stated a cause of action for tortious interference with contracts and the circuit court correctly awarded lost profit damages.

¶ 2 This appeal arises out of a suit, filed by the owner against a tenant, for distraint of rent and breach of lease in conjunction with the leasing of commercial property. The tenant counterclaimed alleging breach of lease, violation of the forcible entry and detainer statute and

tortious interference with contracts. The circuit court denied the owner's claims for breach of lease and distraint of rent. The court granted the tenant's breach of lease, violation of the forcible entry and detainer statute and tortious interference with contracts claims. The court also awarded the tenant damages for lost profits. The owner appeals from the court's order. For the following reasons, we affirm the circuit court.

¶ 3 BACKGROUND

¶ 4 Plaintiff-Counter-Defendant-Appellant, Melrose Commons LLC, (Melrose) is the current owner of the property located at 2001 Cornell Avenue (the property) in Melrose Park, Illinois. Defendant-Counter-Plaintiff-Appellee, Selective Imports, Inc., d/b/a/ Alliance Products (Alliance) was a tenant of Melrose.

¶ 5 Alliance is an importer/exporter of gift, holiday and related merchandise and is owned by Terry Farooqui (Farooqui). In 2006, Cornell Place LLC (Cornell) owned the property. Cornell was owned by Ronald Scarlato and managed by Ronald Scarlato & Sons. In April 2008, Alliance entered into a lease with Cornell for a term of five years, to expire on March 31, 2013. The rent was $16,000 per month with a two percent yearly increase. The lease also required Alliance to pay other monthly amounts including utilities and insurance. The lease provided that the owner would make extensive changes and upgrades to the premises. Farooqui was originally shown the premises by Sam Scarlato (Scarlato), Ronald's son, and Isaac Bazbaz (Bazbaz)[1], an employee of Ronald Scarlato & Sons. The lease was negotiated between Farooqui and Bazbaz.

¶ 6 In June 2010, Cornell and Ronald Scarlato were named defendants in a foreclosure action prosecuted by MB Financial Bank, NA (MB Financial). The property had fallen into disrepair and deterioration. Also, there was a lack of reliable utilities due to unpaid bills. A receiver, Eric

[1] Bazbaz was employed by Ronald Scarlato & Sons, in November, 2011. He had also been employed for a time by Alliance, but returned to work with Scarlato & Sons and acted as an advisor to Scarlato and Melrose.

Janssen (Janssen) was appointed and notified all tenants that rents were to be paid to the receiver beginning July 1, 2010. While the property was in receivership, and continuing through initial ownership following judicial sale, Janssen accepted a lower rent on a month-to-month basis from Alliance, between $7,500 and $9,000. In April 2011, MB Financial bought the property at auction. Janssen remained the manager of the property until it was sold by MB Financial in October 2011. Alliance's rent and tenancy agreement was unchanged during MB Financial's ownership.

¶ 7 In October 2011, Scarlato arranged to purchase the property through a third-party agent, Sergio Volpe (Volpe). Subsequently, the property was transferred to Volpe, who was designated as Scarlato's real estate agent. The document executed by MB Financial and memorializing the transfer provided that Alliance had a month-to-month oral lease. At Scarlato's direction, Volpe transferred the property to Melrose. Scarlato is the owner of Melrose. At this same time, Melrose received an assignment of leases and rents from the building's prior owner, Cornell.

¶ 8 In October 2011, Alliance received a letter advising it that Melrose was the new property owner. Alliance was informed that the rent was to be directed to Melrose, at the office located in the same building complex as Alliance. On November 1, 2011, a rent check in the amount of $9,000 was delivered to Melrose, but was rejected. On November 8, 2011, Alliance, through counsel, re-tendered the check to Melrose's counsel, advising counsel of the existence of a month-to-month tenancy at the rate of $9,000 per month. The check was again rejected.

¶ 9 Following Melrose's rejection of Alliance's rent check, Scarlato and Bazbaz went to Alliance and spoke with Farooqui. They informed Farooqui that Melrose was seeking a new five-year lease and that the current lease required a minimum of $17,000 per month. Farooqui

asked both men to leave and they complied. Alliance attempted to tender a rent check for December to Melrose for $9,000, but it was also rejected by Melrose's counsel.

¶ 10 On December 7, 2011, Scarlato, with ten associates, presented and served a complaint for distraint of rent pursuant to section 9-301 of the Code of Civil Procedure (Code) (735 ILCS 5/9-301 (West 2010)), upon Alliance. Section 9-301 provides for the landlord to seize for rent any personal property of his or her tenant that may be found in the county where such tenant resides. 735 ILCS 5/9-301 (West 2010). Scarlato then proceeded to inventory the warehouse with his agents and blocked the warehouse to prevent Alliance from moving its products. Scarlato also directed Alliance's employees to remove products from a container they were in the process of filling. The complaint for distraint was filed, with the inventory, on December 8, 2011. Also, on that date, additional container boxes, trailers and cars were parked on the perimeter of Alliance's loading dock and entrances, effectively blocking the building and preventing any materials from being received by or shipped from Alliance. The blockade continued until January 9, 2012, when bond was set at $75,000 by order of the court.

¶ 11 In Melrose's complaint for distraint of rent, it was seeking rents allegedly owed and due through December 2011. Subsequently, Melrose filed its amended complaint seeking back rent and utilities from the inception of the lease between Alliance and Cornell and seeking additional rents through the termination of the five-year lease ending in March 2013. Alliance filed a counterclaim alleging breach of lease, violation of the forcible entry and detainer statute, and tortious interference with contracts.

¶ 12 Discovery followed and documents delineating Alliance's inventory, as well as Melrose's inventory list authored in its distraint warrant, were exchanged. All document discovery was ordered to be concluded by August 1, 2013, and an affidavit of completeness signed by Farooqui

was tendered by Alliance. At this time, Alliance had produced an additional document which delineated sales orders, customer names and telephone numbers. In December 2013, Alliance presented an emergency motion to supplement its discovery responses, which the court denied as untimely. When the case was presented for trial, the judge who had been overseeing all aspects of the case was unavailable and the case was assigned to another judge for trial.

¶ 13 The case proceeded to a bench trial on January 13 through January 16, 2014. When the parties first appeared, Melrose presented its motion to bar Alliance from tendering any witnesses since Alliance had never disclosed any witnesses in response to Melrose's Illinois Supreme Court Rule 213(f) interrogatories. Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007).[2]

¶ 14 The motion was denied and the parties were ordered to amend their responses to their Rule 213 interrogatories and exchange them the following morning. Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007).[3] The next morning, Alliance disclosed that Farooqui would testify at trial. Melrose presented its witnesses on January 14, 2014, and rested its case. Farooqui testified on January 15, 2014 and his cross-examination and redirect-examination took place on January 16, 2014.

¶ 15 Farooqui testified that before signing the lease with Cornell, Scarlato and Bazbaz showed him the warehouse. The lease agreement included certain repairs and a build-out space for showrooms, bathrooms, and office and dock areas to be built by Melrose. Farooqui testified that the repairs were never made and that the building eventually fell into disrepair. Despite the building's condition, Alliance continued to pay rent to Melrose. In November, 2011, Scarlato and Bazbaz wanted to negotiate a new five year lease with Farooqui. Farooqui refused, but agreed to speak again in January, after the Christmas season.

[2] Rule 213(f) requires parties to answer interrogatories seeking the identity of their trial witnesses and the subjects upon which those witnesses will testify. Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007).

[3] Rule 213(i) provides that a party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party. Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007).

¶ 16 Farooqui also testified that on December 7, 2011, Scarlato was present at Alliance's offices with a warrant for distraint of rent, alleging Alliance owed Melrose $259,331.25 as of December 1, 2011. Scarlato then proceeded to inventory and blockade the warehouse. The December blockade prevented Farooqui from shipping the Christmas orders that were under contract. The merchandise that Melrose removed from the shipping container on that day, were Christmas goods worth $21,000. That order was subsequently cancelled, and Alliance lost the customer. Also on that day, General Wholesale, an Alliance customer for over 19 years, was scheduled to pick up an order for gross sales worth $337,000 but the blockade prevented General Wholesale from obtaining their goods, and the sale was cancelled. Alliance would have cleared a 30% profit from the order.

¶ 17 Farooqui further testified to the loss of other sales in the month of December: Midwest Merchandise, with a gross sale order of $117,000; United Discount/Bargain Warehouse, with a gross sales order for $59,000; United Textile, with a gross sales order worth $102,000; International Wholesale, with a gross sales order of $15,000; Stagg Trading, with a gross sales order of $54,985; and Hanarama, with a gross sales order of $89,000. Farooqui also stated that he lost business with certain suppliers because he could not receive any shipments to fill standing orders due to the blockade. After Farooqui's testimony, Alliance rested its case.

¶ 18 The circuit court filed its written memorandum order on April 30, 2014, which is summarized, in relevant part, below. The court found against Melrose on its claims for breach of lease and distraint of rent. The court found in favor of Alliance on its breach of lease, violation of the forcible entry and detainer statute, and tortious interference with contracts claims. The court also awarded Alliance $238,495.50, in damages for lost profits.

¶ 19 The court found that Melrose, as a second and subsequent purchaser following the judicial sale, had no legal foundation to act upon Cornell's lease with Alliance for pre-foreclosure rents. Further, the court noted that it was apparent from the sale documents, receiver's reports and the property deed that Alliance was on a month-to-month lease with MB Financial, paid $9,000 per month and was current as of November 2011. The court further found that Melrose had no claim against Alliance for back rent and its seizure of Alliance's property was without legal justification.

¶ 20 The court determined that the evidence established that both Scarlato and Bazbaz knew of the production and seasonal nature of Alliance's business, as evidenced by their initial visit which occurred during the holiday shipping season. The court noted that at the point of entering the warehouse for the purpose of taking an inventory for the distraint action, Melrose had knowledge of the seasonal nature inherent in Alliance's business. Also, Farooqui testified that the blockade prevented him from shipping the Christmas orders that had been contracted for.

¶ 21 The court noted that Farooqui testified that on December 7, 2011, his employees were loading a container, when Scarlato and Bazbaz appeared at the warehouse and directed Alliance employees to unload the merchandise. That order was cancelled by the purchaser. The court determined that this action alone indicated that Melrose took affirmative steps to prevent Alliance from fulfilling a contractual obligation.

¶ 22 The court made the additional finding that Farooqui testified both from memory and personal notes concerning lost business. Farooqui testified that the blockade prevented other firms from obtaining their goods, and these sales were cancelled. Farooqui stated that suppliers who could not drop off merchandise because of the blockade also cancelled. The court specifically stated that Farooqui "demonstrated an encyclopedic knowledge of his customers and

sales, which upheld under vigorous cross-examination". Further, the court reasoned that "[t]he events established by the court file, including transcripts and prior proceedings, as well as the testimony elicited at trial clearly establishes that Alliance has sufficiently proved Melrose, through its agents, tortiously interfered with Alliance's then-existing sales contracts."

¶ 23 Melrose filed a motion to reconsider, which was denied in a subsequent memorandum order dated September 12, 2014. Melrose then filed this timely appeal.

¶ 24 ANALYSIS

¶ 25 On appeal, Melrose raises the following contentions: (1) the circuit court abused its discretion by allowing Farooqui to testify, in violation of Rule 213 and the previous judge's orders; (2) the circuit court abused its discretion in allowing Farooqui to testify about damages due to Alliance's failure to produce requested documents; (3) the court erred in finding Melrose tortiously interfered with contractual rights where there was no evidence that Melrose knew of the existence of any of Alliance's contracts; (4) the evidence was insufficient to support an award of damages for lost profits; and (5) Alliance's claim was barred by its failure to mitigate its damages.

¶ 26 Alliance responds that the circuit court did not err and asks that we affirm the judgment in Alliance's favor.

¶ 27 A reviewing court should not overturn a trial court's findings merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the fact finder. *Bazydlo v. Volant*, 164 Ill. 2d 207, 214 (1995). The trial judge, as the trier of fact, is in a position superior to a reviewing court to observe witnesses while testifying, to judge the credibility, and to determine the weight their testimony should receive. *Id*. at 214-15. A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or

when the findings appear to be unreasonable, arbitrary, or not based on evidence. *Bazydlo*, 164 Ill. 2d at 215 (citing *Johnson v. Abbott Laboratories, Inc.*, 238 Ill. App. 3d 898, 905 (1992)).

¶ 28 I. Farooqui's Trial Testimony

¶ 29 We turn to Melrose's first contention that the circuit court abused its discretion by allowing Farooqui to testify, in violation of Rule 213 and the previous judge's order. Melrose argues that discovery violations by Alliance required the sanction of barring Farooqui's testimony at trial.

¶ 30 We begin with the basic premise that the goal of the discovery process in Illinois is full disclosure. *Copeland, v. Stebco Products Corp*., 316 Ill. App. 3d 932, 937 (2000) (citing *Buchler v. Whalen*, 70 Ill. 2d 51, 67 (1977)). Illinois Supreme Court Rules on discovery are mandatory rules of procedure subject to strict compliance by the parties. *Seef v. Ingalls Memorial Hospital*, 311 Ill. App. 3d 7, 21 (1999). "Discovery is not a tactical game; rather, it is intended to be a mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial." *Copeland*, 316 Ill. App. 3d at 937 (quoting *Boland v Kawasaki Motors Manufacturing Corp., USA*, 309 Ill. App. 3d 645, 651 (2000)).

¶ 31 Rule 213 is designed to give those involved in the trial process a degree of certainty and predictability that furthers the administration of justice and eliminates trial by "ambush." Ill. S. Ct. R. 213 (eff. Jan. 1, 2007); *Copeland*, 316 Ill. App. 3d at 946 (2000). Rule 213(f) requires parties to answer interrogatories seeking the identity of their trial witnesses and the subjects upon which those witnesses will testify. Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007). A party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party. Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007).

¶ 32 Rule 219(c) authorizes a trial court to impose a sanction, including barring a witness from testifying, upon any party who unreasonably refuses to comply with any provisions of the court's discovery rules or any order entered pursuant to these rules. Ill. S. Ct. R. 219(c) (eff. July 1, 2002); *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). The decision to impose a particular sanction under Rule 219(c) is within the discretion of the trial court and, thus, only a clear abuse of discretion justifies reversal. *Boatman's National Bank v. Martin*, 155 Ill. 2d 305, 314 (1993).

¶ 33 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. *Wakefield v. Sears, Roebuck & Co.*, 228 Ill. App. 3d 220, 226 (1992). When imposing sanctions the court's purpose is to coerce compliance with discovery rules and orders, not to punish the dilatory party. *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 62 (1995). A trial court is empowered to fashion a sanction, but is limited by the caveat: the rule is to be liberally construed to do substantial justice between the parties. Ill. S. Ct. R. 213(k) (eff. Jan. 1, 2007). This rule is intended as a shield to prevent unfair surprise but not a sword to prevent the admission of relevant evidence on the basis of technicalities. Ill. S. Ct. R. 213(k) (Committee Comments (March 28, 2002)).

¶ 34 The factors a trial court must use in determining what sanction, if any, to apply are: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence. *Boatmen's National Bank*, 155 Ill. 2d at 314. Of these factors, no single factor is determinative. *In re Estate of Klien*, 245 Ill. App. 3d 413, 433 (1993). A court must consider the unique factual situation that each case

presents and then apply the appropriate criteria to these facts in order to determine what particular sanction, if any, should be imposed. *Boatmen's National Bank*, 155 Ill. 2d at 314.

¶ 35 Melrose argues that under Illinois law, the circuit court must apply the above factors in determining which, if any, sanctions are required, and that this analysis was not conducted by the court. Melrose maintains that if the analysis had been conducted, its motion to bar Farooqui's testimony would have been granted. Melrose argues that all six factors weigh in favor of barring Farooqui, and that the court's failure to take this action was an abuse of discretion.

¶ 36 Alliance responds that under the circumstances in this case, the drastic sanction sought by Melrose was not warranted. Alliance maintains that the factors were considered by the court and under the specific factual situation presented here, the court did not abuse its discretion in denying Melrose's motion to bar Farooqui's testimony. Alliance maintains that the factors to be considered in deciding if a sanction should be applied are undeniably in its favor, and the circuit court did not err in finding so.

¶ 37 As to the first factor to be considered, surprise to the adverse party, Melrose argues it was undeniable that Farooqui's testimony was a surprise. Melrose asserts that Alliance never disclosed Farooqui as a witness prior to trial and that his testimony embodied Alliance's theory of the case and was not corroborated by any documentary evidence. Melrose maintains that it had no reason to expect that Alliance would tender any witness to testify because it did not identify any trial witnesses in its answers to interrogatories. Melrose argues that it was "ambushed" by Alliance's previously undisclosed testimony of Farooqui.

¶ 38 Alliance responds that Farooqui's testimony did not come as a surprise, as he was the owner and president of Alliance, the one who negotiated the leases, dealt with Scarlato and Bazbaz and was identified as the one who answered the interrogatories. Alliance maintains that

by waiting for trial to bring its motion to bar and raise the lack of identifying trial witnesses, Melrose engaged in gamesmanship. Alliance further maintains that it was the one "ambushed" at trial, when faced with a surprise motion to bar its main witness who was well known to Melrose.

¶ 39 We agree with the circuit court and find no surprise. We note that the circuit court found that Alliance's answers to interrogatories had named Farooqui as the individual with the pertinent information concerning all aspects of the litigation. The court also found that prior to trial, documents evidencing the amount of inventory in the warehouse had been exchanged as of August 1, 2013. Further, as the court confined Farooqui's testimony to disclosures up to and including August 1, 2013, we fail to find any surprise as to the substance of Farooqui's testimony. This factor weighs in Alliance's favor.

¶ 40 The second factor to be considered is the prejudicial effect of the proffered testimony. Melrose asserts that the decision to allow Alliance to call an undisclosed witness severely prejudiced Melrose. Melrose maintains that months prior to trial it issued interrogatories requesting a list of trial witnesses, and that Alliance failed to identify a single witness. Melrose contends that Alliance never disclosed Farooqui as a potential witness prior to trial, causing unfair prejudice. Melrose argues that it was also prejudiced because it relied on Alliance's affidavit indicating it had produced all of the documents it was required to, and on cross-examination, Alliance admitted it had multiple categories of responsive documents it had not disclosed.

¶ 41 Alliance contends there was no prejudice to Melrose. Alliance argues that Farooqui's integral involvement in the case was known to Melrose, yet, it choose not to take Farooqui's deposition. Alliance also contends that Alliance disclosed Farooqui as the individual who provided information for each interrogatory response. Further, in that response, Alliance attached

a summary of damages, including the names and addresses of the customers from whom it lost sales, the amount of the lost sales and the profit margins of the sales. Alliance maintains that any prejudice is due to Melrose's own inaction in not pursuing sufficient discovery.

¶ 42 We agree with the circuit court and find no prejudice. In response to Melrose's argument that it was prejudiced because it relied on Alliance's affidavit indicating it had produced all of the documents it was required to but had not, the court stated it did not allow for any testimony beyond the documents that had already been disclosed as of August 2013, thus eliminating any prejudice on this matter. Further, the court noted that it had been disclosed Farooqui was the principal and the person involved with the transactions with the rental of the premises. As the testimony was limited to disclosed discovery, we fail to find any prejudice. This factor weighs in Alliance's favor.

¶ 43 The third factor to be considered is the nature of the testimony. Melrose maintains that Farooqui's testimony embodied Alliance's theory of the case. Melrose asserts that it relied on Alliance's failure to disclose Farooqui as a trial witness in forming its trial strategy. Melrose argues that without a deposition transcript, and without the underlying documents to use during cross-examination, it had no opportunity to challenge Farooqui's testimony on any topic. Melrose also contends that Alliance's failure to answer Rule 213 interrogatories until trial, prohibited it from undertaking additional discovery, including the deposition of Farooqui. Ill. S. Ct. R. 213.

¶ 44 Alliance again asserts that it disclosed Farooqui in its response to interrogatories on May 13, 2013 as the individual who provided information for each interrogatory response. In that response, Alliance attached a summary of its damages, including the names and addresses of the customers from whom it lost sales, the amount of the lost sales and the profit margin of the sales. Based on the answers to interrogatories and the documents that had been exchanged, Alliance

contends that Melrose was well aware of the facts that Farooqui intended to rely upon during his testimony. Further, Melrose was well aware of the scope and nature of Farooqui's testimony.

¶ 45 We agree with the circuit court that the nature of the testimony was known to Melrose prior to trial. The circuit court determined that documents delineating Alliance's inventory, as well as Melrose's inventory list authored in its distraint warrant, had been exchanged. The court also noted that the documents evidencing the stagnant inventory were in Melrose's possession in December 2011. Further documents, evidencing specific cancelled orders, were tendered on August 1, 2013. The court also found that Melrose's argument that "it did not believe Alliance had any witnesses, or sufficient documents, to defend its action, or prosecute its counterclaim" were belied by "both the testimony of Farooqui and the documents tendered as of August 1, 2013." We find that the nature and significance of Farooqui's testimony were well known to Melrose prior to trial. This factor weighs in favor of Alliance.

¶ 46 The fourth factor to consider is Melrose's diligence in pursuing discovery. Melrose argues that it was diligent in requesting documents and Rule 213 interrogatories several months prior to trial. Ill. S. Ct. R. 213. Melrose points out that this case was filed in 2011, and Melrose served its interrogatory seeking the identity of Alliance's trial witnesses in March 2013. By then, Melrose maintains that all pretrial discovery was well underway. Subsequently, Melrose obtained a court order requiring Alliance to respond to all outstanding discovery requests. Further, Melrose contends that when Alliance failed to comply, Melrose filed a motion to compel, which was granted.

¶ 47 Alliance maintains that Melrose failed to utilize available discovery procedures despite its awareness of Farooqui's position at Alliance. Alliance maintains that Melrose did not seek any supplemental or formal Rule 213 disclosures beyond the initial form interrogatories. Ill. S. Ct. R.

213. Additionally, Alliance contends that Melrose failed to request a deposition of Farooqui prior to trial, failed to request Rule 201(k) conferences, and waited to file a motion to bar Farooqui's testimony until trial. Ill. S. Ct. R. 201(k) (eff. Jan. 1, 2013).[4] Alliance asserts that Melrose never requested such a conference. Alliance maintains that these omissions prove that Melrose exhibited a lack of diligence in seeking discovery.

¶ 48 We agree with the circuit court that Melrose's discovery deficiencies were significant. The circuit court noted that although there was no suitable reasoning offered for Alliance's failure to file formal answers to Rule 213 interrogatories until ordered by the trial court, Alliance did try to amend its answers but the request was denied. Ill. S. Ct. R. 213. However, the court stated that there was no request to take Mr. Farooqui's deposition prior to trial, no 201(k) conferences, no motion to compel, and no motion to bar Mr. Farooqui's testimony until trial. Ill. S. Ct. R. 201(k). This factor weighs in favor of Alliance.

¶ 49 The fifth factor to consider is the timeliness of Melrose's objection to the testimony. Melrose argues that it timely objected to Farooqui's testimony. Prior to trial, Melrose presented its motion to bar Farooqui's testimony and during trial, Melrose consistently objected to the proffered testimony. Alliance responds that Melrose waited for trial to bring its motion to bar and raise the lack of Rule 213 responses. Ill. S. Ct. R. 213. Alliance argues that Melrose perpetrated the lack of discovery requests in order to file its motion to bar Farooqui's testimony until the very last minute.

¶ 50 We agree with the circuit court that Melrose's objections were untimely in the discovery process. The court noted that rules of disclosure are designed to bring information to the forefront, not to allow a recalcitrant party to ignore areas of potential information, and later claim

[4] Rule 201(k) provides in relevant part: that every motion with respect to discovery shall incorporate a statement that after personal consultation and reasonable attempts to resolve differences the parties have been unable to reach accord. Ill. S. Ct. R. 201(k) (eff. Jan. 1, 2013).

non-disclosure. The circuit court found that Farooqui's testimony was anticipated, expected and no surprise or prejudice inured to Melrose at trial. This factor weighs in favor of Alliance.

¶ 51 The sixth and final factor to consider is Alliance's good faith in calling Farooqui to testify. Melrose contends there can be little doubt that Alliance acted in bad faith. Melrose maintains that waiting until the second day of trial to disclose a trial witness is evidence of bad faith. Melrose argues that Alliance's failure to comply with its mandatory duty to supplement discovery responses were a further sign of bad faith. Moreover, as a clear example of bad faith, Melrose states that during cross-examination it was discovered that Alliance did have multiple categories of documents responsive to Melrose's requests that it had not produced.

¶ 52 Alliance responds that there is nothing in the record that it exhibited deliberate disregard for the court's authority, nor bad faith. Alliance contends the existence and identity of Farooqui were not hidden and his significance was well known to Melrose. Alliance argues that sufficient documentation of its inventory was exchanged prior to trial

¶ 53 We agree with the circuit court that Alliance acted in good faith when it called Farooqui to testify. While the circuit court acknowledged that there was no suitable reason offered for Alliance's failure to file formal answers to Rule 213 interrogatories until ordered by the trial court, the court did note the exchange of inventory information by August 1, 2013 and Farooqui's responses to the initial interrogatories. Ill. S. Ct. R. 213. We cannot conclude from this record that Alliance was lacking in good faith. This factor weighs in favor of Alliance.

¶ 54 Melrose argues that all the factors the court is required to consider in determining whether to exclude Farooqui's testimony weigh in favor of exclusion. Melrose argues that based on Farooqui's undisclosed and uncorroborated testimony, which Melrose had no means of anticipating or refuting, the court entered judgment against Melrose and in favor of Alliance and,

among other things, awarded lost profit damages of $238,495.50. Melrose further contends that the proper sanction for these discovery violations would have been to grant its motion to bar Farooqui's testimony.

¶ 55 Melrose relies on *Ashpole v. Brunswick Bowling & Billiards Corp*., 297 Ill. App. 3d 725, 726-27 (1998) for the proposition that allowing the testimony of an unidentified witness at trial warrants reversal. In *Ashpole*, the plaintiff in a slip and fall action issued Rule 213 interrogatories. *Id*. at 26. The defendants identified a witness with knowledge of the fall but they did not disclose her as a potential trial witness. *Id*. On the second day of trial, the defendants presented the witness to testify over the plaintiff's objection and the court allowed the testimony. *Id*. at 727. The appellate court reversed and remanded for a new trial. *Id*. at 728. The court found that the plaintiff was completely surprised by the witness' testimony given that she had not been disclosed as a trial witness. *Id*. The court reasoned that the witness was critical for the defendants because her testimony was unique and embodied the defendants' theory of the case. *Id*. at 729. The court determined that the admission of her testimony was clearly prejudicial. *Id*. The court found that the introduction of the witness' testimony was an abuse of discretion that warranted reversal. *Id.*

¶ 56 We find *Ashpole* factually distinguishable. In *Ashpole*, the witness was never disclosed or mentioned in any way other than as one of several employee witnesses of a slip and fall. The witnesses' testimony was unique because she was the only eyewitness and the witness was not disclosed until the third day of trial. In the case at bar, Farooqui is the owner of Alliance, signed the leases for Alliance and was disclosed as the one who answered the interrogatories. We find nothing about Farooqui's testimony was unknown or unexpected.

¶ 57 Melrose additionally cites to *American Service Ins. v. Olszewski*, 324 Ill. App. 3d 743, (2001), for the general proposition that allowing an undisclosed witness to testify is a violation of disclosure requirements and requires reversal. In *Olszewski*, the plaintiff insured the defendant. 324 Ill. App. 3d at 744. The plaintiff maintained that the policy had lapsed and that at the time of the accident the defendant was not insured because of his failure to renew the policy. *Id*. The defendant argued he had renewed the policy through an insurance broker. *Id.* At trial, the defendant called Makolajczck, the insurance broker, to testify. *Id*. at 745. The plaintiff moved to bar the witness citing the defendant's failure to disclose the witness in his answer to Rule 213 interrogatories. *Id*. The trial court denied the motion and allowed the testimony, finding Mikolajczyk would only testify to facts and that, because of the nature of the case, the plaintiff could not claim any surprise. *Id*. The appellate court reversed, finding that discovery rules are mandatory and since Makolajczk was not disclosed, the plaintiff had no opportunity to depose or prepare for cross-examination. *Id*. at 748.

¶ 58 We find Melrose's reliance on *Olszewski* to be unavailing. In *Olszewski*, the witness was never disclosed and was not a party. Further, the plaintiff had no additional time to prepare for cross-examination. Here, the factual background and the scope of Farooqui's testimony was no surprise to Melrose. Further, the court allowed for the amending of interrogatories on January 13, 2014, the exchanging of these on January 14, 2014, with Farooqui's cross-examination taking place on January 16, 2014. Thus, the court did allow Melrose additional time to prepare for Farooqui's testimony.

¶ 59 Contrary to Melrose's contentions, the circuit court did include the six factors necessary to determine what sanction, if any, was warranted. We agree with the court's findings. As stated above, the factors favor Alliance.

¶ 60 The rules of disclosure advanced by Rule 213 are designed to bring information to the forefront. They are not designed to allow a recalcitrant party to ignore areas of potential information, and later claim non-disclosure. *Copeland*, 316 Ill. App. 3d at 937. We further note the unique factual situation of this case, including the illegal distraint and the parallel litigation discussed in the circuit court's memorandum orders. See *Boatman's National Bank*, 155 Ill. 2d at 314.

¶ 61 We believe a greater degree of prejudice and a stronger wrongdoing is necessary than that presented by the facts of this case in order to impose the drastic sanction requested by Melrose. We note the stated purpose of the Illinois Supreme Court Rules is to have a trial on the merits. Rule 213 is intended as a shield to prevent unfair surprise but not a sword to prevent the admission of relevant evidence on the basis of technicalities. Ill. S. Ct. R. 213(k) (Committee Comments (March 28, 2002). Therefore, we find the circuit court did not abuse its discretion in denying Melrose's motion to bar Farooqui's testimony.

¶ 62 Melrose makes the additional argument that the circuit court's error is further highlighted by the decision to allow the testimony, because it amounted to an unjustified disregard of a prior judge's discovery orders. Melrose contends that a prior judge's orders required Alliance to produce requested documents and an affidavit of completeness by August 1, 2013. Melrose contends that a prior judge's discovery orders were "effectively vacated" at trial and that Melrose had relied on their parameters in preparing its case for trial. Alliance contends that the prior judge entered general case management orders setting discovery deadlines and also extending those deadlines. We note that Alliance presented a motion to supplement its discovery which was denied and contrary to Melrose's argument, the circuit court determined that "at trial Alliance's

documentary evidence was limited to those documents disclosed prior to the August 14, 2013, affidavit of completeness." Thus, we reject the argument.

¶ 63 II. Farooqui's Damages Testimony

¶ 64 We next address Melrose's second contention on appeal, that the circuit court abused its discretion to allow Farooqui to testify about damages. The purpose of damages it to place the non-breaching party in the position he would have been in had the contract been performed; the non-breaching party should not be placed in a better position. *Wilmette Partners v. Hamel*, 230 Ill. App. 3d 248, 261 (1992). The amount of damages awarded is generally within the sound discretion of the trier of fact; nevertheless, a reviewing court can order a new trial if the damages are manifestly inadequate, if proved elements of damages have been ignored, or if the award does not bear a reasonable relationship to plaintiff's loss. *Id*. at 262; (citing *Netzel v. United Parcel Service, Inc*., 181 Ill. App. 3d 808, 817 (1989)).

¶ 65 Melrose contends that the award of damages was error because of Alliance's failure to produce requested documents. Melrose argues that the court had ordered Alliance to produce documents regarding what Alliance had paid for its inventory, how it was valued, whether it was insured, and whether it was subsequently sold, and if so for what amount, yet it failed to do so. Melrose contends that without that documentary evidence there was no way for it to effectively cross-examine Farooqui. Melrose argues that Alliance's failure to produce documents relating to its damages claim, that Melrose requested and that the court ordered Alliance to produce, was severely prejudicial. Melrose asserts that pursuant to Rule 219, which empowers a court to bar a witness from testifying concerning an issue to which a violation of a previously entered discovery order relates, the sanction of barring Farooqui's testimony as to damages was necessary and the denial was an abuse of discretion. Ill. S. Ct. R. 219

¶ 66 Melrose relies on *Hawkins v. Wiggins*, 92 Ill. App. 3d 278, (1980) for the proposition that the failure to produce requested documents pertaining to alleged damages warrants the exclusion of testimony as to those damages. In *Hawkins*, the plaintiff sought to recover damages sustained in an automobile accident. 92 Ill. App. 3d at 281. At trial, the defendant moved to bar the plaintiff from introducing any evidence of loss of income because the plaintiff had failed to produce copies of tax returns that the defendant had requested in a notice of deposition and a notice to produce. *Id*. The plaintiff had stated that the returns would be produced at trial, but then indicated the returns could not be found. *Id*. The motion was allowed. *Id*. The court found that barring evidence of lost income as a sanction for noncompliance with the defendant's notice to produce was not an abuse of discretion. Melrose contends that the same result is warranted here. Melrose maintains that based solely on Farooqui's undisclosed and uncorroborated testimony, the circuit court imposed a judgment against Melrose totaling $248,851.50. Melrose asserts that the court erred in denying Melrose's motion to bar Farooqui's damages testimony.

¶ 67 Alliance responds that Farooqui's damage testimony was proper. Alliance contends that Melrose was aware of the damage claims well prior to trial, including the amount of damages, the identity and location of the customers and that Farooqui was the individual with the knowledge of these issues. Alliance maintains that the circuit court allowed all relevant evidence admissible at trial, including the lack of production and documentation, which is necessarily a consideration in a witness' credibility. Alliance asserts that the circuit court properly allowed Farooqui to testify as to Alliance's damages and its ruling was not a clear abuse of discretion.

¶ 68 The circuit court found that the documents evidencing the stagnant inventory were in Melrose's possession in December, 2011, and documents, evidencing specific cancelled orders, were tendered on August 1, 2013. The court also noted that Alliance's answer to interrogatories

named Farooqui as the individual with the pertinent information concerning all aspects of the litigation. The court found that Melrose's decision to not pursue additional discovery, was a tactical decision on its part and not caused by Alliance's failure to provide requested information.

¶ 69 We agree with the circuit court that Farooqui's damages testimony was proper, and note that the determination of witnesses' credibility is a matter for the trier of fact and is not to be second guessed on appeal. *Gambino v. Boulevard Mortgage Corp*., 398 Ill. App. 3d 21, 54 (2009). The decision to impose a particular sanction under Rule 219(c) is within the discretion of the trial court and, thus, only a clear abuse of discretion justifies reversal. Ill. S. Ct. R. 219(c); *Boatman's National Bank,* 155 Ill. 2d at 314. There was no abuse of discovery here, and no sanction was necessary.

¶ 70 III. Tortious Interference With Contracts

¶ 71 Melrose's third contention on appeal is that the court erred in finding it tortiously interfered with contractual rights where there was no evidence that Melrose knew of the existence of any of Alliance's contracts. Alliance responds that the court did not err and it sufficiently established a cause of action for tortious interference with contracts.

¶ 72 The elements of the tort of tortious interference with existing contract rights are: (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of this contractual relation; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's wrongful conduct; and (5) damages. *Simmons v. Campion*, 2013 IL App (3d) 120562, ¶ 29; *HPI Health Care Services, Inc. v. Mt Vernon Hospital, Inc*., 131 Ill. 2d 145, 154-55, (1989). The issue on appeal centers on the second element, Melrose's awareness of Farooqui's contractual relationships.

¶ 73 Melrose states that Farooqui testified that Alliance had contracts with specific third parties. However, Melrose argues that there was no evidence at trial that it knew of even one of the contracts with which it allegedly interfered with, let alone all of them, as required by Illinois law. Melrose argues that without having knowledge of the existing contracts, it cannot be liable for tortious interference with contracts. Melrose maintains that absent any evidence that Melrose knew of the specific contracts, the court erred in finding tortiuos interference with contracts.

¶ 74 Alliance responds that the entry and blockade of its warehouse on December 7, 2011, amounted to tortious interference with its contracts. Alliance argues that Farooqui testified at length, subject to cross-examination, of all of the specifics related to those contracts, including that most of Alliance's business occured during the holiday season. Alliance contends that Melrose was aware of the seasonal aspect of its business. The evidence showed that Alliance was an ongoing import/export business for many years and as such, had contracts with customers for the sale of products.

¶ 75 Alliance argues that Melrose admitted using Bazbaz because of his relationship with Farooqui. First, Bazbaz was employed by Scarlato & Sons, and involved in the lease negotiations between Cornell and Alliance in 2008. Second, Bazbaz was employed by Alliance where his duties included sales. Bazbaz had extensive knowledge of Alliance's sales, customers and products. Finally, Bazbaz left Alliance and returned to Scarlato & Sons, and advised Melrose. Alliance also points to the timing of the blockade, which occurred during its seasonal shipping season. Alliance argues that the evidence showed that Alliance had customers during the blockade, Melrose interfered with the contracts, and, as a result, Alliance lost profits. Alliance maintains that it was well within the court's discretion and within the proffered evidence, to find that the contracts did in fact exist and that Melrose was well aware of the contracts.

¶ 76 We note here the circuit court's finding that both Scarlato and Bazbaz knew of the production and seasonal nature of Alliance's business; evidenced by their initial visit which was timed during the holiday shipping season. Based upon the evidence, the court determined that at the point of entering the warehouse for the purpose of taking an inventory for the distriant action, Melrose had knowledge of the seasonal structure inherent in Alliance's business. The court further noted that Farooqui testified that the blockade prevented him from shipping the Christmas orders that had been contracted for. Farooqui further testified that on December 7, 2011, his employees were loading a container, when Scarlato and Bazbaz appeared at the warehouse and directed Alliance employees to unload the merchandise. That order was cancelled by the purchaser. This action alone indicated that Melrose took affirmative steps to prevent Alliance from fulfilling a contractual obligation. Farooqui testified that the blockade prevented other firms from obtaining their goods, and these sales were cancelled. Finally, Farooqui stated that suppliers who could not drop off merchandise because of the blockade also cancelled. The circuit court held that "events established by the court file, including transcripts and prior proceedings, as well as the testimony elicited at trial clearly establishes that Alliance has sufficiently proved Melrose, through its agents, tortiously interfered with Alliance's then existing sales contracts."

¶ 77 We are in accord with the circuit court's determination that Melrose was aware of Alliance's contractual relationships. In light of the elements necessary to support a claim for tortious interference with contracts, and after our review of the record, we conclude that the circuit court properly found that the evidence presented was sufficient to sustain the action against Melrose. See *Simmons*, 2013 IL App (3d) 120562, ¶ 29.

¶ 78 IV. Lost Profit Damages

¶ 79 We now turn to Melrose's fourth contention on appeal that the circuit court erred in awarding lost profit damages because the evidence was insufficient. Melrose maintains that Farooqui's testimony was too speculative and did not provide a reasonable basis for the computation of damages, and, therefore, the evidence was insufficient to support an award for lost profits. Melrose claims that at trial, Farooqui testified that Alliance earned 30% gross margin on all of its sales. On cross-examination, Melrose attempted to show Farooqui did not have the requisite knowledge of these figures. However, Melrose argues that it could not effectively cross-examine Farooqui about contracts that he claimed were cancelled as a result of the distraint, the value of those alleged contracts, the profit margin on those alleged contracts, Alliance's income prior to and after the distraint, or any other component of its lost profit damages claim.

¶ 80 Melrose maintains that there is no evidence that any of Alliance's customers cancelled any of their orders for particular goods at a particular price as a result of the distraint. Melrose argues that the circuit court's award for lost profits based solely on Farooqui's testimony as to gross margin, without accounting for any other costs and expenses, such as rent, is based on false and speculative assumptions. Melrose maintains that testimony that Alliance would have earned a 30% margin was not sufficient to support the circuit court's award of $238,495.50 in lost profits. Melrose asserts that Alliance's historical margins had never remotely approached the heights of 30%. Melrose further urges this court to find that Farooqui's lost profit damages were not calculated with reasonable certainty and the award was against the manifest weight of the evidence.

¶ 81 It is Alliance's contention that the circuit court properly awarded lost profit damages. Alliance maintains that Farooqui proffered reasonable testimony regarding the tortious interference by Melrose with its customers, which resulted in lost profits. Further, Alliance argues that its fixed costs for the year were already paid at the time of the blockade, therefore, only the expenses necessary to the contracts at issue should be deducted from the damages. See *Wilmette Partners v Hamel*, 230 Ill App. 3d 248, 263 (1992). Moreover, Alliance points out that Melrose took its own accounting of Alliance's inventory with regards to its distraint action. Lastly, Alliance contends that damages need not be proven with mathematical certainty, and here Alliance presented sufficient evidence that allowed the court to consider and compute lost profit damages. Alliance contends that the award for lost profits was proper.

¶ 82 The circuit court found that Farooqui testified both from memory and personal notes concerning lost business. The court specifically stated that Farooqui "demonstrated an encyclopedic knowledge of his customers and sales, which upheld under vigorous cross-examination. With respect to the contracts that remained unfilled during the blockade, Mr. Farooqui testified to gross sales of $794,985. He stated that on the seasonal products, the mark-up was between 25-30%, although some were as high as 50%. On the specific orders that were not shipped due to the blockade, he testified that his profit was 30% of the gross, or $238,495.50." The circuit court found that the successfully prosecuted action by Alliance was grounded in tort, and the proper measure of damages includes economic loss, as established through Alliance's testimony. *Santucci Construction Co. v. Baxter & Woodman, Inc.*, 151 Ill. App. 3d 547, 553 (1986).

¶ 83 We agree and note that the evidence of injury suffered by Alliance furnishes a sufficient basis for the lost profit damages assessed by the circuit court. Reviewing courts will reverse

damage awards that are based on speculation or conjecture. *SK Hand Tool Corp. v. Dresser Industries, Inc.,* 284 Ill. App. 3d 417, 426 (1996). All the law requires in cases of this character is that the evidence shall, with a fair degree of probability, tend to establish a basis for the assessment of damages. *Schatz v. Abbott Laboratories, Inc*., 51 Ill. 2d 143 147 (1972) (citing *Barnett v. Caldwell Furniture Co*., 277 Ill. 286 (1917)). The record meets the requirements of *Barnett* that "the evidence shall, with a fair degree of probability tend to establish a basis for the assessment of damages." 227 Ill. 286.

¶ 84 V. Failure To Mitigate Damages

¶ 85 We find Melrose's fifth and final argument on appeal, that Alliance failed to act immediately to mitigate its damages, is without merit. Melrose argues that Alliance eventually obtained the release of its inventory by posting a $75,000 bond. Melrose argues that by waiting five weeks to post such a bond, during which time Alliance allegedly lost contracts valued at $794,985 and for which the court awarded damages of $238,495.50, Alliance failed to mitigate its damages. Melrose contends that this failure bars an award of damages. See *Ashe v. Sunshine Broadcasting Corp*., 90 Ill. App. 3d 97, 100 (1980) (avoidable consequences doctrine requires one injured by a breach of contract to use all reasonable means to minimize his damages).

¶ 86 Alliance responds that it was not possible to post a $75,000 bond anytime before January 9, 2012. Alliance claims that in order to release its inventory, Alliance was required to post a bond in an amount double the rent sought pursuant to 9-311of the Code.[5] 735 ILCS 5/9-311 (West 2012). Melrose sought $214,760.10 in its complaint for distraint, thus requiring a bond of $429,520.20. Alliance maintains that this was beyond the resources of Alliance.

[5] Section 9-311 requires that when any distraint of rent is levied, the person whose property is distrained, may release the same by entering into bond in double the amount of rent claimed. 735 ILCS 5/9-311 (West 2011).

¶ 87 The circuit court noted that Melrose fought every effort by Alliance to lift the distraint and blockade and it was only under a judge's order that Melrose acquiesced to the lower bond of $75,000. We find no intentional avoidance to mitigate damages.

¶ 88 Based upon our review of the record on appeal, we cannot say that the circuit court's findings were against the manifest weight of the evidence. A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on evidence. *Bazydlo*, 164 Ill. 2d at 215

¶ 89 CONCLUSION

¶ 90 Accordingly, for the reasons set forth above, we affirm the judgment of the circuit court.

¶ 91 Affirmed