2011 IL App (2d) 110300-U
No. 2-11-0300
Order filed December 16, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

INTERNATIONAL PROFIT ASSOCIATES, INC.,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 07-AR-720
INDUSTRIAL RESOURCE GROUP, LLC,	)	Honorable Diane E. Winter,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

Held: Trial court did not abuse its discretion in barring witness whom defendant did not disclose in its answers to Rule 213(f) interrogatories; judgment against defendant was affirmed where trial court's findings on plaintiff's breach of contract claim and defendant's fraudulent inducement affirmative defense were not against the manifest weight of the evidence.

¶ 1 Plaintiff, International Profit Associates, Inc. (IPA), sued defendant, Industrial Resource Group, LLC (IRG), in the circuit court of Lake County, seeking to recover money defendant allegedly owed plaintiff under a contract for business management consulting services. Following a bench trial, the court entered judgment in favor of IPA in the amount of $3,020.87. Defendant appeals from the judgment entered in favor of IPA and from an order barring witness Nancy Miller from testifying at trial. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant is an Indiana corporation that provides hydraulic and pneumatic repair and retrofitting services. Plaintiff is an Illinois corporation that provides business management consulting services. In June 2007, plaintiff filed a one-count breach of contract complaint against defendant. Plaintiff alleged that defendant entered into a contract with IPA on April 19, 2007, under which IPA was to provide 250 hours of management consulting services at a rate of $245 per hour plus expenses. Plaintiff further alleged that it performed 141 hours under the contract, and that defendant still owed it $19,338.48 for its services.

¶ 4 Attached to the complaint was the consulting services agreement between plaintiff and defendant. The agreement provided as follows. IPA would assign a project manager and a business consultant to the project, which would commence on April 23, 2007. The project manager would "prepare a Value Enhancement Program encompassing the objectives and scope of the engagement." Results depended on many factors, and it was "understood and agreed that no express or implied warranty of any general or specific results shall apply to the work done under this agreement." Defendant agreed to "pay all invoices in full, upon presentation," and there would be "at least one" invoice per week. Defendant could "recess the engagement" at the end of any business day. The agreement was signed by IRG's owner, Vincent Naccarato.

¶ 5 On July 27, 2007, defendant filed its answer to plaintiff's complaint and asserted fraudulent inducement as an affirmative defense. Defendant's allegations spanned 30 pages and contended that plaintiff was a corporate entity through which certain individuals, led by John Burgess, conducted a scheme to fraudulently induce clients into signing contracts for consulting services, which were of no value to them.

¶ 6 According to defendant's allegations, the scheme began with a telemarketer contacting a potential client to set up a sales appointment. A salesperson then arrived at the appointment and attempted to sell the client an "objective" survey of the client's business. If the salesperson successfully sold a survey, then a business analyst would arrive shortly thereafter to conduct it. Once on site, the analyst would follow a scripted routine whereby the analyst would obtain the client's financial information, concoct inflated "problem costs" that the analyst would attribute to poor business management, and present a consulting services agreement under which IPA proposed to rescue the client from its business management failures. According to defendant, the salesperson and the analyst would guarantee the client a three-to-one return on consulting fees, despite knowing the assurance to be false.

¶ 7 Defendant further alleged that plaintiff trained its analysts to "psychologically manipulate" clients with the goal of "wear[ing] the client down to create urgency." For example, defendant alleged that plaintiff's training manuals instructed the analyst to perform a "council call" to a "council of advisors" in the client's presence, in order to falsely instill confidence in the client that the analyst was backed up by a team of business experts. Defendant also alleged that the training manuals instructed analysts to "drop bombs" of misleading financial data to instill in the client fear of imminent financial meltdown. Defendant further alleged that the training manuals instructed the analyst to never to leave a copy of the business survey—which allegedly consisted of boilerplate with the client's financial data plugged in—with the client, so that the client would not have the opportunity to scrutinize the analyst's claims.

¶ 8 Defendant alleged that plaintiff succeeded in fraudulently inducing it to sign a consulting services agreement by employing this scheme. According to defendant, an IPA telemarketer contacted defendant during April 2007. On April 18, 2007, IPA business analyst Sheri Pollard met with defendant's owner. Using the misleading and deceptive tactics outlined above, Pollard fraudulently induced defendant to enter into an agreement with IPA for 250 hours of consulting services at a rate of $245 per hour plus expenses. On April 23, 2007, IPA project manager Robert Bratti and IPA business consultant William Barger arrived at defendant's premises to begin the consulting project. Defendant ultimately paid IPA approximately $22,000 in consulting fees.

¶ 9 A. Order Barring Witness Nancy Miller

¶ 10 Nancy Miller was a former employee of IPA who, in January 2010, signed an affidavit in connection with a 2007 federal suit filed by defendant and other former clients of IPA against John Burgess, the founder of IPA, and other individuals (*Amari Co. v. Burgess*, No. 07-C-1425). The federal suit alleged that the consulting services scheme masterminded by Burgess and others violated the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 *et seq.* (West 2010)). In the federal affidavit, Miller described various instances of plaintiff's deceptive business practices, including that the "council call" performed in a prospective client's presence was a charade, during which the analyst was "simply placed on hold, while [the analyst] pretended to talk to a group of experts while no one was on the other end." Miller also stated that IPA's consultants were not actually bonded for $2,000,000, as IPA told its clients, and that IPA misrepresented to clients the educational background and business experience of its employees.

¶ 11 The procedural history relevant to the trial court's order barring Miller from testifying at trial began in June 2008, when defendant tendered its initial responses to plaintiff's written discovery.

After defendant tendered its responses, plaintiff filed a motion to compel and for sanctions. Plaintiff argued in part that, in defendant's answers to Supreme Court Rule 213(f) (eff. Jan. 1, 2007) interrogatories, defendant's attorney, Robert Reda, had merely attached the witness disclosures filed in the federal case. Plaintiff further asserted that the verification pages attached to defendant's discovery responses were simply copies of the verification pages used in the federal suit. Before the trial court ruled on plaintiff's motion, the court granted Reda leave to withdraw as attorney for defendant.

¶ 12 On August 14, 2008, the trial court granted attorney Leon Edelson leave to appear for defendant. Apparently, Edelson then told the trial court that defendant had not reviewed or verified the discovery responses that Reda had tendered, and that he wanted to withdraw the responses and tender new ones. Presumably, the trial court permitted Edelson to do so, because, on September 29, 2008, the trial court granted defendant 21 days to respond to written discovery. After defendant failed to comply with this order, the court ordered defendant to answer written discovery by November 3, 2008. On November 19, 2008, after defendant again failed to answer written discovery, the trial court entered an order barring defendant from introducing at trial evidence or testimony for which plaintiff had sought discovery.

¶ 13 On April 14, 2009, the trial court granted the law firm of Churchill, Quinn, Richtman & Hamilton, Ltd. (Churchill) leave to appear for defendant. On October 5, 2009, Churchill attorney Mark Van Donselaar filed a motion to vacate the November 19, 2008, order barring defendant from introducing evidence at trial. On October 8, 2009, the trial court granted defendant's motion and ordered defendant to tender discovery responses by October 23, 2009.

¶ 14 Defendant subsequently tendered new discovery responses. While defendant's initial answers to Rule 213(f) interrogatories had disclosed Miller as a witness—she was one of numerous witnesses listed on the disclosures filed in the federal suit—defendant's new answers did not disclose Miller as a witness. In the introductory paragraphs of its "superceding" interrogatory answers, defendant stated that it "hereby revoke[d] and repudiate[d] any interrogatory answers purportedly made and served on its behalf by Robert Reda *** or by Leon Edelson." Defendant stated that it "had no such knowledge of such answers prior to the engagement of [attorney Van Donselaar]." The new answers were properly verified by Naccarato on behalf of IRG.

¶ 15 On November 5, 2009, after a hearing, the trial court ordered plaintiff to make available six witnesses for discovery depositions. Miller was not one of the witnesses. Meanwhile, defendant substituted attorneys one more time. On December 1, 2009, attorney Merle Royce filed his appearance on behalf of defendant.

¶ 16 On March 8, 2010, plaintiff filed an "emergency motion to quash depositions." Plaintiff stated that it had recently received notices of five depositions from defendant. Plaintiff argued that defendant had failed to take the discovery depositions of the witnesses listed in the November 5, 2009, order, and that being forced to take the depositions now, just a few weeks before the trial, would prejudice plaintiff. That day, after a hearing, the trial court ordered that the depositions take place on April 26, 2010, the day before the trial was scheduled to start. Again, Miller was not mentioned in the order.

¶ 17 On April 1, 2010, plaintiff filed a motion to exclude Miller as a witness at trial. Plaintiff anticipated that defendant would attempt to call Miller as a witness, because defense counsel had recently tried to call her as a witness at the trial of another case brought by IPA. Plaintiff asserted that defendant had not disclosed Miller in its answers to Rule 213(f) interrogatories, and that plaintiff would be prejudiced were it required to take the deposition of an additional witness on April 26, 2010.

¶ 18 Defendant argued in response that plaintiff had known about Miller since at least January 2010. At that time, defense counsel had sought to continue an arbitration hearing in another case being prosecuted by IPA because Miller had been unable to attend the hearing to testify. Defendant further argued that, on March 9, 2010, it had disclosed Miller as a witness in yet another case being prosecuted by IPA. On that date, defense counsel had e-mailed plaintiff's counsel, stating his intent to call Miller as a witness in that case. Defense counsel had attached to the e-mail Miller's federal affidavit. Defendant further argued that it had offered Miller for deposition on March 22, 2010, in the other IPA case. On April 5, 2010, the trial court entered an order barring Miller from testifying at trial, finding both that defendant had failed to disclose Miller in its answers to Rule 213(f) interrogatories and that Miller was not a "material witness."

¶ 19 B. Bench Trial

¶ 20 The bench trial began on April 27, 2010, and lasted two days. Naccarato, defendant's owner, testified regarding his experience with plaintiff. He testified that a telemarketer from IPA contacted him and offered to set up a no-cost appointment with a salesperson, to which Naccarato agreed. He testified that the telemarketer's "one hook" was that IPA guaranteed a three-to-one return on every dollar spent on consulting fees. On April 12, 2007, IPA senior area manager Patricia Freeland arrived and made her pitch. Freeland emphasized the three-to-one guarantee. After Naccarato told her he could not afford the $1,200 survey fee, Freeland told him that IPA had a "really good" business analyst who "happened to be in town," and she offered to cut the survey fee to $500.

Naccarato accepted, and IPA business analyst Sheri Pollard arrived a few days later to conduct the survey.

¶ 21 Naccarato testified that Pollard spent approximately two days preparing the survey of defendant's business. She interviewed employees and had full access to defendant's financial records. At some point during the second day, Pollard conducted a "council call" in Naccarato's presence. Naccarato testified that he could hear Pollard's side of the conversation only, and that she was "strongly advocating" and "going to bat" for defendant. It appeared to Naccarato that there was concern on the other end of the line over whether defendant's "sales volume was big enough" for IPA to take it on as a client. Naccarato was "sitting there very apprehensive about whether or not [defendant] was going to be able to be taken on by IPA." During the conversation, Pollard "turned the tide," and IPA agreed to accept defendant as a client.

¶ 22 Pollard then had a 15-minute meeting with Naccarato during which she presented the survey results. She told him that the numbers in the survey reflected what defendant could achieve if it "based everything on [its] best performance." She told him that defendant's profits could increase by $168,000. Naccarato also testified that the survey mentioned an "owner's bonus of $900,000." The numbers that Pollard showed him "were pretty impressive." When Pollard continued to read through the survey, Naccarato told her, "Look, I know how to read. We don't have to do this. I am going to take you at your word you can do this. Let's go." At the end of the 15-minute meeting, Naccarato signed an agreement for consulting services on behalf of defendant. Pollard did not leave a copy of the survey with defendant.

¶ 23 Pollard's testimony differed in some respects from Naccarato's testimony, but was largely consistent. Pollard denied making a council call. She also testified that she read through the entire contract with Naccarato before he signed it, including the portion requiring payment of weekly invoices. She had not told Naccarato that IPA's employees were paid on a commission, because it had never come up. She admitted that she told Naccarato she would not recommend defendant as a client unless she were sure that defendant would receive a three-to-one return on the consulting fees. She also admitted that she did not leave a copy of the completed survey with defendant.

¶ 24 Regarding the survey itself, Pollard testified that it contained an "optimal detail income statement," which combined defendant's best performances in various categories of expenses from years prior to calculate defendant's "optimal profit." The survey, which was admitted into evidence, reported that defendant's "optimal profit" for a single year would be $204,766, or 14.3% of revenue. The survey further reported that defendant's profit rate for the years 2005 and 2006 had equaled only 3.6% and 3.1% of revenue, respectively, and that defendant's projected profit for 2007 was only 3.2% of revenue. The survey projected a five-year cumulative "minimum mandatory profit" of $1,369,469, of which $900,029 would be an "owner's bonus." Pollard said she told all of her clients that achieving the optimal profit numbers would be "difficult because you would have to be in 100 percent control 100 percent of the time." The numbers represented "the absolute most perfect that you can do." She testified that "someplace in the middle" was "ideally where realistically a client could land." She offered the more conservative estimate "to maintain credibility and to be realistic."

¶ 25 Naccarato testified that IPA project manager Richard Bratti and IPA consultant William Barger arrived on April 23, 2007, the Monday after Naccarato signed the agreement. Naccarato expressed concern to Bratti over defendant's ability to pay for the consulting project. Bratti "spent a lot of time just basically calming [him] down" and told him that IPA would "work out" how defendant would be able to pay for the project. According to Naccarato, on the second day that Bratti was there, he and Bratti agreed to a "payment plan" whereby defendant would pay IPA's weekly invoices using post-dated checks, and IPA would not cash the checks if defendant did not have sufficient funds in its account. Bratti also agreed that the post-dated checks would be spread out "end-to-end," rather than "stacked," so that only one post-dated check per week would be cashed. Naccarato testified that he thought Bratti handwrote this agreement on the "Value Enhancement Review" dated April 24, 2007. However, the document, which was admitted into evidence at trial, contained the following typed language: "In order to assist you in the financial management of the project, I have been able to obtain permission from my director to work within your cash constraints. Therefore I am presenting to you for approval a payment plan which we will agree to." This handwritten language followed: "Further to the agreement, the client has agreed to accelerate payments if surplus of cash occurs." Both Bratti and Naccarato initialed next to the handwritten language and signed the document.

¶ 26 Naccarato testified that, at some point early during the second week, Barger informed him that the payment plan would be changed from "end-to-end" to "stacking," whereby more than one post-dated check would be cashed in a given week. This frustrated Naccarato, but Barger showed him a "cash management forecast" spreadsheet that revealed that defendant had sufficient funds to pay the second week's invoices. Naccarato testified that he later discovered that Barger had altered the spreadsheet to change the terms for defendant's accounts payable from due in 30 days, which was defendant's norm, to due in 60 days, which made it appear that defendant had more cash than it did.

¶ 27 During his testimony, Barger admitted to changing from an "end-to-end" to a "stacking" payment plan during week two of the project. Barger also testified that, after he broke the news to

Naccarato that the payment plan would be changed, Naccarato expressed concern over being able to afford the payments. Barger admitted to showing him the "cash management forecast" spreadsheet during weeks two and three of the project. The cash management spreadsheet for week two, which was admitted into evidence at trial, revealed that someone had entered defendant's accounts payable as due in 60 days. The spreadsheet for week three revealed that someone had entered the accounts payable as due in 40 days.

¶ 28 At the end of the third week, after IPA refused to defer cashing a check after defendant incurred an unexpected expense to repair a truck, Naccarato exercised his right under the agreement to "recess" the project. He also stopped payment on all of the post-dated checks that IPA had not yet cashed. In his letter recessing the project, which was dated May 10, 2007, Naccarato wrote that he was motivated not by "dissatisfaction with your representative," but by "a very real concern regarding my ability to pay." At trial, Naccarato testified that, at the time he recessed the project, he was satisfied with IPA's work. Naccarato had also signed weekly "Value Enhancement Reviews" in which he had rated IPA's performance as ranging from "3 out of 5" to "5 out of 5."

¶ 29 Following the bench trial, both parties filed memoranda in support of their positions. On November 22, 2010, the trial court entered its judgment order. The court found that the parties had entered into an agreement to perform a survey of defendant's business and, subsequently, a consulting agreement. Regarding defendant's fraudulent inducement defense, the court found:

> "The [d]efendant claims IPA's survey was not objective and unbiased because it was performed by an analyst who received a commission which was not disclosed. No evidence was offered that the survey contained any untrue statements. The [d]efendant cannot reasonably rely on IPA's claim to conduct an objective and unbiased analysis of the business

when [d]efendant knew that IPA's business was to remediate business problems. IPA had an interest in obtaining a Service Agreement after the completion of the survey. Therefore, the fact that the fee paid for the survey was paid as a commission to the [a]nalyst is not a material fact that IPA had to disclose.

No evidence was presented that the 3 to 1 assurance was a false statement when made. Mr. Naccarato testified that the analyst, Sherri [*sic*] Pollard[,] told him he would receive a 3 to 1 'guarantee' as opposed to Ms. Pollard's testimony that she used the word 'assurance.' The Agreement for Services does not reference such a guarantee and in fact contains language specifically excluding any types of warranty. Therefore, the word difference becomes immaterial.

Finally, evidence that [p]laintiff utilizes a marketing strategy designed to obtain clients and receive payment for services which is aggressive and at times disingenuous, does not mean the conduct implementing the strategy is fraudulent. The Agreement for Services contains an integration clause, a disclaimer of any warranties and a cancellation clause. The fact [p]laintiff created pressure, urgency and appealed to [d]efendant's desire for increased profits and net spendable monies does not constitute fraud in the inducement. The fact that [p]laintiff's business model is designed to insure payment and requires customers to rate performance and agree to all charges on a weekly basis does not amount to fraud."

¶ 30 At trial, IRG also argued that it was not liable under the contract because IPA had breached the oral agreement to extend the contract's payment terms. Regarding this argument, the court found:

"Mr. Naccarato testified that he was pleased with Mr. Barger's services and the only reason he recessed the project was because he felt IPA had not complied with their oral agreement to extend payment terms if IRG's cash flow could not support the payments. Mr. Naccarato testified that he discussed this concern with Mr. Barger and they memorialized an agreement to extended payment terms at page 112 of the first weeks' [*sic*] Value Enhancement Review. However, the actual language of the handwritten change provides for an acceleration of payments if surpluses of cash should occur. No provision is found for extended payment terms in any of the written documents, but the parties clearly agreed to vary the contract terms. IPA did extend flexible payment terms to IRG by taking 3 checks payable weekly for the first weeks' [*sic*] services. Mr. Naccarato became dissatisfied with IPA when IPA insisted in the middle of the second week that checks for the second weeks' [*sic*] services would come due at the same time checks for the first weeks' [*sic*] services were coming due thus changing the payments from 'end to end' to 'stacking.' However, he continued the services into the third week when the project was recessed. Later, when IRG requested IPA to hold off cashing a post-dated check due to lack of cash flow, IPA refused. It was at that point IRG stopped payment on all outstanding checks to IPA. Mr. Naccarato's stated reason for non-payment was his dissatisfaction with extended payment terms which were never part of the written contract and were only vague oral modification agreements.

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Mr. Naccarato testified credibly that he advised Mr. Barger that his vendors required payments on a 30 day basis and that payment schedule was important to his business and to his vendors' businesses. Mr. Naccarato testified that he was concerned about his ability to afford IPA's services. Mr. Barger's testimony acknowledged telling Mr. Naccarato IPA would take it day by day and that he would use the cash flow reports to assess his affordability. When Mr. Naccarato was told in the middle of the second week that the payment terms being offered were now 'stacking' instead of 'end to end' he was shown a cash flow chart which lengthened his account payables from the 30 days which he had always met to 60 days the second week and 40 days the third week. Based upon the altered cash flow chart, he issued the checks for the second and third weeks' services. ***

The 30 day vendor payment schedule was a material aspect of the business. Mr. Barger knew that IRG was committed to the 30 day payment schedule. Mr. Barger was the person preparing the cash flow analyses and presenting them to Mr. Naccarato and yet he professed not to know how the changes could occur. Mr. Barger was the only author listed for the computer program. Mr. Barger's suggestion that IRG's staff made the changes in the account payables was not credible. Mr. Naccarato relied on the cash flow report in the middle of the second week as to the company's ability to afford IPA's services. Based upon the cash flow reports, Mr. Naccarato continued with IPA's service for the remainder of the second and through the third week. Mr. Naccarato would not have approved of the lengthening of the account payable time periods and he would have ended IPA'a [*sic*] services as of Wednesday of the second week.

The invoice for the second week was $11,328.36. Prorated for 2 days of the total of 5 billed, the prorated amount is $4,531.35 which would not be due to IPA along with the third week's bill of $11,786.26 for a total of $16,317.61. The total billed was $19,338.48

less the disallowed billings of $16,317.61 leaving a balance of [*sic*] owed to IPA of $3,020.87."

Based on these findings, the trial court entered judgment in the amount of $3,020.87 in favor of plaintiff and against defendant. On February 23, 2011, the court denied defendant's motion for reconsideration. This timely appeal followed.

¶ 31 II. ANALYSIS

¶ 32 Defendant appeals from (1) the order barring witness Nancy Miller from testifying at trial and (2) the order entering judgment in favor of IPA. We address each in turn.

¶ 33 A. Order Barring Witness Nancy Miller

¶ 34 Defendant argues that the trial court erred when it barred witness Nancy Miller from testifying at trial. Defendant contends that its failure to disclose Miller was inadvertent. Defendant further argues that plaintiff had known of the potential for Miller being a witness for some time, since defendant had disclosed Miller in its preceding Rule 213(f) disclosures, which attorney Reda tendered to plaintiff in June 2008, even though attorney Edelson later withdrew those disclosures. Defense counsel also disclosed Miller as a witness in two other cases being prosecuted by IPA, the first disclosure dating back to January 2010. Defendant further contends that Miller was a material witness to its fraudulent inducement defense, because Miller would have testified that IPA's business surveys were biased, that the promise of a three-to-one return was false, that the council call was a sham, and that the problem costs were concocted to scare clients into purchasing consulting services.

¶ 35 Supreme Court Rule 213(f) (eff. Jan. 1, 2007) provides that "[u]pon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial ***." Rule 213(i) imposes a duty on a party to supplement its discovery responses whenever new or additional information becomes known. Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007). The committee comments to Rule 213(f) state that it is meant "to prevent unfair surprise at trial, without creating an undue burden on the parties before trial." Ill. S. Ct. R. 213(f), Committee Comments (adopted March 28, 2002).

¶ 36 Supreme Court Rule 219(c) (eff. July 1, 2002) empowers a trial court to impose sanctions for a party's unreasonable failure to comply with the rules regarding discovery. "A party's noncompliance is 'unreasonable' where there has been a deliberate and pronounced disregard for a discovery rule." *H & H Sand & Gravel Haulers Co. v. Coyne Cylinder Co.*, 260 Ill. App. 3d 235, 242 (1992). Once a court has imposed a sanction, "the sanctioned party has the burden of establishing that the noncompliance was reasonable or justified by extenuating circumstances." *In re Estate of Andernovics*, 311 Ill. App. 3d 741, 746 (2000). One sanction available under Rule 219(c) is to bar an undisclosed witness from testifying at trial. Ill. S. Ct. R. 219(c)(iv) (eff. July 1, 2002). We review a trial court's decision to impose a sanction under Rule 219(c) for an abuse of discretion. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). To determine whether the court abused its discretion, we look at the following factors: "(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." *Shimanovsky*, 181 Ill. 2d at 123-24.

¶ 37 Defendant urges us to review *de novo* the trial court's decision to bar Miller from testifying, because the facts are uncontroverted, and because we can "independently decide the propriety of the sanction." Defendant's argument is without merit. The issue before us is not whether it was proper for the trial court to apply Rule 219(c) to the undisputed facts, but whether the court abused its discretion in imposing a particular sanction under Rule 219(c). Compare *In re Marriage of Bonneau*, 294 Ill. App. 3d 720, 723 (1998) (reviewing *de novo* the issue of whether a discovery privilege applied to undisputed facts), with *Shimanovsky*, 181 Ill. 2d at 123 (reviewing for abuse of discretion the trial court's imposition of a particular sanction under Rule 219(c)).

¶ 38 Initially, we conclude that the trial court did not abuse its discretion in concluding that defendant unreasonably failed to comply with Rule 213(f). We note that the parties do not dispute that defendant failed to disclose Miller in its "superceding" Rule 213(f) interrogatory answers. Moreover, defendant did not establish that its failure to comply with the rule was reasonable or justified by extenuating circumstances. As we discuss below, defense counsel knew that Miller was a potential witness in January 2010, yet he took no formal action to disclose Miller as a witness in the present case until plaintiff filed a motion in April 2010 to bar Miller from testifying.

¶ 39 After reviewing the record in light of the relevant criteria, we also cannot say that the trial court abused its discretion in barring Miller from testifying at trial as a sanction for defendant's violation of the rule. Although we agree with defendant that, given Miller's federal affidavit, her testimony could have provided support for defendant's fraudulent inducement defense, the nature of Miller's testimony is but one criterion relevant to our analysis. The other five criteria weigh in favor of affirming the sanction.

¶ 40 Regarding surprise to the adverse party, we cannot agree with defendant that plaintiff would not have been surprised had the trial court permitted Miller to testify. Although defendant points out that it disclosed Miller in its preceding 213(f) disclosures, which attorney Reda tendered in June 2008, defendant does not contest that its subsequent counsel withdrew those disclosures. Moreover, the preceding 213(f) disclosures merely referred to defendant's witness disclosures in the federal case, which disclosed Miller along with numerous other witnesses. Notably, the federal disclosures did not indicate that Miller would testify regarding plaintiff's alleged fraudulent business practices, but merely identified Miller as a business analyst with knowledge of plaintiff's business.

¶ 41 Likewise, it is of no help to defendant that its attorney had disclosed Miller as a witness in January 2010 and in March 2010 in two of the other cases being prosecuted by IPA. Instead, that consideration seems relevant to the sixth factor, the good faith of the party offering the testimony. Obviously defense counsel knew that Miller was a potential witness in January 2010, yet defendant took no formal action to disclose Miller as a witness in the present case until plaintiff filed a motion in April 2010 to bar Miller from testifying. Moreover, defendant participated in two hearings before the trial court during which the parties discussed which witnesses would be deposed prior to trial—one hearing on November 5, 2009, and one on March 8, 2010—and, based on the record before us, it appears that defendant did not mention Miller in the context of the present case at either hearing.

¶ 42 We also cannot conclude that Miller's testimony would not have been prejudicial to plaintiff. This is not a situation where Miller's testimony would have provided little-to-no support for defendant's case. See *Pancoe v. Singh*, 376 Ill. App. 3d 900, 913-14 (2007) (concluding that witness's testimony was not prejudicial to defendant where it added little-to-no support for plaintiff's case). Instead, Miller's testimony would have covered matters beyond the scope of any other witness's testimony. Moreover, the court had already ordered the parties to depose several witnesses on April 26, 2010, the day before trial was to begin. We cannot say that requiring plaintiff to depose another witness and prepare for an important cross-examination would not have prejudiced plaintiff.

¶ 43 Regarding the diligence of the adverse party and the timeliness of its objection, we conclude that both criteria support the trial court's decision to impose the sanction. Plaintiff filed numerous motions regarding written discovery in this case and diligently followed up each time defendant failed to properly tender its responses. Additionally, plaintiff timely filed its motion to exclude Miller as a witness when it anticipated that defendant might attempt to call Miller at trial.

¶ 44 Finally, regarding the good faith of the party offering the testimony, we conclude that this criterion offers no reason to reverse the sanction. As discussed above, defendant took no formal action to disclose Miller as a witness until plaintiff filed a motion in April 2010 to bar Miller from testifying. Defendant failed to do so despite the purported importance of Miller's testimony. Similarly, although defendant disclosed Miller in its preceding responses to 213(f) interrogatories, which were subsequently withdrawn, defendant did not disclose Miller in its superceding responses. This suggests a lack of diligence on the part of defendant. Given this background, we cannot say that the trial court abused its discretion in barring Miller, or that the sanction was unjust.

¶ 45 B. Judgment in Favor of IPA

¶ 46 Defendant argues that the judgment in favor of IPA should be reversed, because the trial court erred in finding that defendant did not prove its fraudulent inducement affirmative defense and its contention that it was not liable under the contract because IPA breached the oral agreement to extend the payment terms. We will affirm the judgment following a bench trial unless the judgment was against the manifest weight of the evidence. *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 177 (2004). " 'A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.' " *Dargis*, 354 Ill. App. 3d at 177 (quoting *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001)).

¶ 47 1. Breach of the Oral Agreement to Extend Payment Terms

¶ 48 Defendant argues that the trial court erred in finding that it did not prove that it was not liable under the contract because IPA breached the oral agreement to extend the payment terms. Defendant contends that IPA breached the oral agreement between Naccarato and Bratti to spread out defendant's payments "end-to-end," rather than to "stack" them, and that this constituted a material breach of the consulting agreement. Defendant further argues that Bratti's insertion of the "acceleration clause" in the first week's "Value Enhancement Review" "undercut the mutual assent which is necessary to the formation of a contract." Defendant contends that this rendered the consulting agreement "void and unenforceable."

¶ 49 The parties do not dispute the trial court's finding that, during the first week of the consulting project, Naccarato and Bratti orally agreed to modify the payment terms of the consulting agreement. Under the modified terms, IPA agreed to accept post-dated checks in payment of the weekly invoices. The post-dated checks would be spread out "end-to-end" rather than "stacked."

¶ 50 It is well-established that, where one party materially breaches a contract, the non-breaching party is discharged from its duty to perform under the contract. *Dragon Construction, Inc. v. Parkway Bank & Trust*, 287 Ill. App. 3d 29, 33 (1997). A breach is "material" where the obligation not performed "is of such importance that the contract would not have been made without it." *Dragon Construction*, 287 Ill. App. 3d at 33.

¶ 51 We disagree with defendant that plaintiff's refusal during weeks two and three to spread out the post-dated checks "end-to-end" constituted a material breach of the consulting agreement.

Although Naccarato was frustrated when Barger informed him that the payments would be "stacked," rather than spread out, Naccarato still issued post-dated checks in payment of the invoices for weeks two and three. Consequently, even if plaintiff did breach the parties' oral agreement by not accepting "end-to-end" payments, this did not constitute a material breach of the consulting agreement, as defendant clearly was willing to continue and did continue with the consulting project despite the breach.

¶ 52 The trial court concluded that defendant was not liable under the contract to the extent that Barger had misrepresented defendant's ability to afford the "stacked" payments. Even though Naccarato was willing to make the "stacked" payments, the evidence revealed that he was willing to do so only because Barger had misrepresented defendant's ability to pay. In the middle of the second week, Barger had showed Naccarato an altered "cash management forecast" spreadsheet, which misrepresented defendant's cash flow by altering the accounts payable terms. Consequently, the trial court concluded that defendant was not liable for any services rendered after Tuesday of the second week, reasoning that defendant would not have "continued with IPA's service for the remainder of the second and through the third week" but for Barger's misrepresentation. The trial court's findings were not against the manifest weight of the evidence.

¶ 53 We also find unpersuasive defendant's argument that Bratti's insertion of the "acceleration clause" in the first week's "Value Enhancement Review" "undercut the mutual assent which is necessary to the formation of a contract" and rendered the consulting agreement "void and unenforceable." Naccarato signed the "Value Enhancement Review" and initialed next to the handwritten acceleration clause. Naccarato was under a duty to read the document and is charged with knowledge and assent to what he signed. *Asset Exchange II, LLC v. First Choice Bank*, 2011 IL App (1st) 103718, ¶ 43.

¶ 54 Based on the foregoing, we cannot conclude that the trial court's finding that defendant did not prove that it was not liable under the contract because IPA breached the oral agreement to extend the payment terms was against the manifest weight of the evidence.

¶ 55 2. Fraudulent Inducement Defense

¶ 56 Defendant next argues that the trial court erred in finding that it did not prove its fraudulent inducement defense. Defendant asserts that plaintiff made at least three material misrepresentations upon which it relied in entering into the consulting agreement. The alleged misrepresentations were (1) plaintiff's statement that the survey would be "objective" and "unbiased," (2) plaintiff's three-to-one assurance, and (3) the "problem costs" outlined in the survey.

¶ 57 Fraudulent inducement is an affirmative defense that may render a contract unenforceable. *Jordan v. Knafel*, 378 Ill. App. 3d 219, 229 (2007). The defense is available where a contract was procured through misrepresentation. *Jordan*, 378 Ill. App. 3d at 229. The misrepresentation must have been "(1) one of material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false by the maker, or not actually believed by him on reasonable grounds to be true, but reasonably believed to be true by the other party; and (4) *** relied upon by the other party to his detriment." *Jordan*, 378 Ill. App. 3d at 229. The party asserting fraudulent inducement as a defense has the burden of proving it by clear and convincing evidence. *Warren Chevrolet, Inc. v. Bemis*, 197 Ill. App. 3d 680, 686 (1990).

¶ 58 Defendant urges us to review the trial court's findings regarding its fraudulent inducement defense under the clearly erroneous standard, because the material facts adduced at trial were largely undisputed, and because the trial court's reasons for rejecting its defenses were "legally insufficient." However, we agree with plaintiff that the applicable standard of review is whether the trial court's findings were against the manifest weigh of the evidence. See *Warren Chevrolet*, 197 Ill. App. 3d at 686 (holding that trial court's determination that the defendant did not prove its fraudulent inducement defense was not against the manifest weight of the evidence); *First National Bank of Elgin v. St. Charles National Bank*, 152 Ill. App. 3d 923, 934 (1987) (holding that trial court's determination that the defendants failed to establish their fraudulent inducement defense was against the manifest weight of the evidence).

¶ 59 a. "Objective" and "Unbiased" Survey

¶ 60 Defendant argues that plaintiff misrepresented that the survey would be "objective" and "unbiased" because plaintiff did not disclose that the survey fee was in fact a sales commission. It is not disputed that plaintiff told defendant that the survey would be objective and unbiased, nor is it disputed that the survey fee was in fact a sales commission paid to senior area manager Freeland. However, after reviewing the record, we cannot conclude that either of these alleged misrepresentations was sufficient to prove a fraudulent inducement defense.

¶ 61 Ordinarily, statements of opinion cannot give rise to a fraudulent inducement defense. *Heider v. Leewards Creative Crafts, Inc.*, 245 Ill. App. 3d 258, 265 (1993). Under certain circumstances, however, a statement that would otherwise be an opinion may qualify as one of fact that could give rise to the defense:

> " 'Wherever a party states a matter which might otherwise be only an opinion but does not state it as the expression of the opinion of his own but as an affirmative fact material to the transaction, * * * the statement clearly becomes an affirmation of the fact within the meaning

of the rule against fraudulent misrepresentation.' " *Heider*, 245 Ill. App. 3d at 265-66 (quoting *Perlman v. Time, Inc.*, 64 Ill. App. 3d 190, 197 (1978)).

Examples of statements of opinion that qualify as factual assertions include a jeweler's statement as to the value of a diamond, or a physician's statement upon a matter of health. *Heider*, 245 Ill. App. 3d at 266 (citing W. Keeton, *Prosser & Keeton on the Law of Torts* § 109, at 761 (5th ed. 1984)); see also *James v. Lifeline Mobile Medics*, 341 Ill. App. 3d 451, 456 (2003) (citing *Wilkinson v. Appleton*, 28 Ill. 2d 184, 188-89 (1963)) (statements as to matters of opinion generally do not amount to fraud unless relating "to a specific extrinsic fact materially affecting the value of matters at issue and where that fact is one peculiarly within the knowledge of the speaker"). In these situations, a statement of opinion "carrie[s] with it an implied assertion that the speaker kn[ows] facts which would justify the opinion, and thus could be taken as a statement of fact." *Heider,* 245 Ill. App. 3d at 266.

¶ 62 We cannot conclude, under the circumstances, that IPA's statements crossed the line from opinion to fact. When IPA claimed that the survey would be "objective" and "unbiased," it was not implicitly making claims regarding facts that were exclusively within IPA's knowledge. The circumstances here—a consulting company selling consulting services to a business—were qualitatively different than the circumstances under which a jeweler makes statements as to the value of a diamond or a physician makes statements on matters of health. In those situations, the jeweler and the physician have exclusive knowledge of the facts necessary to verify their opinions. Here, IPA did not have exclusive knowledge of any facts necessary to verify its statements. As the trial court reasoned, any subjectivity or bias on IPA's part was obvious given the transactional context—IPA was seeking to sell consulting services to defendant. Moreover, IPA's statements were not verifiable by reference to extrinsic facts in the same way a jeweler's or a physician's statements are verifiable by reference to extrinsic facts. See also *Heider*, 245 Ill. App. 3d at 266 (holding that a realtor's statement that material applied to beams in a warehouse was "not a problem" was a statement of opinion that carried with it an implied assertion that the material did not contain asbestos). Consequently, we conclude that IPA's statements were simply opinions, and that defendant could not have reasonably interpreted them otherwise.

¶ 63 We also agree with the trial court that plaintiff's silence concerning the sales commission was not a material misrepresentation of fact that could form the basis for a fraudulent inducement defense. While a party's silence may give rise to a fraudulent inducement defense where the party had an intent to deceive and the circumstances "create[d] the opportunity and duty to speak" (*Washington Courte Condominium Association-Four v. Washington-Golf Corp.*, 267 Ill. App. 3d 790, 815 (1994)), those circumstances were not present here. As the trial court reasoned, it is well known that salespeople often earn commissions. Defendant cites no authority to support its assertion that plaintiff was under a duty to publicize this well-known fact. Moreover, Naccarato did not testify that he inquired into whether the survey fee was a commission, or that he would not have agreed to the survey had he known that the fee for it was a sales commission.

¶ 64 Defendant argues that, under the above reasoning, fraudulent inducement would not be available as a defense any time a misrepresentation was made incidental to a sales transaction. Defendant contends that "one could not to [*sic*] rely on an auto manufacturer's or salesman's representations about the gasoline consumption of a car *** because they are in the business of selling cars." However, defendant's analogy misses the mark. Were a salesperson to misrepresent a car's fuel efficiency, this arguably would satisfy the material misrepresentation element of a fraudulent inducement defense, since a car's fuel efficiency is an extrinsic fact potentially material to a customer who is deciding whether to purchase a car. However, were a salesperson to fail to disclose that he earned a commission for each car sold, this ordinarily would not satisfy the material misrepresentation element.

¶ 65 b. Three-to-One Assurance

¶ 66 Next, defendant argues that plaintiff's three-to-one assurance was a material misrepresentation sufficient to prove fraudulent inducement. It is not disputed that plaintiff made the three-to-one assurance. Nonetheless, we agree with the trial court that the assurance was insufficient to give rise to a fraudulent inducement defense.

¶ 67 A fraudulent inducement defense ordinarily must be based upon a misrepresentation of past or present fact. *McDonald v. McDonald*, 408 Ill. 388, 394-95 (1951). An assurance or prediction as to a future event generally cannot form the basis for the defense. *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 334 (1977); *McDonald*, 408 Ill. at 394-95. An exception to this rule is where one party promises future conduct without the intent to perform, and where the promise is part of a scheme to defraud. *Steinberg*, 69 Ill. 2d at 334; *McDonald*, 408 Ill. at 395; *Sullivan v. Sullivan*, 79 Ill. App. 2d 194, 199 (1967). However, even under the exception, the party asserting fraud must still prove that the promised future conduct either did not or would not have occurred—in other words, that the promise of future conduct was in fact a misrepresentation. See *Steinberg*, 69 Ill. 2d at 333-34 (statement in medical school's admissions catalog that it would evaluate applicants on the basis of listed criteria could form the basis for an action for fraud if the plaintiff could prove that medical school actually based its admissions decisions on unpublished criteria, such as monetary pledges made on behalf of applicants); *McDonald*, 408 Ill. at 395 (reasoning that, in order to prove that promise was fraudulent, the plaintiff had to prove that the defendant "in fact" broke the promise).

¶ 68 Initially, we conclude that the three-to-one assurance was a promise that concerned a future event. Business analyst Pollard testified at trial that she told Naccarato she would not recommend defendant as a client unless she were confident that it could receive a three-to-one return on its consulting fees. Although Pollard's statement concerned a present event in one sense—that she recommended defendant as a client because she was then confident that defendant could receive a three-to-one return—the three-to-one assurance itself concerned a future event—that defendant would receive a three-to-one return if it completed the consulting project. Accordingly, the three-to-one assurance could give rise to a fraudulent inducement defense only if plaintiff made it without the intent to follow through on the assurance, if it was in fact a misrepresentation, and if it was part of a scheme to defraud. See *Steinberg*, 69 Ill. 2d at 334; *McDonald*, 408 Ill. at 395.

¶ 69 After reviewing the record, we agree with the trial court that defendant failed to present clear and convincing evidence that plaintiff did not intend to follow through on the three-to-one assurance at the time it was made. Plaintiff's assurance of a three-to-one return was clearly contingent on defendant's completion of the entire consulting project, and defendant presented no evidence that plaintiff did not intend for defendant to achieve that result.

¶ 70 We also agree with the trial court that defendant did not present clear and convincing evidence that the three-to-one assurance was in fact a misrepresentation. Because defendant "recessed" the project after IPA refused to work around its cash flow problem, we have no basis to conclude whether the three-to-one assurance was in fact a misrepresentation. It would be impossible for us to determine whether the consulting project would have generated a three-to-one return, because the consulting project was never completed.

¶ 71 We find unpersuasive defendant's argument that it was not required to prove that plaintiff made the three-to-one assurance knowing it to be false, but only that plaintiff made the assurance with reckless disregard for its truth or falsity. Although a misrepresentation may be fraudulent where a party makes the misrepresentation with reckless disregard for its truth, a party asserting fraud still must prove that the misrepresentation was in fact false. See *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 193-94 (1989) (holding that the defendant's misrepresentation as to amount of company's liabilities was fraudulent even though the defendant made the misrepresentation with reckless disregard for its truth). Because we cannot conclude that the three-to-one assurance was in fact false, it is inapposite whether plaintiff made the assurance with reckless disregard for its truth.

¶ 72 Similarly, we are unable to conclude that the record contained clear and convincing evidence that the three-to-one assurance was part of a scheme to defraud. Again, fraud requires proof of a material misrepresentation of fact. As the trial court reasoned:

> "[E]vidence that [p]laintiff utilizes a marketing strategy designed to obtain clients and receive payment for services which is aggressive and at times disingenuous, does not mean the conduct implementing the strategy is fraudulent. *** The fact [p]laintiff created pressure, urgency and appealed to [d]efendant's desire for increased profits and net spendable monies does not constitute fraud in the inducement. The fact that [p]laintiff's business model is designed to insure payment and requires customers to rate performance and agree to all charges on a weekly basis does not amount to fraud."

In sum, high pressure sales tactics do not cross the line and become fraud unless and until there is a material misrepresentation of fact.

¶ 73 We also find unpersuasive defendant's argument that the three-to-one assurance was a material misrepresentation because plaintiff presented it as the criteria by which IPA would decide whether to take on defendant as a client, when in fact IPA directed its analysts to recommend IPA to every client. "A misrepresentation is 'material' if it is such that, had the other party been aware of the [misrepresented fact], he would have conducted himself differently." *Heider*, 245 Ill. App. 3d at 266 (citing *Brown v. Broadway Perryville Lumber Co.*, 156 Ill. App. 3d 16, 24 (1987)). Although Naccarato testified that Pollard made a phone call during which she was "strongly advocating" for IPA to accept defendant as a client, he also testified that he was "sitting there very apprehensive about whether or not I was going to be able to be taken on by IPA." Naccarato's testimony suggests that he had already decided to sign a consulting agreement, and would do so as long as IPA accepted defendant as a client. More important, Naccarato did not testify that he would have done anything differently had he known that IPA directed its analysts to recommend its services to every client. Based on this evidence, it was not against the manifest weight of the evidence to conclude that IPA's feigned selectiveness was not a material misrepresentation upon which Naccarato relied in deciding to sign the consulting agreement.

¶ 74 c. Problem Costs

¶ 75 Defendant next argues that the "problem costs" outlined in the survey were material misrepresentations sufficient to prove its fraudulent inducement defense. Defendant contends that the problem costs were "contrived" and "presented a very bullish business turn around" that was unrealistic in reality. According to defendant, "one cannot expect to perform at their [*sic*] best level in each and every aspect of their [*sic*] business."

¶ 76 Initially, we note that defendant did not present evidence that Naccarato relied on the problem costs in deciding to sign the consulting agreement. Although Naccarato testified that the numbers "were impressive," and that he remembered that the survey mentioned an "owner's bonus" of $900,000, he also testified that, when Pollard sat down to present the completed survey to him, he told her, "Look, I know how to read. We don't have to do this. I am going to take you at your word you can do this. Let's go." Naccarato seemed to ignore the contents of the survey, not to rely on it. For the same reason, we also find unpersuasive defendant's argument that "Naccarato did not have *** opportunity to study Pollard's calculations." Based on Naccarato's testimony, he had no desire to study the survey before signing the consulting agreement.

¶ 77 We also conclude that there was no evidence that the problem costs were misrepresentations of fact. Defendant concedes that Pollard calculated the problem costs by taking defendant's best performance in each category of expenses from the prior two years and combining them to reveal defendant's "optimal profit." Naccarato testified that Pollard told him that the numbers in the survey reflected what defendant could achieve if it "based everything on [its] best performance." Pollard testified that she told all of her clients that the optimal profit numbers represented "the absolute most perfect that you can do" and that it would be difficult to achieve the optimal profit "because you would have to be in 100 percent control 100 percent of the time." Even if Naccarato had relied on the problem costs in deciding to sign the consulting agreement, the numbers were not misrepresentations of fact—Naccarato was fully aware of what the numbers represented.

¶ 78 Defendant contends that, in the survey, Pollard manipulated defendant's financial data to inflate the discrepancy between its "projected profit" for the year 2007 and its "optimal profit." In particular, defendant points out that, while the survey reported that defendant's "other general and administrative costs" for the first three months of 2007 had equaled only 5.9% of revenue, Pollard entered defendant's "other general and administrative costs" as 22.3% of revenue when she calculated defendant's "projected profit" for the full 12 months of 2007. Defendant contends that this alteration made defendant's "optimal profit" appear much larger than its "projected profit." Defendant ignores that, in calculating defendant's "optimal profit," Pollard also entered defendant's "other general and administrative costs" as 22.3% of revenue. Accordingly, Pollard's alteration of defendant's "other general and administrative costs" did not inflate the discrepancy between the "projected profit" and the "optimal profit," as defendant claims.

¶ 79 Based on the foregoing, we cannot conclude that the trial court's finding that defendant failed to prove its fraudulent inducement defense was against the manifest weight of the evidence.

¶ 80 III. CONCLUSION

¶ 81 For the above reasons, we affirm the judgment of the circuit court of Lake County.

¶ 82 Affirmed.