2012 IL App (2d) 120215-U
No. 2-12-0215
Order filed November 26, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ARC ONE, LLC., Plaintiff, v. ROCKFORD STRUCTURES CONSTRUCTION CO, NORMAN J. WEITZEL, NU-CON CONSTRUCTION CO., FRED LENZ d/b/a LENZ DECORATORS, ROCK VALLEY GLASS OF ROCKFORD, INC., CITY WIDE INSULATION, INC., and UNKNOWN OWNERS AND NON-RECORD CLAIMANTS, Defendants.	)	Appeal from the Circuit Court of Winnebago County. No. 08-CH-1278 Honorable J. Edward Prochaska, Judge, Presiding.

NU-CON CONSTRUCTION CO., Plaintiff-Appellee, v. NORMAN J. WEITZEL, ROCKFORD STRUCTURES CONSTRUCTION, CO., HARRIS MASON CONTRACTOR, MIRANDA CONSTRUCTION LTD., ARCHITECTURAL DESIGNS, INC., FRED LENZ d/b/a LENZ DECORATORS, CHRISTIANSEN, INC., CITY WIDE	)	Appeal from the Circuit Court of Winnebago County. No. 08-CH-1477

INSULATION, INC., ARC ONE, LLC., DISTRICT COUNCIL NO. 30 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO,	)	
Defendants;	)	
(Rockford Structures, Defendant and Counter-Plaintiff)	)	Honorable J. Edward Prochaska, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's determinations that plaintiff was entitled to a mechanics lien in the amount of $86,830.50 and that defendant breached its contract were not against the manifest weight of the evidence. Thus, we affirmed the trial court's judgment.

¶ 2 In 2006, plaintiff, Nu-Con Construction Co., contracted with defendant, Rockford Structures Construction Co., the general contractor on the construction of the Staybridge Suites in Rockford, to perform rough carpentry and drywall services. In 2008, plaintiff filed a three-count complaint against defendant, alleging a claim pursuant to the Illinois Mechanics Lien Act (the Act) (770 ILCS 60/1 *et seq.*), breach of contract, and *quantum meruit*. Following a bench trial, the trial court entered a judgment against defendant and in plaintiff's favor for $86,830.50, plus $2,486.20 in costs and $41,108.17 in interest. Defendant appealed pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), contending that (1) the trial court erred in concluding that plaintiff was entitled to relief under the Act; and (2) the trial court erred in finding that defendant breached its contract. We affirm.

¶ 3 I. Background

¶ 4 The record reflects that, on August 24, 2006, defendant entered into a contract with DKN Partnership, LLP. Defendant was acting as an agent for the owner, Norman J. Weitzel, and would serve as the general contractor for the construction of the Staybridge Suites hotel in Rockford. DKN Partnership and Weitzel are not parties to this appeal. On August 24, 2006, plaintiff entered into a subcontract agreement with defendant to provide rough carpentry and drywall work on the hotel for $738,491. Plaintiff's original proposal specified that it would be paid $270,574 for the rough carpentry work and $467,917 for the drywall work. Thereafter, plaintiff amended its proposal to reflect that it would be paid $548,904 for the drywall work, but the carpentry amount would remain the same. Defendant accepted the revised proposal. On May 4, 2007, plaintiff ceased working on the hotel, claiming that defendant was withholding payments. On August 10, 2007, plaintiff recorded its subcontractor lien claiming that defendant owed plaintiff $210,091, plus interests and additional costs, for its work on the hotel.

¶ 5 On September 17, 2008, plaintiff filed a three-count complaint. Count I sought foreclosure of its mechanics lien. Count II alleged that defendant breached its contract, resulting in $210,091 in damages. Count III alleged a *quantum meruit* theory of relief in that plaintiff's work on the hotel unjustly enriched Weitzel and defendant, and that the fair market value for plaintiff's labor and materials equaled $210,091.

¶ 6 A bench trial commenced on June 27, 2011. Plaintiff called Donald Ely, plaintiff's chief executive officer. Donald testified that the amount of plaintiff's contract with defendant totaled $738,491, and that defendant would make payments to plaintiff periodically during the project. Donald testified that defendant was "very slow" with submitting payments to plaintiff and that plaintiff ultimately quit working on the project after defendant failed to make timely payments.

Donald testified that plaintiff had substantially completed the carpentry portion of the contract before quitting. Donald testified that, pursuant to Weitzel's request, plaintiff performed work beyond the terms of the contract, and that Weitzel and defendant told plaintiff that it would be compensated for the extra work. Donald testified that defendant did not request for plaintiff to cure any alleged defects after plaintiff quit the project; however defendant did send change orders to plaintiff reflecting that defendant performed certain work.

¶ 7 During cross-examination, Donald acknowledged that paragraph 14 of the contract provided that no extra work or change orders would be accepted without defendant's written approval. Donald testified regarding an architect's "Field Reports, Staybridge," dated April 17, 2007, which report raised questions concerning the quality of plaintiff's carpentry work. Donald testified "[t]here's all kinds of problems listed in [the architect's report] that have nothing to do with us. *** I can go down the list and tell you what all the problems that [defendant] caused *** and that's why the architect wrote up the report." Donald acknowledged that plaintiff did not complete all items listed in the punch list, but Donald maintained that plaintiff substantially completed the carpentry work. Donald testified that, when determining the amount of the lien, plaintiff deducted unfinished work; and further admitted that defendant paid plaintiff $186,426.

¶ 8 Plaintiff next called Barbara Ely. Barbara testified that she was plaintiff's president and was "in charge of the bulk of the paperwork," including issuing lien waivers. Barbara testified how she calculated plaintiff's $210,091 lien amount. Barbara testified that plaintiff received $186,426.72 in payments from defendant, but did not receive a $78,454.80 payment listed in a sworn statement defendant had issued. Barbara acknowledged that there was a discrepancy in plaintiff's lien amount,

but explained that the discrepancy resulted from not all change orders being documented. Those change orders were nonetheless included in the lien.

¶ 9 Plaintiff next called Mike Gonzalez, a carpentry contractor for Excel Interior Construction. Gonzalez testified that plaintiff subcontracted with Excel to work on the project. Gonzalez testified that defendant gave plaintiff a punch list and plaintiff directed Excel to complete the punch list. Gonzalez testified that Excel completed the work, defendant did not contact Excel after it completed the punch list items, and defendant never informed Excel that its work was substandard. On cross-examination, Gonzalez admitted that Excel did not complete all of the items listed on the punch list, but maintained that Excel was not at fault for failing to do so. Gonzalez testified that Excel planned to work on the drywall phase of the project, but refused to do so after not being paid. Plaintiff rested after Gonzalez's testimony.

¶ 10 Defendant called Gary Daub, a senior project manager for defendant. Daub testified that defendant did not accept various change orders submitted by plaintiff. Daub testified that the rough carpentry work on the project "was not a hundred percent" and that plaintiff did not complete that work. Daub testified that defendant was required to finish the drywall portion of the project, and that other parts of the project could not be completed until the drywall portion was finished. Daub testified that plaintiff did not do any drywall work. Daub sent a June 12, 2007, letter to plaintiff stating, "You [plaintiff] have decided on your own that you will not honor this portion of your contract. We are NOT in agreement [that the contract will be terminated]." Daub testified that defendant hired contractors to complete plaintiff's unfinished work, which required "months" to complete.

¶ 11 Defendant next called Nathan Heinrich, defendant's vice president. Heinrich testified that defendant paid $197,677.11 beyond its contract with plaintiff to complete plaintiff's unfinished carpentry work. Heinrich testified that, when including the drywall work, defendant paid $366,170.66, above its contract with plaintiff.

¶ 12 Defendant next called John Glasser, the superintendent for defendant on the project. Glasser testified regarding a fax he sent to plaintiff dated May 21, 2007, listing carpentry work that plaintiff needed to complete. Glasser testified that plaintiff did not finish the work and that he hired additional carpenters to complete the work. Glasser testified regarding a video highlighting plaintiff's unfinished carpentry work. Glasser testified that he made the video because plaintiff's claim that it completed the carpentry work was not accurate. Thereafter, defendant rested.

¶ 13 Plaintiff recalled Gonzalez as a rebuttal witness. Gonzalez testified regarding items on the punch list that had not been finished, and explained why the unfinished punch list items were not completed. Gonzalez testified that it would have taken only one day and two carpenters to complete the unfinished punch list items.

¶ 14 Plaintiff next called Rafael Gutierrez, a carpenter for Excel. Gutierrez testified that he served as the foreman for Excel on the project. Gutierrez testified that the only complaint he received concerned safety, and not the quality of the work.

¶ 15 On September 16, 2011, the trial court entered its memorandum decision and order. The trial court found that "[t]here is no question that [defendant] failed to pay [plaintiff] in a timely fashion for work performed by [plaintiff]," and referenced Donald and Barbara's testimony. The trial court found that defendant's failure to pay plaintiff constituted a material breach of contract, and justified

plaintiff quitting the project at the end of the carpentry portion. However, the trial court found that plaintiff's failure to complete the drywall portion of its contract did not constitute a breach.

¶ 16 The trial court further found that plaintiff substantially completed its carpentry work. The trial court acknowledged Daub and Glaser's testimony that plaintiff failed to complete its carpentry work, and defendant's videotape showing alleged deficiencies with the carpentry work. Nonetheless, the trial court concluded that "the most credible witnesses concerning this issue" were Donald, Gonzalez, and Gutierrez. The trial court's order emphasized Gonzalez's testimony that most of the punch list items had been completed.

¶ 17 With respect to damages, the trial court opined that its "finding [was] rather straightforward." The trial court concluded that the agreement provided that only change orders agreed to in writing by both parties would be authorized and added to the original contract price. The exhibits reflected four such change orders proposed by plaintiff, totaling $25,100. The trial court concluded that the contract for the carpentry work, including plaintiff's change orders, totaled $295,674. Defendant had previously paid defendant $186,426. In addition, defendant had one change order totaling $21,057.50 and a damage credit totaling $1,360 deducted from the contract. Thus, plaintiff was entitled to a lien amount of $86,830.50.

¶ 18 Defendant timely appealed after the trial court denied its postjudgment motion to reconsider.

¶ 19 II. Discussion

¶ 20 Both issues raised by defendant require this court to review the sufficiency of the trial court's factual findings. The standard of review we apply when a challenge is made to a trial court's ruling

following a bench trial is whether the trial court's judgment was against the manifest weight of the evidence. *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995); *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill. App. 3d 590, 598 (2000). A trial court's judgment will be found to be against the manifest weight of the evidence when its findings appear to be unreasonable, arbitrary, or not based on evidence. *Wildman, Harrold*, 317 Ill. App. 3d at 599. This court must resolve questions of testimonial credibility in favor of the prevailing party and draw from the evidence all reasonable inferences in support of the trial court's judgment. *Wildman, Harrold*, 317 Ill. App. 3d at 599 (citing *H&H Press, Inc. v. Axelrod*, 265 Ill. App. 3d 670, 679 (1994)). We will not reverse a trial court's decision if differing conclusions can be drawn from conflicting testimony unless an opposite conclusion is clearly apparent. *Wildman, Harrold*, 317 Ill. App. 3d at 599 (citing *Buckner v. Causey*, 311 Ill. App. 3d 139, 144 (1999)).

¶ 21 Moreover, this court gives great deference to the trial court's findings because the trial court, as the trier of fact, is in an optimum position to observe the demeanor of witnesses while testifying, to judge their credibility, and to determine the weight their testimony and other evidence should receive. *Habitat Co. v. McClure*, 301 Ill. App. 3d 425, 440-41 (1998). We may affirm the trial court's decision on any basis supported by the record. *Reedy Industries, Inc. v. Hartford Insurance Co.*, 306 Ill. App. 3d 989, 997 (1999).

¶ 22 Guided by these principles, we will address defendant's contentions in turn.

¶ 23 A. Mechanics Lien

¶ 24 We will first address defendant's contention that the trial court erred in concluding that plaintiff was entitled to relief under the Act. Defendant argues that plaintiff was not entitled to relief because it failed to fulfill its contractual obligations by not completing the carpentry work in

workmanlike manner, and not performing any drywall work. Defendant argues that the trial court failed to account for defendant's offsets and corrective work. Defendant further argues that the trial court erred in concluding that plaintiff did not commit constructive fraud by overstating its lien amount.

¶ 25 Mechanics liens are statutory creatures, and the purpose of the Act is to permit a lien upon premises where a benefit has been received by the owner and where the value or the condition of the property has improved due to the furnishing of labor or materials. *Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill. App. 3d 597, 609 (2000). To establish a valid lien under the Act, a plaintiff bears the burden of demonstrating that (1) the lien claimant had a valid contract; (2) with the property owner, the owner's agent, or a person authorized by the owner to contract for improvements; (3) plaintiff furnished labor services or materials; and (4) the lien claimant performed pursuant to the contract or had a valid excuse for non-performance. *Doornbos Heating & Air Conditioning, Inc. v. Schlenker*, 403 Ill. App. 3d 468, 483 (2010). Normally, a contractor must completely perform the contract to enforce its lien. *Fieldcrest Builders*, 311 Ill. App. 3d 597 at 609. However, " '[u]nder the doctrine of substantial compliance, the general rule regarding building contracts is that a builder is not required to perform perfectly, but rather, is only held to a duty of substantial performance in a workmanlike manner.' " *Behl v. Gingerich*, 396 Ill. App. 3d 1078, 1092 (2010) (quoting *Howard v. Jay*, 203 Ill. App. 3d 539, 544 (1990)). Substantial compliance is honest and faithful performance of the contract's material and substantial parts, without willful departure from, or omission of, the essential elements of the contract. *Doornbos Heating*, 403 Ill. App. 3d at 482. What constitutes substantial performance is a factual inquiry that depends on the circumstances of a particular case. *Id.* at 483-84.

¶ 26 In this case, the record reflects that the trial court carefully weighed the conflicting evidence with respect to plaintiff's performance. The trial court noted that defendant presented testimony from Daub and Glasser that plaintiff's carpentry work was incomplete. Defendant further introduced a video depicting alleged deficiencies in plaintiff's carpentry work. However, the trial court concluded that the "most credible witnesses concerning this issue" were Donald, Gonzalez, and Gutierrez, each of whom testified that plaintiff "finished (or nearly finished) all of its carpentry work on the project." The trial court noted that Gutierrez testified that defendant never complained about any of the alleged problems identified in the videotape and that Gonzalez testified that nearly all of the punch list items had been completed. Thus, despite defendant's argument that the trial court "inexplicably favored [plaintiff's] testimony," the record reflects that the trial court clearly considered the documentary evidence and made a credibility determination with respect to the conflicting testimony. The trial court was in the best position to judge the credibility of the witnesses and determine the weight given to their testimony (see *Habitat*, 301 Ill. App. 3d at 440-41), and we will not substitute our judgment for that of the trier of fact (see *Hollowell v. Wilder Corp.*, 318 Ill. App. 3d 984, 991 (2001)).

¶ 27 Moreover, the trial court's determination of the lien amount was consistent with the manifest weight of the evidence. See *Doornbos Heating*, 403 Ill. App. 3d at 485 (noting that the issue of damages is a question of fact that will not be disturbed unless it was against the manifest weight of the evidence). Damages do not need to be proved with absolute certainty, but rather, "the plaintiff need only present evidence that tends to show a basis with which to compute the damages with a fair degree of probability." *Id.*

¶ 28 Here, plaintiff presented sufficient evidence to enable the trial court to compute damages to a reasonable degree of probability. The trial court heard testimony regarding change orders proposed by both parties, and also considered evidence presented by defendant of the costs it allegedly incurred in finishing the carpentry work. Ultimately, the trial court calculated the damages by taking the original contract price for the carpentry work and adding in plaintiff's change orders that had been accepted by defendant in writing. That amount reflected a total contract price of $295,674. The trial court subtracted from that amount defendant's change order of $21,057.50 for the crane time used by plaintiff, and also reduced the contract price by an additional $1,360 for the carpentry work not completed by plaintiff. The trial court concluded by noting that defendant had already paid plaintiff $186,426, and after taking into account deductions for defendant's change order and the credit, defendant owed plaintiff a balance of $86,830.50. Because the trial court's calculation of the lien amount was primarily based on the documentary evidence submitted by the parties, we conclude that its determination was calculated to a reasonable degree of probability and was not against the manifest weight of the evidence. See *id.*

¶ 29 In reaching our determination, we reject defendant's argument that the trial court erred by refusing to find that plaintiff committed constructive fraud by overstating its lien amount. Under a constructive fraud theory, the Act requires an "intent to defraud." *Peter J. Hartman Co. v. Capitol Bank & Trust Co.*, 353 Ill. App. 3d 700, 708 (2004). "The mere overstatement of the contractor's claim is insufficient to prove an intent to defraud; however, constructive fraud must be proved by additional evidence from which intent to deceive can be inferred." *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 394 Ill. App. 3d 870, 879 (2009). Here, the trial court acknowledged the discrepancy between the lien amount and the change orders, but "did not find that [plaintiff] intended

to defraud [defendant]." Defendant has failed to persuade us to depart from the trial court's determination.

¶ 30 Defendant's reliance on *Lohmann Golf Designs, Inc. v. Keisler*, 260 Ill. App. 3d 886 (1994) is misplaced. There, the lien claimant filed a lien for $436,704 on three separate parcels of property, despite having a total legitimate claim for only $145,568. *Id.* at 891-92. The appellate court affirmed the trial court's determination of finding constructive fraud, concluding that the claimant "could not justify any assertions that it [was] entitled to triple that amount." *Id.* at 892. In this case, although plaintiff overstated its lien, similar circumstances do no exist. The trial court concluded that, in a contract totaling $295,674, including plaintiff's change orders that defendant accepted in writing, the stated lien amount contained "$55,000 in legitimate, even if unproven, claims" and approximately "$45,000" that was "simply not explained at all." Thus, unlike *Lohmann*, where the overstated amount tripled the amount owed, here the unexplained overages amounted to a fraction of the total contract. Accordingly, we agree with the trial court's determination that, while plaintiff was not entitled to the entire amount stated in its lien, plaintiff did not exhibit an intent to defraud.

¶ 31 B. Breach of Contract

¶ 32 We next address defendant's contention that the trial court erred in concluding that it breached its contract with plaintiff. Defendant argues that, contrary to plaintiff's assertion, it did not make late payments. Defendant emphasizes that it "did not withhold payment until after [plaintiff] breached the [agreement] and made it abundantly clear it would not finish its work." Defendant also reiterates that the trial court erred in concluding that plaintiff substantially completed the carpentry work.

¶ 33 To establish a breach of contract claim, a plaintiff must show (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) resulting damage to the plaintiff. *Catania v. Local 4250/5050 of the Communications Workers of America*, 359 Ill. App. 3d 718, 724 (2005). The interpretation of a contract is reviewed *de novo*, but "whether a breach of contract occurred *** is a question of fact, and the court's finding will not be disturbed on appeal unless it was against the manifest weight of the evidence." *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 34.

¶ 34 Based on our review of the record, the trial court's determination that defendant breached its contract with plaintiff was consistent with the manifest weight of the evidence. The parties do not dispute the validity of their agreement. Further, with respect to plaintiff's performance, we have already concluded that the trial court's determination that plaintiff substantially completed the carpentry portion of the contract was not against the manifest weight of the evidence.

¶ 35 We are cognizant that plaintiff did not complete the drywall portion of its contract. However, Illinois law permits recovery for partial performance under a contract when the contract is divisible. See *Candalaus Chicago, Inc. v. Evans Mill Supply Co.*, 51 Ill. App. 3d 38, 44 (1977). "Whether a contract is entire or severable cannot be determined by a precise rule and must depend upon the intention of the parties," and the inquiry hinges on whether the parties gave a single assent to the whole transaction or whether they assented separately to several things. *Id.* at 44-45. In this case, that the parties assented separately to the carpentry and drywall portion of the contract is reflected by the parties renegotiating the price of the drywall portion up from $467,917 to $548,904. However, the record does not reflect that the parties similarly renegotiated up the price of the

carpentry portion of the contract. See *id.* at 45 (finding that a contract was divisible because the relationship between the parties consisted of several agreements).

¶ 36 Moreover, the trial court's determination that defendant failed to timely pay plaintiff was not against the manifest weight of the evidence. The record clearly reflects that defendant's payment application numbers four and five remained outstanding and were not paid. Defendant argues that it paid plaintiff's first three payment applications in a timely manner and that it "did not withhold payment until after [plaintiff] breached the subcontract and made it abundantly clear it would not finish its work." This argument is unpersuasive. The parties' rights were defined by the contract. See *John J. Calnan Co. v. Talsma Builders, Inc.*, 77 Ill. App. 3d 221, 225 (1979). Defendant has not directed us to, nor could we discern, any provision in the parties contract that permitted it to not pay plaintiff for carpentry work already completed if defendant believed that plaintiff would not finish its contractual obligations.

¶ 37 Defendant further argues that plaintiff's fourth and fifth payment applications were not valid because those applications were not supported by lien waivers, and directs our attention to exhibit E of the parties' contract, paragraph 3.a.ii. However, that contractual provision provided that, after submitting a payment application, plaintiff would be notified that payment "is or will be ready and what requirements must be met to receive payment." According to the contract, "[t]ypical requirements throughout the project include" partial or final lien waivers. The record is devoid of any indication that defendant notified plaintiff that payment for its fourth and fifth payment applications were withheld until lien waivers were received.

¶ 38 In sum, with respect to both claims, the trial court was presented with conflicting evidence. The record reflects that the trial court carefully weighed the evidence and resolved conflicts in the

testimony. As noted above, it is not the function of a reviewing court to substitute its judgment for that of the trier of fact, and therefore, the trial court's judgment was not against the manifest weight of the evidence.

¶ 39 III. Conclusion

¶ 40 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 41 Affirmed.