2016 IL App (2d) 150956-U
No. 2-15-0956
Order filed November 17, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SALCE, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-CH-799
	)	
DOWNERS GROVE, IL (1149 OGDEN), LLC; INSITE REAL ESTATE, LLC; STARBUCKS COFFEE COMPANY; MB FINANCIAL BANK, N.A.,	)	
	)	
Defendants-Appellees.	)	
	)	
(Gerardi G. Contractors, Inc. & Frank Gerardi; NORR Architects, Illinois Roof Pros. Corp.; Harmon Electrical Systems, Inc.; K. Hoving Companies; Enterprise Plumbing, Inc.; R.A. Health Construction, Inc.; and Unknown Claimants, Defendants.)	)	Honorable Robert G. Gibson Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: In connection with plaintiff's mechanics' lien, defendants presented insufficient evidence to warrant summary judgment on their constructive-fraud defense; summary judgment reversed, cause remanded.

¶ 2 Salce Inc. (Salce), an excavating contractor, filed a complaint to foreclose on a mechanics' lien on InSite Real Estate, LLC (InSite), and Gerardi G. Contractors, Inc. (Gerardi), the developer and the general contractor respectively (collectively, defendants), involved in the construction of a single-tenant retail property at 1149 Ogden Avenue, in Downers Grove. The complaint also named others with a potential interest in the property (including the property's eventual tenant, Starbucks), and included additional claims, but those parties and claims are not at issue in this appeal. What is at issue is that, according to the complaint, Salce was owed around $186,000, the total amount for work that it performed for which it had not been paid.

¶ 3 Defendants answered that Salce's lien was overstated "in excess of $60,000," and was so "intentionally overstated" that it constituted a "constructive fraud." Under the Mechanics Lien Act, a "[mechanics'] lien shall [not] be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefor under this Act, unless it shall be shown that such error or overcharge is made with intent to defraud." 770 ILCS 60/7(a) (West 2012). See 770 ILCS 60/7(a) (West 2012). In other words, if defendants could substantiate their claim that Salce's lien was intentionally overstated—which is to say, fraudulently overstated—then the lien could be defeated. After discovery, defendants moved for summary judgment on the issue of fraud, which the trial court granted in defendants' favor. As we explain, the trial court erred in granting summary judgment for the defendants.

¶ 4 We can begin with what is not in dispute. Salce was subcontracted to excavate the site, to haul off material unsuitable for reuse, and to import stone backfill so that the property could be left at "finished grade." The lot is approximately 5,200 square yards, and the initial contract called for Salce to excavate approximately 600 cubic yards of soil and sediment from the site. This was done with an understanding that prior to breaking ground, the site was approximately 300 cubic yards

above the project's proposed finished grade. During the excavation, however, it was discovered that "utility spoils," such as sewage and other waste, had contaminated some of the soil making it unsuitable for reuse. This required Salce to excavate and haul away more than was called for in the initial contract and a change order was entered. As per the original contract, different materials were hauled to different dump sites based on the type of material (for example, concrete went to one location, asphalt another). Per the change order, the contaminated soil was dumped at one of two different dump sites depending on the soil's level of contamination. It is undisputed that the contaminated soil had to be replaced with backfill at a one-to-one ratio and that, ultimately, when the project was completed, the site was at the finished grade. Just how much material Salce excavated and dumped, and how much stone backfill it imported, has been disputed.

¶ 5 During discovery, defendants issued interrogatories asking Salce to state, *inter alia*, what amounts Salce had excavated and dumped in connection with the project. Salce provided answers to the interrogatories, which stating that its method of excavation and disposal was "the same as any other project": an excavator's 1.5 cubic yard bucket "is filled up ten times" and each bucket is deposited into the bed of a dump truck and the dump truck hauls the material away and dumps it at a disposal site. In theory, that would mean that each dump truck's "trip" accounted for the disposal of 15 cubic yards of material. (Elsewhere, we are told that the dump trucks have a 30 cubic yard storage capacity; however, it is unsafe to drive around with a fully loaded dump truck.) Salce's answers were signed under penalty of perjury by Paul Salce, the president of Salce Inc. (We will continue to refer to Salce, Inc. as "Salce" and will refer to Paul Salce as "Paul.")

¶ 6 Defendants focus on three discrepancies in Salce's answers. First, according to its answers, Salce had excavated and, in 74 trips, dumped 1,186.2 tons of highly contaminated soil at a disposal site in Joliet. The site in Joliet weighs the trucks when they come in and when they exit to ensure

accuracy. Based on this answer defendants have argued that, using a conversion rate of 1.45 tons of soil to cubic yards yields a figure of approximately 818 cubic yards of dumped soil. (Salce agrees with that figure.) And 818 cubic yards in 74 trips means there was an average of roughly 11 cubic yards of soil dumped per trip, not 15.

¶ 7 Second, according to its answers, Salce had excavated and dumped 1,440 cubic yards of less-contaminated soil, which it dumped at a site in Westchester in 96 trips. The reason this figure is in cubic yards and not tons is because the facility in Westchester did not have a scale and thus could not weigh the trucks. Thus, the figure of 1,440 cubic yards was clearly an estimate based on 96 trips at 15 cubic yards dumped per trip. And finally, defendants note, Salce stated that it imported roughly 1,246 tons of stone—or 711 cubic yards—to the project site. This was in addition to the "[a]pproximately 60 loads of stone and backfill," at "10 to 12 cubic yards" each, *i.e.*, around 600 cubic yards, that Salce had stockpiled and reused at the site. Salce further stated that "[a]n unknown amount of other stone and materials were brought in [to the site] by additional sub-contractors ***."

¶ 8 As part of discovery, defendants deposed Paul Salce. Paul was part of the four-person team from Salce that worked on the project site. During his deposition, Paul stated that some of Salce's answers to defendants' interrogatories were "incorrect" or were based on estimates. In particular, Paul stated that his answers were incorrect regarding the amount of stone backfill that was salvaged at the site. He stated that he only "salvaged a little amount of stone" and that there was "no way" he had salvaged up to 600 cubic yards of stone as stated in Salce's answer. Paul was less definitive concerning a number of other details. As to what was dumped where and how much was dumped, Paul variously responded with "I'm not certain," "I don't recall," "I would have to look into it," and "I'll have to check [because] I'm actually confused." As to any discrepancies, Paul

noted that there was no scale at the Westchester facility so he had to estimate the amount of soil that was dumped there (at 15 cubic yards per trip). Paul further stated that, because the excavation took place in northern Illinois in December, some of the contaminated soil had frozen to the truck beds and had to be taken to the Joliet site where it could be removed with a back-hoe scraper. On cross examination, Paul stated that his secretary had prepared "those numbers"—the ones used in Salce's answers—and that he did not review "the tickets" that reflect each dump truck's trip. Finally, Paul asserted that Salce was not exclusively responsible for the backfill brought onto the job site citing, for example, that the "[c]oncrete guy" had ordered "a lot" of stone which was brought onto the site by one of Salce's competitors.

¶ 9 Defendants moved for summary judgment on the issue of constructive fraud. See 770 ILCS 60/7(a). Attached to defendants' motion was Salce's answers, a transcript of Paul deposition, and an affidavit from Michael Larson, the developer's managing director. In his affidavit, Larson alleged that Salce had claimed to haul away significantly more soil than the stone backfill it imported, so much so that the site would have been one to two feet below finished grade. Larson's affidavit, however, contains a number of questionable statements in support of that conclusion. For instance, Larson stated that the amount of reusable stone under the site's existing pavement was "negligible, possibly 33 cubic yards," yet Larson provides no source for that estimate. Elsewhere, Larson states that the amount of backfill used by other sub-contractors "would have been minimal, and, at the very most, would account for approximately 22 cubic yards"; there is no source for that estimate either. Finally, Larson notes that "the concrete contractor would have used approximately 177.4 cubic yards of backfill for the subbase under the concrete pavement"; again, there is no source. Then, Larson used those figures (and others) to estimate that there was a "shortfall" in the amount of material Salce had hauled away versus the amount it imported of between 500 and

1,100 cubic yards. According to Larson, this all meant that Salce had overstated its lien between $16,000 and $35,000.

¶ 10 In ruling on defendants' summary judgment motion, the court stated that it had reviewed the interrogatories as well as the transcript of Paul's deposition, both of which the court found "troubling." According to the court, it was "problematic that Mr. Salce is now essentially admitting to perjury" and that there "seem[ed] to be a continuing pattern here for attempting to massage the facts to fit the information that is presented to him." The court stated that it was a "close case" but, ultimately, it granted summary judgment in defendants' favor. Salce filed a motion to reconsider, which the trial court denied.

¶ 11 Salce appeals and we reverse. Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). We review orders granting summary judgment *de novo*. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). As has often been said, summary judgment is a drastic means of disposing of litigation without a trial, and should be granted only when the movant's right to judgment is clear and free from doubt. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. But where a reasonable person could draw divergent inferences from the undisputed facts, summary judgment should be denied. *Id*. As we explain, this case falls in the latter category and not the former.

¶ 12 The question presented here is whether defendants offered sufficient evidence that Salce's lien was (1) overstated and, if so, (2) that any overstatements were made "with intent to defraud." See 770 ILCS 60/7(a). But it is difficult, bordering on impossible, to resolve questions of fraudulent intent, a matter that often turns on credibility determinations, at the summary judgment stage. To do so at this juncture in the litigation requires clear, convincing, and unrefuted evidence

of fraud. *Independent Trust Corp. v. Hurwick*, 351 Ill. App. 3d 941, 955 (2004) (citing *Home Savings & Loan Association of Joliet v. Samuel T. Isaac & Associates, Inc.,* 99 Ill. App. 3d 795, 806 (1981)); *Palmateer v. International Harvester Co.*, 140 Ill. App. 3d 857, 860 (1986); see also *In re Chavin*, 150 F.3d 726, 727-28 (7th Cir. 1998). Such cases are the exception, not the rule. As pointed out in *Chavin*:

> "credibility issues are to be left to the trier of fact to resolve on the basis of oral testimony *except* in extreme cases. The exceptional category is—exceptional. For the case to be classified as extreme, the testimony sought to be withheld from the trier of fact must be not just implausible, but utterly implausible in light of all relevant circumstances." (Emphasis in original.) *In re Chavin*, 150 F.3d at 728.

¶ 13 The evidence in this case is not of such caliber as to render a trial unnecessary. At most, defendants offered evidence demonstrating that Salce did not have its proverbial ducks in a row and that it might run into difficulty when proving up the amount of work performed in connection with its lien. But defendants' evidence, which included Paul's deposition and Larson's affidavit, failed to show that Salce's lien was *in fact* overstated—let alone that it was so grossly overstated as to constitute fraud. True, in his deposition, Paul conceded that his initial statements concerning the work performed, which he swore to in Salce's answers, may have been incorrect. But, contrary to defendants' argument, that error is not necessarily fatal. Paul did not state that his answers were *knowingly* incorrect and the evidence does not support such an inference. *Cf. In re Chavin*, 150 F.3d at 728-29 (finding that the deponent's level of financial expertise rendered his answers "ridiculous"); see also *People v. Clinton*, 2016 IL App (3d) 130737, ¶ 24 (perjury requires "the witness or affiant *knows* his or her testimony to be false" (emphasis added)).

¶ 14 Moreover, we note that Salce was not required to prove up its lien at the summary

judgment stage. See *Thompson*, 241 Ill. 2d at 438. Rather, at this juncture, it was *defendants*, as the moving party that were required to prove up Salce's fraud. Their evidence was insufficient in that regard. Defendants' support for their assertion of fraud was largely confined to Larson's estimate of the work Salce performed, as well as Larson's estimate of the amount of material that other contractors used or brought onto the site. Using those estimates, defendants assert that there is a discrepancy between the amount Salce is owed and the amount Salce has claimed it is owed.[1] Such estimates, both in this case and in general, are hardly definitive evidence of fraud. See, *e.g.*, *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 379 (2008) (rejecting defendants' assertion that *plaintiffs'* internal estimate of the amount of work performed merited summary judgment on the issue of fraud). In other words, Larson's guesswork does not exclude the possibility that Salce is an honest claimant that mistakenly filed a mechanics' lien for an incorrect amount. See *Roy Zenere Trucking & Excavating, Inc. v. Build Tech, Inc.*, 2016 IL App (3d) 140946, ¶ 44; *Lohmann Golf Designs, Inc. v. Keisler*, 260 Ill. App. 3d 886, 891 (1994).

¶ 15 The purpose of summary judgment is merely to determine whether a genuine question of material fact exists, not to try one. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011); *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). At best, defendants' evidence shows that they can raise doubts about whether Salce is entitled to foreclose on its lien as stated. That evidence, however, fails to show that defendants were entitled to judgment on the question of fraud as a matter of law.

[1] We note that defendants have offered no explanation for the discrepancy between a critical statement in their answer (that Salce's lien was overstated by more than $60,000) and their assertion in their motion for summary judgment (that Salce's lien was overstated somewhere between $16,000 and $35,000). Furthermore, defendants have offered no explanation for their failure to pay Salce anything toward the amounts they concede Salce is owed.

Cf. id. For the reasons stated, the judgment of the circuit court of Du Page County is reversed and the case is remanded to the trial court for further proceedings.

¶ 16 Reversed and remanded.