

NOTICE
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2013 IL App (4th) 130115-U
NO. 4-13-0115
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 15, 2013
Carla Bender
4th District Appellate
Court, IL

LARRY FULK,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Adams County
R.L. BRINK, INC.; THOMPSON, INC.; and)	No. 11L21
RONALD L. BRINK, Individually,)	
Defendants-Appellees.)	Honorable
)	Thomas J. Ortbal,
)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed the trial court's grant of summary judgment in favor of defendants on plaintiff's claim under the Prevailing Wage Act (820 ILCS 130/1 *et seq.* (West 2006)).
- ¶ 2 In April 2011, plaintiff, Larry Fulk, filed a complaint under the Prevailing Wage Act (820 ILCS 130/11 (West 2006)), which he amended in October 2011 and again in December 2011. In the second amended complaint, plaintiff alleged that defendants, R. L. Brink, Inc. (Brink), Thompson, Inc. (Thompson), and their mutual owner and chief executive officer, Ronald L. Brink (Ronald), failed to pay him prevailing wages for his work on "multiple Illinois public works projects" between 2004 and 2008.
- ¶ 3 In May 2012, plaintiff filed a "motion for partial summary judgment on the issue of liability" in which he essentially sought an order declaring defendants generally liable for

unspecified violations of the Act that occurred during plaintiff's employment, but reserving for trial the identification of specific violations and the determination of damages. Defendants filed a cross-motion for summary judgment. In October 2012, the trial court granted summary judgment in favor of defendants, citing plaintiff's failure to identify any specific project for which he was allegedly denied the prevailing wage. In November 2012, plaintiff filed a motion to reconsider, which the court partially granted in January 2013 based upon plaintiff's positive identification of one specific project during his deposition. Later in January 2013, after defendants filed an affidavit showing that the Act was not applicable to that specific project, the court granted summary judgment in favor of defendants and dismissed plaintiff's second amended complaint with prejudice.

¶ 4 Plaintiff appeals, arguing that the trial court erred by (1) only partially granting his motion to reconsider and (2) granting summary judgment in favor of defendants. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 Initially, we note that although plaintiff's original complaint alleged violations of the Act that occurred between 2004 and 2008, the trial court granted defendants' motion to dismiss plaintiff's claims relating to events prior to April 2006 because those claims were barred by the applicable five-year statute of limitations. See *Seaman v. Thompson Electronics Co.*, 325 Ill. App. 3d 560, 565, 758 N.E.2d 454, 458 (2001) (holding that the "catch-all" five-year statute of limitations of section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205 (West 2010)) applies to claims brought under the Act). Plaintiff has not contested that ruling.

¶ 7

A. Plaintiff's Second Amended Complaint

¶ 8

According to plaintiff's second amended complaint, Brink engaged in general and highway construction for private businesses and public bodies. Thompson engaged in the hauling of construction machinery, equipment, materials, supplies, machine parts, and fuel to Brink construction sites. Ronald was the principal owner, chief executive officer, and in daily control of Brink and Thompson.

¶ 9

Plaintiff worked for Brink "for a few months in early 2004" and then for Thompson from 2004 until 2008. Plaintiff claimed that he was never paid the prevailing wage during his employment with Brink and Thompson. Plaintiff alleged that defendants were liable for violations of the Act "for an amount yet to be determined, but believed to be in excess of \$50,000.00 plus interest."

¶ 10

Plaintiff included in his second amended complaint a list of 57 Illinois public works projects on which Brink allegedly performed construction services under contract between 2004 and 2008.

¶ 11

B. Plaintiff's January 2012 Deposition

¶ 12

At a January 2012 deposition, plaintiff testified that his attorney had provided him with the list of 57 construction projects. He had not seen the list until the morning of the deposition. He also testified that (1) he had nothing to do with preparing the list, (2) he did not know who prepared the list, (3) he did not know the source of the information contained in the list, and (4) he did not know who would know the source of the information contained in the list.

¶ 13

Plaintiff could independently recall only one construction project that he worked on during his four years of employment at Brink and Thompson. Specifically, plaintiff testified

that he drove cranes to the Cedar Creek Trail project in 2008. However, when one of his attorneys handed him the list of 57 jobs and asked him to place a check mark next to each of the projects he worked on, plaintiff marked every job listed except 11 jobs performed for Adams County and a job performed for the Quincy Park District. Unlike the 45 jobs that plaintiff marked on the list, the 11 Adams County jobs did not include the location of the projects or a description of the services performed. Plaintiff explained, "for you [(defense counsel)] to ask me off the top of the head, I can't tell you the job, but looking at them and the description brings it back, especially being so many hours on the jobs." Plaintiff did not mark the Quincy Park District job because the description stated "WAC Parking Lot" and plaintiff was "not sure what the WAC stands for." Despite testifying that he could recall 45 specific jobs after seeing the list and reading the descriptions, plaintiff could not remember the amount of time he worked on any of the jobs.

¶ 14 Plaintiff also testified that his duties at Thompson were not limited to hauling materials and equipment to and from Illinois public works projects. During his employment, he hauled loads via truck to 16 different states and worked in the shop "a lot." During his period of employment with Thompson, plaintiff also hauled loads for four other unrelated companies.

¶ 15 C. Ronald's January 2012 Deposition

¶ 16 At his January 2012 deposition, Ronald testified that plaintiff worked for Thompson from 2004 until "roughly" 2009. At Thompson, plaintiff "was an over[-]the[-]road driver, work[ed] in the shop quite a bit, and hauled some equipment" to "public and private sites." Ronald was not aware of any effort made to maintain records as to when plaintiff was working on prevailing wage jobsites. When asked if plaintiff was ever paid the prevailing wage

during his employment, Ronald testified, "I don't think he was."

¶ 17 D. The Parties' Cross-Motions for Summary Judgment

¶ 18 In May 2012, plaintiff filed a "motion for partial summary judgment on the issue of liability" (see 735 ILCS 5/2-1005 (West 2012)) in which he asserted that Ronald admitted committing violations of the Act in his deposition testimony when he stated, "I don't think he was" in response to counsel's question of whether plaintiff was ever paid the prevailing wage during his employment. Although plaintiff essentially conceded that the record before the trial court revealed no specific violations of the Act, he characterized that issue as a question of damages that should be addressed at trial.

¶ 19 In June 2012, defendants filed a cross-motion for summary judgment in which they argued they were entitled to summary judgment as a matter of law as to all issues because (1) Brink and Thompson are separate entities that fall within the exemption of section 3 of the Act (820 ILCS 130/3 (West 2006)), which excludes the transportation of materials and equipment by sellers and suppliers—in this case, Thompson—from coverage; (2) plaintiff was unable to identify which jobs he worked on during his employment with Thompson; and (3) the Illinois Wage Payment and Collection Act (820 ILCS 115/1 *et seq.* (West 2006)), under which plaintiff brought his claim for monetary damages, does not apply.

¶ 20 In the alternative, defendants sought partial summary judgment as to (1) projects for which plaintiff allegedly delivered fuel, which defendants argued did not constitute "materials" or "equipment" under section 3 of the Act (820 ILCS 130/3 (West 2006)), and (2) federal-aid projects covered by the federal Davis-Bacon Act (40 U.S.C. § 3142 (2006)) because section 11 of the Act (820 ILCS 130/11 (West 2006)) explicitly exempts those projects from

coverage.

¶ 21 In August 2012, plaintiff filed a response to defendants' cross-motion for summary judgment (erroneously titled, "response to defendant's motion to dismiss"), in which he again argued that identification of the specific projects he worked on was "a question of calculating damages and not one of liability." Plaintiff further asserted, as follows:

"It is conceivable for the court [to] find that Defendants' [*sic*] committed a violation and have damages limited by the facts that are presented in calculating damages, however, a motion for summary judgement is not a proper remedy, because contested issues of material fact remain."

¶ 22 In October 2012, the trial court granted summary judgment in favor of defendants. In a brief written order, the court explained that because plaintiff could not identify the jobs he worked on, he had no damages.

¶ 23 E. Plaintiff's Motion To Reconsider

¶ 24 In November 2012, plaintiff filed a motion to reconsider in which he asserted that, during his deposition, he identified the jobs he could remember working on by placing check marks next to those jobs on the list attached to the second amended complaint. Plaintiff also pointed out that he specifically identified the Cedar Creek Trail project as one of the jobs he worked on during his employment. Again, plaintiff characterized the need to identify specific violations of the Act as a question of damages and not necessary to determine liability under the Act. Plaintiff asserted that even if he failed to prove actual damages, he should be entitled to recover nominal damages under the Act.

¶ 25 In response to plaintiff's motion to reconsider, defendants argued that plaintiff must prove actual damages under the Act, which he failed to do.

¶ 26 In January 2013, the trial court partially granted plaintiff's motion to reconsider only as to the Cedar Creek Trail project. The court found that plaintiff's specific mention of that project during his deposition testimony created a genuine issue of material fact as to whether he was entitled to recover damages under the Act for that project. As to the other projects, however, the court found that plaintiff's "identification of every contract and project included in [the list] is inherently implausible and unreasonable in light of the entire deposition testimony."

¶ 27 The trial court agreed with defendants "that it may be extraordinarily difficult, if not impossible, based upon the record before the court at this stage, for Plaintiff to establish a specific amount of damages" and "the record, at this point, would certainly preclude any damages beyond nominal damages as the testimony of [plaintiff] was clearly speculative and conjectural in nature." However, the court disagreed with defendants' assertion that plaintiff was not entitled to recover nominal damages under the Act.

¶ 28 F. The Trial Court's Subsequent Grant of Summary Judgment
in Favor of Defendants

¶ 29 Later in January 2013, defendants filed an affidavit completed by Richard Lentz, the controller for Brink. According to the affidavit, the Cedar Creek Trail project was a federal-aid project and therefore exempt from the requirements of the Act. See 820 ILCS 130/11 (West 2006). Following a January 24, 2013, hearing (the transcript of which is not included in the record), the trial court granted summary judgment in favor of defendants and dismissed plaintiff's second amended complaint with prejudice.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 Plaintiff argues that the trial court erred by (1) granting his motion to reconsider only as to the Cedar Creek Trail project and (2) granting summary judgment in favor of defendants. We note that, because the court granted summary judgment in favor of defendants as to all issues, plaintiff's contention that the court erred by only partially granting his motion to reconsider is redundant and need not be addressed as a separate issue. Accordingly, we address only whether defendants were entitled to summary judgment.

¶ 33 A. Summary Judgment and the Standard of Review

¶ 34 Summary judgment motions are governed by section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)). Pursuant to that statute, summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). "When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28, 978 N.E.2d 1000.

¶ 35 Where a case is decided on summary judgment, our review is *de novo*. *Id.* at ¶ 30, 978 N.E.2d 1000. Accordingly, "[i]n determining whether the trial court reached the proper result, we need not confine ourselves to the court's rationale but may instead affirm the grant of summary judgment on any basis supported by the record." *Cornerstone Bank & Trust, N.A. v. Consolidated Grain & Barge Co.*, 2011 IL App (4th) 100715, ¶ 24, 956 N.E.2d 944.

¶ 36

B. The Act and the Method of Enforcement

¶ 37

The Act requires general contractors and subcontractors on public-works projects to pay the prevailing wage to their employees. 820 ILCS 130/4 (West 2006). "The policy behind the Act is to ensure that workers on public-works projects are paid the prevailing wage for their work and that public-works projects will therefore be completed efficiently and expeditiously."

People ex rel. Department of Labor v. Valdivia, 2011 IL App (2d) 100998, ¶ 13, 955 N.E.2d 631.

The prevailing wages for a given contract are to be determined by the public body awarding the contract or, upon request of the public body, by the Department of Labor. 820 ILCS 130/4 (West 2006).

¶ 38

Section 6 governs enforcement of the Act and provides that the Department of Labor shall "inquire diligently as to any violation of this Act, shall institute actions for penalties herein prescribed, and shall enforce generally the provisions of this Act." 820 ILCS 130/6 (West 2006). The Attorney General is required to prosecute cases under the Act on behalf of the Department of Labor or any interested person. 820 ILCS 130/6 (West 2006).

¶ 39

Section 11, which prescribes the penalties available under the Act, empowers the Attorney General "to sue for injunctive relief against the awarding of any contract or the continuation of work under any contract for public works at a time when the prevailing wage prerequisites have not been met." 820 ILCS 130/11 (West 2006). Section 11 further provides that "[a]ny contract for public works awarded at a time when the prevailing wage prerequisites had not been met shall be void as against public policy." 820 ILCS 130/11 (West 2006).

¶ 40

C. The Limited Private Cause of Action Under the Act

¶ 41

Although the Department of Labor and the Attorney General are responsible for

general enforcement and prosecution of the Act, section 11 provides a limited private cause of action, as follows:

"Any laborer, worker or mechanic employed by the contractor or by any sub-contractor under him who is paid for his services in a sum less than the stipulated rates for work done under such contract, shall have a right of action for whatever difference there may be between the amount so paid, and the rates provided by the contract together with costs and such reasonable attorney's fees as shall be allowed by the court." 820 ILCS 130/11 (West 2006).

As the terms of this provision make clear, the private cause of action under the Act is limited to a claim for *actual* damages (*i.e.*, the dollars-and-cents difference between what the laborer, worker, or mechanic was actually paid and what he should have been paid under the Act).

¶ 42 Plaintiff has argued throughout this litigation that even if he is unable to establish actual damages, he should be entitled to move forward on a claim for nominal damages.

" 'Nominal damages are damages awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage.' " Black's Law Dictionary 418 (8th ed. 2004) (quoting Charles T. McCormick, *Handbook on the Law of Damages* § 20, at 85 (1935)). The private cause of action under section 11 of the Act is explicitly dependent upon the loss or damage suffered as a result of the employer's failure to pay the prevailing wage. By seeking only nominal damages, plaintiff's claim is no more than an inquiry into violations of the Act. The General Assembly has empowered only the Department

of Labor to pursue such inquiries. 820 ILCS 130/6 (West 2006). Because plaintiff is not the Department of Labor and his counsel is not the Attorney General, his right to maintain a cause of action under the Act is limited to a section 11 claim for actual damages equal to the difference between the value of wages actually paid and the value of the prevailing wages that should have been paid. 820 ILCS 130/11 (West 2006). The Act does not contemplate a private cause of action for nominal damages.

¶ 43 The record before us is completely devoid of any evidence as to (1) the amount of hours plaintiff worked on any project; (2) the prevailing wage applicable to any project; or (3) the amount plaintiff was actually paid for his work on any project. Without that evidence, there is no way to prove the amount—or even the existence—of actual damages.

¶ 44 "[A] defendant can obtain a summary judgment by establishing plaintiff cannot prove a necessary element of plaintiff's case." *Webber v. Armstrong World Industries, Inc.*, 235 Ill. App. 3d 790, 796, 601 N.E.2d 286, 290 (1992). In determining whether summary judgment should be granted on this basis, the court is encouraged to consider the purpose of summary judgment and the discovery processes available. *Id.* at 795, 601 N.E.2d at 289-90. However, because *plaintiff* moved for summary judgment on the issue of liability before defendants filed their cross-motion for summary judgment, we presume that plaintiff has exhausted his channels of discovery and placed into evidence everything available to him to support his claim. However, it is not enough. Because the record before us contains no evidence of actual damages, plaintiff has failed to establish a right to recover under the Act. Accordingly, defendants are entitled to summary judgment as a matter of law.

¶ 45 We note that plaintiff asserted in his second amended complaint that he brought

his action "under the terms of the Illinois Wage Payment and Collection Act [(WPCA)]." See 820 ILCS 115/1 *et seq.* (West 2006). The purpose of the WPCA "is to provide employees with a cause of action for the timely and complete payment of earned wages or final compensation." *Andrews v. Kowa Printing Corp.*, 351 Ill. App. 3d 668, 675, 814 N.E.2d 198, 205 (2004) *aff'd*, 217 Ill. 2d 101, 838 N.E.2d 894 (2005). "Wages" under the WPCA are defined as "any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties, whether the amount is determined on a time, task, piece, or any other basis of calculation." 820 ILCS 115/2 (West 2012). Without deciding whether a party could use the WPCA to recover monetary damages for violations of the Act, we note that the evidence in this case affirmatively shows that defendants and plaintiff had no agreement or contract pertaining to prevailing wages. Even assuming, *arguendo*, that defendants paid plaintiff a sum less than the prevailing wage, that difference would not constitute a "wage" under the WPCA. The WPCA therefore has no application under the facts of this case.

¶ 46 Because we conclude that the defendants are entitled to summary judgment on account of plaintiff's inability to prove the necessary element of actual damages, we decline to address the myriad of additional arguments advanced by the parties.

¶ 47 III. CONCLUSION

¶ 48 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of defendants.

¶ 49 Affirmed.