

NOTICE

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2015 IL App (5th) 140203-U

NO. 5-14-0203

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

KIRK BROWN and ROBBYN BROWN,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	St. Clair County.
)	
v.)	No. 13-SC-2492
)	
DAECH & BAUER,)	Honorable
)	Ellen A. Dauber,
Defendant-Appellee.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Schwarm and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment in favor of the contractor was affirmed, rejecting the homeowners' claims that the trial court erred in (1) awarding damages to the contractor where the manifest weight of the evidence demonstrates that the contractor breached the contract and did not substantially perform pursuant to the contract; (2) finding that the contractor did not violate the Energy Efficient Building Act; (3) finding that the contractor did not violate the Home Repair Fraud Act; (4) finding that the contractor did not violate the Home Repair and Remodeling Act; (5) finding that the contractor did not violate the Consumer Fraud and Deceptive Business Practices Act; and (6) failing to make a "mathematical correction."

¶ 2 The plaintiffs, Kirk and Robbyn Brown, brought this *pro se* small claims breach of contract action against the defendant, Daech & Bauer, based on Daech & Bauer's failure to complete siding and trim work on their home. Daech & Bauer filed a counterclaim

seeking the balance due under the contract. At the bench trial, the Browns also argued, for the first time, that Daech & Bauer had violated the Home Repair and Remodeling Act (815 ILCS 513/1 *et seq.* (West 2012)) and the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2012)). The trial court found that (1) the Browns failed to prove that Daech & Bauer violated the Home Repair and Remodeling Act; (2) the Browns failed to prove that Daech & Bauer violated the Consumer Fraud and Deceptive Business Practices Act; (3) under the contract, Daech & Bauer was entitled to recover a total of \$2,901.29; and (4) the Browns had already paid \$1,974.04, leaving a balance owed by the Browns of \$927.25. Judgment was therefore entered in favor of Daech & Bauer and against the Browns in the amount of \$927.25.

¶ 3 The Browns filed a motion to reconsider. In the motion, the Browns raised additional claims, including claims that (1) Daech & Bauer violated the Energy Efficient Building Act (20 ILCS 3125/1 *et seq.* (West 2012)); (2) Daech & Bauer violated the Home Repair Fraud Act (815 ILCS 515/1 *et seq.* (West 2012)); and (3) the court should make a "mathematical correction." In a detailed written order, the trial court denied the Browns' motion to reconsider.

¶ 4 The Browns appealed, arguing that the trial court erred in (1) awarding damages to Daech & Bauer where the manifest weight of the evidence demonstrates that Daech & Bauer breached the contract and did not substantially perform pursuant to the contract; (2) finding that Daech & Bauer did not violate the Energy Efficient Building Act; (3) finding that Daech & Bauer did not violate the Home Repair Fraud Act; (4) finding that Daech & Bauer did not violate the Home Repair and Remodeling Act; (5) finding that

Daech & Bauer did not violate the Consumer Fraud and Deceptive Business Practices Act; and (6) failing to make a "mathematical correction." For the following reasons, we affirm.

¶ 5

BACKGROUND

¶ 6 On November 29, 2012, the Browns met with Daech & Bauer, and Daech & Bauer gave them an estimate for work that was to be done on their home to repair hail damage. The estimate, which was for a total of \$3,714.21, indicates, among other things, that it was for removing and replacing siding, fanfold foam insulation board, and an attic gable vent. The estimates for removing and replacing the fanfold foam insulation board and the attic gable vent were \$528 and \$95.79, respectively.

¶ 7 On January 14, 2013, Daech & Bauer submitted to the Browns' insurer, State Farm, a revised estimate for the work that was to be done. The revised estimate, which was for a total of \$3,525.08, also indicates, among other things, that it was for removing and replacing siding, fanfold foam insulation board, and an attic gable vent.

¶ 8 On February 4, 2013, Kirk signed a contract with Daech & Bauer. The contract indicates that the scope of work includes removing and replacing siding on the left elevation for \$3,525.08, which was the "price agreed upon by Daech & Bauer and State Farm." The contract also indicates that the scope of work includes installing aluminum fascia over existing wood trim and wood fascia for \$423, for a total contract price of \$3,948.08. The contract also indicates that the deposit for one half of the contract price, or \$1,974.04, was paid and that the balance due was \$1,974.04. Robbyn paid the deposit.

¶ 9 The Browns repeatedly contacted Daech & Bauer because it had not yet started the work. Robbyn explained that Daech & Bauer was having a problem matching the siding color. She testified that she paid \$140 to ITEL Laboratories for color matching of the siding. She had a receipt for that payment and requested that Daech & Bauer be ordered to pay for the color matching even though Daech & Bauer had already paid ITEL Laboratories for color matching the siding. Basically, the Browns did not trust Daech & Bauer and sent their own sample for color matching to verify what Daech & Bauer had already done. The results were the same.

¶ 10 On May 10, 2013, the Browns signed a Daech & Bauer change order. The change order indicates that the Browns had agreed to specific colors of the siding, fascia, and trim. There was no change in the contract price.

¶ 11 On June 6, 2013, Daech & Bauer removed and replaced the siding, but it did not remove and replace the fanfold foam insulation board or the attic gable vent, which were provided for in the estimates. It also did not replace the trim on the front of the house, which was provided for in the contract.

¶ 12 The following day, Robbyn contacted Jim Daech, the owner of Daech & Bauer, to advise him of the work that was not done. It was Daech's position that the contract did not include removing and replacing the fanfold foam insulation board or the attic gable vent. Daech suggested that Robbyn contact State Farm to see what the estimate included.

¶ 13 Robbyn contacted State Farm. In response, State Farm sent a June 7, 2013, email to Daech & Bauer. The email advises Daech & Bauer that the \$3,525.08 estimate, upon which Daech & Bauer and State Farm had agreed, includes line items for removing and

replacing the fanfold foam insulation board and the attic gable vent. State Farm asked that Daech & Bauer complete all repairs shown on the estimate.

¶ 14 On June 10, 2013, Daech sent the Browns an email indicating that the contract did not include the attic gable vent or the fanfold foam insulation board. According to Daech, those amounts were included on the original estimate provided to the Browns but were not part of the final signed contract. Daech agreed to refund the \$423 that was agreed upon for the trim work on the front of the home, which was required by the contract but not completed.

¶ 15 The Browns responded to Daech by email on June 12, 2013. The Browns' email notes that the estimate given to, and approved by, State Farm, which was for the same amount as the contract, did include removing and replacing the fanfold foam insulation board and the attic gable vent. The email asks that Daech & Bauer either complete the contract or return the Browns' down payment. The parties were never able to reach a settlement of the dispute. Daech & Bauer never did any additional work on the Browns' home, and the Browns never paid the remaining amount due under the contract.

¶ 16 In their small claims complaint, the Browns alleged that Daech & Bauer's work was defective and incomplete. They claimed that Daech & Bauer owed them \$5,000 based on a breach of a written contract. In attachments to the form complaint, they also requested that the court "nullify the contract" due to a breach; order Daech & Bauer to refund the deposit plus costs; award "any other fees or fines the court determines to be proper and just to prevent and/or discourage Daech & Bauer and others of the same mind

from engaging in such unethical and unscrupulous actions"; and order Daech & Bauer to submit mechanic lien waivers.

¶ 17 Daech & Bauer filed a counterclaim seeking the unpaid balance of the contract. Specifically, Daech & Bauer sought \$1,551.04 (representing the unpaid balance of the contract of \$1,974.04 minus \$423 for the unperformed trim work on the front of the Browns' home) plus interest, attorney fees, and court costs.

¶ 18 At trial, Robbyn testified that, someone from the City of O'Fallon had told her that without the fanfold foam insulation board, her house violates the "Illinois Energy Code." Therefore, the Browns requested that Daech & Bauer be ordered to return the down payment so that they could have another contractor redo the vinyl siding work with the fanfold foam insulation board.

¶ 19 Robbyn also testified that she and Kirk hired another contractor, Fulford Home Remodeling, to do the trim work on the front of the house, at a cost of \$1,475. At trial, the court noted that, based on the contracts for the trim work, it appeared that the trim work actually done by Fulford Home Remodeling was more extensive than the trim work Daech & Bauer had agreed to do.

¶ 20 Daech acknowledged that Daech & Bauer did not remove and replace the fanfold foam insulation board or the attic gable vent. He claimed that Daech & Bauer was not required to do so under the contract even though the estimates called for it.

¶ 21 Daech further testified that the original sheeting used on the Browns' house was R-board, or polystyrene board. He testified that there was a quarter of an inch difference in the thickness between R-board and fanfold foam insulation board. Therefore, if he

replaced the R-board with fanfold foam insulation board on only part of the house, the siding on the part that was replaced would bulge out at the seam. If the Browns wanted to replace the R-board with fanfold foam insulation board, they would need to do the whole house, not just part of it.

¶ 22 Daech testified that he was familiar with the national codes for siding and that there would not be any code violation for replacing siding on the house without removing and replacing the R-board. He testified that if he removed and replaced all of the siding, he would be required to upgrade to the energy codes that Robbyn had referred to earlier but not on a partial replacement like in this case.

¶ 23 Daech testified that Daech & Bauer met all of the requirements of the Home Repair and Remodeling Act. He testified that Daech & Bauer's electronic contract, which was sent to Kirk, included a copy of the "Home Repair: Know Your Consumer Rights" brochure. See 815 ILCS 513/20 (West 2012).

¶ 24 Daech acknowledged that Daech & Bauer did not install the trim on the front of the Browns' home, which was required by the contract. He testified that, in its counterclaim, Daech & Bauer was not seeking the \$423 for the trim work.

¶ 25 In closing argument, Robbyn argued that Daech & Bauer breached its contract as alleged in her complaint. She also argued that Daech & Bauer violated the Home Repair and Remodeling Act by failing to provide an itemized scope of the work (see 815 ILCS 513/15 (West 2012)) and by failing to give the Browns a brochure explaining their rights under the Act (see 815 ILCS 513/20 (West 2012)). She also alleged a violation of the Consumer Fraud and Deceptive Business Practices Act.

¶ 26 On January 28, 2014, the trial court entered a written order, with specific findings of fact. The court found that the Browns failed to prove that Daech & Bauer violated the Home Repair and Remodeling Act. The court found that the contract was specific enough in detail. The court also found credible Daech's testimony that Daech & Bauer provided the brochure to Kirk via email with the original contract.

¶ 27 The court also found that the Browns failed to prove that Daech & Bauer violated the Consumer Fraud and Deceptive Business Practices Act. The court noted that there was no evidence that, before filing the complaint, the Browns sent via certified mail a written demand for return of their down payment. See 815 ILCS 505/2Q(c) (West 2012).

¶ 28 The court found that the work to be performed under the contract did include removal and replacement of the fanfold foam insulation board and the attic gable vent as described in the estimate provided to State Farm. Although the parties' contract does not specifically include this work as line items, it does refer to the price as agreed upon by State Farm. The price agreed upon by State Farm clearly included this work. Daech & Bauer did not install the fanfold foam insulation board or the attic gable vent, and the court found that Daech & Bauer was not entitled to be paid for that work.

¶ 29 The court found, however, that the Browns failed to prove that the siding as installed, with R-board as insulation, violates any code and requires that the work be redone by another contractor. Therefore, the court found that the Browns were not entitled to a refund of all of the money paid to Daech & Bauer but, instead, were liable for the work that was actually completed.

¶ 30 The court found that, under the contract, Daech & Bauer was entitled to recover a total of \$2,901.29 (the \$3,948.08 contract price minus \$423 for the unperformed trim work on the front of the house minus \$528 for the fanfold foam insulation board minus \$95.79 for the attic gable vent). The court found that the Browns had already paid \$1,974.04, leaving a balance owed by the Browns of \$927.25.

¶ 31 The court declined to award attorney fees or interest because Daech & Bauer did not complete all work as required under the contract, and there was a legitimate dispute as to whether the Browns owed additional money. The court therefore entered judgment in favor of Daech & Bauer and against the Browns in the amount of \$927.25, with each party to pay its own court costs.

¶ 32 The Browns filed a timely motion to reconsider. In the motion, the Browns made claims beyond those raised in the complaint and attached documents not admitted into evidence by the trial court. In the motion, the Browns claimed that the trial court should have found that Daech & Bauer violated the Home Repair Fraud Act; found that Daech & Bauer violated the Energy Efficient Building Act; and entered a money judgment against Daech & Bauer for violating the Home Repair and Remodeling Act and the Consumer Fraud and Deceptive Business Practices Act. The Browns also sought a "mathematical correction." In response, Daech & Bauer filed a motion to strike documents, which the Browns had attached to their motion, and objected to the motion because it failed to state any proper legal basis for the court to reconsider its order. Daech & Bauer again requested attorney fees. The trial court granted Daech & Bauer's motion to strike, denied

the Browns' motion to reconsider, and denied Daech & Bauer's motion for attorney fees. The Browns appealed.

¶ 33

ANALYSIS

¶ 34 The Browns first argue that the trial court erred in awarding damages to Daech & Bauer where the manifest weight of the evidence demonstrates that Daech & Bauer breached the contract and did not substantially perform pursuant to the contract. "The standard of review of a trial court's judgment after a bench trial is whether that judgment is against the manifest weight of the evidence." *Northwestern Memorial Hospital v. Sharif*, 2014 IL App (1st) 133008, ¶ 25. "A judgment is against the manifest weight of the evidence when it appears from the record that the judgment is arbitrary, unreasonable, not based on evidence, or the opposite conclusion is apparent." *Id.* "Under a manifest weight of the evidence standard, we give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and the witnesses and has a degree of familiarity with the evidence that a reviewing court cannot possibly obtain." *In re D.F.*, 201 Ill. 2d 476, 498-99 (2002). "A reviewing court, therefore, must not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn." *Id.* at 499.

¶ 35 Under the doctrine of substantial performance, the general rule regarding construction contracts is that a contractor is not required to perform perfectly, but, instead, is only held to a duty of substantial performance in a workmanlike manner. *Behl v. Gingerich*, 396 Ill. App. 3d 1078, 1092 (2009). Substantial performance is honest and

faithful performance of the material and substantial parts of the contract with no willful departure from or omission of the essential terms of the contract. *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 483 (2010). A construction contract may be substantially performed even though there may be some omissions or deviations from the contract or some defects in the material or workmanship when these are not a result of bad faith, do not impair the structure as a whole, and are remediable without materially damaging other parts of the structure. *Id.* What constitutes substantial performance depends on the relevant facts of each case. *Id.* at 483-84. A homeowner who receives substantial performance of a construction contract must pay the bargained-for price, less a credit for defects in what he received as compared to what strict performance would have given him. *Behl*, 396 Ill. App. 3d at 1092.

¶ 36 The trial court's findings regarding the breach of contract claim and counterclaim in the present case are not against the manifest weight of the evidence. The trial court found that the parties entered into an agreement to repair the Browns' house for the total price of \$3,948.08. The parties separated the work to be performed into two parts as shown on the face of the contract: (1) removing and repairing the siding on the left elevation for \$3,525.08; and (2) installing aluminum fascia over existing wood trim and fascia for \$423.

¶ 37 The essential part of the siding contract (\$3,525.08) between the parties was the agreement to remove and replace the siding on the left elevation. The Browns argued that the contract price included costs for fanfold foam insulation board and installation of

an attic gable vent. Once the work got underway, Daech & Bauer discovered that fanfold foam insulation board was not necessary due to intact R-board being under the old siding. According to Daech, installation of fanfold foam insulation board would have caused bulging. The siding was removed and replaced in a reasonably workmanlike manner. The trial court found no evidence to support the Browns' claim that the fanfold foam insulation board was a substantial necessary part of the contract.

¶ 38 Daech testified that in a repair job the size and scope of this one, the intact R-board met all code requirements. Robbyn testified that someone from the City of O'Fallon told her that without the fanfold foam insulation board, the house violated the "Illinois Energy Code." The trial court found that the Browns failed to prove that the siding as installed, with R-board as insulation, is in violation of any code and requires the work to be redone by another contractor.

¶ 39 The trial court did find that the attic gable vent and the fanfold foam insulation board were included in the parties' agreement, even though those items were not specified in the contract itself. In awarding a recovery to Daech & Bauer, the trial court made deductions from the contract price by an amount necessary to account for the difference between what the Browns got by the actual performance as compared to what they bargained for. Specifically, the trial court implicitly found that the \$3,525.08 contract for the work on the left elevation was substantially performed but gave the Browns credit for the cost of the fanfold foam insulation board (\$528) and the attic gable vent (\$95.79) that were not installed. Both parties agreed, and the trial court found, that none of the trim work (\$423) had been performed on the front of the house. Daech & Bauer's

counterclaim did not make a claim for the \$423 trim work on the front of the house, and the court did not award the \$423 for that work.

¶ 40 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 parties' intention. *Id.* at 44-45. 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 45. In the present case, that the parties assented separately to the siding and trim portions of the contract is reflected on the face of the contract itself. Therefore, it was proper for the court to permit recovery for Daech & Bauer's partial performance under the severable contract.

¶ 41 The Browns also argue that the trial court erred in finding that Daech & Bauer did not violate the Home Repair and Remodeling Act. The Browns raised the argument that Daech & Bauer violated the Home Repair and Remodeling Act for the first time on the day of trial. The alleged violations were based upon a failure to provide a brochure and lack of specificity in the contract. The trial court, after hearing all of the testimony and considering all of the evidence, found that the Browns were given a copy of the required brochure and that the contract was in specific enough detail. In denying the Browns' motion to reconsider, the court noted that it continued to find that the Browns had failed to prove that Daech & Bauer violated the Home Repair and Remodeling Act. The court noted that the brochure was emailed to the Browns and that the contract was sufficiently detailed. The court also found that, even if there were minor violations, the Browns did

not prove that the violations caused any actual damages to them. They did not claim to be damaged by not knowing the scope of the work or not being advised of their rights. Instead, they claimed to be damaged by Daech & Bauer's failure to properly complete the work. Therefore, the court found that they were not entitled to damages under the Home Repair and Remodeling Act. That finding is not against the manifest weight of the evidence.

¶ 42 The Browns next argue that the trial court erred in finding that Daech & Bauer did not violate the Consumer Fraud and Deceptive Business Practices Act, another claim that the Browns raised for the first time on the day of trial. On the day of trial, Robbyn delivered a notice/demand to Daech & Bauer to return the Browns' down payment for failing to complete work, pursuant to section 2Q(c) of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2Q(c) (West 2012)). The court, after hearing all of the testimony and considering all of the evidence, found that the Browns failed to prove at trial that Daech & Bauer violated the Consumer Fraud and Deceptive Business Practices Act. In denying the Browns' motion to reconsider, the court noted that, in order to maintain an action under section 2Q of the Consumer Fraud and Deceptive Business Practices Act, the plaintiff must prove that a contractor who failed or refused to commence or complete work failed to return a down payment within 10 days of receipt of a written demand sent by certified mail. The Browns did not send Daech & Bauer a written demand for return of the down payment via certified mail. Instead, Robbyn delivered the demand on the day of trial. Therefore, there was no way that Daech & Bauer could have violated this portion of the Consumer Fraud and Deceptive Business

Practices Act at the time of trial because 10 days had not passed since the demand was made. Accordingly, the trial court's finding that the Browns failed to prove that Daech & Bauer violated the Consumer Fraud and Deceptive Business Practice Act is not against the manifest weight of the evidence.

¶ 43 The Browns also argue that the trial court erred in finding that Daech & Bauer did not violate the Home Repair Fraud Act. The argument that Daech & Bauer violated the Home Repair Fraud Act was raised for the first time in the Browns' motion to reconsider the trial court's judgment. The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available at the time of the hearing, changes in the law, or errors in the court's previous application of existing law. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 19. Arguments raised for the first time in a motion to reconsider in the trial court are forfeited on appeal. *Id.* Accordingly, the Browns' argument that Daech & Bauer violated the Home Repair Fraud Act, which was raised for the first time in their motion to reconsider, was forfeited.

¶ 44 The Browns next argue that the trial court erred in finding that Daech & Bauer did not violate the Energy Efficient Building Act. The argument that Daech & Bauer violated the Energy Efficient Building Act was also raised for the first time in the Browns' motion to reconsider and is, therefore, forfeited. Forfeiture aside, in denying the Browns' motion to reconsider, the trial court noted that, at trial, the only evidence in support of this claim came from Robbyn, who testified that someone from the City of O'Fallon had told her that fanfold foam insulation board was required by the "Illinois Energy Code." She admitted, however, that she had no documents to support her

allegation. Moreover, Daech testified that he was familiar with all relevant building codes and that fanfold foam insulation board was not required in this case. In denying the Browns' motion to reconsider, the court stated that it found Daech's testimony persuasive and that the Browns could not present new evidence concerning this allegation at the motion-to-reconsider stage. The trial court's finding that the Browns failed to prove that Daech & Bauer violated the Energy Efficient Building Act is not against the manifest weight of the evidence.

¶ 45 Finally, the Browns argue that the trial court erred in failing to make a "mathematical correction." Essentially, the Browns argue that they should be credited for other line items on Daech & Bauer's estimates, such as for the cost of a dumpster, which they allege was not used, and because Daech & Bauer's workers were on the job for only one day instead of two. In denying the Browns' motion to reconsider, the trial court found that they failed to prove any mathematical error on the court's part. That finding is not against the manifest weight of the evidence.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County.

¶ 48 Affirmed.