2011 IL App (2d) 100611-U
No. 2—10—0611
Order filed July 21, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KEITH BURCHETT and PATRICIA BURCHETT,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 03—L—1397
J.P. McMAHON BUILDERS, INC.,	)	Honorable Joseph S. Bongiorno,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Bowman concurred in the judgment.

ORDER

Held: The trial court did not err in denying plaintiffs' posttrial motion. Plaintiffs' claim that they were prejudiced by the placement of a demonstrative exhibit in the jury room fails because the exhibit does not bear on a central issue in the case. Plaintiffs' claim that there was no enforceable oral contract is unavailing where there was a meeting of the minds on the essential terms of the contract. The jury's damages award in defendant's favor on its counterclaim was supported by the evidence. Finally, the trial court did not abuse its discretion in excluding from evidence, based upon two prior rulings, an unsigned contract, where plaintiffs' claim was based on an oral contract, where plaintiffs point to no provisions in the document that they claim were essential to their case, and where there are questions concerning the document's enforceability. Judgment affirmed.

¶ 1 Plaintiffs, Keith and Patricia Burchett, sued defendant, J.P. McMahon Builders, Inc., for breach of an oral contract in a suit pertaining to the construction of a residential home. In a counterclaim against plaintiffs, defendant also alleged breach of an oral contract. A jury: (1) rendered a verdict against plaintiffs on their breach-of-contract claim; (2) rendered a verdict in defendant's favor on its counterclaim; and (3) awarded defendant $113,600 in damages. Plaintiffs moved for a new trial, judgment notwithstanding the verdict (judgment *n.o.v.*), or remittitur. The trial court denied plaintiffs' motion. Plaintiffs appeal, arguing that: (1) they are entitled to a new trial because the court deputy's accidental placement of a demonstrative exhibit into the jury room was prejudicial; (2) defendant did not sufficiently establish the terms of the oral contract for a management fee to support the jury's verdict in its favor; (3) defendant did not sufficiently present evidence to support the jury's damages award on the counterclaim; and (4) the trial court erred in excluding from evidence an unsigned written contract. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Plaintiffs claimed that, in February 2001, they negotiated with defendant and orally accepted defendant's $300,000 offer to manage the construction for them (within 14 to 16 months) of a 10,000-square-foot residence at 321 South Vine Street in Hinsdale. Defendant commenced construction on March 1, 2001, and, as construction proceeded, plaintiffs made periodic payments to defendant. Plaintiffs subsequently sued defendant for breach of oral contract, alleging that, by September 2002, over 14 months after construction commenced, the project was not complete and suffered from defective work, including water infiltration.

¶ 4 In its counterclaim, defendant alleged that plaintiffs breached their oral agreement in that they: (1) failed to pay in full the $300,000 construction management fee and still owed defendant

$100,000; and (2) failed to reimburse defendant $16,620.09 for certain advances it made to subcontractors on plaintiffs' behalf (including $10,000 paid to Signature Trim; $3,000 paid to Munster's Moisture; $1,170 paid to Hometite Systems; and $2,540.09 to defendant for miscellaneous costs and expenses). Defendant further alleged that it was wrongfully terminated in October 2002.

¶ 5 At trial, McMahon testified that he, on defendant's behalf, entered into an oral contract with plaintiffs to be the general contractor for the construction of their home. He initially discussed building their home in November 1999. In June 2000, defendant coordinated the demolition of two existing homes on the two lots that would be combined and on which the new home would be constructed. McMahon testified that his firm was hired, via an oral contract, to build plaintiffs' home in August 2000. This occurred during a telephone conversation with Michael McLaughlin, who represented an architectural firm, and McMahon believed that Keith was present with McLaughlin and discussing the terms. McMahon testified that the parties agreed that plaintiffs would pay his firm a flat $300,000 management fee to build their home. No plans for the home existed at this time. At a meeting in August or September 2000 at Keith's office, McMahon told Keith that the home would be completed within 14 months, excluding acts of God or "things that were out of our control." McMahon received the plans for the home in November 2000. The plans were submitted to the Village of Hinsdale in November 2000 and approved by the village in February 2001.

¶ 6 McMahon further testified that his firm broke ground on the project in mid-March 2001. By early-summer 2002, there remained water infiltration issues in the basement. By August 2002, the home was 75% complete. McMahon testified that his firm was terminated in September 2002 before it could remedy the problem.

¶ 7 McMahon conceded that none of the change orders he filled out stated that the project would be delayed due to the specified change. He explained that this was so because he completed the forms in a hurry and, by August 2002, was "very nervous" about his relationship with plaintiffs because Keith had not signed any of the forms. McMahon testified that selections were not timely made after December 2001 and that delays were also caused by the fact that the architectural plans were only 65% complete. Before June 2002, he never notified plaintiffs that Patricia's failure to timely make selections resulted in a six-month delay in the home's construction.

¶ 8 Keith testified that, at his first meeting with McMahon to discuss construction of the residence, Keith related that he would provide plans to McMahon and then request a bid from him. Weeks later, at another meeting, Keith related to McMahon that he wanted a "good job done" on the home and a guarantee for the work and that he was concerned about water infiltration issues and wanted assurances that there would be no such issues with the house. At a third meeting, Keith hired McMahon and asked that he build the home for a flat fee. McMahon agreed to the flat fee arrangement and stated that he could commence work when he received the approved plans. According to Keith, McMahon represented that he could complete the construction in 14 to 16 months. McMahon also stated that he would guarantee his work.

¶ 9 When excavation commenced, crews hit a pocket of water. McMahon never presented Keith with a change order to extend the 14-to-16-month completion date; however, Keith conceded that this unforeseen event would have delayed the home's completion by three to four weeks. Water infiltration continued to be an issue with the house. Even after the roof was installed, there were water problems in the basement and they led to mold. Keith testified that he had a good relationship with McMahon until mold developed in the basement in August or September of 2002. He

contacted McMahon and left a message. Plaintiffs also hired a relative who worked for a remediation company. One day, plaintiffs had to stop insulation installers from installing insulation over the mold. According to Keith, McMahon stated that he would pay for the mold remediation. McMahon never paid the $17,000 bill; Keith paid it.

¶ 10 Keith further testified that he agreed to pay defendant $300,000 to construct his home and agreed to reimburse defendant for expenditures it made on plaintiffs' behalf to construct the residence. Keith agreed to no other payments, and McMahon never asked for any other payments.

¶ 11 Keith signed change orders, but no change orders reflected a delay in the completion date. However, Keith conceded that certain changes plaintiffs made to the home, such as finishing a third floor area, adding radiant heat, and adding a lap pool, required additional time to be added to the completion date. Keith also conceded that, several months before the scheduled completion date, he did not make all selections, such as carpeting and the landscaping plan, that McMahon had requested be made in a June 28, 2002, letter containing a list of required selections.

¶ 12 When plaintiffs terminated defendant, there were leaks in the lower basement (sports court) and in the front, wrap-around porch areas. They had paid defendant and its subcontractors about $2.2 million. After plaintiffs terminated defendant, Keith hired another contractor to complete the home. Plaintiffs paid the second contractor and its subcontractors about $1.7 million to complete the home ($100,000 of which went to the general contractor). Plaintiffs moved into the home in February 2003. Currently, there are no water infiltration issues in the home.

¶ 13 During trial, a door exemplar—a door threshold and partial door mechanism—was utilized as a demonstrative trial exhibit. Craig Oddo, defendant's superintendent on the project, testified at trial. During his testimony concerning the construction of the upstairs balconies, Oddo was asked

by defense counsel to address weep holes that allow water to seep out of the threshold toward the home exterior. After the court ascertained that plaintiffs' counsel did not object to its use, defense counsel then used the threshold exemplar as a demonstrative exhibit. Oddo testified that the exhibit was a replica of doors that were installed at plaintiffs' residence. Plaintiffs' counsel also referred to the exhibit during their cross-examination of Oddo and referenced the exhibit during their closing argument, but incorrectly as an *admitted* exhibit. During trial, neither party moved to have the threshold exemplar admitted into evidence. After trial and jury deliberations, it was discovered that the courtroom deputy provided to the jury the door exemplar.

¶ 14 The jury rendered a verdict in defendant's favor on plaintiffs' complaint. On defendant's counterclaim, the jury rendered a verdict for defendant in the amount of $113,600. The trial court denied plaintiffs' post-trial motion requesting a new trial, judgment *n.o.v.*, or remittitur. Plaintiffs appeal.

¶ 15 II. ANALYSIS

¶ 16 A. Placement of Demonstrative Exhibit in Jury Room

¶ 17 Plaintiffs argue first that the trial court erred in denying their motion for a new trial on the basis that the courtroom deputy provided the jury an exhibit that was not admitted into evidence. They contend without explanation that the exhibit directly related to an issue in the case. Plaintiffs note that the trial court did not investigate the deputy's actions and that it is not known whether the jurors asked the deputy to retrieve the exhibit. Plaintiffs contend that there is no way to ascertain the extent of the extraneous influence without some form of inquiry and that the deputy's conduct compromised the integrity of the jury's verdict. They request a reversal of the jury's verdict and a new trial. For the following reasons, we reject plaintiffs' request.

¶ 18 We review for an abuse of discretion a trial court's ruling on a motion for a new trial. *Anderson v. Zamir*, 402 Ill. App. 3d 362, 364 (2010). A trial court abuses its discretion only if no reasonable person would take the position adopted by the court. *Bruce v. Atadero*, 405 Ill. App. 3d 318, 323 (2010).

¶ 19 "Where a jury has been exposed to improper extraneous information, reversal of the jury's verdict is not automatic." *People v. Wilmer*, 396 Ill. App. 3d 175, 181 (2009). Rather, reversal is required only when the extraneous information prejudices the losing party. *Id.* Specifically, "[t]he losing party need not prove actual prejudice, but need demonstrate only that the unauthorized information relates directly to an issue in the case and might have improperly influenced the verdict." *Wade v. City of Chicago Heights*, 295 Ill. App. 3d 873, 888 (1998). "The burden then shifts to the nonmoving party to establish that the incident is harmless" *(Wilmer*, 396 Ill. App. 3d at 181), that is, that no prejudice resulted (*Haight v. Aldridge Electric Co.*, 215 Ill. App. 3d 353, 368 (1991)). A verdict may stand only where "it is obvious that the moving party was not prejudiced by the extraneous information." *Wilmer*, 396 Ill. App. 3d at 181-82 (reversing for an evidentiary hearing to ascertain nature of extraneous information, where a juror conducted computer research on Illinois law and discussed the information with the jury and where he attested that another juror brought Bible verses to the jury room and discussed them with other jurors).

¶ 20 In *Heaver v. Ward*, 68 Ill. App. 3d 236 (1979), a case involving an automobile accident and upon which plaintiffs' rely, the jury foreman made an independent visit to the accident site and made a diagram of the intersection that he brought to the jury room during the deliberations, along with a copy of the "Rules of the Road." Although there was conflicting evidence concerning whether the diagram was shown to the other jurors, it was clear that at least one juror was shown the "Rules of

the Road." The court reversed and remanded for a new trial, holding that it was sufficient that the unauthorized evidence may have improperly influenced the verdict. *Id.* at 241.

¶ 21 We agree with defendant that the threshold exemplar was not a central issue in this case and that *Heaver* is, therefore, distinguishable. The exemplar was used to familiarize the jury with threshold weep holes. The existence of weep holes on the thresholds of plaintiffs' residence was not in dispute. Rather, one of the issues was whether the weep holes were obstructed (by caulk) and, if so, whether the obstruction caused accumulated, undrained water to seep into the residence. Plaintiffs never claimed that the threshold assembly and weep holes caused the water damage. Accordingly, we cannot conclude that any prejudice could have resulted from the fact that this unadmitted exhibit entered the jury room. We further note that, unlike in *Heaver*, the extraneous information here had previously been subject to cross-examination—plaintiffs' counsel utilized the exhibit during their cross-examination of Oddo.

¶ 22 Other cases upon which plaintiffs rely are also distinguishable. In *Lombardo v. Reliance Elevator Co.,* 315 Ill. App. 3d 111 (2000), a negligence case, a bank maintenance worker was injured after riding a sidewalk lift and sued the building owner, elevator maintenance company, and elevator inspection company. The trial judge unilaterally provided the jury during deliberations a copy of a contract between the bank and the maintenance company and provided the original of the document that included misleading and highly prejudicial exculpatory language that appeared to eliminate the maintenance company's liability. The *Lombardo* court held that the trial court committed reversible error because its actions "prejudicially permitted the presentation of new evidence in a manner that avoided evidentiary constraints and cross-examination." *Id.* at 121-22. Thus, the prejudicial nature of the exculpatory language was not in dispute and bore on a central issue in the appeal.

¶ 23 *Modelski v. Navistar International Transportation Corp.*, 302 Ill. App. 3d 879 (1999), a products liability case, involved a tractor seat assembly without a safety interlock device that caused a farmer to be ejected to the rear of the tractor and resulted in his death. The court held that the plaintiff suffered prejudice as a result of the jury's viewing of and experimentation with the tractor seat assembly that had been used as a demonstrative exhibit but was never admitted into evidence. *Id.* at 884. The court concluded that the jury should not have been granted access to the exhibit because it had never been introduced into evidence and because the access invited the experimentation that the jury subsequently conducted. *Id.* The jury's experiment "was not conducted under circumstances similar to those present when the accident occurred, was not subject to evidentiary constraints or cross-examination, and constituted the introduction of new evidence in the jury room." *Id.* Thus, as distinguished from this case, *Modelski* focused on the jury's experimentation with new evidence and the functioning of the seat was central to the plaintiff's case.

¶ 24 Finally, in *State v. Kamel*, 972 A. 2d 780 (2009), upon which plaintiffs also rely, the court held that the trial court violated the criminal defendant's constitutional right to a fair trial when it failed to conduct an inquiry after learning that the jurors were exposed during their deliberations to evidence that had been marked for identification—brass knuckles—but not admitted into evidence. *Id.* at 784. The defendant was convicted of drug-related offenses, criminal trespass, and interfering with an officer. The court noted that brass knuckles "suggest to the average juror that the defendant, charged with interfering with an officer, among other crimes, had violent, unlawful propensities." *Id.* The court found error on the basis that the jurors were exposed to and "might have considered[ ] potentially prejudicial evidence that had not been admitted as an exhibit." *Id.* at 785. Significantly, and distinguishing *Kamel* from the present case, the *Kamel* court relied on precedent that held that

a trial court has a duty in *criminal* cases to conduct a preliminary inquiry where there are allegations of jury misconduct. *Id.* at 785.

¶ 25 In summary, the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial on the basis that the threshold exemplar was placed in the jury room.

¶ 26 B. Terms of Oral Contract

¶ 27 Plaintiffs next argue that the verdict in defendant's favor on its counterclaim should be set aside because defendant never established the terms of an oral contract. In its counterclaim, defendant alleged a breach of an oral contract for a management fee. Plaintiffs contend that there was no meeting of the minds concerning any contract and that the parties never jointly signed, for example, a single change order form. Plaintiffs also claim that defendant never discussed with them the management fee; that McMahon did not describe what would be included in the management fee; and that the parties did not discuss change orders. For the following reasons, we reject plaintiffs' argument.

¶ 28 A judgment *n.o.v.* presents a question of law that we review *de novo*. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 547 (2005). A judgment *n.o.v.* should be "entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967); accord *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). A trial court should not "enter a judgment *n.o.v.* if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Id.* at 454. The standard for obtaining a judgment *n.o.v.* is a " 'very

difficult standard to meet' " and is limited to " 'extreme situations only.' " *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1125 (2000) (quoting *People ex rel. Department of Transportation v. Smith*, 258 Ill. App. 3d 710, 714 (1994)).

¶ 29 For an oral contract to be valid and enforceable, there must be an offer, an acceptance, and a meeting of the minds regarding its terms. *Johnson v. Hermanson*, 221 Ill. App. 3d 582, 584 (1991). Further, its terms must be definite and consistent. *Trittipo v. O'Brien*, 204 Ill. App. 3d 662, 672 (1990). When it appears that the language used or the terms proposed are understood differently by the parties, there is no meeting of the minds and no contract exists. *Id.* Some terms may be missing or left to be agreed upon, but the failure of the parties to agree upon essential terms of the contract indicates that the mutual assent required to make or modify the contract is lacking and that there is no enforceable contract. *Delcon Group v. Northern Trust Corp.*, 187 Ill. App. 3d 635, 643 (1989).

¶ 30 We reject plaintiffs' claim. Keith testified that he hired defendant to build his home. When Keith went to McMahon's office to hire him, Keith "asked [McMahon] to do it for a flat fee, which [McMahon] agreed to." Keith further testified that they discussed the duration of the project and that he agreed to pay defendant a $300,000 flat fee to construct his residence and agreed to reimburse defendant for expenditures that it made on plaintiffs' behalf to construct their home. Keith also stated that he agreed to no other payments and that McMahon never asked for any other payments. He acknowledged that the parties discussed the need to make timely selections and that he and Patricia agreed to do so. Keith also testified that he paid defendant $200,000 prior to terminating the firm. McMahon testified that plaintiffs did pay his firm $200,000 before termination and that

they still owed $100,000. The parties' testimony and conduct was sufficient for the jury to find that there was a meeting of the minds and an offer and acceptance as alleged by defendant.

¶ 31 C. Damages on Counterclaims

¶ 32 Next, plaintiffs argue that defendant failed to present sufficient evidence to support the jury's monetary damages award in its favor on defendant's counterclaim. They urge that the $113,600 award is based on conjecture and speculation and was excessive because defendant did not establish a reasonable basis for its computations. For the following reasons, we reject their claim.

¶ 33 The burden is on the party seeking damages to establish a reasonable basis for computing them. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 107 (2006). Damages must be proved with reasonable certainty and cannot be based on conjecture or speculation. *Id.* However, absolute certainty with regard to damages is not required. *Prairie Eye Center, Ltd. v. Butler*, 329 Ill. App. 3d 293, 302 (2002).

¶ 34 First, as previously noted, $100,000 remained outstanding of the $300,000 management fee the parties had agreed to. Second, plaintiffs claim that defendant never offered proof of what it paid to New Century. They note that McMahon testified that "around $77,000" was paid to New Century before defendant was terminated and that there was no testimony concerning who paid the invoice and that no invoice was ever offered into evidence. Plaintiffs also assert that McMahon never testified that he or his firm paid that invoice. We reject this claim because defendant never sought reimbursement for any amounts owed to this vendor. Next, as to Signature Trim, plaintiffs argue that defendant never offered any proof of a $10,000 payment to this vendor and that no invoice was offered into evidence or that the work was performed on the property. This claim also fails because McMahon testified as to this amount and plaintiffs never challenged the figure. Finally, we reject

plaintiffs' argument that defendant was not entitled to reimbursement for $3,600 in miscellaneous expenses. They claim that defendant offered no evidence, proof of payment or receipts to support his claim. However, McMahon testified as to this amount and his testimony was uncontradicted.

¶ 35 In sum, we cannot conclude that the jury erred in finding that plaintiffs owed defendant $113,600.

¶ 36 D. Exclusion of Exhibit

¶ 37 Plaintiffs' final argument is that the trial court abused its discretion in precluding them from referring at trial to an unsigned contract. They claim that defendant created the document, that plaintiffs signed it, and that it was given to defendant and never returned to plaintiffs. We reject this argument.

¶ 38 We review a trial court's decision on motions *in limine* and for a new trial for an abuse of discretion. *Alm v. Loyola University Medical Center*, 373 Ill. App. 3d 1, 4 (2007); *Schmitz v. Binette*, 368 Ill. App. 3d 447, 452 (2006).

¶ 39 In their original complaint, plaintiffs raised a breach-of-contract claim premised in part on the unsigned contract. The document they attached to their complaint contains an incomplete date, no completion time or contract sum, and no signatures. A judge (other than the one who presided over the trial) struck the document and dismissed the complaint. In their amended complaint, plaintiff did not plead any claim based on the unsigned contract, but alleged a breach of an oral contract. Prior to trial, the trial court granted defendant's motion *in limine*, barring reference to the unsigned contract.

¶ 40 At trial, during McMahon testimony as an adverse witness during plaintiffs' case-in-chief, plaintiffs asked McMahon what were the terms of his oral contract with them. Defendant's counsel

objected, and the trial court sustained the objection on the basis that it called for a conclusion, noting to plaintiffs' counsel that he would instead have to elicit what was stated by the parties and not their conclusions. Plaintiffs' counsel requested a sidebar, at which he made an offer of proof as to the unsigned contract, arguing that there was a meeting of the minds. The trial court again noted that counsel could question McMahon as to what the parties stated to each other, but that counsel could not indirectly present the contract that was barred by both the first judge and via a motion *in limine*. The court further noted that it would permit the parties to refresh the witness's recollection only if McMahon denied on cross-examination that a conversation took place; however, the document would not be admitted into evidence. In its subsequent examination of McMahon, plaintiffs' counsel did not refer to the contract.

¶ 41 We conclude that the trial court did not abuse its discretion. Plaintiffs pursued a breach-of-oral-contract theory and not breach of a written contract. Accordingly, the purported written contract was not material to plaintiffs' claim. Indeed, plaintiffs do not point to any provisions in the document that were critical to their claim. Further, as previously noted, the document was incomplete and, therefore, there are questions concerning its relevancy, materiality, and enforceability.

¶ 42 III. CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 44 Affirmed.