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2012 IL App (3d) 100820-U

Order filed April 30, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

BLACKSHOR SNOW REMOVAL & EXCAVATING, INC.,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois
Plaintiff-Appellant,	)	
v.	)	Appeal No. 3-10-0820 Circuit No. 09-SC-1902
LESLIE B. COHEN,	)	Honorable Joe Vespa, Judge, Presiding.
Defendant-Appellee.	)	

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justice Lytton concurred in the judgment.  
Justice Wright dissented.

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**ORDER**

- ¶ 1 *Held:* The circuit court's judgment for the defendant as to the plaintiff's claim for breach of a "time and materials" contract was not against the manifest weight of the evidence where the defendant presented evidence that the plaintiff did not perform all of the work or supply all of the materials reflected in its unpaid invoices.
- ¶ 2 Plaintiff Blackshor Snow Removal & Excavating, Inc. (Blackshor) sued defendant Leslie B. Cohen (Cohen) for breach of contract. Blackshor claimed that Cohen breached the parties'

oral "time and materials" contract by failing to pay for certain labor and equipment that Blackshor expended on a landscaping and hardscraping project performed at Cohen's home. After a bench trial, the circuit court ruled in favor of Cohen on Blackshor's claim for breach of contract. Blackshor appeals that judgment.

¶ 3

### BACKGROUND

¶ 4 Blackshor is a landscaping and snow removal company. During the Spring of 2008, Cohen hired Blackshor to perform a landscaping project at his home. The job consisted of both traditional landscaping (for example, laying sod and planting shrubs and trees) and "hardscraping," which involves the installation of pavers or blocks for the construction of patios, sidewalks, and driveways.

¶ 5 Pursuant to an oral agreement entered into by the parties, Blackshor was retained on a "time a materials" basis. In other words, Cohen agreed to pay Blackshor for the manhours it expended, the materials it provided, and the equipment it used on a per hour basis, at an hourly rate agreed to by the parties. Blackshor did not quote Cohen a price for the completion of the project.

¶ 6 Blackshor began working at Cohen's residence in early May 2008 and worked on an almost daily basis through the end of August 2008. Blackshor performed landscaping, installed sidewalks, a patio, and a timber retaining wall. Blackshor also began installing a paver driveway. It excavated the driveway, prepared the subsurface, and installed approximately one-half of the paver blocks. At that point, the project was temporarily delayed due to heavy rainstorms and the unavailability of Blackshor's crew leader. When Blackshor's crew returned to the site to complete the driveway installation, they were told that their services were no longer needed.

¶ 7 Cohen paid Blackshor's May and June invoices in full. However, Cohen challenged some of the charges included in Blackshor's later invoices and made only partial payment on some of those invoices. On September 5, 2008, Cohen sent Blackshor a letter and a spreadsheet detailing his exceptions to some of the charges included in the outstanding invoices. Cohen claimed that some of the work billed by Blackshor was either not performed or was billed at rates in excess of those agreed upon by the parties. In addition, Cohen maintained that some of the materials included in Blackshor's invoices had previously been billed to the defendant by third-party suppliers. Cohen also objected to Blackshor's charges for "lost time and gas" and for other charges incurred "clean[ing] up messes" created by Blackshor's crews. He claimed that Blackshor's crews had caused extensive "collateral damage" and had carelessly left dirt, soil, debris, and silica dust which Cohen had to remove from his house and from the street at his own expense. Cohen also complained about the quality of the work performed by Blackshor. Cohen enclosed two checks which he claimed were "in full satisfaction" in the amounts he determined were "reasonable, fair, and owing" on the remaining invoices. Cohen stated that, if Blackshor could "prove otherwise," he was "prepared to listen." However, Cohen stated in the letter that he made "no promises of future compensation at this time."

¶ 8 Blackshor sued Cohen for breach of contract. Blackshor claimed damages of \$9,077.00, the amount Blackshor claimed was due and owing for the time and materials Blackshor had expended on the project. Cohen filed a counterclaim alleging that the work was not performed in a workmanlike manner and seeking the recovery of certain costs and expenses associated with the completion of the driveway and the cleanup of construction debris allegedly left by Blackshor's crews. Cohen also raised accord and satisfaction as an affirmative defense.

Specifically, Cohen argued that, by accepting payment of an amount less than the amounts reflected in its invoices (*i.e.*, by cashing the checks that Cohen offered on September 5, 2008, "in full satisfaction" of the amounts due on the outstanding invoices), Blackshor reached an accord and satisfaction with Cohen as to all amounts that Cohen owed to Blackshor.

¶ 9 After a bench trial, the circuit court issued a Judgment Order ruling that Blackshor had "failed to sustain [its] burden that the alleged work was completed and in a workmanlike manner." Accordingly, the court found for Cohen as to Blackshor's claim for breach of contract. However, the circuit court rejected Cohen's accord and satisfaction argument and found for Blackshor as to Cohen's counterclaim. This appeal followed.

¶ 10 ANALYSIS

¶ 11 As Blackshor notes, because the parties entered into a "time and materials contract," the only issue presented is whether Blackshor actually performed the work and provided the materials and equipment reflected in its unpaid invoices.<sup>1</sup> Blackshor bears the burden of establishing these facts by a preponderance of the evidence. See, *e.g.*, *Dyduch v. Crystal Green Corp.*, 221 Ill. App. 3d 474, 477 (1991) (in order to meet its burden of proof on a breach of contract claim, the plaintiff must establish that it performed under the contract); see also *DeHeer-Liss v. Friedman*, 227 Ill. App. 3d 422, 427 (1991). We will affirm the circuit court's

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<sup>1</sup> See generally Philip L. Bruner and Patrick J. O'Connor, Jr., *Bruner and O'Connor on Construction Law*, Vol. 1, § 2:20 (2011) (a "time and materials contract is a form of open-ended cost reimbursement contract under which the contractor is paid merely for furnishing construction resources of labor and materials without significant performance risk," with labor costs computed at fixed hourly rates and materials provided at cost).

decision that the plaintiff failed to sustain its burden of proof as to this element unless it is against the manifest weight of the evidence. *DeHeer-Liss*, 227 Ill. App. 3d at 427.

¶ 12 According to the spreadsheet that Cohen sent to Blackshor with his September 5, 2008, letter (which was admitted into evidence), some of the work billed by Blackshor was either not performed or was billed at rates in excess of those agreed upon by the parties. Cohen's spreadsheet also stated that, in some instances, Blackshor had billed Cohen for materials that had been provided and billed to Cohen by third-party suppliers, not by Blackshor. Accordingly, Cohen's letter and spreadsheet suggested that Blackshor did not perform some of the work and did not supply some of the materials for which it billed Cohen.<sup>2</sup> Given this evidence, the circuit court's conclusion that the plaintiff failed to prove its performance under the parties' time and materials contract was not against the manifest weight of the evidence.

¶ 13 Blackshor argues that the circuit court erroneously required Blackshor to prove that the work was performed in a workmanlike manner. This argument is unavailing. It is irrelevant whether the work that was actually performed by Blackshor was done in a workmanlike manner.

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<sup>2</sup> This distinguishes Blackshor's case from cases in which we have awarded a contractor the cost of labor and materials that it indisputably provided pursuant to a time and materials contract. See, e.g., *Fischer v. McHenry State Bank*, 74 Ill. App. 3d 509, 512 (1979) (affirming trial court's award of \$21,000 to contractor for services rendered pursuant to a time and materials contract where "no worthwhile evidence was presented by the defendant at trial to contradict the accuracy of the plaintiffs' billings," the defendant never objected to the billings he received in the plaintiffs' monthly invoices, and "the total amount claimed by the plaintiffs [was] completely un rebutted").

There was evidence suggesting that Blackshor *did not perform* some of the work or supply some of the materials billed in its invoices. Such evidence supports the circuit court's judgment, irrespective of the quality of the work that Blackshor actually did perform. In sum, because there was evidence suggesting that Blackshor did not perform some of the work at all, it was not against the manifest weight of the evidence for the circuit court to conclude that Blackshor had failed to meet its burden of proof on its claim for breach of contract. "We review the trial court's judgment, not its rationale." *People v. Reed*, 361 Ill. App. 3d 995, 1000 (2005). Thus, we may affirm on any ground that the record supports, "regardless of whether the lower court relied on [that] ground[] and regardless of whether the lower court's reasoning was correct." *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995); see also *Reed*, 361 Ill. App. 3d at 1000; *People v. Johnson*, 392 Ill. App. 3d 897, 913 (2009). As noted above, there was evidence suggesting that Blackshor billed Cohen for work it never performed and for materials it did not provide. There was also evidence suggesting that Blackshor billed Cohen at rates which exceeded the rates agreed upon by the parties. Accordingly, the circuit court's judgment was correct, even if it was based on an erroneous or improper basis.

¶ 14 The dissent suggests that, because Blackshor has appealed only the legal question of whether the circuit court applied the proper standard in evaluating its complaint, we should decide the appeal on that basis alone, and we "should not consider any question of fact such as whether the billed work was actually performed." We disagree. As noted above, we review the circuit court's judgment, not its rationale, and we may affirm on any basis supported by the record. Here, in order to prevail on its claim for breach of contract, Blackshor was required to prove that it performed the work and provided the materials for which it billed Cohen. *See, e.g.,*

*Dyduch*, 221 Ill. App. 3d at 477 (in order to meet its burden of proof on a breach of contract claim, the plaintiff must establish that it performed under the contract). Because there is evidence in the record suggesting that Blackshor failed to make this required showing, we may affirm the circuit court's judgment, regardless of the circuit court's rationale or the arguments Blackshor makes on appeal.

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, we affirm the circuit court of Peoria County's judgment in favor of Cohen on Blackshor's claim for breach of contract.

¶ 17 Affirmed.

¶ 18 JUSTICE WRIGHT, dissenting:

¶ 19 Plaintiff, alone, appeals the court's ruling based on a question of law which requires *de novo* review of the law, not the facts. In this appeal, plaintiff has challenged only the court's application of the law regarding the initial complaint rather than challenging the court's findings of fact regarding the countersuit. I respectfully suggest this strategic decision dictates the outcome of this appeal. I emphasize there is no cross appeal by defendant and the factual issues raised in defendant's brief, namely, Issue I and Issue III, are beyond the scope of this appeal.

¶ 20 The difficulty in this case is that the trial court's finding the work was not unworkmanlike for purposes of defendant's burden of proof on the countersuit was inconsistent with the trial court's separate finding that plaintiff had not proved the work performed was workmanlike for purposes of the initial complaint. Yet, these inconsistent factual findings are inconsequential to the question of law presented in this appeal.

¶ 21 Here, plaintiff was not required to make any showing regarding the quality of their work and the unnecessary finding becomes irrelevant. The defense failed at trial because the trial court

found defendant did not prove the work was unworkmanlike. This finding is not challenged on appeal by plaintiff. Hence, the strategic decision to appeal on the basis of a question of law regarding burden of proof, controls the scope of our review.

¶ 22 Since there is no cross appeal by defendant, this court should not consider any question of fact such as whether the billed work was actually performed or whether an accord and satisfaction was reached. Therefore, I respectfully dissent. Plaintiff should prevail on appeal once the burden of proof has been properly assigned as a matter of law on the narrow question of workmanlike performance, which is the only issue the trial court found defeated the initial complaint.