

NOTICE  
Decision filed 10/23/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 130512-U

NO. 5-13-0512

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).

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ASAP CONTRACTING & ROOFING LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 12-SC-2084
	)	
JAMES NOLAN and LINDA NOLAN,	)	Honorable
	)	Thomas W. Chapman,
Defendants-Appellees.	)	Judge, presiding.

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JUSTICE SPOMER delivered the judgment of the court.  
Justices Stewart and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* Judgment of the circuit court denying plaintiff's breach of contract claim affirmed where the judgment was not against the manifest weight of the evidence.

¶ 2 The plaintiff, ASAP Contracting & Roofing LLC (ASAP), appeals the September 12, 2013, judgment of the circuit court of Madison County that denied its breach of contract claim against the defendants, James and Linda Nolan. For the following reasons, we affirm.

¶ 3 **FACTS**

¶ 4 On June 5, 2012, ASAP filed a small claims complaint against the Nolans for

breach of contract. The complaint alleged that ASAP had performed all of the conditions required of it under a contract between it and the Nolans, and that the Nolans breached the contract by failing to make final payment to ASAP. The Nolans filed a counterclaim on September 12, 2012, alleging, *inter alia*, ineffective workmanship. A bench trial was conducted on September 11, 2013.<sup>1</sup>

¶ 5 The relevant facts reflected in the bystander report are as follows. The Nolans reported hail damage to their property on June 15, 2010. In September 2010, Madison Mutual Insurance Company (MMIC) retained a third party to review the damages and provide an estimate of repair. The estimate totaled \$16,375.91, and included the cost of replacement of the damaged roof and gutters, as well as repairs to the damaged portions of the interior of the home. On September 7, 2010, the parties signed a contract for performance of the work. In a letter dated September 20, 2010, MMIC issued the Nolans a check for \$10,581.68, which represented the actual cash value (ACV) of the roof at the time of loss, pursuant to the ACV provision of the policy. The check was delivered to ASAP by the Nolans and the balance of the cost of replacement was to be paid by MMIC for the Nolans to deliver to ASAP upon completion of the work.

¶ 6 ASAP performed part of the work and sent MMIC a bill for \$24,369.38. Subsequently, ASAP, MMIC, and an adjuster agreed on a revised estimate of \$22,470.38.

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<sup>1</sup>No transcript of the proceedings exists in the record on appeal. However, a bystander report was filed as a supplement to the record on January 14, 2014, and the parties do not dispute the facts therein.

ASAP did not perform any of the interior work or the guttering, although both were included in the estimate of repair as well as the claim. The Nolans complained about the adequacy of ASAP's workmanship and MMIC approved payment of \$22,470.32<sup>2</sup> for the total amount of the loss. However, MMIC only approved payment of \$18,970 for ASAP's roofing work. The remaining \$3,500 was earmarked for the interior work and gutter repairs, which ASAP had not performed.

¶ 7 Chris Bruss was ASAP's operations manager at the time of the trial. He was not employed by ASAP when the roof was damaged nor when ASAP performed the work, but he visited the Nolans' residence and viewed the roof in February 2013. Bruss testified that ASAP performed the work and that the Nolans owed a balance of \$7,823.33. In addition to that amount, Bruss requested prejudgment interest and attorney fees, but limited ASAP's total request for damages to the small claims jurisdictional limit of \$10,000.

¶ 8 Pary Flynn testified that he is an experienced roofer who performs roofing and gutter installation. Flynn reported that ASAP's ineffective workmanship caused property damage to the Nolans' home and the numerous deficiencies included, *inter alia*, no flashing, nonstandard workmanship, traffic damage, broken shingles, improper adhesive used to repair leaks, and improper nail placement over the entire roof. Flynn did not submit an estimate of the cost to correct the defects, but he described ASAP's work as

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<sup>2</sup>Although \$22,470.38 was the amount agreed upon, the bystander report states that MMIC approved payment of \$22,470.32, a difference of six cents.

"extremely poor" and he explained that there would likely be future damage to the Nolans' residence due to the poor workmanship.

¶ 9 James Nolan testified that his wife coordinated the repairs for the loss and dealt with MMIC. However, she was unavailable to testify because she was undergoing chemotherapy. Nolan conceded that although he signed the contract with ASAP, he did not read all of the terms. Moreover, Nolan did not recall receiving the September 20, 2010, letter from MMIC informing the Nolans that the initial \$10,581.68 was for ACV only and the remainder of any payments would be forwarded when the work was completed by ASAP.

¶ 10 Nolan testified that he and his wife do not owe ASAP any money because the workmanship on their roof is defective. Nolan specified that ASAP neither completed the exterior work nor performed any interior work and that the roof leaked shortly after ASAP left the job. Nolan notified ASAP of the leak. Subsequently, a representative of ASAP came to the residence and applied silicone sealer to several locations on the roof. Nolan reported that the roof still leaks, but he did not notify ASAP of the same until the lawsuit was filed. ASAP did not attempt to further correct the work, pending the disposition of the lawsuit. Pursuant to the bystander report, Nolan presented evidence that ASAP failed to install new flashing, that there were 15 instances of chipped shingles—most of which were repaired with a silicone sealant, and that there was a leak in the Nolans' kitchen as well as a roof deflection issue—which Pary Flynn testified was not caused by ASAP. Nolan testified that he and his wife used \$10,000 of the insurance claim money to have new front doors installed on the residence, which was not a part of

the loss estimate. The Nolans paid \$925 to have the gutters replaced. The costs to perform the interior work and to correct the exterior work were not yet known. Accordingly, Nolan presented no evidence to that regard.

¶ 11 The bystander report reveals that ASAP did not obtain a building permit for performing the work, nor did ASAP have a roofing license at the time the contract was signed nor when the work was performed. Jesse Johnson testified that he never performed any work on the Nolans' property, but was involved for the sole purpose of holding a license to provide a permissible avenue for ASAP, which had no license, to perform the work for the Nolans.

¶ 12 The circuit court entered a judgment on September 12, 2013, finding in favor of the Nolans on ASAP's breach of contract claim, and finding in favor of ASAP on the Nolans' ineffective workmanship claim. ASAP filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 ASAP's sole issue on appeal is restated as whether the circuit court erred by finding in favor of the Nolans on the breach of contract claim. The applicable standard of review of a circuit court's judgment following a bench trial is whether the judgment is against the manifest weight of the evidence. *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 177 (2004). " 'A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.' " *Id.* (quoting *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001)). "A trial court's judgment following a bench trial will be upheld if there is *any* evidence supporting it." (Emphasis added.) *Nokomis Quarry*

*Co. v. Dietl*, 333 Ill. App. 3d 480, 484 (2002). "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.

¶ 15 "The ordinary rule applied in cases involving building contracts is that a builder is not required to perform perfectly, but rather he is held only to a duty of substantial performance in a workmanlike manner." *Brewer v. Custom Builders Corp.*, 42 Ill. App. 3d 668, 673 (1976). To recover under substantial performance, " '[i]t is sufficient that there is substantial performance in good faith or that there is an honest and faithful performance of the contract in its material and substantial parts, with no willful departure from, or omission of, the essential points of the contract.' " *Watson Lumber Co. v. Mouser*, 30 Ill. App. 3d 100, 105 (1975) (quoting *Broncata v. Timbercrest Estates, Inc.*, 100 Ill. App. 2d 49, 52 (1968)). A contractor may not recover on a contract if the work amounts to less than substantial performance. See *Howard v. Jay*, 203 Ill. App. 3d 539, 544 (1990).

¶ 16 Here, ASAP brought an action for breach of contract and the circuit court found in favor of the Nolans. We find evidence to support the circuit court's finding that ASAP did not substantially perform. Pursuant to the bystander report, ASAP did not perform any of the interior work or the guttering, although both were included in the estimate of

repair and the claim. Pary Flynn testified that ASAP performed substandard workmanship by not using flashing and because there was traffic damage to the roof, broken shingles, improper adhesive used to repair leaks, and improper nail placement over the entirety of the roof. Flynn testified that ASAP's work was "extremely poor" and that there would likely be future damage to the residence due to that poor workmanship. James Nolan testified that ASAP did not complete the work and that the roof still leaks. As earlier noted, the parties do not dispute the facts of the bystander report. Because the evidence supports a finding that ASAP did not meet its duty of substantial performance, we find the decision of the circuit court in favor of the Nolans on ASAP's breach of contract claim is not against the manifest weight of the evidence.

¶ 17 We are mindful that although a builder's breach of contract claim may not stand when the work amounts to less than substantial performance, recovery may still be obtained via a quasi-contractual theory for the reasonable value of the services rendered less the damage suffered by the purchaser. See *id.* However, because ASAP advanced no such claim, we need not consider any potential recovery to that regard.

¶ 18 Finally, we acknowledge discussion at oral argument regarding the propriety of the Nolans using \$10,000 of the supplemental insurance payments for new front doors, the same of which was not a part of the loss estimate. However, those facts are of no consequence to our analysis here, which is limited solely to whether the Nolans breached the contract with ASAP.

¶ 19

CONCLUSION

¶ 20 For the foregoing reasons, the September 12, 2013, judgment of the circuit court of Madison County, that denied ASAP's breach of contract claim against the Nolans, is affirmed.

¶ 21 Affirmed.