

No. 1-15-3018

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JERRY K. CONSTRUCTION AND DEVELOPMENT, INC.,)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 13 M1 104393
)	
JOZEF BUGAJ and ALFREDA BUGAJ,)	Honorable
)	Daniel P. Duffy,
Defendants-Appellees.)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held:* Court did not abuse its discretion in barring plaintiff construction company from calling defendants as trial witnesses because plaintiff did not disclose them as intended witnesses.

¶ 2 Plaintiff Jerry K. Construction, Inc. appeals from an order of the circuit court granting a directed finding at trial for defendants Jozej (or Jozef) and Alfreda Bugaj in plaintiff's action for breach of contract and unjust enrichment. Plaintiff contends on appeal that the court erred in

barring it from calling defendants as trial witnesses because it did not list them in discovery as trial witnesses. For the reasons stated below, we affirm.

¶ 3 In its complaint as amended, plaintiff raised claims of breach of contract and unjust enrichment. Plaintiff alleged that it was a corporation licensed for home remodeling and defendants owned certain residential real property (the premises). Plaintiff alleged that it performed a detailed list of work on the premises "in a good workmanlike manner," providing all the labor and most of the materials. The breach of contract count, Count I, alleged that the parties entered into an oral contract on or about December 6, 2009, and March 11, 2010, whereby plaintiff would perform services on the premises including carpentry, plumbing, electrical, duct, tile, and basement work in exchange for \$15,000 from defendants. Plaintiff alleged that it completed the contracted work on July 24, 2010, met all conditions precedent for payment, and repeatedly demanded payment of the \$15,000 but defendants refused to pay, which plaintiff alleged to be a material breach of the contract. The unjust enrichment count, Count II, alleged that plaintiff's work on the premises conferred a \$15,000 benefit upon defendants and it would be unjust and unreasonable to allow defendants to retain that benefit without paying plaintiff.

¶ 4 Defendants answered, admitting that they owned the premises but otherwise denying the substantive allegations of the complaint. They also filed a counterclaim, alleging that Jaroslaw Kubik holds himself out as one of the owners of plaintiff corporation, Jaroslaw and Arletta Kubik have a minor child, defendants are the child's grandparents through Arletta and take care of him when Arletta is at work, and Jaroslaw chose to gratuitously perform remodeling work on the premises between December 6, 2009, and July 24, 2010. Count I of the counterclaim alleged fraud from plaintiff alleging an oral remodeling contract between it and defendants, and defendants' breach of that contract, when plaintiff knew that there was no such contract. Count II

alleged, in the alternative, violation of the Home Repair and Remodeling Act (815 ILCS 513/1 *et seq.* (West 2014)) in that plaintiff alleged an oral remodeling contract and did not provide defendants a written contract or work order for the remodeling work as required by said statute.

¶ 5 Plaintiff answered the counterclaim, admitting that Jaroslaw holds himself out as an owner of plaintiff corporation and that he has a child with Arletta, neither admitting nor denying that defendants take care of the child, and denying that Jaroslaw performed remodeling work on the premises gratuitously. Plaintiff denied the substantive allegations of the counterclaims.

¶ 6 During discovery, plaintiff issued a discovery response disclosing only Jaroslaw as its intended witness.

¶ 7 The case went to trial on January 27, 2015. The record does not include a transcript for that date, but an order of that date states that plaintiff rested its case in chief, subject to cross-examination, and that defendants would file a motion for a directed finding.

¶ 8 Defendants filed a motion for a directed finding, arguing that plaintiff's trial evidence failed to make *prima facie* cases for the existence of an oral contract and for unjust enrichment. Plaintiff responded to the motion for a directed finding, arguing that its trial evidence established an oral contract. Plaintiff also argued that, while Jaroslaw was its only witness, defendants had not yet testified and "very well might" corroborate Jaroslaw's testimony, contradict his testimony but be deemed not credible, or leave his testimony uncontradicted by not testifying.

¶ 9 A hearing was held on the motion for directed finding on April 22, 2015. Following extensive arguments by the parties, the court granted a directed finding for defendants on both counts of plaintiff's complaint and entered judgment thereon. The court found that only Jaroslaw testified, plaintiff sought to call defendants as witnesses, and defendants objected as they were undisclosed witnesses. The court noted that Jaroslaw had testified at trial to being the sole

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employee of plaintiff corporation, owned by his sister, and to working on defendants' home only after his normal workday ended. He could not recall dates that he performed work, nor did he have any evidence of the number of hours that he worked or any receipts for materials provided. He could not testify to the date the oral contract was allegedly formed nor to its terms, and he testified that he did not state a specific total price for the work until it was nearly complete. He had testified to being neither trained nor licensed, to not obtaining any permits for work on defendants' home, and to not having work inspected by the appropriate authorities. On these facts recalled by the court, it found that a contract was not formed between the parties, noting the absence of the essential term of price before work began. As to unjust enrichment, "the only benefit that was testified to that was conferred was [Jaroslaw's] work on the project. However, there was no testimony as to the number of hours expended, no specific testimony as to what dates the work was done, and most importantly no testimony as to the value of the benefit conferred by the work, which Jaroslaw had testified to being "unfinished." Defendants made an oral motion to withdraw their counter-complaint, and the court dismissed it without prejudice.

¶ 10 Plaintiff filed a motion to reconsider. The motion noted that the court granted a directed finding for defendants after hearing only Jaroslaw and refusing plaintiff's call of defendants as witnesses. Plaintiff argued that there were no written motions related to discovery nor any motion to bar defendants' testimony, and that it was improper to bar plaintiff from calling defendants as witnesses. Plaintiff sought a new or reopened trial where it could call defendants as witnesses. Defendants responded to the reconsideration motion, noting that Jaroslaw was the sole witness disclosed by plaintiff in discovery; a copy of the discovery response was attached. Defendants argued that plaintiff was allowed at trial to call all the witnesses it disclosed, and also that plaintiff has the burden of proving its own case so that its reliance on defendants' testimony

to prove its *prima facie* case shows that it has no *prima facie* case. Plaintiff replied in support of its reconsideration motion, reiterating that there was "no motion to compel [and] no barring order," and arguing that there was no allegation that Jaroslaw as plaintiff's agent read or approved the discovery response in question.

¶ 11 On September 22, 2015, the court denied the reconsideration motion after arguments. The court noted that, because plaintiff made a discovery response including a witness disclosure, there was nothing for defendants to compel or bar until trial when plaintiff tried to call an undisclosed witness. The court found that Jaroslaw's trial testimony made it "clear there was no contract, and it was also clear there would have been nothing the other side could have offered to establish there was a contract." As to unjust enrichment, Jaroslaw's testimony made it "crystal clear" that plaintiff corporation does not have an unjust enrichment claim. Thus, the court concluded, a directed finding on both counts was proper. This appeal timely followed.

¶ 12 Before proceeding to address this appeal on its merits, we note that the record does not contain a report of proceedings or equivalent (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) for the first day of trial. Plaintiff, as appellant, bears the burden of providing a sufficiently complete record to support its claim of error. *Jackson v. Mount Pisgah Missionary Baptist Church*, 2016 IL App (1st) 143045, ¶ 60. In the absence of such a record on appeal, we presume that the trial court's orders were in conformity with the law and had a sufficient factual basis, and any doubt arising from the incompleteness of the record will be resolved against the appellant. *Id.* When the trial court imposes a sanction pursuant to a party's motion, we may presume that the reasons for the sanction are those stated in the motion absent a contrary indication on the record. *Id.*, ¶ 61.

¶ 13 On appeal, plaintiff contends that the court erred in barring it from calling defendants as trial witnesses because it did not list them in discovery as trial witnesses.

¶ 14 Supreme Court Rule 213 (eff. Jan. 1, 2007), governing interrogatories, provides in relevant part that, "[u]pon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information: *** Lay Witnesses. A 'lay witness' is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness." Ill. S. Ct. R. 213(f)(1). The Rule provides that "[t]he information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on direct examination at trial. *** Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial," though a party may cross-examine a witness it did not disclose. Ill. S. Ct. R. 213(g).

¶ 15 The Rule 213 disclosure requirements are mandatory and subject to strict compliance. *Jackson*, ¶ 56, citing *Sullivan v. Edward Hospital*, 209 Ill.2d 100, 109 (2004). A party is entitled to rely upon an opposing party's answer to Rule 213(f) interrogatories and expect that only witnesses disclosed pursuant to Rule 213(f) will be called to testify at trial. *Jackson*, ¶ 63.

¶ 16 A trial court's decision to impose a discovery sanction will not be reversed absent a clear abuse of discretion, and a court abuses its discretion only when no reasonable person would take the view adopted by the court. *Id.*, ¶ 62. In reviewing a sanction, we look to the same factors the trial court was required to consider. *Id.* The factors to be considered in determining whether excluding witnesses is appropriate are (1) surprise to the adverse party, (2) nature of the witness' testimony, (3) prejudicial effect of their testimony, (4) diligence of the adverse party, (5) whether

objection to the witness' testimony was timely, and (6) good faith of the party calling the witness.

Id. No single factor is determinative. *Id.* Relevant considerations in assessing prejudice include the strength of the undisclosed evidence, likelihood that prior notice could have helped the opposing party discredit the evidence, feasibility of continuance rather than a more drastic sanction, and willfulness of the proponent in failing to disclose the witnesses. *Id.*, ¶ 65.

¶ 17 Here, plaintiff argues that calling defendants as trial witnesses would not be a surprise to defendants as a party. While it is true that defendants could not be surprised by the content of their own testimony, they were entitled to presume that only witnesses disclosed by plaintiff in discovery would be called by plaintiff at trial. Plaintiff argues that defendants were not diligent in discovery or in raising their objections in court. However, as the trial court ably explained, defendants would have no reason to object to being called as trial witnesses until they were so called. They indeed "did not engage in the Rule 201(k) process and never pursued any judicial remedy for any purported discovery deficiencies," but did not make a "last minute technical ambush" as plaintiff argues, because plaintiff's discovery responses at issue did not reflect any relevant deficiency until plaintiff tried to call undisclosed witnesses at trial.

¶ 18 We consider the nature of the court's disposition of the case – a directed finding for defendants following the testimony of plaintiff's sole employee, Jaroslaw – to be crucial. Plaintiff had to establish that it reached an oral contract with defendants, performed the work called for by that contract, and was not paid for that work. For an unjust enrichment claim, plaintiff had to establish that it performed work for defendants under such circumstances as to convey a benefit to them for which they should have paid but did not. Had plaintiff deemed the testimony of defendants key to making those showings, it should have disclosed them as witnesses at some point before trial. "[T]his is all information that plaintiff would have known from the inception

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of the lawsuit he would need to prove." *Jackson*, ¶ 66. It did not. Moreover, as plaintiff's sole employee and agent who allegedly formed the contract with defendants and performed all work thereunder, Jaroslaw's evidence should have been sufficient to state a *prima facie* case, with any testimony from defendants serving merely as corroboration. As plaintiff noted in response to the directed finding motion, defendants' testimony could either corroborate Jaroslaw's testimony, contradict his testimony but be deemed not credible by the court, or leave his testimony uncontradicted if they did not testify. However, the trial court found after hearing Jaroslaw's testimony that it failed to show that the essential contract term of price was established before work began. The trial court found that his testimony that he received a salary from plaintiff and performed the work in question for defendants in his off-hours established that any unjust enrichment claim that may exist lay with Jaroslaw and not plaintiff. Under such circumstances, we cannot conclude that allowing plaintiff to call defendants as witnesses would have changed the outcome of this case. In sum, we cannot conclude that the trial court abused its discretion by not allowing plaintiff to call defendants despite its failure to disclose them.

¶ 19 Accordingly, the judgment of the circuit court is affirmed.

¶ 20 Affirmed.