2017 IL App (1st) 160321-U

No. 1-16-0321

Third Division
February 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

GALAXY ENVIRONMENTAL, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff and Counterdefendant-Appellant,	)	Cook County.
	)	
	)	No. 12-L-7185
v.	)	
	)	Honorable
KONSTANTINOS ANTONIOU,	)	Jeffrey Lawrence,
	)	Judge, presiding.
Defendant and Counterplaintiff-Appellee.	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court did not abuse its discretion in declining to employ judicial estoppel where there was no evidence that defendant intended to deceive bankruptcy court in failing to disclose potential *quantum meruit* claim. Trial court's finding for defendant on *quantum meruit* claim was not against the manifest weight of the evidence.

¶ 2 Plaintiff and counterdefendant, Galaxy Environmental, Inc. ("Galaxy"), brought a complaint against defendant and counterplaintiff, Konstantinos Antoniou, seeking the repayment of several loans. During trial, both parties amended their pleadings and Antoniou

added a counterclaim under a theory of *quantum meruit*. Following a bench trial, the trial court found for Antoniou on his *quantum meruit* claim and awarded him $251,956. It found for Galaxy on a theory of unjust enrichment based upon the loans and awarded it $84,457. Galaxy appeals, contending that the trial court (1) erroneously allowed Antoniou to amend his complaint to add his *quantum meruit* claim because it was judicially estopped and, alternatively, (2) that it's finding for Antoniou was unsupported by the record. We affirm.

¶ 3 BACKGROUND

¶ 4 Galaxy is a construction and contracting company, of which George Salinas is the sole shareholder. Salinas met Antoniou through a mutual business associate and the two began a business relationship in late 2008. On June 26, 2012, Galaxy filed a complaint against Antoniou alleging that it had made several loans totaling over $400,000 to Antoniou over a three year period ending in January 2012, which he failed to repay.

¶ 5 A bench trial commenced on September 28, 2015. During the course of the trial, both parties made amendments to their pleadings. On September 20, 2015, Galaxy made an oral motion to amend its pleadings and file an amended complaint. Antoniou then moved to amend his answer and file a counterclaim for unpaid services. Galaxy objected, arguing that the new counterclaim was an unfair surprise. Following argument, the trial court allowed both parties to amend.

¶ 6 On October 1, 2015, Galaxy filed its amended complaint adding a count asserting unjust enrichment. Antoniou filed his counterclaim asserting that Galaxy had breached an oral employment contract to pay him $1,850 per week for 138 weeks of employment. Galaxy filed a motion to dismiss the counterclaim pursuant to subsection 2-619(a)(5) of the Code of

Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2014)), arguing that any contractual claim was barred by the statute of limitations. The trial court denied the motion.

¶ 7 On October 6, 2015, Antoniou moved for leave to amend his counterclaim to add a claim in *quantum meruit*. Galaxy objected to the amendment "for the reasons stated before the initial filing of the counterclaim." The trial court granted Antoniou leave to file the amended counterclaims. The trial proceedings were then continued to November 5, 2015.

¶ 8 The following relevant evidence[1] was adduced at trial. Salinas testified that he met Antoniou in a meeting with accountant Daniel Greenman in the middle of 2008. Antoniou was experiencing severe financial problems including a personal bankruptcy at the time. At the meeting, Salinas agreed to help Antoniou "get back on his feet" by loaning him funds to pay both personal and business expenses. Salinas anticipated that Antoniou would win lucrative contracts for Galaxy. He intended the construction business generated to be structured as a joint venture between Galaxy and either Antoniou or one of his businesses. Galaxy entered two documents memorializing the terms of the profit-sharing for two such ventures. Salinas testified that Antoniou was not an employee but an independent partner of Galaxy and would share in the profits of any business he brought to the company. Salinas did, however, give Antoniou the title of vice president with Galaxy in January 2009, "making it easier for [him] to win construction contracts on Galaxy's behalf.

¶ 9 Salinas informed his business administrator, Wendy Arroyo, that Antoniou would be paying his personal and business expenses through Galaxy and that such payments were to be treated as loans. Arroyo was to check with both Salinas and Antoniou before making any payments and to keep a record of these loans. Galaxy also made payments into a "Netspend"

[1] We note briefly that several witnesses testified at great length regarding the specific details of various amounts paid by Galaxy purportedly on behalf of Antoniou in regards to Galaxy's loan claims. However, as neither party contests the trial court's rulings regarding those claims on appeal, that testimony is not relevant to our analysis.

account on Antoniou's behalf. Salinas testified that the Netspend account was solely used for Antoniou's own expenses and that none of the Netspend payments were used for the benefit of Galaxy. Galaxy entered a statement of the Netspend account into evidence and the parties stipulated that Galaxy had rendered payment of $89,371. Salinas also testified that Galaxy made 24 loans to Antoniou totaling nearly $81,300. The loans were made with no interest. He first testified that they were to be paid back "on demand," but later testified that they were to be paid back out of the profits of joint ventures.

¶ 10 Salinas's testimony regarding Arroyo's payment of Antoniou's expenses and payments made into the Netspend account were corroborated by the largely similar testimony of Arroyo. Arroyo identified several emails to and from Antoniou or his accountants discussing payments made. She also identified a large binder in which a record of the loans was kept that is not included in the record on appeal. The emails and binder were admitted into evidence. Arroyo further testified that Salinas and an employee named Michael Chagoya were the highest paid employees at Galaxy. She identified tax records that listed the individuals' salaries for 2009 to 2010 as $59,044 and $54,700, respectively.

¶ 11 Antoniou testified that he had extensive experience in the construction industry and had owned and operated multiple construction companies. He became an employee of Galaxy in the latter part of 2008 and received the title of vice president in 2010 or 2011. His duties included estimating jobs, bidding for jobs, communicating with general contractors, and supervising projects. He also consulted with Salinas on the general operations of the company, including how to improve efficiency and profitability. He worked over 40 hours per week. Antoniou also introduced numerous exhibits into evidence, including emails between himself and both Galaxy's employees and its clients discussing business matters.

¶ 12 Roger Householder, a former accountant for Galaxy, testified that he met with Salinas on August 5, 2010, and reviewed various aspects of Galaxy's operations. Salinas informed Householder that Antoniou was the vice president of operations and earned a salary of $1,850 per week, but that the salary was deferred. Following Householder's testimony, Galaxy introduced evidence that the accountant had previously been convicted of fraud by a federal court.

¶ 13 Finally, on November 5, 2015, Galaxy introduced evidence that Antoniou had filed a voluntary bankruptcy petition in 2009 in which he was required to list his sources of income. He disclosed $22,877 in income from the operation of various business entities, but did not list any income from Galaxy. In a later filing in the bankruptcy proceedings made September 22, 2009, Antoniou was required to disclose litigation pending against him, as well as any claims he held. He disclosed several of such claims, but did not disclose any claim against Galaxy.

¶ 14 On January 4, 2016, the trial court filed a written order in which it found that both parties had failed to sufficiently prove their contract claims, noting that both parties' business records could "best be described as chaotic." The court explained that both Galaxy and Antoniou were entitled to recompense under their alternate claims. It found that the evidence supported a finding in Galaxy's favor of $84,457 based on the amounts it had paid for Antoniou's personal expenses under a theory of unjust enrichment. The court then found that Antoniou was employed by Galaxy from December 1, 2008, until August 31, 2011, and that $1,850 per week was reasonable compensation for his services. It ruled that Antoniou was therefore entitled to $265,347 for his services under a theory of *quantum meruit*. Noting that the record reflected that Galaxy had paid one of Antoniou's corporations $13,391 for

"consulting services," the trial court ordered that his award be offset by that payment, for an ultimate award to Antoniou of $251,956.

¶ 15 Galaxy subsequently timely filed a notice of appeal seeking to appeal the "Memorandum Opinion and Order entered on January 4, 2016."

¶ 16 ANALYSIS

¶ 17 Initially, we note that both parties' briefs on appeal are disorganized and at times incohesive. See *Twardowski v. Holiday Hospital Franchising, Inc.*, 321 Ill. App. 3d 509, 511, (2001) (This court is "entitled to have briefs submitted that present an organized and cohesive legal argument in accordance with the Supreme Court Rules.") Our review is further hampered by both parties' inadequate statements of fact, which omit relevant evidence, furnish erroneous cites to the record, and exaggerate or even misrepresent the facts in evidence. See Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016) (Appellate briefs shall include "Statement of Facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal.") However, while the insufficiency of the parties' briefs hinders our review, the merits of the case are readily ascertained from the record on appeal and we therefore choose to reach the merits. See *Twardowski*, 321 Ill. App. 3d at 511.

¶ 18 Before reaching the individual issues raised by Galaxy, we must also address Antoniou's general contention that the record on appeal is incomplete. He asserts that Galaxy has not included a large binder and several other exhibits entered into evidence by the company. Antoniou correctly asserts that an appellant bears the burden of presenting a sufficiently complete record on appeal, and that any doubts resulting from an incomplete record must be resolved against the appellant. See *Lewandowski v. Jelenski*, 401 Ill. App. 3d 893, 902

(2010). However, he does not specify any doubt or prejudice arising from the missing exhibits, nor does he identify what inferences must be presumed from the documents' absence. Having reviewed the record, this court has found no indication that the exhibits in question are relevant to the issues on appeal, and thus we find the record sufficiently complete to allow our determination of the merits.

¶ 19 Judicial Estoppel

¶ 20 Galaxy first contends that the trial court erred in allowing Antoniou to file his counterclaims because he was judicially estopped by his prior filings in his bankruptcy proceedings. Antoniou responds that this court does not have jurisdiction to address this issue on appeal because Galaxy's notice of appeal states only that the court's final judgment was being appealed and does not indicate the October 1, 2015, order that granted him leave to file his counterclaims. He argues alternatively that Galaxy did not raise this argument in the trial court and has thus forfeited it.

¶ 21 We have jurisdiction to review both of Galaxy's claims. This court liberally construes notices of appeal, particularly where there is no prejudice to an opposing party. *In re Estate of Stewart*, 2016 IL App (2d) 151117, ¶ 128. It is well settled that "an appeal from a final judgment draws into issue all prior nonfinal orders [that] produced the final judgment." *Dowell v. Bitner*, 273 Ill. App. 3d 681, 688. This court may review a nonfinal order not specified in the notice of appeal so long as that decision was part of the procedural progression leading to the final judgment. *Stewart*, 2016 IL App (2d) 151117, ¶ 128. Clearly, the October 1 order allowing Antoniou's counterclaim was a procedural step leading to the ultimate disposition of that claim in the January 4 order. Therefore, Galaxy's identification of

only the latter order in its notice of appeal does not deprive this court of jurisdiction to review the earlier order.

¶ 22 Although we disagree with Antoniou's jurisdictional argument, we find his argument regarding forfeiture persuasive. Generally, a party forfeits all issues not raised in the trial court and may not raise such an argument for the first time on appeal. *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, ¶ 24. There is no evidence in the record that Galaxy ever argued before the trial court that judicial estoppel precluded Antoniou's amending of his pleadings to add his counterclaims. Galaxy did not address Antoniou's bankruptcy until November 5, 2015, when it entered his bankruptcy filings as substantive evidence in the trial. Although the trial court took notice of the "judicial estoppel" argument, this occurred almost a month after the trial court granted Antoniou leave to amend his pleadings with a *quantum meruit* claim. It is clear from both the timing and context of the argument that Galaxy argued judicial estoppel solely as an affirmative defense to the claims at trial and not, as it now argues on appeal, as a barrier to the filing of the claims in the first place. However, the forfeiture rule is an admonition to the parties and not a limitation on the jurisdiction of this court. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 504-05 (2002). Because the trial court did consider the judicial estoppel argument in the context of its final judgment and it is at least arguable that Galaxy incorporated its judicial estoppel argument into its arguments against the trial court's findings for Antoniou on the *quantum meruit* issue, we address the issue in that context.

¶ 23 Judicial estoppel is an equitable doctrine invoked to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Seymour v. Collins*, 2015 IL 118432, ¶ 36. The doctrine is

applicable "when litigants take a position, benefit from that position, and then seek to take a contrary position in a later proceeding." *Id.* The doctrine "is flexible and not reducible to a pat formula." *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 46. However, our supreme court has noted five prerequisites that are generally required in order to invoke the doctrine of judicial estoppel: "The party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *Seymour*, 2015 IL 118432, ¶ 37. Once a court has determined that the prerequisites are present, "the trial court must determine whether to apply judicial estoppel- an action requiring the exercise of discretion." *Id.* ¶ 47. The court may consider multiple factors including "the significance or impact of the party's action in the first proceeding, and *** whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake." *Id.*

¶ 24 Judicial estoppel must be proven by clear and convincing evidence because the "evidentiary standard properly accounts for a degree of caution with which this doctrine should be considered and applied." *Id.* ¶ 39. The party seeking to utilize estoppel bears the burden of proof. *Smeilis,* 2012 IL App (1st) 103385, ¶ 20.

¶ 25 Given the equitable nature of judicial estoppel, a trial court's determination regarding judicial estoppel is typically reviewed for an abuse of discretion. See *Seymour,* 2015 IL 118432, ¶ 48. However, Galaxy argues that *de novo* review is proper because our supreme court noted in *Seymour* that "[w]hen a court is required by law to exercise its discretion, the failure to do so may itself constitute an abuse of discretion, precluding deferential consideration on appeal." *Id.* ¶ 50. The court in that case found no deferential review was

required because the lower court had found that "the mere failure to disclose the personal injury cause of action in the bankruptcy proceeding, mandated dismissal" and thus the lower court had not exercised its discretion. *Id.* In the present case there is no such affirmative evidence that the trial court failed to exercise its discretion, and accordingly we proceed under the abuse of discretion standard. An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court. *Id.* ¶ 41.

¶ 26 Galaxy argues that the five prerequisites for judicial estoppel have been met: Antoniou (1) took two positions by failing to disclose his employment and wage claim in bankruptcy and then later alleging the claim against Galaxy, (2) the failure to disclose is inconsistent with his present allegations, (3) the positions were both given in judicial proceedings, (4) Antoniou intended for both the bankruptcy court and the court below to believe him, and (5) he received the benefits of bankruptcy due to his failure to disclose. However, even if we accept Galaxy's contention, *arguendo*, this only brings us to the second step of the judicial estoppel analysis.

¶ 27 Judicial estoppel is an extraordinary doctrine that should be applied with caution because it "precludes a contradictory position without examining the truth of either statement." (Internal quotation marks omitted.) *Moy v. Ng*, 371 Ill. App. 3d 957, 964 (2007). Notably, the question of whether there was an intent to deceive or mislead is a "critical factor" in deciding whether to apply judicial estoppel.[2] *Seymour*, 2015 IL 118432, ¶ 54. Galaxy has not produced clear and convincing evidence that Antoniou intended to deceive or mislead the bankruptcy court. Although it argues that Antoniou's assertion that he worked more than 40

[2] Although there are other factors which may be considered in determining whether to apply judicial estoppel, Galaxy argues solely that Antoniou's failure to disclose was "a calculated decision."

hours a week is so inconsistent with his failure to disclose Galaxy as an employer that we must infer that he acted with intent to deceive, the mere presence of an inconsistency does not mandate the application of judicial estoppel. See *id.* ¶ 47. Similarly, the mere failure to meet a legal obligation to disclose does not establish the intent to deceive or manipulate a bankruptcy court. See *id.* ¶ 64. In 2009, Antoniou did not disclose employment with Galaxy in bankruptcy proceedings that required disclosure of his income and legal claims. However at that time, according to Antoniou's claims, Galaxy was not actually providing wages to him. Galaxy has provided no evidence that leads to the conclusion that Antoniou's failure to disclose the then nonpaying employment was not inadvertent or a mistake. Accordingly, the trial court did not abuse its discretion in declining to exercise judicial estoppel.

¶ 28 The Trial Court's Factual Findings

¶ 29 Galaxy next contends that the trial court erroneously found in Antoniou's favor on his *quantum meruit* claim. It argues that Antoniou failed to prove the fair market value of his services, that the evidence showed that Galaxy employees were paid less, and that the trial court did not take into account money paid by Galaxy to Antoniou's businesses. Antoniou responds that the record reflects ample evidence supporting his *quantum meruit* claim.

¶ 30 We first must address our standard of review. Galaxy asserts, without legal citation, that the abuse of discretion standard applies to the trial court's *quantum meruit* award; that assertion is incorrect. It is well-settled that the judgment of the trial court following a bench trial will be reversed only if it is against the manifest weight of the evidence. *Longo Realty v. Menard, Inc.*, 2016 IL App (1st) 151231, ¶ 19; see also *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 978-79 (2010). A judgment is against the manifest weight of the evidence only where the opposite conclusion is apparent or the findings are

unreasonable, arbitrary, or not based on the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). In other words, we will uphold the trial court's judgment following a bench trial "if there is any evidence supporting it." *Nokomis Quarry Co. v. Dietl*, 333 Ill. App. 3d 480, 484 (2002).

¶ 31 *Quantum meruit* is an equitable remedy to provide restitution for unjust enrichment, frequently used where alternative contract claims fail. *Cove Management v. AFLAC, Inc.*, 2013 IL App (1st) 120884, ¶ 34. To recover under a theory of *quantum meruit*, a plaintiff must prove (1) he performed a service to benefit the defendant, (2) he did not perform this service gratuitously, (3) the defendant accepted this service, and (4) no contract existed to prescribe payment for this service. *Installco Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 781 (2002). The burden is on the party seeking recovery, who "must show that valuable services" were furnished by the party and received by the defendant, and that it would be unjust for the defendant to retain these without paying for them. See *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 9 (2004) Accordingly, "the measure of recovery is the reasonable value of work" (*Id.* at 9), and, in order to recover under this doctrine, the provider must prove that the services performed were "of some measurable benefit to the defendant" (*Van C. Argiris & Co. v. FMC Corp.*, 144 Ill. App. 3d 750, 753 (1986)).

¶ 32 Evidence exists in the record to support the trial court's judgment. Antoniou testified that he provided services including managerial duties, contract negotiating and bidding, and consulting with Salinas. This testimony was corroborated by emails which showed Antoniou performing such tasks with both Galaxy's employees and clients, as well as by his title of vice president. Thus, evidence before the trial court supported a finding that Antoniou performed beneficial services for Galaxy and that Galaxy accepted those services. Given

Antoniou's testimony regarding his experience in the construction field, the trial court had evidence to support an inference finding that the services rendered by Antoniou were valuable to Galaxy. Moreover, Householder provided testimony that Galaxy stated that it paid Antoniou $1,850 per week in 2010. This testimony suggests an agreed upon valuation of the benefit Antoniou brought to Galaxy, supporting the trial court's award of $1,850 per week. Galaxy argues that if Householder's testimony were to be believed, the $1,850 per week figure would only be applicable from 2010 onwards and not retroactively to the beginning of Antoniou's employment. However, Householder's testimony was not that Galaxy agreed to pay that amount in the future, but that it was at that time paying him that salary. Regardless, the agreement to pay in the future would still provide some evidence to support the value of Antoniou's work to the company. Accordingly, we cannot say that the trial court's award was against the manifest weight of the evidence.

¶ 33 Galaxy argues that the trial court's findings were erroneous because Householder was impeached by a prior fraud conviction and thus his testimony is unreliable. We afford great deference to the trial court's credibility determinations in a bench trial " 'because the fact finder is in the best position to evaluate the conduct and demeanor of the witnesses.' " *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35 (quoting *Samour, Inc. v. Board of Election Commissioners*, 224 Ill. 2d 530, 548 (2007)). Accordingly we defer to the trial court's determinations of credibility findings.

¶ 34 Galaxy asserts that the tax forms indicating it paid other employees less than the amount awarded to Antoniou and the two profit sharing agreements from specific projects contradict the trial court's findings. It is the fact finder's role to resolve inconsistencies in the evidence. See *Kunkel v. P.K. Dependable Const., LLC*, 387 Ill. App. 3d 1153, 1158 (2009).

Furthermore, the cited documents evidence do not actually contradict the trial court's findings. The fact that Galaxy paid other employees less does not foreclose the possibility of the company agreeing to pay Antoniou more. Similarly, although the existence of the profit sharing agreements with the two specific projects provides some evidence of the relationship between Galaxy and Antoniou, it does not directly indicate that the parties did not interact differently on other ventures. The presence of some contrary evidence supporting Galaxy's arguments does not render the court's ruling against the manifest weight of the evidence.

¶ 35 Galaxy also argues that the trial court failed to account for payments it made to Antoniou's business which served as recompense for any services provided. This assertion is belied by the record. The court clearly understood that payments had been made to companies owned by Antoniou because it explicitly offset his award by some of those payments.

¶ 36 We note in closing that Galaxy ends its reply brief with the conclusory assertion that "the trial court erred in its calculation of the damages." However, it offers no explanation of such an error and does not provide an alternative calculation for the damages. See *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007) ("A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented.") As such, we understand Galaxy's challenge to concern the fact that *quantum meruit* damages were awarded at all, and not to the specific amount rewarded.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons we find that the trial court did not abuse its discretion in declining to employ the equitable remedy of judicial estoppel against Antoniou and that its

finding for Antoniou on his *quantum meruit* claim was not against the manifest weight of the evidence. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 39 Affirmed.