

No. 1-16-0389

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 DISTRICT

CONTINENTAL GROUP, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee/Cross-Appellant,	)	Cook County
)	
v.	)	No. 13 L 499
)	
ALL ACCESS INTERNATIONAL, INC., a/k/a ALL)	
ACCESS LOGISTICS, INC.,	)	Honorable
	)	Thomas R. Mulroy,
Defendant-Appellant/Cross-Appellee.	)	Judge, Presiding.
)	
ALL ACCESS INTERNATIONAL, INC., a/k/a ALL	)	Appeal from the
ACCESS LOGISTICS, INC.,	)	Circuit Court of
	)	Cook County
Counterplaintiff-Appellant/Cross-Appellee,)	
)	
v.	)	No. 13 L 499
)	
CONTINENTAL GROUP, LLC, SPARTAK)	
CORPORTATION, N.P. ENTERPRISES, INC.,)	
ANGEL BOTEV, and NIKOLA PANAYOTOV,	)	Honorable
	)	Thomas R. Mulroy,
Counterdefendants-Appellees/Cross-Appellants.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the trial court, which found that the counterplaintiff failed to prove its claims of fraud, civil conspiracy to commit fraud, breach of contract, and violations of the RICO Act, was not against the manifest weight of the evidence where the counterplaintiff failed to provide a reasonable basis for the computation of damages.

¶ 2 The counterplaintiff, All Access International, Inc., a/k/a All Access Logistics, Inc. (All Access), appeals from an order of the trial court granting judgment in favor of Continental Group, LLC, Spartak Corporation, N.P. Enterprises, Inc., Angel Botev, and Nikola Panayotov (collectively referred to as the counterdefendants) on All Access's counterclaims, which asserted fraud, civil conspiracy to commit fraud, breach of contract, and violations of the Racketeer Influenced and Corrupt Organization (RICO) Act (18 U.S.C. § 1961 *et al.* (West 2012)), arising from the counterdefendants' alleged overbilling for trucking services. On appeal, All Access contends that it sustained its burden of proof for each counterclaim. For the reasons that follow, we affirm.

¶ 3 The following factual recitation is taken from the pleadings, testimony, and exhibits of record.

¶ 4 In early 2008, All Access was in the business of brokering delivery services between clients and trucking companies. One client, Panalpina, a freight-forwarder, invited All Access to bid on a contract to provide vehicles, drivers, and dispatchers at Panalpina's warehouse in Elk Grove Village. Salvatore Marcello, an "owner" of All Access, prepared the bid with assistance from Panayotov, who previously worked with Panalpina.¹ In August 2008, All Access secured the contract and hired Panayotov as its director at Panalpina.

¹ Although the record only identifies Marcello as an "owner" of All Access, we observe that this term is inappropriate because All Access is a corporation.

¶ 5 All Access leased a fleet of vehicles and gave Panayotov authority to hire drivers, who earned \$12 to \$20 per hour; and owner-operators, who provided their own vehicles, drivers, and fuel, and received \$30 to \$35 per hour. Spartak Corporation (Spartak), whose sole shareholder was Angel Botev, was one such owner-operator. Another owner-operator, Continental Group, LLC (Continental), consisted of two members: Spartak and N.P. Enterprises, Inc., whose sole shareholder was Panayotov.

¶ 6 All Access typically paid drivers and owner-operators on an hourly basis. As an exception, it paid Continental a flat rate for work performed during the "third shift" and for deliveries to Sigma, a company located in Milwaukee. Additionally, Continental received 75% of All Access's billing rate for pick-ups that Continental's drivers made on the return route from Sigma to Panalpina. Drivers punched their timecards at Panalpina and emailed invoices to Margaret Woss, an All Access employee. Under Panayotov's supervision, Woss collected the timecards, compared them against the invoices, and entered the data into spreadsheets for payroll.

¶ 7 In February 2012, Marcello began examining All Access's operating costs and hired a company to investigate the relationship between Botev, Panayotov, Spartak, and Continental. Based on the investigation, All Access refused to pay Continental's invoices from July 31 to September 20, 2012.

¶ 8 Continental filed a complaint against All Access in January 2013, seeking \$119,646.50 in damages for the unpaid invoices. Count I alleged breach of contract. Count II alleged that, by failing to object to the invoices, All Access admitted liability for the accounts stated.

¶ 9 All Access filed a counterclaim against the counterdefendants in April 2013. Counts I and II sought treble damages totaling \$990,000 and \$150,000, respectively, for violations of the

RICO Act (18 U.S.C. § 1961(c) (West 2012)). Count III sought \$330,000 in damages for alleged fraud by Continental, and count IV sought \$380,000 in damages for civil conspiracy to commit fraud by all the counterdefendants. Common to all the counts, All Access alleged that Continental sent inflated invoices and used All Access's credit cards for unauthorized fuel purchases.

¶ 10 The case proceeded to a bench trial in September 2015.

¶ 11 Continental called Botev and Panayotov as witnesses. According to their testimony, Panayotov hired Botev as a driver for All Access in February 2009. Botev and Panayotov later formed Continental, which sent additional drivers and vehicles to All Access. Panayotov provided Continental with billing information for pick-ups that its drivers made on the return route from Sigma to Panalpina. However, All Access sometimes paid Continental's invoices late or did not pay in full. Botev authenticated the unpaid invoices and stated that both he and Panayotov discussed the late payments with Marcello. Panayotov denied knowing why All Access did not pay the invoices. Following Botev's and Panayotov's testimony, Continental rested its case-in-chief.

¶ 12 In its defense and in support of its counterclaims, All Access called Marcello as a witness. In 2011 and 2012, Marcello met with Panayotov and Botev to discuss operating costs, driver hours, and the number of drivers working. Panayotov requested higher rates for Botev and raised concerns regarding late payments to Continental. According to Marcello, Continental's invoices were "substantially" lower after Panayotov left All Access in June 2012.

¶ 13 In July 2012, Marcello hired a company to investigate the relationship between Panayotov, Botev, Continental, and Spartak. During the investigation, All Access searched for timecards from 2009 to 2011, but only found timecards and daily logs from January through July

2012. Marcello stated that All Access kept the timecards at Panalpina, and denied that Panayotov told him that Panalpina wanted the records moved. During the investigation, Marcello learned that Continental's drivers purchased fuel using All Access's credit cards and that Continental refused to provide records for its own fuel account. In August 2012, Panayotov and Botev met with Marcello and requested payment on six weeks of invoices. Marcello refused to pay due to the investigation.

¶ 14 Margaret Woss, who worked in billing and payroll for All Access, testified that All Access's timecards and billing records did not indicate whether drivers operated vehicles belonging to All Access, Spartak, or Continental.

¶ 15 All Access proffered testimony from dispatchers and drivers, who testified that Continental's drivers operated All Access's vehicles from once per week to several times per day and that drivers for Continental or All Access were assigned to the vehicles based on need and availability. On at least one occasion, Panayotov instructed an All Access driver to purchase fuel using an All Access credit card although drivers for Continental had also operated the vehicle.

¶ 16 Investigator Carl Novak testified that he examined All Access's driver log sheets, fuel receipts, timecards, credit card records, and delivery order forms from January 1 through July 1, 2012. Novak also received a list of drivers for Continental and All Access. Using this information, he calculated that Continental's drivers used All Access's credit cards to purchase \$10,304.79 in fuel for All Access's vehicles. As Novak did not receive mileage information, he could not determine whether Continental's drivers used all the fuel that they purchased.

¶ 17 Next, Novak examined Continental's hourly billing practices. He learned that Continental was supposed to charge All Access \$35 per hour for use of a vehicle, driver, and fuel, and \$18 per hour for only a driver, but in fact, charged \$35 per hour for all hours billed.

Thus, Continental overbilled All Access by \$17 for each hour that a Continental driver operated an All Access vehicle. Novak estimated that the overage from January 1 through July 1, 2012, was \$49,421.60.

¶ 18 Finally, Novak examined Continental's billing for deliveries to Sigma. As Continental and All Access divided payment for Sigma deliveries "on a 75/25 percentage basis[,]" Novak multiplied each of Sigma's invoices to All Access by .75 and compared the result to what Continental actually billed for the deliveries. He estimated that the overage from January 1 through July 1, 2012, was \$22,216.

¶ 19 Sheryl Canty, a certified public accountant, testified that All Access retained her to investigate possible overbilling by Spartak and Continental. She did not receive timecards from All Access or payroll records from Continental or Spartak, but instead received copies of Spartak's and Continental's cancelled payroll checks and invoices that All Access paid to both companies. Using these materials, Canty attempted to compare the hours that Spartak's and Continental's drivers worked against the hours that both companies billed to All Access.

¶ 20 First, Canty examined Spartak's payroll checks from March 2009 through December 2010, and Continental's payroll checks from November 2010 through July 2012, and determined the amount of money that Spartak and Continental paid their drivers during those time periods. Next, she subtracted payments that Spartak and All Access made for (1) flat-rate deliveries to Sigma; (2) flat-rate work performed during the "third shift;" (3) fuel reimbursement; and (4) drivers that All Access did not recognize or was "never billed for." When she made these adjustments, she was unaware that some drivers might have billed using corporate names. She also did not know whether Spartak and Continental had provided every payroll check, and she assumed that neither company had provided checks unrelated to payroll. Based on the average

hourly rate that Spartak and Continental paid their drivers, Canty determined the total billable hours worked by drivers for each company.

¶ 21 Finally, Canty examined invoices that All Access paid to Spartak from February 2009 through October 2011, and paid to Continental from January 2011 through July 2012. She adjusted the totals to account for non-hourly billing. Based on Spartak's and Continental's hourly billing rates, Canty determined the number of hours that Spartak and Continental billed All Access.

¶ 22 By comparing the hours that Spartak's and Continental's drivers worked to the hours that the companies billed All Access, Canty concluded that Spartak overbilled for \$46,157.44 and that Continental overbilled for \$42,357.98. Due to the lack of additional records from Spartak and Continental, Canty could not determine whether overbilling occurred in connection to Sigma deliveries, "additional trips," or "third shifts."

¶ 23 After All Access rested, Continental recalled Panayotov, who testified that he told Marcello that Panalpina wanted All Access to remove its records from its warehouse and that Marcello instructed him to transfer the records to All Access's warehouse. He denied hiding the documents. According to Panayotov, drivers used multiple vehicles throughout the day but only identified the first vehicle on their daily log sheet. He denied that Continental's drivers were permitted to buy fuel using All Access's credit cards or that he complained to Marcello about untimely payments to Continental.

¶ 24 At the close of trial, the court granted judgment for All Access on Continental's complaint and granted judgment for Continental on All Access's counterclaims. The court stated that neither Botev nor Panayotov testified credibly but that All Access's witnesses were "credible, believable, straightforward, and helpful." The court stated:

"The Court believed the Defense testimony insomuch as it seriously impeached and discredited Plaintiff's invoices and finds that Plaintiff's invoices *** were incorrect, unreliable, unworthy of belief, and wrong and thus finds for Defendants and against Plaintiff on Plaintiff's Complaint.

Defendants introduced good evidence to prove their Counterclaim which, based on the testimony and documents, narrowly failed to meet Defendants' burden of proof. This evidence, however, thoroughly impeached Plaintiff's claim and the invoices submitted to prove the claim. The Court thus finds for Plaintiff*** on Defendants' Counterclaim."

¶ 25 All Access filed a motion to reconsider. While the motion to reconsider was pending, the trial court granted All Access's motion for leave to file an amended counterclaim pursuant to section 2-616(c) of the Code of Civil Procedure. 735 ILCS 5/2-616(c) (West 2014). The amended counterclaim added allegations of breach of contract by Spartak and Continental. The trial court denied the motion to reconsider as to each counterclaim. All Access filed a notice of appeal and Continental filed a notice of cross-appeal.

¶ 26 No counterdefendant filed a response brief, and Continental did not file an appellee brief. Because the record is simple and All Access's claimed errors may be decided without the aid of an appellee brief, this court may address the merits of the appeal. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 27 On appeal, All Access contends that the trial court's findings demonstrate that it met its burden of proof for each counterclaim and permitted the calculation of damages within a "reasonable probability." As the court found Continental's witnesses incredible but considered

All Access's witnesses to be credible and unimpeached, All Access maintains that the court erred in applying the law to the facts of the case.

¶ 28 As an initial matter, we observe that All Access requests *de novo* review. *De novo* review is appropriate only where "the question on appeal is limited to application of the law to undisputed facts[.]" *City of Champaign v. Torres*, 214 Ill. 2d 234, 241 (2005). In a civil case turning upon factual issues, such as the case at bar, we will not disturb the trial court's findings unless they are against the manifest weight of the evidence. *Samour, Inc., v. Board of Election Commissioners of City of Chicago*, 224 Ill. 2d 530, 542 (2007). "A factual finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." *Id.* at 544. Because the trial court is best positioned "to observe the conduct and demeanor of the parties and witnesses[.]" a reviewing court will not substitute its judgment regarding "the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn." *Best v. Best*, 223 Ill. 2d 342, 350-51 (2006); see also *People v. Jackson*, 409 Ill. App. 3d 631, 647 (2011) (trier of fact may accept or reject as much or as little of a witness's testimony as it deems appropriate). In this case, where the trial court's order made no factual findings regarding All Access's counterclaims, we must presume that the court found all controverted facts in favor of the counterdefendants. *Inland Land Appreciation Fund, L.P. v. County of Kane*, 344 Ill. App. 3d 720, 727 (2003). We may affirm the judgment on any basis supported by the record, regardless of whether the trial court relied upon those grounds. *Vulpitta v. Walsh Construction Co.*, 2016 IL App (1st) 152203, ¶ 30.

¶ 29 All Access raised counterclaims for fraud, civil conspiracy to commit fraud, breach of contract, and violations of the RICO Act (18 U.S.C. § 1961 *et al.*) (West 2012)). Common to each cause of action, All Access had "the burden of establishing not only that [it] sustained

damages, but also of providing a reasonable basis for computation of those damages." *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 31. A party is not required to prove damages with "mathematical certainty," and "need only present evidence to allow the trial court to compute damages within a fair degree of probability." *Doornbos Heating and Air Conditioning, Inc., v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 487 (2010). However, damages "may not be predicated on mere speculation, hypotheses, conjecture or whim." *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 57. Evidence presented in support of damages "must not be remote, speculative, or uncertain." *Doornbos*, 403 Ill. App. 3d at 485.

¶ 30 All Access maintains that the testimony of Novak, the investigator, and Canty, the accountant, provided a reasonable basis for calculating damages related to unauthorized fuel purchases, inflated billing, and instances where Continental billed All Access for the full cost of a driver, vehicle, and fuel even when Continental's drivers operated All Access's vehicles. Our review of the record, however, discloses gaps in the evidence that preclude the calculation of damages within a fair degree of probability. Certain evidence, like All Access's timecards from 2009 to 2011, was unavailable to Novak and Canty. Other evidence, such as the timecards from January 1 to July 1, 2012, was available but omitted information pertinent to the calculation of damages—in particular, the time and distances that Continental's drivers operated All Access's vehicles. Further, Novak and Canty both acknowledged instances where their calculations relied on assumptions, and, in one instance, they provided contradictory testimony regarding whether damages sought by All Access could be calculated at all. In view of these issues, which we consider in detail as follows, the trier of fact could have concluded that All Access did not provide a reasonable basis for calculating damages.

¶ 31 First, Novak proposed that damages for fuel purchases could be calculated based on the cost of fuel that Continental's drivers purchased for All Access's vehicles. As available records did not indicate the precise mileage that Continental's drivers drove the vehicles, however, Novak could not determine whether drivers for Continental or All Access used the purchased fuel. Similarly, although Novak proposed that All Access incurred damages for each hour that Continental's drivers billed at the incorrect rate while operating All Access's vehicles, the evidence included no way to calculate the precise number of hours that Continental's drivers operated those vehicles. Notably, testimony from drivers and dispatchers indicated that drivers for both Continental and All Access were assigned to the vehicles with varying frequency throughout the day. Consequently, any calculation of damages arising from the hours that Continental's drivers operated All Access's vehicles, or the amount of fuel that they used, amounts to speculation and conjecture and cannot provide a basis for calculating damages. *Phillips*, 2014 IL App (1st) 122817, ¶ 57.

¶ 32 Canty's calculations for determining excessive billing by Spartak and Continental are similarly speculative. She testified that, in order to compare the hours worked by Spartak's and Continental's drivers against the hours billed to All Access, she subtracted unrelated payments from Spartak's and Continental's payroll records. In determining which payments to disregard, however, she was unaware whether drivers operated under corporate names and was uncertain whether the checks available for her analysis fully and accurately reflected Spartak's and Continental's payrolls. Additionally, Canty's comparison of payroll records and invoices involved data from entirely different time periods. She compared Spartak's payroll checks from March 2009 to December 2010 against All Access's payments from February 2009 to October 2011, and compared Continental's payroll checks from November 2010 to July 2012 against All

Access's payments from January 2011 to July 2012. Given these discrepancies, Canty's analysis does not allow for an accurate calculation of damages incurred during the time periods that she analyzed.

¶ 33 Other damages calculations proposed by All Access are similarly infirm. Novak's and Canty's testimony conflicted as to whether sufficient evidence existed to calculate overbilling for Continental's deliveries to Sigma. Moreover, we have reviewed additional calculations that All Access proposed in its closing argument and appellate brief for determining damages incurred outside the time periods analyzed by Novak and Canty. Those calculations, like the calculations proposed by Novak and Canty, rely on assumptions regarding the time and distances that Continental's drivers drove All Access's vehicles and are similarly speculative.

¶ 34 Based on the foregoing, the trial court did not contradict the manifest weight of the evidence in rejecting All Access's proposed damages calculations. Although the best evidence regarding damages " 'is often nothing better than the opinions of persons well informed upon the subject under investigation,' " in this case, the record establishes that All Access's calculations are predicated on assumptions that do not allow for the computation of damages within a fair degree of probability. *Levin v. Welsh Brothers Motor Service, Inc.*, 164 Ill. App. 3d 640, 655 (1987) (quoting *Johnston v. City of Galva*, 316 Ill. 598, 603-04 (1925)). In cases involving both claims and counterclaims, such as the case at bar, each party must meet its burden of proof irrespective of whether the opposing party establishes its competing claims. *Redmond v. Socha*, 216 Ill. 2d 622, 644 (2005). As All Access failed to provide a reasonable basis for calculating damages, the trial court's order granting judgment for All Access on Continental's complaint but granting judgment for Continental on All Access's counterclaims was not against the manifest weight of the evidence.

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¶ 35 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 36 Affirmed.