

2017 IL App (1st) 162038-U

No. 1-16-2038

Order Filed: September 8, 2017

FIFTH DIVISION

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

WILLOW ELECTRICAL SUPPLY)	Appeal from the
CO., INC.,)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	2015 M1 110658
)	
T & H ELECTRICAL, LTD.,)	
and Patrick Hay,)	Honorable
)	John J. Curry, Jr.
Defendants-Appellees.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 HELD: The circuit court erred and abused its discretion by denying plaintiff's motion to reopen the case to allow it to present additional evidence and testimony supporting its contention that the president and owner of an electrical corporation breached his fiduciary

duties to it arising under section 21.02 of the Illinois Mechanics' Lien Act (Act) (770 ILCS 60/21.02 (West 2012)).

¶ 2 This appeal arises from a two-count complaint filed by plaintiff Willow Electrical Supply Company, Inc. (Willow) against defendants T & H Electrical, Ltd. (T & H) and its president Patrick Hay. In count I, Willow alleged a breach of contract claim against T & H in connection with its contract with the electrical contractor to supply it with electrical materials and equipment for use in a construction project. In regard to count II, which is the subject of this appeal, Willow alleged that Hay breached his fiduciary duties to it arising under section 21.02 of the Illinois Mechanics' Lien Act (Act) (770 ILCS 60/21.02 (West 2012)).

¶ 3 Section 21.02(a) of the Act states that a contractor "shall hold in trust" unpaid sums due the subcontractor if the contractor requested or required the subcontractor to execute and deliver a waiver of the subcontractor's mechanics lien in exchange for payment or the promise of payment. 770 ILCS 60/21.02(a) (West 2012). Under Section 21.02(c) of the Act, any contractor who knowingly retains or uses the money held in trust under this section or any part thereof, for any purpose other than to pay those persons for whom the moneys are held in trust, shall be liable to any person who successfully enforces his or her rights under this section. 770 ILCS 60/21.02(c) (West 2012).

¶ 4 Willow claimed that pursuant to a request from Hay, in his capacity as president and representative of T & H, it executed a document waiving its rights to file a mechanics' lien against the property involved in the construction project in exchange for a promise from Hay that it would be paid, with interest, out of a portion of the proceeds T & H received from the general contractor once its work was completed. Willow asserted that Hay breached his fiduciary duties

under section 21.02 of the Act when he knowingly failed to deliver on that promise. Willow brings this action against defendants to recover \$9,565.09, which remains unpaid under its contract with T & H.

¶ 5 In addition to its contention that Hay breached his fiduciary duties under section 21.02 of the Act, Willow alternatively argues on appeal that the circuit court erred by denying its motion to reopen the case to allow it to present additional evidence and testimony which it alleges would have supported this contention. For the reasons that follow, we find merit with Willow's alternative argument and therefore remand the matter to the circuit court with directions to reopen the case for the purpose of receiving additional evidence and hearing further testimony regarding Willow's claim that Hay breached his fiduciary duties under section 21.02 of the Act.

¶ 6 BACKGROUND

¶ 7 Because there was no court reporter present at the bench trial to record the proceedings and the record does not include a bystander's report, we derive the following background facts from the common law record and Willow's appellate brief.¹ The one-day bench trial was held on November 5, 2015. At trial, Willow alleged that it entered into a contract with T & H to supply it with electrical materials and equipment for an ongoing construction project. Willow claimed that in exchange for Hay's promise of payment for the electrical materials, it agreed to his request to execute a waiver of its mechanics' lien rights. Willow alleged that Hay subsequently violated his fiduciary duties under section 21.02 of the Act when he used the lien waiver to collect funds from the general contractor to pay T & H for its work on the construction project, but then failed

¹ Neither of the defendants filed appellate briefs in this cause.

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to disburse any of those funds to pay Willow for the balance due and owing on its contract with T & H.

¶ 8 At the time of trial, T & H was in default and had not filed an appearance. The electrical contractor was the proverbial "empty chair" defendant. The circuit court heard testimony from various other witnesses and received documentary evidence.

¶ 9 Joseph Leung, president of the general contractor who paid the disbursement of money to T & H, testified that his corporation paid T & H in full for its work on the construction project. He maintained that the payment included an amount to cover the cost of the materials T & H purchased from Willow. Evidence was presented that T & H received payment from the general contractor sometime between May and September of 2014.

¶ 10 The date T & H received payment from the general contractor was important because Hay claimed he should not be held personally liable to Willow under the Act for the unpaid balance of the costs of the materials T & H purchased from Willow on the ground that at the time T & H received the payment, he was no longer affiliated with T & H. Hay testified that after May 2014, he disassociated himself from the company's business affairs and left the company to be operated by his parents. Hay testified that following his disassociation from T & H, he did not have any authority over or knowledge of the disbursement of funds, including any money owed to Willow under its contract with T & H.

¶ 11 After the parties rested and presented their closing arguments, the matter was temporarily adjourned for a few hours. When the case was recalled, counsel for Willow made an oral motion to reopen the case to allow him to present evidence allegedly showing that Hay gave false and

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misleading testimony concerning the date on which he disassociated himself from the business affairs of T & H. Counsel claimed to have evidence showing that Hay was involved in the business affairs of the electrical company at least as late as September 2014.

¶ 12 This new evidence came in the form of two separate mechanics' lien claims filed on behalf of T & H by Hay on August 6, 2014 and September 2, 2014, respectively. The lien claims were signed and verified by Hay in his capacity as president of T & H. Counsel claimed he discovered the documents during recess and that they were filed in connection with a lawsuit on file in the Chancery Division of the circuit court of Cook County.

¶ 13 The circuit court denied Willow's motion to reopen the case. The court determined that even if the case was reopened and Hay recanted his trial testimony regarding the date he disassociated himself from the business affairs of T & H, this would not be sufficient to hold him personally liable under the Act because Willow failed to meet its burden of establishing that Hay knowingly retained or misdirected funds due and owing to Willow. In support of its position, the court relied on the case of *Chicago Materials Corp. v. Hildebrandt (In re Hildebrandt)*, Nos. 08 B 06162, 08 A 00336, 2012 WL 260036 (Bankr.N.D.Ill. Jan. 27, 2012), a decision which for reasons we discuss below, is distinguishable on its facts.

¶ 14 The circuit court ultimately found in favor of Willow on its breach of contract claim against T & H. However, the court ruled against Willow on its claim that Hay violated section 21.02 of the Act.

¶ 15 In addition, and more importantly for the purposes of this appeal, in making its rulings the circuit court found that Hay gave false trial testimony. The court stated it was "troubled by

Hay's false testimony as evidenced by the documents [mechanics' lien claims] newly discovered by [Willow's counsel]." The court ruled, *sua sponte*, that Hay and his counsel violated Supreme Court Rule 137 by filing "unreasonable" answers in response to certain allegations contained in Willow's complaint, warranting the imposition of sanctions. The court determined that Hay and his counsel's conduct caused Willow to expend additional unnecessary effort to prove its case and also caused the unnecessary expenditure of judicial resources.

¶ 16 On April 27, 2016, after Hay and his counsel's motion for substitution of judge for cause was denied, the circuit court entered Rule 137 sanctions against them and continued the matter for an evidentiary hearing on Willow's petition for attorneys' fees. On June 21, 2016, the circuit court awarded Willow its attorneys' fees and costs. The court however denied Willow's request to substitute the court's affidavit as a bystander's report; the court had filed the affidavit in connection with the defendants' motion for substitution of judge. This appeal followed.

¶ 17 ANALYSIS

¶ 18 We believe the circuit court erred by denying Willow's motion to reopen the case to allow it to present additional evidence and testimony supporting its contention that Hay breached his fiduciary duties arising under section 21.02 of the Act. At the outset, we note that no appellees' briefs have been filed in this case. Nonetheless, we will address the merits of this appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (in the absence of an appellee's brief, a reviewing court should address an appeal on the merits where the record is simple and the claimed errors are such that the court may easily decide the issues raised by the appellant).

¶ 19 An order denying a motion to reopen proofs is reviewed for an abuse of discretion. *In re Estate of Bennoon*, 2014 IL App (1st) 122224, ¶ 53. In deciding whether to allow a party to reopen a case, the trial court should consider such factors as whether the failure to introduce the evidence occurred because of inadvertence or calculated risk, whether the adverse party will be surprised or unfairly prejudiced by the evidence, whether the evidence is of the utmost importance to the movant's case, and whether any cogent reasons exist to justify denying the request. *Davis v. States Drywall & Painting*, 268 Ill. App. 3d 704, 716 (1994). In addition, where a case is tried before the court without a jury, such as in this case, greater liberty should be allowed in reopening proofs. See, e.g., *Dunahee v. Chenoa Welding & Fabrication*, 273 Ill. App. 3d 201, 210 (1995).

¶ 20 An examination of these factors under the factual circumstances of this case weigh in favor of reopening the case to permit Willow to present additional evidence supporting its contention that Hay breached his fiduciary duties arising under section 21.02 of the Act. The circuit court should have reopened the case to permit Willow to cross-examine and impeach Hay with the two mechanics' lien claims he filed on behalf of T & H in the chancery court on August 6, 2014 and September 2, 2014, respectively. In light of this evidence, further examination of Hay could have established that he was the acting president of T & H at the time it received payment from the general contractor and therefore he perjured himself when he testified that after May 2014, he did not have any knowledge concerning the disbursement of funds collected in reliance on the lien waiver executed by Willow.

¶ 21 The first factor – whether the failure to introduce the evidence occurred because of inadvertence or calculated risk – favors Willow. Counsel for Willow claimed he discovered the two lien claims during recess and that they were filed in connection with a lawsuit on file in the

Chancery Division of the circuit court of Cook County. Clearly this was not a tactical move or calculated risk.

¶ 22 In regard to the second factor, the defendants would not have been surprised or unfairly prejudiced by the introduction of the evidence of the mechanics' lien claims since Hay was the person who signed and verified these documents and filed them on behalf of T & H. The third factor also favors Willow since this evidence was of the utmost importance because it would have allowed further examination of Hay concerning where the subject funds were disbursed after T & H received them from the general contractor.

¶ 23 In regard to the final factor – whether any cogent reasons exist to justify denying the request – the only reason offered for refusing Willow's request to reopen the case came from the circuit court itself who determined that even if the case was reopened and Hay recanted his trial testimony regarding the date he disassociated himself from the business affairs of T & H, this would not be sufficient to hold him personally liable under the Act because Willow failed to meet its burden of establishing that Hay knowingly retained or misdirected funds due and owing to Willow. However, the court's ruling was based on the case of *Chicago Materials Corp. v. Hildebrandt (In re Hildebrandt)*, Nos. 08 B 06162, 08 A 00336, 2012 WL 260036 (Bankr.N.D.Ill. Jan. 27, 2012) (*Chicago Materials Corp. II*), a decision which is distinguishable on its facts.

¶ 24 In *Chicago Materials Corp.*, the plaintiff Chicago Materials Corporation (CMC) was an Illinois corporation engaged in the business of supplying bituminous materials for construction projects. See *Chicago Materials Corp. v. Hildebrandt (In re Hildebrandt)*, Nos. 08 B 06162, 08 A 00336, 2008 WL 5644893 at *1 (Bankr.N.D.Ill. Dec. 18, 2008) (*Chicago Materials Corp. I*). CMC alleged that it performed work on a construction project for which Hildebrandt Paving,

Ltd. (HP), was a subcontractor. *Chicago Materials Corp. II*, 2012 WL 260036 at *1. The vice president of HP was Mr. Craig Hildebrandt, the Chapter 7 debtor in the case. CMC maintained that it provided materials to HP that HP used on the construction project, but it was not paid in full by HP. *Id.*

¶ 25 CMC sought to impose a constructive trust in its favor under the Act, in the amount of its unpaid compensation. *Chicago Materials Corp. II*, 2012 WL 260036 at *6. CMC argued that under section 21.02(c) of the Act, Mr. Hildebrandt became a trustee and fiduciary of CMC with regard to the proceeds obtained from the general contractor as a result of its lien waiver. CMC maintained that Mr. Hildebrandt committed what is referred to as "defalcation while acting in a fiduciary capacity," when he failed to pay CMC out of the proceeds he received from the general contractor. Defalcation is generally defined as "a failure to produce funds entrusted to a fiduciary and applies to conduct that does not necessarily reach the level of fraud, embezzlement or misappropriation." *In re Hall*, 483 B.R. 281, 294 (Bankr. D. Conn. 2012).

¶ 26 The bankruptcy court disagreed with CMC. The court determined that section 21.02(c) of the Act did not create a fiduciary relationship between CMC and Mr. Hildebrandt, such that his alleged conduct in failing to pay CMC out of the proceeds he received from the general contractor amounted to an act of defalcation while acting in a fiduciary capacity which precluded discharge of the resulting debt under section 523(a)(4) of the Bankruptcy Code (11 U.S.C.A. § 523(a)(4)).

¶ 27 Section 523(a)(4) of the bankruptcy code excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). Federal law determines whether a fiduciary relationship exists under this section of the bankruptcy code. See *In re McBride*, 512 B.R. 103, 113 (Bankr. D. Mass. 2014).

¶ 28 The bankruptcy court found that a "key problem" with CMC's argument was that it failed to present any evidence concerning the disbursement of the proceeds after HP received payment from the general contractor and the funds were deposited into HP's bank account. *Chicago Materials Corp. II*, 2012 WL 260036 at *6. The court stated it had no way of determining whether the failure to pay CMC was "more than negligence or mistake." *Chicago Materials Corp. II*, 2012 WL 260036 at *5. The court maintained that the funds could have been lost, stolen, garnished, or used to pay other subcontractors or material suppliers who also submitted lien waivers at the same time as CMC, and "who would have equally been beneficiaries under the Illinois Mechanics Lien Act." *Id.* Finally, the court determined that even if CMC demonstrated that Mr. Hildebrandt previously breached his fiduciary duty by failing to pay CMC out of the proceeds he received from the general contractor, the evidence showed that any such debt was already paid, where CMC admitted that Mr. Hildebrandt subsequently repaid it nearly double the amount it was owed. *Chicago Materials Corp. II*, 2012 WL 260036 at *6.

¶ 29 The instant case is readily distinguishable from *Chicago Materials Corp. II*, upon the facts and the applicable law. In *Chicago Materials Corp. II*, the bankruptcy court analyzed the Act within the framework of the bankruptcy code's dischargeability of debt provision for debts arising from fraud and defalcation of a fiduciary. The target defendant in *Chicago Materials Corp. II*, was a Chapter 7 debtor and vice president of the subject corporation who possessed no ownership interest in the business, whereas Hay was the owner and president of the company at issue in this case. Moreover, the plaintiff in *Chicago Materials Corp. II*, never presented any evidence that Mr. Hildebrandt received the funds from the general contractor.

¶ 30 Thus, the bankruptcy court's decision in *Chicago Materials Corp. II* does not support the circuit court's reasoning as to why it denied Willow's motion to reopen the case. We find the

circuit court erred by denying Willow's motion to reopen the case, because the federal bankruptcy decision the court relied on to deny the motion is inapplicable to the facts of this case.

¶ 31 Accordingly, for the foregoing reasons, we reverse the circuit court's order denying Willow's motion to reopen the case and remand with directions to reopen the case to allow Willow to present additional evidence and testimony supporting its contention that Hay breached his fiduciary duties arising under section 21.02 of the Act.

¶ 32 Reversed and remanded with directions.