2018 IL App (3d) 150477-U

Order filed June 18, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

VALLEY VIEW SCHOOL DISTRICT 365-U FOR THE USE OF IBEW LOCAL 176 HEALTH, WELFARE, PENSION, VACATION, AND TRAINING TRUST FUND TRUSTEES,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiffs-Appellees,	)	
v.	)	Appeal No. 3-15-0477 Circuit No. 09-L-883
HARTFORD FIRE INSURANCE COMPANY, a Connecticut Corporation, and HARTFORD INSURANCE COMPANY OF ILLINOIS, an Illinois Corporation,	)	The Honorable Barbara N. Petrungaro, Judge, Presiding.
Defendants-Appellants.	)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Carter and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly granted summary judgment to public entity on performance bond claim against insurer subcontractor for failure to remit payments to union benefit funds.

¶ 2 This is an appeal from the judgment of the circuit court of Will County in an action on a performance bond filed by the Valley View School District against the defendants, Hartford Fire Insurance Company and Hartford Insurance Company of Illinois (collectively Hartford). Following extensive motion practice, the circuit court granted Valley View's motion for summary judgment and denied Hartford's cross-motion for summary judgment. The court entered judgment in favor of Valley View and against Hartford in the amount of $307,194.20. Hartford filed an appeal bond and this appeal ensued. On appeal, Hartford maintains that the circuit court erred in denying its motion for summary judgment and granting Valley View's motion for summary judgment.

¶ 3 BACKGROUND

¶ 4 Valley View School District contracted with Wright Construction Company to act as general contractor on three building renovation projects: Humphrey Middle School, Jane Addams Middle School, and Jonas Salk Elementary School. Wright brought in Grace Electrical Corp. as the electrical contractor on each project. Grace secured from Hartford on each project a single bond document containing two different bond descriptions, one referred to as a "payment bond" and the other referred to as a "performance bond." Each bond description listed Grace as the principal. The bonds issued by Hartford were standard form AIA A312. Each project had a separate bond document, although the bonds ran in continuous and sequential page numbers from one bond form to the next.

¶ 5 Hartford issued Bond Number 83BCSEJ1925 for the Humphrey School project on behalf of Grace as principal, for the benefit of Valley View School District 365-U and Wright Construction, as obligees of Grace. The bond form for the Humphrey School project contained both "payment bond" and "performance bond" language on sequential pages within the same

bond form. Hartford issued Bond Number 83BCSEJ1926 for the Jane Addams Middle School project. The bond form named Grace as the principal and Valley View and Wright as obligees of Grace. Again, the bond was comprised of a single form with both payment bond and performance bond language found on sequential pages of the form. Likewise, Hartford issued Bond Number 83BCSEJ covering the Jonas Salk Elementary School project naming Grace as principal with Valley View and Wright as obligees of Grace. As with the other two bonds, this bond was also comprised of a single form with payment bond and performance bond provisions on sequential pages of the form.

¶ 6 Each document identified Grace as the "Contractor," Valley View as the "Owner" and Harford as the "Surety" and contained the following language in the "performance bond" section: "[t]he Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the construction contract, which is incorporated herein by reference." The document further provided that "[i]f the Contractor performs the construction contract, the Surety and the Contractor shall have no obligation under this bond." The language contained in the "payment bond" section was slightly different, providing that "the Contractor and the Surety, jointly and severally bind themselves, their heirs, executors, administrators, successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the performance of the construction contract, which is incorporated herein by reference."

¶ 7 The "payment bond" language of each document contained the following language regarding time limits: "No suit or action shall be commenced by a claimant under this Bond *** after the expiration of one year from the date (1) on which claimant gave notice required [by this Bond], or (2) on which the last labor or service was performed by anyone or the last materials or

equipment were furnished by anyone under the construction contract, whichever of (1) or (2) first occurs." The "performance bond" language of each document contained the following language regarding time limits: "Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction *** and shall be instituted within two years after contractor default or within two years after the contractor ceased working or within two years after the surety refuses or fails to perform its obligations under this bond, whichever occurs first."

¶ 8 Grace had a collective bargaining agreement with International Brotherhood of Electrical Workers Local 176, by which Local 176 agreed to provide electrical workers to Grace and Grace agreed to make certain payments for each union member working for Grace into the Union's Health, Welfare, Pension, Vacation, and Training Trust Fund (the Funds).

¶ 9 It is uncontroverted that contractual work was last performed on the projects on October 19, 2007. On December 17, 2007, Local 176 served a "Notice and Claim for Lien Against Public Funds and Against the Bond on Public Project" on each of the three projects. The Union claimed $307,194.22 in total against the three projects ($146,696.88 on the Humphrey School project; $125,024.62 on the Jane Addams School project; and $35,472.72 on the Jonas Salk School project).

¶ 10 On February 15, 2008, a judgment was entered in the U.S. District Court for the Northern District of Illinois in favor of the Funds and against Grace in the amount of $362,952.13. That judgment, which was part of the record before the circuit court in the instant matter, consisted of unpaid contributions to have been paid by Grace to the Funds for covered employees working on certain school funding projects in Will County, including the Valley View projects.

¶ 11 On October 16, 2009, nearly two years after the Union served its notice of claim, Valley View filed a complaint seeking payment from Hartford on the bonds. The complaint was brought by Valley View for the use of the Fund. Valley View acknowledged that the Fund was the true plaintiff but that it had standing to bring the claim on the bond as the Fund's assignee. The complaint alleged that "suit is timely brought within the two-year limitation period provided by the performance bonds." Hartford filed an answer and affirmative defense denying that Valley View had standing to bring the action on behalf of the Fund, reserving to itself all defenses Grace had on the original claims, challenging the amount claimed, and asserting that Valley View's action was untimely under the one-year limitation limit contained in the payment bond language of the bond documents.

¶ 12 On November 22, 2011, Hartford filed a motion for summary judgment, seeking dismissal of Valley View's complaint: 1) as time-barred by a one-year limitation period set for in the terms of the payment bond; and 2) plaintiffs' lack of standing to bring an action on the performance bond's two-year statute of limitations on the performance bond. Valley View subsequently filed a cross-motion for summary judgment claiming a right to recovery for nonpayment on the performance bond. Valley View's summary judgment motion included two affidavits to establish that Grace owed unpaid contributions to the Fund; Nichole Cassem, IBEW Fund administrator, and Howard Levinson, a certified public accountant, who performed an audit on Grace as it related to the Valley View projects. Hartford challenged the sufficiency of the affidavits under Supreme Court Rule 191. Ill. S. Ct. R. 191 (eff. July 1, 2002). The circuit court denied Hartford's Rule 191 objections.

¶ 13 On July 6, 2012, the circuit court denied Hartford's motion for summary judgment. The court based its decision to deny Hartford's summary judgment motion on its finding that it was

not clear from the bond documents what the parties intended as to the time limits for filing claims based upon the payment bond language as contrasted with the performance bond language contained within the same document. Following the court's ruling, the parties continued to engage in extensive discovery.

¶ 14 On September 10, 2013, the circuit court denied Valley View's cross-motion for summary judgment on the same basis it had denied Hartford's motion a year earlier: a lack of unambiguous intent as to the meaning of the conflicting terms of the bond document regarding the apparently conflicting limitation provisions of the payment bond language and the performance bond language. Following the court's denial of Valley View's cross-motion, the parties continued to engage in extensive discovery. After discovery, each party re-asserted its cross-motions for summary judgment, supported by additional affidavits regarding whether the bond form constituted a single bond covering both payment and performance; or two bonds, one covering payment and one covering performance, each with a different limitation period.

¶ 15 On October 21, 2014, the circuit court granted Valley View's summary judgment motion and denied Hartford's cross-motion for summary judgment. The court made the following observation: "[t]his court previously determined that a question existed as to whether the bonds were to be read separately or as one document. The evidence presented indicates that the two bonds are to be read separately." The court noted that its decision was controlled by our supreme court's decision in *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 25, where the court held that all Illinois public project bonds on deemed to contain separate completion and payment provisions as a matter of law. The circuit court consequently held that: 1) Valley View had standing to assert a claim against Hartford on the performance bond; and 2) Valley View was entitled to payment of $307,194.20 on the performance bond.

¶ 16 Hartford filed a motion to reconsider, raising several arguments including an argument that the court had erroneously applied *Lake County Grading*, as well as an argument that the court had erroneously calculated the amount of alleged Fund contributions not properly paid by Grace. The court denied Hartford's motion to reconsider and this appeal followed.

¶ 17 ANALYSIS

¶ 18 At issue is whether the circuit court properly granted Valley View's motion for summary judgment while denying Hartford's motion for summary judgment. The propriety of the court's summary judgment rulings is addressed in two sub-issues: 1) whether the trial court properly determined that Valley View's claim for the benefit of the fund was timely under *Lake County Grading* and sections 1 and 2 of the Illinois Public Construction Bond Act (Bond Act) (30 ILCS 550/1 and 30 ILCS 550/2 (West 2010)); and 2) whether a genuine issue of material fact existed as to Valley View's entitlement to judgment of $307,194.20 as a matter of law. The second issue also has two sub-issues: 1) whether Valley View had standing to assert a claim on behalf of the Fund; and 2) whether a genuine issue of material fact existed as to the amount owed by Grace to the Fund.

¶ 19 1. Standard of Review

¶ 20 This appeal is before this court on the circuit court's ruling on cross-motions for summary judgment. Summary judgment is properly entered where the pleadings, depositions, admissions and affidavits on record demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). It is the role of the reviewing court to determine whether the circuit court correctly found that no genuine issue of material fact existed and whether it correctly entered summary

judgment in favor of one party while denying summary judgment to the opposing party. *Fitzwilliam v. 1220 Iroquois Venture*, 233 Ill. App. 3d 221, 237 (1992). Generally, when parties file cross-motions for summary judgment, they are in agreement that only questions of law are involved in the appeal and the reviewing court should decide all issues based on the existing record. *Allen v. Meyer*, 14 Ill. 2d 284, 292 (1958). However, the filing of cross-motions for summary judgment does not necessarily establish that there is no genuine issue of material fact, or obligate the reviewing court to affirm or reverse the circuit court's summary judgment rulings only as a matter of law. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. We review all decision regarding summary judgment *de novo*. *Mitchell v. Special Education Joint Agreement School District No. 208*, 386 Ill. App. 3d 106, 111 (2008). However, where affidavits are relied upon by the circuit court in ruling on summary judgment, we will review the circuit court's determination regarding the sufficiency of the affidavit's compliance with appropriate supreme court rules only for an abuse of discretion. *Farmers Automobile Insurance Association v. Neumann*, 2015 IL App (3d) 140026, ¶ 14. Additionally, when reviewing the meaning and application of statutory provisions, our review is also *de novo*. *MidAmerica Bank, FSB v. Charter One Bank, FSB*, 232 Ill. 2d 560, 565 (2009).

¶ 21 2. Limitation of Action

¶ 22 On appeal, Hartford first challenges the circuit court's ruling allowing Valley View to assert a timely claim for unpaid benefit contributions under the performance bond language of the bond documents. Hartford maintains that unpaid benefits allegedly owed to the Fund by Grace were recoverable, if at all, only under the "payment bond" language of the bond documents. Hartford further argues that, by virtue of the contractual language of the "payment bond" provisions, Valley View was required to bring a claim within one year of work last being

performed on the relevant projects; a requirement that was not met when Valley View brought the claim on October 16, 2009, a few days shy of two years after work was last performed on October 19, 2007. Valley View maintains that, as a matter of law, the contractual language in the "payment bond" portion of the bond documents did not limit its ability to seek a remedy for Grace's noncompliance with its obligations to the Fund under the "performance bond" portion of the bond document. Valley View further maintains that the circuit court was correct, as a matter of law, in holding that Grace's unpaid contributions to the Fund were recoverable under a "performance bond" pursuant to *Lake County Grading*.

¶ 23 At issue in *Lake County Grading* was whether the specific language of a surety bond issued under the provisions of the Bond Act (30 ILCS 550/1 *et seq.* (West 2008)) was statutorily deficient, and if so, whether the statutory terms were to be implied in every bond issued under the Bond Act. *Lake County Grading*, 2014 IL 115805, ¶ 20. In the instant matter, relying on *Lake County Grading* the circuit court held that under the Bond Act all performance bonds issued on public projects are deemed to include language permitting recovery of fund contributions required to be paid by the principal. The following portion of section 1 of the Bond Act formed the basis of the *Lake County Grading* court's holding:

> "Except as otherwise provided by this Act, all officials, boards, commissions, or agents of this State in making contracts for public work of any kind costing over $50,000 to be performed for the State, and all officials, boards, commissions, or agents of any political subdivision of this State in making contracts for public work of any kind costing over $5,000 to be performed for the political subdivision, shall require every contractor for the work to furnish, supply and deliver *a bond* to the State,

or to the political subdivision thereof entering into the contract, as the case may be, with good and sufficient sureties. The amount of *the bond* shall be fixed by the officials, boards, commissions, commissioners or agents, and *the bond*, among other conditions, shall be conditioned for completion of the contract, for the payment of material used in the work and for all labor performed in the work, whether by subcontractor or otherwise.

* * *

Each such bond is deemed to contain the following provisions whether such provisions are inserted in such bond or not:

'The principal and sureties on this bond agree that all the undertakings, covenants, terms, conditions and agreements of the contract or contracts entered into between the principal and the State or any political subdivision thereof will be performed and fulfilled and to pay all persons, firms and corporations having contracts with the principal or with subcontractors, all just claims due them under the provisions of such contracts for labor performed or materials furnished in the performance of the contract on account of which this bond is given, when such claims are not are not satisfied out of the contract price of the contract on account of which this bond is given, after final settlement between the officer, board, commission or agent of the State or of any political subdivision thereof and the principal has been made.' "(Emphases added.) 30 ILCS 550/1 (West 2008).

¶ 24 Our supreme court in *Lake County Grading* made the following holdings of relevance in the instant matter: 1) the "deemed" language contained in section of 1 of the Bond Act incorporates both completion and payment provisions in all surety bonds for public construction in Illinois, even if the bond documents do not expressly contain such provisions; 2) " 'the bond' shall be conditioned, among other conditions, upon the completion of the contract and for payment of material and labor;" and 3) payment to all persons, firms and corporations having contracts with the principal is included as a component of completion of the contract. *Lake County Grading*, 2014 IL 115805, ¶¶ 24-25. The court further noted that the Bond Act assures payment to all parties and "guards the tax money allotted for public works by assuring that the terms, conditions and agreements of the [construction] contract will be fulfilled and paid by the surety if the contractor does not complete the project." *Id.* ¶ 26. Stated simply, the holding in *Lake County Grading* stands for the proposition that payment and performance are both protected by *the* bond and that, therefore, payment required under the construction contract is an element of performance covered by *the* bond. *Id.*

¶ 25 The circuit court also found that the Prevailing Wage Act (820 ILCS 130/1 *et seq.* (West 2008)) provided additional support for the proposition that payment of "fringe benefits" were part and parcel of complete performance under the terms of the construction contract. We agree with the court's reasoning. The Prevailing Wage Act mandates that all public entities "require in all contractor's and subcontractor's bonds that the contractor or subcontractor include such provision as will guarantee the faithful performance of such prevailing wage clause as provided by contract or other written instrument." 820 ILCS 130/4(c) (West 2008). See *Thomas v. A.G. Electrical, Inc.*, 304 S.W.3d 179, 183 (Mo. App. 2009) (holding that health, welfare and pension benefits required under the Missouri Prevailing Wage Act are recoverable under a performance

bond even where a payment bond has issued). Like the circuit court in the instant matter, we are persuaded by the Missouri court's reasoning and find it helpful in our holding that payment obligations incurred under the Illinois Prevailing Wage Act are amenable to a claim under a performance bond, even where payment bond language purports to provide a different limitation period for filing a claim on the bond.

¶ 26 Hartford counters by maintaining that, under the Bond Act, "payment bonds" and "performance bonds" have different purposes. Hartford points out that a performance bond ensures that the contractor will perform the work as contracted, while a payment bond ensures that subcontractors and material providers will be *paid* before the owner makes final payment under the contract. Thus, although the two bonds are combined into a single bound, they serve separate and distinct purposes. *Western Waterproofing Co., Inc. v. Springfield Housing Authority*, 669 F. Supp. 901, 903 (C.D. Ill. 1987). Harford further notes that the Bond Act has a different limitation period for "payment bonds" and "performance bonds." 30 ILCS 550/2 (West 2008) (one-year statute of limitations for payment bond claims). While we agree with Hartford's observations regarding the purposes of "payment" and "performance" bonds, we cannot agree with its characterization of Grace's obligation to the Fund as "payment" rather than "performance." As Hartford acknowledges, the purpose of the payment bond is to ensure that subcontractors and material providers receive payment. It is uncontroverted that the Fund was neither a subcontractor nor a material provider seeking payment for services or materials. It is true, as Hartford suggests, that making contributions to the Fund is not what would typically be viewed as "work" as contracted; however, it cannot be questioned that Grace's obligation to "perform" under the construction contract included its obligation to make appropriate

contributions to the Fund. Hartford's argument that contributions to the Fund were "payments" not "performance" as those terms are interpreted under the Bond Act must fail.

¶ 27 Hartford similarly maintains that the shortened limitation period applicable to the "payment bond" provisions of the bond documents evidenced a reasonable intent by principal and surety to shorten the period for "payment claims" against Grace. Hartford points out that under the terms of the Bond Act the limitation period for claims on the bond can be set by the parties at any time period that is reasonable. See *Board of Education of Community High School District No. 99 v. Hartford Accident & Indemnity Co.*, 152 Ill. App. 3d 745, 750-52 (1987). Hartford's argument would prevail if the claim being asserted by Valley View for the benefit of the Fund was a claim on a payment bond. However, since the claim was cognizable as a claim on the performance bond, Hartford's argument must fail.

¶ 28 Once it has been established that the surety bond issued by Hartford covering both payment and performance by Grace is "deemed" by the Bond Act to contain the language provided in section 1 of the statute, it naturally follows, as a matter of law, that the two-year limitation period contained in the "performance" language of the bond document at issue would apply to Valley View's claims for contributions not paid to the Fund as required under the construction contract and the Prevailing Wage Act. In other words, given the nature of these payments as required actions under the construction contract and applicable law, remittances to the Fund are properly characterized as "performance" under the construction contract. Once remittances to the Fund are recognized as performance obligations, the two-year limitation period contained in the "performance bond" provisions of the bond documents must be applied to Valley View's claims, notwithstanding the contrary language contained in the "payment bond"

provisions. We hold therefore that the circuit court was correct in finding that Valley View's action on the bond in the instant matter was timely as a matter of law.

¶ 29 3. Standing

¶ 30 Hartford next maintains that the circuit court erred in granting Valley View summary judgment and denying its motion for summary judgment when it found that Valley View had standing to raise the claim on behalf of the Fund. The crux of Hartford's argument is that, even if the circuit court's finding that the claim was properly asserted against the performance bond, the performance bond obligees were limited to Valley View and Wright Construction. Since the Fund was not named as an obligee on the bond, it did not have standing to raise a claim against the bond. Hartford further asserts that its liability as surety is limited to the express terms of the bond document and the Fund could only have a claim if it had been listed as an obligee on the bond. *Solai & Cameron, Inc. v. Plainfield Community Consolidated School District No. 202,* 374 Ill. App. 3d 825, 836 (2007) ("A surety is not bound beyond the express terms of the performance bond and, when interpreting a performance bond, the court must look solely to the unambiguous language of the bond as evidence of the intentions of the parties.").

¶ 31 Valley View argues that its standing to bring the instant claim arises from section 2 of the Bond Act (30 ILCS 550/2 (West 2008)), its responsibility to enforce Grace's compliance with the provisions of the Prevailing Wage Act (820 ILCS 130/4(c) (West 2008)), as well as a line of case law supporting the proposition that a party to a bond can assert claims "for the use and benefit of" certain third-party beneficiaries. See *Bates & Rogers Construction Co. v. Greeley & Hansen,* 109 Ill. 2d 225, 232 (1985); *People ex rel. Resnik v. Curtis & Davis, Architects & Planners, Inc.,* 78 Ill. 2d 381, 386 (1980); *Wilde v. First Federal Savings & Loan Association of Wilmette,* 134 Ill. App. 3d 722, 731 (1985).

¶ 32 Turning first to Hartford's argument that only expressly stated obligees may enforce the performance bond, we note that Valley View is an express obligee intended to be protected under the performance bond. If it were the case here that the Fund sought to enforce the performance bond, Hartford would obviously be correct in asserting that the Fund lacked standing to bring claim in its own right. In the instant case, however, Valley View is an intended obligee on the bond. Hartford's argument that only express parties may enforce the bond must, therefore fail. The question still remains whether Valley View, an express obligee on the performance bond, has standing to pursue a claim on that bond "for the benefit and use of" the Fund.

¶ 33 In our previous discussion of the limitation of action issue, we noted that section 1 of the Bond Act (30 ILCS 550/1 (West 2008)) lead to the conclusion that, as a matter of law, Grace's compliance with contractual provisions to make payments to the Fund was enforceable under the performance bond provisions of the bond contract. *Supra* ¶ 23. The same reasoning must apply to the question of Valley View's standing to the claim at issue in the instant matter. Pursuant to section 1 of the Bond Act, Grace's contractual obligation to make payments to the Fund was an element of performance on the construction contract. As such, it was as much an obligation owed to Valley View as it was to the individual members of Local 176. Once we accept that payment to the Fund by Grace was a performance obligation owed to Valley View, as an express obligee of the bond, any argument that Valley View has no standing to enforce Grace's performance on the bond must fail.

¶ 34 Moreover, Valley View's position that the Fund is an intended third-party beneficiary of the performance bond is a natural consequence of the legal conclusion that payment to the Fund is an element of performance. Third-party beneficiary status is determined by "the contract and the circumstances surrounding the parties at the time of its execution." *Bates & Rogers*, 109 Ill.

2d at 232. Here, the construction contract, incorporated into the bond documents by reference, could not have been more specific in expressing the intent that properly calculated payments into the Fund for each covered worker were an element of performance under the construction contract. Generally, when a performance bond incorporates the construction contract by reference, the performance bond and the contract it secures are to be read as one instrument. *Solai & Cameron*, 374 Ill. App. 3d at 835. Thus, we hold that the Fund and the individual members of Local 176 were intended beneficiaries of the performance bond as a matter of law.

¶ 35 4. Damages

¶ 36 Hartford's final argument is that the circuit court erred in finding that Valley View was entitled to summary judgment for damages of $307,194.20. Hartford maintains that the affidavits of Cassem and Levinson, upon which the court relied to determine that Grace had failed to make payments to the fund and the amount due, were based upon insufficient personal knowledge and conclusions, and therefore failed to meet the requirements of Supreme Court Rule 191. Ill. S. Ct. R. 191 (eff. July 1, 2002).

¶ 37 Affidavits filed in connection with a motion for summary judgment are governed by Supreme Court Rule 191(a), which provides:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

¶ 38 An affidavit supporting a motion for summary judgment is sufficient where the affidavit on its face establishes that the affiant has personal knowledge of the facts therein and there is a reasonable inference that the affiant could competently testify to those facts at trial. *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 71. We review the sufficiency of affidavits under an abuse of discretion standard of review. *Neumann*, 2015 IL App (3d) 140026, ¶ 14.

¶ 39 In the instant matter, both affidavits satisfy the requirements of Rule 191. While Hartford correctly observes that Cassem became the administrator of the Fund at a date after the relevant events, she was the person responsible for maintaining the documents and records of the fund. As such, she was able to competently testify from personal knowledge as to the existence and terms of the contract between Local 176 and Grace, the contribution requirements, and the unpaid amounts owed at the time Valley View filed its claim on the performance bond. On the face of her affidavit and attached documents, it could reasonably be established that Grace was a party to a collective bargaining agreement requiring certain contributions to the Local 176's benefit funds.

¶ 40 In his affidavit, Levinson, the certified public accountant for the Fund, detailed facts to which he would competently testify regarding the amounts due from Grace for each covered employee who worked for Grace on the Valley View projects. Attached to Levinson's affidavit was a summary audit report, created in the ordinary course of business, that detailed the hours worked and wages paid to each employee, as well as the amount of contribution to the Fund due for each employee. The attached audit reports established the unpaid amount owed to the fund based upon the contractually stated contribution rates for each fund and either the wages paid or hours worked for each covered employee. Levinson's affidavit established that the amount owed depended upon the whether the particular fund was to be funded based upon wages paid or hours

worked. In either event, the amount unpaid was based upon a mathematical calculation. Levinson's affidavit established that his firm's audit established that Grace failed to pay contributions to the Fund and the amount of those unpaid contributions.

¶ 41 Before the circuit court, Hartford maintained that each the documents attached to each affidavit and the lack of contemporary knowledge of the events by each affiant undermined the credibility of each to the point that the affidavits were fatally deficient under Rule 191. Specifically, Hartford argued that the documents attached to the affidavits were summaries of the audits, not the actual audits, and that the summaries included workers that were not Local 176 members or were Local members performing on non-bonded work. Hartford further argued that the affidavits and supporting documents failed to establish that Grace had entered into a collective bargaining agreement with Local 176 requiring contributions to the Funds and failed to establish the amounts owed to regarding each specific covered employee. The circuit court rejected Hartford's arguments, noting that Cassem and Levinson were competent to testify based upon personal knowledge acquired in the course of their employment and duties for the Funds. The court further noted that the factual statements contained in each affidavit were supported by the documentary evidence of record, including sworn lien and bond claim notices available at the time of the audit conducted by Levinson. Further, the court noted that "as no contradiction had been provided" to the factual content of the affidavits, "there [was] no genuine issue of material fact raised as raised by [Hartford's] response" to Valley View's motion for summary judgment.

¶ 42 We find no abuse of discretion in the circuit court's finding that the affidavits complied with the requirements of Rule 191. Both Cassem and Levinson had a sufficient degree of personal knowledge of the facts asserted in their affidavits by virtue of their employment with or for the Funds. Moreover, as the circuit court noted, to the extent that Hartford challenged the

credibility of the factual allegations contained in the affidavits, those factual statements were not contradicted by counter-affidavits. It is well-settled that courts will accept an affidavit as true if it is not contradicted by counter-affidavits or other evidentiary materials. *Lindahl v. City of Des Plaines*, 210 Ill. App. 3d 281, 299 (1991); *Ligenza v. Village of Round Lake Beach*, 133 Ill. App. 3d 286, 293 (1985) ("[w]hen facts within an affidavit are not contradicted by counteraffidavit, they must be taken as true notwithstanding the existence of contrary unsupported allegations in the adverse party's pleadings"). Hartford's challenges to the credibility of the factual statements contained in the affidavits at issue cannot stand where no counteraffidavits were filed to create a genuine issue of material fact. Moreover, we note that Hartford's argument that nothing in the record supported the allegation that Grace had a collective bargaining agreement with Local 176, or the fact that Grace failed to make required contributions to the fund is directly contradicted by the federal court judgment for the Fund and against Grace, which conclusively established the issues Harford claimed were unproven by the affidavits at issue. It appears that the only issue not established by the record evidence of the federal court judgment was the exact dollar amount of the Funds judgment attributable to Hartford's performance bond. That issue was well within the personal knowledge competence of Levinson's affidavit.

¶ 43 Accordingly, we find that the circuit court did not commit error in admitting the affidavits filed in support of Valley View's summary judgment motion. We further find that, based upon the uncontroverted facts contained in the supporting affidavits and other evidentiary materials of record, the circuit court correctly determined that no genuine issue of material fact existed and Valley View was entitled to judgment as a matter of law on its claim on the Hartford performance bond issued to cover performance by Grace on the Valley View projects.

CONCLUSION

¶ 44 For the foregoing reasons, we affirm the Will County circuit court's grant of summary judgment in favor of Valley View and the denial of summary judgment to Hartford.

¶ 45 Affirmed.