SIXTH DIVISION
March 4, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE HEARTLAND CONSTRUCTION GROUP, INC., Plaintiff-Appellee, Cross-Appellant	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 07 CH 8181
PATIENCE NELSON, KERRY NELSON, THE NORTHERN TRUST COMPANY, UNKNOWN OTHERS and NON-RECORD CLAIMANTS, Defendants-Appellants, Cross-Appellees.	)	The Honorable Thomas R. Mulroy, Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices McBride and R.E. Gordon concurred in the judgment.

O R D E R

Held: Where homeowners did not establish remodeling contractor defrauded or caused them actual damages, their allegations of technical violations of the Home Repair and

Remodeling Act (815 ILCS 513/1 *et seq.* (West 2006)) were insufficient under *K. Miller Construction Co., Inc. v. McGinnis*, 238 Ill. 2d 284, 938 N.E.2d 471 (2010), to nullify the parties' contract or the contractor's mechanics lien.

Following a bench trial in an action to enforce a mechanics lien and for breach of a home repair contract, the trial court entered judgment awarding $7,464 to Heartland Construction Group and against the homeowners Patience and Kerry Nelson. Based on our supreme court's recent decision in *K. Miller Construction Co., Inc. v. McGinnis*, 238 Ill. 2d 284, 938 N.E.2d 471 (2010), we reject the Nelsons' contention that Heartland's violations of the provisions of the Home Repair and Remodeling Act (HRRA) (815 ILCS 513/1 *et seq.* (West 2006)) requiring a written contract and a consumer rights brochure be given to the homeowners invalidated any contract they had with Heartland. In order to nullify a mechanics lien or underlying contract, actual damages or fraud must be established; technical violations of the HRRA are insufficient. We reject Heartland's cross appeal because we find no basis to overturn the trial court's calculation of damages, a matter within the discretion of the fact finder; we also deny Heartland's request for attorney's fees because the Nelsons' presented a good faith defense under existing law.

BACKGROUND

Patience Nelson, a lawyer, met Richard Easty, Jr., the lone shareholder and president of Heartland, in the late 1990s when

the Nelsons' son was a member of a Cub Scout pack headed by Easty. In February 2006, shortly after Patience and her husband Kerry contracted to purchase a home in River Forest, Illinois, Patience contacted Easty seeking a bid for remodeling work on the home. Easty performed a walk-through of the home on February 12, 2006. He testified at trial that the Nelsons did not provide him with architectural plans, which prevented him from supplying a written estimate at the time.

In early March, the Nelsons faxed Easty a list of work they wanted performed on the home. Patience asked Easty to meet at the home on May 1, 2006, "so we can figure out the scope of the project [and] prepare a contract." On May 1, 2006, the parties met at the home to discuss the project. According to Easty, the Nelsons "were anxious to get started." No written contract was prepared. On May 2, 2006, Easty began the demolition work as Patience requested. On May 5, 2006, the Nelsons received an invoice for $5,000 with a notation, "Deposit for kitchen and home remodeling work," which they paid almost immediately.

When called as an adverse witness in Nelsons' case, Easty conceded no written contract existed between the parties on May 5, 2006, but he claimed he did the demolition work pursuant to an understanding. According to Easty, the parties understood the scope and price of the final project would be decided upon after

Easty's subcontractors assessed the project after the demolition work was begun. Easty provided the Nelsons with updated estimates for the total project as the various subcontractors submitted individual estimates; the Nelsons, in turn, would revise the estimates if they disapproved proposed items.

On May 26, 2006, Easty emailed Patience Nelson an updated budget, dated May 25, 2006, with a project cost of $78,241; Easty stated he would proceed with the project "unless you let me know otherwise." The Nelsons did not let Heartland know "otherwise" and admitted in their answer to Heartland's complaint that this was the agreed upon cost of the project. The home remodeling budget was never reduced to a formal contract and the Nelsons never received a consumer rights brochure required by the HRRA (see 815 ILCS 513/20 (West 2006)). According to Easty's testimony, he was not aware of the requirements of the HRRA at the time.

As the project progressed, Patience Nelson requested several changes to the project. Anxious to complete the work, she told Easty to perform certain "extras," that is, work not reflected in the May 25, 2006, budget. According to Easty, Patience Nelson directed that he bill them later, rather than delay the work to reach a price for the "extras."

On September 14, 2006, Easty submitted a written "Change

Order 1" to the Nelsons, charging them an additional $13,415 for extras. On September 25, Patience sent a letter to Easty, containing a partial list of her objections to the cost of certain "extras" in Change Order 1. She also emailed Easty the following day that she was "really caught off guard with the $13,000 Change Order we received." Easty submitted Change Order 2 on September 25, 2006, crediting the Nelsons with $398 for the return of a sump pump. After meeting with the Nelsons regarding the cost set out in Change Order 1, Easty issued a revised extras list labeled "Change Order 1R2," which reduced the total of the charged extras to $10,127. Easty testified the Nelsons agreed to the $10,127 charge for extras as reflected in Change Order 1R2. On October 11, Easty submitted Change Order 3, seeking an additional $1,380 for plumbing work. This brought Heartland's total charge for extras to $11,109 after the credit for the return of the sump pump. Easty's last day on the job was October 26 or 27, 2006.

On November 25, 2006, Patience emailed Easty, saying, "I do intend to make an additional payment" pending completion of work on some refrigerator panels, addition of a missing storm window, closure of holes in the basement ceiling, and removal of glass from some closet doors. On November 27, 2006, Patience informed Easty that she "terminated" the contract; she repeated this on

November 30, 2006. The parties agree that the Nelsons paid a total of $72,000 for the work performed on their home.

Procedural History

On January 17, 2007, Heartland recorded a mechanics lien with the Cook County Recorder of Deeds. The lien stated Heartland entered into an agreement "on or around May 5, 2006" under which Heartland agreed to renovate the Nelsons' home for $78,241. It stated Heartland was entitled to a total of $89,350 due to additional labor and materials (totaling $11,109) furnished to the Nelsons. On March 22, 2007, Heartland filed a complaint to foreclose its lien and to recover the outstanding balance of $17,350. The complaint alleged the parties entered into a contract on or about May 5, 2006, which they revised on May 25, 2006.

Without filing an answer, the Nelsons moved to dismiss pursuant to 735 ILCS 5/2-619(a)(2) (West 2006), contending Heartland lacked legal capacity to foreclose on its lien because it had violated the HRRA. The motion was denied. The Nelsons later filed an answer, asserting Heartland violated the HRRA and the Mechanics Lien Act (770 ILCS 60/0.01, *et seq.* (West 2006)), which they contended invalidated any contract between the parties and Heartland's lien. The Nelsons also advanced two counterclaims: (1) Heartland breached both an oral and a written

contract between the parties by damaging the Nelsons' home and by not honoring the parties' agreed-upon price; and (2) Heartland violated the Illinois Consumer Fraud and Deceptive Practices Act (CFA) (815 ILCS 505/1 *et seq.* (West 2006)) by providing oral estimates that were lower than the eventual amount charged for the improvement project. The Nelsons moved for summary judgment, on the basis that Heartland violated the HRRA, but Judge Lewis M. Nixon denied the motion.

The bench trial that ensued was heard on January 30, 2009, and March 6, 2009. At the conclusion of the trial, Judge Thomas R. Mulroy issued a written opinion, first stating, "This court is bound by the decision on the motion for summary judgment and therefore will not consider Defendants' affirmative defense [of] violation of the HRRA." The court then made the following findings.

> "After hearing the witnesses' testimony, observing their demeanor on the witness stand, and reviewing the exhibits admitted into evidence, the court finds that Plaintiff met its burden of proof in establishing that the parties had an enforceable contract for $78,241 for renovations to the Property, Plaintiff performed the contract, and the

Defendants did not perform."

In addition to the $78,241 contract value, the court found the Nelsons liable for $1,223 of the extras[1] claimed by Heartland in the Change Orders, for a total of $79,464. The court found Heartland suffered damages of $7,464, after the payment of $72,000, on both its mechanics lien and its breach of contract counts. It allowed statutory interest and costs with the mechanics lien award, but denied attorney's fees. It denied both of the Nelsons' counterclaims, finding Heartland performed its contractual obligations and the evidence did not demonstrate Heartland violated the CFA. The parties timely cross appeal.

ANALYSIS

The Nelsons raise four issues on appeal. Their first contention is the trial judge improperly deferred to the ruling of the circuit court judge on their summary judgment motion under the HRRA. Because this issue turns on whether "the HRRA precludes recovery under both [Heartland's] mechanic's lien and breach of contract claims," as the Nelson's argue in their second

[1] The court found the Nelsons liable only for certain extras: the rebuilding of a masonry firebox; work on the main stair bottom tread, and additional work in the master bedroom, the total cost of which was reduced by the $398 credit for the return of the sump pump.

contention, as well as whether Heartland proved the existence of an oral contract as the Nelson argue in their third contention and whether the complaint and lien accurately described the "purported contract" as the Nelson argue in their final contention, we address the Nelsons' first contention last. We then address Heartland's cross appeal in which it contends it is entitled to greater damages and to the award of attorney's fees.

HRRA Violations

The Nelsons's contention that Heartland violated the HRRA requires that we interpret that statute, which triggers a *de novo* review, as each party asserts. *MD Elec. Contractors, Inc. v. Abrams*, 228 Ill. 2d 281, 286, 888 N.E.2d 54 (2008).

Whether the uncontested violations of the HRRRA by Heartland bar it from any recovery, as the Nelsons contend, falls squarely within the holding of the recent supreme court decision in *K. Miller*.

In *K. Miller*, the plaintiff construction company violated the HRRA by failing to obtain a signed contract prior to commencing remodeling work on the defendant's home. *K. Miller*, 238 Ill. 2d at 297. The construction company sued the homeowners for refusing to pay for the work it had done, but the homeowners relied on the HRRA violation as an affirmative defense. *Id.* at 289. The supreme court held that whether a violation of the HRRA

served as an affirmative defense was addressed by the General Assembly through an amendment, which clarified that violations of the writing requirement to the Act did not render oral contracts unenforceable. "[A] violation of the Act does not render oral contracts unenforceable or relief in *quantum meruit* unavailable." *Id.* at 300 (recounting a legislative statement that " 'unless there's actual damages, a consumer cannot get out of paying the balance due to a home repair or remodeling company by using these two technical provisions in the Act of requiring a pamphlet to be given and requiring a written contract before work on the project' ", quoting 96th Ill. Gen Assem., Senate Proceedings, March 9, 2010, at 68 (statements of Senator Wilhelmi)). The court held, "the remedy for violations of the Act lies elsewhere." *K. Miller*, 238 Ill. 2d at 300 (intimating an HRRA claim may be brought under the CFA). The court reversed the trial court's dismissal of the construction company's breach of contract and mechanics lien claims. *Id.* at 301.

Notably, the Nelsons's argue in their main brief that "the facts of this case are virtually identical to *K. Miller.*" The problem for the Nelsons is that their argument relied on our appellate decision holding that the contractor's contract claim was barred, which the supreme court reversed. Here, as in *K. Miller*, the contractor violated provisions of the HRRA.

Heartland began work on the Nelsons' home without first memorializing their understanding in a written contract to be signed by both parties as mandated by the HRRA. 815 ILCS 513/15, 30 (West 2006). Heartland also failed to provide the HRRA consumer rights pamphlet. 815 ILCS 513/20 (West 2006). Nonetheless, as our supreme court made clear in *K. Miller*, these violations do not void the parties' agreement; the oral contract remains binding on the Nelsons.

The supreme court also intimated that the proper avenue to vindicate violations of the HRRA is through an action under the Consumer Fraud and Deceptive Practices Act. *K. Miller*, 238 Ill. 2d at 300 (the remedy for HRRA violations lies outside the HRRA itself); *Universal Structures, Ltd. v. Buchman*, 402 Ill. App. 3d 10, 22, 937 N.E.2d 668 (2010), citing 815 ILCS 513/35 (West 2008), 815 ILCS 505/10a (West 2008); *Fandel v. Allen*, 398 Ill. App. 3d 177, 189-90, 937 N.E.2d 1124 (2010); 815 ILCS 505/2Z (West 2006).

The Nelsons, however, mention the CFA for the first time in their reply brief, raising the prospect that the CFA claim has been forfeited. *Vancura v. Katris*, 238 Ill.2d 352, 369, 939 N.E.2d 328 (2010) ("Consistent with the plain language of the rule, this court has repeatedly held that the failure to argue a point in the appellant's opening brief results in forfeiture of

the issue."), citing Supreme Court Rule 341(h)(7) (Ill. S. Ct. R. 341(h)(7)). Nonetheless, we comment on the Nelsons' claim under the CFA because the supreme court did not issue its opinion in *K. Miller* until after the Nelsons filed their opening brief. See *Halpin v. Schultz*, 234 Ill. 2d 381, 390, 917 N.E.2d 436 (2009) ("That rule, however, is an admonition to the parties rather than a limitation on a court of review. Reviewing courts may look beyond considerations of waiver in order to maintain a sound and uniform body of precedent or where the interests of justice so require.").

The Nelsons' counterclaim asserted a count under the CFA. Judge Mulroy ruled that count failed to allege that the Nelsons suffered damages *as a result of* the HRRA violation. Instead, the CFA count connected the damages to matters independent of the requirements of the HRRA. The Nelsons have not raised the sufficiency of these allegations for a CFA claim before us and, as a consequence, we note only that the Nelsons acknowledge in their reply brief that "[t]here was no allegation that Heartland acted in a dishonest or fraudulent manner." This, too, is fatal to the CFA claim. See 815 ILCS 505/2 (the CFA proscribes only "unfair or deceptive acts or practices"). Accordingly, the Nelsons could not have prevailed on their CFA claim for technical violations of the HRRA even if the issue was properly before us.

Existence of Contract

The Nelsons contend that, even if the HRRA does not bar Heartland's claim, there was no contract between the parties. We find the record evidence forecloses this contention.

The Nelsons admitted in their affirmative defense that there was a "May 5, 2006 oral contract." They stated in their counterclaim that, "On May 5, 2006, Plaintiffs, Kerry and Patience Nelson, entered into an oral contract with Defendant Heartland to remodel their basement and make other cosmetic improvements to their residence." Patience Nelson made the same admission in an affidavit submitted on the Nelsons' motion for summary judgment. "It is uncontested that demolition began May 2, 2006, and the Nelsons now admit they received an invoice for the demolition on May 5, 2006." The Nelsons admitted in their answer that the total "agreement amount was for $78,241." The trial court found:

> "Patience confirmed that Defendants had a written agreement with Plaintiff on the following occasions: September 25, 2006: "Our contract dated May 25, 2006 is for the amount of $78,241."

The Nelsons do not challenge these findings on appeal,

rendering their argument that there was "no meeting of the minds" patently without merit. See *Buchman*, 402 Ill. App. 3d at 20 (an oral remodeling contract existed where the contractor had "tendered written, itemized work orders to homeowner defendants for approval before the work was performed and defendants paid plaintiff in several installments during the course of the project.").

Here, where there were not only itemized work orders and installment payments, but also multiple admissions by the Nelsons that a contract existed, there can be no doubt that the parties entered into a valid oral contract around May 5, 2006.

Validity of Mechanics Lien

The Nelsons argue that Heartland's mechanics lien is unenforceable because it inadequately described the contract. As the contents of the lien claim filed with the Cook County Recorder of Deeds are undisputed, and the Nelsons' claim requires interpretation of the Mechanics Lien Act, we review that finding *de novo*, as proposed by the Nelsons. *Weather-Tite Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389, 909 N.E.2d 385 (2009).

The burden of establishing compliance with the Mechanics Lien Act is on the party seeking to enforce the lien. *Ronning*

Engineering Co. v. Adams Pride Alfalfa Corp., 181 Ill. App. 3d 753, 759,537 N.E.2d 1032 (1989). The Act provides that a claim for lien "shall consist of a brief statement of the claimant's contract." 770 ILCS 60/7 (West 2006). Here, the lien that Heartland recorded with the Cook County Recorder of Deeds stated Heartland entered into an agreement "on or around May 5, 2006," under which Heartland agreed to renovate the Nelsons' home for $78,241.

The Nelsons contend the holding in *Ronning* supports their claim that Heartland's "brief statement" in its mechanics lien is inadequate. In *Ronning*, a contractor's complaint alleged that its mechanics lien filing was based on a verbal contract entered into on July 1, 1986, with a certain party. *Ronning*, 181 Ill. App. 3d at 759. However, the contract attached and incorporated into the claim for lien was a written agreement dated September 20, 1985, between the contractor and an entity other than the party named in the complaint. *Ronning*, 181 Ill. App. 3d at 759. Thus, the lien claim was legally insufficient to identify the "claimant's contract" as the same contract set out in the contractor's complaint. *Ronning*, 181 Ill. App. 3d at 759.

No such infirmity exists between the complaint and the recorded lien in this case. The complaint alleged, "On or about May 5, 2006 Heartland *** entered into an agreement (the

'Contract') with Owners [the Nelsons]." The lien claim stated the parties entered into an agreement "on or around May 5, 2006." *Ronning* is inapposite.

The Nelsons' citation to *Braun-Skiba, Ltd. v. La Salle National Bank*, 279 Ill. App. 3d 912, 665 N.E.2d 485 (1996), is also unavailing. The contractor's lien in that case was not timely because it was filed over four months after the contractor completed its construction work in violation of 770 ILCS 60/7 (West 2006).

Finally, we found in the prior section that Heartland and the Nelsons entered into an oral contract on or about May 5, 2006. This finding makes the adequacy "of the brief statement of the claimant's contract" in the recorded lien beyond dispute. See *First Federal Savings & Loan Association v. Connelly*, 97 Ill. 2d 242, 249, 454 N.E.2d 314 (1983) (lien claim sufficient even though it pertained to a contract for work on four different buildings likely performed on different dates); *Lyons Federal Trust & Savings Bank v. Moline National Bank*, 193 Ill. App. 3d 108, 112, 549 N.E.2d 933 (1990) ("a statement of mechanics lien does not necessarily require a contract date to be alleged").

Earlier ruling on Summary Judgment

Because we find the Nelsons' affirmative defense under the

HRRA was without merit, it renders moot the Nelsons' contention that Judge Mulroy erred in concluding that he was bound by Judge Nixon's summary judgment ruling that the HRRA did not preclude Heartland's claims. "As a general rule, courts of review may sustain orders on any grounds which are called for by the record, regardless of the grounds relied on when the order was entered." *Norskog v. Pfiel*, 197 Ill. 2d 60, 69-70, 755 N.E.2d 1 (2001). We understand each circuit court judge to have rejected the HRRA affirmative defense, which was the correct result.

Heartland's Cross-Appeal

Heartland contends it should have received a larger damages award and an award of attorney's fees on its successful contract and mechanics lien claims.

We review judgment awards following a trial under the manifest weight of the evidence standard. *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153, 1157, 902 N.E.2d 769 (2009). Heartland contends it established by clear and convincing evidence that it was entitled to a greater amount of the "extras" identified in its Change Orders than the $1,223 awarded to it by the trial judge. A contractor is entitled to compensation for extra-contractual work if the contractor establishes "the [five] prerequisites for their recovery."

Wilmette Partners v. Hamel, 230 Ill. App. 3d 248, 264, 594 N.E.2d 1177 (1992).

> "[A] contractor must make the following showing by clear and convincing evidence: (1) the work was outside the scope of his contract promises; (2) the extra work items were ordered by the owner; (3) the owner agreed to pay extra, either by his words or conduct; (4) the contractor did not furnish the extras as his voluntary act; and (5) the extra items were not rendered necessary by any fault of the contractor." *Wilmette Partners*, 230 Ill. App. 3d at 264.

Here, the trial court found the Nelsons admitted they owed $1,223 in extras; any amount in excess of that was disputed by the Nelsons. In other words, it fell to the trial judge as trier of fact to determine whether the Nelsons were responsible in excess of the agreed amount, a determination that turned on the credibility of the witnesses.

Heartland appears to urge that the statement it attributes to the Nelsons that they "would pay" for the extras listed in Change Order 1 makes the amount it should receive for the extras

beyond dispute. Yet, in its own statement of facts, Heartland acknowledges the Nelsons stated they would pay only "once he [Easty] reduced [the extras charges in Change Order 1] in response to their concerns." That Easty did reduce the amount in Change Order 1R2 did not mean that that lower amount could not also be disputed by the Nelsons. Patience Nelson testified "the change order was not consistent with our agreement" and "was not accurate." Heartland did not obtain a signature from the Nelsons on the Change Order 1 or Change Order 1R2. The trial court found the there was "serious disagreement" on the amount owed on extras.

"When contradictory testimony that could support conflicting conclusions is given at a bench trial, an appellate court will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent." *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859, 893 N.E.2d 981 (2008). Based on our review of the record, it is not clearly apparent that the trial court should have awarded Heartland additional damages. We do not find the court's damages award to be against the manifest weight of the evidence.

Given our decision to uphold the circuit court’s award of damages, Heartland's claim that the trial court erred in not

awarding it attorney's fees must also fail. Heartland argues the Nelsons promised to pay the amount Heartland requested, only to renege later. Attorney's fees are to be awarded in mechanics lien cases only when the homeowner's failure to pay "is not well grounded in fact and warranted by existing law." 770 ILCS 60/17(d) (West 2006).

Here, the only viable claim Heartland can assert is one based on the Nelsons' failure to pay at least the original oral contract price of $78,241. Yet, Heartland's claim for attorney's fees is limited to its defense of the Nelsons' affirmative defenses under the HRRA. However, at the time the Nelsons filed their suit, there was conflicting appellate authority regarding the validity of a contractor's claims when the contractor fails to comply with every provision of the HRRA. *K. Miller*, 238 Ill. 2d at 299-300, comparing *Smith v. Bogard*, 377 Ill. App. 3d 842, 879 N.E.2d 543 (2007) (violation invalidates the contract) with *Fandel*, 398 Ill. App. 3d at 186 (violation does not invalidate the contract). The trial court found the parties engaged in a "genuine and vigorous dispute" of facts and law.

We find no basis to disagree with the trial court's ruling that the Nelsons' affirmative defense was sufficiently grounded in fact and law to avoid the imposition of attorney's fees on the losing party.

CONCLUSION

Violations of HRRA did not preclude Heartland's mechanics lien and breach of contract claims against the Nelsons under the facts of this case where they failed to connect the violations to actual damages or to fraud on the part of Heartland. The trial evidence supported the trial court's award of damages to Heartland against the defenses asserted by the Nelsons. As trier of fact, it was within the trial court's discretion to award less than Heartland claimed; the court's refusal to award attorney's fees to Heartland is also consistent with the manifest weight of the evidence.

Affirmed.