2012 IL App (1st) 113162-U

THIRD DIVISION
December 28, 2012

No. 1-11-3162

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

INDUSTRIAL DOOR, COMPANY, INC., an Illinois Corporation,	)	Appeal from the Circuit Court of Cook County
Counter-Defendant-Appellant,	)	
v.	)	No. 10 M1 142589
INFINITI OF HOFFMAN ESTATES, INC., an Illinois Corporation,	)	Honorable Thomas Donnelly, Judge Presiding.
Counter-Plaintiff-Appellee.	)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Neville and Justice Steele concurred in the judgment.

ORDER

¶ 1 *Held*: The jury's award of damages in a breach of contract claim was not erroneous where the existence of a contract was established and the evidence supported the amount of damages awarded. The trial court did not abuse its discretion in denying a motion for a continuance on the day of trial because the assignment of the rights to a commercial garage door should not have been a surprise to counter-defendant. Issues not properly preserved for review are forfeited on appeal.

¶ 2 Counter-defendant-appellant Industrial Door, Company, Inc. (Industrial Door) appeals the judgment entered against it in the amount of $6,700 and in favor of Infiniti of Hoffman Estates, Inc. (Infiniti) as damages for Industrial Door's failure to return a commercial garage door. On appeal, Industrial Door contends that there was no contract between it and Infiniti regarding the storage of the garage door. Industrial Door also contends that Infiniti failed to prove the amount of damages that it was entitled to as a result of the alleged breach of contract to store the garage door and that the jury was not properly instructed regarding the amount of damages that may be awarded in a breach of contract action. Industrial Door further contends that the amended counter-claim was not filed by a party, the amendment to the counter-claim to include an assignment of the rights in the garage door was not properly pled and that the trial court erred in denying its request for a continuance following Infiniti's amendment to the counter-claim on the day of trial. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Industrial Door's business consists of providing home and industrial restoration services. Infiniti's business consists of selling and servicing automobiles, which is the same business that Mercedes-Benz of Hoffman Estates, Inc. (Mercedes-Benz) operates. Infiniti and Mercedes-Benz are both Motor Werks L.P. companies and are now located next to each other in Hoffman Estates, Illinois. Mercedes-Benz started constructing a new facility in Hoffman Estates, Illinois in 2005, and hired Pepper Construction Company (Pepper Construction) as the project's general contractor.

¶ 5 Pepper Construction and Industrial Door entered into a subcontract agreement dated November 23, 2004 where Industrial Door would "furnish all labor, material, equipment, supervision and insurance as required to provide and fully complete all OVERHEAD & SPECIAL DOORS work" for Mercedes-Benz located at 1000 W. Golf Road in Hoffman Estates, Illinois in return for $71,995.

¶ 6 In 2005, Mercedes-Benz began construction of the new facility, and the original plans included both a showroom and a separate service building. During the construction, the service building had two commercial-grade 18' x 12' Richard Wilcox sectional doors installed as the entrance to the service area. Before the construction for the entire facility was completed, Mercedes-Benz decided to use half of the service building as the showroom and determined that only one garage door was needed. If future business required a separate showroom and service area, Mercedes-Benz would return to the original plan of separate facilities and a two garage door entrance to the service area.

¶ 7 On April 11, 2005, Industrial Door provided Pepper Construction with an "Estimate and Contract" prepared on Industrial Door's letterhead. The project on this document was described as "Change Estimate #131 - Revise West Service Bay." The document stated that "This Proposal is valid for 30 days," and it was not signed by either party. The proposal stated the following:

"Jim,

I have reviewed the drawing and notes regarding the removal of the north-west 18' x 12' sectional door.

This estimate is for the removal, storage and re-installation of this door.

The storage cost is $50.00 per month for a total of 24 months. If the time frame is shorter we will revise the cost at that time."

The proposed cost to furnish those services was $4,275.

¶ 8 On May 22, 2005, Industrial Door prepared a "service/repair order" (service order) for Motor Werks at Mercedes-Benz's location. The work performed was listed as follows:

"Arrive at site to remove Richard Wilcox door & operator. Unwire operator as needed. Cut to size and installed 3" x 3" tubed to accommodate new door to be install at later date. Adjust limits and check operation on two *** rolling door[s]. Assist electrician to figure out timers and lopes. Resure window. Load old door for customer to store at our shop and to bring back to shop and store."

This service order was signed by the customer, and the order included a sentence stating that "signature denotes service rendered as requested."

¶ 9 During the period of September 20 to 27, 2006, Industrial Door provided services on all of Infiniti's sectional doors. Industrial Door provided Infiniti with an invoice for the work performed dated September 29, 2006 and totaling $2,366.13. The invoice was payable upon receipt and a service charge of 1.5% per month would be added to any past due balances.

¶ 10On June 15, 2009, Infiniti's Controller sent Industrial Door a letter on Infiniti's letterhead, which identified Infiniti as "A Motor Werks Company." The letter stated the following:

"Dear Michelle,

I am in receipt of your letter dated June 11, 2009. I have left you messages on 5/14, 5/21, 5/28 and the one today with no return calls.

As I stated in my messages there is a door that your company took from a job contracted through Pepper Construction that we never received back nor received a credit for. In talking with the owner here, Jim Hub, he is more than willing to make payment for the open invoice when we receive answers in regards to the missing door/credit.

Please contact me at your earliest convenience to help get this matter resolved."

On January 15, 2010, James Hub, Partner, sent a letter on Infiniti's letterhead to Abrams & Abrams P.C. stating the following:

"To Whom It May Concern:

I am in receipt of your letter dated January 8, 2010. We have disputed these claims from Industrial Door since day one.

As we have disputed in the past, Industrial Door did extensive work for Motor Werks for several locations, and they have yet to provide us with a door they removed from one of those locations. The resolution is simple, provide us with the door they removed and took or provide us with a credit."

The letterhead identified Infiniti as "A Motor Werks Company."

¶ 11 On May 12, 2010, Industrial Door filed a complaint against Infiniti rasing a breach of contract count alleging that it provided industrial restoration services in September 2006 that Infiniti requested for a cost totaling $2,366.13, but Infiniti failed to pay the invoice despite Industrial Door's request for payment. On June 22, 2010, Infiniti, designating itself as "Motor Werks," filed its answer and counter-complaint. Infiniti acknowledged that it requested and accepted the services provided by Industrial Door, and that it has not paid for those services. As an affirma-

tive defense, Infiniti asserted that because Industrial Door breached a contract regarding the removal, storage and re-installation of the garage door, it withheld payment for the subsequent services that Industrial Door performed for Infiniti. The counter-complaint consisted of three counts all relating to the garage door, including a count for breach of contract, trespass to chattels and conversion.

¶ 12 On July 6, 2010, the trial court entered an order granting default judgment in Infiniti's favor on its counter-complaint and against Industrial Door in the amount of $8,200.39. On July 7, 2010, Industrial Door filed a motion to vacate the default judgment. On July 27, 2010, the trial court entered an order vacating the default judgment of July 6, 2010 and ordered Industrial Door to answer or otherwise respond to the counter-complaint within 28 days. On August 18, 2010, Industrial Door filed an emergency motion to vacate defaults entered against it and leave to file its appearance and jury demand to Infiniti's counter-complaint. On August 31, 2010, the trial court granted Infiniti's motion to dismiss it as a defendant in Industrial Door's breach of contract complaint with prejudice and entered judgment in its favor and against Industrial Door in the amount of $8,313.28, plus costs, on its counter-complaint. This was the second default judgment entered against Industrial Door. On September 21, 2010, the trial court vacated all prior defaults and entered Industrial Door's appearance and demand for a jury trial regarding the counter-complaint.

¶ 13 Industrial Door filed an emergency motion to dismiss on May 6, 2011 arguing that Motor Werks was not the proper party to file a counter-complaint against it. The trial court held a hearing on the emergency motion on the day set for trial, and allowed, over Industrial Door's objec-

tion, Infiniti to amend the counter-complaint during a brief recess because it determined that an amendment would cure the alleged defect raised by Industrial Door. The amendment specified the assignment of interest in the garage door from Mercedes-Benz to Infiniti on or about June 15, 2009. Industrial Door moved for a continuance because the trial court allowed Infiniti to amend the counter-complaint on the day of trial, which resulted in an unfair surprise and it needed time to evaluate the validity of all of the amendments. Infiniti objected to a continuance arguing that Industrial Door should have known about the assignment based on its repeated requests for Industrial Door to return the garage door from May 14, 2009 through January 15, 2010. The trial court denied Industrial Door's request for a continuance because it believed that Industrial Door was stalling, and found that the amended counter-claim cured the defect raised by Industrial Door regarding the proper party to bring the counter-claim. The trial court also denied Industrial Door's emergency motion to dismiss. The proceeding moved to trial on that same day and the parties selected a jury.

¶ 14 After the jury was selected, the parties called their witnesses to testify. A report of proceedings and a transcript of the witnesses' testimony was not prepared, but the parties prepared a bystanders' report. Infiniti called James Hub, who is President of Infiniti and Mercedes-Benz and has been since 2005, to testify. Hub testified, in part, that Industrial Door was paid for the work that was completed regarding construction of the Mercedes-Benz facility. In September of 2006, Infiniti hired Industrial Door for maintenance work on its commercial garage doors. The invoice cost for this work totaled $2,366.13 and Industrial Door demanded payment of the invoice from Infiniti in May of 2009. Prior to that time, Mercedes-Benz requested the return of the stored ga-

rage door from Industrial Door.

¶ 15 Hub also testified that on approximately May 14, 2009, Mercedes-Benz assigned its right, title and interest in the stored garage door and in the storage contract to Infiniti. On May 14, 2009, May 21, 2009, May 28, 2009 and June 15, 2009, Infiniti left messages for Industrial Door requesting return of the garage door, but it received no response from Industrial Door regarding that request. Infiniti also sent Industrial Door letters demanding the return of the garage door.

¶ 16 Hub further testified that when Industrial Door removed the garage door from the Mercedes-Benz location, it also removed the motor and the rails. Mercedes-Benz purchased the garage door for $7,600, and when Industrial Door removed and retrieved the garage door from the Mercedes-Benz facility, it was a new door. Hub did not directly negotiate the storage terms for the garage door with Industrial Door, which was done by Pepper Construction.

¶ 17 James Bennett, Industrial Door's President, testified that in 2005, Pepper Construction hired Industrial Door to install two commercial grade 18' x 12' Richards Wilcox sectional doors for the service bay entrance of a new Mercedes-Benz facility that was being constructed next to Infiniti. After construction began, Pepper Construction requested it to remove one of the garage doors from the service bay entrance, which it did as requested. He testified that Industrial Door's business does not consist of garage door storage, but it may do so for an important customer. Regardless, Bennett stated that it did not agree to store the garage door after it was removed from the Mercedes-Benz facility. After Industrial Door removed the garage door, it discarded it. Bennett also stated that the cost of the garage door was significantly less than $7,600, and that a used garage door has no value. Bennett further stated that when the garage door was installed in

2005, it was new and it was removed before construction was completed at the facility.

¶ 18 After deliberations, the jury returned a verdict in favor of Infiniti in the amount of $6,700 on the breach of contract claim. The jury found in favor of Infiniti on the conversion count and in favor of Industrial Door on the trespass to chattels count. Industrial Door filed a post-trial motion on June 10, 2011 moving for a directed verdict or judgment notwithstanding the verdict, or in the alternative, a new trial. Following a hearing on the post-trial motion on October 6, 2011, the trial court denied the motion. Industrial Door timely filed its appeal.

¶ 19 ANALYSIS

¶ 20 On appeal, Industrial Door claims that the judgment in Infiniti's favor should be reversed because Infiniti failed to establish that a valid contract existed between the parties. Industrial Door contends that its proposal to Pepper Construction regarding storage of the garage door was not signed and expired after 30 days. Because the proposal was not executed, it lapsed thereby defeating any claim that a valid contract existed. Industrial Door also contends that Infiniti was not named as a party on the proposal to store the garage door.

¶ 21 A valid contract exists where there is an offer, acceptance and consideration. *Hedlund & Hanley, LLC v. Board of Trustees of Community College District No. 508,* 376 Ill. App. 3d 200, 205-06 (2007). No contract forms if an element is missing. *See A. Epstein & Sons Intern., Inc. v. Eppstein Uhen Architects, Inc.,* 408 Ill. App. 3d 714, 720 (2011) (stating that a binding contract exists when all three elements are present). A valid contract must also include a meeting of the minds or mutual assent to the contract's terms. *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 30 (1991). Mutual assent may be demonstrated by the parties' conduct. *Id.* The

determination of whether a contract exists, as well as its terms and the intent of the parties are questions of fact for the trier of fact. *Hedlund & Hanley, LLC,* 376 Ill. App. 3d at 205. We will not reverse a trial court's finding of fact unless the appealing party establishes that the findings were against the manifest weight of the evidence. *Id.* A finding is against the manifest weight of the evidence "only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Id.*

¶ 22 We disagree with Industrial Door that Infiniti failed to establish the elements that are required to form a contract. In the case *sub judice*, the offer was documented in Industrial Door's proposal dated April 11, 2005 to Pepper Construction for the removal, storage and re-installation of a 18' x 12' garage door for the sum of $4,275. The remaining three elements required to form a contract were documented in Industrial Door's service order dated May 22, 2005 to Motor Werks at the Mercedes-Benz location. In that service order, Industrial Door listed the work performed to include: "Load old door for customer to store at our shop and to bring back to shop and store." This service order was prepared by Industrial Door and signed by the customer, which, according to the service order, "denotes service rendered as requested." Based on this document, it is clear that there was mutual assent between Industrial Door and Mercedes-Benz for Industrial Door to store the garage door because the service order expressly states it would "store [the door] at our shop." Based on the plain language of the service order, it is indisputable that Industrial Door agreed to store a garage door for Mercedes-Benz. Moreover, the parties do not dispute that Industrial Door did, in fact, remove the garage door and there is also no dispute that Industrial Door was paid for that work, which satisfies the acceptance, consideration and

mutual assent elements. Industrial Door claims that there was no contract because the proposal was not signed, but we consider that fact irrelevant in light of the more persuasive facts that Industrial Door did remove the garage door and Hub testified that Industrial Door agreed to store the door, which is consistent with the terms set forth in the service order. Additionally, Mercedes-Benz assigned its rights to the garage door pursuant to the service order to Infiniti on June 15, 2009 resulting in Infiniti now being a party to the storage agreement in place of Mercedes-Benz. Accordingly, a valid contract for the removal and storage of the garage door existed, and after the assignment, the contract was between Industrial Door and Infiniti.

¶ 23 Next, Industrial Door claims that the damages amount was incorrect because Infiniti failed to present evidence supporting the value of the garage door. It contends that the only evidence presented regarding the value of the garage door was Hub's testimony that he paid $7,600 to purchase it, but he did not specify from whom he purchased the door or when he purchased it. Because the garage door would have been stored for four years, Industrial Door claims that the value of the door four years later did not equal the value of the door when it was first purchased.

¶ 24 Issues regarding damages in a breach of contract dispute involve a question of fact, and we will not disturb a finding regarding damages unless it is against the manifest weight of the evidence. *Doornobs Heating & Air Conditioning, Inc. v. James D. Schlenker*, 403 Ill. App. 3d 468, 485 (2010). A jury's award of damages is against the manifest of the evidence if the award is not supported by the evidence or the amount of damages is erroneous as a matter of law. *Id.* The party seeking damages bears the burden of proving the amount of damages to a reasonable

degree of certainty and the evidence presented to support its damages may not be remote, speculative, or uncertain. *Id.* The reasoning underlying an award of damages in a breach of contract action is to put the injured party in the same position it would have been in if the contract was fully performed. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 546 (2011).

¶ 25 The evidence offered by Infiniti amply supports the jury's award of damages. Hub testified that Mercedes-Benz paid $7,600 for the garage door and that it was new both when it was installed and removed by Industrial Door. Bennett, however, testified that the garage door's cost was significantly less than $7,600. Bennett also testified that "a used garage door has no value." Conflicting testimony exists regarding the value of the garage door. On review, our function is not to assess the credibility of the witnesses because the jury was charged with that responsibility as it is the "sole arbiter of the credibility of witnesses." *People v. Bailey*, 409 Ill. App. 3d 574, 586 (2011). Hub's testimony unequivocally established that the garage door was purchased for $7,600. Due to Industrial Door's breach, the garage door, which was new and, thus, had no wear or tear on it, cannot be returned. The jury's award of $6,700 was not against the manifest weight of the evidence as witness testimony clearly established that the garage door's cost was $7,600. The reasoning underlying an award of damages in a breach of contract action is to put the injured party in the same position it would have been in if the contract was fully performed. Here, if the contract had been fully performed, Industrial Door would have returned an unused garage door ultimately, after the assignment, to Infiniti upon its request for the garage door's return. Even if that request occurred four years after the garage door was

purchased, the door, when it was removed, was new and not used. Because the new, unused garage door was not returned, the jury's award in favor of Infiniti in the amount of $6,700, which, based on the evidence presented, was less than the cost of a new door, was not against the manifest weight of the evidence.

¶ 26 Industrial Door further claims that the jury was not instructed regarding damages in a contract action, but was only instructed regarding damages in a conversion action. Industrial Door acknowledges that it did not tender separate jury instructions on the issue of damages, but argues that the trial judge should have *sua sponte* instructed the jury on the proper amount of damages in a contract action. Because the jury was not properly instructed, Industrial Door maintains that a new trial is warranted. Infiniti responds that Industrial Door forfeited review of this issue because it did not object to the jury instructions tendered during trial and did not separately raise this issue in a post-trial motion. We agree with Infiniti.

¶ 27 To preserve an issue for review, a defendant must not only object to an error at trial, but also include it in a written post-trial motion. *Thorton v. Garcini*, 237 Ill. 2d 100, 106 (2010). The record is devoid of facts demonstrating that Industrial Door objected to the jury instructions tendered by Infiniti and it has not argued on appeal that it made such an objection during the proceedings. The only reference to jury instructions in Industrial Door's post-trial motion is in the section addressing its claim that the garage door's value was not established, which specifically stated that "Plaintiff's jury instruction requires valuation at the time of the withholding taking place." Thus, Industrial Door's reference to the jury instruction was to support its claim that the value of the garage door was not established according to the jury

instructions tendered, and not that the instructions themselves that were tendered were deficient.

¶ 28 Moreover, a party forfeits the right to challenge a jury instruction that was given unless it also tenders an alternative, remedial instruction to the trial court. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557 (2008). The reasoning underlying this requirement is to provide the trial court with an opportunity to correct a deficient instruction and to preclude a party that fails to act when the trial court could correct the erroneous instruction from attaining an unfair advantage and obtaining a reversal on appeal. *Id.* at 557-58. In the case *sub judice,* Industrial Door did not object to the tendered instructions during the proceedings, it did not sufficiently raise an objection addressing inadequate jury instructions in its post-trial motion and it acknowledges that it did not tender alternative instructions addressing the issue of damages. Accordingly, Industrial Door failed to preserve for review the question of whether the jury was properly instructed on the measure of damages to award in a breach of contract claim.

¶ 29 Next, Industrial Door claims that because Motor Werks was not a party to the instant case, it had no right to file a counter-complaint against Industrial Door, who filed an action against Infiniti and not Motor Werks. Industrial Door also claims that when the counter-complaint was filed, none of the pleadings referred to Infiniti as the party entering into any contract with Industrial Door. It further claims that the record is devoid of an assignment to Infiniti because the only assignment referred to in the amended counter-claim refers to the assignment from Mercedes-Benz to Motor Werks and not to Infiniti.

¶ 30 Industrial Door claims that it, as defendant, has a right to know who it is defending against, and we conclude that such a requirement was satisfied here. Although the utmost

precision in identifying the parties in the counter-complaint is lacking, who the parties are and the relationship between the parties may be clearly gleaned from the pleadings and proceedings. The parties do not dispute that both Industrial Door and Infiniti were parties to the lawsuit. Industrial Door, instead, claims that confusion arose regarding Infiniti's reference to Motor Werks and Mercedes-Benz in the counter-complaint and amended counter-claim, but we are not persuaded by its claims.

¶ 31 The record includes a letter dated January 15, 2010 on Infiniti's letterhead from Hub disputing Industrial Door's claims and asserting that Industrial Door did extensive work for several of Motor Werk's locations, but failed to return a door that it removed. Hub's signature was followed by his identification as Partner of Infiniti, which was denoted as "A Motor Werks Company." The record also includes a notice of intention to offer documents under Illinois Supreme Court Rule 90(c) dated December 30, 2010 filed by "Defendant/Counter-Plaintiff, Infiniti of Hoffman Estates, Inc. ('Motor Werks')." Infiniti, the named defendant in Industrial Door's complaint, identifying and defining itself as "Infiniti" or "Motor Werks" should be of no surprise to Industrial Door as Infiniti has identified itself as "Motor Werks" on multiple occasions leading to and during the proceedings. Infiniti has interchangeably referred to itself as Infiniti and Motor Werks and designated itself in the introductory paragraph of its answer and counter-claim as "Defendant/Counter-Plaintiff, Infiniti of Hoffman Estates, Inc. ('Motor Werks')." Taking Infiniti's reference to itself as Motor Werks in context, Industrial Door was not prejudiced by Infiniti's self-reference as "Motor Werks" in its answer and counter-complaint.

¶ 32 Moreover, any possible confusion relating to Infiniti's self-identification as "Motor

Werks" was clarified by its amended breach of contract count where it clearly delineated itself as "Motor Werks" and further specified that both it and Mercedes-Benz were a Motor Werks *L.P.* Company. (Emphasis added). Thus, Motor Werks, as being synonymous with Infiniti, was clearly distinguished from the Motor Werks L.P. Company, which was not a party to the instant proceedings whereas Motor Werks was a party. Because Infiniti and Motor Werks were understood to be the same entity, but yet different from Motor Werks L.P. Company, Infiniti, also known as Motor Werks for purposes of the amended complaint, was the counter-plaintiff and a party to the lawsuit. Accordingly, the judgment and verdict form properly named Infiniti as the prevailing party because it was, indeed, a party to the counter-complaint.

¶ 33 Industrial Door also contends that the assignment from Mercedes-Benz to Motor Werks failed to comply with the statutory requirements for an assignment and set-off because the amended counter-claim did not state how title to the garage door was acquired and that either Mercedes-Benz or Motor Werks had actual ownership of the door. Industrial Door acknowledges that this claim was first raised in its post-trial motion. Infiniti responds that Industrial Door's claim of error is forfeited, and we agree.

¶ 34 As previously stated, to properly preserve an issue for review, a party must object at trial and in a written post-trial motion. *Check v. Clifford Chrysler-Plymouth of Buffalo Grove, Inc.*, 342 Ill. App. 3d 150, 159 (2003). All claims of error, whether in form or substance, regarding pleadings that are not objected to during trial are forfeited for review. *Id.* A doctrine related to the forfeiture rule is the doctrine of aider by verdict. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 60 (1995). Under that doctrine, if a party permits an action to advance to a verdict, all formal,

purely technical and clerical errors in a complaint, as well as defective or imperfect facts essential to a cause of action, are cured by the entry of a verdict. *Id.* at 60-61*; ABN AMRO Services Co., Inc. v. Navarrete Industries, Inc.*, 383 Ill. App. 3d 138, 143 (2008); *Check*, 342 Ill. App. 3d at 159. An exception to that doctrine allows a defendant to raise at any time a claim that a complaint fails to state a recognized cause of action. *Adcock*, 164 Ill. 2d at 61. Courts, however, have drawn a distinction between a complaint that fails to plead a cause of action, which may be challenged at any time, and a complaint that defectively or imperfectly alleges a cause of action, which may not be challenged after the entry of a verdict *Id.* at 62.

¶ 35 In the case *sub judice*, Industrial Door did not make an objection at trial regarding Infiniti's failure to comply with statutory requirements addressing assignments and set-offs, but it did raise this claim in its post-trial motion. Because Industrial Door did not object both at trial and raise the objection in its post-trial motion, its claim regarding the insufficiency of the assignment is forfeited. Moreover, the doctrine of aider by verdict further precludes review of the issue because the verdict cured any deficiency regarding the assignment's compliance with statutory requirements. Also, the exception to the doctrine of aider by verdict does not apply in the instant case because Industrial Door's claim is that Infiniti's pleading of a breach of contract cause of action was deficient and imperfect, which may not be raised upon entry of a verdict. Since Industrial Door's contention is forfeited, we need not address the substance of its claims that the amended complaint failed to comply with the statutory provision addressing assignments and set-offs.

¶ 36 Lastly, Industrial Door claims that it was entitled to a continuance on the day of trial once

the trial court allowed Infiniti to file an amended counter-claim to now allege an assignment of the interest in the garage door where that assignment had not been previously pled. Industrial Door contends that the trial court denied it an opportunity to adequately review the amended counter-claim to allow it to raise any deficiencies regarding the amendment, such as the assignment's failure to comply with statutory requirements, especially since this was a one day trial. On this basis, Industrial Door claims that the trial court abused its discretion when it denied its motion for a continuance.

¶ 37 When ruling on a motion for a continuance, the trial court considers the diligence of the movant and the facts as they exist at the time a request is made for the continuance. *People v. Smith*, 248 Ill. App. 3d 351, 360 (1993). The decision to grant or deny a motion for a continuance is within the trial court's sound discretion. *People v. Friedman*, 79 Ill. 2d 341, 347 (1980). We will disturb a trial court's ruling on a motion for a continuance if that ruling was an abuse of the trial court's discretion. *Smith*, 248 Ill. App. 3d at 360. A trial court abuses its discretion when its "decision is arbitrary, fanciful or unreasonable, such that no reasonable person would take the view adopted by the trial court." *People v. Ramsey*, 239 Ill. 2d 342, 429 (2010).

¶ 38 Here, the trial court did not abuse its discretion in denying Industrial Door's motion for a continuance following an amendment to Infiniti's counter-complaint on the day of trial. Industrial Door claims that the assignment of Mercedes-Benz's interest in the garage door to Motor Werks was a surprise because such assignment was never raised before the day of trial. Although Industrial Door may not have received a copy of the assignment, it, nonetheless, was,

or should have been, fully aware of Infiniti's claim to Mercedes-Benz's garage door. Infiniti's two letters to Industrial Door provide sufficient evidence that Industrial Door knew or should have known that Infiniti had an interest in the garage door that Industrial Door removed. More specifically, Infiniti's letter to Industrial Door dated June 15, 2009, states that Infiniti's Controller left messages for Industrial Door on May 14, 2009, May 21, 2009, May 28, 2009 and June 15, 2009 with no return calls. The letter specified that the Controller stated in the messages that Industrial Door took a garage door from a job contracted through Pepper Construction and the door was not returned nor was there a credit for the door. The letter continued by stating that payment on the open invoice will be made when answers are provided regarding the missing door or credit. In another letter dated January 15, 2010, sent to Industrial Door, Hub reiterated that it disputed Industrial Door's claims and stated that Industrial Door did extensive work for Motor Werks, but failed to return a door that it removed from a Motor Werks location. This letter continued by stating that the resolution was simple, provide the garage door that they removed and took or provide a credit. Thus, the facts as they existed when the trial court denied the motion for a continuance, conveyed to Industrial Door that Infiniti had an interest in retrieving the garage door from Industrial Door, and that it was actively pursuing the return of the door.

¶ 39 Moreover, the amendment to the breach of contract count clarified that Mercedes-Benz assigned its interest in the garage door to Motor Werks, which in this context was understood to mean Infiniti as designated in the introductory paragraph of its answer and counter-complaint. The addition of the assignment language formalized Infiniti's interest in the garage door for

pleading purposes that it previously alluded to in its written communications to Industrial Door. Based on this evidence, the trial court's decision to deny Industrial Door's motion for a continuance was not "arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the trial court."

¶ 40 CONCLUSION

¶ 41 For the reasons stated, we affirm the judgment of the trial court, and the award of damages to Infiniti regarding its breach of contract counter-claim.

¶ 42 Affirmed.