2012 IL App (2d) 110434-U
No. 2-11-0434
Order filed February 17, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

INTERNATIONAL PROFIT ASSOCIATES, INC., and INTERNATIONAL TAX , ADVISORS, INC.,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellees,	)	
v.	)	No. 07-AR-554
BRADLEY M. GRIFFIN, INC., d/b/a HOME THEATER DESIGN GROUP,	)	Honorable Diane E. Winter,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: (1) Trial court's finding that defendant did not prove its fraudulent inducement defense was not against the manifest weight of the evidence where defendant's representative testified that she did not rely on plaintiffs' representations in deciding to enter into tax consulting contract; (2) trial court's finding that plaintiff performed its obligations under the contract was not against the manifest weight of the evidence; and (3) trial court's decision to bar witness from testifying was not an abuse of discretion where defendant failed to disclose the witness in its 213(f) interrogatory responses and where the issue of the witness testifying did not arise until plaintiffs filed a motion to bar the witness less than two weeks prior to trial.

¶ 1 Plaintiffs, International Profit Associates, Inc. (IPA), and International Tax Advisors, Inc. (ITA), sued defendant, Bradley M. Griffin, Inc. (BMG), in the circuit court of Lake County, seeking to recover money defendant allegedly owed plaintiffs under a contract for business management and tax consulting services. Following a bench trial, the court entered judgment in favor of defendant on IPA's claim and in favor of ITA on its claim. Defendant appeals from the judgment entered in favor of ITA and from an order barring witness Nancy Miller from testifying at trial. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Defendant is a Texas corporation that provides home theater design and installation services. Plaintiffs, IPA and ITA, are Illinois corporations that provide business management and tax consulting services, respectively. On May 14, 2007, plaintiffs filed a two-count complaint against defendant. In count I, plaintiffs alleged that defendant entered into a contract with IPA on January 3, 2007, under which IPA subsequently provided 343 hours of consulting services at a rate of $245 per hour plus expenses. Plaintiffs further alleged that defendant still owed IPA $22,952.61 under the contract. In count II, plaintiffs alleged that defendant also entered into a contract with ITA on January 3, 2007, under which ITA subsequently provided tax consulting services for a flat fee of $15,000 plus expenses. Plaintiffs further alleged that defendant still owed ITA $9,149.48.

¶ 4 On July 12, 2007, defendant answered plaintiffs' complaint and asserted fraudulent inducement as an affirmative defense. Defendant's allegations spanned 32 pages, the majority of which related solely to IPA. Defendant alleged that IPA was a corporate entity through which certain individuals, led by John Burgess, conducted a scheme to fraudulently induce clients into signing contracts for consulting services, which ultimately were of no value to them. Components of the

scheme included inducing a client to agree to have IPA conduct an "objective" survey of the client's business. Once a client signed up for a survey, the next step was for an IPA business analyst to follow a scripted routine whereby the analyst would obtain the client's financial information, concoct inflated "problem costs" that the analyst would attribute to poor business management, and present a consulting services agreement under which IPA proposed to rescue the client from its business management failures. According to defendant, the salesperson and the analyst would also guarantee the client a three-to-one return on consulting fees, despite knowing the assurance to be false.

¶ 5 Only approximately two pages of the affirmative defense specifically related to ITA. Defendant alleged that an IPA business analyst also sold defendant tax consulting services through ITA. The ITA agreement provided:

> "The Project Manager will prepare a [t]ax [e]ngagement [p]lan encompassing the objectives and scope of the engagement. Due to the fact that each [c]lient's business and tax situation is unique, consulting services' [*sic*] work is custom designed around each objective, giving consideration to the specific nature of [c]lient's business and tax situation."

Defendant alleged that the tax engagement plan was "nothing more than a boilerplate [p]lan without any benefit."

¶ 6 Pretrial Discovery and Order Barring Nancy Miller

¶ 7 The first two and a half years of litigation were plagued by discovery disputes, which ultimately resulted in an order barring witness Nancy Miller from testifying at trial. Miller was a former IPA employee who, in January 2010, signed an affidavit in connection with a 2007 federal suit filed by defendant and other former IPA clients against John Burgess, the founder of IPA, and

other individuals (*Amari Co. v. Burgess*, No. 07-C-1425).[1] The majority of Miller's federal affidavit described various instances of IPA's alleged deceptive business practices. Only 6 of the 82 paragraphs specifically related to ITA. Miller stated in the affidavit that ITA's tax-consulting work was "rarely if ever done by so-called [s]enior [t]ax [c]onsultants sent to meet clients, [to] represent that they were doing the work, [and to] collect a retainer, and sent back to the clients [to present] reports, [to] pretend they had done such reports, and [to] collect the balance of the fee." Miller stated that she knew this "from talking to [senior project managers] on jobs [she] sold that involved tax work as well as business consulting and otherwise following up on such jobs."

¶ 8 The procedural history that ultimately resulted in the order barring Miller from testifying began with defendant tendering responses to written discovery in June 2008. Immediately thereafter, plaintiffs filed a motion to compel and for sanctions, asserting that the discovery responses were improper. Plaintiffs contended that portions of the discovery responses—including defendant's signed verification pages and Supreme Court Rule 213(f) witness disclosures—were simply copies of the verification pages and the witness disclosures that defendant had filed in the federal suit. Before the trial court ruled on plaintiffs' motion, however, defendant obtained a new attorney, who apparently told the court that defendant had not reviewed or verified the prior discovery responses, and that defendant wanted to withdraw them and tender new responses. Presumably, the court permitted defendant to do so, because on September 29, 2008, the court granted defendant 21 days to respond to written discovery. On November 19, 2008, after defendant failed to answer written

[1]The federal suit alleged that the consulting services "scheme" masterminded by Burgess and others violated the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 *et seq.* (West 2010)).

discovery, the trial court entered an order barring defendant from introducing at trial evidence or testimony for which plaintiffs had sought discovery.

¶ 9 Nearly a year later, on October 8, 2009, the trial court vacated the November 19, 2008, discovery sanction on defendant's motion. Shortly thereafter, defendant tendered new responses to written discovery. Unlike its prior Rule 213(f) witness disclosures, defendant's new disclosures did not disclose Miller as a witness. Moreover, in the introductory paragraphs of its "superceding" interrogatory answers, defendant stated that it "hereby revoke[d] and repudiate[d] any interrogatory answers purportedly made and served on its behalf by [defendant's prior attorneys]." Defendant stated that it "had no such knowledge of such answers prior to the engagement of [its new attorney]." The new answers were properly verified by Sheri Griffin, defendant's president.

¶ 10 The court subsequently conducted two hearings at which the parties discussed which witnesses would be made available for deposition. On November 5, 2009, the trial court ordered plaintiffs to make six witnesses available for deposition, none of whom were Miller. On March 8, 2010, after defendant failed to depose any of the six witnesses, the court again ordered plaintiffs to make the witnesses available for deposition. Again, Miller was not discussed.

¶ 11 On April 1, 2010, plaintiffs filed a motion to exclude Miller as a witness at trial. Plaintiffs anticipated that defendant would attempt to call Miller as a witness, because defense counsel had recently tried to call her as a witness at the trial of another case brought by IPA. Plaintiffs asserted that defendant had not disclosed Miller in its answers to Rule 213(f) interrogatories, and that plaintiffs would be prejudiced were they required to take the deposition of an additional witness prior to trial, which was scheduled to begin on April 13, 2010. Defendant argued in response that plaintiffs had known about Miller since at least January 2010, because defense counsel at that time

had sought to continue an arbitration hearing in another case brought by IPA because Miller had been unable to attend the hearing to testify. Defendant further argued that, on March 9, 2010, it had disclosed Miller as a witness in yet another case brought by IPA. On that date, defense counsel had e-mailed plaintiffs' counsel, stating his intent to call Miller as a witness in that case. Defense counsel had attached to the e-mail Miller's federal affidavit. On April 5, 2010, following a hearing, the trial court entered the order barring Miller from testifying at trial, finding both that defendant had failed to disclose Miller in its answers to Rule 213(f) interrogatories and that Miller was not a "material witness."

¶ 12 Bench Trial

¶ 13 At the two-day bench trial, Sheri Griffin, defendant's president, testified regarding her experience with plaintiffs. She testified that a telemarketer from IPA contacted her in December 2006. She had previously contracted with IPA for consulting services in 2001, so she was familiar with the company. She agreed to a no-cost survey, and IPA business analyst Thomas Gluzinski arrived on January 2, 2007, to conduct it. Gluzinski told Griffin that he would recommend IPA's services only if he were sure that defendant could achieve a three-to-one return on consulting fees. Gluzinski "held himself out to [Griffin] as a business authority," and "he in no way, shape or form indicated that he was a salesperson or paid by a commission." Griffin provided Gluzinski with defendant's financial statements for the prior four years, with copies of her personal tax returns, and with an office in which to work.

¶ 14 On the next afternoon, Gluzinski met with Griffin to present the completed survey. He "seemed very troubled, very disturbed." He discussed various problem areas that he had identified, including defendant's labor and administrative costs. He told Griffin that defendant had lost $96,271

due to "poor control over direct labor" and $115,998 due to "poor control of admin [*sic*] wages." He presented the numbers "very quickly" in "rapid fire," and provided no explanation for how he calculated the numbers. Gluzinski "eventually told [Griffin] that if [she] didn't implement what he was suggesting that [defendant] would be out of business in six months."

¶ 15 Griffin also testified that Gluzinski presented information related to ITA's tax consulting services:

> "Q. [Defendant's attorney:] And he made a tax presentation to you, too?
>
> A. [Sheri Griffin:] He did.
>
> Q. What did he tell you about that?
>
> A. Basically he said that we could have the person come out and they would see what they could do. He only had our taxes for a couple hours that morning before he actually did the presentation, and so there was [*sic*] some numbers thrown around but, you know, 'I am just estimating' kind of thing. Because he was saying he hadn't had a chance to look through it thoroughly.
>
> Q. Did he indicate anything about the qualifications of the tax person that would be doing the analysis?
>
> A. He told me that the tax department were [*sic*] either all retired IRS CPA's [*sic*] or attorneys."

¶ 16 At the end of Gluzinski's four-hour presentation, Griffin signed a contract for consulting services from IPA and ITA, as well as from Accountancy Associates, LLC (AAL).[2] The four-page

[2]The contract between defendant and AAL was not at issue in this case; we discuss the AAL portion of the contract only because it is relevant to the issue of the divisibility of the contract, which

contract, which was admitted into evidence at trial, consisted of three agreements. The first page of the contract contained general provisions that "shall apply to all independent agreements." It provided that "[t]he contents of this page are incorporated into each of the independent agreements of IPA, ITA, and AAL attached hereto; however, the additional separate and distinct terms and understandings stated in IPA's, ITA's, and AAL's respective independent agreements are applicable only to the specific agreement in which they appear." The second page described the scope of work to be provided by AAL and provided for a $15,000 flat fee, plus expenses. The third page described the scope of work to be completed by ITA and also provided for a $15,000 flat fee, plus expenses. The fourth and final page described the scope of work to be completed by IPA and provided that defendant agreed to pay weekly invoices at a rate of $245 per hour worked, plus expenses.

¶ 17 Griffin next testified that IPA Senior Project Manager Neal Bryson, IPA Senior Business Consultant Kelly Payne, and ITA Senior Tax Consultant Elliot Shaw arrived the next day, January 4, 2007, to begin the consultancy. Shaw was present only for three-to-four hours that day, and he and Griffin had a "brief conversation" during which Shaw collected tax-related information. The record reflects that a "tax engagement plan" was then prepared and signed by Shaw, Bryson, and Griffin. The plan provided that the "engagement will be directed by Neal Bryson, Senior Project Manager, and developed by Elliot S. Shaw JD., LL.M and the strategy development team assigned to this engagement." The plan described the "strategy development team" as "composed of a [t]ax [s]trategist, one or more [t]ax [a]nalysts, and such other tax specialists deemed appropriate." The plan further provided that "[i]t is anticipated that Elliot S. Shaw, JD., LL.M will present ITA's findings and recommendations in a [t]ax [s]trategy [r]eport" on a specified date. Griffin signed the

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we discuss below.

plan and initialed each page. At that time, she also paid $5,000 towards the $15,000 ITA fee and paid $1,096.47 for Shaw's travel expenses.

¶ 18 Griffin testified that the next time she saw Shaw was on April 11, 2007, when he arrived to present the completed tax strategy report to Griffin and her husband, Brad. Shaw "handed each of [them] a copy of the work product and went through and just highlighted, almost through the table of contents." He then explained 2 of approximately 10 topics in the report before asking to be excused. Regarding what happened when Shaw returned, Griffin testified as follows:

"Q. [Defendant's attorney:] After Mr. Shaw came into the room, what did he say?

A. [Sheri Griffin:] He asked if he could speak with us frankly.

Q. And what was yours [*sic*] and Brad's response?

A. Of course.

Q. Now, what did he say to you about the preparation of the tax plan?

A. He said that the preparation was just a form that the people in Buffalo Grove had filled in.

Q. Did he say he had prepared it?

A. No.

Q. Did he tell you that you should pay for the tax plan?

A. No.

Q. Did *** you write some checks to him?

A. Yes.

***

Q. Why did you write the checks?

A. He said that without faxing the checks, he wouldn't be released from the job and he wouldn't be able to fly home.

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Q. Did he give you any advice as to payment of the tax plan?

A. Yes.

Q. And what was that advice?

A. Stop payment on all outstanding checks.

Q. Did he give you any advice as to your bank accounts?

A. Yes.

Q. What did he tell you with respect to your bank accounts?

A. To close all accounts, bank or credit card, that the company had access or copies of those account numbers.

Q. Did he tell you to get a lawyer?

A. Yes.

Q. Did he tell you why you should get a lawyer?

A. Yes.

Q. What was the reason he told you?

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A. He said, 'These people are ripping you off. This is a scam.'

***

Q. And was that directed at the tax plan?

A. Yes.

***

Q. Did you give him any checks for any reason other than for him to be able to get back home?

A. No."

Griffin testified that she hired an attorney the next day. The attorney then sent a letter dated April 13, 2007, to IPA directing that any correspondence be directed to him.

¶ 19 On cross-examination, Griffin further testified that Shaw told her that the tax strategy report "was just a lot of fill-in-the-blank stuff, that it wasn't our tax plan." However, she also testified that, before Shaw left, she signed a form acknowledging that she had received the tax strategy report and that she was satisfied with it. The form, which was admitted into evidence, stated that "[t]he issues addressed in this report and discussed in our closing conference were examined, reviewed, and approved as indicated by the signatures below." The form further provided that "[t]his also signifies your satisfaction with ITA's work to date as it relates to [p]roject [p]lan *** of January 4, 2007, and the ITA U.S. [c]onsulting [s]ervices." Both Shaw and Griffin signed the form.

¶ 20 Shaw did not testify at trial. The only ITA employee to testify was Donald Garner, an attorney employed as ITA's tax services director.[3] Garner testified that the typical process during an ITA consulting project was for a tax consultant to gather information from the client and then to bring that information to a team of specialists that creates a report. Garner explained several of the findings and recommendations specific to the tax strategy report delivered to defendant, including recommendations in the areas of estate planning, payroll tax planning, retirement plans, and tax-

[3]In its reply brief, defendant gives Garner's title as "tax services director." The transcript of Garner's testimony gives his title as "tech services director," but this may very well be an error.

deductible college savings plans. Garner also testified that there was no question that Shaw delivered the tax strategy report and that defendant signed a document indicating her satisfaction with it and delivered checks in payment for it to Shaw.

¶ 21 Following the bench trial, both parties filed written closing arguments. On January 10, 2011, the trial court entered its judgment order. Regarding ITA's claim, the court found as follows:

> "The ITA portion of the [a]greement for [s]ervices provided for the development of the ITA Tax Engagement Plan. Pursuant to that plan [d]efendant agreed to the preparation of a tax plan for the corporation as well as for the principals. The service was billed as a flat fee of $15,000 and a down payment was made. Mr. Shaw on behalf of ITA delivered the tax plan and supporting documents to the [d]efendant. At that meeting, Mr. Shaw relayed certain information to Ms. Griffin which caused her to stop payment on her outstanding checks to IPA and ITA, including those that she delivered to Mr. Shaw at that meeting. ITA is requesting the remaining professional fee balance of $11,436.85 be paid. No evidence or testimony was received that ITA did not perform the agreed upon services and provide the documentation outlined in the [a]greement."

Regarding defendant's fraudulent inducement defense, the court found:

> "The Court received no evidence that the materials presented by IPA to the [d]efendant contained untrue statements or that untrue statements were made during the survey process. The [d]efendant presented no evidence that the analysis or problem costs presented by IPA contained false statements. No evidence was presented that the 3 to 1 assurance was a false statement when made.

> Plaintiffs' business practices were designed to obtain clients and receive payment for services. The [a]greement for [s]ervices contains an integration clause, a disclaimer of any warranties and a cancellation clause. The fact [p]laintiff created pressure, urgency and appealed to [d]efendant's desire for increased profits and net spendable monies does not constitute fraud."

Based on these findings, the trial court entered judgment in the amount of $11,436.85 in favor of ITA.[4] On April 5, 2011, the court denied defendant's motion for reconsideration. This timely appeal followed.

¶ 22 ANALYSIS

¶ 23 Defendant raises three issues on appeal: (1) that the court erred in "rejecting" its fraudulent inducement defense; (2) that the court failed to interpret Shaw's statements as "admissions" that ITA did not fulfill its obligations under the contract; and (3) that the court erred in barring Nancy Miller from testifying.

¶ 24 Defendant's Fraudulent Inducement Defense

¶ 25 Defendant argues that the trial court erred in not finding that it was fraudulently induced into contracting for ITA's services. Defendant asserts that IPA made at least three material misrepresentations upon which defendant relied in entering into the contract with ITA. The alleged misrepresentations were IPA's statements that the survey it performed would be "objective," IPA's

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[4]The trial court entered judgment in favor of defendant on IPA's claim because the court found that "the project had already exceeded the anticipated hours," that IPA consultant Bryson had "performance issues," and because "several components of the engagement had not been completed."

three-to-one assurance, and the "problem costs" outlined in the survey. Defendant maintains that it would not have contracted for ITA's services but for IPA's alleged misrepresentations.

¶ 26 Fraudulent inducement is an affirmative defense that may render a contract unenforceable. *Jordan v. Knafel*, 378 Ill. App. 3d 219, 229 (2007). The defense is available where a contract was procured through misrepresentation. *Jordan*, 378 Ill. App. 3d at 229. The misrepresentation must have been "(1) one of material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false by the maker, or not actually believed by him on reasonable grounds to be true, but reasonably believed to be true by the other party; and (4) *** relied upon by the other party to his detriment." *Jordan*, 378 Ill. App. 3d at 229. The party asserting fraudulent inducement as a defense has the burden of proving it by clear and convincing evidence. *Warren Chevrolet, Inc. v. Bemis*, 197 Ill. App. 3d 680, 686 (1990). We will reverse the trial court's findings on a fraudulent inducement defense only if they were against the manifest weigh of the evidence. *Warren Chevrolet*, 197 Ill. App. 3d at 686.

¶ 27 Our review of the record has not uncovered any evidence that would support defendant's claim that it was fraudulently induced into signing the ITA portion of the agreement. The only testimony that Griffin gave concerning her decision to contract for ITA's services was that, during Gluzinski's presentation to her on January 3, 2007, "[b]asically he said that we could have the [ITA] person come out and they would see what they could do." She testified that "[h]e only had our taxes for a couple of hours that morning before he did the presentation, and so there was [*sic*] some numbers thrown around but, you know, 'I am just estimating' kind of thing." Based on Griffin's own testimony, she did not rely on any representations made by Gluzinski prior to signing the ITA portion of the agreement. See *Jordan*, 378 Ill. App. 3d at 229 (to prove a fraudulent inducement

defense, a party must present clear and convincing evidence that the party relied on a material misrepresentation). The only other representation related to ITA that Gluzinski made was that "the tax department were [*sic*] either all retired IRS CPA's or attorneys." Nothing in the record would suggest that this was false. See *Jordan*, 378 Ill. App. 3d at 229 (a material misrepresentation must have been "known to be false by the maker"). Consequently, we cannot say that the trial court erred in not finding that defendant was fraudulently induced into contracting for ITA's services.

¶ 28 We are also unpersuaded by defendant's arguments that the ITA and IPA agreements were "interrelated" and "a single contract" for purposes of its fraudulent inducement defense. In its opening brief, defendant argues that the trial court erred in treating the contract as divisible,[5] and that the court should have found that IPA's failure to perform "frustrated the purpose" of the ITA portion of the agreement. In its reply brief, however, defendant concedes that it never raised this argument before the trial court, and states that it "will abstain from any argument that it's excused from ITA's claim because of IPA's breach." However, defendant then states that it "will continue to argue the interrelationship of the projects in connection with its fraudulent inducement defense." Accordingly, because the issue of the divisibility of the contract remains relevant to our analysis of defendant's fraudulent inducement defense, we will address it despite defendant's limited concession.

¶ 29 The term "divisible" has two meanings in contract law. See *Kimco Corp. v. Murdoch, Coll & Lillibridge, Inc.*, 313 Ill. App. 3d 768, 773-74 (2000) (discussing the two meanings); Restatement (Second) of Contracts § 240 cmt. b (1981) (same). Under the first meaning, " '[a] divisible contract

[5]The court implicitly treated the contract as divisible, since it ruled in favor of defendant on the IPA portion of the contract and in favor of ITA on its portion.

is one in which both parties have divided up their performance into units or installments in such a way that each past performance is the rough compensation for a corresponding past performance by the other party.' " *Kimco*, 313 Ill. App. 3d at 773 (quoting *Trapkus v. Edstrom's, Inc.*, 140 Ill. App. 3d 720, 727 (1986)). A good example of a divisible contract in this sense is a monthly employment contract—a month of work earns a corresponding monthly payment. *Kimco*, 313 Ill. App. 3d at 774-75. Under the second meaning, "divisible" means "more than one." *Kimco*, 313 Ill. App. 3d at 773-74 (citing 6 W. Jaeger, Williston on Contracts § 861 (3d ed. 1962)). The test for this type of divisible contract is " 'whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.' " *Kimco*, 313 Ill. App. 3d at 774 (quoting 6 W. Jaeger, Williston on Contracts § 861 (3d ed. 1962)); see also *Bjork v. Draper*, 381 Ill. App. 3d 528, 544-45 (2008) (applying test); *Meredith v. Knapp*, 62 Ill. App. 2d 422, 425-26 (1965) (same). Under either meaning, the court's task is to effectuate the intent of the parties. *Bjork*, 381 Ill. App. 3d at 544; *Kimco*, 313 Ill. App. 3d at 773. Because in reality parties often will not have considered the question of divisibility at the time of contracting, in practice the test is whether, had the parties thought of it, they would have agreed to severable portions of the contract irrespective of the other portions. See *Bjork*, 381 Ill. App. 3d at 544; *Kimco*, 313 Ill. App. 3d at 773. A trial court's determination of the parties' intent will not be disturbed on appeal unless it was against the manifest weight of the evidence. *Bjork*, 381 Ill. App. 3d at 544.

¶ 30 After reviewing the record, we cannot conclude that it was against the manifest weight of the evidence for the trial court to treat the IPA and the ITA portions of the contract as separate agreements. The first page of the contract contained general provisions that "shall apply to all independent agreements." The page further provided that "[t]he contents of this page are

incorporated into each of the independent agreements of IPA, ITA, and AAL attached hereto; however, the additional separate and distinct terms and understandings stated in IPA's, ITA's, and AAL's respective independent agreements are applicable only to the specific agreement in which they appear." The third page described the scope of work to be completed by ITA and provided for a $15,000 flat fee. The fourth and final page described the scope of work to be completed by IPA and provided for an hourly fee. Based on these provisions, the contract clearly evinced the parties' intent to enter into separately enforceable agreements. Moreover, defendant has cited no evidence in the record that would support its claim that the parties intended the contract to be a single, indivisible agreement. The contract clearly was divisible in the sense of "more than one."

¶ 31 Because the contract was divisible, we also cannot agree with defendant that the trial court erred by not concluding that defendant was fraudulently induced into contracting for ITA's services because it relied on IPA's representations concerning the "objectivity" of the survey, the three-to-one assurance, and the "problem costs." Even assuming that defendant presented evidence that it relied on these specific representations in deciding to contract for IPA's services, nothing in the record suggests that defendant relied on the same representations in deciding to contract for ITA's services. As discussed above, Griffin testified that she did not rely on any representations made by Gluzinski prior to signing the ITA portion of the agreement.

¶ 32 Shaw's "Admissions" as Evidence of ITA's Failure to Perform

¶ 33 Defendant next argues that the trial court erred in failing to interpret Shaw's statements as "admissions" that ITA did not perform its obligations under the contract. Defendant points to Shaw's purported statements that the tax strategy report consisted of "fill-in-the-blank stuff" and was

not "their tax plan," that it "was just a form that the people in Buffalo Grove had filled in," that "these people were ripping you off," and that the consultancy was a "scam."

¶ 34 Plaintiffs initially respond that defendant has forfeited the issue of ITA's alleged breach because defendant failed to raise the issue before the trial court. Plaintiffs contend that defendant's only affirmative defense was fraudulent inducement, and that defendant filed no counterclaim for breach of contract. Plaintiffs further contend that, even considering Griffin's testimony regarding Shaw's statements, the trial court's finding that ITA fulfilled its obligations under the contract was not against the manifest weight of the evidence.

¶ 35 We disagree with plaintiffs that defendant has forfeited the issue of ITA's failure to perform. Although plaintiffs and defendant refer to ITA's failure to perform as a "breach of contract," we construe defendant's argument to be that ITA fell short of proving an element of its breach of contract claim—specifically, the element that ITA performed its obligations under the contract. See *Anderson v. Kohler*, 397 Ill. App. 3d 773, 785 (2009) ("To prevail on a breach of contract claim, the plaintiff must plead and prove that (1) a contract existed; (2) *the plaintiff performed his obligations under the contract*; (3) the defendant breached the contract; and (4) the plaintiff sustained damages as a result of the defendant's breach." (Emphasis added.)). Moreover, sufficiency of the evidence is not an issue that can be forfeited on appeal from a judgment entered following a bench trial. See Ill. S. Ct. R. 366(b)(3)(ii) (eff. Feb. 1, 1994) (providing that, in nonjury cases, "[n]either the filing of nor the failure to file a post-judgment motion limits the scope of review"); *In re Gail F.*, 365 Ill. App. 3d 439, 445 (2006) (holding that "there is no point in a nonjury proceeding in which a party must either raise or forfeit an issue of the sufficiency of the evidence").

¶ 36 We note that defendant uses the word "admissions" without clarifying the meaning it intends. The cases that defendant cites hold that a statement is a party admission—and thus not inadmissible hearsay—if made during the existence of an employment relationship and concerning matters within the scope of employment. *E.g.*, *Halleck v. Coastal Building Maintenance Co.*, 269 Ill. App 3d 887, 892-93 (1995). However, the admissibility of Griffin's testimony regarding Shaw's statements is not at issue on appeal. The trial court overruled plaintiffs' hearsay objection and allowed the testimony, and neither party challenges the statements' admissibility on appeal. Shaw's purported statements also were not "judicial admissions," because Shaw did not make the statements in the course of the judicial proceeding. See *Bartolomucci v. Clarke*, 60 Ill. App. 2d 229, 236 (1965) (noting that judicial admissions must be made during the course of a judicial proceeding). Griffin's testimony concerning Shaw's statements was simply evidence for the trial court to weigh in making its findings. See *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002) ("In a bench trial, the trial court must weigh the evidence and make findings of fact.")

¶ 37 We can construe defendant's argument concerning Shaw's purported "admissions" to be that the trial court did not afford them sufficient weight in reaching its decision. This brings us to the central issue, which is whether the trial court's finding that ITA performed its obligations under the contract was against the manifest weight of the evidence. A judgment following a bench trial is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the judgment is unreasonable, arbitrary, or not based on evidence. *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 177 (2004). We cannot substitute our judgement for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn. *In re D.F.*, 201 Ill. 2d 476, 498-99 (2002). We must draw from the evidence all reasonable

inferences in support of the judgment. *H & H Press, Inc. v. Axelrod*, 265 Ill. App. 3d 670, 679 (1994). The "manifest weight of the evidence" is " 'the clearly evident, plain and indisputable weight of the evidence.' " *Application of County Collector*, 59 Ill. App. 3d 494, 499 (1978) (quoting *Gettemy v. Grgula*, 25 Ill. App. 3d 625, 628 (1975)). If there is substantial evidence to support a trial court's judgment, the judgment is not against the manifest weight of the evidence merely because there is also substantial evidence to the contrary. *McMillian v. McLane*, 338 Ill. App. 514, 516 (1949). "The latter must palpably outweigh the former." *McMillian*, 338 Ill. App. at 516.

¶ 38 Defendant argues that the evidence at trial established ITA's failure to fulfill three obligations under the contract: (1) that the strategic tax plan would be "developed by Elliot Shaw, JD., LL.M"; (2) that Shaw would "present ITA's findings and recommendations in a [t]ax [s]trategy [r]eport"; and (3) that "tax consulting services work [would be] custom designed ***, giving consideration to the specific nature of [c]lient's business and tax situation." We address each argument in turn.

¶ 39 Defendant maintains that the only "reasonable construction" of the phrase "developed by Elliot Shaw, JD., LL.M," was that Shaw would be "personally involved" in the preparation of the tax strategy report. However, the record refutes defendant's contention that Shaw was required to personally prepare the report. The original contract dated January 3, 2007, did not name the specific individuals who would prepare the tax strategy report. The contract provided, *inter alia*, that "[t]he [p]roject [m]anager will prepare a [t]ax [e]ngagement [p]lan encompassing the objectives and scope of the engagement" and that "ITA shall evaluate past years [*sic*] tax reporting submissions and develop a [s]trategic [t]ax [r]eport comprised of specific tax related strategies for [c]lient ***." The original contract did not name Shaw but instead authorized ITA to "assign a [p]roject [m]anager and

a [t]ax [c]onsultant to begin consulting services." Thus, defendant's contention that Shaw was required to personally prepare the report finds no support in the January 3, 2007, contract.

¶ 40 The tax engagement plan also does not support defendant's contention that Shaw was required to personally prepare the report. The plan, dated January 4, 2007, provided that "[t]his engagement will be directed by Neal Bryson, Senior Project Manager, and developed by Elliot Shaw, JD., LL.M and the strategy development team assigned to the engagement." Although defendant interprets this provision to mean that Shaw would be "personally involved in the preparation of" the tax strategy report, the language of the provision does not support such a limited construction. The provision provided that "[t]his *engagement* will be *** *developed* by Elliot Shaw, JD., LL.M *and* the strategy development team." (Emphases added.) First, the "engagement" consisted of several parts. It not only consisted of the preparation of a tax strategy report, but also involved the collection of information, the articulation of specific objectives, and the presentation of a completed report. Second, the phrase "developed by," which was not defined anywhere in the contract documents, did not necessarily mean "personally prepared by." The word "develop" can mean "to lay out *** in or evolve *** into a clear, full and explicit presentation," "to express *** in expanded form," or "to cause to unfold gradually." *Webster's Third New International Dictionary* 618 (1993). The plan did not explicitly or clearly define Shaw's role. Third, to the extent that the plan required Shaw to participate in the engagement, it did not contemplate him working alone, but provided that Shaw *and* the strategy development team would "develop[]" the engagement. The plan defined the team as "composed of a [t]ax [s]trategist, one or more [t]ax [a]nalysts, and such other tax specialists deemed appropriate."

¶ 41 Tax Services Director Garner's testimony supports the conclusion that Shaw was not required to personally prepare the tax strategy report. Garner testified that an ITA engagement typically involved gathering information from the client and then taking it back to the home office in Buffalo Grove to have a team of specialists prepare the report. Garner further testified that Shaw's role was to present and explain the report to the client. Garner testified that the team of specialists in Buffalo Grove consisted of CPAs, LLMs, and attorneys.

¶ 42 The record contains evidence that ITA fulfilled its obligation to have the "engagement *** developed by Elliot Shaw, JD., LL.M and the strategy development team." Griffin testified that Shaw collected tax-related information from her during their January 4, 2007, meeting. The tax engagement plan also described five objectives that the tax strategy report would address. The plan stated that these objectives "were developed by Sheri Griffin and discussed with her." While it is unclear who drafted the tax engagement plan, the plan was dated January 4, 2007, which was the only day Shaw was on defendant's premises prior to the date he delivered the final report. The plan was signed by Shaw and "approved" by Senior Project Manager Bryson. At a minimum, these facts support the conclusion that Shaw participated in "develop[ing]" the engagement.

¶ 43 The testimony of Senior Project Manager Bryson and Tax Services Director Garner also supports the conclusion that Shaw participated in "develop[ing]" the engagement along with the strategy development team. Bryson testified that he had two conversations with Shaw during the engagement. Two weeks prior to Shaw's delivery of the tax strategy report, Bryson called and asked him if he had "any concerns about the delivery" and if "everything look[ed] like it was going to be coming together." Bryson testified that Shaw "indicated that everything seemed to be on track." During another conversation, Shaw "indicated to [Bryson] there was going to be $400,000 savings

on the estate side and $60,000 savings on the taxes side." Bryson testified that Shaw expressed no concerns to him during the engagement.

¶ 44 Tax Services Director Garner gave detailed testimony explaining several of the findings and recommendations specific to the tax strategy report delivered to defendant. These included findings and recommendations tailored to the five objectives outlined in the tax engagement plan that was signed by Shaw. For example, Garner testified that the report recommended that defendant utilize one of several retirement plans, such a 401K plan, which defendant did not have previously. This recommendation addressed the objective of "[p]roviding as much retirement income [as] feasible." The report also outlined a "comprehensive estate plan ***, including a [*sic*] irrevocable trust." This recommendation addressed the objective of "minimizing estate and gift taxes." Based on Garner's testimony, we can infer that the strategy development team used the information that Shaw collected in preparing the report, and that the team tailored the report to the objectives that Shaw participated in outlining.

¶ 45 The only evidence that defendant presented to show that ITA did not fulfil its obligation to have the "engagement *** developed by Elliot Shaw, JD., LL.M and the strategy development team," was Griffin's testimony concerning Shaw's alleged statements to her and her husband on April 11, 2007. However, as discussed above, Shaw's purported statements were not judicial admissions that dispensed with the need for proof, but, rather, were simply evidence for the trial court to weigh in making its findings. Balanced against Shaw's purported statements was the evidence discussed above of Shaw's participation in the engagement, as well as Griffin's own testimony that Shaw delivered the report, highlighted the topics covered in the table of contents, and presented two of the topics in detail. Griffin also signed a document indicating her satisfaction with

the report and delivered checks in payment for the report to Shaw. Given these considerations, we cannot conclude that the trial court's judgment was against the manifest weight of the evidence based upon defendant's argument that the report was not "developed by Elliot Shaw, JD., LL.M."

¶ 46 Regarding the provision that Shaw would "present ITA's findings and recommendations in a [t]ax [s]trategy [r]eport," defendant again relies on a limited excerpt from the tax engagement plan. The tax engagement plan provided that "[i]t is anticipated that Elliot S. Shaw, JD., LL.M will present ITA's findings and recommendations in a [t]ax [s]trategy [r]eport on Thursday, March 15, 2006." Contrary to defendant's characterization, the plan did not dictate the manner in which Shaw would present the report, nor did it require Shaw to utilize a Power Point presentation. The plan simply stated that ITA's findings and recommendations would be presented "in a [t]ax [s]trategy [r]eport." As discussed above, Griffin testified that Shaw delivered the report, highlighted the topics covered in the table of contents, and presented 2 of the topics in detail. Although she explained her reasons for doing so, Griffin also admitted that she signed a document indicating her satisfaction with the report and gave Shaw payment for the report. Consequently, there was substantial evidence in the record to support a finding that ITA performed its obligation to present its findings and recommendations "in a [t]ax [s]trategy [r]eport."

¶ 47 Regarding the provision that "tax consulting services work [would be] custom designed ***, giving consideration to the specific nature of [c]lient's business and tax situation," the only evidence to support defendant's claim that the report was not "custom designed" was Shaw's purported statements to Griffin that the report consisted of "fill-in-the-blank stuff" and was not "their tax plan." It was the trial court's task to weigh this evidence against the other evidence presented, including Garner's detailed testimony explaining the custom findings and recommendations

contained in defendant's tax strategy report. As discussed above, it also appears that the report was based upon information that Shaw collected from Griffin and was tailored around objectives outlined after consulting with Griffin. Given these considerations, we cannot say that the trial court's judgment was against the manifest wight of the evidence based on defendant's argument that the tax strategy report was not "custom designed."

¶ 48 Based on the foregoing, we cannot say that the trial court's finding that ITA performed its obligations under the contract was against the manifest weight of the evidence.

¶ 49 Order Barring Witness Nancy Miller

¶ 50 Defendant argues that the trial court erred when it barred witness Nancy Miller from testifying at trial. Defendant contends that its failure to disclose Miller was inadvertent. Defendant further argues that plaintiffs had known of the potential for Miller being a witness for some time, since defendant had disclosed Miller in its preceding Rule 213(f) disclosures, which defendant tendered to plaintiffs in June 2008, even though defendant subsequently withdrew those disclosures. Defense counsel also disclosed Miller as a witness in two other cases brought by IPA, the first disclosure dating back to January 2010. Defendant further contends that Miller was a material witness to its fraudulent inducement defense, because Miller would have testified, among other things, that IPA's business surveys were biased, that the promise of a three-to-one return was false, and that the "problem costs" were concocted to scare clients into purchasing consulting services.

¶ 51 Supreme Court Rule 213(f) (eff. Jan. 1, 2007) provides that "[u]pon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial ***." Rule 213(i) imposes a duty on a party to supplement its discovery responses whenever new or additional information becomes known. Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007). The committee comments to

Rule 213(f) state that it is meant "to prevent unfair surprise at trial, without creating an undue burden on the parties before trial." Ill. S. Ct. R. 213(f), Committee Comments (adopted March 28, 2002).

¶ 52 Supreme Court Rule 219(c) (eff. July 1, 2002) empowers a trial court to impose sanctions for a party's unreasonable failure to comply with the rules regarding discovery. "A party's noncompliance is 'unreasonable' where there has been a deliberate and pronounced disregard for a discovery rule." *H & H Sand & Gravel Haulers Co. v. Coyne Cylinder Co.*, 260 Ill. App. 3d 235, 242 (1992). Once a court has imposed a sanction, "the sanctioned party has the burden of establishing that the noncompliance was reasonable or justified by extenuating circumstances." *In re Estate of Andernovics*, 311 Ill. App. 3d 741, 746 (2000). One sanction available under Rule 219(c) is to bar an undisclosed witness from testifying at trial. Ill. S. Ct. R. 219(c)(iv) (eff. July 1, 2002). We review a trial court's decision to impose a sanction under Rule 219(c) for an abuse of discretion. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). To determine whether the court abused its discretion, we look at the following factors: "(1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence." *Shimanovsky*, 181 Ill. 2d at 123-24.

¶ 53 Defendant urges us to review *de novo* the trial court's decision to bar Miller from testifying, because the facts are uncontroverted, and because we can "independently decide the propriety of the sanction." Defendant's argument is without merit. The issue before us is not whether it was proper for the trial court to apply Rule 219(c) to the undisputed facts, but whether the court abused its discretion in imposing a particular sanction under Rule 219(c). Compare *In re Marriage of Bonneau*,

294 Ill. App. 3d 720, 723 (1998) (reviewing *de novo* the issue of whether a discovery privilege applied to undisputed facts), with *Shimanovsky*, 181 Ill. 2d at 123 (reviewing for abuse of discretion the trial court's imposition of a particular sanction under Rule 219(c)).

¶ 54 Initially, we conclude that the trial court did not abuse its discretion in concluding that defendant unreasonably failed to comply with Rule 213(f). We note that the parties do not dispute that defendant failed to disclose Miller in its "superceding" Rule 213(f) interrogatory answers. Moreover, defendant did not establish that its failure to comply with the rule was reasonable or justified by extenuating circumstances. As we discuss below, defense counsel knew that Miller was a potential witness in January 2010, yet defendant took no formal action to disclose Miller as a witness in the present case until plaintiffs filed a motion in April 2010—less than two weeks prior to trial—to bar Miller from testifying.

¶ 55 After reviewing the record in light of the relevant criteria, we also cannot say that the trial court abused its discretion in barring Miller from testifying at trial as a sanction for defendant's failure to comply with the rule. Although we accept defendant's argument that Miller's testimony may have provided support for its fraudulent inducement defense, the nature of the testimony is but one factor to consider, and the other five factors weigh in favor of affirming the sanction.

¶ 56 Regarding the first factor—surprise to the adverse party—we cannot agree with defendant that plaintiffs would not have been surprised had the trial court permitted Miller to testify. Although defendant points out that it disclosed Miller in its preceding 213(f) disclosures, which defendant tendered in June 2008, defendant does not contest that it later withdrew those disclosures and expressly revoked its previous answers. Moreover, defendant's preceding 213(f) disclosures merely attached defendant's witness disclosures in the federal case, which disclosed Miller along with

numerous other witnesses. Notably, the federal disclosures did not indicate that Miller would testify regarding plaintiffs' alleged fraudulent business practices, but merely identified Miller as a business analyst with knowledge of IPA's business.

¶ 57 Likewise, it is of no help to defendant that its attorney had disclosed Miller as a witness in January 2010 and in March 2010 in two of the other cases brought by IPA. Instead, that consideration seems relevant to the sixth factor—the good faith of the party offering the testimony. Obviously defense counsel knew that Miller was a potential witness in January 2010, yet defendant took no formal action to disclose Miller as a witness in the present case until plaintiffs filed a motion in April 2010 to bar Miller from testifying. Moreover, defendant participated in two hearings before the trial court during which the parties discussed which witnesses would be deposed prior to trial—one hearing on November 5, 2009, and one on March 8, 2010—and, based on the record before us, defendant did not mention Miller in the context of the present case at either hearing.

¶ 58 Regarding the second factor—the prejudicial effect of the testimony—we cannot conclude that Miller's testimony would not have been prejudicial to plaintiffs. On the day that plaintiffs filed their motion to bar Miller, the court had already ordered the parties to depose several witnesses on April 12, 2010, the day before trial was to begin. Moreover, as we have repeatedly mentioned, the issue of Miller testifying did not arise until less than two weeks before the start of trial. We cannot say that requiring plaintiffs to depose another witness and to prepare for another cross-examination would not have prejudiced them, especially considering that Miller's testimony would have covered matters beyond the scope of any other witness's testimony. See *Pancoe v. Singh*, 376 Ill. App. 3d 900, 913-14 (2007) (concluding that witness's testimony was not prejudicial to defendant where it did not go beyond the scope of any other witness's testimony).

¶ 59 Regarding the fourth and fifth factors—the diligence of the adverse party and the timeliness of its objection—we conclude that both criteria support the trial court's decision to impose the sanction. Plaintiffs filed numerous motions regarding written discovery in this case and diligently followed up each time defendant failed to properly tender its responses. Additionally, plaintiffs timely filed its motion to exclude Miller as a witness when it anticipated that defendant might attempt to call Miller at trial.

¶ 60 Given this background, we cannot say that the trial court abused its discretion in barring Miller, or that the sanction was unjust.

¶ 61 CONCLUSION

¶ 62 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 63 Affirmed.