

NOTICE
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2012 IL App (5th) 110181-U
NO. 5-11-0181
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

JAMES YOUNG,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Hamilton County.
)	
v.)	No. 07-L-9
)	
MANNON L. WALTERS, INC.,)	Honorable
)	Barry L. Vaughan,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Welch and Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court awarding damages to the plaintiff for unpaid services is not against the manifest weight of the evidence, but the amount awarded is incorrect because it improperly included prejudgment interest. Additionally, the trial court's denial of the defendant's counterclaim for conversion is not against the manifest weight of the evidence.

¶ 2 The defendant, Mannon L. Walters, Inc., appeals from a judgment entered by the circuit court of Hamilton County in favor of the plaintiff, James Young. The circuit court ordered the defendant to pay the plaintiff \$56,003.80 plus court costs, granted the defendant's counterclaim for replevin, and denied the defendant's counterclaim for conversion. On appeal, the defendant argues that the trial court's finding that the defendant owed the plaintiff \$56,003.80 is against the manifest weight of the evidence. Part of our analysis on this issue involves determining whether the trial court properly included prejudgment interest in the \$56,003.80 awarded to the

plaintiff. The defendant also argues that the court's denial of its counterclaim for conversion is against the manifest weight of the evidence and that the court abused its discretion by denying the defendant's motion to reconsider.

¶ 3

BACKGROUND

¶ 4

The plaintiff operates an excavating and construction business. In 2006 and 2007, the plaintiff worked for the defendant in various locations, including Franklin and Hamilton Counties in Illinois. On July 13, 2007, the plaintiff filed a complaint against the defendant, alleging that the defendant owed him money for unpaid excavation services. To his complaint, the plaintiff attached a list of invoices he had submitted to the defendant (plaintiff's exhibit A), which included the payments received from the defendant and the amounts the plaintiff claimed were still owed. The plaintiff also attached to his complaint another list (plaintiff's exhibit B), a list that was compiled by the defendant's secretary/treasurer, Ivy Morris. Plaintiff's exhibit B set forth most of the same invoices as in plaintiff's exhibit A, invoices numbered 2 through 66, but also added amounts the defendant had paid the plaintiff that were not reflected on plaintiff's exhibit A. The plaintiff acknowledged in his complaint that the defendant had paid \$174,533.08 and alleged that the defendant continued to owe him \$98,153.44.

¶ 5

The defendant answered the plaintiff's complaint and admitted that it had hired the plaintiff to perform excavating and general oil field services, admitted that it had received invoices from the plaintiff, and alleged that the plaintiff's billing summary was not accurate. The defendant filed an affirmative defense in which it admitted that it owed the plaintiff money, but alleged that the amount owed was no more than \$34,583.50. The defendant also filed a counterclaim against the plaintiff, alleging claims for replevin and conversion in that the plaintiff had wrongfully taken and

withheld from the defendant a welder for which it had paid over \$10,000. The plaintiff filed an answer to the counterclaim admitting that he had the defendant's welder in his possession but denying that the defendant was entitled to relief on either of its counterclaims.

¶ 6 The remainder of the facts is derived from the bench trial conducted on November 15, 2010. At the beginning of the trial, the plaintiff submitted a group exhibit (plaintiff's exhibit 1). Both parties agreed that plaintiff's exhibit 1 included all of the invoices that were still disputed and that the defendant owed the plaintiff no more than \$56,003.80. The invoices included in plaintiff's exhibit 1 are a portion of those attached to the plaintiff's complaint, specifically, invoices 24 through 29, 52, 53, 55, and 61 through 66. Additionally, plaintiff's exhibit 1 included invoice 69, which had not been attached to the complaint. Invoice 69 is dated July 10, 2007, and indicates that it is for "interest on unpaid bills." Invoice 69 lists the unpaid balance as \$98,153.44, an interest rate of 1.50%, and \$1,472.30 interest due.

¶ 7 Becky Young testified that the plaintiff is her husband, and she takes care of all of the bookkeeping and billing for his business. She testified that she prepares invoices from the time sheets the plaintiff turns in, which include the number of hours he worked, what he did, and which equipment he used for each job. She then delivers the completed invoices to the party to be billed. In 2006 and 2007, she generated the invoices that are included in plaintiff's exhibit 1 and delivered them to the defendant. She explained that the list of invoices attached to the complaint (plaintiff's exhibit A) was no longer accurate, but at the time the plaintiff filed the complaint, that list was her attempt to match the invoices she had sent to the defendant with its payments. Becky testified that she had conferred with the defendant's bookkeeper, Ivy, and then compiled the invoices that are included in plaintiff's exhibit 1. Becky acknowledged

that the only remaining outstanding balances due from the defendant on the date of the trial were listed in plaintiff's exhibit 1.

¶ 8 Becky testified that it was very difficult for her to keep track of which invoices sent to the defendant had been paid and which had not. She requested that the defendant send her a 1099 form each year for her income tax records, but she never received one. She stated that she had applied all of the payments received from the defendant to the plaintiff's outstanding invoices.

¶ 9 Ivy testified that she maintains all of the business records for the defendant, including computer records of all expenses incurred and invoices paid. She acknowledged that she prepared plaintiff's exhibit B, the list of the plaintiff's invoices and the defendant's payments attached to the plaintiff's complaint, by conducting a computer search for payments made to James Young Excavating. She testified that she later realized that the defendant had made additional payments to the plaintiff under other names, such as Jim Young Farms, but those payments were not reflected on plaintiff's exhibit B. As a result, she conducted a further search for payments made to the plaintiff under other names and found additional payments. Ivy testified that she found six checks the defendant had paid to the plaintiff that had not been credited to the defendant. According to Ivy, the six checks, admitted into evidence as defendant's exhibits A, B, C, E, G, and K, should have been deducted from the amount due to the plaintiff. None of these checks contained any information linking them to any particular invoice. The checks submitted in this group are defendant's exhibits:

(A) to James Young Excavating on March 23, 2006, for \$3,800;

(B) to James Young Excavating on April 18, 2006, for \$7,300;

(c) to James Young on May 4, 2006, for \$5,840;

(E) to James Young on August 2, 2006, for \$10,152.30;
(G) to Jim Young on December 30, 2006, for \$5,000; and
(K) to Jim Young Excavating on July 30, 2007, for \$3,750.50.

¶ 10 The plaintiff admitted that he endorsed all of the checks listed above except defendant's exhibit B for \$7,300. He explained that defendant's exhibit G for \$5,000 was not paid to him for his work but was part of a transaction in which Jan, an employee of the defendant, asked him to cash the check and give her back the cash so that she could pay cash to "a guy in Indiana" for items purchased from him. He said that Jan wanted to pay the seller cash because she got a better price from him by paying cash. The plaintiff testified that he did not send the defendant an invoice for this transaction because it was not part of his work for the defendant. The defendant offered no contradictory testimony. Ivy corroborated the plaintiff by testifying that she had a practice of signing blank checks, which she called "field checks," and giving them to field representatives to use as needed at job sites.

¶ 11 The plaintiff testified that defendant's exhibit K, in the amount of \$3,750.50, was reimbursement for work for the defendant and not owed to him in this case. The defendant's attorney admitted that exhibit K was not at issue in this case. The plaintiff said that he did not specifically recall the other checks (defendant's exhibits A, C, and E). The only evidence from the defendant regarding these checks came during Ivy's testimony. Ivy said that none of these checks were credited to the defendant on plaintiff's exhibit B (attached to the complaint). Ivy did not testify that any of the checks should specifically apply to any particular invoice but only that they all appeared to be "field checks" and should be credited to the defendant and subtracted from the plaintiff's claim that the defendant owed him \$56,003.80.

¶ 12 Becky testified that the plaintiff did not have an agreement with the defendant

that interest would be added to unpaid invoices, and she acknowledged that none of the invoices sent to the defendant included any language indicating that the plaintiff would charge interest on unpaid invoices. The plaintiff corroborated Becky's testimony that he did not have an agreement with the defendant concerning interest charges on unpaid invoices. Mannon L. Walters, Jr., the defendant's president, testified that he did not owe any interest to the plaintiff since they had no agreement that he would pay interest on unpaid invoices.

¶ 13 The plaintiff testified that he worked in Texas for the defendant in 2006. When he returned to Illinois at the end of December 2006, he brought with him a welder that belonged to the defendant. The plaintiff acknowledged that he still had the welder in his possession even though the defendant had requested that he return it. He stated that he was refusing to return the welder to the defendant until the defendant paid him the money owed to him. He admitted that he did not have any documentation to show that he possessed a security interest in the welder. He testified that, since he took possession of the welder, he had not used it and had kept it in storage.

¶ 14 Mannon identified the welder in the plaintiff's possession as a Big Blue 400 industrial welder (Big Blue welder) for which he paid \$10,104.21. He testified that he did not sell or give the Big Blue welder to the plaintiff and that, since about February 2007, he had demanded its return several times, but the plaintiff had refused to return it "unless he got a check." Mannon stated that he had employees who were trained to use the Big Blue welder, but they could not use it after the plaintiff took it. He said that he had to hire outside workers to do some of the welding that his employees would have done with the Big Blue welder if the plaintiff had not had it in his possession. He testified that he had to purchase a replacement welder, but he

was not sure how much it cost.

¶ 15 Ivy testified that she compiled a list of the defendant's payments to third-party welders since the plaintiff took possession of the Big Blue welder in late 2006. The list was admitted into evidence as defendant's exhibit N. Ivy calculated that the defendant had paid third-party welders a total of \$29,700.88 since late 2006. Ivy identified the welders to whom the payments were made but did not know what kind of welder they used or what kind of work the Big Blue welder did. She testified that she did not know if any of the charges on defendant's exhibit N related to work that the Big Blue welder could have done.

¶ 16 Mannon testified that he would have enlisted the help of third-party welders for "roughly about 20 percent" of the work listed on defendant's exhibit N even if the Big Blue welder had been available to him at that time. He explained that about 20% of the work listed on defendant's exhibit N was done in the early morning hours after his welders had finished work for the day. He stated that it was not safe to have his welders work the extra hours.

¶ 17 In his closing argument, the plaintiff's attorney argued that the plaintiff was entitled to prejudgment interest under the statute and that the court should award the plaintiff judgment in the amount of \$56,003.80 plus interest for a total judgment of \$65,911.92. Although the plaintiff was not able to provide the court with a citation to the statute, the trial court determined that the plaintiff was referring to the Interest Act (815 ILCS 205/0.01 to 11 (West 2010)). The trial court noted that the only provision of the statute that might apply required a finding that the defendant withheld money from the plaintiff by an unreasonable and vexatious delay of payment. The court stated: "I am not certain that is the case here. This appears to me more a dispute on accounting practice."

¶ 18 The court said that it agreed with the defendant that it had tried to determine how much it owed the plaintiff and had never refused to pay what was rightfully owed. The court also found, however, that "much of the confusion was caused by the defendant." The court explained its ruling as follows:

THE COURT: The testimony from Becky Young was that she requested 1099s, she requested invoice numbers on their payments, made different requests of the defendant to make it easier for her to apply payments and credits, and those were not forthcoming. *** And, to me, it wasn't clear from the evidence presented by the defendant how their payments were to be applied.

The invoices prepared by the plaintiff were more detailed. And from the plaintiff's perspective, they noted on the invoices which—which wells or which job sites the billing was assigned to. *** [T]he Court is more persuaded by the plaintiff's arguments that \$56,003.80 is due and owing. ***

*** I believe that plaintiff does make [his] case, and the Court is convinced by [a] preponderance of the evidence that \$56,003.80 is due and owing. The Court denies pre-judgment interest because I do not believe it fits either one of the provisions set forth in Section 2 of the Interest Act."

The court found that the defendant was not entitled to any credit for the additional checks written to the plaintiff because it found Becky Young's testimony to be more credible than any evidence the defendant presented.

¶ 19 The court granted the defendant's counterclaim for replevin and ordered the plaintiff to return the Big Blue welder to the defendant within three days of the bench trial. The court denied the counterclaim for conversion. The court entered a docket-sheet order finding in favor of the plaintiff, ordering the defendant to pay the plaintiff \$56,003.80, denying the plaintiff's request for prejudgment interest, ordering the

plaintiff to return the Big Blue welder, and denying the counterclaim for conversion.

¶ 20 On December 10, 2010, the defendant filed a motion to reconsider, arguing that the court should have granted its counterclaim for conversion and should have credited it for additional payments to the plaintiff. The trial court denied the motion to reconsider, and the defendant filed a timely notice of appeal.

¶ 21 ANALYSIS

¶ 22 The defendant argues that the trial court's award of \$56,003.80 and its denial of the defendant's counterclaim for conversion are against the manifest weight of the evidence. When reviewing a challenge to the trial court's ruling after a bench trial, we are to affirm the trial court unless its judgment is against the manifest weight of the evidence. *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001). "A judgment 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 the evidence." *Judgment Services Corp.*, 321 Ill. App. 3d at 154.

¶ 23 The defendant first argues that the amount of the judgment entered in favor of the plaintiff is incorrect. It supports this argument by listing the payments it claims the court omitted but for which it should have been credited. The defendant's argument is not persuasive because it is based on plaintiff's exhibits A and B, which were not used at the trial. Becky specifically testified that she had conferred with Ivy, that she had reviewed the plaintiff's outstanding invoices and all of the money received from the defendant, and that her original accounting, set forth in plaintiff's exhibit A, was no longer accurate. The parties agreed at the trial that the only amounts due to the plaintiff were listed in plaintiff's exhibit 1, which included only invoices 24 through 29, 52, 53, 55, 61 through 66, and 69 (\$1,472.30 for "interest on unpaid bills"). Therefore, the defendant's argument that includes payments for other

invoices is irrelevant. We have carefully reviewed all of the evidence and conclude that the plaintiff presented sufficient evidence to support his claim that the defendant owed him money for unpaid services rendered. With the exception of invoice 69 for unpaid interest, there is sufficient evidence in the record to support a judgment for all of the invoices included in plaintiff's exhibit 1.

¶ 24 The trial court found Becky's testimony more credible than any other evidence on the issue of what amounts were due to the plaintiff and what amounts the defendant had already paid. Becky testified that she reviewed all of the plaintiff's outstanding invoices, she applied every payment received from the defendant, and she arrived at a final accounting of the unpaid invoices which were submitted as plaintiff's exhibit 1. The defendant did not dispute that the plaintiff had done the work included in plaintiff's exhibit 1 but argued only that it had paid additional amounts for which it had not been credited. The defendant submitted six checks (defendant's exhibits A, B, C, E, G, and K) that Ivy testified should be credited to the defendant to reduce the total amount owed.

¶ 25 However, the plaintiff testified that he did not endorse defendant's exhibit B for \$7,300, and the photocopy of that check has no signature on the reverse side. The plaintiff explained that defendant's exhibit G for \$5,000 was not paid to him for his work but was part of a transaction whereby he cashed a check so that the defendant's employee would have cash to pay a vendor. Ivy's testimony tended to corroborate the plaintiff's explanation about that check, and the defendant did not present any evidence to dispute the plaintiff's explanation. The defendant agreed that defendant's exhibit K for \$3,750.50 was not at issue in this case.

¶ 26 The other checks included one (defendant's exhibit A for \$3,800) made payable to James Young Excavating, but Ivy testified that her initial accounting to the plaintiff

(plaintiff's exhibit B attached to the complaint) included checks payable to "James Young Excavating." Ivy explained that it was only after she conducted a search for payments made to the plaintiff under other names that she found additional amounts for which the defendant should receive credit. Therefore, according to Ivy's testimony, the checks payable to James Young Excavating were already included in her accounting and already used to reduce the amount the plaintiff claimed due. Because defendant's exhibit A was payable to James Young Excavating, it should not be used to reduce the amount the defendant owes to the plaintiff.

¶ 27 There are only two remaining checks (defendant's exhibits C and E) to consider. The defendant did not submit any evidence to show that these checks were issued to pay for any of the invoices included in plaintiff's exhibit 1, and there is no evidence to explain why they should be applied to reduce the defendant's debt. The trial court found Becky to be a credible witness and relied on her statement that she applied all of the payments received from the defendant and that the only remaining outstanding invoices were included in plaintiff's exhibit 1. There is no evidence to refute Becky's testimony.

¶ 28 Nevertheless, the court awarded \$56,003.80 to the plaintiff, and that amount includes \$1,472.30 for unpaid interest as set forth in invoice 69. There was no testimony or evidence to support an award that included invoice 69 because the parties had no agreement that the plaintiff was allowed to charge interest on unpaid invoices, and there was no notice given to the defendant that the plaintiff intended to charge interest on unpaid invoices. See *Progressive Land Developers, Inc. v. Exchange National Bank of Chicago*, 266 Ill. App. 3d 934, 945 (1994) ("Prejudgment interest is proper where authorized by statute, agreement of the parties, or in cases where warranted by equitable considerations."). Moreover, the plaintiff apparently

abandoned that theory at the trial. In his closing argument, the plaintiff's attorney did not argue that his client was entitled to interest pursuant to invoice 69 but only pursuant to the Interest Act, which provides in relevant part as follows:

"Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; *and on money withheld by an unreasonable and vexatious delay of payment.*" (Emphasis added.) 815 ILCS 205/2 (West 2010).

¶ 29 The trial court noted that the only portion of the statute that could possibly apply to the facts of this case is the clause providing for interest on money "withheld by an unreasonable and vexatious delay of payment." *Id.* We agree with the trial court that there is no evidence to show that the defendant unreasonably and vexatiously delayed payment. Although the defendant's payment to the plaintiff was not timely, the lengthy delay appears to be caused by poor accounting practices that resulted in confusion to both parties.

¶ 30 Therefore, we affirm the trial court's judgment in favor of the plaintiff, but we modify the judgment by subtracting \$1,472.30 from \$56,003.80 for a modified judgment against the defendant of \$54,531.50.

¶ 31 We next consider the defendant's argument that the trial court's denial of its counterclaim for conversion is against the manifest weight of the evidence. The defendant does not comment on the trial court's grant of its counterclaim for replevin. In its ruling from the bench, the trial court found that the defendant proved its claim for replevin. Replevin is similar to conversion but is a "strict statutory proceeding,

and the statute must be followed precisely." *Carroll v. Curry*, 392 Ill. App. 3d 511, 513 (2009). The replevin statute provides as follows: "Whenever any goods or chattels have been wrongfully distrained, or otherwise wrongfully taken or are wrongfully detained, an action of replevin may be brought for the recovery of such goods or chattels, by the owner or person entitled to their possession." 735 ILCS 5/19-101 (West 2010). Therefore, the primary relief granted to a party who proves a claim for replevin is the return of the property wrongfully withheld. *Carroll*, 392 Ill. App. 3d at 514 ("The primary purpose of the replevin statute is to test the right of possession of personal property and place the successful party in possession of the property."). As its relief on the replevin claim, the trial court ordered the plaintiff to return the Big Blue welder to the defendant within three days of the bench trial. The defendant has not filed anything to alert the court that the Big Blue welder has not been returned or that, upon its return, it was damaged in any way.

¶ 32 In denying the counterclaim for conversion, the court stated that it did not believe that the plaintiff had withheld the Big Blue welder "in an attempt to convert" it. The court noted that it appeared that the plaintiff's refusal to return the welder was merely an inartful and ill-advised attempt to serve some sort of mechanic's lien or gain some leverage against the defendant. The court emphasized that it did not condone the plaintiff's actions but did not want to punish him when "he was, in fact, owed \$56,000." The court found that the defendant failed to carry its burden of proof on its counterclaim of conversion.

¶ 33 "Conversion is the unauthorized deprivation of property from a person entitled to its possession." *IOS Capital, Inc. v. Phoenix Printing, Inc.*, 348 Ill. App. 3d 366, 370 (2004). To prove conversion, the defendant was required to establish "(1) a right in the property, (2) a right to immediate possession, (3) wrongful control by the

defendant, and (4) a demand for possession." *Id.* Under a claim for conversion, the claimant may be entitled to damages in addition to the return of the property. *Cruthis v. Firststar Bank, N.A.*, 354 Ill. App. 3d 1122, 1137 (2004) ("The law recognizes an award of damages for conversion based on the reasonable value of the use of the property during the period of wrongful detention."). Such damage awards for conversion, however, are based on "the existence and proof of evidence that discloses a reasonable rental or use value of the converted property." *Id.* It is the burden of the party claiming conversion to establish the value of the property converted, and "the evidence must afford some reasonable and proper basis for ascertaining the value." *Id.*

¶ 34 In the case at bar, the defendant attempted to prove that it had been required to hire third-party welders to do work that it would have done with the Big Blue welder if it had been available. However, it was not clear from that evidence whether the defendant was truly required to hire outside welders, whether the work of the outside welders was the same as if the Big Blue welder had been available, and if so, what amount of damages would have compensated the defendant. Mannon testified that he would have hired outside welders to do "roughly" 20% of the work he claimed his workers could not do because the welder was not available. Ivy was familiar with the amounts paid to the outside welders, but she had no idea what kind of welding they did or whether it was the same kind of welding that would have been done with the Big Blue welder. For all of these reasons, the trial court's denial of the defendant's counterclaim for conversion is not against the manifest weight of the evidence.

¶ 35 The defendant's final argument concerns the court's denial of its motion to reconsider. The decision of the trial court to grant or deny a motion to reconsider lies within the discretion of the court and will not be reversed on appeal absent an abuse

of that discretion. *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563, 572 (2006). In the motion to reconsider, the defendant argued that the court should have reduced the amount it owed to the plaintiff by payments that it included in its list attached to the plaintiff's complaint (plaintiff's exhibit A) and the additional checks submitted at the trial. The defendant also argued in the motion to reconsider that the court should have granted its counterclaim for conversion and awarded it damages for its payments to third-party welders. We have fully addressed both arguments. Therefore, we find that the trial court did not abuse its discretion by denying the defendant's motion to reconsider.

¶ 36

CONCLUSION

¶ 37

For all of the reasons stated, we affirm the trial court's judgment, but remand this case to the circuit court of Hamilton County with directions for the court to enter a modified judgment in favor of the plaintiff in the amount of \$54,531.50 (\$56,003.80 judgment originally entered minus \$1,472.30 interest improperly included).

¶ 38

Affirmed as modified and remanded.