

2013 IL App (2d) 121329-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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Appellate Court of Illinois,
Second District.

Robert KASINECZ, d/b/a R.K.
Enterprises, Plaintiff–Appellant,

v.

[Joseph DUFFY](#), National City Mortgage, d/b/a Commonwealth United Mortgage Co., [Mortgage Electronic Registration Systems, Inc.](#) (MERS), Homecoming Financial, Downers Grove Sanitary District, and Unknown Owners, Trustees, Lenders And Lien Claimants, Defendants–Appellees.
(National City Mortgage Co., d/b/a Commonwealth United Mortgage, Third–Party Plaintiff,

v.

Elite Financial Investments, Inc., a/k/a Elite Mortgage, Third–Party Defendant.).

No. 2–12–1329. | Aug. 6, 2013.

Appeal from the Circuit Court of Du Page County. No. 05–CH–614, [Bonnie M. Wheaton](#), Judge, Presiding.

Opinion

Prime Contractor quits pre-completion, then sues owner

ORDER

Justice [SCHOSTOK](#) delivered the judgment of the court:

*1 ¶ 1 *Held*: On remand, trial court did not err in permitting additional testimony and revisiting its previous determinations on certain issues. Trial court did not err in its findings, and its judgment in favor of homeowner on contractor's claims was not against the manifest weight of the evidence.

¶ 2 This is the second time we have reviewed the proceedings in this case. On March 10, 2011, we entered an order finding that the trial court had wrongly granted the defendants' mid-trial motion for a directed finding on the ground

Prime Contractor

Owner

that the plaintiff contractor, Robert Kasinecz, had not provided the defendant homeowner, Joseph Duffy, with a contractor's sworn statement. *Kasinecz v. Duffy*, No. 2–10–0156 (unpublished order, March 10, 2011). Upon remand, the trial court allowed the defendants to present the remainder of their case and complete the trial. On October 16, 2012, the trial court entered judgment in favor of Duffy on the breach of contract, mechanic's lien, and *quantum meruit* claims brought by Kasinecz. The trial court also entered judgment in favor of Kasinecz on Duffy's counterclaims. Thereafter, the trial court reinstated previous awards of contractual attorney fees to Duffy as the prevailing party, and entered an order granting additional attorney fees to Duffy. Kasinecz appeals from all of these orders. We affirm.

Prime Contractor appealing

¶ 3 BACKGROUND

¶ 4 This case grows out of a dispute that arose when Kasinecz, a general contractor, performed work on a home owned by Duffy during 2004 and early 2005. A dispute arose between them, and on March 9, 2005, Kasinecz removed his tools and workmen from the site. The planned home was not completed and Duffy did not pay Kasinecz the remainder of the contract price. Kasinecz then sued Duffy and the defendant National City Mortgage¹, asserting claims for mechanic's lien, breach of contract, *quantum meruit*, and fraud. Duffy filed various counterclaims. At the trial of these claims, Kasinecz presented the testimony of himself, his sister Marie (who located the property for the renovation project), Duffy, a subcontractor, and a structural engineer. Duffy presented (out of order) the testimony of an architect-builder. The substance of these witnesses' testimony was recounted in our previous decision, and we will not repeat it here.

¶ 5 As noted, at the close of Kasinecz's case, the defendants moved orally for a directed finding on the ground that Kasinecz had not provided Duffy with a contractor's sworn statement. The trial court agreed, finding that Duffy's request in March 2005 that Kasinecz provide him with copies of “the fronts and backs of checks” should be regarded as a request for such a sworn statement, and that Kasinecz's failure to provide one doomed both his mechanic's lien and breach of contract claims. The trial court therefore entered judgment in favor of the defendants. On November 19, 2008, and August 6, 2009, the trial court further granted Duffy contractual attorney fees as the prevailing party.

*2 ¶ 6 Kasinecz appealed, and we reversed, finding that Duffy had not expressly asked Kasinecz to provide him with a sworn statement and that Duffy had not identified any possible prejudice flowing from the lack of such a statement (because the time in which subcontractors could seek payment from Duffy had expired). Under these facts, the case law did not support the forfeiture of Kasinecz's claims for breach of contract and mechanic's lien. *Id.* We therefore reversed the judgment, vacated the orders awarding contractual attorney fees, and remanded for "further proceedings consistent with this decision." *Id.* at 22.

¶ 7 Upon remand, Kasinecz moved for the entry of judgment in his favor, citing our decision. The defendants responded that only Kasinecz had had the opportunity to present his entire case at trial, that factual issues regarding the claims remained, and that they were entitled to present their defense. In his reply, Kasinecz also raised the "law of the case" doctrine, arguing that under this doctrine the trial court could not consider new evidence. The trial court denied Kasinecz's motion and set the resumption of the trial for December 20, 2011.

¶ 8 When the trial resumed, Duffy re-called Kasinecz for additional testimony, and also examined Kasinecz's wife, Rebecca Wing, an attorney who represented Duffy at the closing when Duffy purchased the property. The bank also examined Kasinecz, and was permitted to re-call Duffy to question him about his version of events. The examination of Kasinecz included, among other things, testimony regarding the oral contract that Kasinecz alleged he and Duffy had entered into in April 2004, and the written contract signed by Kasinecz and Duffy on June 15, 2004. In addition, Kasinecz was questioned regarding his work for Equity Financial, a mortgage brokerage company, and the fee he received for bringing Duffy to Equity as a mortgage client. Wing was questioned regarding the scope of her representation of Duffy, and how that representation came about. The parties then submitted written closing arguments.

¶ 9 At a status hearing in July 2012, the trial court indicated to the parties that, after reading the closing arguments and considering the evidence, it had some questions. The court related its questions to the parties and gave the parties two months to submit written responses. [The record on appeal does not contain either a written copy of these questions or a report of proceedings for that date. Although Kasinecz included a "true and correct copy" of these questions in his appendix, we disregard it, as we may not take notice

of matters outside the record (*In re Parentage of Melton*, 321 Ill.App.3d 823, 826 (2001)), and he has not moved to supplement the record. In any event, the exact substance of the questions does not appear to be relevant to any issue on appeal.]

¶ 10 On October 16, 2011, after receiving written responses to its questions, the trial court issued a memorandum opinion and order finding for Duffy on Kasinecz's claims, and for Kasinecz on Duffy's counterclaims. The trial court found, among other things, that the alleged April 2004 oral contract was not enforceable because it lacked definite terms, and that the written contract signed on June 15, 2004, was a novation of the attempted earlier verbal agreement. The trial court also determined that, because no enforceable agreement for Kasinecz to perform the work on the property existed before June 15, 2004, the bank's mortgage and lien (which were created at the time Duffy purchased the property in May 2004) arose prior to any mechanic's lien. The trial court considered the events that led up to and included March 9, 2005, and determined that Kasinecz was the party that first breached the written contract, by failing to provide written invoices to Duffy prior to seeking progress payments, and then by removing his workers and tools from the worksite. Accordingly, Kasinecz could not recover on his breach of contract claim. Further, Kasinecz did not substantially complete his obligations under the written contract, and thus he was not entitled to a mechanic's lien on the property. Kasinecz also failed to meet his burden of proof to show the value of his work and, given the circumstances, it would be inequitable to permit him to recover in *quantum meruit*. Finally, Duffy had failed to submit adequate evidence regarding his counterclaims, and thus Kasinecz was entitled to judgment on those claims. On November 7, 2012, the court entered an amended memorandum opinion and order that was identical to the previous order except that it corrected typographical errors involving the date on which Kasinecz stopped work at the site.

*3 ¶ 11 Two weeks later, the parties entered into an agreed order reinstating the previous awards of attorney fees to Duffy and setting the amount of additional attorney fees due Duffy from the proceedings on remand, but preserving Kasinecz's appeal rights regarding whether Duffy was a prevailing party. This appeal followed.

¶ 12 ANALYSIS

¶ 13 Reopening of Proofs on Remand, and Law of the Case

¶ 14 Kasinecz raises multiple arguments on appeal. He begins by arguing that the trial court should not have restarted the trial and taken more evidence, because the testimony presented prior to the first appeal amounted to a full trial. This contention is patently contradicted by the record. As noted in our previous decision, the trial court entered a judgment for the defendants at the close of the plaintiff's (Kasinecz's) case. However, at that point Duffy had presented only one witness (called out of order due to witness availability), and the bank had not presented any witnesses. Moreover, although the defendants had properly exercised their rights to cross-examine Kasinecz's witnesses, neither Duffy nor the bank had indicated in any way that they were resting their cases. There is no basis for concluding that the trial was essentially over when the trial court entered a directed finding for the defendants. Accordingly, on remand the trial court properly re-opened the proofs to permit the defendants to present their cases-in-chief.

¶ 15 Building on this flawed premise, Kasinecz next argues that our previous disposition was "law of the case" that should have resulted in a judgment for him. This argument reflects a misunderstanding of the law of the case doctrine. The law of the case doctrine provides that questions of law that were actually determined in a previous appeal "are binding on the trial court on remand as well as on the appellate court in a subsequent appeal." *Kreutzer v. Illinois Commerce Comm'n*, 2012 IL App (2d) 110619, ¶ 23. However, matters relating to the merits of a controversy that were not previously decided do not become law of the case, and this includes matters that were presented to the appellate court but not ruled upon. *Filipetto v. Village of Wilmette*, 254 Ill.App.3d 461, 466 (1993). Matters not part of the holding of a previous appeal may be relitigated. *Kalis v. Colgate-Palmolive Co.*, 357 Ill.App. 172, 174 (2005).

¶ 16 Kasinecz argues that the trial court improperly reversed itself on the issue of whether there was a valid oral contract formed in April 2004. Kasinecz notes that, on June 30, 2008, the trial court stated that there was an oral contract between Kasinecz and Duffy, and that it was succeeded by the June 2004 written contract, which was a novation of the oral contract. That finding was made at the close of Kasinecz's case-in-chief. Upon remand, the trial court heard additional evidence regarding the terms of the alleged oral

contract from Kasinecz, who was questioned by both of the defendants. Among other things, Kasinecz testified that, in the oral contract he and Duffy discussed on April 10, 2004, he had "just outlined and put in generalities." Based upon this additional testimony from Kasinecz, at the close of the trial, the trial court found that the attempted formation of an oral contract between Kasinecz and Duffy failed for lack of definite terms.

*4 ¶ 17 In so ruling, the trial court squarely addressed the argument that its previous finding regarding the existence of an oral contract was the law of the case and could not be revisited. It began by noting that its finding was based upon the evidence adduced in Kasinecz's case-in-chief, and that additional testimony had since been presented on the issue. Because additional evidence had been presented, it was not bound by its previous finding. (Kasinecz argues that no new evidence was presented on remand but, as we noted above, this contention is simply incorrect.) The trial court also rejected the argument that our decision precluded it from considering the issue, because the alleged oral contract was not at issue in the prior appeal and we did not decide that issue. See *Kalis*, 357 Ill.App. at 174. This conclusion was indisputably correct, and we agree with the trial court that the law of the case doctrine did not prevent it from revisiting the issue of the validity of the alleged oral contract.

¶ 18 In a footnote, Kasinecz also argues that he was prejudiced by the trial court's initial finding in June 2008 that an oral contract existed, because it was on that basis that he decided not to appeal the trial court's entry of judgment for the defendants on his *quantum meruit* claim. There are two flaws with this argument. First, even if the trial court had made no finding at all regarding the alleged oral contract, it still found that there was a valid written contract between Kasinecz and Duffy, and this finding provided an independent basis for the trial court's disposal of the *quantum meruit* claim. *Prignano v. Prignano*, 405 Ill.App.3d 801, 820 (2010) (no recovery can be had in quasi-contract where express contract governed the parties' relationship). Second, upon remand the trial court revisited the viability of the *quantum meruit* claim, and did not regard the claim as foreclosed despite Kasinecz's failure to appeal its earlier judgment. Thus, it is clear that the trial court's reconsideration of its earlier finding of an enforceable oral contract caused no prejudice to Kasinecz's rights.

¶ 19 Breach of Contract Claim

Existence of express contract subverts equitable contract substitute claims

Difference between § 5 affidavits and prime contractor invoices

Contract requires prime contractor to submit written invoice b4 owner obliged to pay. So, prime contractor must submit those invoices or owner doesn't have to pay

No judicial contract amending

¶ 20 Kasinecz next argues that the trial court erred in finding that he had breached the written contract by failing to provide Duffy with written invoices prior to seeking progress payments, because this finding was (1) against the manifest weight of the evidence, and (2) contrary to the law of the case. In raising these arguments, Kasinecz is confusing two separate things: the sworn contractor's statement which must be supplied by a contractor if a homeowner asks for it, pursuant to section 5 of the Mechanic's Lien Act (770 ILCS 60/5 (West 2006)), and written invoices, which were a requirement imposed by the written contract Kasinecz signed. Our previous decision found that Duffy had not expressly asked for a sworn contractor's statement and was not prejudiced by the lack of one, and so Kasinecz's contract and mechanic's lien claims could not be dismissed solely on the basis that Kasinecz had failed to supply Duffy with such a statement in March 2005. However, in his written contract with Duffy, Kasinecz agreed that progress payments were to be made "upon invoicing." This contractual obligation presented a different issue than the statutory obligation which was the subject of our earlier decision. Accordingly, the trial court's consideration of whether Kasinecz complied with his contractual obligations did not violate the law of the case. *Kalis*, 357 Ill.App. at 174.

*5 ¶ 21 Nor was the trial court's determination that Kasinecz breached the contract by failing to provide written invoices prior to demanding progress payments contrary to the manifest weight of the evidence. At trial, Kasinecz conceded that the first written invoice he ever gave Duffy was dated April 9, 2005, 30 days after Kasinecz had stopped work because of a dispute over Duffy's refusal to provide Kasinecz with a requested progress payment. Kasinecz also testified that he had never given Duffy any written invoices despite his previous requests for progress payments. Kasinecz stated that he did provide Duffy with "verbal invoices," but he could not explain what these consisted of. The trial court interpreted the contractual agreement that "payment shall be made upon invoicing" to refer to written invoices. Kasinecz has not provided us with any authority demonstrating that the trial court erred in interpreting the contract in this matter, and we concur with the trial court's interpretation. Given Kasinecz's admission that he never provided written invoices, the trial court's conclusion that Duffy was justified in refusing to pay him was not against the manifest weight of the evidence.

¶ 22 Kasinecz protests that there was no evidence that Duffy asked for such written invoices. He also points to Duffy's testimony that Kasinecz provided him with the copies of

checks and receipts he requested. However, unlike the duty to provide a sworn contractor's statement, which (pursuant to section 5 of the Mechanic's Lien Act) is triggered by a homeowner's request, Kasinecz's duty to provide written invoices in order to receive payment was a term of the contract. The contract did not state that the duty to provide a written invoice arose only if the homeowner requested such an invoice. Nor did the contract state that the invoice requirement could be met if Kasinecz supplied Duffy with a "voluminous" (according to Kasinecz) pile of copied checks and receipts for him to go through. Rather, the contract provided that "payment shall be made upon invoicing." See *In re Marriage of Tudor*, 2011 IL App (2d) 100187, ¶ 13 ("A court may not add to a contract terms that the parties have not expressly included."). Finally, we note that Kasinecz has not argued that Duffy's actions in issuing prior progress payments without written invoices served to waive the contract term requiring such invoices. We thus have no occasion to address such a theory.

¶ 23 Whether or not Duffy requested a written invoice is simply irrelevant to the question of whether Duffy was required to pay Kasinecz without such an invoice. Pursuant to the contract, no payment was due without an invoice. Kasinecz pulled off the job in response to Duffy's refusal to pay him, but that nonpayment was justified under the contract. The trial court did not err in finding that Kasinecz breached the contract first and entering judgment in favor of Duffy on the breach of contract claim.

O waived written invoices? PC didn't argue it, so PC waived

¶ 24 Mechanic's Lien Claim

*6 ¶ 25 After it determined that Kasinecz had breached the contract, the trial court examined the effect of this breach on Kasinecz's mechanic's lien claim. The court noted that, generally, a contractor may not recover on a lien where he has not fully performed the contract, e.g., where he has breached the contract. *Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill.App.3d 597, 609 (1999). However, under the doctrine of substantial completion, the contractor may still recover if he can show that he substantially performed the contract in a workmanlike manner. *Id.* at 610. If the contractor can show this, he can enforce a lien for the value of the work completed under the contract, minus any deductions for the cost of completing the work. *Id.* If the contractor cannot make this showing, he may not enforce a lien for the work. *Id.*

Substantial completion of contract needed to create debt that mechanics lien claim can secure

Prime Contractor's demanding payment without contractually promised written invoices allows Owner to fire contractor

Presumed: written invoices

Why trial court finds prime contractor didn't substantially complete work required by contract. Catalog of incomplete building components

¶ 26 Examining the evidence adduced at trial, the trial court found that Kasinecz had not substantially performed the contract in a workmanlike manner and so could not enforce his lien. In making this finding, the trial court focused on the issue of substantial completion. It found that Kasinecz did not substantially perform the contract, because at the time he walked off the job, only the framing and sheathing of the walls was complete. Although the roof construction was largely complete, the roof still had openings to the elements, and none of the doors or windows had been installed. None of the mechanicals had been installed, nor had the interior finishing been started. In light of this evidence, the trial court concluded that Kasinecz had not substantially performed the contract.

¶ 27 On appeal, Kasinecz raises no argument with respect to either the applicable law or the trial court's finding regarding the lack of substantial completion. Instead, Kasinecz argues that the work he performed was performed in a workmanlike manner. This argument is misplaced, as the trial court made no finding to the contrary, and it is irrelevant to the actual basis for the trial court's decision. We find no reason to disturb the trial court's determination that Kasinecz could not succeed on his mechanic's lien claim.

¶ 28 Quantum Meruit Claim

¶ 29 In June 2008, in ruling on the defendant's motion for a directed finding at the close of the Kasinecz's case, the trial court found that Kasinecz's claim for quantum meruit must fail because there was an express contract between Kasinecz and Duffy. In its later judgment order on remand, the trial court found that Kasinecz could not recover in quantum meruit because (a) he had not proved the reasonable value of the services he provided, and (b) he had not shown that it would be inequitable for Duffy to retain the benefits of his work. On appeal, Kasinecz challenges the latter two findings. However, he raises no argument as to the trial court's initial basis for denying his quantum meruit claim. It is well settled that "a reviewing court can uphold the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was correct." *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill.2d 169, 192 (2007). We find that the trial court's initial reasoning was correct: "[i]n]o claim on a contract implied in law can be asserted if an express contract * * * exists between the parties and concerns the same subject matter." *Zadrozny v. City Colleges of Chicago*, 220 Ill.App.3d 290, 295 (1991).

No contract substitutes where litigants had contract on same subject matter

Here, a contract regarding the construction project existed between the parties. Although Kasinecz could not enforce the contract due to his own breach, that did not invalidate the contract. Thus, Kasinecz cannot bring a claim for quantum meruit for services provided under the contract. *Installco Inc. v. Whiting Corp.*, 336 Ill.App.3d 776, 781 (2002) (one of the elements plaintiff must prove to recover on a quantum meruit claim is that no contract existed establishing payment for the services rendered).

¶ 30 Other Arguments

*7 ¶ 31 The parties raise other arguments that would be relevant if we were reversing the trial court's judgment on any of Kasinecz's claims. However, as we are affirming that judgment in full for the reasons stated herein, we need not address these arguments.

¶ 32 Finally, we note that, throughout his briefs in this court, Kasinecz has disparaged the trial court, suggesting that the trial court ruled as it did because of prejudice against him. However, in the trial court Kasinecz never sought a substitution of judge for cause. Similarly, in this court he does not provide any support for his insinuations of bias other than the simple fact that the trial court ruled against him. But it is hornbook law that "judicial rulings alone almost never constitute a valid basis" for a claim of judicial bias. *Liteky v. United States*, 510 U.S. 540, 555 (1994); see also *In re Estate of Wilson*, 238 Ill.2d 519, 554 (2010). Moreover, as we have held, the trial court's rulings are supported by the record in this case. We find Kasinecz's unsupported assertions of bias on the part of the trial court improper, and admonish his counsel to avoid similar unsupported accusations in the future.

¶ 33 CONCLUSION

¶ 34 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 35 Affirmed.

Justices McLAREN and SPENCE concurred in the judgment.

Parallel Citations

2013 WL 4012657 (Ill.App. 2 Dist.)

Adverse judicial rulings alone don't add-up to judicial prejudice, particularly where record supports rulings

Footnotes

- 1 As a result of mergers and other succession, National City no longer has an interest in the mortgage on the property at issue here. Its successor in interest, PNC Bank, N.A., filed an appearance in this case on January 9, 2013. However, for the sake of uniformity and clarity we will continue to refer to the bank holding the mortgage as National City or “the bank.”

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