FOURTH DIVISION
September 18, 2014

No. 1-14-0157

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BEST LAWNS, INC. d/b/a BEST TREES,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	13 M1 116655
	)	
CEDAR RUN HOMEOWNERS CORP.,	)	Honorable
	)	Dennis M. McGuire,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Epstein and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: Entry of judgment in favor of plaintiff following a bench trial is affirmed. The trial court judge's finding that the contract was cancelled was not against the manifest weight of the evidence and was not improperly based on the trial court judge's alleged predetermined bias against defendant.

¶ 2 Best Lawns Inc. (Best Trees) filed a complaint against the Cedar Run Homeowners Corporation (HOC) alleging that HOC breached its contract for tree care services by cancelling

the contract before its expiration. Following a bench trial, the trial court judge entered a judgment in favor of Best Trees and against HOC in the amount of $13,292.00, which included breach of contract damages as well as attorney fees and costs. HOC appeals the trial court's judgment in favor of Best Trees claiming that the trial court incorrectly found that it cancelled the contract. HOC also argues that the judgment should be vacated because the trial court judge had a predetermined bias against HOC due to HOC's inability to settle the matter. For the reasons below, we affirm the trial court's judgment in favor of Best Trees.

¶ 3 BACKGROUND

¶ 4 On or about September 24, 2010, Best Trees entered into a contract with "Cedar Run c/o ALMA Management" for tree care services. The contract was to be in effect from the time it was signed in 2010 until 2014. The contract contains a cancellation provision that provides a penalty if the contract is canceled:

> "CANCELLATION. This Contract may be cancelled by the Client prior to Best Trees crews arriving to the jobsite in writing delivered to Best Trees by certified mail. Any other cancellation is unacceptable. Should Best Trees[‘] crews arrive to the job site or if work is in progress and the Client cancels this Contract verbally or otherwise, the Client will be liable for a $65.00 per hour, per person charge. Multi-year contracts that are cancelled will be subject to a 25% charge of the total balance remaining on the contract. $250.00 minimum."

Best Trees performed services under the contract and was paid for those services in 2011 and 2012. In August 2012, HOC replaced ALMA Management as acting master board for the Cedar Run complex. There is a letter in the record dated January 9, 2013 in which Best Trees, realizing

there had been a change in management services, advises Cedar Run c/o Barbara Sher of the contract between Cedar Run and Best Trees for tree pruning services for the years 2011 through 2014. The letter attaches a copy of the contract.

¶ 5 On March 13, 2013, Best Trees filed a lawsuit against HOC alleging that HOC breached the contract by terminating it two years before the contract was set to expire. The complaint sought $3,485.00, which represented 25% of the total balance remaining on the contract, plus costs and reasonable attorney fees.

¶ 6 Following discovery and motion practice, the parties attempted to settle the matter at a settlement conference with the trial court judge. The parties were unable to come to a settlement agreement, and the matter was scheduled for a bench trial. When the parties appeared before the trial court judge for trial, but before any trial proceedings commenced, the following exchange took place on the record:

> MS. DELGADO: And unfortunately, I mean without it being the way they needed it to be before, as we discussed, again, I don't want to go into it too much with Your Honor, the Board wasn't willing to sign off on it.
>
> THE COURT: I don't think [HOC] want[s] a judgment against them, or a finding by me that they are liable under these circumstances.
>
> MS. DELGADO: I mean at the same time, I think based on the actual factors of the case they have a pretty good case of showing they didn't cancel the contract.
>
> THE COURT: Someone signed a contract on their behalf.

MS. DELGADO: Well, no, not on their behalf, on behalf of an HOA. There's a whole situation with an HOC/HOA, so I mean first, two different groups. The second part of the issue is that it was never cancelled. We believe that, that's part of the issue as well.

THE COURT: Are you going to take me up?

MS. DELGADO: I'm sorry, what?

THE COURT: Are you going to take me up?

MS. DELGADO: Take you up?

THE COURT: To the Appellate Court.

MS. DELGADO: I mean I—again, not my call. That would be up to my clients. But, you know what I mean, I feel based on the facts of the case that if we went to trial, that they didn't cancel the contract.

THE COURT: We've gone through this quite extensively. I don't think that you have a strong case. I don't know how much clearer I can be. If you don't want to come to some kind of agreement with the language that I suggested previously, we'll go to trial.

MS. DELGADO: I mean I will discuss it with my clients, they're here right now, but –

THE COURT: Thank you.

The matter was passed and when the parties returned and advised the trial court judge that a settlement could not be reached, trial commenced.

¶ 7 At trial, HOC argued that Best Trees never performed work under the contract in 2013 and, therefore, should not be paid. HOC offered the testimony of Mr. Robert Sher in support of this argument. Best Trees argued that HOC terminated the contract in 2013 pursuant to the terms of the contract, which is why it ceased to perform tree care services for HOC in 2013, and offered Mr. Michael Cavaliere's testimony in support of this argument. The following evidence was elicited at trial.

¶ 8 On February 5, 2013, Anne Dalrymple on behalf of Best Trees wrote to Mr. Sher on behalf of HOC concerning the upcoming work that was to be completed under the contract. Specifically, Best Trees stated:

> "Historically, we have performed our annual dormant tree pruning during Jan/Feb. Regarding the Tree Care Program, I would like to tentatively 'pencil in' Cedar Run onto my schedule board so we can be ready when the management contact information is straightened out. Is there a particular time during the month of February that would work best for Cedar Run? Just let me know. I appreciate it."

¶ 9 On the same day, HOC responded to Best Trees' email stating: "Due to our financial situation we will not be accepting tree maintenance services this year. We hope to be in a better position to accept this service next year."

¶ 10 On February 11, 2013, Best Trees replied:

> "I do not know if you are aware of it or not, but Best Trees and Cedar Run Homeowners Association entered into a four year tree care contract #610365 on October 13, 2010. For your reference, I have attached the correspondence and the contract that I mailed to the Board of Directors care of Barb Sher on January 9, 201[3]. To clarify is Cedar Run Homeowners Association terminating the remaining two years of the Tree Care Contract #610365? Please let me know as soon as possible."

¶ 11 On the same day, HOC responded by asking Best Trees who signed the contract on behalf of HOC for tree care services and also stated that "we may need a couple of trees removed in lieu of the regular maintenance described in your proposal."

¶ 12 Best Trees responded by informing HOC that the contract had been signed by Joe Sorgani of ALMA Property Management, on behalf of Cedar Run's Board of Directors. Following this email, Best Trees emailed HOC again asking if HOC was terminating the contract. There is no response in the record to this email, and Mr. Cavaliere testified that HOC never informed Best Trees that it was not cancelling the contract.

¶ 13 On February 28, 2013, Best Trees' attorney wrote HOC explaining that HOC owed Best Trees $3,485.00 for terminating the tree care services contract prior to its expiration. The letter indicates that Best Trees would file a lawsuit for the $3,485.00, plus costs and reasonable attorney fees, if it was not paid the $3,485.00 by March 10, 2013. HOC did not respond to this letter, and Best Trees filed its lawsuit.

¶ 14 Following trial on December 5, 2013, and upon review of the testimony and exhibits presented in the matter, the trial court judge made a finding that HOC "entered into a contract

with Best Lawns in 2010, a four-year contract, which was terminated by Defendant [HOC] in 2013." The trial court judge also made findings on the record that Best Trees' witness, Mr. Cavaliere, was "very forthright and believable" while HOC's witness, Mr. Sher, "was inconsistent at best." The trial court then entered a judgment in favor of Best Trees in the amount of $3,485.00.

¶ 15 On December 18, 2013, the trial court judge found reasonable attorney fees to be $9,580.00 and reasonable costs to be $227.00. Accordingly, the trial court judge modified the amount of the judgment in favor of Best Trees to $13,292.00.

¶ 16 HOC appeals the judgment in favor of Best Trees and raises only the following two arguments: (1) the trial court's ruling was improperly based upon the trial court's predetermined bias against HOC for failing to settle the case prior to trial, and (2) HOC never cancelled the contract. For the reasons that follow, we affirm the trial court's judgment in favor of Best Trees.

¶ 17 ANALYSIS

¶ 18 The standard of review in a bench trial is whether the judgment is against the manifest weight of the evidence. *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 177 (2004). A reviewing court will not substitute its judgment for that of the trial court in a bench trial unless the judgment is against the manifest weight of the evidence. *First Baptist Church of Lombard v. Toll Highway Authority*, 301 Ill. App. 3d 533, 542 (1998). "A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001).

¶ 19 Trial Court Judge's Predetermined Bias

¶ 20 HOC argues that the trial court's judgment should be vacated because the trial court judge had a predetermined bias against HOC because HOC was unable to settle the lawsuit prior to trial. We find that this argument lacks merit as HOC was unable to show that the judge made comments that exhibited "such a high degree of favoritism or antagonism as to make fair judgment impossible." See *Lesher v. Trent*, 407 Ill. App. 3d 1170, 1176 (2011).

¶ 21 A trial court judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice. *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). "To conclude that a judge is disqualified because of prejudice is not, of course, a judgment to be lightly made." *People v. Vance,* 76 Ill. 2d 171, 179 (1979). "The party claiming bias must show either a personal bias stemming from some source other than the litigation [Citation.] or comments made in the course of the proceedings that reveal such a high degree of favoritism or antagonism as to make fair judgment impossible [Citation.]." *Lesher*, 407 Ill. App. 3d at 1176. Allegations of judicial bias or prejudice must be viewed in context and should be evaluated in terms of the trial judge's specific reaction to the events taking place. *People v. Jackson*, 205 Ill. 2d 247, 277 (2001). A judge's display of displeasure or irritation with an attorney's behavior is not necessarily evidence of judicial bias against the defendant or his counsel. *Id.*

¶ 22 HOC does not present any argument that the trial court judge had "a personal bias stemming from some source other than the litigation." *Lesher*, 407 Ill. App. 3d at 1176. Therefore, we must determine whether HOC was able to overcome the presumption of a judge's impartiality (*Eychaner*, 202 Ill. 2d at 280), and present evidence of "comments made in the course of the proceedings that reveal such a high degree of favoritism or antagonism as to make

fair judgment impossible." *Lesher*, 407 Ill. App. 3d at 1176. On this point, the United States Supreme Court has explained:

> "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." (Emphases in original.) *Liteky v. United States*, 510 U.S. 540, 555 (1994).

¶ 23 Here, we find that the comments HOC takes issue with—the trial court judge's comments regarding his belief that HOC did not have a strong case and comments wherein the trial court judge questions if HOC will take the case to the appellate court—were opinions of the case that the trial court judge had formed following settlement discussions with both parties. The comments were made before any trial proceedings began and prior to the parties' last-ditch effort to try and settle the matter. Thus, given the context in which these comments were made, we do not find that the trial judge's opinions rose to such a "high degree of favoritism or antagonism as to make fair judgment impossible." Further, once it was clear that settlement was not an option, the trial court judge presided over the trial, was active in questioning the witnesses and clarifying

their testimony where needed, and, following argument by both parties, denied Best Trees' motion for a directed finding. There are no allegations that the trial court judge displayed any bias at any time throughout the bench trial proceeding. As such, we do not believe that HOC has met its burden in overcoming the presumption of the trial judge's impartiality with evidence of "comments made in the course of the proceedings that reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." See *Lesher*, 407 Ill. App 3d at 1176.

¶ 24 Cancellation of the Contract

¶ 25 HOC argues that the trial court's judgment in favor of Best Trees was against the manifest weight of the evidence because HOC never cancelled the contract and, as a result, never breached the contract. We cannot agree with this argument.

¶ 26 The contract language at issue here states:

> "CANCELLATION. This Contract may be cancelled by the Client prior to Best Trees crews arriving to the jobsite in writing delivered to Best Trees by certified mail. Any other cancellation is unacceptable. Should Best Trees[‘] crews arrive to the job site or if work is in progress and the Client cancels this Contract verbally or otherwise, the Client will be liable for a $65.00 per hour, per person charge. Multi-year contracts that are cancelled will be subject to a 25% charge of the total balance remaining on the contract. $250.00 minimum."

¶ 27 In order to be effective, cancellation of a contract must be done pursuant to the terms of the contract or by mutual consent of the parties. *Deien Chevrolet, Inc. v. Reynolds & Reynolds Co.*, 265 Ill. App. 3d 842, 844-45 (1994) (citing *Copley v. Pekin Insurance Co.*, 111 Ill. 2d 76, 94

(1986)). After hearing all the evidence at trial, the trial court judge found that HOC terminated the contract and entered judgment in favor of Best Trees. The testimony at trial established that two years into the contract, and at the beginning of the 2013 year, Best Trees wrote to HOC requesting access to the Cedar Run property in order to perform certain tree care services. In response to Best Trees' request, Robert Sher on behalf of HOC responded: "Due to our financial situation we will not be accepting tree maintenance services this year. We hope to be in a better position to accept this service next year." Best Trees responded by reminding HOC of their four-year contract for tree care services, and inquired whether HOC was cancelling the contract. Mr. Sher responded that "we may need a couple of trees removed in lieu of the regular maintenance described in your proposal." Best Trees again inquired as to whether HOC was cancelling the contract. Upon receiving no response from HOC, Best Trees' attorney wrote to HOC indicating that Best Trees would be forced to file a lawsuit against HOC if HOC did not pay it $3,485.00, which was the amount of damages owed for breaching the contract. HOC did not response to this letter, and Best Trees filed a lawsuit. Additionally, in finding that HOC terminated the contract, the trial court judge noted on the record that Mr. Sher's testimony "was inconsistent at best" while Mr. Cavaliere's testimony was "very forthright and believable."

¶ 28 Further, in this case we note the record shows Best Trees was ready, willing and able to perform services it promised under the contract. The record shows that HOC failed to comply with the request by Best Trees to give dates when Best Trees could come out and perform pruning services. The record also shows that HOC initially stated in an email it sent to Best Trees that it no longer needed the services of Best Trees. After being asked in a subsequent email if HOC was canceling the contract, HOC never repudiated the prior cancellation. The letter written

by Best Trees' attorney to HOC supports a finding that Best Trees assented to the nonconforming method of HOC's cancellation of the contract by email.

¶ 29 "A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Judgment Services Corp.*, 321 Ill. App. 3d at 154. In this case, although the cancellation by HOC did not comply with the contract because it was via email rather than certified mail, we cannot say that the trial court's judgment was against the manifest weight of the evidence given that HOC's method of noncompliant cancellation of the contract was subsequently assented to by Best Trees. *Copley*, 111 Ill. 2d at 85 (cancellation of a contract must be done pursuant to the terms of the contract or by mutual consent of the parties).

¶ 30 CONCLUSION

¶ 31 For the reasons above, we affirm the trial court's judgment in favor of Best Trees.

¶ 32 Affirmed.