2025 IL App (3d) 240115-U

Order filed May 16, 2025

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2025

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| BEARD DESIGNBUILD, INC., | ) | Appeal from the Circuit Court |
| | ) | of the 21st Judicial Circuit, |
| Plaintiff-Appellant and Cross-Appellee, | ) | Kankakee County, Illinois, |
| | ) | |
| v. | ) | Appeal No. 3-24-0115 |
| | ) | Circuit Nos. 19-CH-81 & 18-L-60 |
| WILBERT LACY, and RENEE LACY, an Individual, ASSOCIATED BANK, N.A., a Mortgagee, SECURITY LUMBER and SUPPLY CO., a lien holder, KANKAKEE TITLE COMPANY, escrow holder of funds for construction loan, and UNKNOWN NECESSARY PARTIES, | ) | |
| | ) | |
| Defendants, | ) | |
| | ) | Honorable |
| (Wilbert Lacy and Renee Lacy, Defendants-Appellees and Cross-Appellants). | ) | Lindsay Parkhurst, Judge, Presiding. |

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JUSTICE DAVENPORT delivered the judgment of the court.
Justices Holdridge and Anderson concurred in the judgment.

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**ORDER**

¶ 1 *Held*: The trial court did not err in (1) finding both contractor and homeowner breached the home construction contract, (2) awarding damages, (3) finding the settlement between the contractor and homeowner's mortgagee was a setoff, (4) finding no fraud or misrepresentation, and (5) declining to award sanctions. The trial court

erred in awarding damages based on an estimate without any supporting testimony. Affirmed as modified.

¶ 2 This cross-appeal arises from a dispute over a home construction contract. After a bench trial, plaintiff Beard DesignBuild, Inc. (Beard), appeals the court's finding that he breached the construction contract and that a settlement was a setoff. Defendants Wilbert and Renee Lacy (the Lacys) appeal the court's (1) finding that Wilbert breached the construction contract, (2) finding that Beard was not liable for fraud and misrepresentation, and (3) decision declining to order sanctions. Both parties appeal the damages award. We affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 A. The Contract

¶ 5 In 2015, Wilbert purchased an empty lot in Bourbonnais. In 2016, he met with O'Malley Builders, Inc. (O'Malley), to build a custom home on the lot. Mark Adair of Adair Architects, Inc. (Adair), drew the blueprints. O'Malley's construction proposal offered to build a single-family residence "in substantial compliance with certain plans and specifications" on file at O'Malley's office for $459,113.

¶ 6 In seeking other estimates, Wilbert met with Beard's president, Christopher Beard, (Christopher), in April 2017. Wilbert showed Christopher the O'Malley proposal and the Adair blueprints. Christopher told Wilbert he had been in the construction business since 1999. He offered to build the custom home for $494,000.

¶ 7 Wilbert accepted this offer, and Beard began construction in May 2017. Wilbert and Christopher signed the contract on June 19, 2017. The contract consisted of a purchase agreement drafted by Christopher, an "exhibit A" drafted by Wilbert, and a new construction rider drafted by Wilbert's attorney. Wilbert based exhibit A on O'Malley's proposal with O'Malley's pricing

removed. The contract listed the lot owners as Wilbert and his wife Renee Lacy. Renee did not sign the contract.

¶ 8 The purchase agreement included, among others, the following specification requirements. All framing was to be completed "as per plan." The electrical system would be installed "as per print," and would include all fixtures and a 200-amp, 40-circuit service panel. Regarding heating, ventilation, and air conditioning (HVAC), the purchase agreement called for an 85,000 British thermal unit (BTU), 92% efficient furnace, a 3.5-ton condenser, two thermostats, a zoning system, and all ductwork. The exterior was to be all brick construction with stone accents. The purchase agreement stated hardwood flooring would be installed throughout the first floor and carpeting would be installed on the stairs and second floor. The purchase agreement stated Beard would install a 36-inch see-through fireplace "per print." It also required him to install an exterior fire rated door in the garage.

¶ 9 Exhibit A specified "Buyers to obtain financing prior to beginning construction[.]" Regarding specifications, exhibit A required hardwood flooring to be installed in the foyer, dining room, and kitchen and carpet was to be installed in the living room, study, family room, stairs, and bedrooms. For heating, exhibit A listed a 92% high-efficiency furnace, zoned with two thermostats. For air conditioning, it listed high-efficiency central air conditioning. As to electrical work, exhibit A required a 200-amp service panel. In the kitchen, there were supposed to be nine can lights installed.

¶ 10 The last page of exhibit A listed specifications as a "continuation of Exhibit A." Those specifications included a stone front turret, two skylights in the sunroom, an arch window over the dining room, a bump-out foyer, and a 400-amp electrical service panel. It listed "two-feet wider" at the "side" and "middle" of the house, with no further explanation. (After reviewing the record,

this appears to be referring to two structural bays, one on the side of the house and one in the middle). The sunroom roof pitch was supposed to be different from the rest of the house. Hardwood flooring was to be installed in the family room, office, and master bedroom and closet.

¶ 11 According to the new construction rider, Beard and the Lacys were the contracting parties. Beard agreed to construct the home "in a good and workmanlike manner," according to the plans and specifications set forth in the purchase agreement and exhibit A. Any changes requested by the Lacys required a written and signed memorandum. The rider further stated the projected completion date was December 31, 2017, and it defined "substantial completion" as occurring when an occupancy permit is issued. The rider also stated that Beard "shall repair any work that fails to conform to the requirements of the contract and that appears during the progress of the work." Additionally, the rider called for a walk-through at which Beard and the Lacys would create a "punch list" of items to be completed. Finally, the rider stated no changes to the contract were valid unless in writing and signed by Beard and the Lacys.

¶ 12 B. Wilbert Obtains Financing from Associated Bank

¶ 13 Wilbert did not obtain financing from Associated Bank until September 2017. The mortgage with Associated Bank listed the borrower as Wilbert Lacy, a married person, and the loan amount as $425,000. Wilbert and Renee initialed the bottom of each page of the document, and Renee signed it solely for the purpose of waiving homestead rights. The mortgage document required Wilbert to promptly discharge or otherwise address any lien with actual or potential priority over the bank's mortgage. The mortgage also authorized the bank to take protective measures if a legal proceeding threatened its interest in the property, and any amounts disbursed by the bank were to become Wilbert's additional debt.

¶ 14 C. Wilbert Ejects Beard and Its Subcontractors

¶ 15 During construction, Wilbert was in constant contact with Christopher. He texted Christopher frequently for updates and to communicate Renee's many requests for changes. Despite this constant contact, Christopher did not provide a list of credits that were owed to Wilbert, and Wilbert never provided a list of credits he believed he was entitled to. Wilbert and Renee often visited the site. Wilbert was pleased with the progress from May 2017 until January 2018, when Wilbert took issue with the hardwood flooring. From there the relationship deteriorated. In February 2018, Wilbert stopped making payments and sent Christopher a list of demands to avoid legal action. On April 10, 2018, Wilbert informed Christopher if certain demands were not met by April 13, then Wilbert would not permit any of Beard's subcontractors back on the site. On April 13, Wilbert ejected Beard and its subcontractors from the construction site and refused to allow Beard to complete the remaining work or remedy any complaints

¶ 16 D. Mechanic's Lien

¶ 17 On April 19, 2018, Beard recorded a mechanic's lien for $205,155.28. The lien listed both Wilbert and Renee as the property owners.

¶ 18 E. The Pleadings

¶ 19 In June 2018, Kankakee County issued a certificate of occupancy permit to the Lacys, and the Lacys moved into the home, where they have lived ever since. On June 20, 2018, Beard sued the Lacys for breach of contract. In October 2018, Wilbert countersued Beard for breach of contract. In April 2019, Beard sued to foreclose its mechanic's lien. The cases were consolidated in January 2021. In August 2021, Wilbert amended his counterclaim, now asserting five counts: (1) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, (2) action to quiet title, (3) constructive fraud, (4) breach of contract, and (5) intentional misrepresentation. In March 2022, Wilbert again amended his counterclaim, removing Renee as a counter-plaintiff.

¶ 20 As for the parties' breach of contract claims, Beard alleged Wilbert breached the contract by refusing to pay $205,000 that is still due. Wilbert alleged Beard breached the contract by (1) not completing all work under the contract, (2) not performing the work in a workmanlike manner, and (3) installing the wrong HVAC system.

¶ 21 F. Bench Trial

¶ 22 The matter proceeded to a four-day bench trial beginning August 1, 2023.

¶ 23 1. *Christopher Beard's Testimony*

¶ 24 Christopher has been working in construction since 1999. He has had various businesses since 1999, and he incorporated Beard DesignBuild, Inc., in 2011. Before building the Lacy's home, he built three homes within the Lacys' homeowner's association (HOA), so he was familiar with the HOA rules. The purchase agreement was between him, Wilbert, and Renee; and he understood Renee was also part of the contract because both Wilbert and Renee met with him. Renee also approved one of the payouts as an owner.

¶ 25 Wilbert gave Beard the blueprints in February 2017 and Beard began pouring foundation in May. Christopher believed the two-foot increase to the structural bays referred to in the "continuation of Exhibit A" was already incorporated in the blueprints. The roof dictates how high the ceiling can be, and he never agreed to give Wilbert a credit for the roof pitch. The can lights were installed in the kitchen based on the way the cabinets were laid out. Christopher believed the blueprints required a vertical column in the kitchen. The HOA never informed Beard that Wilbert's mailbox violated the rules, and when Christopher asked about it, he was told there was no violation.

¶ 26 During construction, Wilbert made requests for changes. Beard did not initiate any structural changes, rather, all changes were made at Wilbert's request. Beard did not require change orders from Wilbert, and no change orders were signed because Christopher and Wilbert

were "doing things verbally." Wilbert was often at the construction site. According to Christopher, Wilbert never said he was unhappy before February 2018.

¶ 27 Wilbert requested hardwood flooring instead of carpeting in the living room. Beard installed the flooring the Lacys chose, but it began coming apart. An inspector from the supplier determined transitions or dividers needed to be installed. The Lacys did not like this flooring, so Beard installed a second type of flooring.

¶ 28 Wilbert made two demands of Beard in February: fix the front porch and conform the sunroom to the blueprint. Christopher testified Beard met those demands, stating Beard and its subcontractors did the best they could to fix everything, including removing and replacing the sunroom's windows, even though Wilbert approved the originals.

¶ 29 At some point after making the demands, Wilbert told the title company to stop making payouts. Christopher emailed Wilbert on April 9 stating the subcontractors needed assurances they would be paid. The next day, Wilbert emailed Christopher, stating, "[I]f all work is not satisfactorily completed by Friday, 4/13/18, as agreed you and all of your subcontractors are fired. You and your subcontractors will not be allowed on my property." According to Christopher, there was no pressing need to complete everything by April 13; it was just the date Wilbert picked. Wilbert fired Beard on April 13.

¶ 30 Normally, when construction is completed, Christopher walks through the house with the owner and creates a punch list of items to be corrected. Wilbert threw Beard and the subcontractors off the site before a walk-through could be done. There was no closing due to the dispute and the Lacys stopped paying.

¶ 31 Beard did not install carpet in the home because the Lacys disagreed with the carpet supplier on pricing. HVAC was installed but the electric zoned damper system was not hooked up

because the subcontractor was not allowed back on the property. Beard did not install backsplash because the Lacys had not picked out a backsplash. Beard installed a 200-amp electric panel instead of a 400-amp panel because 200 amps is sufficient for a home of this size. The Lacys did not fully pay for interior trim, electrical, counter tops, flooring, dumpsters, porta potties, and general overhead, and they did not pay for any of the painting or closets. Christopher testified Beard completed all materials, fixtures, services, and labor required under the contract, except for the carpeting. He provided a total of $494,000 of goods and services to build the house.

¶ 32 Christopher claims his company met or exceeded all building requirements because all permits were issued. The county inspected the property before Beard was fired. Although the project was projected to be completed on or about December 31, 2017, it was not completed due to Wilbert's delay in obtaining financing and the hardwood flooring issues.

¶ 33 2. *Wilbert Lacy's Testimony*

¶ 34 Wilbert testified that in 2016 or 2017, he and Renee toured one of O'Malley's open models. Wilbert later met with O'Malley about building the house. O'Malley had been in business for more than 30 years. The base price for the standard O'Malley house was $391,900, and with upgrades the price was $459,113. Adair drew the blueprints. Wilbert and Renee met with Adair more than five times, and the blueprints went through more than five revisions.

¶ 35 Wilbert saw Beard was building a home in the subdivision. Wilbert and Renee met with Christopher in March 2017. Christopher told him Beard has been in business over 20 years, and that it had built more than 20 houses in the area. Wilbert testified if he knew Beard was only incorporated in 2011, he would have contracted with O'Malley instead because O'Malley was more experienced. According to Wilbert, Christopher's experience from 1999 to 2011 "does not count."

¶ 36 The contract with Beard was identical to the O'Malley contract, except Wilbert removed the pricing. Wilbert never waived the written change order provision of the contract, and he never made any verbal or written requests for a change order. Wilbert understood a change order to be something that increases the work's scope and price.

¶ 37 Wilbert testified the framer suggested changing one of the doors to a window in the sunroom. Wilbert then asked Beard to install windows instead of the doors that were in the blueprints because "that was suggested to me." He did not believe this was a change order because it was not going to increase the price, change the dimensions, or change the framing. The Lacys picked the hardwood flooring, but they never requested a change in the flooring.

¶ 38 During construction, Wilbert was frequently at the site. In July 2017, Wilbert liked the construction progress. In September 2017, Christopher emailed Wilbert a revised kitchen layout that removed the island. The cabinet subcontractor said the island was not needed. Wilbert responded that the revised layout "looked awesome." Wilbert later told Christopher the island was in the plans, and Wilbert did not tell Beard to disregard the plans. Wilbert also requested changes in the master bathroom. The original tub had a plastic back, but Wilbert wanted a regular tub with tile. The blueprints did not call for tile on the bathroom wall, and this was a change Wilbert requested. Yet at the same time Wilbert maintained he did not ask for anything to be different from the blueprints.

¶ 39 Before the relationship ended, Wilbert asked Beard to fix everything according to the blueprints. Wilbert did not ask Beard to put the vertical post in the kitchen or to decrease the height of the sunroom's ceiling from 15 feet to 12 feet. He asked Beard how much it would cost to put hardwood flooring on the second floor instead of carpet because he did not want to waste his credits.

¶ 40 Christopher told Wilbert he would be given a credit if he did not use an allowance. He believes he is entitled to credits for the following: two feet wider on the side of the house ($5,320), two feet wider in the middle of the house ($5,700), arch window over the dining room ($1,600), skylights, roof pitch ($9,000), bump-out foyer ($1,600), front door ($1,800), 400-amp electric service panel ($900), zoned HVAC ($1,600), HVAC system ($1,600), laundry room cabinets, extras in the kitchen island ($800), wiring ($2,500), dog shower, carpeting ($3,000), and the work he hired Frank Johnson to complete after ejecting Beard from the site. In total, he claims he is owed over $40,000 in credits.

¶ 41 Wilbert did not have trouble getting a bank loan for the new construction. The bank wanted more documents for his two corporations in May 2017. He did not have approval for the construction loan before the contract was signed. In July 2017, Christopher told him that he needed to get the construction loan because Beard needed to pay the subcontractors. In August 2017, Wilbert approached other banks to get the loan. Wilbert testified Beard started the work before the contract was signed and without Wilbert's approval to start. However, in May 2017 text messages, Wilbert asked Christopher if there was "any chance of coming back to a big hole in the ground." Christopher responded it was possible, but he was waiting on permits. On June 5, 2017, Wilbert asked Christopher if there was "any movement at the onsite today." On June 8, 2017, Wilbert told Christopher "I'll get you the contract this weekend." The contract between Beard and Wilbert required Wilbert to obtain financing prior to beginning construction. When this requirement was pointed out to Wilbert during trial, he testified, "He started construction, not me."

¶ 42 Renee signed one owner's payment authorization with Wilbert. She only signed it because the title company asked her to. At some point, Wilbert stopped all payments to Beard and the subcontractors.

¶ 43 When Beard left the home at his request, the HVAC system was not fully connected. Wilbert did not pay the HVAC subcontractor in full because it did not install the correct system according to the contract, and Beard installed an old furnace that was manufactured in 2014. However, Wilbert testified the HVAC system has been operating since he moved in, and he did not have it serviced until recently. Wilbert hired Complete Environmental because there was black mold in the HVAC system. Wilbert was removing all the original ductwork because it violated an unspecified "code" and was not the correct size for the replacement system that was being installed.

¶ 44 3. *Frank Johnson's Testimony*

¶ 45 Frank Johnson is Renee's brother, and he works in the construction business. He visited the home during construction around March 2018 because the Lacys told him "things started not looking right." He noticed the blueprints were not being followed for the back of the house, kitchen, and front porch. The back windows were supposed to go down to the floor, but they were instead waist-high. In the kitchen, a post ran through the counter and beams hung from the ceiling—neither of which appeared in the blueprints.

¶ 46 Wilbert hired Johnson to install carpet on the second floor and on two sets of stairs, backsplash in the kitchen, doorknobs on all interior doors, and drywall in the basement stairway.

¶ 47 4. *Scott Lewis's Testimony*

¶ 48 Scott Lewis, Beard's subcontractor, installed the HVAC system in the Lacys' home. He had been in the HVAC business for more than 20 years and had worked with Christopher for 12 years. He had installed 100 HVAC zoning systems over his career, including 20 to 30 in Bourbonnais and 10 in the Lacys' subdivision, with no complaints. HVAC zoning systems are a more efficient system that allows certain areas of a home to be conditioned with one piece of equipment while another area of the house is not being conditioned. Christopher asked him to bid

on this job. It was Lewis's custom and practice to review the blueprints before giving Beard an estimate. His total contract amount with Beard was $14,897.47, and he had not been fully paid for the work.

¶ 49 According to Lewis, ductwork is rarely drawn into architectural plans. Most of the time technicians can install ductwork based on the blueprints, but things can change during construction, depending on how framing compares to the blueprints.

¶ 50 Lewis measured the house to get the total square footage and used a software program to help size his equipment and perform a load calculation. Based on his load calculation, this house needed a three-ton air conditioning unit and a 70,000-BTU furnace. The system he installed would be sufficient to cool the house only if the system was zoned.

¶ 51 Lewis did not finish installation before Beard was fired, and he was not allowed to come back. At the time of installation, he did not yet charge the air conditioning system by adding or removing refrigerant. He could not charge the system in February 2018 because it needs to be at least 60 degrees outside to accurately charge it. The thermostats he installed were not yet operational. A few weeks before trial, Lewis went to the home to look at the HVAC system. He observed it was wired completely different from how he would have wired it. Specifically, the zone dampers and zone board were unwired, and the air conditioner was wired directly to the furnace. While running, the system was trying to maintain the whole house without zoning. Since being kicked off the site, everything was unhooked, bypassed, and rewired to run as a single zone system. If the system was charged, it was not by Lewis.

¶ 52 Lewis testified he installed a three-ton system because using an air conditioning unit larger than the space requires is problematic. He explained that air conditioning is made to dehumidify, and it has to run for a certain amount of time. If the air conditioning system is oversized, it will

not run long enough to remove humidity. After Lewis installed the three-ton system, Wilbert told Lewis he wanted a larger system than what was originally quoted. Lewis told Wilbert a larger system could not be installed due to framing and design changes and the load calculation.

¶ 53 According to Lewis, a 100,000-BTU 90% efficient furnace would be "extremely" oversized for the first floor. He acknowledged the contract called for an 85,000-BTU 92% efficient furnace, but he instead installed a 70,000-BTU 92% efficient furnace, which is not much different in price. This change was required by the framing; ductwork for an 85,000-BTU furnace would not fit into the existing framing.

¶ 54 If a client needs a larger furnace, whether other changes are necessary depends entirely on the contractor. Lewis can only speak to his own method.

¶ 55 5. *Bob Boulware's Testimony*

¶ 56 The court heard expert testimony from Bob Boulware. He is an engineer specialized in HVAC design and has designed 300-400 systems per year for 36 years. He visited the Lacys' home in February 2019, because the family was concerned about the air conditioning system's lack of performance. He used the blueprints and measured windows to calculate the proper load.

¶ 57 According to Boulware, the contract calls for two units, one 4-ton unit and one 3½-ton unit, but only one 3-ton unit was installed. A 70,000-BTU furnace was installed instead of the 85,000-BTU furnace called for in the contract. He saw there were two thermostats, but only one was operational. The zone controllers were not wired to be operational.

¶ 58 Boulware disagreed with Lewis on multiple issues. While Lewis believed the home needed a 70,000-BTU furnace and a 3-ton air conditioning unit, Boulware opined the home needed a 130,000-BTU furnace and a 6-ton air conditioning unit. Boulware calculated the first floor and second floor separately, then added them together. Boulware used a "more sophisticated" program

than Lewis for his calculations. Changes to the interior framing would have no impact on the load calculation because the load is determined by the outside walls and the temperature difference between the inside and outside of the building. Even if the zoning system was set up, the system installed by Lewis would still be undersized. If the thermostat on the second floor was operational, it would have moved the damper back and forth, but it is doubtful whether it would have maintained temperature.

¶ 59 Boulware recommended having a 4-ton unit and a 2-ton unit for air conditioning because two units would be a simpler system. He also recommended having two separate furnace systems. The estimated cost to install his recommended systems in 2019 was $22,000. But someone would have to confirm whether the initial ductwork could be used.

¶ 60 6. *Tyson Carter's Testimony*

¶ 61 Tyson Carter is a licensed HVAC technician. He signed a contract with Wilbert on July 23, 2023. Wilbert called him because the house was not cooling properly. Carter observed the existing equipment was not charged and it was short of freon. It was hotter in certain areas of the home, and the upper level was "scorching." The existing zone system was wired up, but it was not actually working.

¶ 62 Carter testified the equipment needed to be replaced due to mold, and he recommended installing a larger furnace. He estimated it would cost $54,250 to remove the existing ductwork from the basement, install new ductwork, and install a new 10,000-BTU 90% efficient furnace for the first floor. He started the work the week before trial, and he was contracted to install two furnaces and two air conditioning units. Carter installed a 70,000-BTU 90% efficient furnace for the second floor.

¶ 63 7. *Brian Masterson's Testimony*

¶ 64 Brian Masterson, an expert residential real-estate appraiser, visited the Lacys' home in July 2019. According to Masterson, the home's value would increase by $34,800 if it included the additional square footage contemplated in the "continuation of Exhibit A" (the increase to the structural bays).

¶ 65 8. *James Stutzman's Testimony*

¶ 66 James Stutzman, an expert forensic architect, visited the Lacys' home in March 2019, reviewed the blueprints and Adair's report,[1] and created a report based on his observations. While the parties and the court relied on the report throughout Stutzman's testimony, the report was never admitted into evidence. However, it is contained in the record on appeal.

¶ 67 At trial, Stutzman explained the various ways in which the home deviated from the blueprints. The front stoop as constructed deviates from the blueprints. The wall around the door of the front stoop was not built on a conventional foundation. The stone arch panel is sitting on top of the stoop rather than on its own foundation. The stone of the arch should have continued into the ground and should appear the same as the other exterior walls. Now, it appears to be a wall that is perched up. The stone on the stoop is projecting over the edge of the foundation. This is an aesthetic and structural issue. The cost to remediate is $12,500.

¶ 68 Two structural bays, one on the side of the house and one on the middle of the house, were to be increased by two feet. The cost to remediate is $32,258.

¶ 69 The roof pitch as built was loyal to the architect's vision and no remedial action was necessary.

[1]Adair visited the home at Wilbert's request in 2019 and wrote an inspection report documenting differences from the blueprints. This report was not entered into evidence but is contained in the record on appeal.

¶ 70 The ceiling height in the study is only 12 feet instead of 15 feet. It would cost $2,000 to raise the ceiling.

¶ 71 There is a vertical column in the middle of the kitchen that is not in the blueprints. Adair reportedly studied the load pattern and could not find a justification for the column. There is also a horizontal beam that was supposed to be flush with the ceiling but is currently dropped below the ceiling. This difference does not cause a structural impact. The cost to remediate "the beam framing" is $65,000.

¶ 72 According to the blueprints, the laundry room should have a 32-by-48-inch shower base, but it is not there. The room was also missing the cabinets depicted in the blueprints. The cost to remediate is $5,500.

¶ 73 The two skylights in the center of the home were supposed to be 30 by 45 inches, but they are half of that size. To fix this, the ceiling in the sunroom would need to be raised to accommodate the increased length of the skylight. The cost to remediate is $7,800.

¶ 74 The fireplace in the blueprints was a six-foot wide through-wall fireplace with a hearth on both sides. It was supposed to be centered on the wall with half of the fireplace projecting into the living room and the other half projecting into the sunroom. As built, it is not centered on the wall, which is an aesthetic change. It is also only five feet wide, which is a deviation from the plans. He did not give an estimated cost to remediate.

¶ 75 There is a line item in the contract that called for a bump-out foyer but gave no measurements. The foyer meets the architectural plans, and the current dimensions are the same as in the blueprints. A bump-out foyer would require compromises and adjustments in the geometry of the roof line and slopes.

¶ 76 The rear patio door sills were supposed to be limestone, but they are brick. Limestone is more expensive than brick. The cost to remediate is $2,500.

¶ 77 Three exterior light fixtures are missing. The cost to remediate is $1,500.

¶ 78 The master closet is missing the divider wall and shelving extensions. The cost to remediate is $1,500.

¶ 79 There is an issue with the header that runs horizontally over the garage door. According to the blueprints, this was supposed to be a stone header. Initially, the mason built the header using vertical bricks instead of stone. When someone noticed stone was not used, the mason came back and applied a thin stone over the brick. It appears to be like a veneer or like stone slices are glued on. This existing solution is unacceptable, because it is not likely to withstand normal freeze-thaw conditions. The cost to remediate is $24,200.

¶ 80 The blueprints called for double floor joists in the living room, but there are only single joists. Double joists increase the floor's stiffness, and stiff floors are required if they install tile. The current joists, however, are adequate for the current hardwood flooring. The cost to remediate is $6,800.

¶ 81 The blueprints called for nine can lights in the kitchen, but Beard installed only seven. The cost to remediate is $2,500.

¶ 82 The mailbox was unfinished because it was missing the limestone cap. The mailbox also violated the HOA rules because the brick is not the correct color. The cost to remediate is $750.

¶ 83 The door leading from the hallway to the garage was not self-closing, in violation of building code. While Stutzman included an estimate in his report, he did not testify about the cost to repair.

¶ 84 The blueprints called for steps going into the garage with a railing, but Beard did not install the railing. Stutzman was not sure why the architect required the railing. The cost to remediate is $500.

¶ 85 Stutzman admitted in determining his price estimates, he did not contact any contractors in Bourbonnais. He also did not take his own measurements of the home.

¶ 86 9. *Close of Evidence*

¶ 87 At the close of evidence, the court reserved ruling pending written closing arguments.

¶ 88 G. Beard's Settlement with Associated Bank

¶ 89 During trial, Beard was in the process of settling a dispute over lien priority with Associated Bank. In August 2023, Associated Bank and Beard signed a settlement agreement in which they stipulated the mortgage was a prior and superior lien to Beard's mechanic's lien. In consideration of Beard's stipulation, the bank paid Beard $140,000 (settlement payment). The settlement agreement stated it was inapplicable to claims against the Lacys and the Lacys were not parties to the agreement.

¶ 90 In September 2023, the Lacys moved to admit evidence of the settlement. They argued they were entitled to a setoff from Beard's settlement with Associated Bank. Beard objected to the setoff, arguing Beard relinquished its lien priority to the bank. Associated Bank stated it was the bank's understanding that, under Illinois law, the $140,000 settlement was a reduction of the mechanic's lien.

¶ 91 The Lacys also sought sanctions in the form of attorney fees under Illinois Supreme Court Rule 219(c) (eff. July 1, 2002). They argued sanctions were appropriate because Beard and Associated Bank produced the settlement agreement one month after the trial concluded. Associated Bank could have tendered the settlement agreement when the document was executed,

during trial, and it would have allowed the Lacys to make an informed decision to call more witnesses.

¶ 92 H. Beard's Amended Mechanic's Lien

¶ 93 Beard recorded an amended mechanic's lien on November 1, 2023, removing Renee as an owner. It claimed $178,579.67 was still due and owing from Wilbert for materials furnished and work done.

¶ 94 I. The Trial Court's Ruling

¶ 95 On January 10, 2024, the court issued its oral ruling. It found the settlement payment came from Wilbert's escrow funds and was a setoff.

¶ 96 The court believed both Wilbert and Christopher testified credibly, and believed both parties breached the contract, stating, "I feel that there was a valid contract, that both sides in certain respects met their obligations under the contract and both sides in certain respects breached the contract." It did not specify how or when either party breached. The court ruled Renee was not an owner of the property, but in her dealings with Beard, she was a spouse displaying all the indicia of authority and control to act, so there was no constructive fraud in the mechanic's lien. Moreover, Wilbert did not present direct proof of Beard's intent to defraud and there was no proof of constructive fraud other than the overstated lien amount.

¶ 97 After considering the trial testimony and the August 2023 settlement agreement, the court accepted Beard's calculation of its damages and accepted Wilbert's argument that he was owed a $140,000 setoff based on the settlement payout. The court applied the setoff and found Beard entitled to $38,579.67 on its mechanic's lien. The court then awarded Wilbert $63,750 in damages, itemized as follows: $12,500 for the front stoop, $2,000 to raise the study ceiling, $5,500 for the omitted shower base and cabinets in the laundry room, $7,800 to fix the skylight in the sunroom,

$2,500 for the sills that were brick instead of limestone, $1,500 to install the missing exterior garage lights, $1,500 to fix the master bedroom closet, $24,200 for the stone header, $2,500 to install the missing can lights in the kitchen, $750 for the mailbox, $2,500 to install a self-closing interior garage door, and $500 to fix the missing railing in the garage. By the court's calculations, the amount of damages for Beard's breach of contract is $63,750, less the $38,579.67 remaining on the mechanic's lien, which left damages in the amount of $25,170.33 that Beard owes Wilbert.

¶ 98 The court denied Wilbert damages for the following: the two-foot increase to the structural bays because Wilbert did not meet his burden of proof; the roof pitch because the expert testified no remedial action was needed and the roof conformed to the blueprints; and the kitchen column because there was conflicting testimony on whether the column was needed, and no cost was given to fix it. The court denied damages for the beam in the kitchen ceiling because "there was no structural damage, and the expert testified there was no obvious aesthetic problem." Although the beam did not conform to the blueprint, it was not a material breach of the contract. The court did not award damages for the fireplace; although it was an aesthetic problem, it was not reasonable to fix it, and it was not a material breach. It denied damages for the bump-out foyer because the expert testified the current foyer conformed with the blueprints. It denied damages for the floor joists; although the blueprints called for double joists, it was not a material breach because the floor seemed to be structurally sound and in place. As for the HVAC system, the court said,

> "[T]he Lacys did not meet their burden of proof to establish a breach because they never connected the zoning system that operated—that was designed to operate. They bypassed the HVAC system and—rigged up their own system. This made performance by Beard impossible. And also they—at this point they kicked Beard

> out of the property and would not allow them back in to finish the work so they cannot—they have not met their burden of proof on those issues."

¶ 99 The court ordered the mechanic's lien extinguished and the title quieted. The court found no intentional misrepresentation, and the "sloppiness" of the mechanic's lien and the failure to amend it was just evidence of the disintegration of the communication and relationship between Beard and Wilbert. Further, there was no sanctionable conduct on either side.

¶ 100 The court's written ruling was filed on February 13, 2024. Both parties appeal.

¶ 101 II. ANALYSIS

¶ 102 The parties raise the following issues on appeal: (1) whether Beard breached the contract, (2) whether Wilbert breached the contract, (3) whether the settlement between Beard and Associated Bank was a setoff, (4) whether the trial court's damages award was warranted by the evidence, (5) whether Beard is liable on Wilbert's claims of constructive fraud and intentional misrepresentation, and (6) whether the trial court should have ordered sanctions against Beard.

¶ 103 A. Breach of Contract

¶ 104 Beard argues the trial court erred in finding in Wilbert's favor on Wilbert's breach of contract claims. Specifically, Beard contends Wilbert repudiated the purchase agreement before Beard breached, when—on April 13, 2018—he ejected Beard and the subcontractors from the construction site and refused to pay for work already completed or let them back on to the site to finish the work. As the first-breaching party, Beard argues, Wilbert is not entitled to assert a breach of contract claim. Beard further asserts it substantially performed its duties under the contract, and the purchase agreement defines "substantial completion" as occurring when the relevant governmental authorities issue the occupancy permit.

¶ 105 Wilbert argues he did not breach the purchase agreement, because ejecting Beard from the site was not a breach. Wilbert further argues Beard breached the contract first, excusing Wilbert's further performance, and the trial court's finding that Wilbert also breached is contrary to this principle.

¶ 106 During a bench trial, the court must weigh the evidence and make findings of fact. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). "In close cases, where findings of fact depend on the credibility of witnesses, it is particularly true that a reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence." *Id.* A decision is against the manifest weight of the evidence when the opposite conclusion is evident or when the findings are unreasonable, arbitrary, or not based on the evidence. *Id.* at 252.

¶ 107 "Generally, to recover on a breach of contract claim, the party must have performed its part of the contract." *PML Development LLC v. Village of Hawthorn Woods*, 2023 IL 128770, ¶ 50. "The first-to-breach rule excuses a party's duty to perform under the contract if the other party materially breaches the agreement first." *Id.* However, the partial breach doctrine is an exception to this rule. *Id.* ¶ 51. The partial breach doctrine "applies where an injured party elects to continue performing under the contract despite the other party's material breach." *Id.* "[F]ollowing a material breach, the injured party reaches a fork in the road: it may either continue the contract (retain its benefits of the bargain and sue for damages) or repudiate the agreement (cease performing and sue for damages)." *Id.* ¶ 52. The nonbreaching party's decision to continue performing under the contract converts a material breach to a partial breach, and the nonbreaching party may sue for damages. *Id.* However, the nonbreaching party must also continue its performance, otherwise it may be liable for its own breach. *Id.* In a partial breach, both parties may have breached the contract, resulting in each having a right to damages. *Id.* ¶ 66.

¶ 108 Here, both parties disregarded the contract provisions early on: Beard began construction, but Wilbert did not obtain financing until months later, and neither party insisted on written change orders. Wilbert argues Beard was the first to breach when it began deviating from the plans and blueprints even before construction began. We note the contract documents are full of inconsistencies and contradictions. However, the evidence shows Beard deviated from the plans and blueprints throughout construction. The front stoop is not sitting correctly on the foundation. The fireplace is only five-feet long instead of six-feet as required by the blueprints. There are items missing from the laundry room and master bedroom. The study ceiling is three feet too short. Beard did not install enough can lights in the kitchen or exterior lights on the garage. The stone header over the garage door was initially brick instead of stone as depicted in the blueprints. Although Beard's subcontractor returned to repair the header, this repair was not acceptable because it would not withstand normal freeze-thaw conditions. Despite Beard's breaches, Wilbert kept the contract in force by allowing Beard to continue working, thus converting any material breaches to partial breaches. The court's finding Beard breached the agreement was not against the manifest weight of the evidence.

¶ 109 Wilbert breached by ejecting Beard from the site, preventing their return, and ceasing payments. Beard was ready, willing, and able to finish the job, and planned on making corrections as needed after the walk-through as provided by the contract. Wilbert did not allow Beard to uphold his end of the bargain, and Beard was unable to complete performance. The court's finding Wilbert also breached the agreement was not against the manifest weight of the evidence.

¶ 110 B. Settlement Setoff

¶ 111 Beard contends the trial court erred in finding the settlement between Associated Bank and Beard qualified as a setoff against the damages the Lacys owed to Beard. Beard's position is the

settlement had no relation to its claims against the Lacys, it was not a double recovery, and Beard's claims against the Lacys were explicitly excluded from the settlement.

¶ 112 Wilbert argues the settlement necessarily involves his interests because the bank paid Beard from Wilbert's money. Additionally, he argues that allowing Beard to retain the settlement payment and recover another $140,000 from Wilbert at trial would be a double recovery and against public policy.

¶ 113 "The determination of whether a defendant is entitled to a setoff is a question of law and, therefore, subject to *de novo* review." *Thornton v. Garcini*, 237 Ill. 2d 100, 115-16 (2010). A setoff may refer to (1) a situation where a defendant has a distinct cause of action against the same plaintiff, *i.e.*, a counterclaim, or (2) a defendant's request for a reduction of the damage award because a third party already compensated the plaintiff for the same injury. *Id.* at 113.

¶ 114 "Generally, the amount paid by one defendant acts to reduce the recoverable damages from the remaining defendants." *Otto Baum Co., Inc. v. Sud Family Ltd. Partnership*, 2020 IL App (3d) 190054, ¶ 30. Without a reduction, a plaintiff could obtain damages in an amount exceeding the injury. *Id.* Payments made by one defendant are applied to reduce the damages recoverable from the remaining defendants, even if the plaintiff and one defendant agree the payment will not affect plaintiff's claims against the other defendants. *Id.* ¶ 31.

¶ 115 According to Beard's amended mechanic's lien, $178,579.67 was still due and owing. Associated Bank remitted a $140,000 settlement payment to Beard in exchange for Beard's stipulation the mortgage is superior to the mechanic's lien. The mortgage document allowed Associated Bank to pay "any sums secured by a lien which has priority over this Security Instrument." If the $140,000 payment was not a setoff or a credit, Beard would receive more than what is necessary to make it whole: $178,579.67 due on the amended mechanic's lien plus

$140,000 payment from Associate Bank minus $63,750 damages awarded to Wilbert equals $254,829.67. This would be a violation of the public policy against a plaintiff's double recovery for the same injury. *Id.* ¶ 30.

¶ 116 Therefore, we affirm the trial court's finding the $140,000.00 settlement payment from Wilbert's escrow funds was a setoff.

¶ 117 C. Damages

¶ 118 Beard appeals the damages awarded for the header accents and the internal garage door and further argues Stutzman's repair estimates were unreliable. Wilbert argues the trial court should have awarded additional damages. We review an award of damages after a bench trial under the manifest weight of the evidence standard. *Cadle Properties of Illinois, Inc. v. Fortune Investments, LLC*, 2021 IL App (1st) 200556, ¶ 44. A decision is against the manifest weight of the evidence when the opposite conclusion is apparent or when the findings are unreasonable, arbitrary, or not based on the evidence. *Eychaner*, 202 Ill. 2d at 252. However, "[i]f there is an adequate basis in the record to support the trial court's determination of damages, then we must affirm." *Cadle Properties*, 2021 IL App (1st) 200556, ¶ 44.

¶ 119 Here, the court only heard testimony from Stutzman regarding the estimated cost of repairs. No testimony or evidence was presented to rebut Stutzman's opinions. When a party presents unopposed expert testimony, although the trial court is not required to find in that party's favor, "it is still within the province of the [court] to weigh the credibility of the expert evidence and to decide the issue." *In re Glenville*, 139 Ill. 2d 242, 251 (1990). But the court may not reject unopposed testimony arbitrarily. *Id.* The court may disregard such testimony only when it is inherently impossible, contradicted by positive testimony or circumstances, or the witness has been impeached. *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). Therefore, it was not against the

manifest weight of the evidence for the court to rely on Stutzman's estimates in calculating damages. See *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153, 1159 (2009). As such, the court's award of the following damages was not against the manifest weight of the evidence: $12,500 for the front stoop, $2,000 to raise the study ceiling, $5,500 for the omitted shower base and cabinets in the laundry room, $7,800 to fix the skylight in the sunroom, $2,500 for the sills that were brick instead of limestone, $1,500 to install the missing exterior garage lights, $1,500 to fix the master bedroom closet, $24,200 for the stone header, $2,500 to install the missing can lights in the kitchen, $750 for the mailbox, and $500 to fix the missing railing in the garage.

¶ 120 However, Stutzman's report was not admitted into evidence. And while he testified the door violated building code, he never testified regarding the cost to repair, and no one asked him. Because the court heard no evidence during trial regarding the cost to repair the internal garage door, it was against the manifest weight of the evidence for the court to award $2,500 in damages to Wilbert to install a self-closing door. See *Eychaner*, 202 Ill. 2d at 252.

¶ 121 Moreover, it was not against the manifest weight of the evidence for the court to deny damages for the two-foot increase to the structural bays, the roof pitch, the kitchen column, the beam in the kitchen ceiling, the fireplace, the foyer bump-out, and the floor joists for the reasons the court articulated in its ruling. *Supra* ¶ 98.

¶ 122 The court heard much testimony regarding the HVAC system before declining to award damages, noting the Lacys never connected the zoning system that was designed to operate, instead bypassing and rigging up their own system. The court's decision to deny damages was not against the manifest weight of the evidence. Had the Lacys permitted Beard to return to complete work, they may have received a functioning HVAC system.

¶ 123 Accordingly, we reduce Wilbert's damages by $2,500 (the amount awarded for the internal garage door). Otherwise, we affirm the trial court's damages award.

¶ 124 D. Constructive Fraud and Intentional Misrepresentation

¶ 125 Wilbert contends the trial court should have ruled in his favor on his claims for constructive fraud and intentional misrepresentation. He claims Beard committed constructive fraud when in its mechanic's lien it attested Renee was a party to the contract and an owner, and all the work had been completed. Wilbert also claims he proved intentional misrepresentation because (1) Christopher falsely stated the company had been in business since 1999, yet it did not exist before 2011, (2) Christopher knew when he incorporated the business and testified he had other businesses earlier in his career, (3) Christopher made the false statement to get Wilbert to trust and hire him instead of the competitor, (4) Wilbert relied on this statement and chose Beard over O'Malley, and (5) the Lacys suffered damages when their dream house was delivered late, unfinished, and cost more than O'Malley's quote.

¶ 126 Beard contends the trial court's finding that it did not engage in fraud or misrepresentation is well-supported by the evidence. Christopher reasonably believed Renee was a party to the contract and an owner based on the purchase agreement, new construction rider, and the owners' payment authorization. The trial court rejected Wilbert's attempt to completely disregard Christopher's experience since 1999 solely because he had not incorporated Beard until later. Moreover, Wilbert presented no evidence to refute that Christopher had not been personally engaged in construction since 1999, or that he constructed fewer than 4-5 homes per year.

¶ 127 A reviewing court defers to the factual findings of the trial court unless those findings are against the manifest weight of the evidence. *Eychaner*, 202 Ill. 2d at 251. A decision is against the manifest weight of the evidence when the opposite conclusion is apparent. *Id.* at 252.

¶ 128 "[T]o invalidate a lien claim on the basis of constructive fraud, there must be additional evidence demonstrating that the contractor *knowingly* made the overstatement or overcharge." (Emphasis in original.) *Father & Sons Home Improvement II, Inc. v. Stuart*, 2016 IL App (1st) 143666, ¶ 34. Here, the trial court found there was no constructive fraud. Although Renee was not an owner of the property, the trial court found in Renee's dealings with Beard, she was "a spouse displaying all the indicia of authority and *** control to act." Therefore, there was no constructive fraud by including her on the mechanic's lien. Moreover, the court found Wilbert did not present direct proof of Beard's intent to defraud.

¶ 129 The record supports the trial court's finding that there was no constructive fraud in the filing of the mechanic's lien. "A contractor does not need to complete all the work required under a construction agreement before recording a mechanic's lien claim." *Father & Sons*, 2016 IL App (1st) 143666, ¶ 59. "Completion" as used in the Mechanics Lien Act means completion of the work for which a contractor seeks to enforce his lien. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 389 (2008). Wilbert's argument that Beard committed fraud by indicating the work was complete in the mechanic's lien therefore fails. Moreover, there was no additional evidence demonstrating Beard knowingly made errors in the lien. Although Renee was misidentified as an owner, this error was *de minimis* and not prejudicial because Wilbert was also listed as an owner and Renee acted as a spouse displaying indicia of authority in her dealings with Beard. See *Lake County Grading Co., LLC v. Forever Construction Co., Inc.*, 2017 IL App (2d) 160359, ¶ 83. Mistakes within the lien here did not rise to the level of constructive fraud, and the trial court's ruling was not against the manifest weight of the evidence.

¶ 130 In a claim for intentional misrepresentation, the plaintiff must establish (1) a false statement of material fact, (2) known or believed to be false by the person making it, (3) an intent

to induce the plaintiff to act, (4) plaintiff acted in justifiable reliance of the statement, and (5) damage to the plaintiff resulting from the reliance. *Lewis v. Lead Industries Ass'n*, 2020 IL 124107, ¶ 30. The trial court here found there was no misrepresentation by Beard, but also noted that neither party argued it at trial. It further stated,

> "[S]loppiness on the mechanic's liens and then the failure to—to amend it afterwards, again, is just evidence of the disintegration of the communication and the relationship. It's not really the best way to do business, but at the same time, you know, changing things on a daily basis at a construction site is not—is not a way to build a house either."

¶ 131 The record supports the trial court's finding that Christopher did not misrepresent his experience to Wilbert. The focus during trial was on the breach of contract claim, and neither party addressed the misrepresentation claim. Even so, Wilbert's attempt to invalidate Christopher's professional experience because the specific business was not incorporated until later is unreasonable. At the time Wilbert was interviewing contractors, O'Malley had been in business for 30 years, still longer than Christopher and Beard. Wilbert cannot say he wanted an experienced contractor and acted in justifiable reliance on Christopher's statements when O'Malley was more experienced and presented a lower quote.

¶ 132 We affirm the trial court's denial of Wilbert's constructive fraud and intentional misrepresentation claims.

¶ 133 E. Sanctions

¶ 134 Wilbert contends the trial court should have awarded sanctions against Beard for attempting to obtain a double recovery and concealing the settlement with Associated Bank, as disclosure of the settlement may have made trial unnecessary. We review the trial court's denial

of a motion for sanctions for an abuse of discretion. *Peterson v. Randhava*, 313 Ill. App. 3d 1, 9 (2000). Here, the trial court concluded there was no "sanctionable conduct that [rose] to the level of awarding attorney fees" for either party. It further noted, "Rule 219(c) is meant to accomplish the object of discovery and it's not to be used to punish the parties. And so I feel that attorneys fees would be punitive in this sense because we did get the settlement document, and I did give you credit *** for the setoff." We agree with the court's assessment and therefore find no abuse of discretion.

¶ 135 III. CONCLUSION

¶ 136 In conclusion, we reduce the trial court's damages award by $2,500 and otherwise affirm the trial court's judgment.

¶ 137 The judgment of the circuit court of Kankakee County is affirmed as modified.

¶ 138 Affirmed as modified.