2016 IL App (5th) 150505-U

NO. 5-15-0505

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JILL ESSNER,	)	Appeal from the
	)	Circuit Court of
Plaintiff and Counterdefendant-Appellee,	)	Madison County.
	)	
v.	)	No. 14-CH-148
	)	
BUCK'S, INC.,	)	Honorable
	)	Barbara L. Crowder,
Defendant and Counterplaintiff-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Schwarm and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's ruling that oral settlement agreement existed is not against manifest weight of the evidence because ruling is supported by competent testimony and it was province of trial court to determine witness credibility; theories of waiver and estoppel do not preclude existence of settlement agreement under the circumstances of this case; trial court did not err in denying motion to disqualify counsel; accordingly, trial court's dismissal of the case is affirmed.

¶ 2 The defendant, Buck's, Inc., appeals the ruling of the circuit court of Madison County that dismissed the defendant's counterclaim against the plaintiff, Jill Essner. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. Prior to the commencement of this litigation, the plaintiff and the defendant had a business relationship wherein the plaintiff operated a gas station and convenience store on land owned by the defendant in Edwardsville, and purchased from the defendant fuel to sell at the station. The relationship was governed by a written contract signed by each party. On March 4, 2014, the plaintiff initiated the case at bar when she filed, in the circuit court of Madison County, an *ex parte* emergency motion for a temporary restraining order. The motion was filed after, earlier that day, the defendant hand-delivered to the plaintiff a notice of default under the contract, said notice alleging the continuing failure by the plaintiff to pay the defendant for the sale of its motor fuel and to make other payments required under the contract. The trial court entered the *ex parte* order, allowing the plaintiff continued access to the station to conduct general sales of inventory, but not of fuel. The plaintiff was ordered to post a $10,000 bond within 48 hours, with the case continued until March 14, 2014.

¶ 5 On March 14, 2014, the trial court entered an order noting that no bond had been filed by the plaintiff, that the restraining order was dissolved, and that each party had 30 days to "file any pleading." On April 11, 2014, the defendant filed a verified counterclaim against the plaintiff, alleging breach of contract. On June 25, 2014, the defendant filed a motion for default judgment, alleging that the plaintiff had not answered the defendant's counterclaim. Also on June 25, 2014, the plaintiff filed an answer to the defendant's counterclaim. Therein the plaintiff denied that any breach of contract had

occurred. On that same date, the defendant also filed a motion to compel the plaintiff "to answer all outstanding written discovery," and filed a motion to strike and dismiss any remaining complaint or other pending pleadings filed by the plaintiff.

¶ 6 On August 8, 2014, the trial court entered a written order in which it: (1) denied the defendant's motion for default judgment; (2) granted the defendant's motion to compel written discovery, giving the plaintiff 14 days to respond; and (3) declared moot the defendant's motion to strike and dismiss, because "the only currently pending pleadings are the counterclaim and the answer thereto." Discovery proceeded, with additional filings by the parties, and orders by the trial court, that are not relevant to this appeal.

¶ 7 On January 16, 2015, the plaintiff filed a combined motion to dismiss the defendant's counterclaim, motion to enforce settlement, and motion to vacate a discovery order entered by the trial court on December 17, 2014. Therein, the plaintiff alleged that the parties had settled all issues between them, and stated that she therefore moved to dismiss the defendant's counterclaim because the defendant had "released its claim." Attached thereto were copies of emails sent between the parties, the dates of all of which preceded the April 11, 2014, filing of the defendant's counterclaim.

¶ 8 On April 2, 2015, the trial court entered a written order in which it ordered, *inter alia*, the defendant to file a response brief to the combined motion by April 28, 2015, and the plaintiff to respond thereto by May 21, 2015. On April 28, 2015, the defendant filed its response brief, in which it contended that: (1) the plaintiff's motion to dismiss was untimely, because it was filed after the plaintiff filed her answer, and the plaintiff had not

moved to withdraw her answer; (2) the motion instead should be treated as a motion for summary judgment; and (3) regardless of how the motion was construed, it "should be denied due to serious factual disputes" regarding the alleged settlement, the existence of which the defendant denied. The defendant also filed the affidavit of Matthew J. Manning, former general counsel for the defendant, who, therein, denied that any settlement had taken place between the parties. In the response brief, the defendant incorporated by reference Manning's affidavit.

¶ 9 On May 29, 2015, the trial court ordered that discovery depositions of Manning and of Todd Sivia, counsel for the plaintiff, were to be completed before June 30, 2015, and that an evidentiary hearing would follow on July 23, 2015. The hearing was subsequently rescheduled for September 3, 2015. Manning and Sivia were deposed, and the depositions were filed with the trial court. The defendant also filed a motion to disqualify Sivia from continuing as counsel for the plaintiff because he was likely to be a necessary witness at trial. In the motion, the defendant contended that disqualifying Sivia would not work a substantial hardship on the plaintiff, because, *inter alia*, no trial date had yet been set. The plaintiff filed a response, wherein the plaintiff argued that disqualification of Sivia was a drastic, and unwarranted, remedy.

¶ 10 On September 3, 2015, the trial court held an evidentiary hearing on the plaintiff's motion to dismiss and motion to enforce settlement. At the outset of the hearing, counsel for the defendant noted the defendant's motion to disqualify Sivia, and stated: "I'm not looking for rulings today necessarily but I just wanted to get the matter by [*sic*] the [c]ourt. The [m]otion to [d]isqualify may be something that once the [c]ourt hears Mr.

Sivia's testimony, it will be ready to rule; but if not, it's something we can deal with later." The first witness to testify at the hearing was Todd Sivia. With regard to the disputed settlement, he testified that from March 4, 2014, until March 19, 2014, he exchanged a series of emails with Manning, and with another of the defendant's attorneys−Mark Poulakidas−in an effort to settle the claims each party had against the other. He authenticated the emails, which subsequently were admitted into evidence collectively as the plaintiff's Exhibit E. He testified that on March 12, 2014, he received an email from Poulakidas. The email stated, "I've got some movement on my end," which Sivia testified he interpreted to mean that the parties might be able "to possibly resolve the case in its entirety."

¶ 11 Sivia testified that on March 14, 2014, the temporary order that had been granted by the court expired, and that the plaintiff was served by the defendant with a five-day notice to exit the station. He testified that on March 18, 2014, he received an email from Manning, and that the following day Manning called him. He testified that he and Manning discussed whether the plaintiff "was able to be collected from," and that after he told Manning that "no, it was not likely for them to collect," Manning then "said 'let's everybody walk away.' " Sivia testified that the call concluded with the agreement that "both parties would walk away from their claims and that on the 19th my client would deliver possession of the property." He testified that after the call, he received an email from Manning. The email stated that a representative of the defendant, Larceeda, would appear at Sivia's office "at 5:30 to retrieve the keys." Sivia testified that he responded to the email, because he wanted to confirm their phone call. He testified that the email he

sent to Manning that day in response confirmed "all the terms in the agreement" the men had reached earlier by phone. The text of Sivia's email, in its entirety, stated that:

> "This email is in response to your phone call with me today. I have talked to my client per your request. My client is willing to accept a joint full settlement and release of all claims by your client against my client in exchange for a full settlement and release against your client. My client will keep all equipment, inventory, and trade fixtures my client installed on the premises. My client will then leave interior premises in a broom clean condition upon final exit. We anticipate it being about 6:00 p.m. tonight. Larceeda can still pick up the key at 5:30 p.m. We will work towards completing a mutually acceptable release in the next few days. After signatures on the Settlement and Release, we will agree to sign a dismissal of the case."

Sivia testified that he believed the terms of the email had been complied with. He testified that it was his "understanding that Matt Manning was going to prepare the release" because "you know, bigger corporations are–usually want to draft their own release."

¶ 12 Sivia testified that he had no further contact with Manning. He testified that when he received a copy of the counterclaim the defendant filed in April 2014, he believed the defendant was merely "reserving any rights that they may have until they completed the draft of the settlement," because the trial court had, in March, directed the parties to "file all claims within 30 days." Sivia testified that "in the time frame of" June 17, 2014, he received a call from Poulakidas noting that the plaintiff had not answered the

counterclaim. He testified that he told Poulakidas he thought the case was settled, and that following the call from Poulakidas, Sivia "got a letter either that day or a couple days afterwards that said any settlements are now ended."

¶ 13 On cross-examination, Sivia was asked if he agreed that there existed "a major factual dispute in this case between you and Matt Manning regarding your claim that the parties reached an oral settlement during that phone conversation?" Sivia testified that he did not agree, because his memory of Manning's deposition testimony was that Manning "couldn't remember anything" about the call and the settlement. He was then asked if the affidavit Manning signed prior to his deposition "directly" contradicted Sivia's testimony. He again disagreed. He did agree, however, that only he and Manning were involved in the creation of the disputed settlement agreement. When asked if sometime in March of 2014, a different representative of the defendant−Nichole Mallett−told him that the defendant would "under no circumstances" agree to a walk-away deal, he testified that he did not remember that. Sivia then testified in detail about the various monetary claims asserted by the defendant against the plaintiff, and testified that the plaintiff believed she had various monetary claims against the defendant.

¶ 14 With regard to vacating the station, Sivia testified that he did not agree that the plaintiff was planning to vacate on March 19 because of the five-day notice served on the plaintiff; he testified that the plaintiff could contest the legal sufficiency of the notice, and force the defendant to file a forcible detainer action, allowing the plaintiff to remain in possession of the station until the action was completed. He agreed that no written settlement and release was ever completed, but reiterated his direct examination

testimony that his email encompassed the terms of the oral agreement, and was not rejected by Manning. He again disagreed with Manning's affidavit assertion that Manning had not agreed to the settlement. He testified that it was Manning, not him, who first used the "terminology that–he called me and said everybody walk away." He further testified that while he believed a writing signed by both parties was "customary," he did not believe it was necessary. Sivia testified that he disagreed with Manning's affidavit assertion that Sivia had "agreed to prepare a draft written proposed settlement agreement and submit it to him for review," and with Manning's affidavit assertion that having a representative of the defendant retrieve the keys was not part of some kind of settlement.

¶ 15 Sivia testified that a signed dismissal of the case was not necessary because the temporary order had expired and nothing else was pending at the time, so "there was no need for a dismissal of the case." He reiterated his direct examination testimony that when the defendant later filed its counterclaim, he believed the defendant was simply trying to reserve its rights because the trial court had, in March, directed the parties to file all claims within 30 days. He agreed that this was his opinion, rather than something conveyed to him by any representative of the defendant. He agreed that he later answered the counterclaim and engaged in discovery, for a period of 10 months prior to filing the motion to dismiss on the basis of the alleged settlement. He testified that during those 10 months he was told repeatedly by representatives of the defendant that the representatives were attempting to convince the defendant "to agree to what was agreed to back in March of 2014." He reiterated his direct examination testimony that

following his March 19, 2014, email to Manning he believed "[t]his was a completed settlement. All parties had resolved all claims against each other."

¶ 16 On redirect examination, Sivia reiterated that he answered the counterclaim and engaged in discovery because the plaintiff had an obligation to respond to discovery. Over objection, he testified that the claims the plaintiff believed she had against the defendant amounted to approximately $79,000, and that the defendant's claim against the plaintiff "was about $60,000." He testified that he believed these amounts provided the motivation for a walk-away settlement that would avoid the risks of litigation and "would resolve the case fairly easily." He testified that when he referenced "your request" in his March 19, 2014, email, he believed he was referencing a legal offer from the defendant, although Sivia agreed that he did not use the word "offer" in his email. He testified that when he used the term "accept" in the same March 19, 2014, email, he meant it in the legal sense of the word and was accepting the defendant's offer. He testified that because each party was foregoing claims against the other, he believed there was consideration for the settlement agreement.

¶ 17 Following Sivia's testimony, the trial court allowed the defendant to supplement the record with Manning's discovery deposition. The defendant then called Nichole Mallett, an executive vice president with the defendant, to testify. Mallett testified that the contract between the plaintiff and the defendant did not allow for oral modifications, only changes "reduced to writing and signed by authorized representatives of each parties." She testified that she had limited discussions with Sivia about the case at bar, and that she never had "any definitive agreement" with Sivia. With regard to whether the

defendant had entered walk-away deals in the past, she testified that "we've never waived any money due to us for the operation of the business." With regard to the defendant's relationship with the plaintiff in this case, Mallett testified that she never authorized a walk-away deal with the plaintiff. On cross-examination, Mallett testified that Manning, as general counsel for the defendant, had the authority to settle the defendant's case with the plaintiff.

¶ 18 The final witness to testify at the hearing was Larceeda Ammons Davalt, a regional account executive for the defendant. Davalt testified that she had known the plaintiff since the plaintiff began operating the station in 2008. She testified that she served the plaintiff with the five-day notice on March 14, 2014. She did not testify with regard to knowledge of any settlement negotiations between the defendant and the plaintiff. On cross-examination, she testified that she was not a party to any settlement negotiations between Sivia and Manning.

¶ 19 At the conclusion of the September 3, 2015, hearing, the trial court denied the defendant's motion to disqualify for purposes of the hearing, but left it "entered and continued" for purposes of a possible trial. The trial court also took the matter under advisement. On November 2, 2015, the trial court entered the four-page written order that is the subject of this appeal. Therein, the trial court discussed the factual evidence presented at the hearing, noting that in his deposition testimony, "Manning agreed that 'everybody walking away in terms of dollars' was what he and Sivia were discussing in an attempt to bring the dispute to a close." The trial court also noted that "Manning had a very poor recollection of any specifics," and that "Manning stated he 'did not recall if Mr.

Sivia and I had finalized negotiations' on the date of [the plaintiff's] move from the premises." Ultimately, the trial court ruled that the plaintiff "established with credible testimony the terms of the agreement and that plaintiff had acted upon those terms." The trial court also ruled that "[n]othing in the terms required a release be signed in order for the settlement to be valid," and that the plaintiff "met the burden of proof." Accordingly, the trial court granted the motion to enforce settlement and ruled that the litigation was terminated because the terms of the settlement agreement had been "accomplished." This timely appeal followed.

¶ 20 ANALYSIS

¶ 21 Before addressing the issues raised on appeal, we begin by considering the methods of legal procedure employed by the parties in this case, and whether those methods require us to vacate the trial court's order and remand for further proceedings. "Because a section 2-619 motion admits the legal sufficiency of the complaint, filing such a motion after filing an answer, without requesting leave to withdraw the answer, is procedurally improper." *Clemons v. Nissan North America, Inc.*, 2013 IL App (4th) 120943, ¶ 33. Nevertheless, this court has held that "filing an answer does not preclude a section 2-619 motion, even if it is procedurally improper, and a trial court has discretion to consider a section 2-619 motion filed outside the pleadings phase." *Id.* Late pleadings may be considered by the trial court "unless it can be demonstrated the opposing party would be prejudiced by the late filing." *In re Marriage of Brownfield*, 283 Ill. App. 3d 728, 732 (1996). When a decision on a motion to dismiss has been made following a full evidentiary hearing, at which both parties were permitted to present substantial evidence

on the issue of the motion, the trial court does not abuse its discretion by considering, and ruling upon, the late pleading. *Id*. In the case at bar, the trial court ordered an evidentiary hearing and ruled upon the motion only after taking evidence; on appeal, neither party contends they were prejudiced by the procedure employed by the trial court, and neither contends they were denied the opportunity to present any and all evidence they wished to present. Accordingly, we do not believe the trial court abused its discretion, and we will move forward on the merits, rather than vacating the trial court's order and remanding for further proceedings.

¶ 22 Moreover, with regard to the evidentiary hearing, we note that if, following the filing of a section 2-619 motion, the trial court determines, as it did in this case, that genuine disputed questions of material fact exist, and the trial court therefore decides to "hear and determine the merits of the dispute based upon the pleadings, affidavits, counteraffidavits, and other evidence offered by the parties," this court will "review not only the law but also the facts, and may reverse the trial court order if it is incorrect in law or against the manifest weight of the evidence." *Kirby v. Jarrett*, 190 Ill. App. 3d 8, 13 (1989). When a dispute exists as to whether an oral contract has been formed, that question is a question of fact to be determined by the trier of fact, as are questions of the terms of the contract and the intent of the parties. See, *e.g.*, *In re Marriage of Gibson-Terry*, 325 Ill. App. 3d 317, 322 (2001). With regard to those questions of fact, this court likewise will not reverse the determination of the trier of fact unless that determination is contrary to the manifest weight of the evidence. *Id*. A determination is contrary to the manifest weight of the evidence if "an opposite conclusion is apparent or when the

findings appear to be unreasonable, arbitrary, or not based on the evidence." *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). A court of review may not substitute its judgment for that of the trier of fact below. *Id*. "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*. at 251. In sum, we review the trier of fact's findings of fact under the manifest weight of the evidence standard, while reviewing, as always, questions of law under a *de novo* standard of review. *Offord v. Fitness International, LLC*, 2015 IL App (1st) 150879, ¶ 15.

¶ 23 Against the backdrop of the foregoing, we consider the first issue raised on appeal by the defendant. The defendant contends the trial court erred when it granted the plaintiff's section 2-619 motion because, according to the defendant, "[t]he parties did not, and could not, enter into any global, oral 'walk[-]away' deal when there were (and still are) numerous, unresolved monetary and non-monetary issues and the testimony on every facet of the purported deal is disputed." In support of this proposition, the defendant argues that: (1) Manning and Mallett were more credible than Sivia; (2) Sivia's purported acceptance was too contingent and indefinite to support the trial court's ruling; (3) the purported acceptance does not address the defendant's "continuing non-financial demands"; and (4) no consideration supports the settlement agreement because the plaintiff's claims against the defendant were "illusory" and the plaintiff in fact had "no damages."

¶ 24 In making these contentions, the defendant essentially asks this court to engage in a *de novo* review in which we reweigh the evidence presented at the hearing and conclude that it favors the defendant. This we cannot do. As noted above, in a close case such as this one, where the trial court's findings of fact are dependent upon its assessment of the credibility of the witnesses, it is particularly true that we will defer to the trial court's findings unless they are against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). Also as noted above, findings are contrary to the manifest weight of the evidence if "an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Id*. at 252.

¶ 25 In this case, ample evidence supports the trial court's determination. It is clear from the plain language of the trial court's order that it found Sivia more credible than Manning (who, as the trial court noted, "agreed that 'everybody walking away in terms of dollars' was what he and Sivia were discussing in an attempt to bring the dispute to a close," who also "had a very poor recollection of any specifics," and who ultimately stated that "he 'did not recall if Mr. Sivia and I had finalized negotiations' on the date of [the plaintiff's] move from the premises") and Mallett (who, it is undisputed, had no firsthand knowledge of the contents of the Sivia-Manning phone conversation). It is equally clear that the trial court found that: (1) Sivia's acceptance of the defendant's offer was sufficiently definite (particularly because after Sivia's email, neither Manning, Mallett, nor Poulakidas contacted the plaintiff to continue negotiations or have other discussions for quite some time); (2) Manning waived any "continuing non-financial demands" by proposing, and then agreeing to, a walk-away deal that did not include those

demands; and (3) Sivia testified credibly about the monetary claims the plaintiff believed she had against the defendant–claims that, along with the plaintiff's alleged insolvency, provided the consideration for Manning to offer a "walk-away" deal to the plaintiff in the first place. Sivia also testified that the plaintiff was not required to vacate the station because of the five-day notice served on the plaintiff; he testified that the plaintiff could contest the legal sufficiency of the notice, and force the defendant to file a forcible detainer action, allowing the plaintiff to remain in possession of the station until the action was completed–more motivation for Manning to offer a "walk-away" deal that would end the dispute and quickly allow the defendant to take possession of the station.

¶ 26 The defendant might not like the fact that its representative settled this case in a manner it now disagrees with, but our review of the trial court's findings does not lead us to conclude that an opposite conclusion to the findings is apparent, or that the findings are unreasonable, arbitrary, or not based on the evidence; accordingly, the findings are not against the manifest weight of the evidence and we will not reverse the trial court's decision. See, *e.g.*, *Kirby v. Jarrett*, 190 Ill. App. 3d 8, 13 (1989); *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002).

¶ 27 The defendant next contends a signed written release was required by the terms of Sivia's email, but never provided, and that therefore no settlement can exist. However, it is again clear from the plain language of the trial court's order that it found the testimony of Sivia more credible on this point. Sivia testified that he believed the terms of the email had been complied with. He testified that it was his "understanding that Matt Manning was going to prepare the release" because "you know, bigger corporations are–usually

want to draft their own release." He further testified that while he believed a writing signed by both parties was "customary," he did not believe it was necessary. Sivia testified that he disagreed with Manning's affidavit assertion that Sivia had "agreed to prepare a draft written proposed settlement agreement and submit it to him for review." In addition, Sivia testified that a signed dismissal of the case was not necessary because the temporary order had expired and nothing else was pending at the time, so "there was no need for a dismissal of the case." Finally, Sivia also testified that by the time he learned from Poulakidas that the defendant did not believe the case had been settled–sometime around June 17, 2014–he "got a letter either that day or a couple days afterwards that said any settlements are now ended." Obviously, at that point it would have been pointless for Sivia to then attempt to draft a signed agreement to the settlement. The trial court believed Sivia's version of events rather than the version of events put forward by the defendant. The trial court's findings are not against the manifest weight of the evidence.

¶ 28 Moreover, although the defendant contends the prior contract between the plaintiff and the defendant could be modified only by a signed, written agreement, the defendant did not present any evidence that it pressed this point with the plaintiff, and the trial court's determination that Manning's problems remembering what happened in this case made him a less-than-credible witness supports the inference that Manning might have waived this requirement, just as he made other decisions of which the defendant now disapproves, but by which the defendant is nevertheless bound.

¶ 29 The defendant also argues that "[w]aiver and estoppel preclude [the plaintiff's] claim of an oral settlement." In support of this proposition, the defendant points to the fact that the plaintiff did not immediately raise the purported settlement as a defense against the defendant's counterclaim, choosing instead to answer the counterclaim and engage in discovery for 10 months. However, to explain this conduct, Sivia testified on cross-examination that during those 10 months he was told repeatedly by representatives of the defendant that the representatives were attempting to convince the defendant "to agree to what was agreed to back in March of 2014." This testimony was uncontradicted. Moreover, Sivia reiterated his direct examination testimony that following his March 19, 2014, email to Manning he believed "[t]his was a completed settlement. All parties had resolved all claims against each other." Then, on redirect examination, Sivia reiterated that he answered the counterclaim and engaged in discovery because the plaintiff had an obligation to respond to discovery. The trial court clearly found Sivia's testimony credible, and concluded that, given the representations made to Sivia by the defendant, it was reasonable for Sivia to embark on the course of action he followed: responding to the counterclaim and engaging in discovery, while waiting for the defendant to honor the settlement to which Manning and Sivia had agreed. We do not believe the trial court's finding is against the manifest weight of the evidence, and we decline to disturb it. Because there is no factual basis for the defendant's waiver and estoppel arguments, they necessarily fail. Moreover, we agree with the plaintiff that the defendant did not properly raise and argue claims of waiver and estoppel in the trial court, so that the trial court could consider and rule upon the claims. Accordingly, the plaintiff is correct that the

defendant has waived consideration at the appellate court level of its contention that "[w]aiver and estoppel preclude [the plaintiff's] claim of an oral settlement." See, *e.g.*, *Killion v. Meeks*, 333 Ill. App. 3d 1188, 1190 (2002) (argument waived if not presented to trial court and instead raised for first time on appeal). Waiver notwithstanding, for the reasons discussed above, there is no merit to the defendant's contention that theories of waiver and estoppel bar the plaintiff's position that there was a global, oral settlement.

¶ 30 The final issue raised on appeal by the defendant is whether the trial court erred when it denied, for purposes of the September 3, 2015, hearing, the defendant's motion to disqualify Sivia from continuing as counsel for the plaintiff because he was likely to be a necessary witness at trial. Our standard of review of this issue is well-settled: when a motion to disqualify an attorney is filed, the determination "is directed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997). We will find an abuse of discretion only "where no reasonable person would agree with the position adopted by the trial court." *Id*. If the issue raised on appeal requires the resolution of issues of fact, we will not disturb the trial court's determinations "unless they are unsupported by the evidence in the record." *Id*. Moreover, it is equally well-settled that the disqualification of a party's attorney of choice "is a drastic measure because it destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing." *Id*. at 178. Accordingly, courts must exercise caution "to guard against motions to disqualify being used as tools for harassment." *Id.*

¶ 31 In support of its position on appeal, the defendant contends the trial court erred because: (1) "Sivia's testimony was a key to a highly contested issue, namely the alleged oral settlement agreement, and did not concern the nature and value of legal services provided to" the plaintiff; (2) the disqualification of Sivia would not have worked a hardship on the plaintiff, as another attorney representing her, Paul Marks, was present and participated in the hearing; (3) Sivia's testimony at the hearing "unfairly prejudiced" the plaintiff's case and unfairly prejudiced the defendant; and (4) "the record does not show that the [trial court] considered all factors as required by Rule 3.7 and the case law interpreting this Rule, and does not contain any specific, related findings."

¶ 32 We begin by noting that to the extent the defendant's arguments, above, are premised upon any damage allegedly done to the parties by Sivia's *testimony* at the hearing, even if the trial court had disqualified Sivia as the plaintiff's attorney, Sivia still would have been able to testify at the hearing. The motion, by its own terms, was a motion to disqualify Sivia as an attorney, not as a witness. Nowhere in the motion does the defendant argue that Sivia should be barred from testifying as a witness, nor does the motion provide any grounds for so doing.

¶ 33 We also note that at the outset of the hearing, Poulakidas−as counsel for the defendant−expressly referenced the motion to disqualify and then told the trial court: "I'm not looking for rulings today necessarily but I just wanted to get the matter by [*sic*] the [c]ourt. The [m]otion to [d]isqualify may be something that once the [c]ourt hears Mr. Sivia's testimony, it will be ready to rule; but if not, it's something we can deal with later." The conduct of attorney Poulakidas in stating that the motion could be dealt with

later certainly could be seen as a waiver of the motion for purposes of the hearing, the intent of Poulakidas being to instead preserve the issue for any trial that might follow.

¶ 34 Moreover, as the plaintiff points out, a larger problem for the defendant is that Sivia's participation in the hearing as an attorney, rather than as a witness, was limited to his cross-examination of witness Larceeda Ammons Davalt. It is undisputed that Davalt was not privy to the negotiations between Manning and Sivia that led to the agreement in this case. Her testimony was of, at best, marginal significance to the issue before the trial court at the hearing: whether there was or was not a settlement agreement. Accordingly, even if Poulakidas did not waive the motion for purposes of the hearing by stating that he was not looking for a ruling on the motion that day, and even if the trial court erred in denying the defendant's motion to disqualify Sivia as an attorney at the hearing, the error did not prejudice the defendant in any significant or meaningful way.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 37 Affirmed.