2026 IL App (1st) 241754-U

No. 1-24-1754

Order filed June 30, 2026

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

HOWARD BROWN HEALTH CENTER, Plaintiff-Appellee, v. 1023 W. IRVING PARK ROAD, LLC and BOGDAN POPOVYCH, Defendants-Appellants.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 18 L 13196 Honorable Catherine A. Schneider and Honorable James E. Snyder, Judges, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Martin and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Defendants forfeited review of whether the circuit court erred by granting partial summary judgment in favor of plaintiff on its common law fraud and statutory consumer fraud claims. Further, the circuit court properly (1) denied defendants' motion for sanctions based on plaintiff's alleged spoliation of evidence, (2) denied defendants' motion for judgment *n.o.v.* based on the measure of damages, and (3) awarded plaintiff attorney fees as a discovery sanction. Moreover, plaintiff's claims were not barred by a contractual limitations period, and plaintiff's statutory consumer fraud claims were not duplicative of plaintiff's contract claim.

¶ 2 This litigation arose after plaintiff Howard Brown Health Center (Howard Brown) purchased a partially constructed building from defendants 1023 W. Irving Park Road, LLC (1023) and Bogdan Popovych. Prior to trial, the circuit court ruled on the parties' cross motions for summary judgment and entered partial summary judgment in favor of plaintiff and against defendants as to defendants' liability on plaintiff's claims for fraud in the inducement, fraudulent concealment, and statutory consumer fraud. In a concurrent jury and bench trial, plaintiff's (1) breach of contract claim was presented to the jury on the issues of liability and damages, (2) common law claims for fraudulent inducement and concealment were presented to the jury on the issue of damages only, and (3) statutory consumer fraud claims were tried before the circuit court on the issue of damages only.

¶ 3 The jury rendered a verdict for plaintiff and awarded it about $3.2 million in damages. After a bench trial, the circuit court awarded plaintiff $250,803 in compensatory damages and $300,000 in punitive damages on plaintiff's statutory consumer fraud claims. The circuit court also awarded plaintiff about $1.6 million in attorney fees and costs.

¶ 4 On appeal, defendants argue that the circuit erred by (1) granting partial summary judgment in favor of plaintiff on its common law fraud and statutory consumer fraud claims, (2) denying defendants' motion for sanctions against plaintiff for spoliation of evidence, (3) finding that plaintiff's claims were not barred by a contractual one-year limitations period, (4) denying defendants' motion for judgment *n.o.v.* where plaintiff failed to introduce valuation evidence of the building, (5) entering judgment against defendants for plaintiff's statutory consumer fraud claims, which were duplicative of plaintiff's contract claim, and (6) awarding plaintiff attorney

fees as a discovery sanction under Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) in connection with plaintiff's motion for default.

¶ 5 For the reasons that follow, we affirm the judgment of the circuit court.[1]

¶ 6 I. BACKGROUND

¶ 7 In 2017, plaintiff, a nonprofit community health center, began searching for real estate to expand its clinical and administrative operations. At that time, defendants were developing the property located at 1023 West Irving Park Road in Chicago (the Property) as condominium units. Popovych was the sole manager of 1023, which was the owner and developer of the Property. Popovych also was the president of Panoptic Group, Inc., the general contractor for the Property. In these capacities, Popovych was responsible for overseeing work on the Property. In March 2017, plaintiff's real estate broker, Daniel Nack, and then senior vice president, Bill Joure, toured the Property with Popovych. The Property was only partially complete, still in the early stages of construction, and had no windows yet; it had only a basic core and shell structure. Nack spoke with Popovych to learn whether the Property might be an option for plaintiff's commercial use. Popovych informed Nack that the partially finished structure was being constructed as high-end luxury condominiums with indoor parking and an elevator, and the Property could be finished and used for office space. On or about April 2, 2017, Nack and Joure toured the Property again with Popovych, who again made representations about the condition of the existing, ongoing, and upcoming construction for the Property.

[1]In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

¶ 8 Plaintiff was interested in purchasing the Property and provided a letter of intent to Popovych, outlining certain proposed terms; the letter of intent expressly provided that it was not a binding contract. In subsequent negotiations, Popovych represented in revised drafts of the letter of intent that all work completed on the Property had been done in accordance with the set of construction drawings and permits approved by the City of Chicago Department of Buildings on July 11, 2016 (the permit set),[2] which required compliance with the city's building code. Popovych agreed to complete certain construction on a final work list in accordance with the permit set before plaintiff closed on the purchase. Plaintiff alleged that it understood these representations to mean that defendants had completed and would complete the remaining construction in compliance with the permit set and the highest quality of workmanship.

¶ 9 In their final letter of intent, dated May 5, 2017, plaintiff and 1023 agreed that plaintiff would purchase the Property and 1023 would complete certain construction elements before closing. In those pre-contract negotiations and letter of intent, defendants again represented that all work had been completed in accordance with the permit set and defendants would complete the agreed-upon list of construction items in accordance with the permit set prior to closing.

¶ 10 On June 8, 2017, plaintiff and 1023 entered into an agreement for purchase and sale of real property (agreement). The parties closed on the sale, and plaintiff tendered $3.1 million 14 days after closing. By the closing, however, defendants had not completed the construction items identified in the letter of intent, so 1023 and plaintiff included a provision in the agreement referencing and incorporating those outstanding construction items as defendants' post-closing

[2]A permit set is a set of drawings created by architects and engineers for a building. Once the city approves a permit set, the building must be built to the specifications in the permit set. Popovych presented to plaintiff an approved permit set for the Property.

construction obligations. The agreement included Exhibit E, titled the "Seller's Construction Work Obligations." Sections 10 and 12(f), and Exhibit E of the agreement made clear that 1023 would complete the "Seller's Construction Work Obligations."

¶ 11 After closing, plaintiff repeatedly requested that defendants complete their construction obligations, but defendants failed to do so. Defendants consistently responded to plaintiff's communications by stating that they would return to the Property and complete the agreed-upon construction, but defendants failed to perform the bulk of the outstanding work. With the exception of a few days in August 2017, defendants completed no work at the Property after the closing.

¶ 12 After defendants refused to complete their post-closing construction obligations, plaintiff sought to complete the construction by using other contractors. However, potential contractors visiting the Property refused to work within the structure because they perceived it to be unsafe, citing concerns about the work that was completed by Popovych and whether the reinforced structural masonry walls were constructed according to the plans and specifications. As a result, plaintiff hired engineering firm Raths, Raths, & Johnson (RR&J) to assess the condition of the exterior walls and roof of the existing structure on the Property. In a preliminary report dated August 22, 2017, RR&J found that construction of the building fell below minimum industry and safety requirements, the permit set, and the building code.

¶ 13 On or about September 25, 2017, plaintiff sent a letter to Popovych providing a copy of the RR&J preliminary report and demanded that defendants complete the Seller's Construction Work Obligations and correct the defects identified in RR&J's preliminary report. Defendants responded by offering, again, to complete the Seller's Construction Work Obligations. Defendants, however, failed to do so.

¶ 14 Plaintiff sought a second opinion, hiring Terracon Consultants (Terracon) to perform a nondestructive, penetrating radar examination of the building's outer walls in October 2017. Terracon identified additional deficiencies in the construction. In particular, Terracon determined that the walls lacked sufficient reinforcing steel (rebar) as required to stabilize the structure vertically under the downward forces of gravity on the structure's mass and horizontally against the exterior pressures of wind and weather. These deficiencies in the structure's reinforcing steel compromised its structural integrity.

¶ 15 Plaintiff asked RR&J to test Terracon's findings with invasive testing by making openings in the walls to confirm the presence or absence of rebar as identified by Terracon. In December 2017, RR&J confirmed Terracon's findings that the building lacked adequate rebar, was not structurally sound, and deviated substantially from the permit set, industry standards, and the building code.

¶ 16 In plaintiff's January 2018 letter to defendants, plaintiff informed them of RR&J's and Terracon's findings, including with respect to the lack of rebar in the walls. Plaintiff again demanded that defendants return to the Property to complete their work and correct deviations from the permit set. Plaintiff reiterated that, over the previous five months, it had "repeatedly indicated its willingness to allow 1023 access to the Property to perform [the] Seller's Construction Work Obligations." Plaintiff also notified defendants that their deficient construction precluded plaintiff's provision of healthcare services at the Property, which "necessitate[d] swift action by [plaintiff] to correct the defects described above and complete the facility in a timely manner." In response, defendants again stated that they would return to the Property to fix the identified defects and complete the construction, but they never did.

¶ 17 On December 7, 2018, plaintiff filed suit against 1023 and Popovych, alleging breach of contract, breach of various warranties, and fraud claims. Neither the sheriff's office nor a special process server could obtain personal service on Popovych, either individually or as the agent of 1023. Consequently, plaintiff served 1023 through the secretary of state and Popovych by certified mail. The court entered a default order against 1023 for not appearing, but later vacated that order after defendants' counsel filed an appearance on their behalf.

¶ 18 Plaintiff received a permit to demolish the building on the Property in July 2019 and had the building demolished in August 2019.

¶ 19 Meanwhile, in July 2019, defendants moved the court to dismiss plaintiff's initial complaint. Defendants challenged, *inter alia*, the timeliness of plaintiff's claims based on section 9(c) of the agreement, which required certain claims to be brought within one year of the closing. In October 2019, the circuit court denied defendants' motion, noting that a written order would follow. However, before the court issued a written order, defendants filed a motion to reconsider, reasserting the same arguments.

¶ 20 On February 27, 2020, the circuit court granted in part and denied in part defendants' motion to reconsider. With respect to the one-year limitations period in section 9(c) of the agreement, the court held that it did not apply to plaintiff's entire complaint. The court held that the limitations period applied only to plaintiff's claims based on contractual representations and warranties, and particularly not to plaintiff's breach of contract claim based on 1023's alleged failure to complete its contractual construction work obligations.

¶ 21 On April 9, 2020, plaintiff filed its first amended complaint (the operative complaint) asserting: (Count I) breach of contract against 1023; (Count II) breach of express warranty against

1023; (Count III) breach of covenant against 1023; (Count IV) breach of implied warranty of workmanship against 1023; (Count V) fraud in the inducement against Popovych; (Count VI) fraud in the inducement/promissory fraud scheme against Popovych; (Count VII) fraudulent concealment against Popovych and 1023; (Counts VIII and IX) claims under the Illinois Consumer Fraud And Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2028)) against Popovych and 1023; and (Count X) unjust enrichment against 1023, which was pled in the alternative to Count I. In July 2021, defendants filed their answer to the operative complaint and asserted eight affirmative defenses. Plaintiff answered the affirmative defenses in May 2022.

¶ 22 Meanwhile, in December 2021, plaintiff moved the court to compel defendants' responses to interrogatories and requests for production, which had been served in October 2021. On December 28, 2021, the court continued the motion but ordered defendants to respond to the discovery by January 29, 2022. Defendants' counsel moved to withdraw, which the court granted on January 4, 2022. On February 25, 2022, plaintiff moved for entry of a default judgment against defendants based on their failure to answer the written discovery requests. Plaintiff noticed the motion to be presented on March 16, 2022. On March 3, 2022, new counsel filed an appearance for defendants. On March 22, 2022, the court granted defendants leave to file a motion to vacate the default. On March 29, 2022, defendants moved the court to vacate any defaults against them. Plaintiff's response opposed vacating the default. On April 22, 2022, defendants served responses to plaintiff's written discovery requests. On May 24, 2022, the court entered an order granting defendants' motion to vacate the default. The order also set a briefing schedule for plaintiff's motion seeking attorney fees under Rule 219(c).

¶ 23 In June 2022, plaintiff filed a motion seeking sanctions against defendants under Rule 219(c) and (d). Specifically, plaintiff sought attorney fees incurred in bringing its motions to compel and for default, and in responding to defendants' motion to vacate. In response, defendants argued that the facts did not warrant imposition of a sanction where the late discovery responses were precipitated by their former counsel's withdrawal. Defendants also argued that the fees sought were excessive and not proportionate to the circumstances.

¶ 24 On July 18, 2022, the court granted plaintiff's motion for sanctions, awarding $6125 for the reasonable attorney fees and expenses plaintiff incurred in obtaining compliance with the court's December 28, 2021, order, including fees and expenses associated with the March 16, 2022, default order. The court stated that much of defendants' delay was not attributable to the lapse of time following the withdrawal of their prior counsel. The court found that "[d]efendants' failure to respond to discovery following orders to compel their compliance was a deliberate and pronounced disregard for the rules and orders of the Court." Defendants filed a motion to reconsider, and the court, on October 20, 2022, granted them 24 hours to make payment on the July 2022 sanctions order. Plaintiff responded to the motion to reconsider, and the court, on Augst 15, 2023, denied defendants' motion to reconsider.

¶ 25 Meanwhile, in July 2022, defendants filed a motion under Rule 219(c) to dismiss plaintiff's lawsuit as a discovery sanction based on plaintiff's demolition of the building on the Property or, alternatively, to bar plaintiff from using evidence of the Property's condition. Defendants argued that plaintiff was required to preserve the existing physical condition of the building and the spoliation of this material evidence tainted the discovery process. Plaintiff filed a response and, on September 30, 2022, the circuit court denied defendants' motion for sanctions, finding that

plaintiff's demands in its September 2017 and January 2018 letters advised defendants that plaintiff intended to take remedial efforts toward its property. The court also found that plaintiff had taken reasonable efforts to preserve evidence by waiting nearly two years since its demands to rehabilitate the Property by demolishing a building plaintiff believed was unsound. The circuit court ordered, however, that plaintiff could not use any witnesses from RR&J or Terracon as controlled experts under Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2018); instead, plaintiff could disclose those witnesses under Rule 213(f)(2) and any controlled experts presented by plaintiff would have to base their conclusions on documentary evidence equally available to both parties. At the trial, plaintiff followed this order concerning its expert witness. Defendants did not present any controlled expert witness.

¶ 26 In July 2023, the parties filed cross-motions for summary judgment. Plaintiff argued that it was entitled to summary judgment on each of its claims. Defendants, however, responded that several issues prevented summary judgment, including the agreement's one-year limitations period; plaintiff's breach of the agreement; the impossibility of plaintiff establishing justifiable reliance for the fraud claims or that defendants intended plaintiff to rely on its representations because the agreement permitted plaintiff to inspect the Property; plaintiff's failure to establish materiality or falsity of the alleged misrepresentations; and the existence of genuine issues of material fact due to plaintiff's spoliation. Regarding the alleged falsity of defendants' representations, defendants argued that this issue could not be determined in the context of summary judgment because the parties disputed what documents constituted the permit set. Defendants attached to their response the affidavit of Popovych. In his affidavit, Popovych averred, *inter alia*, that during construction neither he nor 1023 personally performed masonry

work at the Property, which included installation of reinforcing rebar in the core and shell structure, and that the work was performed by third-party subcontractors. He also averred that when he signed the agreement he had no notice or knowledge of any facts to suggest that the building located at the property was deficient or otherwise failed to comply with any permits or building code provisions. Defendants, however, did not refer to Popovych's latter averment in support of defendants' summary judgment argument.

¶ 27 On November 8, 2023, the circuit court granted partial summary judgment in favor of plaintiff and against defendants. Specifically, the court denied plaintiff's request for summary judgment on Counts I through IV, and granted defendants summary judgment on Count X. Relevant to this appeal, the court granted summary judgment in favor of plaintiff on its fraudulent inducement and fraudulent concealment claims (Counts V and VII through IX) based on Popovych's precontractual representation that all of defendants' work would be done in accordance with the permit set. The court stated that defendant "did not appear to offer a genuine issue of material fact" concerning defendants' knowledge of the falsity of Popovych's representation but, rather, merely asserted that plaintiff did not identify what documents constituted the permit set. Moreover, the court rejected that assertion, noting that Popovych had identified the permit set during his deposition. Concerning whether defendants knew that the representation was false, the court stated that circumstantial evidence may justify an inference of knowledge that may stand unless rebutted. The court stated that

> "Popovych, as the overseer and developer of the Property, had specific knowledge of the construction, and whether or not the Property was being completed in accordance with the

> permit set and the city codes would have been in the range of facts known to the Defendants. Defendants do not offer any additional facts to rebut this proposition."

Then, the court concluded that plaintiff had justifiably relied on defendants' material misrepresentation and was damaged thereby.

¶ 28 Defendants moved the court to reconsider the summary judgment order. They argued, *inter alia*, that the circuit court made improper inferences to find that defendants knew the falsity of their representations that the existing construction would be completed according to the permit set. Defendants also argued that the court impermissibly decided the disputed factual matter of defendants' knowledge of defects when the court disregarded Popovych's testimony in the record. Specifically, defendants referred to Popovych's affidavit, wherein he averred that he "had no notice or knowledge of any facts to suggest that the building *** was deficient," and Popovych's deposition testimony, which disputed alleged construction deficiencies.

¶ 29 On December 1, 2023, the circuit court denied defendants' motion to reconsider. Regarding the issue of defendants' knowledge of the falsity of Popovych's representation about the construction being done according to the permit set, the court stated that "the law does not prohibit the court from drawing reasonable inferences from undisputed facts at the summary judgment stage." Moreover, because the court had found that Popovych's statement about the work being done in accordance with the city issued permits was a material misrepresentation, the court, quoting *Brennan v. Persselli*, 353 Ill. 630, 635 (1933), stated that " 'it is immaterial whether a party misrepresenting a material fact knows it to be false or makes the assertion of the fact without knowing it to be true, for the affirmation of what one does not know to be true is unjustifiable.' " Regarding the issue of the court overlooking Popovych's affidavit and deposition testimony that

refuted plaintiff's position that defendants knew their representation was false, the court stated that defendants failed to raise this new argument in their summary judgment briefs and failed to direct the court to Popovych's statements in the exhibits. Nevertheless, the court concluded that Popovych's affidavit was conclusory and did not create any genuine issue of material of fact. Regarding Popovych's deposition testimony, the court stated that it should not be burdened to hunt through the record for support for a party's argument.

¶ 30 A concurrent jury and bench trial was held from December 4 through December 8, 2023, on the issues of liability and damages for plaintiff's breach of contract claim (Count I), and on the issue of damages only for the fraud claims addressed by the circuit court's summary judgment ruling (Counts V and VII through IX).

¶ 31 With respect to plaintiff's breach of contract claim, the jury heard evidence that 1023 had failed to complete work on the Property at the time the parties signed the agreement, so Popovych agreed to complete work on the core and shell after closing. Plaintiff presented evidence of 1023's breach of its work obligations, including that the Property was not built in compliance with the permit set, industry standards, or building code. The jury heard evidence that, except for a few days in August 2017, defendants never went to the Property to complete the post-closing construction. The jury also heard evidence of Popovych's admission that 1023 did not complete the post-closing work required under the agreement.

¶ 32 With respect to damages, plaintiff presented unrefuted evidence through its Rule 213(f)(3) expert witness, Kevin Kalata, of the scope of work and associated costs necessary to repair the Property from its defective condition to bring it into compliance with the permit set and complete 1023's post-closing construction work, *i.e.*, to bring the Property to the condition bargained for by

plaintiff. Mr. Kalata established those estimated costs as $3,436,803 in 2023 dollars (or $2,921,283 in 2019 dollars).

¶ 33 At the conclusion of the trial, the jury returned its verdict in favor of plaintiff on its claims for breach of contract and common law fraud (Counts I, V, and VII), awarding plaintiff a combined $3,211,000 in damages. The circuit court took the issue of damages on plaintiff's Consumer Fraud Act claims (Counts VIII and IX) under advisement pending further briefing.

¶ 34 Defendants moved for judgment *n.o.v.*, on the grounds that plaintiff did not provide sufficient evidence as to the measure of damages and the operative complaint was time barred. On July 31, 2024, the circuit court issued an opinion addressing defendants' motion for judgment *n.o.v.* and the parties' bench memoranda on plaintiff's Consumer Fraud Act claims. The court denied defendants' motion for judgment *n.o.v.* and entered judgment against defendants on plaintiff's Consumer Fraud Act claims, awarding plaintiff $250,803 in compensatory damages and $300,000 in punitive damages. The court also awarded plaintiff $1,575,930 in attorney fees and $120,490.20 in costs.

¶ 35 Defendants appealed.

¶ 36 II. ANALYSIS

¶ 37 A. Partial Summary Judgment in Favor of Plaintiff on its Fraud Claims

¶ 38 The purpose of summary judgment is not to try a question of fact, but to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law.

735 ILCS 5/2-1005(c) (West 2020); *Adams,* 211 Ill. 2d at 43. In appeals from summary judgment rulings, the standard of review is *de novo*. *Id.*

¶ 39 Defendants argue that the circuit court erred when it granted plaintiff's motion for summary judgment on its fraud claims because there was a genuine issue of material fact regarding Popovych's knowledge of the falsity of his statements that the Property had been constructed in accordance with the permit set and his knowledge of inadequate rebar in the walls. Defendants argue that the circuit court erroneously drew an inference in favor of plaintiff, the summary judgment movant, that defendants had knowledge the statements were false and disregarded Popovych's affidavit and deposition testimony, which disclaimed such knowledge.

¶ 40 Plaintiff responds that defendants have forfeited review of this issue because they first raised the argument that plaintiff did not present sufficient evidence of defendants' knowledge of the falsity of their statements or of the deficient rebar in their motion to reconsider the circuit court's summary judgment decision. Plaintiff contends that defendants forfeited this argument on appeal by failing to raise it in their summary judgment briefs.

¶ 41 Defendants reply that this issue is not forfeited because they had (1) argued on summary judgment that plaintiff had not established the required elements necessary to obtain summary judgment concerning the alleged misrepresentation about city permits, and (2) submitted Popovych's affidavit, in which he denied knowledge of the defects, as an exhibit to their summary judgment briefs. Defendants assert that they have not forfeited the issue of whether a genuine issue of material fact existed concerning defendants' knowledge of defects because Popovych's affidavit contradicted facts supplied by plaintiff.

¶ 42 The purpose of a motion to reconsider is to bring to the trial court's attention newly discovered evidence not available at the time of the first hearing, changes in the law, or errors in the previous application of existing law to the facts at hand. *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248 (1991). Accordingly, a trial court is well within its discretion to deny such a motion and ignore its contents when it contains material that was available prior to the hearing at issue but never presented. *Id.* Litigants should not be allowed "to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling." *Id.* Rather, "the interests of finality and efficiency *require* that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be." (Emphasis in original.) *Id.* at 248-49.

¶ 43 In the circuit court's December 2023 order denying defendants' motion to reconsider the court's November 2023 summary judgment decision, the court reviewed the issue of Popovych's refutation of knowledge of defects. The court recounted that it had found in its November 2023 decision that defendants had shown no genuine issue of material fact on this issue in their summary judgment briefs, wherein defendants had argued only that plaintiff had failed to establish the fact of what documents constituted the permit set. The court stated that defendants now in their motion to reconsider

> "point to specific language in Popovych's deposition and his affidavit and other evidence to support this proposition [that an issue of fact exists concerning defendants' knowledge of defects]. Yet in response to plaintiff's [summary judgment] motion, defendants failed to raise this argument and failed to direct the court to any such statements in Popovych's affidavit and deposition to refute plaintiff's position. Now, on reconsideration, because the

> affidavit and deposition transcript were attached as exhibits in the course of the cross motions for summary judgment, [defendants assume] that the court must have found the nuggets of material fact that refute plaintiff's position."

¶ 44 Our review of the record supports the circuit court's description of the scope of defendants' arguments in their summary judgment briefs on this issue before the circuit court. Because defendants did not present as part of their summary judgment arguments the issue of the existence of a genuine issue of material fact based on Popovych's refutation in his affidavit and deposition of his knowledge of defects, we conclude that defendants have forfeited review of this argument on appeal. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36 ("Arguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal."). Accordingly, we do not address the merits of this argument.

¶ 45 B. Sanction Against Plaintiff for Spoliation of Evidence

¶ 46 Defendants argue that the circuit court abused its discretion when it denied their motion seeking sanctions under Rule 219(c) for plaintiff's alleged intentional spoliation of material evidence in this matter, *i.e.*, plaintiff's demolition of the partially constructed building at the Property. In their motion, defendants had asked the circuit court to bar the use of any evidence concerning the condition of the building, debar plaintiff from maintaining its claims, and enter judgment for defendants. On appeal, defendants argue that the physical condition of the building was the primary evidence underlying plaintiff's claims against them. Moreover, as a result of the demolition, they assert they suffered prejudice because they were unable to retain experts to inspect the building to investigate the allegations and findings of plaintiff's experts. Defendants also argue that the circuit court's ruling requiring plaintiff to reclassify its expert witnesses as independent

rather than controlled experts was an arbitrary and illusive sanction that did not prevent any witnesses from testifying, undo the fact that plaintiff retained them, or place any meaningful condition on their testimony about the building.

¶ 47 Plaintiff responds that the trial court's ruling on defendants' motion was a proper exercise of the court's discretion because plaintiff did not violate any discovery obligation, plaintiff's demolition of the building under the circumstances was not unreasonable, the court devised an equitable resolution of the matter to address any undue prejudice that defendants claim they suffered, and defendants did not present any evidence that plaintiff acted intentionally to spoliate evidence to warrant severe sanctions.

¶ 48 Rule 219(c) provides in relevant part:

> "If a party *** unreasonably fails to comply with any provision of [the rules of pretrial procedure or discovery], or fails to comply with any order entered under these rules, the court, on motion, may enter *** such orders as are just, including, among others, the following:
>
> * * *
>
> (iii) That the offending party be debarred from maintaining any particular claim ***;
>
> (iv) That a witness be barred from testifying concerning that issue; [or]
>
> (v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice." Ill. S. Ct. R. 219(c) (eff. July 1, 2002).

¶ 49 Under Rule 219(c), a trial court is authorized to bar testimony or other evidence if a party unreasonably refuses to comply with the relevant discovery rules, so long as the sanction imposed is just. *American Family Insurance Co. v. Village Pontiac GMC, Inc.*, 223 Ill. App. 3d 624, 626 (1992). Unreasonable noncompliance with a discovery rule has been defined by the courts as a deliberate and pronounced disregard for a discovery rule. *Lavaja v. Carter*, 153 Ill. App. 3d 317, 323 (1987). Unreasonable noncompliance with discovery rules is determined, at least in part, by the importance of the information or product that has not been produced. *American Family Insurance Co.*, 223 Ill. App. 3d at 627. Sanctions may also be imposed even if no prior court order protecting the information exists. *Id.* at 626.

¶ 50 The decision of whether to impose sanctions pursuant to Rule 219(c) and, if so, the type of sanction, is largely within the sound discretion of the trial court, and that decision will not be disturbed absent a clear abuse of discretion. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). In determining whether the trial court abused its discretion, a reviewing court considers (1) surprise to the adverse party, (2) the prejudicial effect of the proffered evidence, (3) the nature of evidence being sought, (4) diligence of the adverse party in seeking discovery, (5) timeliness of the adverse party's objection to the testimony or evidence, and (6) the good faith of the party offering the evidence. *Peal v. Lee*, 403 Ill. App. 3d 197, 203 (2010). Of these factors, no single factor controls and each situation presents a unique factual scenario that bears on the propriety of a particular sanction. *Smith v. P.A.C.E.*, 323 Ill. App. 3d 1067, 1076 (2001).

¶ 51 According to the record, the real estate closing concerning the Property occurred on June 8, 2017, with the agreement that defendants would complete outstanding construction work. When defendants failed to return to the Property to complete the work and potential contractors refused

to work within the unfinished building due to safety concerns, plaintiff hired an engineering firm that informed plaintiff in August 2017 that the construction of the building fell below minimum industry and safety requirements, the permit set, and the building code. In September 2017, plaintiff informed defendants by letter of the engineering firm's findings and demanded that defendants correct the defects and finish the construction work. In December 2017, plaintiff received further confirmation of the findings that the building was not structurally sound and deviated substantially from the permit set, industry standards, and the building code. In January 2018, plaintiff informed defendants of the engineering and consultant firms' additional findings, demanded that defendants return to the Property to correct the deficiencies and complete the construction work, and notified defendants of plaintiff's intent to take swift action to remediate the defects of the building and complete its construction. Plaintiff filed its lawsuit against defendants in this matter on December 7, 2018, and demolished the building in August 2019.

¶ 52 Defendants moved the court in July 2022 to dismiss plaintiff's complaint or bar evidence due to plaintiff's demolition of the building. The circuit court denied this motion, finding that plaintiff's demands in its September 2017 and January 2018 letters to defendants advised them that plaintiff intended to take remedial efforts toward the Property. The court also found that plaintiff had taken reasonable efforts to preserve evidence by waiting more than 1½ years to demolish the building after providing notice to defendants of plaintiff's intent to rehabilitate the Property. The court ruled, however, that plaintiff could not classify any witnesses from RR&J or Terracon who had inspected the building in 2017 as controlled experts under Rule 213(f)(3). Instead, plaintiff would have to reclassify those individuals as independent experts under Rule

213(f)(2). Moreover, any controlled expert testimony presented by plaintiff would have to be based on documentary evidence equally available to both parties.

¶ 53 We conclude that the circuit court's ruling on defendants' motion for sanctions was not an abuse of discretion. Plaintiff's conduct did not reflect unreasonable noncompliance with discovery rules where engineers and consultants confirmed that the building was structurally unsound and plaintiff documented the structural deficiencies; the structurally unsound building could not be preserved with as little effort as other types of evidence like chattel or electronically-stored information; the structurally unsound building posed a risk of harm to other property or people; defendants ignored plaintiff's requests and demands that they return to the Property to correct the defects and finish the construction work; the condition of the building prevented plaintiff from providing healthcare services at the Property; plaintiff gave defendants ample notice that it would remediate the Property and thereby negated any surprise to defendants; defendants, despite such notice and plaintiff's initiation of this lawsuit, took no action to inspect the building or obtain a court order to preserve any evidence; and plaintiff waited over 1½ years after it gave defendants notice of plaintiff's intent to remediate the property before plaintiff demolished the building. Furthermore, the circuit court's order limiting plaintiff's use of expert witnesses and limiting the testimony of any controlled expert witnesses to documentary evidence equally available to both parties appropriately addressed any prejudice to defendants.

¶ 54 C. Contractual One-Year Limitations Period

¶ 55 Defendants argue that the circuit court erred by failing to enforce the one-year limitations period in section 9(c) of the parties' contract, both when the court granted partial summary judgment for plaintiff on its common law fraud and Consumer Fraud Act claims in Counts V and

VII through IX of the complaint, and when the court later denied defendants' motion for judgment *n.o.v.* Specifically, defendants argue that these claims are time barred by the one-year limitations period in section 9(c) of the parties' agreement.

¶ 56 We review a circuit court's summary judgment ruling *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). We also review a circuit court's decision on a motion for judgment *n.o.v. de novo*. *Guerra v. Advanced Pain Centers S.C.*, 2018 IL App (1st) 171857, ¶ 29. In addition, the circuit court's decision regarding the enforcement of the limitations period in the parties' contract involves interpretation of the parties' agreement, which is question of law and subject to *de novo* review. *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 57; *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 312 (2007).

¶ 57 Section 9(c) of the parties' agreement provides:

> "(c) *All representations and warranties in this Agreement* shall be deemed to have been made as of the Effective Date and *shall survive the Closing for a period of one (1) year after the Closing* (the "Survival Period"). *Any right of action for the breach of any representation, warranty or covenant contained herein* shall not merge with the deed delivered at the Closing but *shall survive the Closing for the Survival Period* and before the expiration thereof the party claiming a breach must have filed an action in a court of competent jurisdiction, and any warranty and representation not specified in such action shall expire. ***." (Emphases added.)

Section 13 of the agreement lists the seller's representations and warranties to the buyer, and section 18 lists the seller covenants.

¶ 58 Section 10 of the agreement, entitled "Owner's Construction Work Obligations," provides that "[u]pon completion of the Closing, Seller shall be responsible for completion of the construction work set forth in Exhibit E to this Agreement ***." Exhibit E, entitled "Seller's Construction Work Obligations," lists 12 items. Item 1 of Exhibit E is "All 'Work' is per the Permit Set Date 7/11/2016."

¶ 59 According to defendants, the terms of section 9(c) apply to all of defendants' representations made under the contract, including defendants' statement in item 1 of Exhibit E that "[a]ll 'Work' is per the Permit Set date 7/11/2016," which is incorporated into the contract through section 10 and, as a result, is subject to section 9(c)'s one-year limitations period. Defendants state that the undisputed closing occurred on June 20, 2017, setting the expiration of the one-year limitations period in June 2018. Defendants contend that, because plaintiff's initial complaint in this matter was filed on December 7, 2018, plaintiff untimely brought its claims to court nearly 6 months after the expiration of the one-year limitations period. Defendants add that plaintiff did not prove at trial facts sufficient to establish estoppel because the evidence established that plaintiff had knowledge of and the means of discovering its claims no later than September 2017, which was when plaintiff knew that defendants were not performing contractual work. Moreover, the October 2017 testing performed by engineers or consultants, whom plaintiff had retained, had allegedly revealed defects in the building that were so serious that the construction of the building did not comply with the permit set. Defendant asserts that the one-year limitations period undoubtedly applies to plaintiff's common law fraud and Consumer Fraud Act claims because those claims are based on a breach of a representation, as provided in section 9(c) of the agreement.

¶ 60 The primary goal of contract interpretation is to give effect to the intent of the parties. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). In determining the intent of the parties, a court must consider the contract document as a whole and not focus on isolated portions of the document. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007). If the language of a contract is clear and unambiguous, the intent of the parties must be determined solely from the language of the contract document itself, which should be given its plain and ordinary meaning, and the contract should be enforced as written. *Virginia Surety Co.*, 224 Ill. 2d at 556. However, if the contract language is ambiguous, the meaning of the contract language must be ascertained through a consideration of extrinsic evidence. *Gallagher*, 226 Ill. 2d at 233.

¶ 61 The contract terms of section 9(c) and Exhibit E of the agreement are not susceptible to more than one reasonable interpretation and thus are not ambiguous. The plain language of section 9(c) limits the one-year limitations period to any representation or warranty contained in the agreement. Defendants' attempt to extend the reach of 9(c)'s limitations period to the seller's performance of construction work obligations listed in Exhibit E of the contract is unavailing because Exhibit E does not contemplate any limitations period for those obligations. Furthermore, defendants' precontractual representations that induced plaintiff to enter the agreement were not contractual representations subject to section 9(c)'s one-year limitations period. The parties signed the agreement months after defendants misrepresented the state of the Property. See *W.W. Vincent & Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752, 760-61 (2004) (rejecting the argument that the parole evidence rule and the contract's integration clause precluded the plaintiff's fraud claim, which was based on precontractual representations, and finding instead that

doctrines of contract law do not bar claims for fraud, as they have "no application to cases sounding in tort").

¶ 62 Plaintiff's fraudulent inducement claim (Count V) stems from Popovych's misrepresentations and conduct prior to entering into the agreement. Likewise, plaintiff's fraudulent concealment claim (Count VII) stems from defendants' precontractual failure to disclose latent defects in the building. Similarly, plaintiff's Consumer Fraud Act claims (Counts VIII and IX) are premised on defendants' fraud outside of the contract. Definitionally, defendants' precontractual conduct underlying Counts V, VII, VIII, and IX are not representations and warranties made in the agreement, and thus any contractual limitations period does not apply. Defendants correctly point out that the representation that "All 'Work' is per the Permit Set date 7/11/2016," which is found in Exhibit E, is incorporated into the agreement. But the fact that this statement was later incorporated into the parties' contract does not erase the precontractual fraud based on the statement. See *W.W. Vincent & Co.*, 351 Ill. App. 3d at 760-61.

¶ 63 The agreement's one-year limitations period applies only to representations and warranties made exclusively in the contract, so the circuit court correctly ruled that plaintiff's common law fraud claims and Consumer Fraud Act claims were timely. Thus, we reject defendants' timeliness arguments to all of plaintiff's fraud claims and affirm the circuit court's partial grant of summary judgment for plaintiff on its fraud claims and the circuit court' denial of defendant's motion for judgment *n.o.v.*

¶ 64 D. Measure of Damages

¶ 65 Defendants argue that the circuit court erred when it refused to enter judgment *n.o.v.* for defendants on plaintiff's claims for breach of contract, fraud in the inducement, and fraudulent

concealment (Counts I, V, and VII) because plaintiff failed to admit any valuation evidence concerning the building. Defendants contend that as a result of plaintiff's failure, the jury was not provided a reasonable basis for determining diminution damages, which are the correct measure of damages when remedial measures require a substantial tearing down and rebuilding of the structure.

¶ 66 In response, plaintiff states defendants' argument for judgment *n.o.v.* rests on the incorrect assumption that diminution of value is the only possible measure of damages in this case. Plaintiff, however, argues that because the jury properly determined the measure and amount of damages and rendered a general verdict supported by the evidence, the jury's verdict cannot be disturbed.

¶ 67 "The trial court's decision on a motion for judgment *n.o.v.* is reviewed *de novo*." *Werderman v. Liberty Ventures, LLC*, 368 Ill. App. 3d 78, 91 (2006). Defendants may not disturb the jury's verdict on damages unless "all of the evidence, when viewed most favorably to the nonmovant, so overwhelmingly favors the movant that no contrary verdict could ever stand." *Gaffney v. City of Chicago*, 302 Ill. App. 3d 41, 48 (1998); see *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992) ("The court has no right to enter a judgment *n.o.v.* if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome."). "[A] judgment *n.o.v.* may not be granted merely because a verdict is against the manifest weight of the evidence." *Maple*, 151 Ill. 2d at 453.

¶ 68 The circuit court properly left the determination and application of the measure of damages to the jury. See *Wells v. Minor*, 219 Ill. App. 3d 32, 40-41 (1991) (the jury must be "advised or instructed that it must first consider costs of repair, and that it could go to diminution of value only

if it [finds that one of two exceptions to the costs of repair measure of damages apply]"). Here, the court instructed the jury that:

> "the measure of damages for fraud when a builder has provided less than full performance or has provided defective performance is generally the cost of correcting the defective condition and/or completing the project. This is referred to as the cost of repair measure of damages. There are only two exceptions to application of the cost of repair measure of damages: [(1) i]f the defects or complete work *** can only be corrected at a cost unreasonably disproportionate to the benefit of the purchaser; or [(2) if] correction would entail unreasonable destruction of the builder's work that is free from defects.
>
> Th[is] measure of damages is the amount by which the defects or incomplete work have reduced the value of the property. This is referred to as the diminution of value measure of damages. You should assess damages for [plaintiff's] reasonable expenditures necessary to put the purchased property into the condition promised in accordance with the cost to repair measure unless you conclude from your consideration of the evidence that [one of the exceptions applies], in which case you should, instead, award [plaintiff] the difference between the fair market value of the purchased property as actually delivered and the fair market value *** the purchased property would have had if the property had been in the condition promised[,] in accordance with the diminution in value measure."

¶ 69 Defendants do not challenge this instruction on appeal and conceded at trial that they could not. Specifically, defense counsel admitted that he could not complain about the instruction, which included the diminution of value measure of damages and let the jury decide the proper measure

of damages. See *McQueen v. Green*, 2022 IL 126666, ¶ 55 (a party forfeits a challenge to a jury instruction absent a timely and specific objection).

¶ 70 The jury heard evidence about the structural defects in defendants' construction and the costs to repair those defects. In particular, plaintiff presented expert evidence that the cost to repair the defects in the construction and complete defendants' post-closing work was approximately $3.4 million. The jury heard evidence that plaintiff purchased the Property for $3,186,000, which would have been the value of the Property in 2018 if it was not defective. The jury also heard evidence that the property had little to no value to plaintiff with its defects because it was uninhabitable and unusable for any purpose without repairs. The jury, properly instructed and armed with this evidence, rendered a general verdict for $3,211,000 in damages. The verdict did not state the measure of damages employed by the jury, and defendants did not request special interrogatories on the issue.

¶ 71 Plaintiff argues that for defendants to be entitled to judgment *n.o.v.* on the measure of damages, they would have to show that (1) the jury concluded diminution of value was the proper measure of damages, and (2) the jury did not hear any evidence from which it could apply that measure. Plaintiff contends that defendants do not (and cannot) establish either proposition because the general verdict in the absence of special interrogatories prevents defendants from establishing the measure of damages selected by the jury. Plaintiff adds that, in any event, the jury heard evidence of the value of the Property at the time of purchase and the estimated value of the deficient Property, thereby allowing the jury to calculate any necessary diminution. Therefore, according to plaintiff, because the jury rendered a general verdict and more than one theory on the proper measure of damages was presented, this court should affirm the verdict since there was

sufficient evidence to sustain either theory of damages and defendants, having failed to request special interrogatories, cannot complain. To support these arguments, plaintiff cites *Witherell v. Weimer*, 118 Ill. 2d 321, 329 (1987), *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 102 (2010) (general verdict permits the presumption that the jury found in the victor's favor on every issue), and *Tillman v. Pritzker*, 2021 IL 126387, ¶ 24 (appellate court "may sustain the circuit court's judgment on any ground supported by the record").

¶ 72 Absent two narrow exceptions, the measure of damages in a construction defect case is "the cost of correcting the defective conditions." *Park v. Sohn*, 89 Ill. 2d 453, 464 (1982). The two narrow exceptions are (1) "the defects could be corrected only at a cost unreasonably disproportionate to the benefit to the purchaser, or [(2)] if correcting them would entail unreasonable destruction of the builder's work." *Id.* If an exception applies, "the amount by which the defects have reduced the value of the property" serves as the measure of damages. *Id.*; but see Restatement (Second) of Contracts § 348, cmt. c (1981) ("Sometimes, especially if the performance is defective as distinguished from incomplete, it may not be possible to prove the loss in value to the injured party with reasonable certainty. In that case he can usually recover damages based on the cost to remedy the defects.").

¶ 73 The first exception does not apply here. Costs of repair are not disproportionate simply because they have a high price tag. See *Shaw v. Bridges–Gallagher, Inc.*, 174 Ill. App. 3d 680, 684 (1988) (finding that the cost, which more than doubled in seven years, was not disproportionate because "the cost to repair a roof would naturally be more in 1987 than in 1980"). Higher grade construction materials and methods may be necessary to fully remedy some defects, and the cost of those materials and methods is not disproportionate simply because it exceeds the

cost of the original defective construction it remedies. See *Kangas v. Trust*, 110 Ill. App. 3d 876, 880 (1982) ("The [homeowners] received a better roof than they [originally] contracted for only because [the contractor] made the cheaper roof more costly to rebuild."). Here, the evidence demonstrated that in exchange for the $3,186,000 purchase price, plaintiff received a building that not only differed materially from defendants' representations but also was severely deficient in vertical and horizontal structural steel, rendering the building unsound, unsafe, and unusable. Given the cost of materials and labor necessary to correct the defects and complete the construction that defendants failed to complete, and the substantial benefit to plaintiff of doing so—*i.e.*, converting the unusable building into a sound and operable health clinic, the $3,436,803 costs of repair requested from the jury was not disproportionate to the benefit of those repairs. Defendants failed to provide any evidence (*e.g.*, expert testimony) to the circuit court or the jury to prove otherwise.

¶ 74 Nor does the second exception apply, because it is triggered "only 'when correcting the defective work would result not only in discarding the defective work but also in destroying, for example, those portions of a building which were largely free of defects.' " *Young v. Wilkinson*, 2022 IL App (4th) 220302, ¶ 88 (quoting *Arch of Illinois, Inc. v. S.K. George Painting Contractors, Inc.*, 288 Ill. App. 3d 1080, 1083 (1997)). Defendants did not present any evidence, let alone the type of expert evidence that would be necessary, to demonstrate that the repairs on which plaintiff's damages are based unreasonably required the destruction of any non-defective work. See *Arch of Illinois, Inc.*, 288 Ill. App. 3d at 1084 ("completely undoing the faulty work[, *i.e.*, a paint job,] so that the structure can be repainted does not amount to *unreasonable* destruction of the contractor's work" (emphasis in original)).

¶ 75 Defendants cite *Witty v. C. Casey Homes, Inc.*, 102 Ill. App. 3d 619 (1981), to support their argument that an exception should apply, but *Witty* is distinguishable. In *Witty*, the defendant installed a different type of exterior brick than the parties had agreed upon. *Id.* at 620. The court held that diminution in value attributable to the defect was the proper measure of damages because replacing the superficial, nonstructural exterior brick to conform to the parties' contract would have required removing and replacing doors, windows, and their frames, none of which were themselves defective, at a significant cost. *Id.* at 620, 622-23. Here, in contrast, defendants' pervasive, latent, and defective structural construction rendered the entire Property unsound, and no evidence showed that plaintiff's repairs would have destroyed any non-defective work. Instead, the only competent evidence here was plaintiff's unrefuted evidence that the repairs were necessary, reasonable, and proportionate to correct the widespread defects in the structure and complete defendants' post-closing construction obligations.

¶ 76 We conclude that the costs of repair provided the proper measure of damages. Accordingly, the circuit court properly denied defendants' motion for judgment *n.o.v.* regarding the measure of damages, and we affirm the verdict.

¶ 77 E. Consumer Fraud Act Claims Duplicative of Contract Claim

¶ 78 Defendants argue that the circuit court erred by entering judgment against them on plaintiff's Consumer Fraud Act claims because those claims were based on contractual promises and thus are not actionable. Defendants assert that plaintiff's Consumer Fraud Act claims were expressly based on defendants' contractual promise in Exhibit E of the agreement that all the construction work "is per the Permit Set date 7/11/2016." Defendants ask this court to reverse the judgment the circuit court entered against them on plaintiff's Consumer Fraud Act claims.

¶ 79 Defendants support this argument by citing *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 169 (2005), for the proposition that "[a] breach of contractual promise, without more, in not actionable under the Consumer Fraud Act." In *Avery*, the court held that the Consumer Fraud Act claim of the insurance policyholder plaintiffs could not be based on the assertion that the defendant insurer breached its promise to restore the plaintiffs' vehicles to their pre-loss condition or repair their vehicles using parts of like kind and quality. *Id.* at 170. The court ruled that the plaintiffs' Consumer Fraud Act claim was merely a repackaged version of their breach of contract claim, and the Consumer Fraud Act was not intended to " 'supplement every breach of contract claim with a redundant remedy.' " *Id.* at 169 (quoting *Zankle v. Queen Anne Landscaping*, 311 Ill. App. 3d 308, 312 (2000)). Rather " 'a "deceptive act or practice" involves more than the mere fact that a defendant promised something and then failed to do it.' " *Id.*

¶ 80 Because defendants' argument on the effect of the contract concerns the court's application of law to plaintiff's Consumer Fraud Act claims, we review this argument *de novo*. *Id.* at 129 ("As a general rule, the construction, interpretation, or legal effect of a contract is a matter to be determined by the court as a question of law.")

¶ 81 Plaintiff's Consumer Fraud Act claims go beyond the mere fact that defendants failed to do something they had promised. Instead, plaintiff alleged and proved that defendants knowingly induced plaintiff to enter the agreement to buy the property by omitting material facts and making fraudulent misrepresentations that they had completed the existing construction according to the permit set, industry standards, and building code. Plaintiff also alleged and proved that defendants' engaged in a scheme before, during, and after the contract to defraud plaintiff and delay plaintiff's enforcement of its rights and remedies through misrepresentations about the quality of the

completed construction work and false assurances that they would complete their additional construction obligations. These facts make plaintiff's Consumer Fraud Act claims something more than a garden-variety breach of contract claim. Moreover, "the mere *existence* of an underlying contract does not doom a parallel consumer fraud claim." (Emphasis in original.) *Gibson v. Albertsons Companies, Inc.*, 754 F. Supp. 3d 793, 812 (N.D. Ill. 2024). Although plaintiff alleged a breach of contract claim, that claim is based on defendants' breach of their agreement to complete the unfinished construction work on the Property.

¶ 82 We conclude that plaintiff's Consumer Fraud Act claims are not mere merely repackaged versions of plaintiff's contract claim. Accordingly, we affirm the circuit court's judgment entered in favor of plaintiff on its Consumer Fraud Act claims.

¶ 83 F. Discovery Sanction Against Defendants

¶ 84 Defendants argue that the circuit court erred by awarding plaintiff fees and expenses as Rule 219(c) sanctions based on defendants' default, and not for any discovery violation. Defendants state that the motion plaintiff presented at the March 16, 2022, hearing was a default motion brought under section 2-1301(d) of the Code of Civil Procedure (735 ILCS 5/2-1301(d) (West 2020)), and not any motion related to discovery. Defendants add that the court's entry of default against them was not appropriate because they previously had answered and appeared through new counsel on March 3, 2022. Defendants contend that the court's award of Rule 219(c) sanctions was not authorized under that rule and was an abuse of discretion.

¶ 85 The sanctions enumerated under Rule 219(c), which include the entry of a judgment by default, are to be imposed only when the order is just and noncompliance is unreasonable. *Bell v. Board of Education of City of Chicago*, 67 Ill. App. 3d 402, 405 (1978). "Unreasonable

noncompliance" has been construed as conduct "characterized by a deliberate and pronounced disregard for the rule or order not complied with." *Serpe v. Yellow Cab Co.*, 10 Ill. App. 3d 1, 5 (1973). A "just order" has been defined as "one which, to the degree possible, insures both discovery and a trial on the merits." *Id.* Courts have broad discretion to determine appropriate sanctions under Rule 219(c). *Wach v. Martin Varnish Co.*, 96 Ill. App. 3d 954, 957 (1981) (affirming trial court's award of attorney fees incurred as a result of party's failure to comply with discovery rules and orders even when the party eventually complied with discovery).

¶ 86 Applying these principles to the present case, we conclude that the circuit court did not abuse its discretion in awarding plaintiff $6125 in fees for defendants' unjustified failure to comply with their discovery obligations and the court's orders. In an August 3, 2021, scheduling order that followed 1023's prior default for failing to appear or file an answer, the court set a discovery deadline of October 31, 2021, by which defendants failed to respond to plaintiff's timely requests. Plaintiff filed a motion to compel, which the circuit court granted and ordered defendants to respond to the discovery by January 29, 2022. Days later (and before responding to the discovery), defendants' counsel moved to withdraw. In the motion, the circuit court ordered any substitute counsel to file an appearance by January 25, 2022, and appear on January 31, 2022, for a status and trial setting hearing. Defendants did not comply.

¶ 87 Weeks later, with still no defense counsel of record or responses to discovery, plaintiff filed on February 25, 2022, a motion for default, which the court granted. Substitute counsel finally appeared on March 3, 2022, and sought to vacate the default. The circuit court granted defendants' motion to vacate on May 24, 2022. The court allowed plaintiff to seek Rule 219(c) sanctions precipitated by defendants' continued failure to answer discovery issued over seven months before.

¶ 88 Plaintiff sought reimbursement of its legal fees in the amount of $36,717.50 for its efforts in compelling defendants' discovery responses, including for filing a motion for default. The circuit court granted plaintiff's motion for sanctions and awarded plaintiff $6125 in fees. The court's partial award of fees tied to the motion for default was not "arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *Direct Auto Insurance Co. v. Bahena*, 2019 IL App (1st) 172918, ¶ 35. Defendants' noncompliance was unreasonable, and the record shows defendants' disregard for discovery rules and the court's orders concerning discovery.

¶ 89 We affirm the circuit court's award to plaintiff of attorney fees under Rule 219(c).

¶ 90 III. CONCLUSION

¶ 91 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 92 Affirmed.