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IN THE
COURT OF APPEALS OF INDIANA

ENVIROTECH PUMP SYSTEMS d/b/a WEMCO PUMPS,	)	
Appellant/Defendant,	)	
vs.	)	No. 49A04-0905-CV-237
DW SQUARED, INC.,	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Timothy W. Oakes, Judge
Cause No. 49D13-0602-CC-8012

November 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Envirotech Pump Systems d/b/a/ WEMCO Pumps appeals the judgment of the trial court in favor of Appellee/Plaintiff DW Squared, Inc., claiming that the jury's verdict is contrary to law. We affirm.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the judgment follow. On April 24, 2001, WEMCO and DW Squared entered into a Representative Agreement whereby WEMCO appointed DW Squared as its exclusive municipal sales representative for WEMCO products within the State of Indiana.[1] This Representative Agreement replaced a prior agreement dated June 1, 1993. WEMCO terminated the Representative Agreement effective July 25, 2003.

On or about February 27, 2006, DW Squared filed suit against WEMCO alleging criminal conversion and breach of the parties' Representative Agreement with respect to commission payments for orders from Lafayette, Greensburg, North Vernon, Belmont, New Albany, Fort Wayne, and West Lafayette. Following trial, the jury entered a general verdict in favor of DW Squared. The jury awarded DW Squared $9,789.00 in damages with regard to the claim that WEMCO committed criminal conversion, and $43,225.99 in damages with regard to the claim that WEMCO breached the Representative Agreement. On March 31, 2009, the trial court entered judgment in favor of DW Squared. WEMCO now appeals.

DISCUSSION AND DECISION

[1] DW Squared's territory included all of Indiana, except for Lake, Porter, La Porte, and St. Joseph counties.

WEMCO challenges the judgment of the trial court on appeal, contending that the jury's verdict is contrary to law. Specifically, WEMCO contends that the evidence is insufficient to support a determination that WEMCO committed criminal conversion of any funds owed to DW Squared; the evidence is insufficient to support a determination that DW Squared was entitled to its claimed amounts of commission on the New Albany, Fort Wayne, and West Lafayette orders; and the jury's determination that DW Squared is entitled to $43,225.99 in damages is contrary to law because it places DW Squared in a better position than it would have enjoyed otherwise.

A. Standard of Review

> On appeal, a general verdict will be sustained upon any theory consistent with the evidence. We will neither reweigh the evidence nor judge the credibility of the witnesses, but will consider only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom. Only where there is a total failure of evidence or where the jury's verdict is contrary to the uncontradicted evidence will the verdict be reversed.

Coachmen Indus., Inc. v. Dunn, 719 N.E.2d 1271, 1274 (Ind. Ct. App. 1999), *trans. denied* (citations omitted). Thus, whereas here, the jury enters a general verdict, the Appellant labors under a heavy burden in asserting error. *Id*.

B. Criminal Conversion Claim

For its first claim of error, WEMCO contends that the jury's verdict is contrary to law because the evidence is insufficient to support a determination that WEMCO committed criminal conversion of any funds owed to DW Squared. Indiana Code section 35-43-4-3 (2001) provides that a person who "knowingly or intentionally exerts unauthorized control over [the] property of another person commits criminal conversion." "A person engages in

conduct 'intentionally' if, when he engages in that conduct, it is his conscious objective to do so." Ind. Code § 35-41-2-2(a) (2001). "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b).

WEMCO contends that DW Squared failed to prove both that WEMCO acted with the requisite criminal intent when it withheld funds and that DW Squared was entitled to the withheld funds. Viewing the record in the light most favorable to the judgment, however, we conclude that the verdict is not contrary to law. The record reveals that in early 2002, a dispute arose between WEMCO and DW Squared relating to commissions that had been paid to DW Squared for a project that was completed no later than 1999. Rather than filing suit or seeking arbitration of its alleged claim relating to the contested funds paid to DW Squared in approximately 1999, WEMCO sought its own remedy by withholding commissions that had been rightly earned by DW Squared on an unrelated order. There is evidence in the record that WEMCO knew, at the time it withheld the funds, that it was withholding funds that were due to DW Squared. There is further evidence in the record that DW Squared never granted WEMCO the authority to withhold any funds that were owed to DW Squared. Thus, this is not a situation of a total failure of evidence or a verdict contrary to the uncontradicted evidence. Rather, there is conflicting evidence as to the truth of the statements, and the jury apparently found for DW Squared. WEMCO has failed to meet its burden of proving error in this regard.

C. Breach of Contract Claim

For its next claim of error, WEMCO contends that the jury's verdict is contrary to law because the evidence is insufficient to support a determination that DW Squared was entitled to its claimed amounts of commission on the New Albany, Fort Wayne, and West Lafayette orders. DW Squared's breach of contract claim included not only the three orders contested on appeal, but also orders from Lafayette, Greensburg, North Vernon, and Belmont. Because the jury returned a general verdict, we are unable to determine whether the jury awarded DW Squared damages for all or just some of the seven orders. We are also unable to determine the percentage of the damages awarded that was attributed to each of the projects individually.

> Our first task when confronted with contract interpretation is to ascertain the intent of the parties. In interpreting a written contract the court will attempt to determine the intent of the parties at the time the contract was made as disclosed by the language used to express their rights and duties. We endeavor to give words their plain and usual meaning unless, judging from the contract as a whole and the particular subject matter, it is clear some other meaning was intended. Particular words and phrases cannot be read alone; we must gather the parties' intentions from the contract considered as a whole.
>
> When we find a contract's terms to be clear and the intent of the parties apparent, we will require the parties to perform consistently with the bargain each struck, absent equitable considerations like fraud, misrepresentation, undue influence, and the like. If, however, the contractual language is ambiguous, inconsistent, or uncertain, the intent of the parties must be determined by the rules of construction. A contract is ambiguous only if reasonably intelligent people could honestly find the contract's provisions susceptible to more than one interpretation. All ambiguities are strictly construed against the party who prepared the document.

INB Banking Co. v. Opportunity Options, Inc., 598 N.E.2d 580, 582 (Ind. Ct. App. 1992), *trans. denied*.

1. New Albany Order

With respect to the New Albany order, the parties' dispute revolves around Section 12.3 of the parties' Representative Agreement which was prepared by WEMCO. Section 12.3 of the Representative Agreement provides as follows:

> 12.3 Upon the effective day of termination of this Agreement, the Representative shall be entitled to commissions for orders for the Company's Equipment obtained by Representative providing the order was entered and accepted by the Company prior to the effective date of termination and the Representative agrees that it shall not be entitled to any commissions on orders entered thereafter. The portion of commission paid for service or job location shall be deducted for those orders which ship after termination.

Appellant's App. p. 7. The record demonstrates, however, that WEMCO agreed to modify Section 12.3 by granting DW Squared a 120-day extension during which DW Squared could earn commissions for projects on which DW Squared had begun work prior to the termination of the Representative Agreement.

WEMCO asserts that DW Squared is not entitled to its claimed commissions relating to the New Albany order because WEMCO did not accept the New Albany order prior to the termination of the parties' Representative Agreement on July 25, 2003. However, despite WEMCO's assertion that "it is undisputed that WEMCO accepted the New Albany order after the effective date of termination," the record reveals that the parties did indeed dispute whether WEMCO accepted the New Albany order prior to or after termination of the parties' Representative Agreement. WEMCO claims that the New Albany order was not accepted until July 30, 2003, but the record suggests that the New Albany order was placed on June 6, 2003, and internal WEMCO documents acknowledge an order date of July 10, 2003. The order was subsequently signed by a WEMCO representative on July 30, 2003. The jury's

general verdict contained no specific finding regarding the date that WEMCO accepted the New Albany order. WEMCO effectively invites us to reassess the jury's apparent finding that the New Albany order was "accepted" prior to the termination of the parties' Representative Agreement, which we will not do. *Coachmen Indus.*, 719 N.E.2d at 1274.

Moreover, we note that in light of WEMCO's modification of Section 12.3 granting DW Squared a 120-day extension during which it could continue to earn commissions and the evidence demonstrating that DW Squared had been working on the New Albany project for quite some time prior to the termination of the Representative Agreement, it would seem to us that DW Squared would be entitled to commissions earned on the New Albany project regardless of whether the project was "accepted" at some date prior to July 25, 2003, as claimed by DW Squared, or on July 30, 2003, as claimed by WEMCO.

In addition, WEMCO contends that the jury's verdict is contrary to law because it had the discretion to apply different commission rates than those expressed in the contract pursuant to Section 5.5 of the Representative Agreement. Section 5.5 of the Representative Agreement provides as follows:

> 5.5 Special commission rates will be established by the Company on an individual basis where special selling prices are used for any reason whatsoever.

Appellant's App. p. 8. The record reveals that during trial, the parties presented conflicting evidence regarding whether WEMCO employed special selling prices on the New Albany order. The jury's general verdict contained no specific findings regarding the issue of WEMCO's pricing of the New Albany order or the amount of damages awarded to DW

Squared in connection with the New Albany order. Again, this is not a situation of a total failure of evidence or a verdict contrary to the uncontradicted evidence. Rather, there is conflicting evidence as to the truth of the statements, and the jury apparently found for DW Squared. WEMCO has failed to meet its burden of proving error in this regard. Furthermore, to the extent that WEMCO again invites us to reassess the jury's determination regarding WEMCO's pricing of the New Albany order and its award of damages stemming from said order, we decline to do so. *Coachmen Indus.*, 719 N.E.2d at 1274.

2. Fort Wayne Order

With respect to the Fort Wayne order, the parties' dispute again revolves around Section 12.3 of the parties' Representative Agreement which was prepared by WEMCO. On appeal, the parties do not appear to dispute the fact that the Fort Wayne order was entered and accepted by WEMCO prior to the termination of the Representative Agreement. Rather, their dispute seems to center around whether DW Squared is entitled to receive a commission for the service completed and the portion of the Fort Wayne order that shipped prior to the termination of the Representative Agreement. Again, Section 12.3 provides that the Representative shall not be entitled to any commissions on orders entered after termination of the Representative Agreement, and that "the portion of commission paid for service or job location shall be deducted for those orders which ship after termination." Appellant's App. p. 7.

The record demonstrates that shipments were made in connection with the Fort Wayne order on December 2, 2002; March 26, 2004; August 17, 2004; October 22, 2004; and July

29, 2005. The parties presented conflicting evidence at trial regarding the value of the services provided and the portion of the Fort Wayne order that was shipped prior to the termination of the Representative Agreement on July 25, 2003. Therefore, this is not a situation of a total failure of evidence or a verdict contrary to the uncontradicted evidence. Rather, there is conflicting evidence as to the truth of the statements, and the jury apparently found, at least in part, for DW Squared. DW Squared correctly argues that any ambiguity in section 12.3 of the Representative Agreement relating to the commissions due to DW Squared for services provided and portions of orders shipped prior to the termination of the Representative Agreement should be construed against WEMCO. *See INB Banking*, 598 N.E.2d at 582 (providing all ambiguities must be construed against the drafter). In addition, because the jury entered a general verdict, we are unable to determine how much of the jury's $43,225.99 damages award was attributed to the Fort Wayne order. Thus, we conclude that WEMCO has failed to meet its burden of proving error in this regard. To the extent that WEMCO invites us to reassess the jury's apparent determination regarding the Fort Wayne order, we decline to do so. *Coachmen Indus.*, 719 N.E.2d at 1274.

3. West Lafayette Order

With respect to the West Lafayette order, WEMCO claims that the jury's verdict is contrary to law because sections 5.2 and 5.3 of the Representative Agreement "unambiguously give WEMCO the discretion to split commissions on orders which are obtained through the joint efforts of representatives." Appellant's Br. p. 20. Sections 5.2 and 5.3 of the Representative Agreement provide as follows:

> 5.2 If a sale involves a joint effort in regard to engineering, obtaining the order, or services between the Representative and others, the Company shall split the full commission as it deems equitable and such decision and allocation shall be final.
>
> 5.3 If the joint effort involves Representatives, the commission will be paid in accordance with Schedule B. The company reserves the right to allocate commission as it deems appropriate under special circumstances and its allocation shall be final.

Appellant's App. p. 7.

The record reveals that DW Squared argued at trial that it was entitled to commission in the aggregate amount of $53,023.74 for seven different orders. With regard to the West Lafayette order, DW Squared claimed that it was entitled to commission in the amount of $1,771.50. Following trial, the jury entered a general verdict that DW Squared was entitled to commission in the amount of $43,225.99, or $8,797.75 less than DW Squared asserted. The jury made no special findings regarding the West Lafayette order. In light of the jury's general verdict, we are unable to determine whether the jury found for DW Squared with respect to the West Lafayette order. We therefore conclude that WEMCO has failed to meet its burden of proving error in this regard. Further, to the extent that WEMCO's challenge on appeal amounts to an invitation for us to reassess the jury's determination insofar as it may relate to the West Lafayette order, we decline to do so. *Coachmen Indus.*, 719 N.E.2d at 1274.

D. Damages Claim

For its final claim of error, WEMCO contends that the jury's verdict that DW Squared is entitled to $43,225.99 in damages as a result of WEMCO's breach of contract is contrary to law because it places DW Squared in a better position than it would have enjoyed had the

contract not been breached. It is well-settled that trial courts must afford juries great latitude in making damage award determinations. *Hockema v. J.S.*, 832 N.E.2d 537, 541 (Ind. Ct. App. 2005), *trans. denied*.

> A verdict must be upheld if the award determination falls within the bounds of the evidence. Additionally, a trial court may only reverse a jury's award determination when it is apparent from a review of the evidence that the amount of damages awarded by the jury is so small or so great as to clearly indicate that the jury was motivated by prejudice, passion, partiality, corruption or that it considered an improper element.

Id. (citations and quotations omitted).

Here, the record reveals that DW Squared argued at trial that it was entitled to damages in the aggregate amount of $53,023.74, and WEMCO argued that DW Squared was entitled to an award of damages not to exceed $5,983.74. Both DW Squared and WEMCO presented exhibits and testimony in support of their claims regarding the damage suffered by DW Squared. Following trial, the jury entered a general verdict in favor of DW Squared in the amount of $43,225.99. The jury's verdict clearly falls within the bounds of the parties' claims as supported by their testimony and exhibits. Moreover, nothing in the record indicates (and WEMCO makes no argument suggesting) that the jury considered any improper evidence or that it was motivated by prejudice, passion, partiality, or corruption. Thus, WEMCO has failed to show error in this regard. In light of the great latitude granted to juries in making damage award determinations and WEMCO's failure to show error relating to the jury's verdict in the instant matter, we conclude that the jury's verdict is not contrary to law and shall be upheld. *See Hockema*, 832 N.E.2d at 541. Having concluded that WEMCO failed to meet its burden of establishing error with respect to DW Squared's

criminal conversion, breach of contract, and damages claims, we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.