DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AUTOMATED FINANCIAL, L.L.C., an Arizona limited liability company, Plaintiff-Appellee, v. ECLIPSE CASH SYSTEMS, L.L.C., an Arizona limited liability company; DEREK SMITH and JANE DOE SMITH, his wife, Defendants-Appellants.	)	1 CA-CV 08-0790 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-000492

The Honorable Janet E. Barton, Judge

AFFIRMED

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W E I S B E R G, Judge

¶1 Eclipse Cash Systems, L.L.C. (“Eclipse”) and Derek Smith appeal from the judgment following a jury trial in a breach of contract action. Eclipse and Smith argue that insufficient proof supported the award of damages to the plaintiff, Automated Financial, L.L.C. (“Automated”), and that the superior court erred in awarding the full amount of attorney’s fees incurred by Automated. Smith contends that the court erred in denying him an award of attorney’s fees. For reasons that follow, we affirm the jury verdict, the award of attorney’s fees to Automated, and the denial of an award of fees to Smith.

BACKGROUND

¶2 Acting on behalf of Eclipse, Smith executed an Authorized Distributor Agreement with Automated in June 2003, by which for a five-year period, Automated would provide processing for automated teller machines ("ATMs") owned by Eclipse. Automated was in the business of selling ATMs and ATM processing services, and Eclipse was in the business of placing permanent and temporary ATMs at various events, venues, and locations. As part of the contract, Automated was to provide processing services to Eclipse for a fee of twenty cents per transaction and to sell equipment to Eclipse at cost plus ten percent.

¶3 In January 2006, Automated filed suit and alleged that Eclipse had violated the exclusivity provisions of the agreement by allowing another company to process transactions for its ATMs. In addition to breaching the contract, Automated alleged that Eclipse and Smith had breached a fiduciary obligation,[1] that they had breached the duty of good faith and fair dealing with an evil mind, and that Smith wrongfully had interfered with the contract between Eclipse and Automated.

¶4 Eclipse counterclaimed and asserted that Automated had breached the contract by overcharging for equipment and providing deficient equipment and that Automated had both intentionally and negligently interfered with contract. Before trial, the court granted a motion *in limine* to preclude Eclipse from offering any evidence of damages to support its counterclaim for breach of contract, effectively eliminating that claim from the case.

¶5 At the close of Automated's case, Eclipse and Smith moved for judgment as a matter of law ("JMOL") on the ground that Automated had not sufficiently established the loss of future profits due to breach of the contract. The court denied the motion. The jury returned a verdict in favor of Automated

[1]This claim was eliminated from the case and not submitted to the jury.

on its breach of contract claim against Eclipse and awarded $75,331 in damages. The jury also found in Automated's favor on Eclipse's counterclaim for intentional interference with a contractual relationship. But the jury found that Eclipse[2] had not breached the duty of good faith and that Smith had not intentionally interfered with the contract. Eclipse and Smith filed a renewed motion for JMOL, which the court again denied.

¶6 Eclipse and Smith moved for a new trial on damages only and filed a motion to set aside judgment. The court denied the motions. All parties filed motions requesting attorney's fees. Eclipse and Smith requested $119,479 in attorney's fees and costs of $2,780.90 pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01 (2003). The court granted Automated's request pursuant to the Distributorship Agreement and awarded $119,126 in attorney's fees and $4,337.66 in costs. Eclipse and Smith timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) and 12-2101(F)(1) (2003).

DISCUSSION

¶7 Eclipse challenges the jury's finding that Automated was entitled to damages for future lost profits as well as the court's denial of its motion for new trial and for judgment as a matter of law. Eclipse also appeals from the award of fees and

[2]The verdict form on this claim did not include Smith.

costs to Automated, and Smith appeals from denial of his request for an award of attorney's fees and costs.

Evidence of Lost Future Profits

¶8 We first consider the damages award. Eclipse argues that future lost profits must be net of operating expenses and that although it sought proof of Automated's expenses and prior tax returns, Automated objected and never provided these documents.[3] Eclipse argued at trial and in its motions for new trial and for JMOL that Automated had not offered sufficient evidence to support an award of future lost profits.

¶9 Eclipse contends that the trial court erred in denying Eclipse's motions because the only relevant documentary evidence offered by Automated at trial was a report showing projected lost revenue from April 2005 through July 2008. That exhibit showed a net loss of $107,282.59 for April 2005 through May 2007 and a net loss of $141,468.32 for June 2007 though July 2008.[4]

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[3]Automated responds that in discussing the Rule 50 motion, Automated had said that it produced documents in response to five requests by Eclipse but objected to providing prior tax returns because they were irrelevant to future lost profits, and Eclipse did not move to compel additional production of documents. Automated also notes that Eclipse's counsel stated that he sought the documents to see how much Eclipse had paid Automated for parts and fees and not in order to dispute the damages.

[4]Clearly the jury did not accept these revenue losses as the measure of damage because it awarded the lesser amount of $75,331.

¶10 A trial court should grant JMOL if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Ariz. R. Civ. P. 50(a). In moving for JMOL, Eclipse argued that this case was like *Gilmore v. Cohen*, 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963),[5] and that Automated had not proved that its relationship with Eclipse was profitable but had only shown a loss of *revenue*. Eclipse further contended that trial testimony established a number of business expenses would have reduced any claim for lost profits. The trial court found that Eclipse essentially sought reconsideration of its ruling on JMOL made during trial but had not produced any new evidence or shown a legal or factual error in its prior ruling and declined to reconsider it.

¶11 In ruling on Eclipse's subsequent new trial motion, the court found that Automated's evidence "provided a basis from

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[5]In *Gilmore*, the plaintiffs had agreed to purchase thirteen building lots from defendant; after purchasing six, the defendant refused to sell any more lots. *Id*. at 35, 386 P.2d at 81-82. The plaintiffs argued that they had built and sold at a profit houses on the first six lots. *Id*. at 35, 386 P.2d at 82. Our supreme court found that although lost profits were the proper measure of damages, *id*., the plaintiffs offered no evidence of the cost of developing the six lots or the sales prices of the houses. *Id*. at 36, 386 P.2d at 83. To the contrary, one plaintiff testified that no profit resulted from sale of at least three of the lots, and her testimony conflicted with that of her husband. The court affirmed the trial court's finding that the plaintiffs had not established their damages "with reasonable certainty." *Id*. at 37, 386 P.2d at 83.

which a reasonable juror could conclude with certainty that the business relationship between [it] and Eclipse was profitable and the amount of such profits." Appellate courts give wide latitude to trial courts' rulings on post-trial motions, and we generally defer to those rulings because the judge has seen the witnesses, heard the testimony, and "has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court form the printed record." *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998) (citation omitted). Thus, we review for abuse of discretion the denial of a motion for new trial on grounds that the verdict is against the weight of the evidence, *Dawson v. Withycombe*, 216 Ariz. 84, 95, ¶ 25, 163 P.3d 1034, 1045 (App. 2007), and we regard the evidence in the light most favorable to affirming the verdict. *Hutcherson*, 192 Ariz. at 53, ¶ 13, 961 P.2d at 451. In *Hutcherson*, for example, our supreme court acknowledged that in ruling on a request for new trial, the judge sits as "the ninth juror" and must determine whether the verdict "is so 'manifestly unfair, unreasonable and outrageous as to shock the conscience.'" *Id*. at 55, ¶ 23, 961 P.2d at 453 (citation omitted).

¶12 The jury here was properly instructed that to recover damages for future lost profits, Automated had to show that "it

[was] reasonably probable that the profits would have been earned but for the breach; That the loss of profits [was] the direct and natural consequence of the breach; and The amount of lost profits [could] be shown with reasonable certainty." The instruction clarified that "[i]f future lost profits [were] reasonably certain, any reasonable basis for determining the[m] . . . [was] acceptable. However, the amount . . . [could] not be based on conjecture or speculation." The instruction directed the jury to subtract Automated's costs and expenses from the gross revenue it would have received if the contract had not been breached. "In other words, lost profits . . . mean[s] the contract price Automated would have received less operating expenses."

¶13 When determining if sufficient evidence supports a verdict, we will not "reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Hutcherson,* 192 Ariz. at 56, ¶ 27, 961 P.2d at 454 (citation omitted). And as we have recently observed, "the line between the fact of damage and the amount of damage may be blurred when lost profits are at issue." *Felder v. Physiotherapy Assoc.s*, 215 Ariz. 154, 163, ¶ 46, 158 P.3d 877, 886 (App. 2007). But even if a claim of lost profits may

be more capable of mathematical proof through company books or records, “doubts as to the extent of the injury should be resolved in favor of the innocent plaintiff and against the wrongdoer.” *Gilmore,* 95 Ariz. at 36, 386 P.2d at 82. Moreover, "[o]nce the fact of lost profits is established . . . our courts have not been as strict about the amount." *Felder*, 215 Ariz. 164, ¶ 47, 158 P.3d at 887. Thus, disputes over "the evidence used to establish the amount of damages will go to [its] 'weight.'" *Id.* (citation omitted); *see also Logerquist v. McVey*, 196 Ariz. 470, 488, ¶ 52, 1 P.3d 113, 131 (2000) (doubts about accuracy of factual data go to its weight and are questions for the jury).

¶14 In *Nelson v. Cail*, 120 Ariz. 64, 66, 583 P.2d 1384, 1386 (App. 1978), for example, the plaintiff contractor sued an architect for additional costs imposed during a building project and for lost profit from the job. We noted that “once the right to damages has been established, uncertainty as to amount of damages will not preclude recovery.” *Id*. at 67, 583 P.2d at 1387. We held that the plaintiff’s evidence of materials supplied and work performed provided adequate foundation for his testimony, without further factual support, that he had lost profits of $30,000. *Id*. The defendant neither cross-examined him nor objected to lack of foundation for this testimony. *Id*.

We affirmed a larger verdict of $40,000, however, because the plaintiff also testified that the project had cost $100,000 more than the contract price and that he had bought $10,000 worth of extra materials; in addition, his subcontractor testified that he had sought $16,000 for excess costs. *Id*. at 67-68, 583 P.2d at 1387-88.

¶15 Similarly, in *Short v. Riley*, 150 Ariz. 583, 586, 724 P.2d 1252, 1255 (App. 1986), we observed that with "an established business, certainty may also be proved when the plaintiff presents some reasonable method of computing his net profit or loss." Thus, it was sufficient that Short and his accountant presented evidence that Short had profitably run other restaurants and testified both to Short's lost profits during a time that the defendant had withheld the restaurant's liquor license and to rent that could have been charged during that time. *Id*. at 584-85, 724 P.2d at 1253-54. Mathematical precision was not required.

¶16 Here, the jury found that Automated had established its right to lost profits, and thus some uncertainty about the amount of damages did not preclude recovery.[6] Automated

[6]For example, there was evidence that the number of ATMS for which Automated processed transactions increased over time to as many as 65 and that after Eclipse's breach, Eclipse controlled many more ATMs. Whether Automated would have processed all of those ATMS had the agreement continued was uncertain.

introduced evidence of the total number of ATM transactions it had processed for Eclipse from July 2004 to July 2005. It also introduced a summary of its earnings from Eclipse's ATMs from July 2003 through a date in August 2005 on which Automated had stopped processing Eclipse's transactions. In Exhibit 22, Automated reported a lost revenue summary from April 2005 through May 2007, which included information on Eclipse ATMs whose transactions were processed by competitor companies, and a projection of lost revenue from June 2007 through July 2008, which was based on an estimate of Eclipse transactions processed by the competitors,

¶17 Nicole Allard testified on behalf of Automated that Automated had incurred some processor and sponsor fee and that those fees had been deducted from the gross revenue figures in Exhibit 22, which also showed the net lost revenue. Allard additionally testified that there were no other expenses to be deducted. Eclipse cross-examined Allard about the fees and could have provided contradicting evidence but did not.

¶18 Eclipse now contends that without evidence of Automated's office leasing expenses, mortgage or construction costs, wages, supplies, utilities, or vehicle expenses, the jury could not calculate Automated's lost profits. Eclipse offered no evidence that these expenses were affected by its cessation

of business with Automated. Eclipse admits that it was only one of eleven other processing customers of Automated and cites no authority that would require Automated's overall operating expenses be subject to jury scrutiny in this circumstance. Automated sufficiently proved what it would have earned from the slice of business it had with Eclipse offset by the necessary fees associated with processing the Eclipse account. Because the evidence was sufficient to allow the jury to calculate with reasonable certainty Automated's lost profits from termination of the agreement with Eclipse, we affirm the superior court's ruling on the motions for new trial or for JMOL.

Attorney's Fees

¶19 The determination of the successful party for purposes of attorney's fees is a matter for the trial court's "sole discretion," and we will not overturn that decision "if any reasonable basis exists for it." *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994). Our deference to the trial court's discretion also exists in cases involving multiple parties and multiple claims. *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990).

¶20 Eclipse and Smith filed separate but identical cross-motions seeking attorney's fees in the amount of $119,479,

citing Arizona Rule of Civil Procedure 54(f), (g) and A.R.S. § 12-341.01.[7] They also sought a fee award solely in *Eclipse's* favor based on a provision in the parties' agreement. However, Eclipse clearly did not prevail on its counterclaims that Automated had breached the agreement or wrongfully interfered with it.

¶21 Eclipse and Smith now challenge the award ordering Eclipse to pay the entire amount of attorney's fees and taxable costs incurred by Automated. They contend that because Automated prevailed on only one of three claims it asserted and received substantially less that the amount sought in damages, the court should have awarded only a small portion of Automated's attorney's fees. Nevertheless, "the fact that a party does not recover the full measure of relief it requests does not mean that it is not the successful party." *Sanborn*, 178 Ariz. at 430, 874 P.2d at 987.

¶22 In moving for an award of its fees and costs below, Automated and Eclipse each cited the parties' agreement as grounds for the request. The agreement stated: "If suit or action is instituted to enforce or interpret any of the terms of

[7]The affidavit of counsel for Smith and Eclipse merely stated that both had been billed and had paid fees incurred to date without indicating what, if anything, Smith personally had paid.

this Agreement, the prevailing party shall be entitled to recover from the other party, in addition to costs, such claims as the court may adjudge reasonable for legal fees incurred." It is well established that "[a] contractual provision for attorneys' fees will be enforced according to its terms. Unlike fees awarded under A.R.S. § 12-341.01(A), the court lacks discretion to refuse to award fees under the contractual provision." *Mining Inv. Group, L.L.C. v. Roberts*, 217 Ariz. 635, 641, ¶ 26, 177 P.3d 1207, 1213 (App. 2008) (quoting *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (App. 1994)).

¶23 The trial court did not abuse its discretion in finding that Automated prevailed over Eclipse for purposes of the parties' agreement: the jury had awarded damages to Automated on its claim and had declined to find in Eclipse's favor on its counterclaim against Automated for intentional interference with contract. Thus, the court awarded Automated attorney's fees in the amount of $119,126 and taxable costs in the amount of $4,337.66. The minute entry expressly stated that the fees were reasonable, and we note that Eclipse and Smith requested a nearly identical amount without any reduction for lack of success on their counterclaims against Eclipse.

¶24 Smith challenges the trial court's refusal to award attorney's fees and costs to him personally and asserts that he prevailed against Automated. In his reply brief, Smith states that Eclipse agreed to pay his attorney's fees and costs, and thus, as the trial court noted, it is apparent that a fee award would not mitigate Smith's financial burden because he had none. In its discretion, the court declined to award Smith any attorney's fees under A.R.S. § 12-341.01. We find no abuse of that discretion. *Sanborn*, 178 Ariz. at 430, 874 P.2d at 987.

¶25 Although Smith did not cite the parties' agreement as a basis for his fee request, the trial court also stated it would not award fees pursuant to the agreement. Because Smith failed to base his request on the agreement, we affirm the denial of fees for that reason. Further, as the trial court observed, the only evidence before it was that Eclipse alone had paid or would be responsible for the attorney's fees and costs incurred by it and Smith. Although Smith now argues that fees borne by a third party may be recovered by the principal when paid pursuant to an insurance or indemnity agreement, he offered no evidence of any such agreement to the trial court. For all these reasons, the trial court did not err in its denial of an award of fees and costs to Smith.

CONCLUSION

¶26 For the reasons stated, we affirm the award of damages and attorney's fees and costs incurred at trial to Automated as well as the denial of attorney's fees and costs to Smith. Eclipse and Smith request an award of attorney's fees and costs incurred in this appeal on the ground that the action below arose out of contract, but they have not prevailed. Automated requests an award of its attorney's fees and costs from Eclipse pursuant to the parties' contract. Automated has prevailed, and we accordingly grant its request for attorney's fees and costs incurred on appeal against Eclipse only, upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

/S/
SHELDON H. WEISBERG, Presiding Judge

CONCURRING:

/S/
PHILIP HALL, Judge

/S/
JOHN C. GEMMILL, Judge