

STATE OF MICHIGAN
COURT OF APPEALS

DONALD NELSON,

Plaintiff-Appellee,

v

ROBERT GRAVES, LINDA GRAVES and
BEAVER ISLAND FORESTRY,

Defendants-Appellants.

UNPUBLISHED

June 24, 1997

No. 188338

Charlevoix Circuit Court

LC No. 92-036615-CK

Before: Hoekstra, P.J., and Markey and J.C. Kingsley,* JJ.

PER CURIAM.

Defendants appeal as of right from a judgment for plaintiff awarding him \$21,915.82 in damages for breach of two oral agreements and for conversion. We affirm in part and reverse in part.

In April 1991, the parties entered into an oral agreement to engage in a logging operation on land located on Beaver Island that plaintiff owned. The parties disagreed with respect to the terms of this agreement. Plaintiff contends that under the agreement, plaintiff was to pay defendants to remove certain hardwood trees from his property, mill them according to plaintiff's specifications and provide plaintiff with the resulting lumber. Defendants counters that the parties agreed defendants would log the property and keep some of the resulting lumber to offset logging and milling costs. In fact, defendants logged plaintiff's property, milled the logs and sold the resulting lumber. Plaintiff received none of the lumber and paid defendants nothing. Following a bench trial, the trial court found that the terms of the agreement were consistent with plaintiff's contentions and that defendants had breached this contract and converted plaintiff's logs for their own use. Defendants subsequently moved for a new trial, but the court denied the motion.

Defendants argue that the trial court abused its discretion in denying defendants' motion for a new trial, because the court's findings of fact regarding this agreement were against the great weight of the evidence. When faced with a new trial motion, a trial court must determine whether the

* Circuit judge, sitting on the Court of Appeals by assignment.

overwhelming weight of the evidence favored the losing party, and we determine whether the court abused its discretion in making that finding. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). We give substantial deference to the court's finding that the verdict was not against the great weight of the evidence. *Id.* Defendants correctly note that six witnesses testified at trial that the terms of the agreement were as defendants explained, yet only plaintiff testified regarding his version of the agreement. The trial court did not abuse its discretion in denying defendants' motion, however, because it did consider these witnesses' testimony when it made its original findings regarding the terms of the parties' agreement. In its original findings, the trial court determined that although defendants offered to purchase some of the timber from plaintiff's property, the parties never agreed on the price.

Moreover, the court found much of defendant Robert Graves' testimony to be incredible. For example, the court pointed out that although Graves said plaintiff was to receive one-half of the cedar logged from the site, and several cedar stumps were found on plaintiff's property, plaintiff received no lumber, and no cedar logs were found when plaintiff inspected the mill. In another example, the court noted that although defendants customarily provide written contracts to sellers of timber, defendants offered no writing to substantiate their version of the contract. As the court indicated, once there was reason to doubt Graves' credibility on some issues, the truthfulness of his testimony became questionable on all other issues as well. Only Graves and his son Kurt testified regarding the specific terms of their version of the agreement; the other four witnesses either could not remember what plaintiff had told them about the contract or had not been told the details of the contract. Because the trial court concluded that Graves' testimony was incredible, it was not unreasonable for the court to also disregard his son's testimony on this issue as the potential for bias was great. Finally, the testimony of the other four witnesses was consistent with the court's conclusion that the details of an agreement to offset milling costs via the exchange of lumber had not been finalized. Giving substantial deference to the trial court's determination that the verdict was not against the great weight of the evidence, we find that the court did not abuse its discretion regarding the terms of the parties' oral agreement and its denial of defendants' motion for a new trial. *Severn, supra*; *Arrington v Detroit Osteopathic Hospital Corp (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992).

Defendants also argue that the trial court incorrectly calculated the amount of plaintiff's damages and placed plaintiff in a better position than he would have been had the parties fully performed the contract. We agree. This Court reviews a trial court's findings of fact in a bench trial, including findings with regard to the amount of damages, under the clearly erroneous standard, i.e., although there is evidence to support the finding, the reviewing court is left with a definite and firm conviction that a mistake was made. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995). We must, however, give regard to the trial court's special opportunity to judge the credibility of the witnesses who appear before it. *Id.*; MCR 2.613(C).

The trial court awarded plaintiff damages for the value of the lumber defendants obtained and the cost of shipping the lumber from the mainland to Beaver Island. It also deducted the amount plaintiff would have owed defendants for milling the logs. As defendants correctly point out, however, plaintiff also would have been responsible for the amount he agreed to pay

defendants to log the property. See, e.g., *Ambassador Steel Co v Ewald Steel Co*, 33 Mich App 495, 505; 190 NW2d 275 (1971). Plaintiff contends, however, that although the trial court may have incorrectly calculated the amount of damages plaintiff suffered, the damages were not excessive because plaintiff would have recovered a greater sum had the court awarded plaintiff damages in conversion. This conclusion is erroneous. In fact, had the court awarded damages in conversion, plaintiff would have recovered only the fair market value of the lumber converted. Indeed, plaintiff would have been responsible for defendants' logging and milling costs. See *Larson v Van Horn*, 110 Mich App 369, 385; 313 NW2d 288 (1981). Thus, because an award for conversion would not have included the cost of shipping lumber from the mainland, it would have been less than the amount ultimately awarded by the trial court. Because the damage award did not include a deduction for defendants' logging costs, we are left with a firm and definite conviction that the trial court's calculation of contract damages was excessive. *Hofmann, supra*.

Accordingly, judgment is affirmed with respect to the court's finding in favor of plaintiff on the breach of contract claim but is reversed with respect to the damage award. Further, this case is remanded either for a recalculation of damages or for a new trial on the issue of damages if the record does not contain sufficient information to make this determination. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ James C. Kingsley