

STATE OF MICHIGAN
COURT OF APPEALS

ILLUZZIONS, INC., a Michigan corporation, and
MICHAEL D. FLAHERTY,

UNPUBLISHED
June 27, 2000

Plaintiffs/Counter Defendants-
Appellees and Cross-Appellants,

v

VOLPE-VITO, INC., a Michigan corporation, d/b/a
FOUR BEARS WATER PARK,

No. 208577
Macomb Circuit Court
LC No. 93-005367-CH

Defendant/Counter Plaintiff-Appellant
and Cross-Appellee,

and

LOUIS STRAMAGLIA,

Defendant.

Before: Markey, P.J., and Doctoroff and Murphy, JJ.

PER CURIAM.

Defendant Volpe-Vito, Inc. appeals as of right from a judgment on a jury verdict and the circuit court's subsequent order denying a new trial but granting, in part, judgment notwithstanding the verdict and remittitur. At the conclusion of the ten-day jury trial in this breach of contract action, the jury returned its verdict, pursuant to a special form, finding in favor of plaintiff Illuzzions, Inc., and awarding damages of \$295,000. The jury also found that defendant used force to enter or detain possession and trebled damages for a total judgment of \$885,000. The jury found against defendant on a counterclaim alleging breach of contract, and also rendered advisory findings against defendant on counterclaims of private and public nuisance.

Pursuant to the advisory findings, the court entered an order of no cause of action on defendant's counterclaims of public and private nuisance; judgment on the remainder of the jury verdict

was entered thereafter. Defendant subsequently moved for judgment notwithstanding the verdict, new trial and/or remittitur, and the court entered an opinion and order denying new trial, but granting, in part, the motion for JNOV and remittitur - the court voided the trebling of damages. Defendant moved for reconsideration of this order, which the court denied in a second opinion and order. Following this, defendant brought the present claim of appeal.

This case arises from the termination of a commercial lease between plaintiff and defendant.¹ The five year lease, from April 1, 1989 through March 31, 1994, permitted plaintiffs to use part of a building in defendant's water park for the purpose of operating a teenage nightclub on the weekends. Pursuant to the lease plaintiffs also held an option to renew for an additional five years. However, on November 2, 1993, without notice, Louis Stramaglia informed Michael Flaherty that he was unilaterally terminating the lease for alleged violations of various lease provisions.

On November 5, 1993, Flaherty obtained a temporary restraining order restoring him to possession under the lease and prohibiting Stramaglia himself from operating a teen nightclub on the leased premises. But when Flaherty arrived at the premises to work the club that evening, Stramaglia refused to honor the court order. Stramaglia forcibly prevented Flaherty from entering the premises, then operated the club himself that weekend. Over the next two months, legal action continued in the circuit court. Initially, a November 12, 1993, order dissolved the TRO and allowed defendant to remain in possession and operate the club. Then, ultimately, a January 5, 1994, order permitted plaintiff's repossession of the premises upon fulfillment of certain conditions. Flaherty satisfied these conditions on January 7, 1994, intending to operate the club as usual that night. However, because of disturbances caused by the large volume of patrons, the police shut down the club approximately two hours after it opened.

Following the night of January 7, 1994, plaintiffs abandoned the lease purportedly because of the prohibitive expense of the legal fight. The parties' competing claims of breach of contract were ultimately heard in this trial. Plaintiffs sought injunctive relief, implying a claim of breach of the lease contract, and alleged entitlement to treble damages under the forcible entry and detainer statute, MCL 600.2918; MSA 27A.2918. Plaintiffs also alleged tortious interference with contract and abuse of process.² Defendant's counterclaim alleged breach of contract, private nuisance, and public nuisance.

Defendant now challenges the circuit court's post-judgment order denying new trial, but granting, in part, the motion for JNOV and remittitur. Defendant essentially raises the same arguments made in that combined motion and the subsequent unsuccessful motion for reconsideration. Contending that a wrongful detainer occurred only for a single weekend in November 1993, and that thereafter only resort to judicial process kept plaintiffs out of the premises, defendant argues that pursuant to MCL 600.2918; MSA 27A.2918 the circuit court erred in not granting JNOV and/or remittitur to \$200.

¹ Michael Flaherty, as principal of Illuzzions, Inc., and Louis Stramaglia, as principal of Volpe-Vito, Inc., were dismissed as party defendants (counter-defendant in the case of Flaherty) during the trial.

² These third and fourth counts of plaintiffs' complaints were dismissed by directed verdict.

Defendant alternately contends that the circuit court should have granted a new trial on the grounds that manifest injustice resulted from erroneous jury instructions, and that the jury returned a clearly excessive verdict contrary to law. On cross appeal plaintiffs contest the circuit court's decision to remit the verdict, arguing that the court improperly usurped the jury's role by voiding the trebling of damages. We find each party's various arguments to be without merit and accordingly affirm the circuit court's post-judgment opinion and order.

This Court reviews de novo a decision on a motion for JNOV, viewing the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). Only when there is insufficient evidence presented to create an issue for the jury should a trial court grant JNOV. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997).

Meanwhile, this Court reviews the trial court's grant or denial of a motion for new trial for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). A new trial may be granted if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). Such motions are not favored and should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998). A new trial may also be granted when the verdict was clearly or grossly excessive. MCR 2.611(A)(1)(d). However, a court may avoid the need to grant a new trial by instead ordering remittitur.

A trial court's decision regarding remittitur is likewise reviewed on appeal for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 533; 443 NW2d 354 (1989). In determining whether remittitur is appropriate, the proper consideration is whether the jury award was supported by the evidence. *Carpenter v Consumers Power Co*, 230 Mich App 547; 562; 584 NW2d 375 (1998). This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. *Palenkas, supra* at 532; *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997).

Central to the issues raised in this appeal is the understanding that throughout trial dual theories of recovery were proffered on behalf of plaintiffs. Plaintiffs asserted that both breach of the lease contract and violation of the forcible entry and detainer statute were potential bases of damages. Both theories were argued to the jury, and the court separately instructed the jury with respect to each theory. However, the special verdict form utilized by the jury, created and jointly approved by the parties, did not allow for separate findings on the two theories. At no point during trial did defendant object to the presentation of the breach of contract claim, nor did defendant take exception to the court's jury instructions. Nevertheless, as before the circuit court, defendant now contends that the jury's finding in favor of plaintiffs, returned in the special form, demonstrates that the jury found against plaintiffs on the asserted breach of contract claim. Like the circuit court, we disagree.

The jury's verdict, returned by this special form initially found in favor of plaintiffs and assessed liability on the part of defendant in the amount of \$295,000. The jury subsequently found that defendant

had used force to enter or detain the leased premises, and as essentially directed by the structure of the special form, trebled the \$295,000 in damages for a total judgment of \$885,000. Contrary to defendant's argument, we find that despite the lack of specificity in the special form, based on the evidence it is reasonable to conclude that the jury found defendant liable for both breach of contract and violation of the forcible entry and detainer statute. The circuit court found likewise, and in its two post-judgment opinions clearly and concisely detailed its reasoning. We now adopt those opinions, in agreement with both the court's analysis and its decision ordering remittitur of the judgment from \$885,000 to the base award of \$295,000. We briefly summarize the basis for this remittitur.

MCL 600.2918; MSA 27A.2918 provides, in pertinent part:

(1) Any person who is ejected or put out of any lands or tenements in a forcible and unlawful manner, or being out is afterwards held and kept out, by force, if he prevails, is entitled to recover 3 times the amount of his actual damages or \$200.00, whichever is greater, in addition to recovering possession.

(2) Any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner, lessor, licensor, or their agents shall be entitled to recover the amount of his actual damages or \$200.00, whichever is greater, for each occurrence and, where possession has been lost, to recover possession. Unlawful interference with a possessory interest shall include:

(a) The use of force or threat of force.

* * *

(3) The provisions of subsection (2) shall not apply where the owner, lessor, licensor, or their agents can establish that he:

(a) Acted pursuant to court order.

Pursuant to these provisions, defendant was liable for violation of the statute only with respect to the single weekend of November 5-6, 1993, when Stramaglia refused to honor the court order restoring plaintiffs to possession. Between that weekend and plaintiffs' return to possession for a single night before the lease was abandoned, defendant's possession of the leased premises was pursuant to various court orders. Consequently, the jury should have trebled only those actual damages directly related to the clear statutory violation, which occurred during the single November 1993 weekend. The apparent confusion that resulted in the trebling of the entire base award, which presumably included damages for breach of contract, is attributable to the failure of the verdict form to provide the jury the opportunity to separate the damages relevant to each theory of liability.

Recognizing the error in this portion of the jury's verdict, the circuit court effectively corrected this mistake by remitting the total judgment with respect to the trebling. Actual damages specifically related to the November 1993 weekend were not proven at trial. Meanwhile, the figure of \$295,000 was a reasonable award for breach of contract, which contemplates damages for future lost profits

under the remainder of the lease and the five-year lease option. The award is supported by the evidence presented at trial. Given that the parties created the special verdict form and failed to object to the now contested jury instructions, at a minimum they contributed to the confusion at the end of trial. Having considered this culpability and the sequence of events that led to the originally inequitable verdict, we conclude that the circuit court's remedy was appropriate. None of the issues raised on appeal present error mandating reversal of the court's decision.

We hold that the circuit court did not err in denying defendant's motion for JNOV beyond the remittitur granted. We also hold that the verdict and judgment, as corrected, is neither against the great weight of the evidence nor clearly excessive. Accordingly, the circuit court's denial of defendant's motion for new trial does not evidence an abuse of discretion. *Daoust, supra*. Finally, for the same reasons supporting this resolution of defendant's claims, plaintiffs' cross appeal must fail. The circuit court did not abuse its discretion in granting remittitur. *Palenkas, supra* at 533.

Affirmed.

/s/ Jane E. Markey
/s/ Martin M. Doctoroff
/s/ William B. Murphy