S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

LOUIS V. BUZZITTA, Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED May 25, 2001
v	No. 214039 Berrien Circuit Court LC No. 95-002147-CK
LARIZZA INDUSTRIES, INC., and HUGHES PLASTICS, INC., Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,	
and	
DIANE M. BUZZITTA, JAMES V. BUZZITTA, JOSEPH T. BUZZITTA, and PHILIP F. WOOD, as TRUSTEE of the DIANE M. BUZZITTA TRUST, Third-Party Defendants-Appellees.	

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment for plaintiff, following a jury trial, pursuant to which plaintiff was awarded a net amount of $1,394,975, plus statutory interest and costs. The jury also found in favor of plaintiff on defendants' counter-claims for breach of a stock purchase agreement, fraud and misrepresentation. We affirm.

This action arises from the sale of Hughes Plastics, Inc., a plastics manufacturer located in St. Joseph, Michigan, which was formerly owned by plaintiff Louis Buzzitta and his family. Hughes molded plastic parts and specialized in air outlets and instrument panels for the automotive industry. General Motors was its largest customer. Joe Buzzitta, one of Louis Buzzitta's sons, worked at Hughes in sales and marketing.

In October 1994, plaintiff sold Hughes to Larizza Industries, Inc., which was owned by Ron Larizza, pursuant to a stock purchase agreement providing for cash payments, two promissory notes and a consultant/non-compete agreement. The parties agreed that there would be a purchase price adjustment according to an agreed-upon formula based on the equity or negative equity of the shareholders at closing. Paragraph 1.3.2 of the stock purchase agreement set forth the formula for computing the purchase price adjustment and provided that it would be "determined by Buyer's accountants on a basis consistent with Hughes' past accounting practices." The parties never agreed on the closing date equity or purchase price adjustment figures.

Defendants claim that they discovered numerous problems almost immediately after the acquisition. They contend that the Buzzittas misrepresented Hughes' financial condition, its sales income, its relationship with its suppliers and customers, especially General Motors, the condition of its machinery, and other facts concerning the business. Because of these claims and the additional unanticipated funds allegedly required to remedy the situation, defendants refused to pay the remaining monies due under the promissory notes and consultant agreement. Within a few months after the sale of Hughes to Larizza Industries, Larizza sold the business to another plastics manufacturer.

Plaintiff's complaint alleged claims for breach of the stock purchase agreement, breach of the promissory notes and breach of the consulting agreement. Defendants filed a counter-complaint also alleging breach of contract, fraud, and misrepresentation. Following an eleven-day trial, the jury found that defendants breached the purchase agreement and that the Buzzittas were not paid the amounts due on the promissory notes and consulting/non-compete agreement. The jury awarded plaintiff damages of $2,270,000.00, but also found that the purchase price should be reduced by $875,025.00, in accordance with ¶ 1.3.2 of the stock purchase agreement, resulting in a net award of $1,394,975. The jury also determined that the Buzzittas did not breach the representations and warranties in the purchase agreement.

On appeal, defendants raise six issues. First, defendants argue that the evidence was insufficient to submit to the jury the question whether defendants' determination of the closing date equity, or the purchase price adjustment, was the product of bad faith, fraud or gross mistake. We disagree. "When reviewing a claim based on sufficiency of the evidence in a civil action, this Court examines the evidence in a light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference that can be drawn from the evidence." *Price v Long Realty, Inc,* 199 Mich App 461, 472; 502 NW2d 337 (1993). If reasonable jurors could differ, then the question is properly one for the jury. *Id.*

The jury was instructed that if defendants' accountants did not utilize Hughes' past accounting practices in making their determination of the closing date equity, or if defendants' determination of the closing date equity was the product of fraud, bad faith, or gross mistake, then defendants' determination was not binding. Our review of the record reveals sufficient evidence to support either finding.

Although other provisions of the purchase agreement referred to generally accepted accounting practices (GAAP), ¶ 1.3.2 specifically referred to "Hughes past accounting practices," thereby supporting the conclusion that Hughes' past accounting practices were not in conformance with GAAP. Terry Seikel, defendants' chief financial officer who was involved in drafting the stock purchase agreement, testified regarding the procedures that were required in order to close the books and make the necessary determination, but evidence was presented indicating that he did not follow those procedures. His testimony was inconsistent with regard to whether Hughes' past accounting practices conformed with GAAP, and about what methods were used to determine the purchase price reduction figure. Mary Jane Vicary, defendants' controller, stated that she was not instructed to use Hughes' past accounting practices and that she utilized GAAP when she did her computations. She stated that she was not given any source documents. Further, Seikel's credibility was seriously diminished when plaintiff demonstrated, and Seikel admitted, that he had lied to the government on an SEC form and in the confidential memorandum that he presented to the bank.

Although plaintiff's witness, Robert Geyer, was not presented as an expert witness and did not make an independent determination of the closing date equity, his testimony indicated that he was a knowledgeable accountant and a partner in a long-established accounting firm, who was familiar with Hughes' accounting practices. He disagreed with the suggestion that standard methods of determining obsolescence were used and denied that Larizza's accounting methods were consistent with Hughes' past practices. He further opined that he "did not think that adjustment was a good faith adjustment." Geyer's testimony, considered in conjunction with Seikel's and Vicary's testimony, viewed most favorably to plaintiff, provides sufficient support for the jury's verdict.

Next, defendants argue that they are entitled to a new trial because the jury's determination that the purchase price should be reduced by only $875,025 is against the great weight of the evidence. We disagree. This Court reviews a trial court's decision on a motion for new trial for an abuse of discretion. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000). A jury verdict may be overturned on appeal only when it was manifestly against the clear weight of the evidence, and substantial deference will be given by this Court to a trial court's determination that a verdict is not against the great weight of the evidence. *Wischmeyer v Schanz*, 449 Mich 469, 485; 536 NW2d 760 (1995); *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999); *Arrington v Detroit Osteopathic Hospital Corp (0n Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992); MCR 2.611(A)(1)(e). Here, the documents and testimony presented would have supported a range of monetary conclusions on this issue. The jury's determination that the purchase price should be reduced by $875,025 is not manifestly against the clear weight of the evidence. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this issue.

We also conclude that the record does not support defendants' claim that the jury's verdict was the product of impermissible compromise. The verdict was not clearly contrary to the evidence. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 303-304; 616 NW2d 175 (2000); see also *Buckner Loan Co v Bicher*, 221 Mich 198, 200; 190 NW 670 (1922); *Kelly v Nat'l Casualty Co*, 10 Mich App 450, 452; 159 NW2d 363 (1968).

Defendants also argue that the trial court abused its discretion in denying their motion for remittitur. Defendants contend that the promissory notes and consulting agreement were installment contracts and that the jury improperly based its award on monies that were not yet due. *Sparta State Bank v Covell*, 197 Mich App 584, 587; 495 NW2d 817 (1992); MCL 600.5836; MSA 27A.5836. However, we agree with the trial court that because defendants agreed to submit the question of the entire amount due to the jury without objection, and agreed to the jury verdict form asking the jury to determine the issues based on the entire amounts of the purchase agreement and consulting agreement, defendants are now precluded from making this claim. Where a party stipulates to the use of a particular verdict form, he cannot seek relief on the basis that the trial court accepted that stipulation. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). The trial court did not abuse its discretion in denying defendants' motion for remittitur.

Next, we find no error in the trial court's determination that paragraph 5.1 of the stock purchase agreement did not entitle defendants to indemnification for losses sustained as a result of plaintiff's alleged wrongful acts towards defendants. Furthermore, even if the indemnity provision were to be construed as defendants contend, because a cause of action for indemnification is derivative from a finding of primary liability, *Cliffs Forest Products Co v Al Disdero Lumber Co*, 144 Mich App 215, 225; 375 NW2d 397 (1985), and because the jury rejected defendants' claims that plaintiff either breached the purchase agreement or was liable for fraud or misrepresentation, defendants' claim for indemnification would still fail.

Defendants next argue that the jury's verdict on their counterclaim for breach of warranty is against the great weight of the evidence. We disagree. Plaintiff demonstrated that, during negotiations and the due diligence inspection, defendants were informed or learned, or had adequate opportunity to learn, about Hughes' financial situation, the state of the machinery, and the manufacturing contracts. They were aware that Hughes was losing money and was fully borrowed under its line of credit and had "stripped vendor payables." At closing, defendants also knew that there was a negative equity. Further, as part of its closing, defendants made a payoff of almost three million dollars for monies owed by Buzzitta and Hughes.

Indeed, between the first and second letters of intent, the offering price was reduced based on information that defendants had learned. The record shows that during the due diligence inspection defendants' representatives were in the Hughes plant for two days, and could have stayed longer had they desired. They were given all of the information they requested and had every opportunity to examine the machinery. Although Buzzitta had asked them not to talk to the bank, employees, customers or suppliers, the evidence showed that, if they wanted to, that right was reserved to them. Instead, several of defendants' representatives, experienced in acquisitions and knowledgeable about the business, testified that they conducted no more than a "relatively limited" investigation. From this evidence, the jury could properly conclude that defendants were sufficiently informed, or had every opportunity to be informed, and, therefore, had no legitimate basis upon which to claim surprise at the financial condition of the business, the state of the machinery, or the status of Hughes' contracts with suppliers and customers.

Furthermore, plaintiff demonstrated that defendants' reliance on Mark Moore's letter and a statement attributed to Moore by Vince Donovan, in order to show that plaintiff withheld pertinent information, was without merit because Moore testified that, at the time of the acquisition, GM had no problems with Hughes and that he had not and never would have made the statement attributed to him. Further eradicating credibility on this issue was Donovan's testimony at trial that someone else might have made the statement.

James T. Brown's testimony about the machine he bought, and George Kavanaugh's representations that the state of the machines at acquisition was consistent with the appraisal of the machines and equipment done by Norman Levy Co, also raised questions of good faith concerning defendants' representations about the state of the machines after the acquisition, especially considering that Kavanaugh was still working at the Hughes facility for the new owners when he testified. Accordingly, we conclude that the verdict on defendants' counter-claim for breach of warranty was not against the great weight of the evidence. The trial court did not abuse its discretion when it denied defendants' motion for a new trial on the counter-complaint.

Finally, we hold that the trial court did not err when it awarded prejudgment interest on the entire judgment.

We have concluded that the entire amounts of the promissory notes and the consultant agreement were properly placed before the jury. Under MCL 600.6013(1); MSA 27A.6013(1) and MCL 600.6301(a); MSA 27A.6301(a), defendants could not claim "future damages" in a breach of contract action. *Paulitch v Detroit Edison Co*, 208 Mich App 656, 661-663; 528 NW2d 200 (1995). See also *Yaldo v North Pointe Ins Co*, 457 Mich 341, 350; 578 NW2d 274 (1998), and *H J Tucker & Associates, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 561-562; 595 NW2d 176 (1999).

Because the exception regarding future damages was added to § 6013 in 1986, *Paulitch, supra* at 662 n 1, defendants' reliance on *Foremost Life Ins Co v Waters (On Remand)*, 125 Mich App 799; 337 NW2d 29 (1983), and *CMU Faculty Ass'n v Stengren*, 142 Mich App 455; 370 NW2d 383 (1985), both of which preceded the amendment, is misplaced. Defendant's reliance on *Holloway Constr Co v Oakland Co Board of Co Rd Comm'rs*, 450 Mich 608; 543 NW2d 923 (1996), for the proposition that "[s]ection 6013 cannot be used to create a 'double recovery,'" is similarly misplaced. The Court in *Holloway* was referring to the award of interest under both MCL 438.7; MSA 19.4 and MCL 600.6013; MSA 27A.6013 when an arbitration award is involved, *id*. at 612-613, which is not the situation here. Accordingly, we conclude that the trial court did not err in imposing prejudgment interest on the entire amount of the verdict.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage