STATE OF MICHIGAN

COURT OF APPEALS

TECHSYS, INC., ESTATE OF JAY W. PEASE, Deceased, and DRUSILLA PEASE, Personal Representative of the Estate of JAY W. PEASE, Deceased,

Plaintiffs-Appellees,

v

JACK LIFTON, EXIMP, INC., CATHERINE KUPPER and ALBURY INTERNATIONAL, LTD., U.S.A.,

Defendants,

and

ALBURY INTERNATIONAL, INC., ESTATE OF CHARLES SCHEIN, and ROMAUTOPLAST FRANCE,

Defendants-Appellants.

UNPUBLISHED
July 7, 2009

No. 282433
Oakland Circuit Court
LC No. 1998-007479-CK

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Defendants appeal as of right a judgment awarding damages to plaintiffs. Because the trial court's damages award was not against the great weight of the evidence and was not otherwise in error, and the documents relied upon in determining the award were properly considered, we affirm.

This case arises out of the sale of a business, Product Sol, Inc., owned by Jay W. Pease ("Jay") and Drusilla Pease ("Drusilla"). Oakite Products, Inc. and Charles Schein formed Product Sol, L.L.C., to purchase the business. The final asset purchase agreement required a one time payment and also provided for a ten-year consulting agreement in which Jay would receive five percent of the first $2,400,000 of Product Sol, L.L.C.'s annual gross revenue and one percent of annual gross revenue above $2,400,000. Further it provided for a ten-year lease agreement in which Product Sol, L.L.C., would lease Jay and Drusilla's manufacturing building.

Jay and Drusilla formed Techsys, Inc. ("Techsys") after the sale of Product Sol, Inc. and Techsys managed the building lease.

Product Sol, L.L.C., failed to meet its financial objectives. After less than three years of business, Product Sol, L.L.C.'s chief executive officer, Jack Lifton, ceased paying commissions to Jay and ceased making lease payments to Jay and Drusilla. Thereafter, Product Sol, L.L.C., filed for bankruptcy. Plaintiffs sued defendants.[1] Among other subsequently dismissed and unrelated claims, plaintiffs alleged that defendants conspired with Lifton to defraud Jay of commissions. In so doing, they diverted Product Sol, L.L.C.'s income from the sale of scrap materials and disclosed confidential information to other companies. They also failed to collect Product Sol, L.L.C.'s receivables. Furthermore, plaintiffs claimed that, in pursuit of the conspiracy, defendants violated 18 USC 1961, the Racketeer Influenced and Corrupt Organizations ("RICO") statute, by illegally using the mail and filing a false bankruptcy. Plaintiffs requested damages for unpaid commissions and lease payments. Pursuant to RICO, plaintiffs claimed they were entitled to treble damages.

Defendants failed to answer or otherwise defend the complaint. The trial court entered a default judgment awarding $4,281,573 to Jay, $812,930.97 to Techsys, and $46,822.31 for attorney fees and costs. Defendants moved to set aside the default judgment and included an argument in a pleading that a hearing as to the amount of the damages was necessary. The trial court denied defendants' motions to set aside the judgment.

Defendants filed an application for leave to appeal, which this Court denied. Thereafter, defendants applied for leave to appeal to the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration, as on leave granted, "limited to the issues whether the trial court abused its discretion in failing to set aside the damages part of the default judgment and whether to remand to the Oakland Circuit Court for a new hearing on the issue of damages only." *Techsys, Inc v Lifton*, 465 Mich 898; 636 NW2d 145 (2001).

On remand, this Court stated that a default is not an admission regarding damages. *Techsys, Inc v Lifton*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2003 (Docket No. 237517), slip op, p 3. It found that plaintiffs failed to offer sufficient evidence to support their claim for damages. *Id.* Thus, this Court found that the trial court abused its discretion in failing to set aside the damages portion of the default judgment. *Id.*, pp 3-4. This Court remanded to the trial court for a hearing on the issue of damages. *Id.*, p 4.

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[1] The original plaintiffs in this matter were Techsys and Jay. However, when Jay died, his personal representative, Drusilla Pease ("Drusilla"), and the estate of Jay were substituted as plaintiffs. Plaintiffs' original complaint was filed against Jack Lifton, Eximp, Inc., Catherine Kupper, Albury, Albury International Ltd, U.S.A., Schein, and Romautoplast France. Plaintiffs dismissed their claims against Lifton, Eximp, Inc., Kupper, and Albury International Ltd., U.S.A. Moreover, when Schein died, the estate of Schein was substituted for him as a defendant.

The trial court conducted the damages hearing. Plaintiffs offered testimony to prove that, absent defendants' wrongdoing, as outlined in the complaint and now admitted pursuant to the default, Product Sol, L.L.C., would have remained in business. Thus, it would have grossed revenue, a percentage of which would have been paid to Jay as commissions. To show the probable amount of annual gross revenues, absent wrongdoing, plaintiffs offered a projected sales chart created by a Product Sol, L.L.C. representative during negotiations for the sale of Product Sol, Inc., to Product Sol, L.L.C. The trial court relied on this chart in fashioning its damage award. In its judgment, the trial court awarded $900,000 to the estate of Jay. It also ordered this award to be trebled ($2,700,000), pursuant to RICO. Furthermore, it awarded $270,000 to Techsys. Finally, it awarded $115,000 to the estate of Jay and $55,000 to Techsys for attorney fees and costs.

Defendants claim, for the first time on appeal, that the trial court erred when it considered the projected sales chart in calculating damages because the chart was parol evidence that could not be admitted to vary the terms of the agreements. Given this argument, they further maintain that the chart should not have been admitted to calculate the damages of the estate of Jay Pease. We disagree. This unpreserved claim is reviewed for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

The agreements surrounding the sale, including the asset purchase agreement, the consulting agreement, and the lease agreement, contained integration clauses that superseded prior agreements or understandings. See *Hamade v Sunoco, Inc*, 271 Mich App 145, 166; 721 NW2d 233 (2006), quoting *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998) (The parol evidence rule provides that "'[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written instrument, is *not admissible to vary the terms of a contract* which is clear and unambiguous."') (emphasis added). Drusilla testified that she relied upon the projections in the chart when she entered the agreements. Defendants now suggest that the trial court violated the parol evidence rule when, in its opinion, it stated that Jay and Drusilla were reasonably entitled to rely on the chart as part of the sale.

Even if this claim is true, plaintiffs did not offer the chart to vary the terms of the agreements or to suggest that defendants breached the agreements by failing to earn minimum gross revenues or to pay commissions. Rather, plaintiffs alleged, and defendants' default admits, that defendants' wrongdoing thwarted gross revenues and Jay's corresponding commissions. Accordingly, to estimate damages, it was necessary to show the probable amount of gross revenues and the corresponding unpaid commissions.

Even though parol evidence may not be admissible *to vary the terms* of an agreement in a breach of contract claim, defendants fail to cite any authority for the proposition that the parol evidence rule excludes the admission of that same evidence for other claims, such as conspiracy to defraud and the RICO violations. This Court has stated:

> 'when the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the [trier of fact] all the facts and circumstances which have a tendency to show their probable amount.' [*Health Call v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96;

706 NW2d 843 (2005), quoting *Body Rustproofing, Inc v Michigan Bell Telephone Co*, 149 Mich App 385, 391; 385 NW2d 797 (1986).]

As the trial court noted, Product Sol, L.L.C.'s gross revenues following the sale were unreliable because they were affected by the wrongdoing. In contrast, Product Sol, L.L.C.'s projections for gross revenues in the chart, made prior to the sale, were not. Therefore, the chart was a fact tending "to show the probable amount" of damages and was admissible under *Health Call*. The trial court did not commit plain error affecting defendants substantial rights by considering the chart in its damage calculation.

Defendants next claim on appeal is that the evidence did not support the trial court's award for unpaid commissions. We disagree. This Court reviews a trial court's finding regarding the amount of damages for clear error. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *Id.*, p 99. This Court will defer to the trial court's superior position to observe and evaluate witnesses' credibility. *Id.*

'"A party asserting a claim has the burden of proving its damages with reasonable certainty."' *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004), quoting *Hofmann, supra*, p 108. Damages based on speculation are not recoverable, but '"damages are not speculative merely because they cannot be ascertained with mathematical precision."' *Id.* '"It is sufficient if a reasonable basis for computation exists, although the result be only approximate."' *Id.* Further, if the fact of damages is established, the certainty necessary to establishing the amount of damages is relaxed. *Id.*

In this case, the certainty necessary to establish the amount of Jay's unpaid commissions was relaxed because defendants admitted, by default, that they conspired to defraud him of those commissions. *Ensink, supra*, p 525. Drusilla testified regarding Product Sol, Inc.'s profitability. She claimed that business and income were consistent, earning $2,374,916 in 1994. Defendants offered conflicting testimony. They claimed that the tax returns showed declining gross revenues from 1990 to 1994, but admittedly failed to assess other indicators of Product Sol, Inc.'s performance.

To demonstrate the gross revenues and commissions Product Sol, L.L.C., would have earned and paid absent wrongdoing, Drusilla also testified regarding the expected profitability of Product Sol, L.L.C. The chart shows that, during negotiations, Product Sol, L.L.C., expected to either remain stable or experience significant growth. There was conflicting evidence regarding whether the significant growth outlined in the chart was reasonable. Drusilla noted that Product Sol, Inc., enjoyed contracts with General Motors, Ford, and Chrysler. However, in light of Schein's international connections and the size of Oakite and Albury, she expected contracts and sales to increase according to the chart. In contrast, Pivoz opined that the projected sales chart was speculative. He noted that Product Sol, L.L.C., failed to include its assumptions underlying the growth in the chart.

This Court "will not 'set aside a nonjury award merely on the basis of a difference of opinion.'" *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002), quoting *Meek v Dep't of Transportation*, 240 Mich App 105, 121; 610 NW2d 250 (2000),

overruled in part on other gds *Grimes v Mich Dep't of Transportation*, 475 Mich 72 (2006). According to the chart's peak growth revenues forecast for Product Sol, L.L.C., the maximum amount of unpaid commissions that Jay could have received was $1,400,000. However, in light of the mixed evidence regarding Product Sol, Inc.'s performance and gross revenues prior to the sale, it was probable that Product Sol, L.L.C., would experience more modest gross revenue growth following the sale. Thus, the trial court's reduced award of $900,000 was not clear error.

Notably, defendants claim that Lifton's testimony was contrary to this outcome. At the damages hearing, he testified that there was no value to the diverted sales and receivables. The implication, therefore, was that the wrongdoing did not affect gross revenues or Jay's commissions. However, the complaint alleged that as a result of the wrongdoing the gross revenues and commissions were affected. Thus, the existence of damages was established by defendants' default. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000) (A default settles the question of liability and precludes the defaulting party from litigating that issue). At the hearing, Lifton could not testify to the contrary to what had been admitted. The trial court did not clearly err when it rejected Lifton's testimony.

Defendants also make cursory claims that this Court should reject the trial court's award of treble damages, unpaid lease payments, and attorney fees. Defendants fail to support their arguments with citations to the record or legal authority. Because this Court will not search for such authority, these claims are deemed abandoned on appeal. *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra