STATE OF MICHIGAN

COURT OF APPEALS

THE SERVICE SOURCE, INC, and THE SERVICE SOURCE FRANCHISE, LLC, Plaintiff-Appellees,	UNPUBLISHED July 11, 2013
v DHL EXPRESS (USA), INC, Defendant-Appellant.	No. 301013 Lenawee Circuit Court LC No. 09-3258-CK

Before: K. F. KELLY, P.J., and SHAPIRO and KRAUSE, JJ.

PER CURIAM.

This is a breach of contract case involving package delivery service. The trial court granted partial summary disposition on the issue of liability in favor of plaintiffs, and awarded damages after trial. Defendant appeals, arguing that it did not breach its contracts with plaintiffs by ceasing domestic service in the United States, and also that the trial court erred in its calculation of damages, partly because it improperly refused to apply Florida law. We affirm the trial court's holding that defendant was liable for breaching the contract, and also uphold its calculation of damages except for its failure to apply Florida law and deduct from the damages the salaries paid to two of plaintiffs' owner-officers.

I. FACTS

DHL Express (USA), Inc. (DHL) is an Ohio corporation with its principal place of business in Florida. Long involved in international shipping, DHL attempted to enter the domestic shipping market in 2003 by acquiring Airborne Express, a domestic shipper. As part of the acquisition, DHL assumed Airborne Express's contracts with other companies known as resellers. Resellers obtain preferential wholesale rates with shipping companies, and resell the shipping services to smaller customers at rates in between the wholesale rate and the retail rate that would otherwise be charged by the shipper.

Plaintiffs were two of DHL's resellers. The Service Source, Inc., (TSS) was founded in 1995 by Louis Meeks, Scott Wayne, and Michael Wayne as a reseller of Airborne Express shipping services. Meeks and the Waynes created The Service Source Franchise, LLC (TSSF) in 2007 to attempt to franchise territories under the Service Source brand.

DHL and TSS entered into a Reseller Agreement on January 6, 2006, that replaced TSS's prior agreement with Airborne Express. A contract between DHL and TSSF was executed on July 22, 2007. The two contracts were substantially the same, set for five year periods that could be extended by an additional year each year. Using this mechanism, the parties extended the original terms of the contracts such that in the fall of 2008 the contracts were set to expire in 2013.

The contracts state, in relevant part:

> RESELLER AGREEMENT
>
> FOR U.S. ORIGIN DOMESTIC AND INTERNATIONAL SERVICE
>
> * * *
>
> RECITALS:
>
> WHEREAS, RESELLER has requirements for expedited international air express services for documents and/or packages or freight being sent to various locations around the world and for domestic door-to-door air and ground express services for documents and/or packages or freight being sent to various locations throughout the United States ("Services") . . . .
>
> * * *
>
> AGREEMENT:
>
> 1. THE SERVICES.
>
> RESELLER agrees to promote DHL's Services to RESELLER customers, and DHL agrees to provide Services to RESELLER customers to fulfill RESELLER customers' needs for Services. RESELLER shall promote DHL's Services as a preferred carrier to RESELLER customers for international and domestic shipments of documents and small packages. Shipments will originate at RESELLER customers' domestic locations at which DHL regularly provides collection service with its own personnel and will be delivered to any destination regularly serviced by DHL or its designated agents. . . .
>
> DHL may, at its discretion, add additional services to this Agreement from time to time, under terms and conditions to be determined.

Paragraph 28 of each contract states that the contract "shall be governed by and construed in accordance with the laws of Florida without regard to conflict of law rules."

Faced with stiff competition and the economic downturn, DHL decided to withdraw from the domestic shipping market and provide only international service in the U.S. On November 10, 2008, DHL issued a press release stating that domestic service would end January 30, 2009, and that it could no longer guarantee specific delivery dates for domestic packages as of

November 18, 2008. Paragraph 17 of the contracts provides certain criteria that allow for early termination. It is undisputed that none of these criteria existed when DHL announced that it would stop all domestic shipments. 90% of plaintiffs' shipping was domestic.

Plaintiffs filed this suit on February 10, 2009, alleging that DHL's announcement on November 10, 2008 constituted an anticipatory breach of the contracts. Plaintiffs continued to use DHL's domestic services through January of 2009, and international shipping for the next few months thereafter. Plaintiffs also stopped paying defendant for services still being used, with the last payment made on December 2, 2008. By late February 2009, defendant claimed that plaintiffs owed over $500,000. As a result, defendant sent a letter to plaintiffs informing them that the contracts were terminated as of March 5, 2009.

The trial court ordered DHL to file as a counterclaim its affirmative defense that plaintiffs owed it over $500,000. Plaintiffs moved for partial summary disposition on the question of liability. The trial court held that the contracts required DHL to provide domestic service. Because there was no dispute that defendant ceased domestic service in January 2009, the court granted plaintiffs' motion. The case then continued to a bench trial on the issues of damages and defendants' counterclaim.

Louis Meeks testified that he was the president and CEO of both TSS and TSSF. He testified that he had made extensive efforts to create a relationship with either Federal Express or UPS after DHL announced its cessation of domestic service. However, UPS was not interested in resellers, except for the very largest operations, and Federal Express was not interested at all. UPS would only enter into a relationship with TSS if it was *not* a reseller. TSS did manage to transfer approximately 3,000 of its customers from DHL to UPS, but that agreement was terminated shortly thereafter. The individual customers stayed with UPS, but TSS no longer earned money as an intermediary. Meeks pursued a variety of potential alternatives, but none of them panned out.

Given that in reality plaintiffs were unable to find a new business partner after the termination of the DHL contracts, plaintiffs based evidence of their lost profits on the assumption that DHL honored their contracts, but ceased extending them, such that the contracts would lapse in 2013, putting TSS and TSSF out of business at that time. Meeks described a number of expenses that were part of normal operations, such as special rewards for employees, membership in professional organizations, and entertaining clients, that could be cut back or eliminated if the company was soon to be shut down. When they learned that DHL was ending domestic service, Meeks and Scott Wayne cut their own salaries by 60%, cut the other managers' salaries by 20%, and eliminated Christmas bonuses and the usual Christmas party. As another example, Meeks testified that the companies could save money by no longer replacing aging equipment like computers. Similarly, there would be no need for sales personnel in the last year.

Plaintiffs' damages expert was Bruce Knapp, a licensed CPA with experience in business valuation and economic loss analysis. He reviewed TSS and TSSF's tax returns, as well as their detailed general ledger reports and financial statements for several years. He also considered the information given by Meeks regarding steps the plaintiffs would likely take in winding down their business. Knapp "normalized" certain incomes and expenses from previous years, which means making adjustments for items that were not likely to recur in the future. Knapp testified,

like Meeks, that it was fair and reasonable to eliminate certain expenses in the last year of the contract. He also testified that the owners could have chosen to pay themselves no salary, and thus did not include the salaries for Meeks or Scott Wayne in TSS's expenses, resulting in greater lost profits.[1] Together, Meeks and Wayne normally received around $400,000 per year in salary. TSS's pre-tax net income from 2004-2008, including deduction of the officer salaries for Meeks and Wayne, ranged from profits of $250,000-400,000 in 2005-2007 to a loss of $111,127 in 2008.

Knapp determined that the present value of TSS's lost profits amounted to $4,420,000, assuming the business would have been shut down, or $3,490,000 if it simply ran normally for the term of the contract. He also adjusted these numbers downward based on the amounts that plaintiffs admit they did not pay to DHL after DHL announced it would cancel all domestic service.

After trial but before the court rendered its findings, defendant moved to reopen the proofs, claiming it had found evidence in filings in another case that TSS was still a viable company with ongoing income. Plaintiffs submitted evidence that the other case did not involve TSS, but rather a separate entity that was using TSS's former office space, and that TSS's name was only mentioned because the dispute was with Consumers Energy, and TSS was still the lessee. The trial court refused to reopen the proofs, and rendered judgments in favor of plaintiffs of $3,617,789 for TSS and $287,522 for TSSF, largely adopting the testimony of plaintiffs' expert Knapp. The court later adjusted the award to TSS downward to $3,546,789, because of a mathematical error.

II. STANDARD OF REVIEW

"This Court reviews questions regarding conflicts of law de novo." *Burney v P V Holding Corp*, 218 Mich App 167, 171; 553 NW2d 657 (1996). We similarly review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). "The proper interpretation of a contract is a question of law, which we also review de novo." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). On the other hand, "[f]indings of fact by the trial court may not be set aside unless clearly erroneous." MCR 2.613(C). Substantial deference is accorded to the trial court, which has the opportunity to view the demeanor of witnesses and otherwise judge the credibility of evidence proffered. *Flynn v Korneffel*, 451 Mich 186, 191; 547 NW2d 249 (1996); MCR 2.613(C).

III. LIABILITY FOR BREACH

[1] Of the three owners, only Meeks and Scott Wayne received salaries from TSS.

Defendant first argues that the trial court erred in holding it liable for breaching the contracts with plaintiffs. Under both Michigan and Florida law,[2] summary disposition may be granted if the language of a contract is unambiguous. *SSC Associates Ltd Partnership v General Retirement Sys of the City of Detroit,* 192 Mich App 360, 363; 480 NW2d 275 (1991); *Dade County Sch Bd v Radio Station WQBA*, 731 So 2d 638, 643 (Fla 1999).

As defendant argues, one sentence of the contract suggests that defendant was free to cease service to any location if it so chose: "Shipments will originate at RESELLER customers' domestic locations at which DHL regularly provides collection service with its own personnel and will be delivered to any destination regularly serviced by DHL or its designated agents." This suggests that if DHL ceased regular service in any given area, it would no longer be required to collect or deliver there for plaintiffs. If one were to consider only this sentence, it would appear that defendant's argument is correct that it was not bound to pick up or deliver packages at any domestic location.

However, a contract must be read as a whole, and "isolated words and phrases are not determinative of the parties' intentions." *City Nat'l Bank of Miami v Citibank, N.A.*, 373 So 2d 703 (Fla Dist Ct App, 1979); see also *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 719; 706 NW2d 426 (2005) ("This Court is required to read contracts as a whole, giving harmonious effect, if possible, to each word and phrase."). Taken as a whole, the contracts between the parties clearly contemplate that defendant would provide domestic service. The contracts are titled "Reseller Agreement for U.S. Origin Domestic and International Service." The agreements require defendant to provide "services" to plaintiffs' customers, and defines services as "expedited international air express services . . . *and for domestic door-to-door air and ground express services* for documents and/or packages or freight being sent to various locations throughout the United States." (Emphasis added). Further, every reference to shipping refers to both international and domestic service. There is no indication that the parties intended to allow DHL to completely cease either domestic or international service. Reading the contracts as a whole and giving meaning to all of the words in the contract, defendant could likely cease service to a handful of specific domestic locations without breaching the contract, but could not completely stop all domestic service.

The trial court correctly held that defendant breached its contracts with plaintiffs when it unilaterally chose to cease all domestic service.

IV. CHOICE OF LAW AND OFFICERS' SALARIES

Defendant argues that the trial court erred by refusing to apply Florida law despite a contractual choice of law provisions clearly stating that Florida law controls any dispute between the parties. "It is undisputed that Michigan's public policy favors the enforcement of contractual . . . choice-of-law provisions." *Robert A. Hansen Family Trust v FGH Indus, LLC*,

[2] As discussed below, the contracts contained a choice of law provision specifying that Florida law governs the terms of the contracts. However, neither party suggests that there is any relevant difference between Florida and Michigan law when it comes to contract interpretation.

279 Mich App 468, 476; 760 NW2d 526 (2008). Nevertheless, the parties' choice of law may be ignored

> when it "would be contrary to the fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue, and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." [*Martino v Cottman Transmission Systems, Inc*, 218 Mich App 54, 60-61; 554 NW2d 17 (1996) (quoting Restatement (Second) of Conflict of Laws § 187(2)(b))].

In this case, the parties dispute whether Florida law is contrary to a fundamental Michigan policy and whether Michigan has a materially greater interest than Florida in the determination of this issue.

The trial court found that Michigan law differs from Florida law in its treatment of salary paid by a closely held corporation to an officer who is also one of the shareholders. Florida requires that any officer salary be deducted from a corporation's lost profits, regardless of whether the officer was also an owner. See, e.g., *Indian River Colony Club, Inc v Schopke Const & Engineering, Inc*, 592 So 2d 1185, 1187 (Fla Dist Ct App, 1992) (holding that supervisory salary is an expense of doing business, and must therefore be deducted from any calculation of lost profits); *Southern Bell Tel & Tel Co v Kaminester*, 400 So 2d 804, 807 (Fla Dist Ct App, 1981) (holding that officer salaries are an expense of business, and may not be disregarded simply because it would suit the officer-owner). The trial court held that Michigan allows the deduction of salaries paid to officer-owners.

In *Om-El Export Co, Inc v Newcor, Inc*, 154 Mich App 471, 480; 398 NW2d 440 (1986) and *Davidson v GMC (On Rehearing)*, 136 Mich App 203, 207; 357 NW2d 59 (1984) this court held that single-owner corporations need not deduct from their lost profits any amounts for salaries normally paid to the sole owner. Instead, the court held that the sole shareholder "is entitled to damages based on all benefits which would have flowed to him through the corporate form absent defendant's breach of contract." *Davidson*, 136 Mich App at 207; see also *Om-El*, 154 Mich App at 480. In *Om-El*, the plaintiff was wholly owned by one man, who provided services to clients. The court concluded that the defendant would be unjustly enriched if the trial court deducted the owner's salary from the corporation's profits. 154 Mich App at 478-480.

The rationale of those cases does not, however, extend to the present case. In the present case, the plaintiffs were closely held entities, but they had three owners instead of only one. *Om-El* and *Davidson* were based in part on the idea that the corporate entities involved were alter-egos of their respective sole shareholders, but that cannot be the case here. Further, only two of the owners worked as officers and drew salaries, suggesting that the salaries should have been related to actual work performed because otherwise the third partner would be cheated out of part of his share of the profits. TSS did not distribute all of its excess income as officer salaries, but showed a profit most years. Thus, plaintiffs in this case had independent existence apart from their shareholders. In these circumstances, under Michigan law, plaintiffs may only recover their own lost profits, not the officers' lost salaries, particularly given that the officers had the opportunity to find other employment once plaintiffs ceased operation. The trial court

erred in holding that Michigan law produces a different outcome than Florida law in this case, which in turn means that the trial court should have honored the parties' choice of Florida law.

On remand, the trial court shall recalculate damages, deducting from plaintiffs' lost profits the salaries that would have been paid to Meeks and Scott Wayne.[3]

V. CALCULATION OF LOST PROFITS

Defendant alleges a number of other defects in the trial court's calculation of plaintiffs' damages. However, we find that the trial court did not clearly err in its calculation of plaintiffs' damages, and correctly applied the law with the exception of the officer salaries discussed above.

Defendant asserts that the calculations performed by Bruce Knapp, plaintiffs' damages expert, were not a real lost profit analysis and that they were improperly based on a hypothetical situation that never happened. However, any calculation of lost profits necessarily concerns a hypothetical situation in which the plaintiff continued to earn profits. Further, since the parties knew that DHL wished to withdraw from the domestic shipping market (and in fact had done so), it made perfect sense for Knapp to assume that DHL would not have extended its contracts with plaintiffs, and that plaintiffs would then have run their businesses accordingly. While Knapp acknowledged that his calculations were different than a normal lost profit calculation, they are nonetheless a calculation of the profits that plaintiffs would have earned under the most likely scenario in which DHL did not breach the contracts. Defendant misrepresents the record when it claims that Knapp admitted he had not performed a lost profits calculation. Further, Knapp also prepared a traditional calculation based on the assumption that the contracts were performed under business as usual. The trial court was free to find it more credible that plaintiffs would wind down their business rather than continuing as if nothing were amiss until the contract expired.

Defendant argues that the trial court should have discounted the numbers provided by Knapp, because Knapp calculated lost profits as of January 1, 2009, while DHL did not cease providing domestic service until January 30. There is no clear error. While it is undisputed that some domestic shipping continued during January 2009, there is no evidence in the record that TSS was profitable during this period. Defendant's argument presumes that business continued as usual until January 30, 2009, but there is evidence in the record that the announcement had an immediate impact on TSS's business, particularly after DHL ceased guaranteeing delivery dates as of November 18, 2008. There was evidence that TSS did not make a profit during January of 2009, and there was evidence that under normal circumstances it would have been profitable. The trial court did not clearly err by granting damages for this period.

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[3] This does not mean that the trial court is required to deduct the full amount of Meeks and Scott Wayne's usual salary from the damages. As noted above, Meeks and Wayne cut their own salaries when faced with DHL's cancellation of the contracts. On remand, the trial court may conclude that they would have done the same in the wind-down scenario described by Meeks and Knapp at trial.

Defendant also challenges the accuracy of Knapp's assumptions and numbers. However, Knapp explained his methodology in court, and defendant misstates the record by claiming that Knapp "could not explain" how he derived certain numbers in court or that he admitted using the wrong growth rate. Knapp stated that he could not find growth projections for UPS and Fed Ex, but that historically their growth rates closely tracked the GDP, and so he used the projected GDP growth rate in his calculations. Similarly, he explained his reasoning for his calculation of revenue and normalization adjustments. He testified that he did, in fact, subtract earlier revenue that TSS received from UPS when calculating revenue, though defendant claims otherwise on appeal. He also explained the basis of his discount factor.

Defendant did not generally object to the admission of Knapp's testimony at trial, and the court did not abuse its discretion in admitting it. Defendant's arguments on these points go to whether its own expert was more credible, but the trial court considered the testimony and found Knapp to be a more credible witness. Given this Court's deference to the trial court's ability to judge the credibility of witnesses, the trial court did not clearly err in its factual findings on these points. There is no need for a new trial on the question of damages.

Defendant also argues that TSSF (the smaller entity set up later to sell franchises) should not have been awarded any damages because it was never profitable, and is not entitled to reliance damages for investment in its business because it did not treat the contract as void. Both sides' experts reached similar conclusions about TSSF's damages, within $2,000 of each other. The damages were calculated to give TSSF back the money that it would not have invested in the business if it had known that DHL was about to cease shipping domestically. Defendant cites *Resorts Int'l, Inc v Charter Air Center, Inc*, 503 So 2d 1293 (Fla Dist Ct App 1987) and argues that TSSF is not entitled to reliance damages because it continued to take advantage of defendant's shipping services even after defendant ceased domestic services. However, the case does not stand for that proposition.

The *Resorts* Court stated, "A party is entitled to recover, as against the breaching party, the profits lost as a result of the breach or, in the alternative, the non-breaching party may treat the contract as void and seek to recover those expenditures made in reliance upon the performance of the contract." *Id.* at 1296 (citing *Beefy Trail, Inc v Beefy King Int'l, Inc*, 267 So 2d 853 (Fla Dist Ct App 1972). Defendant focuses on the court's use of the phrase "treat the contract as void" and argues that TSSF did not treat the contract with DHL as void. However, it appears from *Resorts* and *Beefy* trail that there is no requirement that the plaintiff immediately cease all performance of the contract. Rather, the court was simply stating that instead of trying to recover lost profits the plaintiff could choose to recoup lost expenses. *Resorts*, 503 So 2d at 1296; *Beefy Trail*, 267 So 2d at 856.

Neither case discusses whether the plaintiff immediately ceased operations, instead emphasizing only that this remedy may not be pursued simultaneously with lost profits. There is no reason to pounce on the use of the phrase "treat the contract as void" as meaning that, when faced with a breach, a plaintiff must immediately cease all performance under the contract or risk losing any right to recover damages. *Resorts* cites *Beefy Trail* for its authority for the language at issue, and the latter case did not discuss the plaintiff's continued performance, nor did it use any similar language that would support defendant's reading of *Resorts*. Therefore, defendant's reading of *Resorts* is not persuasive.

In the present case, TSSF sought only its reliance damages, and both parties' experts only gave testimony related to reliance damages. Therefore, TSSF did not run afoul of the rule expressed in *Resorts* and *Beefy Trail*, and the trial court did not err in granting TSSF its reliance damages.

VI. CONCLUSION

Although the trial court erred in applying Michigan law despite the parties' free choice of Florida law, the trial court correctly held that defendant was liable for breach of contract. Further, its award of damages was not clearly erroneous, except for the failure to deduct Meeks's and Scott Wayne's salaries from TSS's lost profits.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause