STATE OF MICHIGAN

COURT OF APPEALS

FUN FEST PRODUCTIONS, INC., Plaintiff-Counterdefendant-Appellant,	UNPUBLISHED August 14, 2012
v	No. 303980 Macomb Circuit Court
GREATER BOSTON RADIO, INC., d/b/a GREATER MEDIA DETROIT, Defendant-Counterplaintiff-Appellee.	LC No. 2010-000081-CK

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

In this breach of contact action, plaintiff appeals as of right from the trial court's judgment awarding defendant $73,742.03 in accordance with the court's earlier opinion and order granting defendant summary disposition on count I of its counter-complaint and dismissing plaintiff's claims. We affirm.

I. BASIC FACTS AND PROCEDURE

On October 4, 2006, the parties entered into a marketing and promotion agreement that provides, in pertinent part:

> Funfest Productions engages Greater Boston Radio, Inc., doing business as WRIF, WCSX, WMGC-FM, and also as Greater Media Detroit ("Greater Media Detroit" or "Stations"), to assist in implementing the promotion described in Section 3 below and in the Exhibits attached hereto and made a part of this agreement, and known as The 4th of July Weekend in Mt. Clemens (the "Promotion"). Greater Media Detroit and Funfest Productions each shall manage and perform all tasks reasonably necessary to fulfill their respective obligations under this agreement. Funfest Productions authorizes Greater Media Detroit to take such action and to perform such services on its behalf as are reasonably necessary for Greater Media Detroit to fulfill its obligations hereunder.
>
> Funfest Productions acknowledges and agrees that, upon the execution of this agreement by both parties, Greater Media Detroit will be the exclusive

provider to Funfest Productions in the broadcast media industry of the services described in this agreement and in the Exhibits, solely with respect to the Promotion. Funfest Productions agrees that it will not engage in the Promotion or any substantially similar promotion without (a) paying Greater Media Detroit the Promotion Fee described below, and (b) giving Greater Media Detroit the first opportunity to execute the Promotion or substantially similar promotion.

The agreement commenced on October 4, 2006, and was to continue through August 1, 2011. The agreement set out the following obligations and services for the parties:

Greater Media Detroit Obligations and Services

In order to develop, promote, and execute the Promotion, Greater Media Detroit agrees to (a) use the media and promotional materials and (b) provide the development and execution services set forth on Exhibit A to this agreement.

Funfest Productions Obligations and Services

In order to facilitate the development, promotion, and execution of the Promotion, Funfest Productions agrees to provide the products and services set forth on Exhibit B to this agreement. In addition, Funfest Productions will use its best efforts to promote the Promotion to its principals and trade accounts, and shall include Greater Media Detroit, if appropriate, in any presentations and negotiations with respect to the Promotion.

Exhibit A was entitled "Promotion Concept" and provides:

A three day outdoor event in Mt. Clemens over the 4th of July weekend that is free to the public and includes the following: food, beverages (alcoholic and non-alcoholic), entertainment, concerts, fireworks (on Friday), art exhibits, vendors, carnival rides, etc.

Event/Promotion Partnership Agreement Terms:

Except as otherwise set forth below, the parties will participate in a 65 (Funfest Productions)/35 (Greater Media Detroit) split on all revenue and expenses.

Expenses

Entertainment Budget	$150,000.00
Production Cost	$50,000.00
Police	$45,000.00
Clean Up	$15,000.00
Port a Jons	$6,500.00
Generators	$7,500.00
Tents	$6,000.00
Misc. Labor	$10,000.00
Product Cost (Beer and Pop)	$75,000.00

Less Charity 10% $30,000.00

Total estimated expenses for event: $395,000
Funfest Productions responsible for 65% of event expenses.
Greater Media Detroit responsible for 35% of event expenses which totals to approximately $138,250 to be paid in 4 installments of $34,562.50. Funfest Productions must obtain Greater Media Detroit's prior written approval for all expenses that exceed the specific budgeted amount. Greater Media Detroit will continue to be responsible for its 35% share of all expenses that exceed the estimate set forth above, provided it has approved such expenses in writing in advance.

Payment Dates:
February 5, 2007
March 5, 2007
April 9, 2007
May 7, 2007

Revenue

Funfest Productions will receive 65%, and Greater Media Detroit will receive 35%, of all profits brought in from

- VIP tent sale
- vendor space sold by Funfest Productions
- parking
- carnival rides percentage
- beverages sales
- food sales
- beer sponsorship
- Any advertiser sponsorships sold by Funfest Productions

Greater Media Detroit will receive 65%, and Funfest Productions will receive 35%, of any advertising sponsorships sold by Greater Media Detroit provided, however, that in no event shall Funfest Productions receive less than $40,000 under this provision, regardless of the total revenue received.

Stations will provide: Promotional mentions, website exposure, live broadcasts [Underlining and bold in original.]

The "standard terms and conditions" section of the agreement contains the following provisions concerning breach and termination:

2. Breach: Either party shall be in breach of this agreement if it fails to comply with any material term or provision of this agreement or if the Promotion is canceled as the result of an act or omission of such party. If Funfest

> Productions breaches this Agreement, any amounts due under paragraph 3 below shall become immediately due and payable.
>
> 3. Termination: Either party may terminate this agreement in the event of a breach by the other party, provided that such breach is not cured within 30 days following receipt by the breaching party of written notice of the breach. If Funfest Productions directs Greater Media Detroit to terminate a previously authorized transaction, Funfest Productions will be responsible for payment of any costs incurred or committed to be incurred (which are not cancelable) with respect to that transaction. Any termination hereunder shall not extinguish either party's rights or obligations under this agreement that accrued prior to the date of termination and remain outstanding thereafter (including, without limitation, Funfest Productions's [sic] obligation to pay for noncancelable commitments entered into by Greater Media Detroit as provided in the previous sentence, the indemnification of the parties, and the license and use restrictions set forth herein).

The 2007, 2008, and 2009 festivals were held. Although no installment payment dates were established for the years following 2007, it appears that defendant paid the installment payments at roughly the same time of the year as the 2007 schedule, until defendant was late in making the first payment in 2009, prompting plaintiff to send written notice on February 20, 2009 to defendant that it was in breach of contract by its failure to pay. Defendant then made the payment on March 10, 2009.

Plaintiff did not remit defendant's share of the profits from the 2009 event. Plaintiff instead placed the money owed to defendant in an escrow account, allegedly to set off against amounts that plaintiff believed owing to it by defendant. Plaintiff then filed suit in early 2010, alleging that defendant had been in breach of contract since early 2009 by failing to make timely payments and failing to make reasonable efforts to sell advertising sponsorships for the 2009 promotion, and that defendant refused to agree to a reasonable budget for the 2010 promotion and refused to commit to making installment payments in 2010. Plaintiff also alleged that defendant had falsely represented that it would promptly make installment payments to plaintiff, that it would make reasonable efforts to sell advertising sponsorships for the promotion, and that it would undertake certain actions to promote the promotion.

Also in early 2010, defendant formally gave written notice to plaintiff that it was in breach of the agreement. Defendant also answered plaintiff's complaint and counterclaimed for breach of contract, conversion, unjust enrichment, and an accounting. Defendant alleged that plaintiff had breached the agreement by, among other things, failing to pay amounts from the 2009 promotion after plaintiff acknowledged that the money was owed. Defendant thus alleged that it had properly terminated the agreement pursuant to its termination clause.

Defendant moved for summary disposition on plaintiff's breach of contract claim, as well as on the breach of contract and conversion claims of its counterclaim. Plaintiff opposed and moved for summary disposition on its breach of contract claim and defendant's counterclaim in its entirety. The trial court denied plaintiff summary disposition on its breach of contract claim, but granted summary disposition to plaintiff on defendant's conversion, unjust enrichment, and

accounting claims. The trial court granted summary disposition to defendant on its breach of contract claim and dismissed plaintiff's breach of contract claim. The trial court then granted defendant a judgment against plaintiff in the amount of $73,742.03.

II. PLAINTIFF'S BREACH OF CONTRACT CLAIM

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant on plaintiff's breach of contact claim. We review the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 120. In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), the court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. Summary disposition is appropriate where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*.

The interpretation of a contract is a question of law that we review de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005).

The essential elements of a valid contract are: (1) parties competent to contract, (2) proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). In interpreting a contract, this Court's obligation is to determine the intent of the contracting parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). If the language of the contract is unambiguous, we construe and enforce the contract as written. *Id*. If the language of a contract is ambiguous, courts may consider extrinsic evidence to determine the intent of the parties. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). A contract is ambiguous when two provisions irreconcilably conflict with each other or when a term is equally susceptible to more than a single meaning. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

Plaintiff's breach of contract claim alleged, in part, that defendant breached the parties' agreement by failing to make timely installment payments, and that it suffered injury from defendant's failure to do so. Although the agreement provided that its term ran from October 4, 2006, through August 1, 2011, it only specified payment dates on February 5, 2007; March 5, 2007; April 9, 2007; and May 7, 2007. The agreement did not specify payment dates for subsequent years. We conclude that the contract was not ambiguous, but rather was simply silent regarding dates for payment in future years. "[W]hen a contract is silent as to time of performance or payment, absent any expression of a contrary intent, the law will presume a reasonable time." *Jackson v Green Estate*, 484 Mich 209, 217; 771 NW2d 675 (2009). "It is a general rule of law that where no time is stipulated, a reasonable time will be presumed. Reasonable time depends upon the facts and circumstances of each case." *Id*.

Considering the nature of the contract and the particular circumstances of the parties, and the testimony of defendant's director of sales and defendant's market manager, a "reasonable time" for defendant's payments would be four installment payments made at approximately the

same time each year, that being the first week of February, March, April and May, provided that the promotion was successful and the parties desired to continue the endeavor. The breach provision of the agreement provides that "[e]ither party shall be in breach of this agreement if it fails to comply with any material term or provision of this agreement or if the Promotion is canceled as the result of an act or omission of such party." Accordingly, there is no genuine issue of material fact that defendant was obligated to pay at approximately the same time each year and that it breached the contract by failing to timely make payment in February 2009.

We further agree with the trial court that "even if the contract language is . . . ambiguous and interpreted in plaintiff's favor to provide that payments were due the same day each year, . . . defendant cured this breach by making the payment within 30 days and plaintiff accepted this payment." The termination provision of the agreement provides that "[e]ither party may terminate this agreement in the event of a breach by the other party, provided that such breach is not cured within 30 days following receipt by the breaching party of written notice of the breach." The submitted evidence establishes that plaintiff notified defendant that it had breached the agreement by failing to tender payment in February 2009, and that defendant subsequently cured the breach by tendering payment within 30 days of the written notice of the breach. Thus, there is no genuine issue of material fact that defendant cured any breach by making payment within 30 days of receiving notice of the breach.

The trial court further ruled that "plaintiff waived any alleged breach regarding the first installment payment by accepting defendant's payment, the three remaining payments, and proceeding with the 2009 festival." The trial court cited *Quality Products*, 469 Mich at 364-365, for the proposition that waiver of contract rights is "established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract." In this case, the parties' agreement provided that it "may be amended or supplemented only by a written instrument signed by the parties hereto." Here, the parties did not amend or supplement their agreement with a written instrument. However, *Quality Products* also holds that "parties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause." *Id.* at 364. The evidence shows that defendant tendered, and plaintiff accepted, the late payment of the February 2009 installment and all subsequent installment payments for 2009. Thus, there is no genuine issue of material fact that the parties mutually waived defendant's breach relating to the February 2009 payment.

The trial court further found that plaintiff failed to establish any damages as a result of the untimely payment. We agree. Plaintiff did not submit any factual support for its claim that its reputation was damaged by defendant's late payment. Although the evidence shows that defendant's untimely installment payment in 2009 caused plaintiff to make late payments to various bands and performers, none of the bands, performers, or vendors refused to do business with plaintiff as a result. Viewing the evidence in a light most favorable to plaintiff, plaintiff has not established a genuine issue of material fact regarding damages as a result of defendant's breach of the agreement by failing to timely make the February 2009 installment payment.

Plaintiff argues that the trial court erred by focusing solely on whether defendant breached the agreement in 2009 because the 2009 Promotion was not the basis for its breach of contract claim. Plaintiff argues that it filed this suit in January 2010, based on defendant's

anticipatory breach of the 2010 payments. However, the trial court found that due to plaintiff's breach of the agreement by failing to pay defendant revenue from the 2009 Promotion, defendant was excused from making any installment payments for the 2010 event. The termination clause of the parties' agreement provides that "[e]ither party may terminate this agreement in the event of a breach by the other party, provided that such breach is not cured within 30 days following receipt by the breaching party of written notice of the breach." As discussed in Section II, *infra*, we conclude that plaintiff breached the agreement by failing to pay defendant revenue from the 2009 Promotion. Defendant notified plaintiff of the breach in writing in early 2010. Plaintiff failed to cure this breach within 30 days of receipt of that notice. Thus, defendant was free to, and did, terminate the agreement pursuant to the termination provision. Accordingly, there is no basis for plaintiff's claim that defendant breached the agreement in 2010.

Plaintiff also argues that the trial court erred in rejecting its claim that defendant breached the agreement by failing to use its "best efforts" to sell sponsorships. Plaintiff's breach of contract claim alleged, in part, that defendant breached the agreement by failing to make reasonable efforts to sell advertising sponsorships for the Promotion and otherwise promote the Promotion and that it suffered injury, including a reduction in the revenues it would have received had defendant fulfilled its contractual obligations. The trial court found that the clear and unambiguous language of the agreement did not require a minimum amount of advertising sponsorship sales or a best effort requirement. We agree. The relevant contract language provides:

> Greater Media Detroit will receive 65% and Funfest Productions will receive 35% of any advertising sponsorships sold by Greater Media Detroit[sic] provided, however, that in no event shall Funfest Productions receive less than $40,000 under this provision, regardless of the total revenue received.

The plain language of the agreement thus provides that defendant will receive 65 percent, and plaintiff will receive 35 percent, of any advertising sponsorships sold by defendant. The use of the term "any" in relation to the amount of advertising sponsorships presupposes that the amount could be zero. Indeed, the event producers both agreed that the contract did not set any minimum sponsorships that defendant was required to sell. The agreement specifies that in no event shall plaintiff receive less than $40,000, regardless of the total revenue received. This disclaimer protects plaintiff in the event that defendant sold advertising sponsorships less than that which would net plaintiff $40,000. The plain language of the agreement contains no provision for defendant to use its best efforts to sell sponsorships. The parties could have included a best efforts clause in relation to defendant's obligations, but they did not do so. Plaintiff instead chose to protect itself by ensuring that it would receive a minimum amount regardless of the number of sponsorships sold. The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). Because the agreement contains no best efforts requirement for defendant to sell sponsorships and it is undisputed that plaintiff received at least the minimum amount of $40,000 required by the agreement, the trial court properly dismissed plaintiff's claim.

In sum, the trial court did not err in determining that defendant was entitled to summary disposition on plaintiff's breach of contract claim.

III. DEFENDANT'S BREACH OF CONTRACT CLAIM

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant on defendant's breach of contract counterclaim. We disagree.

The parties' agreement provides that plaintiff will receive 65 percent, and defendant will receive 35 percent, of all profits, but does not specify a time for plaintiff to pay defendant its share of the revenue. Plaintiff determined that defendant was due a balance of $73,742.03 from the 2009 Festival. Although it is undisputed that plaintiff never paid that amount to defendant, plaintiff contends that it did not breach the agreement because the agreement does not specify a date by which payment was due.

The contract is silent regarding a time for plaintiff to pay defendant; we therefore presume a reasonable time for payment, depending on the facts and circumstances of the case. *Jackson* 484 Mich at 217. The trial court found that no reasonable trier of fact could conclude that plaintiff's failure to pay defendant its portion of the revenue from the 2009 event was reasonable and that a reasonable time for the revenue payment for the 2009 event would be before defendant was required to begin making installment payments for the 2010 event. The trial court concluded that plaintiff breached the agreement by failing to make the 2009 revenue payment within a reasonable time of the 2009 event. We agree.

The 2009 Festival took place over the weekend preceding the Fourth of July. Five months later, in November 2009, plaintiff acknowledged that it owed defendant $73,742.03 in revenue, and promised to pay that amount to defendant within 30 days, yet failed to do so. It is evident that plaintiff failed to pay revenue from the 2009 event to defendant within a reasonable time. There is no basis for concluding that a reasonable time for plaintiff to pay the 2009 revenue would have been sometime after defendant was to make installment payments of seed money for the 2010 event beginning in February 2010, especially when defendant notified plaintiff in January of 2010 that it considered plaintiff in breach of the agreement for failure to pay the amount it had agreed to pay in November. Accordingly, the trial court did not err in determining that defendant was entitled to summary disposition on its breach of contract counterclaim.

IV. MOTION FOR RELIEF FROM JUDGMENT

Plaintiff next argues that the trial court abused its discretion by denying its motion for relief from judgment on the ground that defendant's judgment and favorable summary disposition ruling was obtained through fraud, misrepresentation, and/or misconduct in contravention of MCR 2.612(C)(1)(c). Specifically, plaintiff alleges that defendant underreported, or failed to report, revenue it received for the sale of various sponsorships for the 2008 and 2009 Festivals. We review a trial court's decision on a motion for relief from judgment for an abuse of discretion. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002). An abuse of discretion occurs when a trial court's decision is outside the range of reasonable and principled outcomes. *Moore v Secura Ins*, 482 Mich 507,

516; 759 NW2d 833 (2008). MCR 2.612(C)(1)(c) provides that "[o]n motion and on just terms, the court may relieve a party . . . from a final judgment, order, or proceeding on the . . . grounds [of] [f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

The record does not support plaintiff's allegations of fraud, misrepresentation, or other misconduct on the part of defendant. Rather, the record reveals that plaintiff's claims of underreported or unreported revenue are explained by bookkeeping differences and recordkeeping mistakes on the part of both parties. The majority of plaintiff's specific allegations of underreported revenues are not supported by documentary evidence. The trial court found that revenue from various vendors was properly credited to plaintiff or that defendant had demonstrated that it did not receive revenue from certain vendors. These conclusions are supported by the record, which is devoid of any evidence that defendant engaged in deliberate fraud, misrepresentation, or misconduct. The record supports the trial court's conclusion that plaintiff's evidence did not establish that defendant engaged in fraud, misrepresentation, or misconduct. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion for relief from judgment.

V. DISCOVERY SANCTIONS

We also reject plaintiff's argument that the trial court abused its discretion by declining to impose discovery sanctions on defendant. We review a trial court's decision whether to impose discovery sanctions for an abuse of discretion. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 21; 697 NW2d 913 (2005). Plaintiff argues that sanctions are appropriate under MCR 2.313(B)(2)(b), which provides, in pertinent part:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may order such sanctions as are just, including, but not limited to . . . an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence[.]

Specifically, plaintiff alleges that defendant failed to produce requested documents and failed to comply with the trial court's discovery order. The record reveals that plaintiff moved to compel defendant's production of documents and depositions, and the parties stipulated to an order extending discovery through December 31, 2010, and requiring defendant to produce specified non-privileged documents by January 10, 2011, which it did.

"[B]ecause sanctions are discretionary, the trial court must carefully consider the circumstances of the case before it." *Id*. The trial court found that each side failed to comply with certain discovery obligations, that plaintiff repeatedly failed to timely initiate discovery, and that defendant did not provide proper exceptions. However, the trial court found no evidence that defendant engaged in a flagrant or wanton refusal to facilitate discovery and that, despite discovery problems attributable to both parties, none were severe enough to award sanctions. There is no indication in the record that defendant willfully failed to provide information to plaintiff. The record reveals that discovery was extended by stipulation of the parties and that defendant thereafter complied with plaintiff's requests. The trial court concluded that the issues

with discovery in this case were resolved by the stipulated order. Under these circumstances, the trial court's determination that sanctions were not warranted was not an abuse of discretion.

We also agree that sanctions were not warranted under MCR 2.114. We review a trial court's decision whether to impose sanctions under MCR 2.114 for clear error. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). A decision is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Id*. Plaintiff argues that defendant's counterclaim and motion for summary disposition were signed in violation of MCR 2.114(D), because they were not well grounded in fact or warranted by existing law. In *Guerrero*, this Court explained:

> Pursuant to MCR 2.114(D), an attorney is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed. Under MCR 2.114(D), the signature of a party or an attorney is a certification that the document is "well grounded in fact and . . . warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law" and that "the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." The filing of a signed document that is not well grounded in fact and law subjects the filer to sanctions pursuant to MCR 2.114(E). MCR 2.114(E) states that the trial court "shall" impose sanctions upon finding that a document has been signed in violation of the rule. Therefore, if a violation of MCR 2.114(D) has occurred, the sanctions provided for by MCR 2.114(E) are mandatory. [*Id*. at 677-678 (internal citations omitted).]

A review of the record reveals that defendant did not underreport or fail to report revenue. Moreover, plaintiff admitted that it owed defendant $73,724.03 for its share of the 2009 Festival. Accordingly, defendant's counterclaim for that amount was well grounded in fact. Because there was no violation of MCR 2.114(D), sanctions under MCR 2.114(E) are not warranted and the trial court did not clearly err in declining to impose them.

We affirm. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ Donald S. Owens
/s/ Mark T. Boonstra