

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

JMR Marine Consulting LLC dba
Treasure Cove Marina

Court of Appeals No. OT-16-024

Trial Court No. 14 CV 109

Appellant

v.

The Liberty Aviation Museum, Inc., et al.

DECISION AND JUDGMENT

Appellee

Decided: June 30, 2017

* * * * *

Danielle C. Kulik and Geoffrey L. Oglesby, for appellant.

Jeffrey L. Kocian, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a December 22, 2015 judgment of the Ottawa County Court of Common Pleas, awarding appellee, Liberty Aviation Museum Inc., et al. (“LAM”) judgment in the amount of \$44,692.35 following the trial in the underlying

litigation stemming from disputes arising in the course of appellant's partial restoration of a historic wooden World War II PT boat owned by appellee. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, JMR Marine Consulting LLC dba Treasure Cove Marina ("JMR"), sets forth the following three assignments of error:

1. WHEN SEVERAL PARTS MAKEUP AN AGREEMENT AND THE COMPLETION OF A PART OF THE AGREEMENT IS BY INVOICE THAT IS ACCEPTED, REVIEWED AND PAID BY THE OWNER, THE COURT CANNOT RETROACTIVELY REDO THE AGREEMENT BY FINDING THAT THE PARTY OVERBILLED WHEN THE BILLS WERE ACCEPTED AND PAID AND THERE WAS NO FRAUD INVOLVED.

2. THE COURT ERRED IN ALLOWING AN EXPERT TO TESTIFY AS AN EXPERT IN CONSIDERING THE EXPERT ['] S OPINIONS WHEN APPELLEE FAILED TO PROVE FRAUD.

3. THE COURT ERRED IN RELYING ON DEFENDANT'S TESTIMONY OVER WHAT WAS IN THE CONTRACT.

{¶ 3} The following undisputed facts are relevant to this appeal. LAM, an Ohio aviation museum, acquired a historic wooden World War II PT boat in the fall of 2012 at a New York auction for purposes of having the unique 72-foot war boat restored in compliance with current Coast Guard regulations with the long term objective of the boat being utilized as a revenue generating passenger boat on Lake Erie.

{¶ 4} During September 2012, LAM transported the newly acquired boat to JMR's marina for purposes of storage that winter and commencement of the restoration of the boat for usage as a coast guard compliant passenger vessel. Given the uniqueness of this endeavor, involving the full restoration of an approximately 75-year-old wooden boat, the parties concurred that the project was not conducive to specific cost estimates or precise time of completion estimates. For the 2012 winter storage, LAM paid JMR storage fees of approximately \$17,000.

{¶ 5} Several months after the project commenced, disputes began to surface between the parties in connection to various business practices of JMR. In response to these disputes, an in-person meeting was conducted between the parties on December 5, 2012, in order to address various points of contention that had arisen.

{¶ 6} For example, the agreement between the parties was that LAM agreed to pay JMR a markup on parts utilized in the project of 20%. However, LAM observed that some initial invoices contained parts markups of 40%, double the agreed-upon margin. In addition, LAM observed some troublesome discrepancies in the labor portions of the billing documentation. For example, LAM was charged \$4,500.00 in one invoice for labor allegedly performed by a worker who was actually out of town and performed no work on the project during the timeframe encompassed by the disputed JMR labor invoice.

{¶ 7} In addition, LAM objected to being charged both for "shop fees" and again charged, separately for "storage space". Both charges appeared to be for the same service

and LAM opposed the double-billing. LAM directly conveyed this objection to JMR at the meeting. In response to the objection by LAM, JMR responded, “Yes, Karl was wrong with this bill. I have recalculated the bill.”

{¶ 8} Following lengthy discussions between the parties at the meeting regarding a multitude of disagreements in connection to JMR’s billing practices and documentation discrepancies suggesting a pattern of overcharging and double-billing, the meeting concluded with JMR obliquely stating, “Guys clock in and out, we check on them, I monitor, I can put in cameras, but I can only watch so much.” Appellee plainly replied, “Hours billed in progress of work do not match. I should not have to watch that closely.”

{¶ 9} Restoration work on the boat continued over the course of the next year. Despite the December 5, 2012 meeting and frank discussion between the parties, objections arose once again in regards to JMR’s billing practices. LAM again became alarmed after it scrutinized JMR’s billing documentation and determined based upon incontrovertible inconsistencies and discrepancies that it was being systematically overbilled for both parts and labor.

{¶ 10} Subsequently, restoration work on the boat by appellant ceased. At that juncture LAM had already paid \$1,616,170.53 towards the restoration project by JMR that remained incomplete.

{¶ 11} Additional efforts between the parties to resolve their disputes connected to JMR’s business practices and billing actions were unsuccessful. On April 2, 2014, JMR filed suit against LAM alleging that despite the breakdown of the incomplete project

based upon billing irregularities, LAM nevertheless owed an additional \$121,823.81 to JMR. On April 9, 2014, LAM filed an answer and counterclaim. On April 11, 2014, LAM deposited the amount demanded by JMR with the clerk of courts pursuant to an interpleader order.

{¶ 12} On December 7, 2015, a two-day trial, conducted by a visiting judge from Lucas County, commenced. The record reflects that during the course of trial voluminous documentation, in excess of 10,000 items, were presented to the court. The documentation encompassed a multitude of invoices, receipts and additional documentation in connection to parts, materials and labor allegedly utilized and performed in the course of the project.

{¶ 13} Notably, the trial court concluded, and this court concurs, that the subject records produced and maintained by JMR in the course of this project were extremely muddled and substandard.

{¶ 14} At trial, JMR maintained that LAM still owed an additional \$108,494.60 in connection to the boat restoration project, as reduced from JMR's original claim of an additional \$121,823.81 being owed.

{¶ 15} Conversely, at trial, LAM presented the testimony of expert witness Timothy Mayles, a CPA at a Sandusky, Ohio accounting firm. The record reflects that Mayles is a certified public accountant, a certified financial forensic accountant, and a certified fraud examiner.

{¶ 16} Mayles furnished testimony detailing his extensive examination of the relevant documentation in order to determine whether LAM had been overcharged by appellant for parts, labor, and storage fees. LAM's expert witness testified that based upon his review of the matter and accompanying calculation, JMR had overcharged LAM in the amount of \$189,672.96.

{¶ 17} The record reflects, consistent with the conclusion of the trial court, that LAM repeatedly requested that JMR modify its accounting and billing documentation and practices to make them more detailed, precise, and reliable. The record reflects that JMR did not do so. The record is unclear regarding whether JMR's substandard practices and documentation, resulting in insurmountable ambiguities, was rooted in negligence or if it was by design. As such, the trial court further concluded that the evidence did not demonstrate whether or not an intent to defraud had caused the overcharges.

{¶ 18} Following the 2-day trial and an exhaustive examination of the evidence by the visiting judge, during which the trial court painstakingly assessed the voluminous documents submitted, in conjunction with consideration of the additional testimony and evidence, the trial court performed the requisite calculations necessary from the discrepancies in parts, materials and labor charges. The documentation reflected overcharges such as appellee being billed for labor hours not actually performed on the subject boat, being billed for parts not used in this project, and being overbilled for the parts that were used.

{¶ 19} Ultimately, the trial court concluded that LAM was entitled to a judgment of \$31,879.35 arising from labor overcharges. The trial court further found that LAM

6.

was entitled to a judgment of \$12,813.00 for parts and materials overcharges.

Accordingly, the trial court entered judgment in favor of LAM in the amount of \$44,692.35. Lastly, the trial court released the \$121,823.81 that had been deposited by LAM at the onset of the litigation. This appeal ensued.

{¶ 20} The standard of review for manifest weight is the same in a civil case as in a criminal case. It must be determined whether the greater amount of credible evidence supports the trial court determination. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12. The appellate court must review the record, weigh the evidence and all reasonable inferences, consider witness credibility and decide, in resolving conflicts in the evidence, whether the trial court clearly lost its way such that a manifest miscarriage of justice occurred. *State v. Prescott*, 190 Ohio App.3d 702, 2010-Ohio-6048, 943 N.E.2d 1092, ¶ 48 (6th Dist.).

{¶ 21} In the first assignment of error, JMR maintains that the trial court erred in its determination that overbilling had occurred. In support, JMR suggests that the overbilling finding was improper given that LAM had cooperated in paying the incremental invoices presented by JMR prior to the irreconcilable differences that arose and the cessation of work. JMR further suggests that because the trial court found insufficient evidence to demonstrate fraudulent intent underlying the overbilling, therefore the finding of overbilling is somehow necessarily compromised. We do not concur.

{¶ 22} JMR's argument appears to be rooted in the misguided notion that LAM's initial cooperation in paying the invoices periodically presented by JMR should be

construed so as to constitute a waiver of any future claim for a refund upon a subsequent finding and claim of overcharges. JMR proceeds to maintain that the return of such funds under these facts would constitute an improper “discount”.

{¶ 23} Appellant presents no controlling legal authority establishing that the trial court judgment in favor of LAM based upon a subsequent discovery of overbilling by JMR is unlawful simply because LAM initially presumed the propriety of the billing and paid the incremental invoices presented by JMR prior to the falling out of the parties and the filing of the subject litigation. Apart from the lack of controlling authority in favor of appellant’s position, we further note that LAM raised the flag shortly after the project began regarding concerns and suspicions of JMR’s billing amounts and practices. As such, we find the suggestion by JMR that LAM’s payment of the initial invoices should be construed as reflecting the propriety of the invoices and a waiver of any future objection to be disingenuous.

{¶ 24} Under these facts and circumstances, appellant has not demonstrated a manifest miscarriage of justice in the trial court finding that overbilling had occurred. On the contrary, the records properly supports the determination. Expert evidence found multiple instances where appellee was billed for parts not used in the project, overbilled for parts that were used in the project, and billed for labor hours not shown to have actually been performed on the project. Wherefore, we find appellant’s first assignment of error not well-taken.

{¶ 25} In the second assignment of error, appellant contends that the trial court erred in allowing and considering the testimony of LAM's certified forensic accounting expert witness. We do not concur.

{¶ 26} In support of the second assignment of error, JMR again cites the fact that the trial court ultimately determined that although ample evidence of significant overbilling by JMR was presented, the evidence failed to clearly show an intent to defraud.

{¶ 27} Appellant unpersuasively argues in support of the second assignment, "If a C.P.A. with additional certifications as a certified fraud Examiner and certified financial forensic examiner could not prove fraud, or make avoidable the contract the trial court cannot void the contract that was paid and give [LAM] a giveback."

{¶ 28} Evid.R. 702 governs expert witnesses. Evid.R. 702 provides that one is qualified as an expert witness so as to properly provide expert testimony if the testimony provided exceeds the knowledge or experience possessed by a layperson, possesses specialized knowledge, skill, experience, training and education regarding the subject matter, and the testimony is based upon reliable specialized information. Evid.R. 702(A)-(C).

{¶ 29} The record reflects that LAM's expert witness was a certified public accountant, certified financial forensic accountant, and a certified fraud examiner. The record reflects that the witness was shown to have served as an expert witness on numerous past occasions and to have been successfully employed in his professional accounting capacity with a local accounting firm for approximately 20 years.

{¶ 30} The record reflects that the disputed trial court determination that LAM’s forensic accounting witness qualified as an expert witness pursuant to Evid.R. 702 was supported by the applicable rules of evidence and was not otherwise improper in any way. We find appellant’s second assignment of error not well-taken.

{¶ 31} In appellant’s third assignment of error, it contends that the trial court erred in finding that LAM did not owe JMR additional storage fees, in excess of the \$16,680.00 previously paid by LAM to JMR for storage of the LAM-owned boat being restored at JMR’s premises. We do not concur.

{¶ 32} The record reflects that LAM promptly refuted any additional separate “storage” charges, in addition to analogous “shop fees”, at the December 5, 2012 meeting of the parties, and requested JMR to address a multitude of billing and documentation concerns. The fact that JMR took issue at the meeting with the characterization of the separate storage fee, in addition to the similar shop fee, as “double-dipping” does not somehow constitute an enforceable agreement against LAM to continue to pay separate “storage” and “shop” fees. In addition, the record reflects that at the December 5, 2012 meeting in which this issue was raised, JMR notably replied, “Yes, Karl was wrong with this bill. I have recalculated the bill.”

{¶ 33} The record contains ample evidence reflecting that the trial court’s denial of an award of additional storage fees to appellant did not constitute a manifest miscarriage of justice.

{¶ 34} Wherefore, we find appellant’s third assignment of error not well-taken.

{¶ 35} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.supremecourt.ohio.gov/ROD/docs/>.