ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA06-1265

May 30, 2007

GADWALL PRODUCTS, INC.
APPELLANT

AN APPEAL FROM JEFFERSON COUNTY CIRCUIT COURT
[CV2003-400-1]

V.

HON. BERLIN C. JONES, JUDGE

BARRY FLETCHER and BARRY FLETCHER AFRODISIAC HOLISTIC HAIR CARE SYSTEM, INC.
APPELLEES

AFFIRMED

In an order filed April 11, 2006, the Jefferson County Circuit Court dismissed appellant Gadwall Products, Inc.'s breach-of-contract claim against appellees, Barry Fletcher and Barry Fletcher Afrodisiac Holistic Hair Care System, Inc., and awarded appellees damages and attorney's fees for their breach-of-contract counterclaim against appellant. Appellant brings this appeal, contending that the circuit court erred (1) in finding that it breached the contract with appellees; (2) in awarding $250,000 in compensatory damages; (3) in awarding damages of $16,598.72 for un-reimbursed expenses in violation of the parol evidence rule and for expenses not authorized by appellant; and (4) in awarding attorney's fees that were unreasonable and not supported by the evidence. We affirm.

Facts

The dispute in this case arose over an agreement between the parties to promote and sell a line of hair and skin care products. Charles "A.C." Freeman originally was part of Hot Head of Arkansas, Inc., which would later be renamed Gadwall Products, Inc. He and Jana Binns eventually met with Fletcher to discuss the products they wanted to sell. Freeman

wanted to work with Fletcher because Fletcher had tremendous experience in the hair-care industry, including authorship of two books, twenty-five years as a hairstylist, and clientele including Tina Turner, Maya Angelou, Halle Barry, and Toni Braxton. Fletcher and Binns traveled to California to promote the products shortly after their initial meeting. Freeman did not direct them to go to California; however, he approved of Fletcher and Binns doing so. In California, Fletcher and Binns attended an appreciation dinner for a Wal-Mart executive, and the two gave away samples of the new products and copies of Fletcher's book *Why Are Black Women Losing Their Hair?* At trial, Freeman agreed that costs incurred in furtherance of the business would be a reimbursable business expense.

Hot Head and appellees signed an agreement on February 28, 2002. Under the terms of the agreement, Fletcher was to use his best efforts to develop and market the products. He was also obligated to assist in the identification and selection of a manufacturer for the products.[1] Fifty percent of Fletcher's intellectual property rights in the developed products

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[1]The relevant language of the agreement provided:

> 3.1 Fletcher shall use his best efforts to develop and market the Concept Products as well as new hair or skin care products exclusively for the benefit of Hot Head. Fletcher shall devote his best efforts in connection with the development and marketing of the Concept Products as requested by Hot Head. Fletcher shall participate in any marketing efforts, including but not limited to personal appearances in television programming or other marketing campaigns, as requested by Hot Head. Fletcher shall assist Hot Head in the development and implementation of all marketing or advertising campaigns undertaken by Hot Head in connection with the Concept Products. In addition, Fletcher shall be available as requested by Hot Head for assistance and consultation in connection with the development and improvement of the Concept Products.
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> 3.2 Fletcher will be responsible for maintaining the quality of the Concept Products and shall take all steps necessary to ensure that the nature and quality of all products sampled, sold, or otherwise disposed of by Hot Head and covered by the Trademarks shall be free of design or manufacturing defect, are merchantable, and fit for the product's intended purpose.
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> 3.3 Fletcher shall assist in the identification and selection of a contract manufacturer for the Concepts Products and shall take all necessary steps to ensure that such manufacturer has the ability to manufacture the product to the quality standards

were conveyed to Hot Head. The agreement provided Fletcher would be paid 7.5% of the net sales of the products; however, the agreement provided that Hot Head would pay a minimum of $150,000 during the first year the products were on the market and $200,000 during the second year. Fletcher also received $100,000 when the agreement was executed. The agreement contained a number of "boilerplate" clauses, including a merger clause, which provided, "This Agreement merges all prior agreements and constitutes the complete agreement between the parties and shall not be amended or supplemented, except by further written agreement." Freeman acknowledged that Fletcher would work with Binns and Harvey Farr on developing and selling the merchandise and that appellant was to provide the financial backing.

Zach Mahaffy became involved with the project at some point after Hot Head changed its name to Gadwall Products. Mahaffy wanted to be involved in the company, and Freeman wanted to cut back his involvement. Mahaffy took over day-to-day control of the business and eventually became 95% owner of the company. Freeman did not have any discussions with Fletcher after Mahaffy took over. Mahaffy first met with Fletcher in Little Rock in April 2002. According to Mahaffy, Fletcher thanked him for wiring the $100,000 (per the agreement). Mahaffy stated that one of the first things he did when becoming involved with the business was open a corporate checking account in the name of Hot Head and deposited $150,000. During the April 2002 meeting, Fletcher told Mahaffy that he was working with Nature's Formula in Dallas to finalize the product. Fletcher was also working on artwork and

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established by Fletcher or Hot Head. Fletcher shall assist with the set up of the plant and shall establish and supervise a quality control program for the manufacture of Concepts Products by such contract manufacturer, and for the packaging, storage and shipment of the Concepts Products.

3.4 Fletcher will review, test and, if appropriate approve or submit recommendations for improvement of all formulations submitted to it by Hot Head.

photos of the products. Mahaffy testified that he authorized $2500 for a photo shoot.

Mahaffy opined that everything was proceeding at a rapid pace by April 15, 2002. He stated that Fletcher did not express any concerns at that time and that any holdup in the process was due to Fletcher wanting to get the products just right. Mahaffy testified that he was still waiting for a final product and final pricing in July or August 2002 and thought that everything was still proceeding well after a July 2002 meeting with Wal-Mart representatives.

On August 9, 2002, Dennis Gebhart, Nature's Formula's vice president of sales and marketing, sent a fax to Wal-Mart informing it that Nature's Formula would manufacture and fill all of the orders and that Nature's Formula had been working closely with Fletcher to formulate the products. Mahaffy stated that no products were ordered at that time because there were no products to order. He stated that he saw no preliminary pricing until August 13, 2002; however, he did not understand those prices to be firm. Mahaffy testified that he did not receive a firm proposal until August 29, 2002, and he would have signed the proposal had it been acceptable. He stated that Nature's Formula claimed to own all of the formulas and refused to release the formulas to him. Without the formulas, he could not acquire insurance for the products. Mahaffy also noted that Nature's Formula wanted a large number of products to be run on each individual item and that it wanted millions of dollars in business before it would release the ingredients of the formulas. He testified that he started weighing other options after receiving the proposal because Nature's Formula was not an option. Soon after, Fletcher attempted to buy out appellant.[2] Mahaffy testified that he proposed a counteroffer and that, at that time, he wanted to find another filler. Instead, he received a letter on September 24, 2002, stating that Fletcher was terminating the agreement.

On cross-examination, Mahaffy stated that he funded the venture from his initial

[2]The record contains a letter from Fletcher dated September 13, 2002, indicating an offer of $50,000.

involvement until the termination of the contract. He stated that he received the startup capital from a loan from a family corporation. He acknowledged that he signed a promissory note for $334,562.67 in favor of the family corporation on August 30, 2003, but denied that the note had anything to do with this case. He denied that he ever relied on outside funding. Mahaffy testified that he had the money to run the products in August 2002, but that he did not order the products because the August 2002 proposal was not acceptable. He asserted that he received no firm proposal until August 29, 2002, and stated that he did not do anything when receiving a fax dated June 17, 2002, because the prices on that fax did not represent the final numbers. However, Mahaffy did acknowledge that the numbers given to him in June 17, 2002, were the same as those provided to him on August 29, 2002.

Dennis Gebhart testified that his involvement in the project began when Binns and Farr introduced him to Freeman. The goal was to launch a retail brand for sale at mass grocery and drug retailers. After the meeting, Fletcher worked with Nature's Formula on the products; however, the process was long because many of Fletcher's products were not compatible with the company's formulas.

Gebhart recalled the fax sent June 17, 2002, which listed prices for the products. He testified that Nature's Formula has the capacity to produce products at those prices that day and that the company needed a deposit before producing. He noted that he never received capital from appellant. He stated that the fax sent August 29, 2002, merely outlined the agreement as far as price and minimums. He disagreed with Mahaffy's testimony that he did not produce cost numbers until August 2002. Gebhart also recalled a conference call with Mahaffy, where Mahaffy claimed to own the formulas. Gebhart asserted that Nature's Formula developed and owned the formulas.

Fletcher testified that prior to entering into the agreement with appellant, he had a well-respected salon in Maryland with celebrity clientele. He noted that he first met with Freeman,

Farr, and Binns at the end of November 2001 to discuss a new product line. Fletcher thought that Freeman had a good reputation with business and trusted that Freeman was willing to invest. In the contract negotiations, Fletcher insisted on a contract bonus, which he received soon after signing the contract. He sold his salon in December 2001, soon after the negotiations. He testified that he stopped styling hair because the business was time consuming and because he was looking for residual income. He opined that he could have lived off the guaranteed payments in the contract.

Fletcher testified that he started working on the products in November 2001, soon after the initial negotiations, and that the formulations for the products were nearly completed before he signed the agreement in February 28, 2002. He wanted to have the products ready for Wal-Mart by the following July. He also testified about the trip to California to inform people about the new products. Over appellant's objection, he submitted an invoice dated February 14, 2002, showing that he spent $13,654.38 on gifts, which included product samples and thirty-two copies of his book. He had not been reimbursed for those costs.

Fletcher testified that he knew nothing about Mahaffy until he received a letter in June 17 stating that Mahaffy was replacing Freeman and that the name of the company had changed. However, Fletcher testified that Mahaffy "put everything on halt" by spending a minimal amount of money on the project. For example, when planning a promotional photo shoot, Fletcher was able to negotiate a cost of $46,000. Mahaffy thought that the cost was preposterous. Fletcher was able to streamline the shoot and have it at a cost of $12,000; however, Mahaffy only committed $2500. Fletcher had to use a local freelance photographer, who charged $4800. Fletcher had to pay $1300 of his own money. He also spent $189.50 on a flight and $416 on a hotel in Chicago, to meet with representatives from North Star, Inc. Fletcher testified that Mahaffy told him that he did not have any money and that he needed a purchase order from Wal-Mart to make things work. At this point, Fletcher opined that

Freeman had backed out of the contract.

Fletcher also discussed the trip to Wal-Mart headquarters in July 2002. He stated that while he had products, he did not have the packaging or labeling. Wal-Mart informed him that it would not purchase anything without having the final product with bar codes. He noted that he did not have big financial backing from appellant at that time. He noted that he paid his own expenses to meet with Wal-Mart representatives, including $236 for the flight and $81.45 for the hotel. Fletcher understood that the order from Wal-Mart was "life or death" to the project. However, there was no money invested in the production other than the $100,000 bonus and the startup capital. Fletcher testified that he had phone contact with Mahaffy "all the time" and that he asked Mahaffy to at least take care of expenses if the project was going to go slow. Fletcher testified that he attempted to launch the product on his own after he terminated the contract; however, he stated that he was out $16,000, and possibly more, as a result.

On April 11, 2006, the circuit court filed an order listing forty-eight findings of fact. The court noted in paragraphs 41 through 46:

> 41. That all acts necessary for general production of the twelve (12) developed products and approved by all necessary enties [sic] were completed by July 20, 2002 and were ready for financing of orders by Gadwall.
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> 42. That Gadwall never placed any orders for any products after having been notified that finished products were ready for production for retail sales.
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> 43. That Hot Head of Arkansas, AC Freeman, Gadwall Products, Inc nor Zach Mahaffy provided any financing for production of the twelve (12) products that had met all prerequests [sic] for production and all parties to said agreement had been so notified.
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> 44. That Fletcher was not reimbursed for certain expenses he incurred promoting and preparing for production of the said products.
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> 45. That by Plaintiff's [appellant's] failing to complete and submit the Wal-Mart application to provide the requested financial information, to not consider any other distributors before complection [sic] of the Wal-Mart venture, and notifying Fletcher that Gadwall and Mahaffy were insolvent and could not provide financing of the developed products, therefore plaintiff's inability,

refusal, or failure to perform the contract constituted a default and therefore; a breach of the contract.

46. That defendant's letter terminating the contract occurred after plaintiff['s] breach of the contract, and defendant's inability to proceed further under the contract, without funding.

The circuit court awarded appellees $16,598.72 in un-reimbursed expenses and $250,000 in damages. On April 25, 2006, appellees filed a motion for attorney's fees. Included with the motion was an affidavit from their attorney stating that he was admitted to the Arkansas bar in 1999; that he began practicing in 1999; that he started his own firm in 2002; and that he was a member of the national, state, and local bar associations. He further alleged that his normal billing rate was $150 per hour and that he spent 97.6 hours on this case during the three years the matter had been pending. As a result, he requested $14,640 in fees. In an order entered June 6, 2006, the court found that counsel's fees were fair and reasonable and awarded appellees the requested fees.

Standard of Review

In bench trials, the standard of review on appeal is not whether there is substantial evidence to support the findings of the court, but whether those findings were clearly erroneous or clearly against the preponderance of the evidence. *Flagstar Bank v. Gibbins*, 367 Ark. 225, — S.W.3d — (2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id*. Disputed facts and determinations of credibility are within the province of the fact-finder. *Id*.

Breach of Contract

Appellant argues that the circuit court erred in finding that appellant breached the agreement. It contends that appellee failed to prove that appellant violated any provision of the contract. It also contends that the court relied heavily on Fletcher's testimony regarding appellant's financial status, that Fletcher's testimony was disputed, and that this court should

not give any deference to that testimony.

When performance of a duty under a contract is contemplated, any nonperformance of that duty is a breach. *Harness v. Curtis*, 87 Ark. App. 337, 192 S.W.3d 267 (2004). As a general rule, the failure of one party to perform his contractual obligations releases the other party from his obligations. *Vereen v. Hargrove*, 80 Ark. App. 385, 96 S.W.3d 762 (2003). To be released from a contractual obligation, the other party's breach must be material. *Id*. Where there is no provision as to the time of the performance of the contract, the law implies that it must be performed within a reasonable time. *Taylor v. George*, 92 Ark. App. 264, 212 S.W.3d 17 (2005). What would be a reasonable time depends upon the intention of the parties at the time the contract was made, the facts and circumstances surrounding its making, or, in general, what was contemplated by the parties at the time. *Id*. Where the pivotal issue is the credibility of the interested parties whose testimony is in direct conflict, this court defers to the circuit court's judgment. *Id*. As the finder of fact, it is within the trial judge's province to believe or disbelieve the testimony of any witness. *Id*.

The record supports the circuit court's finding that appellant was either unable or unwilling to perform its contractual duties with respect to financing the production and marketing of the products. Gebhart's testimony establishes that Nature's Formulas was ready to produce the products as early as June 2002 and that the company merely needed a deposit to start production. While there is some testimony to show that the proposals from Nature's Formula were unacceptable to appellant and that appellant had the right to reject unacceptable proposals, the record also shows appellant's unwillingness to finance the project after Mahaffy became primary stockholder. Further, Fletcher testified that Mahaffy stated that he did not have any money. A fact finder could reasonably infer that appellant's rejection of the previous proposals resulted from this inability to finance the project. While appellant urges this court to disregard Fletcher's testimony regarding appellant's financial status due to the number of

inconsistencies between Fletcher's trial and deposition testimonies, it offers no legal basis for this court to substitute its own credibility determination for that of the circuit court. Our standard of review requires us to accept the circuit court's determination that Mahaffy stated an inability to finance the operation.

The record supports the circuit court's finding that appellant failed to financially support Fletcher's efforts to develop the products. Appellant's inability or unwillingness to perform constituted a material breach of the agreement. We affirm on this point.

Compensatory Damages

Appellant argues that there was no evidence to support the award of $250,000 in damages. It contends that appellees had the burden of showing damages and that any amount of damages awarded by the circuit court could only be the result of speculation and conjecture.

Damages recoverable from breach of contract are those damages that would place the injured party in the same position as if the contract had not been breached. *First United Bank v. Phase II, Edgewater Addition Residential Prop. Owners Improvements Dist. No. 1 of Maumelle*, 347 Ark. 879, 69 S.W.3d 33 (2002). The burden of proof is on the party claiming damages, and such proof must consist of facts, not speculation. *Grand State Marketing v. Eastern Poultry Dist., Inc.*, 63 Ark. App. 123, 975 S.W.2d 439 (1998). If it is reasonably certain that profits would have resulted had the contract been carried out, then the complaining party is entitled to recover lost profits. *Id.* The loss may be determined in any manner that is reasonable under the circumstances. *Id.* The question of damages, both as to measure and amount, is a question of fact. *Industrial Elec. Supply, Inc. v. Lytle Mfg., L.L.C.*, 94 Ark. App. 81, — S.W.3d — (2006).

Appellant argues that appellees did not request damages in the amount of $250,000 and that appellees did not present evidence supporting the damage award of $250,000. In its reply brief, appellant contends that the provisions setting the minimum compensation were

insufficient evidence of the damages suffered and that proof that appellees would have received certain payments under the contract does not establish that appellees lost profits as a result of the alleged breach. However, the payments to which appellees were entitled to under the contract are the lost profits resulting from appellant's breach. But for appellant's breach, appellees would have received 7.5% of the *net* sales of the products and no less than $350,000 over the first two years. The circuit court did not err in awarding appellees $250,000 in damages. We affirm on this point.

Un-reimbursed Expenses

Appellant argues that the circuit court erred in awarding damages for expenses incurred prior to the execution of the contract. It contends that the awards were in violation of the parol evidence rule and in absence of any evidence showing that the expenses were authorized.

The parol evidence rule is a rule of substantive law in which all antecedent proposals and negotiations are merged into the written contract and cannot be added to or varied by parol evidence. *Hagans v. Haines*, 64 Ark. App. 158, 984 S.W.2d 41 (1998). Where a contract is plain, unambiguous, and complete in its terms, parol evidence is not admissible to contradict or add to the written terms. *Id.* However, parol evidence may be admitted to prove an independent, collateral fact about which the written contract was silent. *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 33 S.W.3d 128 (2000). A merger clause extinguishing all prior and contemporaneous negotiations, understandings, and verbal agreements is simply an affirmation of the parol evidence rule. *McNamara v. Bohn*, 69 Ark. App. 337, 13 S.W.3d 185 (2000).

Appellant relies heavily on *Hagans*, *supra*. That case was an appeal from the denial of a request for specific performance of a contract for the sale of commercial real estate. One of the appellees testified that he signed the document in question, but that he did not sign it as an "offer and acceptance" because the document had no provisions regarding a rental provision

to which the parties had previously agreed. Over appellants' objection, the appellees testified that they signed the document because, among other things, there was no stipulation regarding rent. This court reversed, holding that the testimony violated the parol evidence rule, noting that testimony of an order rental agreement could properly be admitted to show a subsequent modification of the terms of a written contract, but not of any terms prior to the existence of the contract. The court held that the testimony was in abrogation of the clear, unambiguous terms of the written agreement and in violation of the merger clause.[3]

However, the outside evidence in *Hagans* altered the material terms of the agreement. Here, the contract is silent as to the payment of expenses to promote the products. The payment of expenses is a matter collateral to the execution of the contract; thus, the parol evidence rule does not bar the admission of such evidence.

Appellant also argues that some of the expenses were unauthorized and that appellees did not present proof of damages totaling $16,598.72. However, Freeman acknowledged that appellant was to provide financial backing for the project and that costs incurred in furtherance of the business should be reimbursed. These expenses would include costs incurred for promotional travel, meetings, and the photo shoot. As to the calculation of damages, the circuit court did not state how it calculated the damages, and appellant made no request for specific findings. In light of Fletcher's testimony that he was "out $16,000, maybe a little more," and the fact that the expenses came close to the amount awarded, we hold that the circuit court did not clearly err in awarding appellees $16,598.72 in damages for un-reimbursed expenses.

Attorney's Fees

[3]Appellees rely on *Bank of America, N.A. v. C.D. Smith Motor Co.*, 353 Ark. 228, 106 S.W.3d 425 (2003). They state that the case criticized and distinguished the decision in *Hagans*. This is incorrect. While the court distinguished *Hagans* from the case before it–the former being a non-UCC case, and the latter being a UCC case–the supreme court gave no indication that *Hagans* was no longer good law.

Finally, appellant argues that the circuit court abused its discretion in awarding attorney's fees. It contends that the award was unreasonable and not based upon any evidentiary material bearing on the amount of the fee.

The Arkansas Code allows a circuit court to award attorney's fees to the prevailing party in a contract dispute. *See* Ark. Code Ann. § 16-22-308 (Repl. 1999). The decision to award attorney's fees and the amount of that award are reviewed under the abuse-of-discretion standard. *Harris v. City of Ft. Smith*, 366 Ark. 277, — S.W.3d — (2006).

In arguing that the circuit court erred in awarding attorney's fees, appellant relies on Rule 54(e) of the Arkansas Rules of Civil Procedure, which addresses motions for attorney's fees. The Addition to Reporter's Notes, 1997 Amendment provides in relevant part:

> The new subdivision does not require that the motion for attorneys' fees be supported at the time of filing with the evidentiary material bearing on the fees. This material must be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees and the amount of such fees or a fair estimate.

Appellant contends that an award based only on counsel's assertion that he devoted 97.6 hours to the case, without detailed records to determine how much time was actually spent, was unreasonable. However, this court recognizes the superior perspective of the circuit court in determining whether to award attorney's fees. *Taylor*, *supra*. Counsel's affidavit was sufficient to alert appellant and the circuit court of the basis for his request. We hold that the circuit court did not abuse its discretion in relying on counsel's affidavit in setting the amount of attorney's fees.

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.