

13-489-cv

ING Global v. United Parcel Service Oasis Supply Corporation

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**In the
United States Court of Appeals
For the Second Circuit**

August Term 2013

No. 13-489-cv

ING GLOBAL,
Plaintiff-Counter-Defendant-Appellant,

v.

UNITED PARCEL SERVICE OASIS SUPPLY CORPORATION,
Defendant-Counter-Claimant-Appellee,

Bone Safety Signs, LLC, Doug Vollenweider, Michael Rose, James
Thompson,
Defendants.

Appeal from the United States District Court
for the Southern District of New York.
No. 11-CV-5697

ARGUED: DECEMBER 12, 2013

DECIDED: JUNE 30, 2014

Before: POOLER, PARKER, and WESLEY, *Circuit Judges.*

1 Appeal from an order of the United States District Court for
2 the Southern District of New York (Samuel Conti, *Judge*),¹ setting
3 aside on the ground of manifest injustice a verdict awarding
4 plaintiff, ING Global, attorney's fees on breach of contract claims.
5 We hold that in light of defendant UPS's failure to move pursuant to
6 Rule 50(a) and the existence in the record of evidentiary support for
7 the verdict, the district court erred in setting the verdict aside. We
8 also conclude that a new trial is not warranted. REVERSED and
9 REMANDED.

10 _____
11 JOHN J. ZEFUTIE, JR. (Justin S. Stochlic, Ugo
12 Colella, Anthony J. Laura, *on the brief*), Patton
13 Boggs LLP, Newark, New Jersey, *for Plaintiff-*
14 *Counter-Defendant-Appellant, ING Global.*

15 ROBERT E. KAELIN (Michael D. Goldfarb, *on the*
16 *brief*), Murtha Cullina LLP, Hartford, CT, *for*
17 *Defendant-Counter-Claimant-Appellee, United Parcel*
18 *Service Oasis Supply Corporation.*
19 _____

20 BARRINGTON D. PARKER, *Circuit Judge*:

21 In October 2012, following a six-day trial, the jury returned a
22 verdict in favor of plaintiff, ING Global ("ING"), on its breach of
23 contract claims. The jury also awarded ING attorney's fees, to be set
24 by the court, as permitted by Georgia law which governed the
25 contract. Despite its failure to have moved pursuant to Rule 50(a)

¹ The Honorable Samuel Conti, United States District Judge for the United States District Court for the Northern District of California, sitting by designation.

1 for judgment as a matter of law prior to the submission of the case to
2 the jury, defendant, United Parcel Service Oasis Supply Corporation
3 (“UPS”), subsequently moved pursuant to Rule 59(e) to amend the
4 judgment to set aside the award of attorney’s fees or, alternatively,
5 for a new trial on the issue of attorney’s fees. The district court
6 concluded that because the verdict was without legal support, it
7 constituted manifest injustice and set aside the award of attorney’s
8 fees. UPS does not appeal from the jury’s verdict against it on the
9 breach of contract claims.

10 We hold that in light of UPS’s failure to have moved for relief
11 pursuant to Rule 50(a) and the existence of evidentiary support in
12 the record for the jury’s verdict, the district court erred in setting the
13 verdict aside. We also conclude that a new trial is not warranted.
14 Accordingly, we reverse the order granting UPS’s motion and
15 remand with instructions to reinstate the verdict and resolve ING’s
16 motion to set attorney’s fees.

17 I. BACKGROUND

18 The facts relevant to our decision are as follows. ING is a
19 small company that produces Reusable Network Containers
20 (“RNCs”), mesh bags used by UPS to consolidate numerous small
21 packages into a larger one to reduce the number of handlings
22 required by UPS’s sorting and transportation system.

23 In 2010 UPS selected ING as the winner of a bidding process
24 to become UPS’s primary supplier of new RNCs. UPS and ING
25 entered into contracts that contemplated an estimated volume of 1.2
26 million new RNCs over the three-year term of the agreement. The

1 contracts reserved to UPS the discretion to adjust the quantity or
2 timing of the order for new RNCs, and also provided that additional
3 quantities of new RNCs would be purchased according to an
4 annexed price schedule.

5 During the summer of 2011, UPS decided to purchase an
6 additional 624,629 new RNCs before the end of the year and, turning
7 to other suppliers, backed away from its contract with ING. In the
8 course of planning for the new order, the UPS commodity manager
9 responsible for RNCs acknowledged in internal emails that UPS had
10 "contracts in place" to cover the additional RNC's and that UPS had
11 obligations under those contracts. However, in nearly simultaneous
12 emails to ING, he took the contrary position that the new order of
13 RNCs was separate from the existing contracts and that UPS had no
14 purchase obligations under its existing contracts with ING.

15 He ultimately treated the 2011 order as separate from the
16 existing contracts and invited several new vendors to submit bids.
17 ING objected, contending that UPS's steps to rebid the order
18 breached their contracts. However, in early August 2011, UPS
19 awarded the contract for the additional RNCs to a competitor of ING
20 that had offered a lower price.

21 ING then sued UPS for breach of the contracts. ING also
22 alleged that UPS had acted in bad faith and sought to recover
23 attorney's fees, as permitted under applicable Georgia law when a
24 party acts in bad faith in making or performing a contract. Ga. Code
25 Ann. § 13-6-11.

1 As part of their pretrial submissions, the parties submitted
2 joint proposed jury instructions that explained the meaning of bad
3 faith under Georgia law:

4 Bad faith does not refer to bad faith in the prosecution
5 of this litigation, but rather to the acts of UPS in dealing
6 with ING prior to ING's filing of this lawsuit. Bad faith
7 means a frivolous and unfounded denial of liability. If
8 you find that UPS's actions before ING filed this lawsuit
9 were frivolous and unfounded, then you must find that
10 UPS acted in bad faith and award ING its attorney's
11 fees. On the other hand, if you find that UPS had any
12 reasonable ground to contest ING's breach of contract
13 claim, then you must find there is not bad faith on the
14 part of UPS and not award ING its attorneys' [sic] fees.

15 Simultaneously, UPS filed a motion *in limine* to preclude the
16 introduction at trial of evidence of bad faith or of attorney's
17 fees on the ground that, as a matter of law, it had a
18 "reasonable ground" to contest ING's claims.² UPS's motion
19 was denied and ING's claims proceeded to trial, during which
20 it was permitted to present its evidence of bad faith which
21 centered primarily around the conflicting emails and the
22 denials by UPS that its contracts with ING obligated it to
23 purchase additional RNC's from ING rather than competitors.

24 During the proceedings, UPS and ING each submitted
25 proposed jury instructions that included a definition of bad
26 faith substantively identical to the version submitted before

² UPS made a cursory pretrial objection to the jury instruction on the same grounds, incorporating by reference the argument from its motion *in limine*.

1 trial, except that ING objected to the inclusion of the
2 “reasonable ground” defense in the jury instructions. The
3 district court overruled that objection, adopted UPS’s
4 proposed instruction that included the “reasonable ground”
5 defense with only minor non-substantive changes, and
6 delivered it to the jury. UPS did not move pursuant to Rule 50
7 to challenge the sufficiency of ING’s evidence of bad faith nor
8 did it move for judgment as a matter of law on the basis that
9 the “reasonable ground” defense precluded an award of
10 attorney’s fees.

11 Subsequently, the jury returned a verdict in favor of ING on
12 the breach of contract claim, awarding it approximately \$1.7 million
13 in damages, which is not contested on this appeal. The jury also
14 found that ING was entitled to an award of attorney’s fees, which
15 meant that the jury had found that UPS had acted in bad faith.

16 Following the verdict and the entry of judgment, ING moved
17 to set the amount of attorney’s fees and UPS cross-moved, pursuant
18 to Rule 59, to amend the judgment by setting aside the award of
19 attorney’s fees or, in the alternative, for a new trial on fees on the
20 ground that the verdict awarding them was against the weight of the
21 evidence. In its motion, UPS raised for the first time new challenges
22 to the court’s charge on bad faith. UPS contended that Georgia law
23 recognizes two distinct, mutually exclusive theories of bad faith; the
24 “frivolous and unfounded denial of liability” theory which ING had
25 argued and presented to the jury, and a separate “sinister motive”
26 theory, involving “dishonest purpose,” “conscious doing of wrong,”
27 or a “breach of known duty through some motive of interest or ill

1 will." Special App'x 17. UPS contended that under the former (but
2 not the latter) theory a party with a "reasonable defense" to a claim
3 cannot be found to have acted in bad faith and that it had such a
4 defense.

5 Notwithstanding that (1) the court had delivered the charge
6 on this issue that UPS had requested; (2) UPS had failed to object to
7 the charge under Rule 51; and (3) UPS had not argued that it was
8 entitled to judgment as a matter of law under Rule 50(a), the district
9 court accepted UPS's interpretation of Georgia law. The district
10 court concluded that the "frivolous and unfounded denial of
11 liability" theory did not apply because it was limited to cases in
12 which one party refused to pay the other. After reviewing the
13 evidence, the court concluded that UPS had reasonable,
14 nonfrivolous defenses. Even though it had not instructed the jury on
15 the "sinister motive" theory of bad faith, the district court analyzed
16 the case under that theory and concluded that ING's claim could not
17 succeed under that alternative.

18 Because UPS was seeking to have the jury's award of
19 attorney's fees set aside and to have judgment entered in its favor on
20 the issue, the district court concluded that UPS was "effectively"
21 moving under Rule 50(b) for judgment as a matter of law,
22 notwithstanding both the verdict and its failure to make an earlier
23 motion as required under Rule 50(a). The court then held that the
24 jury's finding on fees was "clearly erroneous" and concluded that
25 "to prevent manifest injustice," it was required to set aside the
26 award of attorney's fees or grant a new trial on fees. After
27 reweighing the evidence, the district court concluded that a new trial

1 could not result in a verdict in favor of ING. The court then set aside
2 the award of attorney's fees, effectively granting UPS judgment as a
3 matter of law on the issue. This appeal followed.

4 II. DISCUSSION

5 A. Legal Standards

6 Rule 59(e) allows a district court "to alter or amend a
7 judgment." Fed. R. Civ. P. 59(e). We have explained that under the
8 rule "district courts may alter or amend judgment to correct a clear
9 error of law or prevent manifest injustice," that the rule "covers a
10 broad range of motions," and that "the only real limitation on the
11 type of the motion permitted is that it must request a substantive
12 alteration of the judgment, not merely the correction of a clerical
13 error, or relief of a type wholly collateral to the judgment." *Schwartz*
14 *v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 153 (2d Cir. 2008).

15 Here, however, UPS sought relief pursuant to Rule 59(e) that
16 was substantively identical to judgment as a matter of law under
17 Rule 50, as it sought to have the jury's verdict on attorney's fees set
18 aside and to have judgment entered in its favor on that issue.
19 Notwithstanding the "broad range of motions" available under Rule
20 59(e), and the absence of a "real limitation" on the type of motion
21 permitted, we do not believe that the Rule permits a party to obtain
22 judgment as a matter of law under Rule 59(e) after failing to comply
23 with the carefully crafted structure and standards of Rules 50 and
24 51.³ A Rule 50 motion is intended to "inform[] the opposing party of

³ In, *Schwartz*, 539 F.3d 132, the case UPS did cite for the proposition that judgment as a matter of law is available pursuant to Rule 59(e) following the entry of judgment, the district court granted a Rule 59(e) motion concerning a question of law that was presented for the

1 the challenge to the sufficiency of the evidence and afford[] a clear
2 opportunity to provide additional evidence that may be available.”
3 Fed. R. Civ. P. 50 advisory committee’s note to the 2006
4 amendments; *see also Lore v. City of Syracuse*, 670 F.3d 127, 152-53 (2d
5 Cir. 2012) (citing the advisory committee’s note and discussing the
6 purpose of Rule 50 motions). Rule 51 requires parties to articulate
7 and lodge their objections to jury charges before they are delivered
8 so that “the trial court [will have] an opportunity to cure any defects
9 in the instructions before sending the jury to deliberate.” *Jacques v.*
10 *DiMarzio, Inc.*, 386 F.3d 192, 200 (2d Cir. 2004). Permitting a party
11 out of compliance with Rules 50 and 51 to prevail under Rule 59(e)
12 would render those Rules, which are basic to the conduct of federal
13 trials, essentially superfluous. We are not inclined to endorse such a
14 result except *perhaps* in unusually egregious circumstances, which
15 are not presented in this case.

16 Motions under Rule 59 to alter or amend the judgment, or for
17 a new trial, are normally reviewed for abuse of discretion. *See Baker*
18 *v. Dorfman*, 239 F.3d 415, 427 (2d Cir. 2000). However, because UPS
19 was effectively seeking judgment as a matter of law and because the
20 district court granted that relief, we will treat UPS’s motion to have
21 the attorney’s fees verdict set aside as one for judgment as a matter
22 of law pursuant to Rule 50. Accordingly, we will review the district
23 court’s decision *de novo* and apply the normal Rule 50 standards. *See*
24 *Velez v. City of New York*, 730 F.3d 128, 134 (2d Cir. 2013). We will
25 consider UPS’s alternative request for a new trial under the abuse of

first time by the jury’s response to a special interrogatory on the verdict form. The parties had not had the opportunity to address the issue earlier and, thus, could not have been expected to comply with Rule 50.

1 discretion standard normally applicable to such motions. *See*
2 *Patrolmen's Benevolent Ass'n. of City of New York v. City of New York*,
3 310 F.3d 43, 50, 54 (2d Cir. 2002) (reviewing Rule 50 motion *de novo*
4 and Rule 59(a) motion for abuse of discretion where party moved
5 under both rules).

6 Under Rule 50(a), a motion for judgment as a matter of law
7 must first be made before the case is submitted to the jury, and
8 renewed following the verdict pursuant to Rule 50(b). The law is
9 pellucid that a party's failure to move under Rule 50(a) has
10 consequences. If that party later moves under Rule 50(b), the
11 standard for granting judgment as a matter of law is elevated, and
12 the motion may not properly be granted by the district court, or
13 upheld on appeal, except to prevent manifest injustice. *See Lore*, 670
14 F.3d at 153. Manifest injustice exists where a jury's verdict is wholly
15 without legal support. *See Rothstein v. Carriere*, 373 F.3d 275, 291 (2d
16 Cir. 2004); *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 129 (2d Cir.
17 1999); *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)
18 ("Rule 59(e) permits a court to alter or amend a judgment, but it
19 'may not be used to relitigate old matters, or to raise arguments or
20 present evidence that could have been raised prior to the entry of
21 judgment.'" (quoting 11 C. Wright & A. Miller, *Federal Practice and*
22 *Procedure* § 2810.1, pp. 127–128 (2d ed. 1995))).

23 When evaluating a motion under Rule 50, courts are required
24 to "consider the evidence in the light most favorable to the party
25 against whom the motion was made and to give that party the
26 benefit of all reasonable inferences that the jury might have drawn in
27 [its] favor from the evidence." *Tolbert v. Queens Coll.*, 242 F.3d 58, 70

1 (2d Cir. 2001). “The court cannot assess the weight of conflicting
2 evidence, pass on the credibility of the witnesses, or substitute its
3 judgment for that of the jury,” and “must disregard all evidence
4 favorable to the moving party that the jury is not required to
5 believe.” *Id.*

6 When considering a motion for a new trial under Rule 59(a) on
7 the ground that the jury’s verdict is against the weight of the
8 evidence, our cases “teach [that a] high degree of deference [is]
9 accorded to the jury’s evaluation of witness credibility, and that jury
10 verdicts should be disturbed with great infrequency.” *Raedle v.*
11 *Credit Agricole Indosuez*, 670 F.3d 411, 418 (2d Cir. 2012).

12 **B. Manifest Injustice**

13 The jury instructions on Georgia law that are at the center of
14 UPS’s appeal were substantively identical to the ones it submitted
15 and which were delivered without objection from UPS. There is no
16 dispute that the instructions were an accurate statement of Georgia
17 law on the meaning of bad faith. Moreover, the instructions
18 included the “reasonable ground” defense that UPS asserted in its
19 motion *in limine* and in its post-judgment motion. For these reasons,
20 it is clear to us that the jury instructions were not “wholly without
21 legal support.” *Rothstein*, 373 F.3d at 291.

22 At no point prior to its post-judgment motion had UPS raised
23 its concerns about the jury instructions on bad faith, or articulated
24 to the district court its two theories of bad faith under Georgia law.
25 UPS was undoubtedly aware of the “reasonable ground” defense, as
26 it was the subject of a pretrial *in limine* motion and of proposed jury

1 instructions. However, UPS failed to preserve its contention that
2 reasonable grounds existed as a matter of law because it did not
3 move under Rule 50(a), nor did it object under Rule 51 to the court's
4 charge on "reasonable grounds." Thus, UPS has waived any
5 argument on these grounds absent "manifest injustice."

6 We see no such injustice. The jury was properly instructed
7 that a "reasonable ground" to contest a claim was a defense to a
8 finding of bad faith, but rejected UPS's evidence and arguments on
9 that point, as it was entitled to do. The contracts provided that
10 "[a]dditional quantities" of new RNCs "will be purchased at the
11 identified pricing in this Price Schedule," and the UPS commodity
12 manager acknowledged in internal emails that UPS had "contracts
13 in place" to cover the purchase of the additional RNCs. At the same
14 time, evidence the jury was entitled to credit also showed that he
15 took directly opposite positions in nearly simultaneous emails to
16 ING and ultimately sought and secured new bids from ING's
17 competitors whose prices undercut those in ING's contract.

18 Considering this evidence in the light most favorable to ING,
19 and giving ING the benefit of all reasonable inferences that the jury
20 might have drawn in its favor, we have little trouble concluding that
21 a jury, though not compelled to do so, could have found that UPS
22 acted in bad faith. Under these circumstances, we see no injustice
23 and certainly no manifest injustice.

24 Similarly, UPS's arguments concerning the two theories of bad
25 faith it now contends exist under Georgia law do not change this
26 result. The arguments were, of course, forfeited by UPS's failure
27 timely to raise them. As we have seen, the jury was charged that

1 bad faith meant a “frivolous and unfounded denial of liability.”
2 This instruction was well grounded in Georgia case law. In post-
3 trial motion practice, UPS argues for the existence under Georgia
4 law of a specialized definition of “denial of liability” that limits it to
5 “refusal to pay” cases. According to UPS this case was not such a
6 case: It did not refuse to pay, it had no continuing obligation to
7 purchase additional RNC’s from ING and awarded contracts for
8 them to another entity. Because we see no meaningful distinction
9 between this conduct and a “denial of liability” or a “refusal to pay,”
10 we believe that the instruction that the court delivered adequately
11 conveyed UPS’s position to the jury. If UPS preferred a more
12 nuanced or specific definition, it was obligated to request one. In
13 any event, as we have noted, the evidence adduced at trial, viewed
14 in the light most favorably to ING, was sufficient for a reasonable
15 jury to have concluded that UPS engaged in an unfounded denial of
16 contractual liability.

17 C. New Trial

18 UPS moved in the alternative for a new trial pursuant to Rule
19 59(a) on the ground that the verdict was against the weight of the
20 evidence, and renews that motion on appeal.

21 Our precedent is clear that a “decision is against the weight of
22 the evidence if and only if the verdict is (1) seriously erroneous or (2)
23 a miscarriage of justice.” *Raedle*, 670 F.3d at 417-18. Our cases teach
24 that a high degree of deference is accorded to the jury’s evaluation of
25 witness credibility, and that jury verdicts should be disturbed with
26 great infrequency. *Id.* Unlike on a Rule 50 motion, however, on a
27 Rule 59 motion the court “may weigh the evidence and the

1 credibility of witnesses and need not view the evidence in the light
2 most favorable to the verdict winner.” *Id.* at 418. But when, as here,
3 “a verdict is predicated almost entirely on the jury’s assessments of
4 credibility, such a verdict generally should not be disturbed except
5 in an egregious case, to correct a seriously erroneous result, or to
6 prevent a miscarriage of justice.” *Id.* at 418-19. This case is not such
7 a case.

8 The jury, after hearing testimony from witness from both
9 parties, concluded that UPS had acted in bad faith. As the district
10 court noted, there was evidence that would militate against such a
11 finding. But the jury was free to reject that evidence (as it
12 apparently did) and to conclude, based on other testimony, that UPS
13 acted in bad faith in its performance of the contracts. Given that this
14 finding turned to a large extent on the credibility of the witnesses
15 who testified before the jury, the finding and the verdict which
16 followed are particularly ill-suited to after-the-fact second guessing.
17 Our review of the record yields no basis on which to conclude that
18 the jury’s verdict was “egregious,” “seriously erroneous,” or “a
19 miscarriage of justice.”

20 CONCLUSION

21 We reverse the district court’s order setting aside the jury’s
22 award of attorney’s fees. We REVERSE the order denying ING’s
23 motion to set attorney’s fees, and we REMAND the case with
24 instructions to reinstate the jury’s verdict and resolve ING’s motion
25 for attorney’s fees.