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IN THE
COURT OF APPEALS OF INDIANA

PETERS BROADCAST ENGINEERING, d/b/a PBE WIRELESS,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 25A03-1005-SC-260
WROI-FM,	)	
Appellee-Defendant.	)	

APPEAL FROM THE FULTON SUPERIOR COURT
The Honorable Wayne E. Steele, Judge
Cause No. 25D01-1001-SC-75

October 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

An engineering firm sued a radio station in small claims court for the alleged unpaid balance plus interest of invoices for repair and installation services performed for the radio station by the engineering firm. The radio station disagreed with the alleged balance owed and claimed that the engineering firm failed to credit some payments made by the radio station and also that the engineering firm charged an outrageous amount of interest on the alleged unpaid balance. The radio station also claimed that, due to substandard and incompleted work, the radio station had to hire a different company to correct and complete the work performed by the engineering firm. The small claims court declined to enter a money judgment for the engineering firm and instead entered judgment in favor of the radio station, concluding that the engineering firm had failed to prove by a preponderance of the evidence that any money was owed. Declining to reweigh the evidence and finding no clear error, we affirm the judgment of the small claims court in favor of the radio station.

Facts and Procedural History

The facts most favorable to the small claims court judgment indicate that Peters Broadcast Engineering, Inc., d/b/a PBE Wireless ("PBE"), is an engineering consulting company that provides installation and maintenance services to radio stations and other broadcast stations in northern Indiana. WROI-FM ("WROI") is an FM stereo radio station located in Rochester. In approximately January of 2004, PBE was hired by WROI's principal, Tom Bair, to perform various services for WROI. PBE performed services for WROI in January, May, July, and September of 2004. The record indicates that PBE billed

WROI $1,450, $4,828.60, and $398 for those services. All of those bills were paid in full by WROI.

Then, in October of 2004, PBE billed WROI $800 for twenty hours of labor; however, the invoice referencing that labor does not specifically detail what work was performed. WROI was credited with paying only $173.40 of that bill, leaving a balance of $626.60. Apparently, there were no additional payments and no communication between the parties until March of 2008, when PBE performed some emergency work for WROI as a result of a lightning strike at the radio station. PBE billed WROI $806.32, and that bill was paid in full. The invoice made no mention of any unpaid balance remaining from 2004 or any additional charges. Thereafter, in May of 2008, PBE sent an invoice to WROI in the amount of $6,390. While not evidenced on the invoice, according to PBE, this invoice was for services and equipment previously provided in March 2008 as a result of the lightning strike. WROI was later credited with making payments in the amount of $1,193.68, leaving an unpaid balance of $5,196.32.

In September of 2008, the parties began arguing through e-mail as to money allegedly owed to PBE by WROI. Robert Michael Peters, PBE's owner, requested payment of the alleged unpaid balance on the account. Bair disputed the unpaid balance, claiming that certain equipment had already been paid for and also claiming that PBE had failed to credit other payments. Bair also disputed the 18% finance charge that PBE had begun to assess against the alleged unpaid balance on the account dating back to 2004. Including finance charges, PBE claimed that WROI owed $7,977.99. In September 2009, WROI hired a

different engineering firm to both correct and complete work performed by PBE. WROI spent more than $ 8000 to repair and complete its broadcast system.

PBE filed its small claims notice on January 21, 2010.[1] A contested hearing was held on March 30, 2010. Thereafter, on April 5, 2010, the small claims court entered its judgment in favor of WROI. Specifically, the small claims court concluded in part:

> The Court cannot speculate or guess what damages were caused or what the dollar amount of the damages was. If a plaintiff cannot produce evidence to show the amount, the Court cannot award judgment.
>
> The Defendant has made substantial payments on the bill and in addition had to hire someone else to complete the work or redo parts of the work done by Plaintiff in some instances. The Defendant's expenditures equal to [sic] or even exceed that which plaintiff is requesting. However, Defendant did not file a counterclaim.
>
> The Court now FINDS, based on the evidence presented that Plaintiff has not met his burden of proof both to liability and damages as to Defendant.

Appellant's App. at 60. PBE appeals the small claims judgment.

Discussion and Decision

Judgments in small claims actions are '"subject to review as prescribed by relevant Indiana rules and statutes."' *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006) (quoting Ind. Small Claims Rule 11(A)). Upon review of claims tried by the bench without a jury, we shall not set aside the judgment "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A). We define the clearly erroneous standard based upon whether the

[1] In order to proceed in small claims court, PBE waived recovery of any amount in excess of the jurisdictional limit of $6,000. *See* Ind. Code § 33-29-2-4(b).

party is appealing a negative or an adverse judgment. *Garling v. Indiana Dept. of Natural Res.*, 766 N.E.2d 409, 411 (Ind. Ct. App. 2002), *trans. denied*. PBE had the burden of proof at trial on its small claims action. A judgment entered against a party who bore the burden of proof at trial is a negative judgment. *Id*. On appeal, we will not reverse a negative judgment unless it is contrary to law. *LTL Truck Serv., LLC v. Safeguard, Inc.*, 817 N.E.2d 664, 668 (Ind. Ct. App. 2004). To determine whether a judgment is contrary to law, we consider the evidence in the light most favorable to the appellee, together with all the reasonable inferences to be drawn therefrom. *Id*. The judgment will be reversed only if the evidence leads to but one conclusion and the trial court reached the opposite conclusion. *Id*. Our deferential standard of review is particularly important in small claims actions, where trials are "informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law." Ind. Small Claims Rule 8(A).

We initially observe that WROI has not filed an appellee's brief. When the appellee has failed to submit a brief, we need not undertake the burden of developing an argument on the appellee's behalf. *Trinity Homes*, 848 N.E.2d at 1068. Instead, we will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error. *Id*. Prima facie error means error '"at first sight, on first appearance, or on the face of it."' *Id.* (quoting *Santana v. Santana*, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999)). If the appellant fails to meet this burden, we will affirm. *Id*.

Here, we cannot say that PBE has shown error of any sort. The parties in small claims court bear the same burdens of proof as they would in a regular civil action on the same

issues. *Mayflower Transit, Inc. v. Davenport*, 714 N.E.2d 794, 797 (Ind. Ct. App. 1999) (citing Ind. Small Claims Rule 4(A)). It is incumbent upon the party who bears the burden of proof to demonstrate that it is entitled to the recovery sought. *LTL Truck Serv.*, 817 N.E.2d at 668.

PBE claims that it is entitled to recovery upon the theories of open account and account stated. An open account is one in which some item of contract is not settled by the parties, or where there have been running or current dealings between the parties and the account is kept open with the expectation of further dealings. *Bldg Sys., Inc. v. Rochester Metal Prods., Inc.*, 168 Ind. App. 12, 16, 340 N.E.2d 791, 794 (1976). More plainly, "an open account is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions not reduced to writing and subject to future settlement and adjustment." *Id*. (citations omitted).

An account stated, on the other hand, is established by an agreement between the parties that all items of the account and the balance of those items are correct, together with a promise, express or implied, to pay the balance. *Auffenberg v. Bd. of Trs. of Columbus Reg'l Hosp.*, 646 N.E.2d 328, 331 (Ind. Ct. App. 1995). An agreement that the balance is correct may be inferred from delivery of the statement and the account debtor's failure to object to the amount of the statement within a reasonable amount of time. *Id*. Failing to object to liability on an account until a suit is filed constitutes failure to object to the account within a reasonable time and supports the inference of an agreement that the account balance is correct. *Id.*

In the case at bar, there was clearly no agreement between the parties that all items of the account and the balance of those items were correct, or an express or implied promise to pay the balance. Indeed, prior to the suit being filed, WROI disputed the charges assessed against it by PBE. Appellant's App. at 52. Contrary to PBE's argument, WROI objected to its liability on the account within a reasonable time and, thus, we will not infer that WROI in any way agreed that the account balance was owed or correct. *See Auffenberg* , 646 N.E.2d at 331. Accordingly, the small claims court here was not faced with an account stated.

Even if we were to agree with PBE that its claim may, in the alternative, be appropriately characterized as one of an open account, we cannot say that the trial court's judgment in favor of WROI is contrary to law. The general rule is that when a suit is made upon an open account, "the proof should be addressed to the support of the separate items of the account, although general proof of the total amount of such an account and the items included in the account will sufficiently support a judgment in such a suit where the alleged debtor did not object to such mode of proof." *Bldg. Sys., Inc.*, 168 Ind. App. at 16, 340 N.E.2d at 794. Where a defendant objects "to mere general proof by the plaintiff of the items and amount of an open account, or no evidence of the amount of the account is properly introduced, such proof is inadequate to support a recovery by the plaintiff." *Bottema v. Hendricks County Farm Bureau Co-op Ass'n,* 159 Ind. App. 175, 178-79, 306 N.E.2d 128, 130 (1974).

Although PBE submitted invoices reflecting outstanding balances for work it performed, WROI objected to the amount due on the account. Several of the invoices were

not particularly clear as to what services were performed and, more significantly, which specific services were paid for by WROI and which specific services were not paid for by WROI. Indeed, much of the alleged money owed is attributable to exorbitant finance charges upon a disputed unpaid balance. As noted by the small claims court, WROI made substantial payments on the invoices. WROI rejected the validity of some of the charges, disputing mileage charges, disputing interest charges, disputing charges for certain equipment, and also claiming that payments were made that were never credited to its account. Finally, WROI presented invoices of its own indicating that it hired another engineering firm to complete and correct work performed by PBE. Based upon the evidence submitted and the testimony of the parties, the small claims court determined that PBE failed to prove by a preponderance of the evidence that WROI was liable for the requested $6000 in damages.

We remind PBE that despite the general rule as to the "type" of proof necessary to recover on an open account, the fact-finder is not constrained to accept that evidence at face value, especially in light of conflicting evidence. It is the fact-finder's prerogative to weigh all of the evidence and judge its credibility. The small claims court here was presented with incomplete and conflicting evidence. Indeed, "the evidence in the record reveals variations and contradictions which might well have been considered in determining the credibility, sufficiency or weight to be given to the Appellant's evidence, even to the point of rejecting it." *Nationwide Mut. Ins. Co. v. Day*, 140 Ind. App. 564, 568, 224 N.E.2d 520, 523 (1967). We cannot say that the evidence, when viewed in the light most favorable to WROI, leads to but one conclusion, and the trial court has reached an opposite conclusion. PBE merely

invites this court to reweigh the evidence in its favor, a task not within our purview on appeal. The judgment of the small claims court in favor of WROI is affirmed.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.