IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-426

Filed: 20 November 2018

Iredell County, No. 15 CVS 01932

KYLE BUSCH MOTORSPORTS, INC., Plaintiff

v.

JUSTIN BOSTON, INDIVIDUALLY AND JUSTIN BOSTON RACING, LLC, Defendants

Appeal by defendants from judgment entered 13 November 2017 by Judge Anna Mills Wagoner in Iredell County Superior Court. Heard in the Court of Appeals 17 October 2018.

Hamilton Stephens Steele & Martin, PLLC, by Rebecca K. Cheney, for plaintiff-appellee.

Lovekin &Young, P.C., by Gary F. Young, for defendant-appellants.

CALABRIA, Judge.

Justin Boston and Justin Boston Racing, LLC (collectively "defendants") appeal from a judgment following a jury verdict in which the jury found defendants liable to Kyle Busch Motorsports, Inc. ("plaintiff" or "KBM") for $442,561.20 in damages resulting from a breach of contract. On appeal, defendants argue that the

trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict ("JNOV") because plaintiff failed to present evidence of direct damages.

After careful review, we affirm the trial court's denial of defendants' motions for directed verdict and JNOV.

I. Facts and Procedural History

Kyle Busch Motorsports, Inc., founded in 2010 by Kyle Busch, owns and operates a number of racing teams in the NASCAR Camping World Truck Series. KBM, with its sixty-three full-time employees, contracts with drivers and sponsors to provide, for an agreed upon amount, "highly-qualified crew chief, engineer, mechanics, pit crew, truck/trailer to get all of [the] equipment to and from the track, highly-competitive race trucks, and all the necessary garage and pit equipment[,]" in addition to "pre- and post-race press releases[.]" Sponsors, in turn, are permitted to place signage on the racing trucks, the transportation truck and trailers, the pit crew uniforms, and at the racetracks. The drivers share similar advertising opportunities, and receive payments from KBM in the form of $3,000 per race, forty percent (40%) of any prize money won, and other incentives and accommodations associated with the drivers' race duties.

On 11 November 2014, KBM entered into one of these "Driver Contracts" (the "contract") with Justin Boston—the driver—Justin Boston Racing, LLC—the driver's

company—and ZLOOP, Inc. ("ZLOOP")—the sponsor. ZLOOP, which was owned by Justin Boston's father, Bob Boston, agreed to pay $3.2 million (the "base fee") for sponsorship rights to a truck owned by KBM for the 2015 race term and an additional $3.2 million for sponsorship rights for the 2016 race term. Justin Boston was to drive the sponsored truck for both terms. Payments were divided into monthly installments that commenced on 10 January 2015, when the first payment of $500,000 was due. The contract further provided that ZLOOP and defendants were jointly and severally liable for the base fee.

ZLOOP made the first three payments totaling $1.3 million. With permission from KBM, the fourth payment—originally set for $400,000—was switched with the fifth payment—of $250,000—and ZLOOP timely made this newly negotiated fourth payment in April 2015. ZLOOP paid a total of $1,550,000 before abruptly ceasing payments in May 2015.

A letter dated 22 June 2015, indicated that KBM sent notices of breach of contract to Bob Boston as the registered agent of ZLOOP and defendants to the addresses provided for such notices in the contract. The notice of breach indicated that ZLOOP and defendants were in material breach of the contract for their failure to pay $650,000 in base fees that were due as of the date the notice was sent and that they had ten days from the date of the notice to cure the breach before KBM would

"suspend its performance and/or pursue all remedies available at law or in equity."[1] On 5 July 2015, KBM notified Bob Boston via text message, that if the breach of contract was not cured by the end of the following business day, KBM would terminate the contract. Bob Boston responded to the message indicating he was "not wiring the funds and each of us will have to proceed accordingly." On 8 July 2015—ten business days after the notice of breach was sent—KBM sent a notice of termination of contract, addressed again to Bob Boston as the registered agent for ZLOOP and defendants at the addresses listed for such notices in the contract.

On 7 August 2015, KBM filed a complaint in Iredell County Superior Court against ZLOOP and defendants. The complaint alleged a single cause of action—namely "breach of contract"—on the basis that defendants had failed to make the installment payments for May and June of 2015, and had anticipatorily breached the contract through the text message sent by Bob Boston, which stated an unequivocal intent to stop performing under the contract. According to the complaint, KBM sought $4,025,061.20 in damages. This amount was the balance due under the contract minus $805,000 that KBM mitigated and $19,938.80 that KBM credited as a set off amount from Justin Boston's driver's fees.

[1] The contract included a for cause termination clause, which permitted KBM to terminate the contract with cause in the event the sponsor "breaches [the] Contract and fails to cure such breach within Ten (10) business days after KBM's written notice."

Shortly after the complaint was filed, defendants filed a notice of removal with the United States District Court for the Western District of North Carolina, claiming federal jurisdiction over the matter on the basis that ZLOOP filed for Chapter 11 Bankruptcy. KBM filed a motion to remand soon thereafter and voluntarily dismissed ZLOOP from this lawsuit. The United States District Court for the Western District of North Carolina granted KBM's motion to remand to Iredell County Superior Court on 6 July 2016.

As part of ZLOOP's bankruptcy proceedings, the bankruptcy plan administrator for ZLOOP filed a lawsuit against KBM seeking to recover the $1,550,000 that ZLOOP previously paid to KBM, asserting that Bob Boston improperly spent ZLOOP funds to procure the contract. KBM settled this action by agreeing to refund $462,500 of the $1,550,000 ZLOOP had already paid in base fees.

On 11 October 2017, the trial court entered an order for the final pretrial conference in which the parties stipulated to, *inter alia*, the following: "The total amount of damages which KBM seeks from Defendants is the $462,500 returned by KBM to the ZLOOP, Inc., by and through the Bankruptcy Plan Administrator." KBM agreed to limit the amount of damages. Instead of the entire amount due under the contract, minus the set off and mitigated damages, KBM agreed to the amount returned to ZLOOP. This new amount was the result of a settlement in a discovery

dispute arising from defendants' request for additional discovery involving KBM's complete financial records for the 2015 and 2016 race terms.

The case came before a jury and was tried from 11 October 2017 to 13 October 2017. Defendants moved to dismiss at the close of plaintiff's case, and for a directed verdict at the close of all the evidence. The trial court denied the motions. The jury returned a verdict finding defendants in breach of the contract, and jointly and severally liable to KBM for $442,561.20—the amount KBM returned to ZLOOP minus the set off previously deducted from Justin Boston's driver's fees. Defendants moved for a JNOV, which was again denied.

Defendants timely appealed.

II. Motion for Directed Verdict

Defendants' primary contention on appeal is that the trial court erred in denying their motion for a directed verdict because plaintiff failed to present evidence of direct damages under the contract. We disagree.

A. Standard of Review

The standard of review from the denial of a motion for a directed verdict is "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citation omitted). "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the

evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989) (citation omitted). Ultimately, "[i]f there is more than a scintilla of evidence supporting each element of the non-movant's claim, the motion should be denied." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted).

B. Analysis

It is well-established that "[t]he elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Id.* at 26, 530 S.E.2d at 843 (citation omitted). In the order on the final pretrial conference, the parties stipulated that defendants and KBM entered into a valid contract. Therefore, the only issues left for the jury's determination were whether defendants breached the contract, and, if so, what the appropriate measure of damages were resulting from said breach.

As to the issue of breach of contract, Section 14(a) of the contract unequivocally holds the driver, the driver's company, and the sponsor jointly and severally liable for the base fee—"In exchange for the sponsorship rights afforded by KBM pursuant to this Contract, Driver, Driver's Company and Sponsor, jointly and severally, shall pay

KBM $3,200,000 per Term year (the 'Base Fees')[.]" The contract further states that notices—whether for breach or otherwise—shall be deemed conclusively given when "hand delivered, mailed by registered mail or certified mail, return receipt requested, postage prepaid, facsimile or delivered to a nationally recognized overnight courier service[,]" and have been "addressed as detailed on the signature pages of [the] Contract."

In the instant case, the contract was properly admitted into evidence, along with a copy of the notice of breach and notice of termination, both of which were addressed to defendants at the addresses provided for on the signature page of the contract. The notices further indicate they were sent via "Certified Mail, Return Receipt Requested," as required under the contract. During Justin Boston's cross-examination, he admitted that ZLOOP breached the contract by failing to make payments and that he was subsequently liable as a result:

> [Plaintiff's Counsel]: Okay. And you admit that Zloop breached [the contract] by not paying; correct?
>
> [Justin Boston]: Yes, ma'am.
>
> [Plaintiff's Counsel]: Okay. And you acknowledge, don't you, that under the Driver Contract if Zloop didn't pay, you were required to pay?
>
> [Justin Boston]: I was not made aware until after the lawsuit. But yes, I acknowledge that today.
>
> [Plaintiff's Counsel]: You acknowledge that today. And you haven't paid, have you?

[Justin Boston]: No, ma'am.

[Plaintiff's Counsel]: Okay. Do you admit that you have breached this contract?

[Justin Boston]: No.

[Plaintiff's Counsel]: Why haven't you breached the contract?

[Justin Boston]: I'm not the sponsor.

[Plaintiff's Counsel]: So unless you're the sponsor, you don't—

[Justin Boston]: I—

[Plaintiff's Counsel]: —in this contract you had any obligation to pay?

[Justin Boston]: I understand it was in the contract, but as far as myself as the driver, I felt like I performed everything that I was supposed to perform under the contract minus the jointly and severally liable provision in the contract.

[Plaintiff's Counsel]: Right, minus the joint and severally liable portion?

[Justin Boston]: Yes.

[Plaintiff's Counsel]: But you understand that was a part of the contract; correct?

[Justin Boston]: It was.

[Plaintiff's Counsel]: And you have not performed it, have you?

> [Justin Boston]: Sure.
>
> [Plaintiff's Counsel]: Okay. So isn't it true that you have breached this contract?
>
> [Justin Boston]: I just, just don't see it that way, but yes.

Justin Boston further testified that if he breached the contract, Justin Boston Racing, LLC did as well:

> [Plaintiff's Counsel]: Okay. And do you sort of consider [Justin Boston Racing] and Justin Boston to be pretty much the same thing?
>
> [Justin Boston]: Yes, ma'am.
>
> [Plaintiff's Counsel]: Okay. So do you acknowledge that if Justin Boston breached this contract, [Justin Boston Racing] breached this contract, too?
>
> [Justin Boston]: Yes.

This testimony, in conjunction with the contract, is more than sufficient evidence to submit the issue of breach of contract, including whether Justin Boston had proper notice of the breach, to the jury. Accordingly, we hold there was sufficient evidence to support the denial of defendants' motions for directed verdict on the breach of contract issue.

As to the issue of damages, defendants argue that the evidence of damages presented by plaintiff represented consequential damages—recovery of which was not permitted under the contract—as opposed to direct damages. Defendants cite Section 10(c) of the contract which states: "In no event shall either party be liable to

the other for any special, incidental, consequential or punitive damages or losses of any kind that may be suffered by the other with respect to the subject matter of this Contract (other than in connection with a third party claim for which there is required indemnification hereunder)." Defendants also cite the testimony of KBM's Chief Financial Officer, John Fuller, in which he admitted that KBM was seeking to recover funds paid to the bankruptcy plan administrator for ZLOOP and was not money that was initially unpaid under the contract. Therefore, according to defendants, plaintiff failed to present evidence of direct damages.

Defendants' contention is essentially that the pretrial stipulations altered the theory upon which plaintiff was seeking recovery; however this contention is misplaced. Defendants argue that the stipulations as to the issues for the jury stated: "Are the damages incurred by Plaintiff for settling the bankruptcy case damages contemplated by the parties when they entered the contract? (Direct Damages). And/or, is there some provision in the contract requiring defendants to reimburse Plaintiff for such a settlement?" However this reading misstates the stipulations, which are as follows:

> (13) Plaintiff contends that the contested issues to be tried by the jury are as follows:
>
> a. Did Defendants Justin Boston and Justin Boston Racing, LLC breach the Driver Contract? . . .
>
> b. What amount is Plaintiff Kyle Bush Motorsports, Inc. entitled to recover from Defendants Justin

> Boston and Justin Boston Racing, LLC for breach of contract? . . .

The trial court's charge to the jury sheds additional light on the nature of the stipulated damages:

> The parties further stipulated or the plaintiff and defendant further stipulated and agreed that nonparty Zloop on behalf of the defendants paid KBM a total of $1,550,000 pursuant to the driver contract. *Of that amount, KBM returned $462,500 to Zloop* to settle a claim by Zloop by and through the bankruptcy plan administrator. *The total amount of damages which KBM seeks from the defendants is the $462,500 returned by KBM to Zloop, Inc.,* by and through the bankruptcy plan administrator. Since the parties have so agreed you are to take the facts that I just read as true for the purposes of this case.

(Emphasis added). Neither party objected to these stipulations when read to the jury.

Whether the amount, $462,500, is considered direct or consequential damages depends on the appropriate categorization of the money—was it a refund of the base fee, thereby amounting to an unpaid portion under the contract, direct damages; or was it indemnification for a separate amount of money paid out under the settlement agreement with ZLOOP, consequential damages? The answer to this question lies squarely within the stipulations and the unchallenged jury charge.

When we examine the above damages stipulation and jury charge, it is apparent that plaintiff and defendants agreed that the $462,500 was a returned portion of the base fee already paid by ZLOOP. It is precisely because of this agreed

upon fact that the $462,500 is an unpaid portion of the base fee for which defendants admitted to joint and several liability under the contract. While defendants now assert that the $462,500 is actually a separate settlement amount, not a return of the base fee, which could be classified as consequential damages, defendants did not assert this argument at the trial court when the stipulations were made. Accordingly, the $462,500 was properly classified as an unpaid portion of the base fee and amounted to direct damages specifically contemplated at the time the parties entered into the contract. How and why those funds were refunded is irrelevant to defendants' liability for unpaid portions of the base fee. We therefore reject defendants' arguments to the contrary.

Because plaintiff presented evidence in the form of the wire transfer to ZLOOP of the $462,500, testimony that the set offs owed to Justin Boston were $19,938.80, as well as the pretrial stipulations stating this transfer was a refund by KBM of monies paid under the contract, we hold that there was sufficient evidence to support the jury's award of $442,561.20 in damages, and to deny defendants' motions for directed verdict.

III. Motion for Judgment Notwithstanding the Verdict

The standard of review for a motion for judgment notwithstanding the verdict "is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness*

Church of God, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000) (citation omitted). As previously discussed, because there was sufficient evidence to submit the issues of breach of contract and damages to the jury such that it was proper for the trial court to deny defendants' motion for directed verdict, we hold that there was sufficient evidence to support the trial court's denial of defendants' motion for JNOV.

IV. Conclusion

For the foregoing reasons, the trial court properly denied defendants' motions for directed verdict and JNOV.

AFFIRMED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).