

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

RONALD GARNER and MARILYN)	No. 66964-8-I
GARNER, husband and wife,)	
)	
Appellants/Cross Respondents,)	
)	
v.)	
)	
THE ESTATE OF JOLYN HAMILTON,)	UNPUBLISHED OPINION
)	
Respondent/Cross Appellant.)	FILED: September 19, 2011
)	

Ellington, J. — In this dispute concerning the sale of a commercial trucking concern, we are asked to determine whether the court erred in calculating portions of the judgment relating to net accounts receivable due the seller and whether the evidence supports the award of damages. We conclude the court made an error in its calculation and remand with directions to correct the judgment. In all other respects, we affirm.

BACKGROUND

In 2005, Ronald and Marilyn Garner decided to sell their commercial trucking business, Garner Trucking. They contracted with an agency to market the company. The agent that handled the transaction was Salim Dada.

In April 2006, Jolyn Hamilton became interested in buying the company.¹

¹ Jolyn Hamilton is now deceased. Her husband, Gary Hamilton, has been substituted as the personal representative of her estate.

Garner put her in touch with Dada, who gave a sales presentation. The material Dada presented included a list of the company's equipment, both owned and on terminal rental adjustment clause (TRAC) leases.² The parties signed a letter of intent (LOI) in May 2006 for sale of the company at the price of \$975,000.

Three provisions of the LOI are relevant to this appeal. First, for the purchase price, Hamilton was to receive, among other things, "[a]ll equipment currently used by the company free and clear of debt obligations except the equipment on TRAC leases (see attached exhibit A)."³ There was no exhibit attached to the LOI.⁴ When Gary Hamilton asked about the exhibit, Dada told him he already had been given the equipment and TRAC lease list. Hamilton therefore reasonably believed the equipment list he had been provided at the sales presentation was exhibit A.⁵

Second, section 3(c) of the LOI provided that Garner would "retain all cash and cash equivalent that is in excess of the liabilities shown on final balance sheet provided at closing."⁶

Third, section 7(b) of the LOI provided that, as a condition of closing, "[t]here shall have been no material adverse change in the business, customers, suppliers, key relationships, prospect or financial performance of the [c]ompany between the

² Ex. 17. A TRAC lease is one in which a business can acquire a vehicle with no down payment, the leasing company claims the depreciation for tax purposes, and the business has the option to buy the vehicle at the end of the lease term for a predetermined price. Report of Proceedings (RP) (Mar. 29, 2010) at 40-41; RP (Mar. 30, 2010) at 204.

³ Ex. 14.2 at 2.

⁴ RP (Mar. 30, 2010) at 220, 256.

⁵ Clerk's Papers at 44.

⁶ Ex. 14.2 at 2.

execution of this LOI and the closing of the transaction contemplated herein.”⁷

The parties executed a stock purchase agreement (SPA) on July 19, 2006. The SPA contained terms similar to the LOI regarding equipment included in the purchase price, the seller’s right to cash in excess of liabilities, and the requirement that there be no material adverse changes in the company before closing.⁸ The SPA also referenced the equipment listed in Exhibit A. Hamilton testified the exhibit was not attached at closing and he continued to believe it referred to the original equipment list.⁹

Shortly after closing, Hamilton discovered discrepancies between the equipment list and the actual equipment at Garner Trucking. Trailers he believed should have been free and clear were actually on TRAC leases, and there were two new TRAC-leased trucks. As a result, Hamilton owed over \$8,000 more in monthly lease payments than anticipated.¹⁰ Hamilton also discovered an apparent \$97,000 shortfall in the company’s checking account.

⁷ Ex. 14.2 at 2.

⁸ Section 1.6(i) states that the purchase price is based on the company retaining “[a]ll equipment currently used by the [c]ompany free and clear of debt obligations except the equipment on TRAC leases (see attached [e]xhibit A).” Ex. 14.6 at 2. Section 1.6(ii) provided that all equipment on TRAC leases would remain as TRAC leases. Id. Section 1.6(iii) required Hamilton to pay Garner the cash in excess of liabilities on the final balance sheet provided at closing. Id. Section 2.7 of the SPA also stated the company had no indebtedness or liability except as shown on the financial statements. Id. at 4-5. Section 2.9 required that, “[b]etween May 3, 2006 and the date hereof there has not been any change in the financial position, liabilities, ownership, compensation of employees, or business of [c]ompany or in the [a]ssets, other than changes in the ordinary course of business which in the aggregate have not been materially adverse, or as otherwise disclosed in Schedule 2.9 hereto.” Id. at 5. Section 2.10 identified the net accounts receivable as that existing on July 18, 2006. Id.

⁹ The SPA admitted as trial exhibit 14.6 does contain exhibit A, but unlike most of the other exhibits to the document, it does not bear Hamilton’s initials.

¹⁰ RP (Mar. 31, 2010) at 51.

Because of these and other issues, Hamilton refused to pay Garner the outstanding net accounts receivable. Garner filed suit in July 2007, seeking \$67,840.06.¹¹ Hamilton counterclaimed for breach of contract, misrepresentation, and fraud. In January 2008, Hamilton stopped making payments on a promissory note to Garner, terminated the TRAC leases, and shut down the business.¹²

Following a bench trial, the court found Garner breached the terms of the LOI and the SPA and awarded damages to Hamilton. The court offset the damages against amounts due to Garner, and entered a net judgment for Hamilton in the amount of \$72,567.93. Garner appeals.¹³

DISCUSSION

Garner contends the court erred in several of its findings and conclusions. Where the trial court has weighed the evidence, our review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings support the conclusions of law and the judgment.¹⁴ Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the declared premise.¹⁵ We review conclusions of law de novo.¹⁶

Accounts Receivable

The sales agreement provided that Garner “shall retain all cash and cash

¹¹ Clerk’s Papers at 1-2.

¹² RP (Mar. 31, 2010) at 352; Ex. 11.

¹³ Hamilton has abandoned his cross appeal.

¹⁴ City of Tacoma v. State, 117 Wn.2d 348, 362, 816 P.2d 7 (1991).

¹⁵ Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

¹⁶ Id.

equivalent that is in excess of the liabilities shown on the final balance sheet provided at closing.”¹⁷ To determine the amount to which Garner was entitled, the parties met with certified public accountant Robin Nichols shortly before closing. Nichols calculated that Garner should be paid \$130,874.82 for the net accounts receivable as of June 30, 2006.¹⁸ This amount accounted for an anticipated overdraft of \$40,675.03.¹⁹ Shortly after closing, the parties discovered an additional overdraft of \$43,079.01,²⁰ and agreed that would be deducted from the amount Hamilton owed Garner.

To account for some of the discrepancies in the assets and liabilities of the company that had not been adequately disclosed prior to closing, Hamilton recalculated the amount due Garner as \$41,675.49.²¹ Hamilton testified that Garner acknowledged “some mistakes were made and he thought that was the number and I think he agreed at that time to take \$41,000 if I paid it immediately.”²² Hamilton refused to pay because of other unresolved disputes.²³

The court found that the parties had agreed at trial that Hamilton owed Garner \$41,025.00 for the net receivables.²⁴

Garner contends the evidence does not support this finding because neither he

¹⁷ Clerk’s Papers at 43.

¹⁸ Ex. 39 at 5.

¹⁹ Id. at 3-4.

²⁰ Ex. 18.

²¹ Ex. 39 at 1; Ex. 4; Ex. 6.

²² RP (Mar. 31, 2010) at 274.

²³ Id. at 367.

²⁴ RP (Apr. 2, 2010) at 520.

nor Hamilton so testified. It is true that neither Hamilton nor Garner testified about that exact figure. However, in closing argument, Garner's counsel conceded that his claim for receivables should be reduced to account for an undisclosed debt: "[O]ur claim there in the trial brief of the \$67,840 [for net receivables] should be deducted by \$26,814.94, because that was a credit [Hamilton] should have been entitled to."²⁵ The difference is \$41,025.01.

Hamilton's testimony, together with Garner's concession, provides an adequate basis for the court's finding.²⁶ In any event, since the court awarded Garner exactly what he argued he was due, he is estopped from taking a contrary position on appeal.²⁷

Overdraft

The court found that Garner Trucking's bank account was overdrawn by \$97,000 on the day the sale closed, of which \$43,000 had been previously accounted for, "thus leaving the Garner Trucking account overdrawn by \$54,000.00."²⁸ The court included \$54,000 in the judgment for Hamilton. In its oral ruling, the court found:

²⁵ RP (Apr. 1, 2010) at 481.

²⁶ Hamilton argues the court should have awarded even less than \$41,025. But because he withdrew his cross appeal, Hamilton cannot seek affirmative relief. Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 202, 11 P.3d 762 (2000) ("A successful litigant need not cross-appeal in order to urge any additional reasons in support of the judgment, even though rejected by the trial court, but no additional relief will be granted on appeal in the absence of a cross-appeal." (quoting Peterson v. Hagan, 56 Wn.2d 48, 52, 351 P.2d 127 (1960))); RAP 2.4(a), 5.2(f). Accordingly, we do not address his arguments.

²⁷ Mavis v. King County Pub. Hosp. No. 2, 159 Wn. App. 639, 650, 248 P.3d 558 (2011) (judicial estoppel may apply when (1) a party's later position is clearly inconsistent with its earlier position; (2) acceptance of the inconsistent position on appeal would create the perception that one or other court was misled; and (3) the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped).

²⁸ Clerk's Papers at 44.

[T]here was \$97,000 overdrawn in the checking account that would have been a debt that Garner should have paid. But I think that \$43,000 were what was already accounted for in the accounts receivable. If I'm wrong, counsel will correct me. So the \$43,000 was already accounted for in that agreed amount of \$41,000, then it would actually be \$54,000 not \$97,000.^[29]

Garner contends there is not substantial evidence to support the finding that the unaccounted for overdraft was \$54,000. We agree.

Two overdrafts were discussed at trial. The initial overdraft of \$40,675.03 appeared on the June 30, 2006 balance sheet, which the parties discussed with the certified public accountant. In calculating the net accounts receivable owed to Garner, the certified public accountant subtracted this amount.³⁰ The checking account was further overdrawn when Garner cashed a \$43,079.01 check he had written himself before closing.³¹ Hamilton then subtracted this amount in his handwritten recalculation of the accounts receivable due Garner, which formed the basis of the \$41,025 the court awarded to Garner.³² Accordingly, both overdrafts were "already accounted for in that agreed amount of \$41,000."³³ The remaining unaccounted for overdraft was only \$13,245.96 (\$97,000 minus \$40,675.03 minus \$43,079.01).

Hamilton argues on appeal that the \$97,000 overdraft "had nothing to do with [the \$43,079.01] check,"³⁴ but his trial testimony was to the contrary.

²⁹ RP (Apr. 2, 2010) at 519-20. We sympathize with the court's confusion on this point. The documentation was incomplete and the testimony was contradictory.

³⁰ Ex. 39 at 3, 4.

³¹ RP (Mar. 29, 2010) at 26-27; RP (Mar. 31, 2010) at 122-23.

³² RP (Mar. 31, 2010) at 271.

³³ RP (Apr. 2, 2010) at 520.

³⁴ Br. of Resp't at 16-17. To support this assertion, Hamilton simply points out that that check was not posted to the bank account until July 26, 2006, one week after

We conclude the court miscalculated the net accounts receivable to which Garner was entitled by erroneously finding the initial overdraft had not been accounted for in the agreed accounts receivable figure, and remand for the court to correct the judgment by subtracting \$40,675.03.

Damages Related to Trucks

The court found that Garner violated several provisions of the LOI and SPA by failing to disclose two new TRAC-leased trucks on the equipment list provided to Hamilton and by purchasing one of the trucks after executing the LOI. The court awarded Hamilton damages in the amount of the payments Hamilton made before terminating the leases.

Garner does not dispute that he breached the agreements. He argues only that the court erred in finding Hamilton proved damages resulting from the breach. He contends that Hamilton's use of the trucks for over two years³⁶ and his failure to complain about them during that time demonstrates ratification and failure to mitigate damages. Garner argues that "it is doubtful the Hamiltons even were damaged."³⁷ He

the \$97,000 overdraft on July 19, 2006. But it is likely that the \$97,000 "overdraft" appeared in Garner Trucking's accounting software, not on the actual bank account. The pertinent bank statement shows no overdraft that month; the account's minimum balance that month was \$2,059.73. Ex. 42 (July 2006 statement).

³⁵ Hamilton testified that the \$97,000 overdraft was primarily attributable to these two overdrafts discussed herein. RP (Mar. 31, 2010) at 323 ("Part of it was the money that Ron had written myself [sic] checks to. Part of it was the \$40,000 shown on the balance sheet that it was over.").

³⁶ Hamilton did not use the trucks for over two years. The sale closed in July 2006 and Hamilton closed the business in January 2008.

³⁷ Br. of Appellant at 15.

also contends Hamilton could have mitigated or avoided damages by refusing the trucks at the time of sale or by asking Garner to take them back. He contends the “undisputed testimony” was that Garner would have been able to sell the trucks to other interested parties.³⁸

This argument is unpersuasive. First, whether or not Hamilton’s use of the trucks constitutes ratification is a factual question that should have been litigated below.³⁹ Garner never made this argument to the trial court, so it provides no basis for challenging the finding on appeal.

Second, the court acknowledged “[t]here may have been some revenue generated” by the two trucks, but noted “there wasn’t any evidence presented regarding that.”⁴⁰ Garner’s argument that Hamilton’s use of the trucks precludes damages is thus without evidentiary support.

Finally, Garner’s argument that Hamilton could have mitigated his damages by selling the trucks or asking Garner to take them is entirely speculative.⁴¹ Garner provided no evidence that he was prepared to buy the trucks or assume the leases or that he had other buyers available. Nor is it even clear from the evidence that such a transfer was possible. The TRAC leases did not permit an early payoff, and both trucks

³⁸ Reply Br. of Appellant at 11.

³⁹ Peterson v. Neal, 48 Wn.2d 192, 197, 292 P.2d 358 (1956) (“[r]atification and waiver are ordinary facts to be determined by the trial court”).

⁴⁰ RP (Apr. 2, 2010) at 519.

⁴¹ For example, Garner testified, “I could have gotten one of my friends to perhaps take them over.” RP (Mar. 29, 2010) at 126. This statement is at odds with the findings of an arbitrator handling the claim by the leasing company against Garner that “[t]here was no indication Mr. Garner wanted to obtain financing and buy out the leases and there was no indication that he had other buyers available to either buy out or assume the leases.” Ex. 11.

were cross-collateralized to other equipment that was also on leases that prohibited early payoff.

The evidence supports the court's calculation of damages in the amount of the payments, or \$34,233.00 for truck 201 and \$30,912.00 for truck 251.⁴²

Damages Related to Trailers

The court also awarded Hamilton damages related to two trailer sets, 5517/5518 and 5521/5522. The initial equipment list identified them as equipment owned by the company. As such, they were to be "free and clear of debt obligations" at closing.⁴³ Because the trailers actually were on TRAC leases, they were not free and clear of debt obligations at closing. Garner breached the agreements by failing to disclose the leases or to pay off the debts at closing. But he contends Hamilton failed to prove any damages with respect to the trailers.

Garner argues, without authority, that Hamilton could not have been damaged because he knew or should have known that the trailers were on TRAC lease at the time of closing. Garner points out that Hamilton's lender provided an equipment list at closing that accurately identified the trailers' status, and Hamilton initialed the document. But Hamilton testified he had no reason to scrutinize the equipment lists provided by his lender because he had been assured there had been no change from the initial list, which the court found Hamilton reasonably believed was accurate.

The only evidence about trailer-related damages was that provided by Hamilton. He testified Garner owed \$21,288 for one trailing set and \$31,504 for the other.⁴⁴ These

⁴² Clerk's Papers at 46.

⁴³ Ex. 14.2 at p.2, Ex. 14.6 at p.2.

