2013 IL App (1st) 121804-U

THIRD DIVISION
June 12, 2013

No. 1-12-1804

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAND AND LAKES COMPANY, an Illinois Corporation, Plaintiff-Appellee, v. HOMEWOOD DISPOSAL SERVICE, INC., an Illinois Corporation, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of Cook County No. 07 L 3167 Honorable Clare E. McWilliams, Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *HELD*: The circuit court did not err in determining that no oral contract existed and, thus, that the five-year statute of limitations for oral contracts did not apply where there was no evidence of an oral agreement and the contract was not missing an essential term. Moreover, the discovery rule operated to toll the 10-year statute of limitations for written contracts where plaintiff reasonably relied on defendant's representations, conducted further inquiry as soon as it learned it might have a cause of action, and defendant was not unduly prejudiced by the delay. The trial court's damages award was not manifestly erroneous where the record contained adequate support for the court's reliance on a specific exhibit and the inclusion of a certain truck in the damages calculation.

¶ 2 Plaintiff-appellee Land and Lakes Company (Land & Lakes) filed a breach of contract action against defendant-appellant Homewood Disposal Service, Inc. (Homewood) to recover certain disposal fees. Following a bench trial, the circuit court awarded judgment in favor of Land & Lakes in the amount of $1,618,684.14. On appeal, Homewood contends that the suit was barred by the five-year statute of limitations for oral contracts or, alternatively, because Land & Lakes did not carry its burden of proving the discovery rule tolled the 10-year statute of limitations. Homewood further contends that the circuit court erred in relying on an exhibit that overstated the damages by $54,000 and in including a certain disposal truck in its damages calculation, which increased the total damages award by $510,000. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 Land & Lakes is a waste management company and owns the River Bend Prairie landfill (River Bend) located in the Village of Dolton. Prior to June 21, 1994, Dolton collected residential waste from its single-family residences and disposed of this waste at River Bend. Land & Lakes offered Dolton, as its host community, a substantial discount for the disposal of its residential waste. Dolton paid what is known as the "gate rate" for the disposal of its non-residential waste. In May 1994, Dolton decided to privatize its waste collection and sought bids, assuring bidders that its existing agreement with Land & Lakes for residential waste disposal rates would be honored. The Dolton contract was awarded to Homewood, a waste disposal company that had also disposed of waste from other locations at River Bend for years.

¶ 5 Dolton and Homewood entered into an agreement for scavenger services on June 21,

1994. The agreement stated that it was based on Homewood's initial ability to "tip" at River Bend at the current cost of $1.33 per cubic yard. Homewood also agreed to collect Dolton non-residential municipal waste at no charge to Dolton. In the meantime, Dolton informed Land & Lakes that Homewood would now be collecting Dolton's waste and Land & Lakes agreed to honor the discount rate for the Homewood trucks carrying Dolton residential waste. Land & Lakes established commodity code 167 as the billing code for Dolton residential waste. In an internal memo generated on June 21, 1994, Land & Lakes indicated that Homewood would now be disposing of Dolton's residential waste and would receive the same discounted rate previously offered to Dolton. The memo noted that there would be no way to identify which refuse came from Dolton, therefore, Land & Lakes would calculate the historical average for each month and invoice Homewood at the gate rate for any material brought in above the average. The average would be calculated by determining the average amount for any particular month using the average amounts for that month in the previous two years; *e.g.*, the average in July 1994 would be based on the average amount of refuse deposited from Dolton in July 1993 and 1992.

¶ 6 On July 6, 1994, Homewood executed a disposal agreement with Land & Lakes, similar to agreements it had executed in the past. Under the terms of the agreement, Homewood agreed to pay disposal fees at the rate specified in the current published price list, which is commonly known as the gate rate, subject to change without notice. The agreement further provided that the signature of a driver on the waste receipt ticket would be binding and would constitute a valid basis for billing for the amount invoiced. The agreement did not include any terms related to the discounted rate for Dolton residential waste. Homewood proceeded to collect Dolton's waste for

more than a decade and continued to dispose of additional waste at River Bend and at other facilities during this time.

¶ 7 In 2007, Land & Lakes filed a breach of contract action, alleging that Homewood had been disposing of waste other than Dolton residential waste at River Bend and receiving the discounted rate. Specifically, Land & Lakes alleged that although Homewood declared that trucks 105 and 388 carried Dolton residential waste, they in fact carried either commingled waste or waste from other locations entirely. The complaint stated that sometime around February 2006, Land & Lakes suspected that Homewood was disposing of gate rate waste under the Dolton discount rate and hired an investigator to examine the collection and route activities of trucks 105 and 388. On the basis of the investigator's report, Land & Lakes sued for breach of contract. Land & Lakes subsequently learned that truck 355 was also disposing of gate rate waste at the discounted rate and filed a second amended complaint to include truck 355. Land & Lakes alleged that the damages it suffered as a result of being deprived of the gate rate for the three trucks was $1,618,684.14. Land & Lakes further sought interest payments in the amount of $2,374, 663.21. Finally, the complaint stated that after Land & Lakes received the 2006 investigation report and notified Homewood, truck 388 no longer delivered waste to River Bend. The complaint explained that for the calendar years 2000 through 2005, Homewood disposed of an annual average of 12,743 tons of Dolton residential waste. For the calendar years 2006 through 2010, the annual average decreased to 7,636 tons of Dolton residential waste.

¶ 8 At the bench trial, a site clerk for Land & Lakes testified that when trucks arrive at River Bend, they are weighed, the site clerk enters the number on the truck into the computer, and then,

based on the commodity code previously assigned to that particular truck, the computer prints a ticket. The site clerk gives the ticket to the driver, who signs and returns it. The driver then returns to the truck and proceeds to empty the load in the designated area.

¶ 9 Steven Simon testified that he was the owner-operator of Acumen Probe, a licensed investigative agency. Acumen was retained by Land & Lakes to investigate two trucks operated by Homewood. Two Acumen employees conducted surveillance of trucks 388 and 105 over the course of two weeks and Simon personally provided assistance to the employees during the surveillance. Simon prepared the final report of the investigation. Acumen observed both trucks collecting commercial waste. Simon explained that commercial waste was waste collected from any building that was not a residential household, *e.g.*, a grocery store, a healthcare center and a senior living care center. Simon acknowledged that on one of the days they conducted surveillance of truck 105, it only collected residential waste and then drove directly to River Bend.

¶ 10 Thomas Yonker, a Homewood executive, testified that the company experienced operational problems shortly after signing the contract with Dolton. River Bend was not open on Saturdays, including Saturdays that followed holidays when Homewood would have to collect garbage, and the facility closed at 3:30 p.m. each weekday. If a truck picked up trash in another town on the way to Dolton, it would have to dump half loads but would be charged as if it dumped a full load. John Pausma, who worked for Homewood, called an executive at Land & Lakes in an attempt to resolve the operational issues. It was Yonker's understanding that the two men reached a verbal agreement that Homewood's disposal would be based solely on volume and

anything that was brought in that exceeded that volume would be charged at the gate rate.

¶ 11 Thomas Agema testified that he was the general manager for municipal contracts at Homewood. Agema testified that Pausma had a conversation with someone at Land & Lakes on October 4, 1994. Pausma put the details of the discussion in a memo and Agema placed the memo in a file. It was Agema's understanding that prior to October 4, the discount rate only applied to Dolton residential waste. However, after October 4, his understanding was that the discount rate was based on volume and that the gate rate would only be charged for anything that exceeded that volume. Agema testified that prior to this verbal agreement, Homewood was losing the economic benefit of the discount during holiday weeks because River Bend was closed on Saturdays and they had to take the waste to a transfer station and pay higher rates for disposal. Agema further testified that, without the agreement, Homewood would not have had many options and would most likely have had to contact Dolton and explain that it was not able to take full advantage of the discount and discuss an increase in the rate it was charging Dolton. Agnew acknowledged that if the Dolton residential waste decreased but Homewood continued to bring in the same volume of commercial waste, Homewood would benefit financially.

¶ 12 Pausma testified that Homewood experienced problems in disposing of the Dolton residential waste at River Bend for a variety of reasons, including the fact that River Bend was closed on Saturdays and would close on weekdays before the trucks had finished collecting the Dolton waste. He also highlighted issues related to certain garbage Homewood had contracted to collect that was not accepted at River Bend so it had to be dumped at the transfer station at a higher rate, or trucks that would only be a quarter full and Homewood did not want to have to

pay the disposal rate as though it was a full load. Pausma testified that the garbage collected from Dolton was exactly what Homewood expected when it prepared the bid, and that River Bend's hours did not change after June 1994. Pausma acknowledged that Homewood had not anticipated the logistical difficulties it would face in attempting to collect and dispose of the waste under the Dolton contract.

¶ 13 Because of these difficulties, Pausma decided to call Jim Cowhey, Jr., at Land & Lakes in October 1994. He explained the operational difficulties and asked if they could work out a swap arrangement in which Homewood could bring other waste to River Bend in exchange for the Dolton waste it was taking to the transfer station. Pausma testified that Cowhey agreed that as long as Homewood did not exceed the existing cap or quota that was in place for Dolton residential waste, it could dispose of other waste at River Bend to replace the Dolton waste that was being disposed of at the transfer station. Pausma further testified that Cowhey specifically agreed that truck 355, a commercial truck, would be designated as a Dolton truck for purposes of the discounted rate. Following this conversation, Pausma drafted a memo documenting the agreement, made a copy for himself, and gave the original memo to Agema. He did not send a copy of the memo to Land & Lakes. Pausma testified that any waste taken to River Bend in excess of the existing cap was billed at the gate rate. Invoices from Land & Lakes were entered into evidence that showed the higher billing rate for waste that exceeded the average allowed for Dolton. Pausma testified that Homewood paid all of the invoices it received from Land & Lakes.

¶ 14 Mary Margaret Cowhey testified that she is Vice President of Land & Lakes. Mary testified that Land & Lakes relies on the driver's signature on the dump ticket in order to bill the

disposal company for waste deposited at River Bend. Mary testified that she was familiar with the billing arrangement Land & Lakes had with Dolton and explained that Dolton only had to pay state taxes on the disposal of its residential waste, namely, $1.33 per cubic yard. This arrangement only applied to Dolton's residential waste and Dolton paid a higher rate for nonresidential waste. When Dolton privatized its garbage collection and Homewood was the successful bidder, Land & Lakes generated an internal memo explaining its billing procedure for the purpose of trying to "keep the hauler honest" by ensuring that the waste did not exceed the average calculated using the totals for the previous two years. The memo was not disclosed to anyone outside Land & Lakes. Mary testified that she never had a discussion with Pausma about swapping waste and that nobody at Land & Lakes told her of such a discussion. In October 2005, Land & Lakes upgraded to a new software program. With the new program, Land & Lakes was able to generate a report that showed Homewood bringing in the same amount of waste over a long period of time, although that was not the case with other residential haulers who had experienced a decline in solid waste over the previous decade. Mary testified that after her brother, James Cowhey, Jr., brought this issue to Homewood's attention, Homewood stopped bringing at least one truck that was carrying commercial waste to River Bend.

¶ 15 James Cowhey, Jr. (Jim), testified that he is President and CEO of Land & Lakes. In 1994, Jim and his father, James Cowhey, Sr., met with the then mayor of Dolton, who told them of his plans to privatize the garbage collection services for Dolton. The Cowheys confirmed that Land & Lakes would continue to honor the rate of $1.33 per cubic yard to the successful bidder. Jim testified that someone at Land & Lakes generated an internal memo outlining the procedure

that would be followed to set a baseline for the amount of residential waste collected by Dolton in the past. Jim confirmed that the discounted rate only applied to Dolton residential waste. Jim explained that the standard in the industry was to charge the customer for the rated truck capacity rather than for how much waste the truck actually contained.

¶ 16 Jim testified that he did not have a conversation with Pausma about a swapping or waste diverting arrangement, and did not discuss a cap or quota system with Pausma. Jim remembered having approximately three to five conversations with Pausma over the years, and stated that they were operational in nature to discuss issues like trucks being substituted for trucks that had broken down or trucks being stopped by freight trains, necessitating a request for the landfill to be kept open until the truck arrived. In late 2005, Land & Lakes installed a new computer system. The new system gave Land & Lakes enhanced capabilities for extracting data and analyzing numbers. Land & Lakes generated a report with the new system that showed that the level of Dolton residential waste had remained steady over time while residential waste in other communities had decreased. Land & Lakes hired Acumen, a private investigative firm, to follow certain Homewood garbage trucks.

¶ 17 Jim testified that in 1996, Land & Lakes had a meeting with Homewood and disclosed the findings by Acumen that Homewood was disposing of Dolton commercial waste at the discounted rate for residential waste. Nobody from Homewood said anything in the meeting about a swapping arrangement or a cap or quota system. Land & Lakes told Homewood that it believed Homewood owed Land & Lakes well over a million dollars for the commercial waste it had been dumping at River Bend at the reduced residential waste rate. Jim testified that they

were unable to agree on the amount Homewood owed. After Land & Lakes started billing Homewood at the gate rate for certain trucks, truck 388 stopped disposing of waste at River Bend.

¶ 18 German Santillan testified that he drove truck 105 for approximately five years, picking up bulk residential waste in Dolton, specifically, household waste items that would not fit in the residential garbage cans. Santillan explained that he would sometimes have partial loads from Dolton and would then pick up waste in another location. However, Santillan testified that he would dispose of the mixed loads at Homewood's transfer station, not at River Bend, with the exception of mixed loads containing waste from Dolton and a trailer park located in Blue Island. Santillan remembered disposing of at least one such mixed load at River Bend. Santillan signed a ticket at River Bend representing that he was disposing of Dolton waste. Santillan acknowledged that he also picked up waste from apartment buildings and municipal buildings in Dolton. Santillan testified that on certain days of the week, he would routinely pick up waste from the apartment buildings first and that it represented about 1% of the load, then he would fill the rest of the truck with Dolton residential waste and dispose of it at River Bend. He explained that he was not supposed to dispose of the apartment waste at River Bend but said that it was laziness on his part because he did not want to deliver such a small portion to the transfer station. Santillan confirmed that he mingled the apartment waste with the residential waste every Monday and Thursday.

¶ 19 Kevin Vandervelde testified that he drove truck 355 for Homewood, collecting commercial waste from Dolton, Calumet City, South Holland and Harvey. Vandervelde

disposed of the waste once a day at River Bend. He signed the tickets at River Bend, but did not know if the tickets specifically said "Dolton." Vandervelde further testified that truck 355 only collected commercial waste.

¶ 20 Joseph Pennavaria testified that he drove truck 388 for Homewood, collecting commercial waste from Dolton and disposing of it at River Bend. Pennavaria signed the tickets and kept a copy for billing purposes, but did not notice anything on the tickets other than "Homewood Disposal" and the weight.

¶ 21 Robert Goetsch testified that he managed all operations for Homewood, including its transfer station. Although there was no charge for Homewood trucks to dispose of waste at the transfer station, the internal cost was approximately $35 per ton. Homewood kept records of all waste disposed of at the transfer station by its own trucks. Goetsch testified that truck 105, used primarily for the collection of Dolton residential waste, disposed of approximately 1,000 tons of waste per year at the transfer station. Goetsch understood from Pausma that there was a swapping arrangement with Land & Lakes. His understanding of the agreement was that Homewood would dispose of Dolton waste at the transfer station and then the same amount of waste could be taken by another truck to River Bend. Goetsch testified that if the truck finished on the south edge of Dolton, it would be more efficient to dispose of the load at the transfer station rather than drive to River Bend.

¶ 22 On May 22, 2012, the trial court entered judgment against Homewood for $1,618,684.14 plus costs. In its written order, the trial court explained that it found no evidence of an oral contract between the parties, thus, the five-year statute of limitations did not apply. The trial

court further found that the doctrine of equitable estoppel was not applicable to the facts of the case because there was no evidence that Homewood relied on any representations or actions of Land & Lakes to its detriment. The trial court found that a breach of contract had been established, however, the conduct of Homewood did not meet the criteria that would allow for an award of interest where Homewood paid all invoices tendered by Land & Lakes. Homewood timely filed this appeal.

¶ 23 ANALYSIS

¶ 24 Homewood first contends that because the disposal agreement was silent on the issue of the Dolton discount, an essential term was missing and, therefore, the five-year statute of limitations for oral contracts governs. Alternatively, Homewood contends that Land & Lakes could have discovered the alleged breach earlier so the discovery rule does not operate to toll the 10-year statute of limitations for written contracts.

¶ 25 Our review of the applicability of a statute of limitations is *de novo*. *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 467 (2008). There is a 10-year statute of limitations on written contracts. 735 ILCS 5/13-206 (West 2010). Where a party claims a breach of a written contract but the existence of that contract or one of its essential terms must be proven by parol evidence, the contract is deemed oral and the five-year statute of limitations applies. *Armstrong v. Guigler*, 174 Ill. 2d 281, 287 (1996).

¶ 26 In the proceedings below, Homewood argued that the five-year statute of limitations applied because of an oral agreement between Pausma and Cowhey, Jr. The trial court found there was no meeting of the minds between the parties regarding a swap or quota agreement and,

therefore, the five-year statute of limitations did not apply. On appeal, Homewood abandons its argument that there was an oral agreement between the parties and instead argues that because the written contract did not specifically address the Dolton discount, an essential term is missing.

¶ 27 We disagree. The situation is admittedly an unusual one. The record shows that the Dolton discount did not involve a direct contractual arrangement between Homewood and Land & Lakes, but rather an agreement between Land & Lakes and Dolton, and a separate agreement between Dolton and Homewood. This is further supported by testimony that if Homewood did not receive the expected discount, it would have to renegotiate its rates with Dolton, not with Land & Lakes. The breach of contract action is based on a written contract between Homewood and Land & Lakes that Homewood would pay the gate rate for disposal at River Bend. Because the Dolton discount was not a term that was ever contracted for with Land & Lakes by Homewood, no essential term is missing from the contract. Thus, the 10-year statute of limitations for written contracts applies.

¶ 28 For contract actions, the cause of action ordinarily accrues at the time of the breach, to avoid the possibility that plaintiffs will delay bringing suit in order to increase damages. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995). However, the discovery rule was developed in response to the concern that the literal application of a statute of limitations could produce unduly harsh results. *Id*. The discovery rule " ' delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused.' " *Id*. (quoting *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 249 (1994)). Courts apply the

discovery rule on a case-by-case basis, weighing the relative hardships to both plaintiffs and defendants. *Id*. at 78.

¶ 29 The alleged breach in the case *sub judice* initially occurred in 1994 and Land & Lakes did not file suit until 2007. Under the application of the discovery rule, the plaintiff has the burden of proving the date of discovery. *Id*. at 85. The statute begins to run when the party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused and the party is then under an obligation to determine whether actionable conduct is involved. *Id*. at 86 (citing *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 170-71 (1980); *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981)).

¶ 30 Homewood contends that Land & Lakes did not meet its burden because it could have reasonably determined at any point in time that Homewood was dumping something other than Dolton residential waste. We disagree. Testimony at trial established that there is no way to determine whether a truck contains residential waste or commercial waste, or whether a particular truck contains residential waste from Dolton only or a mixture of waste from Dolton and another municipality. Land & Lakes reasonably relied on Homewood to accurately represent which trucks were carrying Dolton residential waste and which were carrying commercial waste or waste from other municipalities. Although Land & Lakes came up with an internal means of attempting to determine whether Homewood was disposing of additional waste under the Dolton discount by comparing the volume to the average volume for the previous two years, it still could not be certain that only Dolton residential waste was being disposed of at the discount rate. It was not until Land & Lakes purchased computer software in 2005 that allowed it to easily

generate reports that it noticed a discrepancy in the volume of waste coming from Dolton as compared to the volume of waste from other municipalities. It then hired an investigator to follow the trucks and determined that the trucks that were disposing of waste under the commodity code assigned to trucks that purportedly collected Dolton residential waste were either combining Dolton residential and commercial waste, or combining waste from other municipalities with Dolton waste. Land & Lakes subsequently followed up with Homewood directly and received acknowledgment that Homewood had been disposing of waste other than Dolton residential waste under the assigned commodity code for Dolton. Thus, Land & Lakes has met its burden of proving that it could not have reasonably discovered the breach sooner, and that it acted as soon as it was aware of the possible breach to determine whether it had a cause of action. The delay in filing suit did not prejudice Homewood, especially where Homewood avoided paying the correct rate for years but ultimately did not have to pay prejudgment interest on the past due amount. Therefore, we conclude that the discovery rule operated to toll the statute of limitations.

¶ 31 We now turn to Homewood's contention that the trial court miscalculated damages. Homewood argues that the trial court relied on an exhibit that had been superseded, resulting in an overstatement of $54,000 in damages. Moreover, Homewood argues that the trial court erred in including truck 105 in its damages calculation, a truck that disposed almost exclusively of Dolton residential waste, resulting in an additional overstatement of $510,000.

¶ 32 An award of damages by a trial court sitting without a jury will not be disturbed on review unless it is manifestly erroneous. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 543

(1996). An award is not manifestly erroneous if there is an adequate basis in the record for the court's determination. *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 147 (1972).

¶ 33 We first address Homewood's contention that the trial court relied on a superseded exhibit. We find no support for this contention in the record. As Land & Lakes explains in its brief, some of its records were damaged with water and it was unable to read those load tickets. The exhibit Homewood asks this court to rely on is the exhibit that contained data from actual load tickets. However, the exhibit that the trial court relied on in calculating its damages award included a calculation based on the assumption that the disposal activity for the Homewood trucks was consistent over the time period for which the actual load tickets were missing. This was supported by testimony that this assumption was reasonable because all of the trucks assigned the Dolton discount code regularly disposed of waste at River Bend. Therefore, there is an adequate basis in the record for the trial court's reliance on the exhibit that included an estimation to account for the time period covered by the damaged load tickets and the trial court's damages award that included the additional $54,000 was not manifestly erroneous.

¶ 34 Finally, we address Homewood's contention that truck 105 should not have been included in the damages calculation. The driver of truck 105 testified that he mixed residential and commercial waste on a routine basis and disposed of it at River Bend even when he knew he was supposed to take it to the transfer station instead. Testimony at trial further established that the Dolton discount only applied to Dolton residential waste, there was no request to "split codes" and that Land & Lakes had never done so and did not know of any other landfill that split codes. Thus, there is an adequate basis in the record to support the inclusion of truck 105 and the trial

court's award of damages on that basis is not manifestly erroneous.

¶ 35 For the reasons stated herein, the judgment of the trial court is affirmed.

¶ 36 Affirmed.