2018 IL App (1st) 171902-U

No. 1-17-1902

Order filed June 8, 2018

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

U.S. GLOBAL CORPORATION,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 L 6452
	)	
INVENERGY WIND LLC.,	)	Honorable
	)	Margarent A. Brennan,
Defendant-Appellant.	)	Judge, Presiding.
	)	
	)	

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's partial denial of Invenergy's motion for summary judgment is not reviewable. Invenergy waived its argument that the trial court abused its discretion by denying the two pretrial motions *in limine* at issue. The trial court did not err in denying Invenergy's motion for a directed verdict and judgment notwithstanding the verdict, nor did it abuse its discretion in denying Invenergy's motion for a new trial. The trial court did not err in failing to limit the jury's monetary award to USG.

¶ 2 This appeal arises from a complaint filed by U.S. Global Corporation (USG) against Invenergy Wind LLC (Invenergy) for breach of contract and tortuous interference with contract. For the reasons that follow, we affirm all of the rulings below.

¶ 3 BACKGROUND

¶ 4 Invenergy is a limited liability company based in Chicago, Illinois that develops and operates domestic and foreign renewable energy projects. USG is a Chicago-based firm specializing in the renewable energy sector. USG assists American companies interested in expanding into foreign markets in this energy sector.

¶ 5 In 2005, USG introduced Invenergy to an energy company in Poland named EEPN sp. z.o.o. (Enerco).[1] Invenergy and Enerco entered into an agreement to construct wind farms in Poland. One of the wind farms was designated the "Tymien Project."

¶ 6 In consideration for USG's introduction, Invenergy and USG entered into a "Joint Development Agreement" (contract). Under the contract, USG acted as project coordinator on the Tymien Project. The contract included a non-circumvention clause, where the parties agreed not to circumvent, bypass, or obviate one another to avoid payment of commissions or fees in any project with a corporation, partnership, or individual that USG introduced to Invenergy. USG entered into a similar agreement with Enerco, seeking to ensure that it would be compensated for any potential projects conducted by Invenergy and Enerco.

¶ 7 Invenergy and USG executed an addendum to their contract. The addendum provided that if the construction of any additional wind projects was commenced by December 31, 2010, or if financial closing of a construction loan was commenced by that date, USG would receive a

[1] EEPN is an affiliate of Enerco and is run by the same principals.

so-called "success fee." The success fee would be $7,000 U.S. dollars per megawatt for the first cumulative 100 megawatts of gross installed capacity of quality projects.

¶ 8 A new wind farm project was subsequently commenced subject to the addendum. The project was designated the "Darlowo Project."

¶ 9 USG made multiple requests to Invenergy for payment of the success fee in connection with the Darlowo Project. Invenergy responded that USG was not entitled to the fee. This lawsuit followed.

¶ 10 In its lawsuit, USG alleged that Invenergy breached the addendum to their contract by failing to pay it the success fee in connection with the Darlowo Project. USG also asserted a claim for tortious interference with contract, alleging that Invenergy induced Enerco to breach its contractual obligations to USG.

¶ 11 Following the close of discovery, Invenergy moved for summary judgment. Invenergy argued that USG was not entitled to the success fee because the conditions precedent that were set forth in the addendum to their contract for payment of the fee had not been satisfied. Invenergy claimed that construction of the Darlowo Project was not commenced by December 31, 2010, and that the financial closing of the construction loan pertaining to the project was not commenced by that date. Invenergy asserted that financial documents pertaining to the construction loan were not finalized and executed until January 2011, with funds disbursed in March 2011. Invenergy added that construction of the project did not commence until March 14, 2011.

¶ 12 The circuit court partially agreed with Invenergy, granting it partial summary judgment in relation to the breach of contract claim. The court determined that financial closing of the

construction loan for the Darlowo Project did not commence by December 31, 2010. However, the court found there was an issue of fact as to whether construction of the Darlowo Project commenced by the December 31st cut-off date. The trial court did not rule on the summary judgment motion as it related to the claim of tortious interference with contract and Invenergy did not seek a pretrial ruling on the claim.

¶ 13 At a pretrial conference, Invenergy moved unsuccessfully *in limine* to exclude reference to a portion of the U.S. Tax Code enacted in 2013. USG sought to introduce this evidence in an effort to show that financial expenditures on a construction project constituted commencement of construction. Invenergy also moved unsuccessfully *in limine* to exclude certain documents allegedly showing that prior to the end of 2010, it anticipated paying USG the success fee at issue.

¶ 14 The case proceeded to a jury trial. The jury returned a verdict in favor of USG on the breach of contract claim, finding that construction of the Darlowo Project commenced by December 31, 2010. The jury awarded USG $700,000.00. The jury found in favor of Invenergy on the tortious-interference of contract claim.

¶ 15 Following denial of Invenergy's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, the circuit court amended the award by adding prejudgment interest, resulting in an award for USG in the amount of $915,874.00. This appeal followed.

¶ 16 ANALYSIS

¶ 17 Invenergy first contends it was entitled to summary judgment on both of USG's causes of action: breach of contract and tortious-interference of contract. We find this issue is not reviewable under the procedural posture of this case.

¶ 18 After the trial court denied Invenergy's motion for summary judgment, the case proceeded to a full trial and judgment on the merits. As a result, we will not review the trial court's decision denying the motion, since, subject to certain exceptions not applicable here, the denial of a motion for summary judgment is not reviewable following an evidentiary trial and final judgment on the merits because the result of any error in such denial merges into the subsequent trial. See *In re Estate of Funk*, 221 Ill. 2d 30, 85 (2006); *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 355 (2002) ("when a motion for summary judgment is denied and the case proceeds to trial, the denial of summary judgment is not reviewable on appeal because the result of any error is merged into the judgment entered at trial").

¶ 19 Invenergy next contends the trial court erred by denying the two pretrial motions *in limine* at issue. Invenergy has waived this contention.

¶ 20 "A motion *in limine* is addressed to the trial court's inherent power to admit or exclude evidence." *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680 (2001). "[A] denial of a motion *in limine* does not preserve an objection to disputed evidence later introduced at trial." *Brown v. Baker*, 284 Ill. App. 3d 401, 406 (1996). "When a motion *in limine* is denied, a contemporaneous objection to the evidence at the time it is offered is required to preserve the issue for review." *Id*. "Absent the requisite objection, the right to raise the issue on appeal is waived." *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 163 Ill. 2d 498, 502 (1994).

¶ 21 In this case, Invenergy failed to object at the time the evidence subject to its motions *in limine* was introduced, and therefore its contentions regarding the trial court's alleged errors in denying the motions are waived. See, *e.g.*, *Ford v. Herman*, 316 Ill. App. 3d 726, 736 (2000) (If

the movant fails to object to the later introduction of evidence that was the subject of the motion *in limine*, the issue is waived on appeal).

¶ 22 Invenergy next contends it was against the manifest weight of the evidence for the jury to find that construction of the Darlowo Project commenced by December 31, 2010, and therefore the trial court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict. Invenergy also claims the trial court abused its discretion by denying its motion for a new trial. Invenergy maintains it was entitled to a new trial because of misleading and prejudicial comments elicited by opposing counsel during his cross-examination of Invenergy's expert witness, which denied it a fair trial. We disagree with each of these contentions.

¶ 23 "A court of review is empowered to reverse a jury verdict only if it was against the manifest weight of the evidence." *Ford v. City of Chicago*, 132 Ill. App. 3d 408, 412 (1985). A jury's verdict is against the manifest weight of the evidence only where, upon viewing the evidence in a light most favorable to the prevailing party, the opposite conclusion is clearly evident or the verdict appears to be arbitrary or unsupported by the evidence. *Krengiel v. Lissner Corporation, Inc.*, 250 Ill. App. 3d 288, 293 (1993); *Mrowca v. Chicago Transit Authority*, 317 Ill. App. 3d 784, 788 (2000).

¶ 24 Invenergy argues that the evidence presented at trial did not support the jury's finding that construction of the Darlowo Project commenced by December 31, 2010. We disagree.

¶ 25 The jury heard conflicting evidence on this factual issue. Both sides presented evidence and testimony from lay and expert witnesses in support of their competing positions and exhibits were introduced into evidence.

¶ 26 Invenergy argued that construction of the Darlowo Project commenced sometime after January 31, 2011, when the finance company sent the construction-site manager a "Notification of Site Turnover" document. USG countered that construction commenced when Invenergy sent Polish authorities a financial report certifying that by the end of 2009, the project had "fixed assets in construction" valued at hundreds of thousands of dollars, and by the end of 2010, fixed assets in construction valued over a million dollars; and when Invenergy submitted a "Notification of Commencement of Construction" document to Polish authorities in March 2010, indicating that under Article 41 of the Polish Building Law, commencement of construction begins once preparatory work on the building site begins, such as leveling the ground, geodata delineation, and preparing background facilities (porta-potties, etc.) and on-site work trailers.

¶ 27 The jury considered and weighed this evidence, made its evaluations as to credibility and weight, and rendered a verdict for USG. Based on the record before us we cannot say that an opposite conclusion is clearly apparent or that the jury's verdict appears to be arbitrary or unsupported by the evidence. Therefore, we hold that the jury's finding that construction of the Darlowo Project commenced by December 31, 2010, is not against the manifest weight of the evidence.

¶ 28 For similar reasons, we find the trial court did not err by denying Invenergy's motions for a directed verdict and judgment notwithstanding the verdict. A trial court's rulings on these motions are reviewed *de novo*. *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168, ¶ 16. A directed verdict or judgment notwithstanding the verdict is proper where all of the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelming favors the movant that no contrary verdict based on that evidence could ever stand. *Maple v.*

Gustafson, 151 Ill. 2d 445, 453 (1992). A trial court should not enter a directed verdict or judgment notwithstanding the verdict "if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Id.*

¶ 29 In denying Invenergy's motion for a directed verdict, the trial court stated in part, "[t]here's been ample evidence for the jury to make a determination one way or the other as to whether or not construction commenced." We agree.

¶ 30 Viewing the evidence in a light most favorable to USG, we cannot say that it so overwhelmingly favored Invenergy on the construction issue that no verdict in favor of USG could ever stand. Rather, like the trial court, we believe the evidence presented a substantial factual dispute so that the jury's assessment of the credibility of witnesses and its determination regarding conflicting evidence was decisive to the outcome. Therefore, we hold the trial court did not err in denying Invenergy's motions for a directed verdict or judgment notwithstanding the verdict.

¶ 31 Invenergy next contends the trial court erred in denying its motion for a new trial. In considering a motion for a new trial, the trial court weighs the evidence and sets aside the verdict only if it is contrary to the manifest weight of the evidence. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 650 (2010). "A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence." *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 38. "A court's ruling on a motion for a new trial will not be reversed except in those instances where

it is affirmatively shown that it clearly abused its discretion." *Maple*, 151 Ill. 2d at 455. The evidentiary challenges raised by Invenergy in its motion for a new trial are also subject to an abuse of discretion standard of review. See, *e.g.*, *Adams v. Sarah Bush Lincoln Health Center*, 369 Ill. App. 3d 988, 998 (2007) ("When a party challenges a trial court's evidentiary ruling, the standard of review is abuse of discretion"). An abuse of discretion occurs when the court's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the court. *Aguilar-Santos v. Briner*, 2017 IL App (1st) 153593, ¶ 61.

¶ 32 Invenergy contends it was deprived of a fair trial, warranting a new trial, because of misleading and prejudicial comments elicited by opposing counsel during his cross-examination of expert witness Douglas Houseman[2], and during closing argument, insinuating that Invenergy withheld certain evidentiary documents from the jury. Invenergy claims counsel elicited testimony from Houseman concerning certain alleged attachments to Plaintiff's Exhibit No. 14 ("Notification of Commencement of Construction" document). Invenergy argues that since there were no attachments to the exhibit, the testimony was elicited to give the jury the false impression that Invenergy was hiding the attachments because they were detrimental to its case.

¶ 33 The scope and extent of cross-examination are within the discretion of the trial court whose determination will not be disturbed on appeal absent an abuse of that discretion resulting in manifest prejudice to a party. *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 1179 (2011). We find no abuse of discretion here.

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[2] Houseman is an engineer retained by Invenergy to give expert opinion on what constituted "commencement of construction in Poland during the 2010 to 2011 time frame."

¶ 34 We find that during her direct examination of Houseman, counsel for Invenergy "opened the door" to the testimony regarding the attachments. Where a plaintiff opens the door to elicitation of certain testimony, the plaintiff cannot complain that he was prejudiced by any cross-examination opposing counsel raised regarding that testimony. See, *e.g.*, *Conner v. Ofreneo*, 257 Ill. App. 3d 427, 434 (1993).

¶ 35 During her examination of Houseman, counsel for Invenergy inquired about Plaintiff's Exhibit No. 14 as follows: "This notice says that on March 24, 2010, construction works are scheduled to commence. Does that indicate to you that construction started on 24 March, 2010, or pretty shortly thereafter?" Houseman responded: "Well, without seeing the 400 to 600 pages in documents that went behind this notice, no." This was the first trial testimony indicating that Plaintiff's Exhibit No. 14 might have had additional pages attached to it.

¶ 36 On cross-examination, USG's counsel asked Houseman: "One of the questions that Ms. Highland asked you was regarding the Notification of Commencement of Construction. Do you remember that?" Houseman answered in the affirmative and counsel directed him to the document, stating "That's our Exhibit 14." Houseman volunteered: "Yes, it is. And I wish I could see the rest of it, but neither side has provided it." Houseman testified that Plaintiff's Exhibit No. 14 was "effectively the cover page" for some 400 pages or more that Invenergy filed with the Polish court.

¶ 37 The questions and answers continued as follows:

> "Q. Well, that's interesting. Neither side has provided it, but that was all submitted by Invenergy, correct?
>
> A. Yes, sir.
>
> Q. I think you said there were 400 pages or more –

> A. I would expect that there would be 400 pages or more of detail that went behind this much of it; drawings that are probably this size or larger.
>
> Q. Permitting, too, correct?
>
> A. The copies of the permits and other things of those sorts.
>
> Q. And that all would've been attached to this document that was filed by Invenergy?
>
> A. That's effectively the cover page, yes sir.
>
> Q. And it all would've been attached to the document that was filed with the Polish court, correct?
>
> A. Yes.
>
> Q. And that would all be in possession and control of Invenergy, correct?
>
> MS. HIGHLAND: Objection. Calls for speculation.
>
> THE COURT: Overruled.
>
> THE WITNESS: I don't know what they have retained from that time period."

¶ 46 As the above illustrates, Invenergy's counsel clearly opened the door to the testimony regarding the attachments elicited during USG's cross-examination of Houseman.

¶ 47 Invenergy next contends it was deprived of a fair trial, warranting a new trial, because opposing counsel allegedly made misleading and prejudicial arguments regarding the date financial closing of the construction loan occurred. Invenergy claims it was prejudiced when counsel for USG told the jury during closing argument that financial closing of the construction loan for the Darlowo Project occurred on January 5, 2011, even though the trial court previously determined that the closing commenced when the funds were disbursed in March 2011.

¶ 48 Invenergy maintains that opposing counsel's argument was designed to convince the jury to disregard and nullify the evidence. Invenergy suggests, that in USG's view, "if the condition precedent of financial closing was *that* close to the deadline (which, as ruled, it was not), then there must have been some intentional delay just long enough to avoid paying USG." (Emphasis in the original.)

¶ 49 We reject Invenergy's contentions because they are based on a misreading of what the trial court actually stated. A review of the record reveals the trial court did not conclude that financial closing of the construction loan for the Darlowo Project occurred when the funds were disbursed in March 2011. At the hearing on the motion for summary judgment, when the court was asked to clarify whether it was finding that the financial closing occurred on the date the loan documents were executed in January or when the funds were disbursed in March, the court responded that while "the funding is the actual closing in my opinion," that was "a question of fact," and that the ruling was simply that the closing did not occur prior to December 31, 2010.

¶ 50 Invenergy finally contends the monetary judgment of $700,000 entered in favor of USG should have been limited to $560,000. Invenergy argues that the "jury's $700,000 damages award is based on USG's argument that [it] was entitled to a Success Fee based on the full 100 MW." Invenergy asserts the evidence presented at trial established that the Darlowo Project was an 80 MW wind farm, rather than a 100 MW wind farm. Invenergy claims that "USG was not entitled to the full $700,000 unless there was a 100 MW project in question, which there was not." Invenergy contends that "[a]s such, any damages to which USG is entitled should be limited to $7,000 per MW for 80 MW of Darlowo I, or $560,000."

¶ 51 We reject Invenergy's arguments because the evidence and testimony it relies on does not actually support its position. The portion of Mr. Romuald Poplawski's testimony cited by Invenergy in support of its position reads, in its entirety, as follows:

"Q. Do you recall how many megawatts were included in Darlowo Phase I? A. In the Phase 1, it was 80 megawatts. Part of the total 250."

¶ 52 Invenergy omits the very next question and answer following the sustaining of an objection by Invenergy:

"Q. Why is it that you believe that you're entitled to compensation for the full 100 megawatts that the contract provided you could get?

A. Because the project is a 250-megawatt project."

¶ 53 Invenergy never followed up on this point, and with good reason. The parties' contract called for compensation for each "wind energy project," not for each phase of the project. As counsel for Invenergy inquired of its own witness Mr. Steve Ryder:

"Q. There were multiple phases of the Darlowo project, right?

A. That's right.

Q. Do you know how many phases there were?

A. There were three phases."

¶ 54 "It is within a jury's discretion to determine damages for breach of contract, and its award of damages is entitled to substantial deference." *Dunlap v. Alcuin Montessori School*, 298 Ill. App. 3d 329, 335 (1998). "We will not disturb a jury's award of damages 'unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss suffered.' " *Id.*, at 335 (quoting *Snover v. McGraw*,

172 Ill. 2d 438, 447 (1996)). "If a jury's award falls within the flexible range of conclusions reasonably supported by the evidence, it must stand." *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1138 (2000).

¶ 55 In this case, there was no basis in the evidence for the trial court to limit the jury's damages award to $560,000. As a result, we cannot find the trial court erred in failing to set aside the jury's award to USG.

¶ 56 For the reasons stated, we affirm the judgments of the circuit court of Cook County.

¶ 57 Affirmed.