2018 IL App (3d) 170511-U

Order filed August 9, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

MARTIN VOGEL, individually, and THE CRANE GUY, INC., an Illinois corporation,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois.
Plaintiffs-Appellants/Cross-Appellees,	)	
v.	)	Appeal No. 3-17-0511
	)	Circuit No. 06-CH-145
ROGER WARNER, CONNIE WARNER, individually, and TN&W IRRIGATION, INC., an Illinois corporation,	)	
Defendants-Appellees.	)	
	)	Honorable
(Roger Warner and Connie Warner, Defendant-appellees/cross-appellants)	)	Michael Risinger, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: Damage award for breach of contract was upheld on appeal as not against the manifest weight of the evidence because there was an adequate basis in the record to support the trial court's calculation.

¶ 2 The plaintiffs appealed from a monetary judgment in their favor after a bench trial in an action for conversion and breach of contract against the defendants.

¶ 3 FACTS

¶ 4 The plaintiffs, Marty Vogel and his company, the Crane Guy Inc., brought suit against the defendants, Roger and Connie Warner and TN&W Irrigation, alleging conversion, breach of contract, and replevin regarding a crane that was used in Vogel's business. After the fourth-amended complaint was dismissed, the fifth-amended complaint only alleged three counts of conversion, which was dismissed by summary judgment. Vogel appealed, and we reversed and remanded. *Vogel v. Warner*, 3-09-1046 (2010) (unpublished order under Supreme Court Rule 23). We found that there were issues of material fact regarding who was the rightful owner of the crane and entitled to possession of the crane. We also found that there was a verbal contract between the parties and the only matters in dispute were the terms of that verbal contract. On remand, Vogel filed a sixth-amended complaint, alleging breach of oral contract by the Warners and conversion by the Warners and TN&W Irrigation. Roger Warner filed a counterclaim, alleging that Vogel kept the crane after Vogel was ordered to return it and seeking damages in the amount of the revenue from that date until the date it was picked up by Warner. The matter proceeded to a bench trial.

¶ 5 Vogel testified that he owned and operated a crane rental business. He was in the midst of bankruptcy proceedings in 2003 when he met the Warners' daughter, Carrie Warner, and started dating her. The Warners hired Vogel to do some crane work for them and to establish a well-drilling operation for TN&W Irrigation. Vogel was paid in cash by Connie Warner to do the well drilling and paid by check for crane services. According to Vogel, the Warners were aware of his

bankruptcy and the fact that the debt for his sole remaining crane needed to be reaffirmed. They offered to help Vogel with the financing of a different crane.

¶ 6 Vogel testified that the terms of the oral contract were that the Warners would purchase a crane, in repayment for the well-drilling work Vogel had been underpaid for, and Vogel would pay all the costs of the crane. He would enjoy the use and possession of the crane until all monthly payments had been made and, when all payments were made, ownership would transfer to Vogel. Vogel's understanding was that it was his crane; Roger Warner gave Vogel the payment book and told him it was Vogel's crane. Vogel paid the loan payments, the insurance, and the maintenance. The bill of sale, dated May 2004 between CRW Corp. and Roger Warner, indicates that Warner purchased the 1997 crane for $103,000, plus $3,000 in freight. Vogel paid $6,000 to Roger Warner for the down payment and for the freight. The Warners were the borrowers on a loan of $100,095 for the purchase of the crane, with the crane as the security for the loan.

¶ 7 Vogel made the first 21 payments on the loan, in the amount of $1,466.56 a month. In April or May 2005, Vogel and Carrie Warner broke up, Vogel married someone else in September 2005, and Carrie Warner filed eviction proceedings against Vogel on November 15, 2005. On February 3, 2006, Roger Warner came and took possession of the crane and told Vogel that Vogel could have it back when it was paid for. The crane was taken to property owned by TN&W Irrigation. There was testimony that the Warners contacted Vogel a few weeks prior to February 3 and gave Vogel the opportunity to get a loan and purchase the crane from the Warners. Vogel could not purchase the crane. Vogel had to rent cranes to complete his scheduled jobs and then ended up leasing a replacement crane because of his bankruptcy proceedings. Vogel testified that he rented the replacement crane for 7 months at $8,011 a month before it was

converted to a direct loan from Center Bank for the amount of $268,871.03. The loan payments were then $4,500.43 a month, starting in March 2007.

¶ 8 At the close of all evidence, the defendants filed a motion for a directed finding. The trial court granted the motion with respect to TN&W Irrigation, dismissing it as a party defendant. The trial court also dismissed the defendants' counterclaim and the plaintiffs' conversion count. After considering written arguments by the parties, the trial court entered an order finding that there was clearly an oral contract and that the Warners breached that contract. The trial court found those terms to be as stated by Vogel: Vogel would find a crane, the Warners would arrange financing, and Vogel would use it and pay for it until it was paid off. As damages, the trial court ordered the Warners to pay Vogel the difference between rent and loan payments until Vogel bought a replacement, plus the shipping and down payment costs:

Rent paid by Vogel from Feb 2006-Jan 2007	$60,603.16
Loan down payment and shipping costs	6,000.00
Loan payments had there been no breach	-17,598.72
Total damage award	**$49,004.44**

¶ 9 Vogel appealed, and the Warners cross-appealed.

¶ 10 ANALYSIS

¶ 11 Vogel argues that the trial court erred by using an incorrect measure of damages, contending that the trial court should have used the cost or value of replacement of the crane as the proper measure of damages. Vogel sought a total of $315,771.03 in damages, which included the monies awarded by the trial court, without a deduction for the loan payments had there been no breach, plus the difference between the purchase price of the replacement crane and the original crane. The Warners argue that the trial court had an adequate basis for its damage award.

¶ 12 The elements of a cause of action for breach of a contract, whether oral or written, are: the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and resultant damages or injury to the plaintiff. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 68. A valid and enforceable contract requires an offer, an acceptance, and consideration. *Id.* The trial court found that there was an oral contract between the parties, the terms of which were that Vogel would find a crane, the Warners would arrange financing, and Vogel would use the crane and pay for the crane until it was paid in full.

¶ 13 In their cross-appeal, the Warners argue that the trial court erred in finding that there was adequate consideration to support the oral contract. In fact, they argue that there was no evidence of any consideration. Vogel contends that there was consideration and any inadequacy of that consideration was not grounds for setting aside the contract.

¶ 14 Consideration consists of some detriment to the offeror, some benefit to the offeree, or some bargained-for exchange between them. *Doyle v. Holy Cross Hosp.*, 186 Ill. 2d 104, 112 (1999). Consideration is sufficient to support a contract if there is any act or promise that benefits one party or disadvantages the other. *Id.* Vogel testified that the Warners wanted to repay him for being underpaid when he did well-drilling for them, and there was also evidence of the family relationship whereby the Warners' daughter benefited by Vogel having a job. The fact that the Warners obligated themselves on a loan for a $100,000 crane based on that consideration might be a little unreasonable, but the mere inadequacy of consideration, in the absence of fraud or unconscionability, is usually insufficient to justify setting aside a contract. *Gavery v. McMahon & Elliott*, 283 Ill. App. 3d 484, 490-91 (1996). Absent any evidence of fraud or unconscionability, the trial court's determination was adequate consideration to support the oral contract not against the manifest weight of the evidence. See *1472 N. Milwaukee, Ltd. v.*

Feinerman, 2013 IL App (1st) 121191, ¶ 13 (we review a trial court order following a bench trial to determine if it is against the manifest weight of the evidence).

¶ 15 There is really no dispute that Vogel, by making the monthly payments on the crane, was performing under the contract and that the Warners breached the contract when they took the crane and demanded immediate payment. The only question remaining, then, is the amount of damage to Vogel caused by the breach. The appropriate amount of damages for breach of contract is the amount that would place the plaintiff in the same position he would have been in had the contract been performed. *Wilson v. DiCosola*, 352 Ill. App. 3d 223, 225 (2004). Thus, in determining which measure of damages to use, the trial court must examine the exact interest harmed. *Santorini Cab Corp. v. Banco Popular North America*, 2013 IL App (1st) 122070, ¶ 26. We review an award of damages made after a bench trial to determine if it is against the manifest weight of the evidence. *1472 N. Milwaukee, Ltd.*, 2013 IL App (1st) 121191, ¶ 13. An award of damages will not be against the manifest weight of the evidence if there is an adequate basis in the record to support the trial court's determination of damages. *Id.*

¶ 16 Typically, the measure of damages in a breach of contract for the sale of personal property, where the article is obtainable in the market, is the difference between the contract price and the market price at the time of the breach. *Santorini Cab Corp.*, 2013 IL App (1st) 122070, ¶ 27. In essence, with a few additions, Vogel argues that he is entitled to the difference between the cost of the original crane and the replacement crane.

¶ 17 A damage award, however, should not provide a plaintiff with a windfall or put him in a better position than the contract. *Id.* In this case, the trial court explained its determination of damages and was careful not to award a windfall. There was no evidence of the fair market value of the crane at the time of the breach, or any evidence that Vogel's business was damaged. The

trial court found that the replacement crane was newer and significantly more expensive than the original crane. We note, also, that the original crane was actually available to Vogel; it was his prior financial troubles that prevented him from obtaining financing and purchasing the crane. To place the plaintiff in the same position he would have been in had the contract been performed, the trial court treated Vogel as the Warners did, as if Vogel was a tenant leasing the crane. To that end, the trial court awarded Vogel the amount of increased lease payments that he had to make until he purchased a new crane, less the amount of the lease payments Vogel would have made for the original crane. In that same vein, since a tenant would not normally pay shipping or down payment costs, the trial court ordered those costs reimbursed to Vogel. Based upon the facts and evidence presented in this case, the trial court's total damage award of $49,004.44 was not against the manifest weight of the evidence.

¶ 18 Vogel also argues that the trial court erred and did not follow the law of the case created by our earlier order reversing summary judgment. The Warners argue that the trial court's dismissal of the conversion count was not against the manifest weight of the evidence. We review *de novo* an order granting a motion for directed verdict. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225 (2010).

¶ 19 Conversion is the unauthorized assumption of the right to possession or ownership of personal property. *Fortech, L.L.C. v. R.W. Dunteman Co.*, 366 Ill. App. 3d 804, 809 (2006). To prove conversion, the plaintiff must show: (1) a right in the property, (2) an absolute and unconditional right to the immediate possession of the property, (3) a demand for possession, and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property. *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114 (1998). In this case, the trial court

found that Vogel's right to the immediate, exclusive possession of the property and wrongful deprivation of that right were not proven.

¶ 20 Vogel argues that we found in our prior order that an oral contract existed and that Vogel established partial performance of that contract, so the trial court should have found that Vogel was the proper party in possession prior to the taking of the crane and the crane was converted. In addition, Vogel argues that there was no rightful repossession of the crane by the Warners. We find that the trial court correctly dismissed Vogel's conversion claim. While Vogel showed a right in the property pursuant to the oral contract, there was no proof that Vogel had the absolute and unconditional right to the immediate possession of the property. While the oral contract may have given him the right to possess the crane, that right was subject to the financing agreement and ownership of the Warners.

¶ 21 Lastly, Vogel contends that the trial court erred in dismissing the corporate defendant because the Warners were officers of the corporation and stored the crane on corporate property. The Warners argue that the dismissal of TN&W Irrigation at the end of Vogel's case in chief was not against the manifest weight of the evidence. Again, we review *de novo* an order granting a motion for directed verdict. *Krywin*, 238 Ill. 2d at 225.

¶ 22 The evidence at trial was that Roger Warner took possession of the crane and stored it at property owned by TN&W Irrigation, the company where the Warners were the officers. The trial court found that there was no evidence of what the corporation did or did not do. There was no evidence that the Warners were acting in their roles as corporate officers, or authorized by the corporation. In any event, since the conversion claim was dismissed, and the corporation was only named in that claim, this claim also fails.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Tazewell County is affirmed.

¶ 25 Affirmed.