2013 IL App (1st) 120601-U

FIRST DIVISION
June 10, 2013

No. 1-12-0601

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

OAK LAWN MINUTE WASH, INCORPORATED, an Illinois corporation, Plaintiff-Appellee, v. BRYAN SORD, an individual; and SUNNY'S CAR WASH, INCORPORATED, an Illinois corporation, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County No. 06 L 9349 Honorable Brigid Mary McGrath, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendants appeal from a jury award in favor of plaintiff. We affirm the judgment below, finding that the defendants waived any error in jury instructions by agreeing to them, and that the record on appeal was insufficient to establish reversible error.

¶ 2 This case illustrates that the rule of *caveat emptor* does not grant sellers unlimited immunity from claims brought by remorseful buyers. The plaintiff, Oak Lawn Minute Car Wash, Inc. (Oak Lawn), sued defendants, Bryan Sord and Sunny's Car Wash, Inc. (Sunny's), alleging breach of contract and fraud. The parties entered into a contract on May 25, 2005, for the purchase and sale

of a car wash owned and operated by Sunny's on May 25, 2005. Sord was the president and secretary of Sunny's. The "Asset Purchase Agreement" (Agreement) between Oak Lawn and Sunny's provided in relevant part that Sunny's represented and warranted that the financial statements were "true and accurate in all material respects." In addition, Sord provided a personal guaranty that "unconditionally and irrevocably guarantee[d] the accuracy of all representations and warranties of [Sunny's]." Among the information provided to Oak Lawn were income statements for the twelve-month period ended December 31, 2004, and the three-month period ended March 31, 2005.

¶ 3 In its three-count complaint, Oak Lawn alleged that the car wash attracted only about half of the expected clients and that the income statements for the 2004 fiscal year and the quarter-ended March 31, 2005, falsely inflated the net income for those respective periods. Oak Lawn sought damages based upon the falsely-inflated purchase price of the business, which in turn had been based upon the inflated net income for those periods. Finding the income information was in fact inflated, the trial court subsequently granted Oak Lawn's motion for partial summary judgment as to liability.

¶ 4 The case then proceeded to a jury trial on the issue of damages only. Although this appeal raises issues regarding jury confusion, the record on appeal contains no transcript (or acceptable substitute) of any evidence or arguments presented to the jury, the jury instructions conference, or the trial court's verbal instructions to the jury. Among the jury instructions submitted below was "Proposed Instruction No. 7," consisting of a verdict form that incorporated Illinois Pattern Jury Instructions, Civil, Nos. 700.11V, 700.18V, and 800.6 (4th ed. 2000). The verdict form first asked whether Oak Lawn sustained damages resulting from defendants' breach of contract, and if so, how

much money would compensate Oak Lawn for that breach. Next, the verdict form asked whether Oak Lawn sustained damages due to Sord's fraud, and again if so, how much how much money would compensate Oak Lawn for that fraud. Finally, the verdict form asked whether "justice and the public good" require Sord to pay additional damages to Oak Lawn "to punish and deter others from similar conduct," and if so, how much money Oak Lawn should receive. The common law record indicates that this modified instruction was "Agreed."

¶ 5 During its deliberations, the jury sent a note to the trial court observing that the verdict form asked it to add the amounts awarded for the breach of contract, fraud, and punitive damages claims, and that, "in closing we were instructed that [the breach of contract damages] and [fraud damages] would not be duplicated in the total." The jury then asked how it should arrive at its total damages award. In response, the trial court wrote to the jury, instructing it to follow the instructions on the verdict form, adding any amounts on the relevant lines. The trial court stated, in writing, that it would "ensure there are no duplicated damages."

¶ 6 Following deliberations, the jury awarded plaintiff total damages of $915,900, consisting of $223,950 each for the breach of contract and fraud claims, and $468,000 for the punitive damages claim. The verdict form shows that the breach of contract and fraud awards were initially $447,900 each, but the jury struck that amount in both places, substituting the lower amounts. In addition, the punitive damages claim had an additional numeral stricken at the beginning, but the numeral is illegible. The trial court entered judgment on the verdict.

¶ 7 Defendants filed a post-trial motion seeking a reduction of "excessive punitive damages." In the motion, defendants noted that plaintiff "was made whole, in both the breach of contract and

fraud counts with a combined award of $447,000," but the motion did not contest the award of compensatory damages. The trial court denied the post-trial motion, and this timely appeal follows.

¶ 8 Before this court, defendants initially contend that the verdict form instruction provided to the jury resulted in the awarding of duplicate damages. Specifically, defendants point to the verdict form, noting that the initial breach of contract and fraud awards were $447,900 each, and then apparently crossed out and revised to reflect one-half of that amount, or $223,950 each. Defendants add that the jury's note to the trial court was a "clear indication that the jury was confused on how to properly award damages" to Oak Lawn. Defendants further claim that the jury was confused as to the amount of punitive damages to award based on: (i) the striking out of an illegible numeral in the punitive damages section of the verdict form, and (ii) the filled-in amount of punitive damages that was "almost identical" to the combined breach of contract and fraud damages. Plaintiff responds that defendants' claim is forfeited.

¶ 9 Under the doctrine of invited error, "a party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). The rationale behind this doctrine is that "it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." *Id.* In this case, the record reveals that the verdict form that the trial court submitted to the jury was agreed to by defendants. As a result, defendants may not now contend that the jury verdict form was erroneous. We therefore agree that defendants' claim is forfeited.

¶ 10 In their reply brief, defendants change direction somewhat, arguing that they do not claim that the jury instructions were erroneous. The defendants seem to acknowledge that they forfeited any

such claim, since the reply brief further states that they "do not claim that they objected to the instructions and they were issued over their objections." Instead, defendants contend that they are merely challenging the damages awarded by the jury, which they believe constitutes an excessive judgment. They further assert that they raised this issue in their post-trial motion. Defendants' position is problematic for several reasons.

¶ 11 First, defendants' post-trial motion challenged the jury's award of punitive damages but raised no claim with respect to the compensatory damages award. It is axiomatic that "[*b*]*oth* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphasis in original.) *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, as noted above, defendants agreed to the verdict form that the trial court submitted to the jury, and we have no transcript casting the accuracy of that memorialization into any doubt. There is nothing in the record on appeal indicating that defendants lodged an objection at trial as to either the compensatory or punitive damages instructions. Accordingly, this argument has also been forfeited.

¶ 12 Second, Supreme Court Rule 341(h)(3) (Ill. S. Ct. R. 341(h)(3) (eff. July 1, 2008)) requires appellants' briefs to set forth the precise issues on which the appeal is based. Defendants' statement of the issue to be reviewed by this court was: "Whether the verdict instructions provided to the jury resulted in the awarding of duplicative damages in favor of plaintiff." A plain reading of that statement indicates that this is a challenge predicated upon faulty jury instructions, not the amount of damages determined by the jury.

¶ 13 Third, the arguments in defendants' opening brief make it clear that their appeal centers on the jury instructions, not the allegedly duplicative nature of the verdict. The brief argues that, "since

the trial court has discretion to determine which instructions to give the jury," the proper standard of review to employ is an abuse of discretion. The case defendants cite in support of their standard of review argument, *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505 (2002), addressed the propriety of the trial court's denial of a proposed jury instruction, not the verdict itself. We therefore must reject defendants' contention in reply that they are challenging the jury's verdict based on a duplicate damages award.

¶ 14 Regardless of how it is characterized, defendants' claim is without merit. We may reverse a jury verdict based upon erroneous instructions only where the instructions result in prejudice to the appellant (here, defendants). *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 28. We cannot determine, however, whether defendants suffered prejudice from the jury instructions because defendants failed to provide a record of the trial proceedings. In particular, we have no record of the testimony of any witnesses, such as business valuation experts, who produced the factual record which resulted in the jury's valuation of damages.

¶ 15 The burden of providing a sufficient record on appeal rests with the appellant (here, defendants). *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). When presented with an insufficient record, we must indulge every reasonable presumption in favor of the judgment appealed from. *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006). Furthermore, any doubts arising from an incomplete record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 391-92.

¶ 16 Supreme Court Rules 321 and 324 require an appellant to provide a complete record on appeal, including a bound and certified copy of the report of proceedings. See Ill. S. Ct. R. 321 (eff.

Feb. 1, 1994); Ill. S. Ct. R. 324 (eff. May 30, 2008). If a verbatim transcript is unavailable, the appellant may file an acceptable substitute, such as bystander's report or an agreed statement of facts, as provided for in Rule 323. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005).

¶ 17 Without this record, defendants' claim of jury confusion based on (i) the apparently revised amounts written in the verdict form and (ii) the note sent to the trial court is merely speculative. In the absence of the trial testimony or exhibits, we cannot determine whether defendants suffered prejudice from the jury instructions. Jury instructions, after all, are based not merely on the underlying causes of action, but also on the evidence presented. Where, as here, the record is incomplete or does not demonstrate the alleged error, we may not speculate as to what errors may have occurred below. *Foutch*, 99 Ill. 2d at 391-92; *Smolinski*, 363 Ill. App. 3d at 757; see also *People v. Edwards*, 74 Ill. 2d 1, 7 (1978) ("A reviewing court may not guess at the harm to an appellant *** where a record is incomplete. *** Where the record is insufficient or does not demonstrate the alleged error, the reviewing court must refrain from supposition and decide accordingly."). We must therefore reject defendants' claims.

¶ 18 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.