STATE OF MICHIGAN

COURT OF APPEALS

MCKELVEY & COMPANY,

Plaintiff/Counter-defendant-Appellee,

v

H & B BOOKKEEPING & TAX SERVICE, INC., BELYNDA A. DOMAS, and JOHNEY DOMAS,

Defendants/Counter-plaintiffs-Appellants.

UNPUBLISHED
December 11, 2008

No. 276663
Wayne Circuit Court
LC No. 05-501928-CK

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

In this breach of contract action, defendants[1] appeal as of right following a jury verdict in favor of plaintiff. We affirm.

Plaintiff operated a year-round tax and accounting business from a building that he owned in Belleville. He discussed a purchase of the building and the business with defendant, who owned tax and accounting businesses in Ypsilanti and Ann Arbor. Plaintiff offered to finance the deal after his wife suffered from a second stroke, and defendant agreed to the sale. The purchase price of the building was $150,000, and the remaining $250,000 accounted for the equipment and intangibles, including goodwill. The contracts expressly exempted plaintiff's investment business from the sale. The contract also provided that plaintiff would not engage in a similar business, trade, or occupation within a 25 mile radius for a five-year period. At that time, the parties signed separate non-compete agreements, and any violation of this restraint provision was subject to legal remedies, such as injunctive relief. However, there was no liquidated damages provision in the non-compete agreements.

[1] Defendants filed a counter-complaint against plaintiff, but the jury did not render a verdict in their favor. Additionally, although the corporate entities were named, the issues involved in the case focused upon the actions of the individual corporate principals. Consequently, the singular plaintiff will refer to Gerald McKelvey, and the singular defendant will refer to Belynda A. Domas.

Within a few months of the execution of the agreements, defendant requested a reduction of $30,000 off the purchase price purportedly because plaintiff's bookkeeper had erroneously included his investment income in the documentation provided.[2] Plaintiff rejected this request, but allowed defendant to restructure the payment agreement. Specifically, she paid off the purchase price of the building, increased her monthly payments, and promised to pay the remaining balloon payment by January 11, 2007. In the fall of 2002, defendant requested $10,000 be taken off the purchase price, but plaintiff refused. Plaintiff testified that defendant did not provide him with any evidence of errors in the financial documents given to her before the sale. Moreover, the contracts stated that defendant had sufficient expertise to review the information presented. Defendant testified that she made these requests because it "didn't hurt to ask" and denied the assertion that it evidenced her intent to breach the agreements.

Plaintiff was entitled to maintain an office in the building until the balance of the contract price was paid. Despite the provisions of the contract, plaintiff opined that defendant breached the contract by disconnecting his computer from the network and depriving him of access to the tax preparation program known as "Drake." He also testified that defendant removed his sign from the front of the building. Without access to the tax preparation software, plaintiff was unable to file taxes for him and other family members. Plaintiff purchased the tax software. To recoup the cost of the software, he decided to prepare taxes for fellow church members as a fundraiser for the church and for investment business customers from his office in Troy. He also mailed a flyer to former clients whom he opined no longer used defendant's services. Once defendant learned of the mailing, she stopped making payments and hired an expert to determine her losses.

Despite defendant's assertion that plaintiff committed the first material breach by his violation of the non-compete agreement, the jury rendered a verdict in favor of plaintiff and did not award defendants any damages with regard to the counter-complaint.

Defendants first allege that the trial court erred in denying their motion for directed verdict and judgment notwithstanding the verdict (JNOV). Specifically, defendant contends that the trial court disregarded the plain and unambiguous language of the purchase agreements and the covenants not to compete by imposing its own notion of fairness in its place. We disagree. A trial court's ruling regarding a motion for a directed verdict is reviewed de novo. *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005). When reviewing the trial court's decision, the evidence and all legitimate inferences are examined in the light most favorable to the nonmoving party. *Id*. This Court reviews the evidence presented up to the time of the motion and resolves any conflict in the evidence in favor of the nonmoving party to determine if a question of fact is presented. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). "A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ." *Cacevic v Simplimatic Engineering Co (On Remand)*, 248

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[2] MCR 7.212(C)(6) provides, in relevant part: "All material facts, both favorable and unfavorable, must be fairly stated without argument or bias." Defendants' brief on appeal did not comport with this court rule. Specifically, it omitted any record evidence supporting defendant's breaches of contract.

Mich App 670, 679-680; 645 NW2d 287 (2001). The denial of a motion for JNOV is also examined in the light most favorable to the nonmoving party. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 18-19; 684 NW2d 391 (2004). This motion should be granted only when there is insufficient evidence presented to create a jury-triable issue. *Id*. On appeal, the trial court's decision is reviewed for an abuse of discretion. *Id*.

The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). If the contract language is clear and unambiguous, its meaning presents a question of law for the court. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

The occurrence of a default or breach of contract presents a question of fact. See *Detroit v Porath*, 271 Mich 42, 54-55; 260 NW 114 (1935); *State-William Partnership v Gale*, 169 Mich App 170, 176; 425 NW2d 756 (1988). A substantial breach of a contract provides a basis to rescind the contract. *Rosenthal v Triangle Dev Co*, 261 Mich 462, 463; 246 NW 182 (1933). A substantial breach includes a failure to perform a substantial part of the contract or one of its essential terms or where the contract would not have been executed if default regarding a specific provision had been expected or contemplated. *Id*. "It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once." *Id*. A merely technical breach does not fall within the class where rescission is permitted. *Id*. at 464. "One consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive." *Holtzlander v Brownell*, 182 Mich App 716, 722; 453 NW2d 295 (1990).

The general rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform. *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). However, the "first breach" rule only applies when the initial breach is substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994); see also *Able Demolition, Inc v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007). It is the function of the trier of fact to resolve issues regarding credibility and intent. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). When witnesses testify to diametrically opposed assertions of fact, the test of credibility must lie where the system has reposed it – with the trier of fact. *Kalamazoo Co Rd Comm'rs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964).

Review of the testimony presented reveals that the trial court properly denied the motions for directed verdict and JNOV. The parties disputed who committed the first breach of contract and if it was substantial. Plaintiff opined that defendant committed three different breaches of the contract terms that precluded him from preparing any tax returns or generating income. Specifically, he testified that defendant removed his sign from the front of the building, limited his access to the office by disconnecting his computer and phone from the broadband network, and deprived him of access to the tax preparation software. Even though the contract provided that a joint decision would be made to address previously filed tax returns containing errors, plaintiff testified that he was never provided notice in writing, as set forth in the contract, and defendant never indicated that there were problems with his tax returns. On the contrary,

defendant testified that she never precluded plaintiff from hanging his own sign and that any disconnection from the network and software was necessary due to privacy laws and licensing agreements. Defendant opined that the impetus for the purchase of the business was the client lists, and plaintiff committed the first material breach of contract by soliciting her clients. In light of the diverging views regarding what occurred, when it occurred, and any attending motive, the trial court properly submitted the issue of breach of contract to the jury. *Gale, supra*; *Michaels, supra*.

Next, defendant submits that the trial court erred in denying the motion for directed verdict or JNOV where it imposed its own notion of fairness and failed to appreciate the value of goodwill and the loss of nearly $50,000 in business as set forth by defendant's expert. We disagree. The essential elements of a valid contract are: (1) competent parties; (2) proper subject matter; (3) legal consideration; (4) mutual agreement; and (5) mutual obligation. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Defendants contend that only $25,000 of the $250,000 purchase price was for equipment. Therefore, it was asserted that the remaining $225,000 was paid for goodwill, and plaintiff deprived her of the goodwill of the business by mailing a flyer advertising tax services to Belleville residents. Irrespective of plaintiff's admission that he mailed flyers to his former clients, defendant was still required to demonstrate damages with reasonable certainty that flowed from the breach. *Alan Custom Homes, supra*. In the present case, the only certain evidence regarding damages was presented by plaintiff. Plaintiff testified that from the flyers mailed, 54 were returned to him, and only one client was obtained from the mailing. Moreover, plaintiff offered testimony from clients who delineated their experience with defendant. These witnesses opined that they had no intention of returning to defendant because they felt she was inexperienced or they did not like the results achieved. Despite defendant's testimony that she found errors in the preparation of tax returns and had to correct them, she did not present any client to substantiate that testimony. Further, defendant's expert did not have any particular experience with evaluating accounting businesses and could not explain normal attrition rates for such a business. This expert refused to recognize that any reduction in hours or transfer of clients to the other offices had any bearing on clientele reduction in the Belleville office. Plaintiff contradicted this testimony with his own expert who had substantial accounting experience. Plaintiff's expert opined that defendant's reduction in hours, her change of the business name prior to a completion of the transfer of good will, the failure to have the same tax preparer in the office, normal attrition rates, and the lack of a community presence caused any client reduction. In light of the disparate testimony, the trial court properly submitted the matter to the jury for resolution.[3]

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[3] Defendant's statement of the issues asserts that the trial court did not properly apply the contract language and instead injected notions of fairness into the trial. However, at the beginning of trial, the judge cautioned that it may be a very "short trial" in light of plaintiff's
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Defendant next alleges that the trial court erred in denying its motion for a new trial when it failed to instruct on defendant's condition defense, the verdict was against all the evidence, and the verdict form was confusing and misleading. We disagree. The trial court's decision regarding a motion for new trial is reviewed for an abuse of discretion. *Amerisure, supra*. An abuse of discretion occurs when the trial court's decision results in an outcome that is not within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "When a party claims that a jury verdict is against the great weight of the evidence, this Court may overturn the verdict only when it is manifestly against the clear weight of the evidence. The jury's verdict should not be set aside if there is competent evidence to support it." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003) (Internal citation omitted). When the evidence can be interpreted to provide a logical explanation for the jury's findings, the verdict is not inconsistent. *Lagalo v Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998). The fundamental rule is that courts must make every attempt to harmonize a jury's verdict. *Id*.

An appellate court reviews claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The jury instructions are examined as a whole, not piecemeal, to determine if error requiring reversal occurred. *Id*. "The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Id*. Reversal based on instructional error occurs only when the failure to do so is inconsistent with substantial justice. *Id*.; see also MCR 2.613(A). Upon request, the trial court must give a standard jury instruction if it is applicable and accurately states the law. *Lewis v Legrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). However, the trial court's determination regarding the applicability and accuracy of an instruction is reviewed for an abuse of discretion. *Id*. When the standard jury instructions inadequately cover an area of law, the trial court is obligated to read supplemental instructions requested by one of the parties provided the instruction properly informs the jury on the applicable law. *Burnett v Bruner*, 247 Mich App 365, 375; 636 NW2d 773 (2001).

The trial court did not abuse its discretion by refusing to provide the requested instruction. The non-compete agreement did not expressly provide that defendant was "relieved of her duty to make installment payments pursuant to the contract." Moreover, the proposed instruction allowed the jury to include conditions not expressly contained in the plain language of the contract, but if it was the "intent" of the parties. The contract must be interpreted based on the language plainly expressed in the contract. *Old Kent Bank, supra*. Extraneous evidence is inadmissible to vary the terms of a contract that are clear and unambiguous. *In re Kramek*

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acknowledged mailing to former clients. In light of this admission, the trial court insinuated that a directed verdict could be granted in favor of defendants. However, after the plaintiff's evidence was presented, the trial court held that the matter was properly submitted to the jury because of the alleged breach by defendant delineated in the testimony. The record does simply not support defendants' contention that the trial court abandoned the rules of contract construction and breach thereof in favor of notions of fairness.

Estate, 268 Mich App 565, 573-574; 710 NW2d 753 (2005). Therefore, the trial court did not err in refusing defendant's special instruction.[4]

With regard to the challenge to the verdict form, we are unable to review this issue because the verdict form is not contained in the record on appeal. The appellant has the duty to file with the trial court the full transcription of testimony and other proceedings because appellate review is limited, and this Court does not consider evidence offered by the parties for which there is no record support. *Band v Livonia Assoc*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). In light of defendants' failure to preserve the proposed verdict forms and the verdict form submitted to the jury in the record, we do not address this issue.

Lastly, defendants contend that the trial court abused its discretion by failing to add the individual, Gerald McKelvey, as a plaintiff on the counter-complaint. Irrespective of the trial court's ruling, defendants failed to establish that the court action was inconsistent with substantial justice. MCR 2.613(A). Further, although the trial court did not allow a formal amendment, defense counsel was allowed to argue liability on the part of the individual. Therefore, this issue is without merit.

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

[4] We note though that this ruling placed form over substance. Regardless of the trial court's ruling regarding the instruction, defendants' counsel was nonetheless permitted to argue to the jury in closing argument that the breach by plaintiff entitled defendant to stop payments.