IN THE SUPREME COURT OF THE STATE OF NEVADA

THE DISTILLERS SOMERSET GROUP, INC., A DELAWARE CORPORATION N/K/A SOMERSET GROUP, INC.,
Appellant,
vs.
AMERICAN MART CORPORATION, A DELAWARE CORPORATION QUALIFIED IN NEVADA,
Respondent.

No. 35020

FILED

MAY 15 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment rendered pursuant to a jury trial in a breach of contract and statutory violation action.

PROCEDURAL HISTORY

Respondent American Mart Corporation (AMC) filed suit against The Distillers Somerset Group (DSG), Guinness, Moet-Hennessy, Schieffelin & Co. and S&S, alleging breach of contract, violation of Nevada's Alcoholic Beverage Franchise Act (ABFA),[1] breach of fiduciary duty, and interference with contractual and prospective economic relationships involving a liquor distributorship agreement. AMC sought injunctive relief, compensatory and punitive damages, costs, and attorney fees.

A jury trial was conducted in 1992. At the conclusion of evidence, the district court directed a verdict in favor of AMC on its breach of contract claim against DSG. The district court also instructed the jury

[1]NRS 598.290 et seq. (1973).

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that under ABFA, a compelling business reason could be good cause to terminate a distribution contract. The jury awarded $232,559.00 against DSG and S&S on the breach of contract claim. The jury found no violation of ABFA and found in favor of Guinness, Schieffelin and Hennessy-Moet on all claims. The district court granted a motion for a new trial, and both sides appealed.

On the first appeal, this court initially dismissed the appeal and remanded the case to the district court with instructions.[2] We indicated that the district court had properly entered a directed verdict against DSG on the breach of contract claim. We also concluded that the district court did not err in granting a new trial on damages as to the breach of contract claim and liability on the remaining claims. A petition for rehearing was filed and granted. We withdrew our previous order and issued a new disposition.[3]

In the new disposition, we concluded that the district court erred in directing a verdict against DSG on the beach of contract claims. We indicated that DSG was entitled to a new trial on those claims, and at the second trial, DSG should be permitted to present evidence on the affirmative defenses of accord and satisfaction, novation, modification or waiver. We further concluded that the district court erred in granting a new trial as to Guinness, Schieffelin and Hennessy-Moet and on the issue of punitive damages. Finally, we concluded that the district court did not err in granting a new trial on AMC's contract damages and ABFA claims against DSG and S&S because the district court failed to properly instruct

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[2]Order of Dismissal, March 8, 1996.

[3]Order Granting Rehearing and Remanding, July 8, 1997.

the jury on the meaning of "good cause" under ABFA, and this error potentially affected the jury's consideration of damages on the other claims. We specifically approved of AMC's proffered instruction that limited "good cause" to certain enumerated provisions of the contract. We therefore reversed the district court and remanded the case for a new trial on (1) the breach of contract claim against DSG, (2) the ABFA claim for termination and attorney fees against DSG, and (3) the intentional interference with contractual relationship claim against S&S.

On remand, AMC withdrew its remaining claim against S&S, leaving only the breach of contract and ABFA claims for termination and attorney fees against DSG. The second trial took place in October 1998.

Two key disputes were litigated at the time of the second trial. The first involved interpreting the language of the dispositional order on the first appeal for the purpose of determining the law of the case. The second a motion in limine to exclude evidence of future lost profits. The district court ruled in AMC's favor on both issues.

The jury unanimously found for AMC on both the contract and ABFA claims. The jury awarded $4,882,820.00 in past damages and $5,582,800.00 in future damages. After extensive post-trial litigation, the district court entered judgment awarding the damages calculated by the jury, plus $5,352,580.00 in interest on the past damages, $175,462.65 in expert witness fees, $101,939.57.00 in costs, and $1,634,484.50 in attorney fees. The total judgment amounted to $17,730,086.72. The district court also denied DSG's motion to retax costs, motion to alter or amend judgment, and motion for a new trial or remittitur. DSG appeals the denial of these motions and the judgment on the jury verdict.

FACTS

DSG is a liquor supplier. AMC is a wholesale liquor distributor. DSG entered into a liquor distribution agreement with AMC on March 1, 1987. The agreement provided that DSG would sell various name brand alcoholic beverages to AMC, who would act as the wholesale distributor of these liquors in an assigned territory. The agreement contained three paragraphs relating to termination.

Paragraph 8 of the agreement provided that the contract would continue until either party gave thirty days written notice. Paragraph 8 also indicated that the termination would be "pursuant to the provisions of Paragraph 9."

Paragraph 9 set forth fourteen grounds under which a party could cancel the agreement for cause "immediately upon written notice." Most of these provisions dealt with a party's financial instability or attempted delegation of duties. Paragraph 9 also stated that these enumerated reasons would be considered "good cause" under ABFA.

Paragraph 10(a) provided that AMC could continue to purchase liquor to meet market demand during paragraph 8's notice period. Paragraphs 10(b) and 10(c) detailed various events that would occur "upon termination of this Agreement for any reason. . . ."

ABFA prohibits an alcoholic beverage supplier from unilaterally terminating an alcoholic beverage distributor's franchise without good cause.[4] The statute in effect at the time of the DSG/AMC agreement did not define "good cause." Prior to executing the agreement, the federal district court issued an opinion indicating that "good cause"

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[4]NRS 598.330 (1973).

could include something more than malfeasance or financial problems with the distributor. It could also include compelling business reasons by the supplier, such as a complete market reorganization.[5] Testimony indicates DSG and AMC were both aware of the American Mart Corp. v. Joseph E. Seagram & Sons decision when the distributorship agreement was executed. However, the agreement did not reference Seagram or use the term "compelling business reasons" defining "good cause." Because the agreement contained a definition of good cause, at the time of the first appeal, we concluded the contract definition controlled for purposes of any ABFA claim.

On July 30, 1987, S&S informed AMC in writing that DSG's parent company, Guinness PLC, had formed a joint venture with Moet-Hennessy, named Schieffelin & Somerset Co. ("S&S"). The letter informed AMC that S&S would be the sole supplier of several liquors included in the DSG-AMC agreement, and that S&S would shortly choose who would distribute those products in AMC's territory. Soon thereafter, DSG informed AMC that it was canceling the distribution agreement effective January 31, 1988, as S&S had chosen a different distributor.

Conflicting evidence was presented at trial with respect to AMC's reaction to the termination notice. DSG argued that conversations and/or documents exchanged between the parties amounted to accord and satisfaction, novation, modification or waiver. AMC asserted the evidence merely demonstrated an interim agreement indicating how AMC and DSG would wind up their business.

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[5]American Mart Corp v. Joseph E. Seagram & Sons, 643 F. Supp. 44 (D. Nev. 1985), aff'd, 824 F.2d 733 (9th Cir. 1987).

DISCUSSION

DSG alleges eight instances of error by the district court: (1) exclusion of Rocky Wirtz' testimony regarding the Seagram case and the intent of the parties when executing the agreement; (2) failure to properly instruct the jury on the issue of contract interpretation based upon the law of the case; (3) failure to give proper instructions on abandonment, waiver, modification and novation; (4) denial of DSG's motion in limine regarding future profits; (5) improper jury instructions regarding the reasonable term of the agreement; (6) improper award of prejudgment interest; (7) improper award of attorney fees; and (8) denial of DSG's motion to retax costs. We address only the issues involving the motion in limine concerning future damages and prejudgment interest. We conclude the remaining contentions are without merit.

A. Future damages

DSG filed a motion in limine objecting to testimony by AMC's expert witness, Dr. Stephen L. Barsby, on the issue of ten years of future damages. DSG argued Dr. Barsby's opinion contradicted his previous reports that had limited damages to a period of ten years. The ten years had already passed as of the time of the second trial, so any additional period of time would be future damages. DSG contended that Dr. Barsby's recent opinion should be excluded as a result of discovery violations. The district court denied DSG's motion.

In January 1992, prior to the first trial, Dr. Barsby served supplemental answers to interrogatories indicating AMC's damages were $3,841,000 and referencing Barsby's January 1992 report. During the first trial, Dr. Barsby testified that the reasonable term of the agreement was ten years, and that the lost profit attributable to the ten-year period

was $4,396,007.[6] In 1998, less than a week before the second trial, DSG was informed that Dr. Barsby had changed his opinion and would now testify that the reasonable term of the agreement was twenty years, substantially increasing AMC's damage claim. DSG filed a motion in limine to exclude the new opinion for violations of NRCP 26. The district court denied the motion.

We review a district court's decision on an abuse of discretion standard.[7] AMC contends that the district court did not err because the failure to disclose the new opinion in a timely manner under NRCP 26 was caused by the failure of a third party to timely produce documents needed for Dr. Barsby to revise his opinion. AMC also claims that the opinion did not alter. AMC argues that Dr. Barsby testified to ten years of future damages in the first trial and this did not change in the second trial. We reject these contentions.

Even assuming the failure of the third party to disclose the documents can be attributed to DSG, it does not excuse the failure to disclose the essence of the change. Dr. Barsby was now asserting that the reasonable term of the agreement was twenty, not ten, years. He indicated that he changed his opinion on the reasonable term of the agreement based upon the history of AMC's replacement distributor with DSG since the date of the first trial. We conclude the district court did

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[6]The figure increased due to receipt of additional information on actual sales.

[7]Otis Elevator Co. v. Reid, 101 Nev. 515, 523, 706 P.2d 1378, 1383 (1985).

abuse its discretion in denying the motion in limine. Accordingly, we vacate that portion of the judgment that relates to future damages.

B. Prejudgment interest

Although DSG argued that NRS 99.040 controlled any award of prejudgment interest below, on appeal the parties agree that NRS 17.130(2) controls the award of interest. NRS 17.130(2) provides interest accrues on the judgment from the time of the service of the summons and complaint. However, we have concluded that where damages occur after the filing of the complaint and before judgment, then interest begins to accrue from the time the damage occurred and on the amount of that damage.[8] In the instant case, a portion of AMC's lost profits occurred after the filing of the complaint. However, interest was calculated on all past damages from the date of service, resulting in an interest award of $5,352.580.00 instead of $2,092,199.00.

DSG asserts that the district court erred in awarding any prejudgment interest because the amount of money attributable to lost profits could not be established from the contract or some other standard, such as established market prices.[9] We note, however, that Jeaness v. Besnilian relies upon Paradise Homes v. Central Surety,[10] which interpreted NRS 99.040 not NRS 17.130(2). We conclude that Jeaness and Paradise Homes are not controlling and AMC is entitled to prejudgment

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[8]LTR Stage Lines v. Gray Line Tours, 106 Nev. 283, 289-90, 792 P.2d 386, 390 (1990).

[9]Citing to Jeaness v. Besnilian, 101 Nev. 536, 541, 706 P.2d 143, 147 (1985).

[10]84 Nev. 109, 437 P.2d 78 (1968).

interest. Due to confusion at the time of the settling of the verdict forms, the jury was not instructed to calculate the lost profits on an annual basis, which would normally be necessary for the appropriate calculation of prejudgment interest. However, as this error was caused by DSG under the invited error doctrine,[11] it is not entitled to object to AMC's calculation of interest. AMC used Dr. Barsby's testimony to calculate interest because the figures awarded by the jury mirrored his testimony, and his testimony did include a breakdown of damages on an annual basis.[12] This provided the district court with sufficient information to properly calculate the prejudgment interest on the past damages. However, in light of our decision on future damages, the total amount due for prejudgment interest will need to be recalculated on remand.

CONCLUSION

We conclude that the district court erred in denying DSG's motion in limine regarding future damages and awarding interest on all past damages from the date of the service of the summons and complaint. We vacate that portion of the award that relates to future damages. Because the amount of past and future damages is ascertainable from the record, we remand the matter to the district court to enter an amended judgment reflecting the correct amount of the damages and to recalculate prejudgment interest. We affirm the judgment in all other aspects. Accordingly, we

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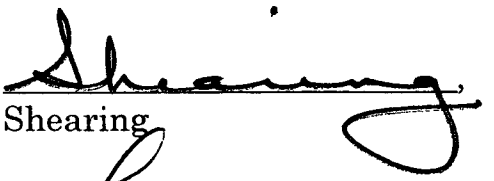
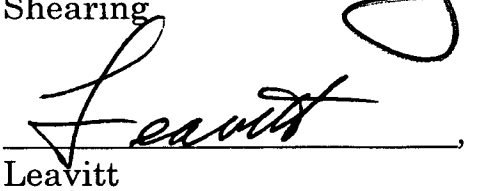
[11]Pearson v. Pearson, 110 Nev. 293, 871 P.2d 343 (1994).

[12]AMC argues that the doctrine should also be used to bar DSG's argument that the five million dollar figure should be reduced. We reject this contention.

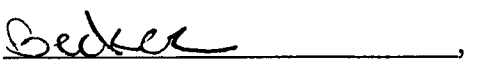
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Shearing



_____, J.
Leavitt



_____, J.
Becker

cc: Hon. Joseph S. Pavlikowski, Senior Judge
Lionel Sawyer & Collins/Las Vegas
Jolley Urga Wirth & Woodbury
Fred W. Kennedy
Clark County Clerk