IN THE SUPREME COURT OF THE STATE OF NEVADA

AMERICAN WAGERING, INC., A NEVADA CORPORATION,
Appellant,
vs.
IMAGINEERING SYSTEMS, INC., A NEVADA CORPORATION; BILL WILLIAMS; CARL CONTI; CHARLOTTE CONTI; AND ALICIA MACH,
Respondents.

No. 37857

FILED

JUN 18 2003

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER REVERSING IN PART AND AFFIRMING IN PART

American Wagering, Inc., (AWI) appeals a final judgment in a breach of contract action. Following a jury trial, the district court awarded Imagineering Systems, Inc., damages for breach of contract and breach of the implied covenant of good faith and fair dealing.

FACTUAL BACKGROUND

AWI is a corporation with two gaming-related subsidiaries which operate race and sports wagering outlets in Nevada. Leroy's Race and Sports Book, one of AWI's subsidiaries, operates a computerized route system.

Imagineering is a privately held corporation that operates route systems for computerized keno outlets in Nevada and other states. Carl Conti and Bill Williams are shareholders, officers and directors of

Imagineering. Leroy's owns a route system operated from a central computer allowing bets to be placed at satellite casinos. Imagineering wanted to apply this technology to keno gaming, so it proposed a merger with AWI. Instead, AWI decided to purchase Imagineering.

In April 1997, AWI signed a non-binding letter of intent to purchase Imagineering and began a due diligence process to evaluate Imagineering. An investigation of Imagineering's finances revealed financial problems. In August 1997, AWI declined to purchase Imagineering. AWI reconsidered, however, and entered into a stock purchase agreement to acquire Imagineering.

Under the terms of the stock purchase agreement, AWI agreed to pay $500,000 in cash, provide $500,000 in AWI common stock, and assume Imagineering's debt. Further, AWI agreed to finalize the purchase within five days after it acquired licensing in jurisdictions where Imagineering operated its keno outlets. AWI included a condition in the agreement that Imagineering maintain its then current financial condition.

The parties extended the original closing date to November 30, 1998, so AWI could acquire licenses in jurisdictions outside Nevada and Imagineering could resolve financial problems. On September 1, 1998, AWI terminated the agreement, allegedly because Imagineering's financial condition had materially deteriorated.

Imagineering ultimately sued AWI for breach of contract, breach of the implied covenant of good faith and fair dealing in contract,

and breach of the implied covenant of good faith and fair dealing in tort. The district court granted a motion for directed verdict on the tort claim in favor of AWI because Imagineering did not have a special relationship with AWI.

On October 30, 2000, a jury found AWI breached the stock purchase agreement and implied covenant of good faith and fair dealing. The jury awarded Imagineering $397,500 in damages for breach of contract and $1,000,000 in damages for breach of the implied covenant of good faith and fair dealing. The district court reduced the award for breach of the implied covenant of good faith and fair dealing to $500,000. The district court entered judgment in favor of Imagineering for $897,500 plus attorney fees and costs.

DISCUSSION

AWI argues the evidence was insufficient to support the $397,500 jury award for breach of contract damages. We agree. A jury's award of damages will be upheld if supported by substantial evidence.[1] Substantial evidence is evidence that "'a reasonable mind might accept as adequate to support a conclusion.'"[2] Here, substantial evidence supports

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[1]See Mackintosh v. California Fed. Sav., 113 Nev. 393, 401, 935 P.2d 1154, 1159 (1997).

[2]Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Edison Co. v. Labor Board., 305 U.S. 197, 229 (1938)); quoted in State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

only damages totaling $294,600, consisting of (1) wages and benefits that Imagineering incurred for thirteen employees that Imagineering would have terminated but for the agreement at a cost of $249,600; (2) renewal of a Mississippi gaming license at a cost of $15,000; and (3) repairs performed at Foxwoods Resort in Connecticut at a cost of $30,000. Consequently, the district court erred in awarding contract damages in excess of $294,600.

Next, AWI claims there was insufficient evidence to support a $1,000,000 jury award for breach of the implied covenant of good faith and fair dealing which the district court subsequently reduced to $500,000 by remittitur. Imagineering did not appeal the remittitur. We conclude the $500,000 award was supported by substantial evidence and affirm the decision of the district court.

Evidence presented at trial substantially supports an award of $500,000. Robert Ciunci, AWI's chief financial officer, testified that Imagineering experienced significant deterioration in their balance sheet and working capital. He stated Imagineering's value decreased by $800,000 between December 1996 and February 1998.[3] He also said Imagineering lost approximately $534,000 during the first five months in 1998. Cindy Merritt, Imagineering's controller, also testified that

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[3]Imagineering's cash was reduced by $250,000, inventory decreased by $350,000, and $200,000 worth of inventory had been sold.

Imagineering lost nearly $1,000,000 between January and August 1998.[4] Further, AWI's letter of termination[5] supports the testimony given by Ciunci and Merritt. It stated that Imagineering's working capital decreased by $500,000 between December 1996 and June 1998 and the net worth of the company decreased by more than $1,000,000 between January and September 1998. We conclude this evidence substantially supports the district court's award of $500,000 for breach of the implied covenant of good faith and fair dealing.

Lastly, AWI claims Jury Instruction 28 was erroneous because an award for breach of contract and breach of the implied covenant of good faith and fair dealing based on the same set of facts amounted to double recovery. We conclude Jury Instruction 28 was proper and the damage awards were not duplicative. The preferable approach would have been to classify the $500,000 award as damages for breach of contract instead of damages for breach of the implied covenant of good faith and fair dealing. Regardless of the classification, however, we conclude Imagineering is entitled to recovery because a plaintiff may assert "a contractual claim

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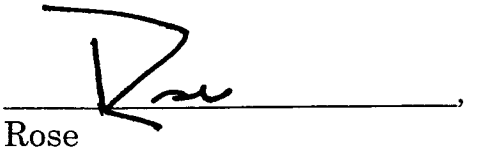
[4]Merritt based the figure on three months of actual loss and five months of projected loss.

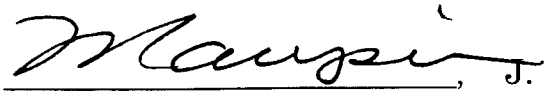
[5]During oral argument, AWI's counsel claimed this was the only evidence presented at trial to show Imagineering's diminution in value.

and also a cause of action asserting fraud based on the facts surrounding the contract's execution and performance."[6]

Accordingly, we affirm that portion of the judgment awarding $500,000 for breach of the implied covenant of good faith and fair dealing, reverse that portion of the judgment awarding breach of contract damages, and remand this matter to the district court with instructions to award Imagineering Systems $294,600 in breach of contract damages. It is so ORDERED.



_____, J.
Rose



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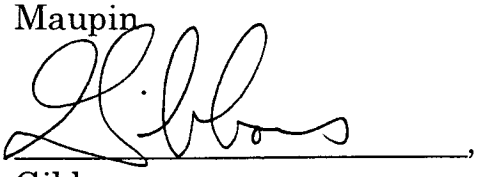

_____, J.
Gibbons

cc: Hon. Mark R. Denton, District Judge
Hunterton & Associates
Law Office of Richard C. Blower
Neil Beller
Clark County Clerk

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[6]Topaz Mutual Co. v. Marsh, 108 Nev. 845, 852, 839 P.2d 606, 610 (1992).