STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2108

James E. Barnes,
Appellant,

vs.

BounceBackTechnologies.com, Inc.,
formerly known as Casino Resource Corporation,
Respondent.

Filed October 13, 2009
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-07-7668

Justin P. Weinberg, Matthew C. Berger, Gislason & Hunter LLP, 2700 South Broadway, P. O. Box 458, New Ulm, MN 56073 (for appellant)

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Considered and decided by Worke, Presiding Judge; Ross, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

On appeal in this contract dispute, appellant argues that the district court (1) erred in denying his summary-judgment motion based on the finding that the parties' memorandum of understanding was ambiguous; (2) abused its discretion in refusing to allow his rebuttal testimony; and (3) abused its discretion in allowing respondent to amend its pleadings and in instructing the jury on the defense of impossibility. We affirm.

FACTS

In 1994, appellant James E. Barnes learned that Monarch Casinos, Inc. was looking for somebody to help them with two Indian casino projects, including one with the Pokagon Band of Patowatomi Indians in Michigan. Monarch had helped the Tribe gain federal recognition under the National Indian Gaming Regulatory Act, and as a result, the Tribe agreed to give Monarch a right of first refusal for the development of a casino. Appellant introduced his employer—respondent BounceBackTechnologies.com, Inc., f/k/a Casino Resources Corporation—to Monarch in exchange for a commission on gaming proceeds.

In March 1995, appellant and respondent signed a memorandum of understanding (MOU). The MOU provides that it "follows discussions . . . concerning the alliance and agreements entered into with [Monarch]." The parties "agreed that the introduction to Monarch was made through [appellant]." The MOU provides that appellant would receive five percent of "the net revenues (profits) recognized by [respondent] from

businesses and/or properties involving federally recognized Indian Tribes, which business and/or properties shall include gaming, hospitality, entertainment, fuel, marketing, manufacturing, servicing, wholesaling, retailing and printing." It further provides:

> There are two projects that are the sole source of this agreement:
>
> 1. The Hoh Tribe and its related Management and Development Agreement dated February 10, 1995.
> 2. The Pokagon Band of Potawatomi Indians, a newly recognized Tribe in Michigan.
>
> Any other relationships that the Company might have, now or in the future, are not part or party to this agreement.

The Tribe issued a public request for bids for the development and management of the casino. Respondent and Monarch formed a joint venture with Harrah's Entertainment, Inc., and submitted a proposal, and the Tribe awarded the development and management contract to the joint venture. But an agreement was never signed because the Tribe had not yet obtained an agreement with the State of Michigan for the operation of a casino on tribal property. Eventually, Harrah's and Monarch deserted the joint venture. Respondent contacted Lakes Gaming, Inc. to determine its interest in partnering to submit a proposal to the Tribe.

In December 1998, respondent and Lakes entered into a MOU evidencing their intent to negotiate a joint venture for the purpose of seeking an Indian gaming management and development agreement with the Tribe for casinos planned in Michigan and Indiana. When respondent and Lakes submitted their proposal, however, the Tribe

indicated that respondent's participation in the project would be "politically unacceptable."

In May 1999, respondent and Lakes signed a conditional release and termination agreement providing that the parties had not entered into a joint-venture agreement and the Tribe had not awarded Lakes or respondent a management agreement. The agreement provided that, in consideration for respondent's termination and withdrawal from the relationship, Lakes would pay respondent a certain percentage of a management fee that Lakes received under a management agreement with the Tribe. Respondent and Lakes amended the termination agreement after the Tribe decided to negotiate exclusively with Lakes. The amended termination agreement provided that "the Tribe required that the termination agreement between Lakes and [respondent] be modified so that [respondent] would not be receiving any payments based on the revenues received by Lakes under the Management Agreement." Respondent and Lakes amended the termination agreement to "fix the payments from Lakes to [respondent] in full satisfaction of Lakes' financial obligations to [respondent] under the Memorandum and Termination Agreement." The termination agreement was amended a second time to clarify when the fixed payments to respondent would commence. Lakes agreed to notify respondent in writing within five days of the Tribe's Michigan casino opening. The Tribe opened Four Winds Casino & Resort in New Buffalo, Michigan in August 2007.

In April 2007, appellant filed a declaratory-judgment action against respondent, alleging that respondent failed to pay appellant the five percent of the $2 million down payment Lakes received from respondent relating to the Tribe's Michigan casino due to

him under the MOU. Both parties filed summary-judgment motions. Appellant argued that the MOU unambiguously provided that he was entitled to five percent of any revenues that respondent received in connection with the Tribe. Respondent argued that genuine issues of material fact exist; or in the alternative, that summary judgment should be granted in its favor because appellant could not prevail on his claims as a matter of law. The district court denied both motions.

On May 30, 2008, a jury found that respondent had not breached the terms of the MOU. The district court entered judgment in favor of respondent and dismissed the case with prejudice. The district court denied appellant's motion for a new trial. This appeal follows.

D E C I S I O N

Summary Judgment

Appellant argues that the district court erred in denying his summary-judgment motion. The Minnesota Supreme Court has held that when "a trial has been held and the parties have been given a full and fair opportunity to litigate their claims, it makes no sense whatever to reverse a judgment on the verdict where the trial evidence was sufficient merely because at summary judgment it was not." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 918 (Minn. 2009) (quotation omitted). The denial of summary judgment in this case cannot be viewed as affecting the judgment; therefore, it is not a reviewable order.

Motion for a New Trial

Appellant also argues that the district court erred in denying his motion for a new trial. Because the district court has the discretion to grant a new trial, we will not disturb the decision absent a clear abuse of that discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). There is insufficient evidence to conclude that the district court abused its discretion in this case.

Rebuttal Testimony

Appellant argues that the district court abused its discretion in refusing to allow his rebuttal testimony.

> Rebuttal evidence . . . explains, contradicts, or refutes the defendant's evidence. Its purpose is to cut down defendant's case and not merely to [reaffirm] that of the plaintiff. The fact that testimony would have been more proper for the case-in-chief does not preclude the testimony if it is proper both in the case-in-chief and in rebuttal. What is proper rebuttal evidence rests almost wholly in the discretion of the court.

Farmers Union Grain Terminal Ass'n v. Indus. Elec. Co., 365 N.W.2d 275, 277-78 (Minn. App. 1985), *review denied* (Minn. June 14, 1985) (citations omitted).

At the close of the parties' cases-in-chief and the court's denial of the motions for a directed verdict, appellant requested permission to rebut the testimony of John "Jack" Pilger, respondent's chief executive officer, regarding a clause in the MOU. The district court found that appellant's request to present rebuttal testimony was untimely. Relying on *Farmers* and *Whitney v. Buttrick*, appellant contends that he is allowed to provide rebuttal testimony after the close of evidence and motions for directed verdict. *See id.*;

376 N.W.2d 274 (Minn. App. 1985), *review denied* (Minn. Jan. 23, 1986). But neither of these cases specifically addresses the timing of rebuttal evidence.

Appellant also argues that the district court abused its discretion in refusing his request to give rebuttal testimony after finding that "[appellant's] proffered testimony was relatively insignificant, and . . . it was not prejudicial to exclude [appellant's] untimely proffered rebuttal evidence." Appellant contends that the central issue is the parties' interpretation of the MOU—whether appellant was only to be compensated under the MOU if respondent entered into a deal with Monarch, or if he was to be compensated if respondent entered into a deal with anyone involving the Tribe. Pilger testified regarding the clause in the MOU that states: "[a]ny other relationships that the Company might have, now or in the future, are not part or party to this agreement." Pilger testified that the clause meant that "if we go out and do a deal with anybody else but Monarch [] this agreement is null and void." Although appellant's counsel informed the court that appellant's rebuttal testimony would pertain to that provision in the MOU, appellant failed to make an offer of proof. Additionally, appellant did testify that if respondent made a deal involving the Tribe with anyone other than Monarch, it was his understanding that he was still entitled to compensation under the MOU. While this testimony did not pertain to the specific clause in the MOU on which he wished to present rebuttal testimony, appellant did provide the jury with his interpretation of the MOU.

The district court is afforded considerable deference in allowing or disallowing rebuttal testimony in its case-management function and appellant failed to make an offer

of proof that would have allowed us to determine whether the proffered testimony would have merely reaffirmed his prior testimony or contradicted that of respondent. And while we do not have a rule in Minnesota specifically referring to the right to introduce rebuttal evidence, caselaw establishes that after the parties have rested, the district court acts within its discretion in refusing to allow the plaintiff to "reopen" his case to introduce rebuttal testimony that is "relatively insignificant" and that has caught the plaintiff off-guard only because the plaintiff engaged in deficient pretrial discovery. *Sec. State Bank of Howard Lake v. Dieltz*, 408 N.W.2d 186, 192 (Minn. App. 1987). Relying on *Dieltz*, we defer to the district court's finding that appellant's proffered testimony was insignificant. Because we conclude that the district court did not misinterpret the law and we defer to the district court's finding, the court did not abuse its broad discretionary authority in denying appellant's request to present rebuttal testimony.

Motion to Amend Pleadings

Appellant also challenges the district court's ruling allowing respondent to amend its pleadings to include the affirmative defense of impossibility. "Generally, the decision to permit or deny amendments to pleadings is within the discretion of the district court and will not be reversed absent a clear abuse of discretion." *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003).

"[A] party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Minn. R. Civ. P. 15.01. The district court should liberally grant motions to amend when justice requires and doing so will not prejudice the adverse party. *Id.*; *Fabio v. Bellomo*, 504

N.W.2d 758, 761 (Minn. 1993). Further, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings[,]" and an amendment to the pleadings may be necessary to cause them to conform to the evidence. Minn. R. Civ. P. 15.02. We have held that "[t]he rules of civil procedure permit a defendant to amend the pleadings to add an affirmative defense." *Loppe v. Steiner*, 699 N.W.2d 342, 348 (Minn. App. 2005) (citing Minn. R. Civ. P. 15.01). "If evidence relating to an unpleaded affirmative defense is introduced without objection, the defense is deemed as properly litigated." *Id.* (citing Minn. R. Civ. P. 15.02).

The defense of impossibility is available when: (1) because of a fact, (2) that the defendant did not know about and had no reason to know about when he made the contract, (3) the defendant's performance is made impossible. 4 *Minnesota Practice*, CIVJIG 20.80 (Supp. 2009). Respondent presented evidence that when it entered into the MOU it expected that the Tribe would award the development and management contract to Monarch. After entering into the MOU, respondent learned that the Tribe was not going to honor its commitment to Monarch. The defense of impossibility became apparent based on the testimony that respondent could not perform under the MOU because the Tribe refused to award the casino project to respondent and Monarch. Because evidence relating to the affirmative defense of impossibility was introduced at trial without objection, the district court did not abuse its discretion in granting respondent's request to amend its pleadings.

Jury Instruction

Finally, appellant challenges the district court's inclusion of the defense-of-impossibility jury instruction. District courts are allowed considerable latitude in selecting the language in jury instructions. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). We will not reverse a district court's decision unless the instructions constituted an abuse of discretion. *Id.* Appellant does not argue that the district court materially misstated the law when it instructed the jury on the defense of impossibility; rather, appellant's argument is essentially a reargument of his position that the district court erred in allowing respondent to amend its pleadings to include the affirmative defense of impossibility. We have already determined that the district court did not abuse its discretion in permitting respondent to amend its pleadings; it follows that the court did not abuse its discretion in its jury instructions.

Affirmed.