STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1005

James Klapmeier,
Appellant,

vs.

Joseph Ebel, et al.,
Respondents.

Filed July 13, 2010
Affirmed
Peterson, Judge

St. Louis County District Court
File No. 69VI-CV-08-420

Dean C. Eyler, Joy R. Anderson, Minneapolis, Minnesota (for appellant)

Joseph F. Leoni, Trenti Law Firm, Virginia, Minnesota (for respondents)

Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Stauber, Judge.

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

PETERSON, Judge

In this appeal from an order denying posttrial motions, appellant argues that (1) he is entitled to judgment as a matter of law (JMOL) because there was no evidence to support the jury's verdict, which found that although respondents breached the terms of a houseboat lease, no damages resulted to appellant, and appellant owed respondents

money on the lease; (2) he is entitled to a new trial because the district court admitted evidence of estimated average costs when the parties' agreement required costs specific to operation of the leased houseboat; and (3) because the parties stipulated that appellant was entitled to possession of the houseboat, the district court erred in failing to order respondents to return it by placing it in the water when respondents had specialized equipment to do so and appellant did not. We affirm.

FACTS

When respondents Joseph and Katy Ebel bought a houseboat rental business, which they renamed Ebel's Minnesota Voyageur Houseboats (EMVH), from appellant James Klapmeier, there was a $44,000 judgment lien against property owned by the business. Respondents paid the judgment and sought repayment from appellant. Respondents proposed adding a houseboat, the Boatel 60', owned by appellant to EMVH's fleet and renting it out to pay off the $44,000.

In July 2002, the parties entered into a lease agreement that was to remain in effect until EMVH "collected a Net Rental from its rental of the Houseboat to the public in the sum of $44,000.00." The lease defined "net rental" as

> the gross rentals received by [EMVH] from the renting of said Houseboat to the public less [EMVH's] actual costs in respect to the possession, maintenance, repair and operation of said Houseboat in accordance with this Lease. Such actual cost shall include the monies spent and paid by [EMVH] to any third party for insurance, licensure, gas, maintenance, repair and including wages and related payroll costs paid to [EMVH's] employees for labor provided in respect to said Houseboat.

The lease required that, every year, EMVH provide appellant "a written report of the Net Rental from the Houseboat for the calendar year . . . showing gross rentals and all costs by date and amount."

EMVH rented out the houseboat from 2003 through 2007. EMVH did not provide appellant with any of the annual account statements required by the lease. In November 2007, Katy Ebel sent an e-mail to appellant's accountant stating that respondents had received $67,337 in revenue for rentals of the Boatel 60' and incurred expenses of $48,375, leaving a balance due of $25,038 under the lease agreement. Respondents requested termination of the lease agreement because the Boatel 60' was not generating sufficient income.

In April 2008, appellant began this lawsuit against respondents alleging that they had breached the lease agreement by failing to provide annual accountings of the net rental income received from the Boatel 60' and that respondents had misrepresented the amount of income earned renting out the Boatel 60'. The case was tried to a jury. At the beginning of trial, appellant's counsel argued that the contract unambiguously required documentation of expenses specific to operation of the Boatel 60' and that any other evidence of expenses was inadmissible. The district court ruled that whether the accounting method used by respondents, averaging expenses across the entire fleet of houseboats operated by EMVH, complied with the contract was a fact question for the jury to determine.

Appellant's accountant, Rick Conway, testified on cross-examination that although he had not done accounting for houseboat rental companies, he had done accounting for similar businesses, like car rental companies. He then testified:

> Q: . . . [I]n the documents that we reviewed, . . . where Katy Ebel states that she can't document any single houseboat so she lump sums maintenance, insurance, wages and mechanical wages, and comes out with a lump sum cost based on averages, that's how she did it?
> A: Yes.
> Q: And is that a reasonable way of doing a cost analysis for a business such as the Ebels?
> A: Yes.

Katy Ebel testified:

> Q: Now, [Interrogatory] Number 6 asks you to produce all documents, receipts, and documentation for maintenance of the Boatel 60 for the years 2002 to the present, including all documents reflecting hours of operation of the boat. Your response is, "We do not keep these kinds of documentation for any single boat, rather they are in our expenses as a lump sum." Is that a correct answer?
> A: Yes.
> Q: Okay. Then you went down to figure that general maintenance is $3500 a year; insurance is 1100; employees' wages, 3615; mechanics' wages, 1,460. Is that a correct answer?
> A: That's right.
> Q: Okay. And that would be per boat per year?
> A: Yes.
> . . . .
> Q: So you don't have any specific documentation for the maintenance?
> A: Well, I have the accounts on Quick Books to go back to, but it's not specific per boat. It's just lump sum of maintenance and repairs.

The expenses allocated to each boat total $9,675 per year or $48,375 for five years.

Evidence was also presented about a proposal that appellant's son, Steve Klapmeier, made to respondents in 2007. Steve Klapmeier proposed that rental income from the Boatel 60' be paid directly to appellant, respondents be paid a $700 fee every time the Boatel 60' was rented, and respondents bill appellant for any additional services. During cross-examination, appellant testified as follows in response to questions from respondents' attorney:

> Q: Okay. So if we took $700, okay, and . . . Katy Ebel had testified that the Boatel over the three or four-year period had rented out 24 times – I'm going to get criticized on my math here, but I will try it. That would have generated an income based on Steve Klapmeier's and your recommendation of $17,800?
> A: Correct, if your math is correct.
> Q: Okay. Then if we added 700 times, I believe nine trips that your family took, that would be $6,300. If we added that together – if in fact we did this whole arrangement like you suggested you did two prior times to this jury and as you advised Steve to do with [respondents] in 2007, the total rental amount that [respondents] would have received over all of those years would have been $24,100.
> A: Yes.[1]

The jury found that respondents breached the lease agreement but that the breach did not directly damage appellant. The jury awarded respondents $22,969 in damages. Judgment was entered awarding respondents that amount plus costs and disbursements and declaring that appellant was entitled to possession of the Boatel 60'. Appellant moved for JMOL, a new trial, returned possession of the Boatel 60', and other relief. The

[1] Counsel's math was not correct. 24 x 700 = 16,800, rather than 17,800. Consequently, the total rental amount that respondents would have received over all the years under this arrangement would have been $23,100, rather than $24,100.

district court denied appellant's motion for JMOL or a new trial but ordered that respondents release the Boatel 60' to appellant. This appeal followed.

Respondents sent appellant a letter stating that he could pick up the Boatel 60', which was dry docked. Appellant requested that respondents put the boat into the water for pick up, but respondents refused. After this appeal was filed, appellant moved the district court for an order requiring respondents to return the boat to the water. The district court denied appellant's motion.

D E C I S I O N

I.

Appellant argues that he is entitled to JMOL or a new trial because there was no evidence of costs specific to the Boatel 60' and because the district court erred in admitting Katy Ebel's testimony regarding estimated and averaged costs.

JMOL is appropriate under Minn. R. Civ. P. 50 if the verdict is "manifestly against the entire evidence" viewed in the light most favorable to the nonmoving party or contrary to law. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003) (quotation omitted); *see also Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009) (applying standard of review for denial of JNOV to denial of JMOL). The reviewing court applies a de novo standard of review to a district court's denial of a motion for JMOL. *Langeslag*, 664 N.W.2d at 864. This court makes "an independent determination of the sufficiency of the evidence to present a fact question to the jury." *Lester Bldg. Sys. v. Louisiana-Pacific Corp.*, 761 N.W.2d 877, 881 (2009) (quotation omitted). A district court's denial of a motion for JMOL after a verdict must be affirmed if, "in considering

the evidence in the record in the light most favorable to the prevailing party, there is any competent evidence reasonably tending to sustain the verdict." *Langeslag*, 664 N.W.2d at 864 (quotation omitted).

"The applicable test for granting a new trial on the basis that the evidence does not justify the verdict is whether the verdict is so contrary to the preponderance of the evidence as to imply that the [fact-finder] failed to consider all the evidence, or acted under some mistake." *Clifford v. Geritom Med, Inc.*, 681 N.W.2d 680, 687 (Minn. 2004) (quotation omitted). "[E]videntiary rulings are within the district court's discretion." *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). This court will not disturb a district court's evidentiary ruling unless the district court has erroneously interpreted the law or abused its discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). An appellate court will grant a new trial because of improper evidentiary rulings only if a party demonstrates prejudicial error. *Id.* at 46. Evidentiary error is prejudicial if it might reasonably be said to have changed the result of the trial. *Poppenhagen v. Sornsin Constr. Co.*, 300 Minn. 73, 79-80, 220 N.W.2d 281, 285 (1974).

"The construction and effect of a contract presents a question of law, unless an ambiguity exists." *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Whether a contract is ambiguous is a legal determination. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982). A contract is ambiguous if its terms are reasonably susceptible to more than one interpretation. *Id.* Unambiguous language must be accorded its plain and ordinary meaning. *Brookfield Trade Ctr*, 584 N.W.2d at 394.

The interpretation of an ambiguous contract is a question of fact, and extrinsic evidence may be considered if the contract is ambiguous. *City of Virginia v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991).

The lease agreement defined "net rental" as

> the gross rentals received by [EMVH] from the renting of said Houseboat to the public less [EMVH's] actual costs in respect to the possession, maintenance, repair and operation of said Houseboat in accordance with this Lease. Such actual cost shall include the monies spent and paid by [EMVH] to any third party for insurance, licensure, gas, maintenance, repair and including wages and related payroll costs paid to [EMVH's] employees for labor provided in respect to said Houseboat.

The lease required that, every year, EMVH provide appellant "a written report of the Net Rental from the Houseboat for the calendar year . . . showing gross rentals and all costs by date and amount."

It is undisputed that respondents did not provide appellant with any of the annual written reports required by the lease and that respondents did not keep track of operation costs specific to the Boatel 60' but rather used an average cost based on the total number of boats in their fleet. Appellant argues that actual costs unambiguously means operation costs specific to the Boatel 60' and, therefore, because respondents admitted that they received $67,337 in gross income and presented no evidence of operation costs specific to the Boatel 60', the only reasonable conclusion is that the $44,000 debt had been paid in full and that appellant is entitled to a judgment of $23,337 for the amount of income the Boatel 60' earned over the debt amount.

Appellant's argument assumes that the words actual and specific are synonymous. But they are not. "Actual" is defined as "[e]xisting and not merely potential or possible" or "[b]ased on fact." *The American Heritage Dictionary of the English Language* 18 (3d ed. 1992). "Specific," in contrast, is defined as "[e]xplicitly set forth," "definite," or "unique." *Id.* at 1730. The lease agreement is ambiguous in that it does not define a method for determining actual costs. Accordingly, the district court properly determined that whether the accounting method used by respondents complied with the lease agreement was an issue for the jury to determine. Appellant's own accountant testified on cross-examination that the accounting method used by respondents was a reasonable way of doing a cost analysis for a business like EMVH. The district court did not abuse its discretion in allowing Katy Ebel's testimony on the costs of operating the Boatel 60'.

II.

Speculative, remote, or conjectural damages are not recoverable at law. *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 839 (Minn. App. 1994), *review denied* (Minn. June 29, 1994). To recover, a party must prove the fact of loss to a reasonable, although not absolute, certainty. *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977). There is no general test for determining whether damages are remote and speculative, so such matters are generally left to the judgment of the district court. *Olson v. Aretz*, 346 N.W.2d 178, 183 (Minn. App. 1984), *review denied* (Minn. Oct. 30, 1984).

As already addressed, the district court acted within its discretion in allowing Katy Ebel's testimony on operating the Boatel 60'. At trial, respondents sought damages of $25,038:

$67,337 (gross revenues)
- $48,375 (expenses)
$18,962 (net rental income)

$44,000 (judgment)
- $18,962 (amount applied toward judgment)
$25,038 (damages)

The other damages formula presented by respondents based on Steve Klapmeier's proposal is as follows:

$44,000 (judgment)
- $24,100 (rental income)
$19,900 (damages)

This formula includes the mathematical error in the calculation of rental income that we have already discussed. When that error is corrected, and rental income is stated as $23,100, the amount of damages under the formula becomes $20,900. The jury's award of $22,969 is midway between $25,038 and $20,900 ($25,038 + $20,900 = $45,938; $45,938 ÷ 2 = $22,969).

Although Conway testified that the accounting method used by respondents was a reasonable way of doing a cost analysis for a business like EMVH, there are factors, such as the age and size of the boat and the number of rentals, which could result in different boats incurring different costs. For example, Katy Ebel testified that in 2003, the Boatel 60' generated only $4,725 in gross revenue compared to about $20,000 in 2005 and 2006. She also testified that there are three different sized boats with different price ranges and that some boats are more popular than others. The jury could reasonably have concluded that not all of the costs claimed by respondents were actual costs of operating the Boatel 60'. But no evidence was presented as to any alternative method of allocating costs. The

only alternative method of determining damages that was presented at trial was the arrangement proposed by Steve Klapmeier. We, therefore, conclude that the evidence that was presented at trial reasonably supports the jury's determination of damages. *See Larson v. Urban Unit Corp.*, 360 N.W.2d 451, 452 (Minn. App. 1985) (affirming damages award for defective construction when award was "well within the range of estimates put in evidence").

III.

Appellant argues that the district court erred in denying his motion to require respondents to put the Boatel 60' in the water. The lease required EMVH to return the houseboat to appellant in good repair upon expiration of the lease and stated that "it shall be [appellant's] responsibility to transport the Houseboat from [EMVH's] place of business at the Ash River Trail, Orr, Minnesota to such location as [appellant] desires." Because the lease expressly and unambiguously makes it appellant's responsibility to transport the boat from respondents' place of business and contains no requirement that the boat be in the water, the district court did not err in denying appellant's motion for an order requiring respondents to return the boat to the water.

Affirmed.