Circuit Court for Prince Georges County
Case No.: CAL14-26102

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 01371

September Term, 2016

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104 INVESTMENT LLC,

v.

VALLEYCREST LANDSCAPE MAINTENANCE, INC

Nazarian,
Reed,
Krauser, Peter, B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: August 17, 2018

This appeal deals primarily with the denial of Appellant's motion for a new trial in the Circuit Court for Prince Georges County. Appellant, 104 Investment LLC, filed suit against Appellee, Valleycrest Landscape Maintenance, Inc., alleging breach of contract, fraud, and unjust enrichment. Following a five day jury trial, judgment was rendered against Appellant on all claims alleged. Aggrieved by the verdict, Appellant filed a motion for new trial. The motion was denied by the circuit court and subsequently Appellant filed this timely appeal.

Appellant raises two questions for our consideration, which we have reworded and rephrased slightly, as follows:

I. Did the Circuit Court for Prince Georges County err where it denied Appellants motion for a new trial on the basis that the verdict reached was contrary to the evidence, or the weight of the evidence presented at trial?

II. Did the circuit court commit an abuse of discretion where it denied Appellants motion for new trial because Appellant was prejudiced and did not receive a fair trial?

For the following reasons, we answer both of Appellants questions in the negative and shall affirm the decision of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On November 1, 2013, Appellant, 104 Investment, LLC, entered into a valid and binding Maintenance and Service Agreement ("Contract") with Appellee, Valleycrest Landscape Maintenance, Inc. The parties contracted that Appellee would provide snow

removal services to Appellants commercial property located in Lanham, Maryland, ("property") commencing on November 1, 2013, and ending on March 31, 2014.

Pursuant to the Contract, Appellant was to pay Appellee for its services at an hourly rate. Further, the Contract contained minimum billing amounts for the use of certain types of equipment and materials. For example, if rock salt was used to de-ice the pavements or the parking lot, Appellant was to pay two hundred and ninety-five dollars by the ton ($295.00/ton). The Contract permitted Appellee to use either a chemical ice melt, which totaled one thousand six hundred dollars by the ton ($1,600.00/ton), or rock salt.

During the five month contractual period, Appellant was sent twelve invoices representing the snow and ice management services that Appellee had performed. Each invoice indicated that Appellant had been charged with the more expensive, chemical ice melt. By March 27, 2014, Appellant had paid a total of $111,730.00 to Appellee for its services. After the expiration of the Contract, Appellant, disappointed with the total amount of the invoices, complained to Appellee. After demanding further explanation for the amount paid, and hearing no response from Appellee, Appellant initiated suit in the Circuit Court for Prince Georges County alleging Breach of Contract, Fraud, and Unjust Enrichment. [1]

[1] The suit was initiated with two other claims: Negligent Misrepresentation and Payment of Money by mistake; however, those claims were not presented to the jury during trial, and are thus not at issue in this appeal.

During discovery it was determined that Appellee subcontracted a portion of the work to J & K Services Snow Removal ("J&K"). Each time J&K invoiced Appellee, it charged them for the use of the following materials: "salt spread," "magnesium salt spread," and/or "sidewalk salt spread." In turn, Appellee billed Appellant for the use of "chemical ice melt."

During trial, a representative for Valleycrest, Anthony Bishop ("Bishop"), indicated that he believed that "salt spread" was a chemical ice melt. Further, after visiting the property during one of the occasions J&K was present, Bishop indicated that he witnessed J&K using a bagged product labeled, "chemical deicing agent." Regardless, there was no verification of what product was being used on the property by J&K. Conversely, J&K's owner, John Popescu ("Popescu"), testified that it used "solar salt," a cleaner, longer lasting, and more expensive form of rock salt on the property. Popescu further testified that he previously contacted Appellant requesting that it "terminate [its] current contract[] with ValleyCrest" and refer all business to J&K.

Prior to trial, and in an effort to avoid going through costly litigation, Appellee independently and without any mediation efforts, adjusted its invoices to reflect a change from chemical ice melt to rock salt. Subsequently thereafter, Appellee sent a check for $33,540.50 to Appellant. Along with the check, included a letter stating: "As ValleyCrest has adjusted the invoices as requested by 104 Investment and remitted payment of $33,540.50, there is no need to address the chemical ice melt/rock salt issue at trial."

Additionally, Appellee filed a Motion *in Limine*[2] with an accompanying proposed draft order, requesting exclusion of any evidence dealing with the issue of "billing for chemical ice melt per bag versus rock salt per ton." The proposed draft order, having similar language stated, "ORDERED that this Court will not hold a trial as to the issue of billing for chemical ice melt by the bag as opposed to rock salt by the ton." This motion was denied. Prior to the motion being denied, Appellant rejected the check, believing that by accepting, it was bound by the terms of the letter and unable to argue the charge discrepancy, fraud, and to seek punitive damages.

Trial commenced on February 1, 2016 before the Honorable Michael R. Pearson. During trial, Appellant attempted to testify directly to both to the Motion *in Limine* and the draft order, but was precluded. Instead, Appellants witness testified that there were conditions attached to the check that were unacceptable and would have limited its potential claims. Appellant entered the check, the letter, and the adjusted invoices into evidence. At the conclusion of trial, an instruction was read to the jury regarding mitigation of damages: "an [Appellant] has a duty to use reasonable efforts to reduce the damages, but it is not required to accept the risk of additional loss or injury in these efforts." Following deliberation, the jury awarded judgment in favor of Appellee.

[2] There were several Motions in *Limine* filed in this case. For the purposes of this appeal, we refer to the January 4, 2016, motion.

Appellant filed a motion for new trial arguing that the jury verdicts, finding no breach of contract, no fraud, and no unjust enrichment, were contrary to the evidence, or the weight of the evidence presented at trial. It further argued that it was prejudiced during trial because it could not present evidence as to why it failed to mitigate its damages. Namely, the contents of the Motion *in Limine* and proposed draft order. The circuit court denied Appellant's motion and this appeal followed.

DISCUSSION

I. WEIGHT OF THE EVIDENCE

A. Parties' Contentions

Appellant argues that the jury verdict's finding no breach of contract, no fraud, and no unjust enrichment are against the weight of evidence adduced at trial.[3] For the breach of contract verdict, Appellant contends: "the jury's verdict finding no breach of contract is entirely irreconcilable with the foregoing evidence or weight of the evidence presented during the trial." For the verdict finding no fraud, Appellant argues: "the undisputed evidence established that appellee made the intentional decision to bill Appellant for the most expensive melting product permitted by the parties' contract, even though the

[3] To further illustrate its point that the verdict was contrary to the evidence presented at trial, in its reply brief, Appellant misattributes the following quote to Albert Einstein: "If the facts don't fit the theory, change the facts." It has been confirmed by the estate of the late Einstein that he never said those words. *See* Albert Einstein (@AlbertEinstein), Twitter (July 24, 2017, 9:15 AM) https://twitter.com/AlbertEinstein/status/889474132106203136. In fact, many quotes legitimately attributed to Einstein, display a recognition of the priority of fact over theory.

subcontractor's invoices to the Appellee described the ice melting product as salt spread." It further asserts that Appellee "padded" its invoices, so much so that it rises to a level of fraud. Lastly, Appellant asserts it "conferred a monetary benefit upon the Appellee by paying Appellee for a more expensive chemical ice melt product when, in fact, only less expensive rock salt was used." It further argues that the finding of no unjust enrichment was against the evidence, or the weight of the evidence presented during trial.

Appellee disagrees, arguing that there was more than ample evidence to support the jury's findings of no breach of contract, no fraud, and no unjust enrichment.

B. Standard of Review

Appellant is asking this Court for a new trial because it believes the jury verdicts reached in the circuit court, were contrary to the evidence, or against the weight of the evidence. For the following reasons, we reject the premise of the question because it is an improper basis for this Court to grant a new trial.

Typically, judging the weight of the evidence is the province of the jury only. *See Fowler v. Benton,* 245 Md. 540, 545 (1967)("[t]he jury alone have the right and power to judge of the weight of the evidence."). The jury has the discretion to choose to believe, or not to believe, evidence presented during trial. Upon review of a motion for new trial, a judge may properly set aside a jury verdict because it was rendered without consideration of the evidence or the weight of the evidence. *Buck v. Cam's Broadloom Rugs, Inc*., 328 Md. 51, 61 (1992). *See also, Weissman v. Hokamp*, 171 Md. 197, 201 (1937)("[t]he weight

of all the evidence was for the jury and for the court on the motion of new trial."). Nonetheless, it is not for an appellate court to express an opinion regarding the weight that a trial judge placed on evidence presented at trial.

Appellant incompletely cites *Buck*, such that upon further investigation, it would have been informed that appellate courts refuse to substitute its judgment for that of the trial judge.

> [*A*] *claim that the verdict is against the weight of the evidence requires assessment of credibility and assignment of weight to evidence – a task for the trial judge.* We refuse, therefore, to substitute our judgment for that of the trial judge in this case.

(emphasis added). 328 Md. 51, 61 (1992). *See also, Safeway Stores v. Barrack*, 210 Md. 168, 173 (1956)("the weight and preponderance of the evidence is for the triers of fact and cannot be reviewed on appeal."). We refuse to supplant our judgment for that of the trial judge because the trial judge has the opportunity to "closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record…" *Buck*, at 59.

Thus, it is not for this court to determine the question of the weight of the evidence, whose province first belongs to the jury, and then upon the review of a motion for new trial, the circuit court judge.

II. MOTION FOR NEW TRIAL

A. Parties' Contentions

Appellant contends that it was not given a fair trial, and was prejudiced by the circuit court, because it was precluded from introducing evidence that would further expound on why it did not accept the $33,540.50 check from Appellee. It argues, "one of the biggest issues [during trial] was whether [Appellant] mitigated its damages." Moreover, it asserts that the courts failure to admit this evidence tainted the jury, arguing that the jury was "merely left with the testimony… stating that there were 'conditions' attached to the acceptance of the check when it was delivered," instead of the nature of those conditions. Appellant contends that the jury did not "get to hear the string[s] attached to accepting the check;" that it believed it would have to eliminate its claims for fraud and punitive damages. According to the motion for new trial, Appellant asserts that the "prejudicial error in the trial was the result of the Court sustaining [Appellee's] objection to preclude [Appellant] from presenting to the jury its rebuttal evidence to [Appellee's] mitigation defense."

Appellee disagrees, arguing that the circuit court did not prohibit Appellant from presenting any other documentary or testamentary evidence at trial pertaining to what it had perceived as conditions attached to the check. Namely, the check, the letter attached to the check, and the invoices. In fact, the Motion in *Limine* stated, "104 Investment has notified ValleyCrest that it still intends to proceed to trial on at least its fraud claim and

punitive damages." Further, Appellee asserts that the "check was an attempt to mitigate damages and lessen the disputed issues for trial. Simply because the jury ultimately did not agree with [Appellant's] position does not mean [it] was deprived of a fair trial." We agree.

B. Standard of Review

We review the circuit court's denial of a motion for new trial under an abuse of discretion standard. *Campbell v. State*, 373 Md. 637, 665-66 (2003)("denials of motions for new trials are reviewable on appeal and rulings on such motions are subject to reversal when there is an abuse of discretion.").

Abuse of discretion is such a high threshold that should only be found in extraordinary and exceptional cases:

> "Abuse of discretion" is one of those very general, amorphous terms that appellate courts use and apply with great frequency but which they have defined in many different ways. It has been said to occur "*where no reasonable person would take the view adopted by the [trial] court*," or *when the court acts "without reference to any guiding rules or principles*."
>
> ...
>
> The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

(emphasis added) (alterations in original)(internal citations omitted), *North v. North*, 102 Md. App. 1, 13-14 (1994). An abuse occurs when a judge exercises their discretion in a capricious manner or when they act beyond the letter or reason of the law. *Ricks v. State*,

312 Md. 11, 31 (1988). It must be further proven that no reasonable person would take the view adopted by the trial court. *North*, 102 Md. App. at 13.

In *Miller v. State*, 380 Md. 1, 92-93 (2004)(quoting *Wernsing v. Gen. Motors Corp*., 298 Md. 406, 420 (1984)), the Court of Appeals stated:

> [I]t may be said that the breadth of a trial judge's discretion to grant or deny a new trial is not fixed or immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.

Meaning, trial judges are afforded broad discretion to control the conduct of the proceedings in their court rooms. *Biglari v. State*, 156 Md. App. 657, 674 (2004). As such, absent some serious error, abuse of discretion, or autocratic action, the appellate courts will not disturb those decisions. *Sumpter v. Sumpter*, 436 Md. 74, 82 (2013).

In the context of reviewing denials of motions for new trial, extraordinary circumstances can be found when "the action of the trial court was, in effect, a refusal to even entertain or consider a motion for a new trial or when the trial court, in dealing with such a motion, exceeded its jurisdiction." *Carlile*, 264 Md. 475, 478 (1972)(internal citations omitted).

Even if this Court finds an abuse of discretion, it follows the maxim that "appellate courts of this state will not reverse a lower court judgement for harmless error: the complaining party must show *prejudice* as well as *error*." *Sumpter*, 436 Md. 74 (quoting

Harris v. David S. Harris, P.A., 310 Md. 310, 319 (1987)(italics in original)). Prejudice is found where the error is so egregious that it influences the outcome of the case. *Id.* (finding Appellant was prejudiced because the trial court denied a request that hampered Appellant from challenging information at trial).

Thus, we review this question through the lens of giving deference to the trial court and recognizing that the abuse of discretion standard is only reviewable when there exists extraordinary circumstances.

C. Analysis

We consider last Appellants argument that it is owed a new trial because of perceived prejudice from the trial court and a failure to receive a fair trial. Appellant basses this assertion on the trial court's decision to sustain objections brought by the Appellee when Appellant attempted to introduce statements from the Motion *in Limine* and proposed order. During trial, Appellants witness testified that the check was rejected because it contained an unacceptable condition. When Appellant counsel attempted to have the witness read directly from the draft order, it was prohibited.

> [Appellant Counsel]: And when you looked at this, there was a proposed order that they wanted the judge to sign, correct?
>
> [Appellant's Witness] There was.
>
> [Appellant Counsel]: Can you go to that order? And the order – where it says "ordered that," what did you see that they were sending to the judge to ask the judge to enter in that?
>
> [Appellee Counsel]: Objection.

THE COURT: Sustained.

…

[Appellant Counsel]: … Upon receipt of these documents and your review of it, did you make a decision what to do with respect to the checks?

…

[Appellant Witness]: There was a check where [Appellee] was returning monies to us but in order for us to take that money, we had to agree to something that we couldn't agree to do. And that would be to give up our right --

[Appellant Counsel]: Just without saying or reciting specifically was any order right now, just – because the judge sustained his motion, just tell me generally why you sent it back? [sic]

[Appellant Witness] because in exchange for taking the money, we had to limit what we were able to bring to the Court and to the –

[Appellee Counsel]: Objection

THE COURT: Sustained.

[Appellant Counsel] So there was a condition that was unacceptable to you, correct?

[Appellant Witness]: That is correct.

[Appellant Counsel]: And so you instructed your attorney to do what?

[Appellant Witness]: To return the money.

Following the examination of Appellants witness, the following exhibits were admitted into evidence: (1) the check reflecting the adjustments; (2) the letter attached to the check

stating, "there is no need to address the chemical ice melt/rock salt issue at trial;" and (3) the adjusted invoices.

Nowhere in the record does it indicate that Appellant was unable to present other evidence showing that it rejected the check because it believed that by accepting, it would not be able to pursue its fraud claim and seek punitive damages. The letter, attached to the check, is evidence enough to suggest that by accepting the check it believed it would have been precluded from bringing the "issue of billing for chemical ice melt by the bag as opposed to rock salt by the ton" at trial. Moreover, this same language appears similarly in the denied Motion *in Limine* and draft of the proposed order.[4]

In its reply brief, Appellant contends:

> it is undeniable that the jury was influenced by what appeared to be (because of the erroneous exclusion of relevant evidence) an unexplainable failure by Appellant to mitigate damages, which resulted in casting Appellant in an overall negative light to the jury and tainted the jury verdict.

This Court does not presume to know how the jury was influenced or, if it was actually influenced by the exclusion of the Motion *in Limine* and the draft order. That is not for

[4] A trial judge has the discretion to avoid presenting evidence to the jury that could be prejudicial and confusing. Here, the admittance of a denied pre-trial motion into evidence could be unduly prejudicial and confusing to the jury. *See* Md. Rule 5-403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

this Court to decide. This Court does recognize, however, that Appellant had every opportunity to present evidence to the jury regarding why it chose to reject the check without the use of a failed pre-trial motion.

This case presents no extraordinary or exceptional circumstances that would suggest that Judge Pearson abused his discretion. There is no indication that the trial judge acted in a random or capricious manner when denying Appellants motion for new trial. Moreover, the exclusion of the Motion *in Limine* and the proposed draft order from evidence was not prejudicial in nature. It neither precluded Appellant from presenting evidence from its witness that to accept the check would limit its potential claims, nor did not preclude Appellant from arguing the same in its closing. To reconcile why it did not argue this issue in its closing, it correctly cites this Court's decision in *James v. State*, 191 Md. App. 233 (2010), counsel must stay within the bounds of the evidence presented at trial; however, Appellant was not foreclosed from arguing that accepting the check presented complications to its case. In fact, Appellant stated in its closing:

> …Three weeks before trial, they send these invoices… so here is the check and they couple it and say but the jury is – we don't want the jury to make a decision about this, there should be no issue of what the jury is going to decide on this issue…It wasn't hey guys here is a check, it is our money and we are entitled to

> that money, it was if you take it then the jury is not going to decide this issue. So we sent it back. [sic]

Appellant was not prejudiced by the preclusion of entering a denied proposed draft order into evidence. Accordingly, we discern no abuse of discretion by the Circuit Court for Prince Georges County, and the motion for new trial was properly denied.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.