YOUNGTECH, INC., Plaintiff-Respondent,
v.
BEIJING BOOK CO., INC., Defendant-Appellant.

2006 WL 3903976 (N.J. Superior Ct., App. Div.)
(unpublished)
Decided Dec. 29, 2006.

SYNOPSIS

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, L-3799-04.

Before Judges LEFELT, PARRILLO, and SAPP-PETERSON.

PER CURIAM.

Defendant, Beijing Book Co., Inc. (BBCI), appeals from an order of judgment, following a non-jury trial, awarding damages to plaintiff, Youngtech, Inc. (Youngtech), for breach of contract. Because we conclude the trial judge made several findings of fact that were not supported by the record, and because those findings were material to the outcome, we reverse.

Defendant, a subsidiary of China National Publications International Import and Export, Inc., a Chinese corporation, purchases and sells books. In early 2001, defendant entered into an agreement (Contract I) with plaintiff that called for plaintiff to provide hardware and software necessary to implement defendant's new computer system. The terms of Contract I detailed the services plaintiff would perform, including internet and intranet services and various networked databases designed to facilitate inventory tracking, ordering and invoicing. The value of Contract I was $45,000. In accordance with the agreement, defendant was required to pay plaintiff $22,500 at the time the agreement was executed. Upon completion of Phase I of the contract, which was described in the "Statement of Work" appended to Contract I, plaintiff would receive the balance due under the contract. Phase I was completed in March 2001, and defendant tendered the final payment to plaintiff.

On April 25, 2001, the parties entered into a second agreement (Contract II) valued at $50,000 that called for plaintiff to perform various additional services, including software development, telephone and on-site technical support. As had been done with Contract I, defendant paid plaintiff $25,000 when they executed the agreement, and the balance was to be paid at the time the project was completed, which was anticipated to be in August 2001. According to defendant, the work was not completed by that date and, despite verbal notice to plaintiff of continuing problems with the system, those problems were never corrected. Plaintiff claims that it made modifications to Contract II, based upon verbal requests by defendant. The modifications cost $37,000, which plaintiff later discounted to $25,000.

Plaintiff terminated its relationship with defendant in May of 2002 and subsequently filed suit seeking the $25,000 balance due on Contract II and another $25,000 for the requested modifications. Defendant answered the complaint and also filed a counterclaim alleging that plaintiff failed to fully perform Contract II, resulting in additional costs incurred by defendant when it had to (1) outsource the repair of the software plaintiff installed, (2) pay $16,177 in overtime pay, and (3) pay $18,648.63 in salaries for new employees in order to complete the work plaintiff was contracted to perform.

At the completion of the bench trial, the judge made the following findings of fact:
1) The parties met in January of 2001 to implement a new computer system in four phases.
2) The parties entered into two contracts for computer hardware and software, as well as a verbal modification to Contract II.
3) "Phase II of the project or contract provided for the database software as it applied to the periodical department and the agreed upon price was $25,000."
4) With regard to the Book and Accounting Departments, "the parties never consummated a contract for these projects."
5) With regard to buyer's dissatisfaction when the software was installed, buyer "presented no proofs that their complaints were conveyed either in writing or verbally to [seller]."
6) Jeff Gao, buyer's employee, testified that seller's computer system never worked properly and that he had reported this to Michael Wang, seller's repair technician who was on-site "almost daily until the end of October 2001" and then "returned sometime in May of 2002." Mr. Gao also testified that buyer hired Mr. Tung to fix the problems in June of 2002 and that the problems were fixed by October or November of 2002.
7) When Phase II was complete, seller verbally agreed to make modifications to the system for $37,500, discounted to $25,000.
8) Circumstantial evidence proves that contract "amendments" worth $25,000 were made.
9) There is no evidence, apart from payroll records

that do not describe employee jobs, that buyer was forced to hire employees to do the work the allegedly defective software could not.
10) Linda Lin, executive vice president for buyer, testified that the system was being worked on from June 2002 through December 2002 and, due to the system failing to operate properly, additional employees had to be hired to do the work the system was supposed to do at a cost of $27,499 for salaries and overtime.
11) There is no direct or circumstantial evidence that buyer hired Mr. Tung to fix the software, "no contract, and no invoice for payment, nothing except the testimony of Mr. Gao."
12) Buyer's expert, Mr. Venkatraman, testified that the system problems "could have been fixed in a matter of one to seven days and the system would have been fully functional" and that "everything needed to fix the problems was present on site at the time of his evaluation."

Based only upon those findings, the trial judge found that plaintiff had performed its obligations under the contract and awarded plaintiff $50,000, less a $2,377 setoff for equipment the judge found was not provided by plaintiff in accordance with the contract requirements, for a total award of $47,623. The judge dismissed defendant's counterclaim.

Defendant raises the following points for our consideration on appeal:

POINT I
THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY FAILING TO CONSIDER THE TESTIMONY OF DEFENSE WITNESS GUOZHI WANG AND BY MAKING NUMEROUS OTHER ERRONEOUS FINDINGS AND RULINGS.

POINT II
THE TRIAL JUDGE COMMITTED AN ABUSE OF JUDICIAL DISCRETION CAUSING HER TO MAKE A MISTAKE IN HER FINDINGS OF FACT.

POINT III
TO THE EXTENT THAT IT IS APPLICABLE, THE COURT BELOW MISAPPLIED THE UCC IN REACHING THE DECISION BEING APPEALED.

POINT IV
THE TRIAL COURT'S DECISION SHOULD BE REVERSED AND THE APPELLATE DIVISION SHOULD MAKE ITS OWN FINDINGS OF FACT AND ENTER JUDGMENT IN FAVOR OF DEFENDANT ON ITS COUNTERCLAIM.

The scope of appellate review in a non-jury case is limited. *In re Guardianship of J.T.*, 269 N.J. Super. 172, 188 (App. Div. 1993). The trial judge's factual findings should be upheld whenever they are "supported by adequate, substantial and credible evidence." *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 484 (1974). The factual findings, however, must be clearly stated and correlated with relevant legal conclusions. *State v. Singletary*, 165 N.J. Super. 421-25 (App. Div), *certif. denied*, 81 N.J. 50 (1979). Otherwise, a reviewing court is unable to perform its function of deciding whether the trial court decision is supported by adequate, substantial, and credible proof in the record. *See id.* at 426.

Moreover, determinations of credibility are accorded deference because "the trial court is better positioned to evaluate the witnesses' credibility, qualifications, and the weight to be accorded to her testimony." *In re Guardianship of D.M.H.*, 161 N.J. 365, 382 (1999) (citing *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 607 (1989)).

In concluding there was no breach of contract "relate[d] to [the] delivery and failure to correct defects," the court found that defendant "presented no proofs that their complaints were conveyed either in writing or verbally to Youngtech, Inc." There was, however, testimony from defendant's witnesses and from plaintiff's on-site technician that defendant complained about continuing problems with the hardware. Both Jeffrey Gao, who was assigned to manage the computer system for defendant's Periodical Department, and Guozhi Wang, president of BBCI from December 2000 to November 2002, testified that complaints were made. Wang also testified that plaintiff never fully completed the repairs. John Yeung, president of Youngtech, testified that he received those complaints and was aware of continuing problems with the software.

The judge's opinion does not indicate that she found the witnesses' testimony on this issue less than credible and, based upon the record, we cannot infer that she made this finding. The evidence of complaints was material to the question of whether or not plaintiff breached the terms of the contract. Her failure to specifically discuss her consideration of this evidence and her assessment of its weight had the clear capacity to cause an unjust result. *See Pioneer Nat'l Title Ins. Co. v. Lucas*, 155 N.J. Super. 332, 338 (App. Div.), *aff'd o.b.*, 78 N.J. 320 (1978). Further, the judge's opinion also suggests that under the

Uniform Commercial Code (UCC), N.J.S.A. 12A:1-101 to 12-26, she concluded that written notice of a breach is required to trigger a seller's duty to take corrective action. We disagree.

N.J.S.A. 12A:2-607(3)(a) provides that a buyer must notify a seller of a breach within a reasonable time after its discovery or within a reasonable time after the breach should have been discovered. N.J.S.A. 12A:1-201(25)(a) defines notice under the UCC as the seller's "actual knowledge" of the breach. Here, there was ample testimonial evidence from both plaintiff and defendant that all parties were aware of problems with the software within a reasonable time (within the month) after installation.

The judge also found there was insufficient evidence to demonstrate that the faulty system installed by plaintiff required that defendant hire extra employees to perform tasks the system was to perform. The judge noted that the payroll records introduced into evidence "reveal nothing to the court other than payment was made to several employees and with no further description as to what the employees jobs were or for the time period they were hired until the time periods the alleged broken system was fixed[.]" In addition to the payroll records, however, defendant presented testimony that outlined who was hired and for what purpose. For example, witnesses Gao and Guozhi testified that Ms. Sandonato was hired to perform distribution related work in the Periodicals Department, work defendant claims should have been performed by the computer system but was not because the necessary section of the software had not been provided.

The evidence of overtime payments and the hiring of three new employees was not only relevant on the issue of defendant's damages as they related to its counterclaim, but was also relevant to defendant's defense of plaintiff's claim that it had fully performed the contract in accordance with the agreement. It may be that the judge considered this testimony and found it unpersuasive when analyzed in the context of the written payroll records. Unfortunately, the judge did not articulate that such a conclusion was reached following such an analysis. Therefore, we cannot determine whether this testimony was considered at all.

Likewise, in her written opinion the judge wrote that "[t]here was no direct or circumstantial evidence presented by the defendant that [defendant] hired Mr. Tung, to remedy the computer problem, no contract, and no invoice for payment, nothing except the testimony of Mr. Gao." Not only was there testimony from Gao that Tung performed the work, there was also testimony from Wang and Linda Lin, executive vice president of BBCI, that the work was performed and Tung paid for the work. Once again, the trial judge was not obliged to accept this testimony as credible, but in the absence of any written findings about this testimony, we cannot conclude from her conclusion that the judge found the testimony presented on this issue lacking in credibility or unpersuasive. Although the judge found this issue relevant on the question of defendant's damages on its counterclaim, this was also relevant on the issue of whether plaintiff failed to correct defects in the products delivered, which necessitated the hiring of Tung to complete the work.

In summary, apart from a blanket statement asserting that all evidence and testimony was considered, the judge did not specifically articulate her analysis of this testimony in arriving at her decision. Indeed, in her findings of fact, no mention is made at all of the *de bene esse* testimony of BBCI's president, Guozhi Wang, a key participant in the pre-Contract I and II discussions and events that unfolded thereafter. The omission of any reference to Wang's *de bene esse* deposition from the written decision creates an inference that the judge did not consider this testimony.

In summary, we are satisfied that the lack of adequate findings of fact, from which conclusions of law flowed, in a number of critical areas seriously curtailed defendant's right to a fair hearing and therefore constitutes plain error. *R.* 2:10-2.

In light of our disposition, we will not address most of the defendant's remaining arguments. Because of the possibility of re-trial, however, we add the following comments.

The judge correctly applied the UCC to this matter. The sale of a computer system involving both hardware and software is a "sale of goods" even if there are incidental service aspects of the transaction; therefore, the UCC applies. *Dreier Co., Inc. v. Unitronix Corp.,* 218 N.J. Super. 260 (App. Div. 1986).

We note that a few courts in other states have held that a contract for customized computer software is a service contract. *See Data Processing Servs., Inc. v. L.H. Smith Oil Corp.,* 492 N.E.2d 314 (Ind. Ct. App. 1986) (a contract to design, develop, and implement a customized data processing program is a service contract subject to common law); *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.,* 670

S.W.2d 40 (Mo. Ct. App. 1984)(a sale of custom programming software is not a transaction in goods as contemplated by Article 2 of the UCC). However, most jurisdictions treat computer software development and sales not as a service but as goods subject to the UCC, both for the sake of uniformity and clarity of the law and because software is on discs and is a tangible and moveable item rather than an intangible idea. *See Advent Systems, Ltd. v. Unisys Corp.*, 925 F.2d 670, 676 (3d Cir. 1991) (customized software is governed by the UCC because Article 2 provides for "specially manufactured goods"); *Neilson Bus. Equip. Ctr., Inc. v. Monteleone*, 524 A.2d 1172 (Del. 1987) (lease/purchase of a "turnkey" software package with technical support services is a sale of goods); *RRX Indus., Inc. v.Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985) (the service aspect of a contract for customized computer software is merely incidental). Scholars agree. *See, e.g.*, Bonna Lynn Horovitz, *Computer Software as a Good under the Uniform Commercial Code: Taking a Byte Out of the Intangibility Myth*, 65 B.U.L.Rev. 129, 152-64 (1985); Andrew Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?*, 35 Emory L.J. 83, 883-86, 909 (1986)..

Here, defendant asserts that of the two separate contracts between the parties, Contract I provided for the hardware exclusively, and Contract II provided for software exclusively, and that therefore Contract II is a contract for services falling outside the UCC. In fact, a close reading of each contract reveals that Contract I provides for hardware, training services and support, and Contract II provides for "turnkey" (i.e., stock) software customized for the buyer, as well as training services and technical support. Contract I is clearly governed by the UCC, as is Contract II, under *Dreier, supra*, 218 N.J. Super. at 267 because the "turnkey" software (i.e., the Microsoft SQL Server 2000 database and data analysis package, the Windows 2000 Web and Application package, and the ColdFusion Server 4.5 Web package) more than likely came to defendant on tangible and moveable discs, as did any custom software plaintiff designed for defendant to augment the stock software.

Furthermore, under each of the two contracts, defendant was to pay a flat fee for the hardware, software, and services combined, rather than for hourly or daily design, training, and technical support services. This, in our view, is evidence that the parties contemplated a sale of goods rather than a services contract. *Conopco, Inc. v. McCreadie*, 826 F. Supp. 885, 870-71 (D.N.J. 1993), *aff'd*, 40 F.3d 1239 (3d Cir. 1994) (citing *Nielson, supra*, 524 A.2d 524 at 1173).

Defendant claims the trial judge abused her discretion in excluding a seventy-nine page document identified as "Basic Requirements" written partially in English and Chinese. Defendant sought to introduce this document as it bore upon the parties' understanding of the contract. The judge excluded the document because she could not understand the Chinese portion, despite defendant's offer to have the document translated by someone agreed upon by both counsel or by someone appointed by the court at defendant's expense. The judge, however, did admit a two-page synopsis of the document.

N.J.R.E. 403 allows a judge, in her discretion, to exclude otherwise admissible evidence under specified circumstances, including when the proffered evidence is confusing or when its admissibility will consume an inordinate amount of time. *See Benevenga v. Digregorio*, 325 N.J. Super. 27, 32 (App. Div. 1999), *certif. denied*, 163 N.J. 79 (2000). As a reviewing court, we accord substantial deference to the trial court's evidentiary rulings. *State v. Morton*, 155 N.J. 383, 453 (1998), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1380, 149 L.E.2d 306 (2001). Further, we review such rulings under an abuse of discretion standard. *State v. Marrero*, 148 N.J. 469, 483 (1997); *State v. Erazo*, 126 N.J. 112, 131 (1991); *State v. Ramseur*, 106 N.J. 123, 266 (1987). Thus, a trial judge's evidentiary rulings will not be disturbed on appeal, unless we find that the rulings were clearly capable of producing an unjust result. *R.* 2:10-2; *see also Marrero, supra*, 148 N.J. at 484 (citation omitted) (an appellate court can only substitute its judgment for that of the trial court if it "find[s] that the trial court's ruling 'was so wide of the mark that a manifest denial of justice resulted.' "

Here, two years prior to trial, plaintiff's counsel objected to the use of the document during the discovery deposition of Yeung because it was in Chinese. Therefore, defendant had two years to translate the document if defendant intended to introduce it at the time of trial, but failed to do so. Under these circumstances, we see no abuse of the trial court's discretion in excluding the document.

Reversed and remanded for trial on all issues. We do not retain jurisdiction.