NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LEHIGH VALLEY RESTAURANT GROUP INC., Appellee v. JAMES M. MITICH, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 112 EDA 2013

Appeal from the Judgment of December 12, 2012,
in the Court of Common Pleas of Lehigh County,
Civil Division at No. 2010-C-4275

BEFORE: SHOGAN, WECHT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: **FILED OCTOBER 10, 2013**

This is an appeal from a judgment entered in favor of Appellee Lehigh Valley Restaurant Group, Inc. ("Appellee") and against Appellant James Mitich ("Appellant"). We affirm.

The background underlying this matter can be summarized in the following manner. Appellee filed a complaint against Appellant. According to the complaint, Appellee formerly employed Appellant as its president and chief operating officer. Appellee labeled its first count in the complaint as a count of unjust enrichment. This count included multiple allegations against Appellant. For instance, Appellee claimed that it overpaid a cash bonus to Appellant in 2009 and that Appellant agreed to refund the overpayment.

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*Retired Senior Judge assigned to the Superior Court.

Appellee maintained that Appellant still owes $31,377.00 of the agreed-upon repayment.

Appellee labeled its second count as "Demand Promissory Notes." Stated succinctly, Appellee averred that it executed three promissory notes in favor of Appellant and that, despite Appellee's demands for payment in full on these notes, Appellant has failed to meet his obligations under the notes. The parties refer to the notes as Note 1, Note 2, and Note 3.

After a two-day non-jury trial, the court entered a verdict in favor of Appellee, awarding it damages in the amount of $59,638.03. Appellant filed post-trial motions, which the trial court denied. After judgment was entered, Appellant timely filed a notice of appeal.

In his brief to this Court, Appellant asks us to consider the following questions.

> 1. Did the court below improperly determine [Appellant's] indebtedness on Note 1 was $258,361.40?
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> 2. Did the court below improperly determine that [Appellant] had any remaining obligation on Notes 2 and 3 after his termination since each stated that "[Appellant] . . . promises to pay on demand . . . or as otherwise directed in writing by the Lender [Appellee] and both notes clearly directed in writing that the method of payment was restricted to payroll deductions made while [Appellant] was employed?[1]
>
> 3. In the context of determining damages, did the court below improperly determine the applicable share price of $36.50 was

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[1] Appellant's issue appears to implicate a quoted statement; he, however, fails to indicate where the quote ends.

> fair and reasonable, where the issue was neither a determination that was before the court nor was it the subject of any admissible evidence presented by [Appellee] at trial?
>
> 4. Even if the issue was properly before the court, did the [c]ourt below improperly determine the applicable share price of $36.50 where the applicable Note 1 specifically provides that [Appellant's] shares "will be redeemed as treasury stock at the then current price" at the time of default (*i.e.* at the time of his termination) and where the [sic] it was uncontroverted in that the "then current price" at the time of [Appellant's] termination was $67.80?
>
> 5. Did the court below improperly determine that [Appellant] owed his employer $31,377.00 as an overpayment of his 2009 bonus supported only by irrelevant oral testimony as to company practice in improper modification of a contractual bonus obligation that provided that any modification had to be in writing?
>
> 6. Did the court below improperly determine that [Appellant] owed his employer $28,261.03 as an overpayment of his 2010 bonus since the record is devoid of any evidence that his bonus had not fully vested as paid during the term of his employment?

Appellant's Brief at 7-8.

As an initial matter, we note that Appellant's brief fails to comply with the Rules of Appellate Procedure in several meaningful ways. For instance, Appellant fails to indicate where in the record he preserved his issues for appellate review, in violation of Pa.R.A.P. 2117(c) and Pa.R.A.P. 2119(e). In addition, Appellant presents this Court with six questions in his "Statement of Questions Involved;" yet, the "Argument" portion of his brief only contains five parts, in violation of Pa.R.A.P. 2119(a). Furthermore, Appellant's first and last arguments, which correspond to the first and last

issues presented in his "Statement of Questions Involved," are devoid of citation to any legal authority, in violation of Pa.R.A.P. 2119(b).

Next, we observe that all of Appellant's arguments claim that the trial court "improperly determined" one thing or the other. We highlight, however, that Appellant fails to specify the nature of his claims. For instance, it is not clear whether Appellant is challenging the weight of the evidence, the sufficiency of the evidence, both the weight and the sufficiency of the evidence, or something altogether different.

The unclear nature of Appellant's issues and arguments renders it difficult for this Court to determine its scope and standard of review for each issue. Appellant's ten-page motion for post-trial relief contained a multitude of claims of trial court error, and Appellant asserted therein that the errors entitled him to judgment notwithstanding the verdict or a new trial. Rule of Appellate Procedure 2111(a) requires appellants to include in their briefs "[a] short conclusion stating the precise relief sought." Pa.R.A.P. 2111(a)(9). In his "Conclusion and Prayer for Relief," Appellant states:

> It is respectfully submitted, [sic] that the Decision of the court below must be reversed and the matter remanded for an adjudication that LVRG[, *i.e.*, Appellee,] failed in its claims against Mitich[, *i.e.*, Appellant,] and that judgment be entered for Mitich and against Mitich [sic] on each claim proffered in LVRG's Complaint.

Appellant's Brief at 26. From this statement, we conclude that it does not appear that Appellant is challenging the court's decision to deny his post-trial motions for a new trial; rather, he seems only to challenge the court's

decision to deny his various motions for judgment notwithstanding the verdict.

Thus, to the extent that we review the merits of Appellant's issues, we will rely on the legal principles that follow.

> In reviewing a motion for judgment n.o.v., the evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, [a] judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.
>
> There are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant[.] With the first a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.

Fletcher-Harlee Corp. v. Szymanski, 936 A.2d 87, 93 (Pa. Super. 2007) (citations omitted).

We now will dispose of Appellant's issues. Because Appellant failed to develop the arguments he presents in support of his first and sixth issues with citation to pertinent authority, we find that Appellant waived these issues. ***See Harris v. Toys "R" Us-Penn, Inc.***, 880 A.2d 1270, 1279 (Pa.

Super. 2005) ("We have repeatedly held that failure to develop an argument with citation to, and analysis of, relevant authority waives that issue on review.").

As to Appellant's second issue, as best we can discern, Appellant claims that he is entitled to judgment as a matter of law with respect to Appellee's claims that Appellant continues to owe Appellee for indebtedness he incurred with regard to Notes 2 and 3. Appellant seems to suggest that, in agreeing with Appellee's position at trial, the trial court erred in the manner in which it interpreted Notes 2. and 3.

For purposes of this appeal, the pertinent language contained in Note 2 and Note 3 is the same. We, therefore, only will reproduce the language of Note 2. Note 2 states:

> Demand Promissory Note
>
> U.S. $39,779.29 Due: On Demand
>
> FOR VALUE RECEIVED, the undersigned, James M. Mitich ("the Borrower"), hereby acknowledges himself indebted to Lehigh Valley Restaurant Group, Inc. ("the Lender") and promises to pay on demand or to the order of the Lender 6802-A Hamilton Blvd, Allentown, PA 18106, USA, or as otherwise directed in writing by the Lender, the principal sum of $39,779.29 with interest thereon at the rate of 8.75% per annum, calculated monthly, not in advance, both before and after demand, maturity, default and judgment until paid.
>
> The Lender may assign all of its right, [sic] title, and interest in, to and under this promissory note. All payments required to be made hereunder shall be made by the Borrower without any right of set off or counterclaim. The payments shall be made bi-weekly with payroll deductions starting on 9/11/09 for a period of 59 pay periods as per the schedule attached ending on 03/27/12. If additional principle payments are made, then can

> only be made in increments of the principle due for the next scheduled payment. . . .

Complaint, 10/20/10, Exhibit B.

Appellant argues as follows:

> Here, the plain language of Note 2 and Note 3 provides only one method of repayment – payroll deductions from [Appellant's] pay at [Appellee]. Given this plain language, there is no basis for [Appellee] to argue that it is entitled to repayment by some other method after terminating [Appellant] – an act that was entirely within [Appellee's] control. . . .

Appellant's Brief at 21. Appellant suggests that, because he was terminated and repayment of his debt only could be achieved through payroll deductions, he no longer has any obligation to pay the indebtedness he owes to Appellee with respect to Notes 2 and 3.

Appellant's interpretation of the notes flies in the face of the unambiguous language of the notes. The notes certainly provide a payment plan whereby repayment of the indebtedness evidenced by the notes could be achieved *via* payroll deductions from Appellant. However, the notes clearly and unambiguously provide that Appellant also promised "to pay on demand." The record establishes that Appellee demanded payment from Appellant and that Appellant did not comply with his promise to pay on those demands. Appellant's second issue warrants no relief.

The argument Appellant offers on pages 21-23 of his brief appears to correspond with his third and fourth issues. In this argument, Appellant insists that the issue of the propriety of Appellee's sale of Appellant's stock in Appellee was not before the trial court. Appellant, in the alternative, also

seems to suggest that, assuming *arguendo* this issue was before the court, the court erred by concluding that the sale price of $36.50 for the shares of stock was fair and reasonable.

Appellant fails to indicate the importance of the sale of his stock to this case.[2] Moreover, the nature of his issue and arguments are difficult to discern. Appellant simply has failed to convince us that he is due relief based upon his allegation of trial court error. ***See Commonwealth v. Wrecks***, 931 A.2d 717, 722 (Pa. Super. 2007) ("An appellant also has the burden to convince us that there were errors and that relief is due because of those errors.").

Appellant's fifth issue suffers the same problems as the remainder of his brief. Appellant maintains that, pursuant to his original employment contract, he was to receive a $114,273.00 bonus in 2009. Appellee argued that Appellant later accepted that he only would receive a bonus of $82,896.00. The trial court agreed with Appellee's position.

On appeal, Appellee concedes that his employment contract could have been modified orally. Appellant's Brief at 25. He suggests that, in order to prove that he orally agreed to take a lesser bonus, Appellee was required to provide clear, precise, and convincing evidence of Appellant's agreement. ***Id.*** Appellant then states:

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[2] It appears that the trial court utilized the proceeds that Appellee realized from the sale of Appellant's stock to offset some of the debt Appellant owed to Appellee.

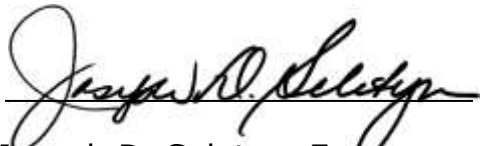
> Accordingly, it is respectfully suggested that [Appellee] **failed to develop** "clear, precise, and convincing evidence" to support the unwritten bonus program that would have provided the negative balance to the sum owed to [Appellant].

Appellant's Brief at 25 (emphasis added). Appellant then points out that his co-worker's employment contract contained "the unwritten bonus program allegedly applicable to [Appellant.]" ***Id.***

It is unclear to us what Appellant's co-worker's employment contract has to do with whether Appellant agreed to the modified bonus program. It also is unclear to us what Appellant is arguing here. He again simply fails to convince this Court that he is due relief.

Judgment affirmed

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/10/2013