NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

FRANK J. SURNAMER,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
BRUCE L. ROTHROCK, SR.,	:	
	:	
Appellant	:	
	:	
	:	
ROTHROCK MOTOR SALES, INC. AND BRUCE L. ROTHROCK, SR.	:	
	:	
Appellants	:	
v.	:	
	:	No. 1368 EDA 2013
FRANK J. SURNAMER	:	

Appeal from the Judgment Entered June 4, 2013
In the Court of Common Pleas of Lehigh County
Civil Division No(s).: 2010-C-1592
2011-C-173

FRANK J. SURNAMER,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
BRUCE L. ROTHROCK, SR.,	:	
	:	
	:	
ROTHROCK MOTOR SALES, INC. AND BRUCE L. ROTHROCK, SR.	:	
	:	
	:	
v.	:	
	:	No. 1833 EDA 2013
FRANK J. SURNAMER	:	
	:	
Appellant	:	

Appeal from the Judgment Entered June 4, 2013
In the Court of Common Pleas of Lehigh County
Civil Division No(s).: 2010-C-1592
2011-C-173

BEFORE: PANELLA, MUNDY and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED APRIL 14, 2014**

Appellants/Cross-Appellees, Rothrock Motor Sales, Inc., and Bruce L. Rothrock, Sr. (collectively, "Rothrock"), appeal from the judgment[1] entered in this consolidated[2] breach of contract action in the Lehigh County Court of Common Pleas. The judgment was in Rothrock's favor and adverse to Appellee/Cross-Appellant, Frank J. Surnamer ("Surnamer"), who filed a cross-appeal. In their direct appeal, Rothrock contends that although they prevailed at trial, the trial court should have awarded additional damages. In his cross-appeal, Surnamer claims, *inter alia*, that the evidence established an oral contract and the Statute of Frauds does not bar his claim. We affirm.

* Former Justice specially assigned to the Superior Court.

[1] We amended the caption to reflect an appeal from judgment rather than an order denying a post-trial motion. ***See generally Johnston the Florist, Inc. v. TEDCO Constr. Corp.***, 657 A.2d 511, 515 (Pa. Super. 1995) (*en banc*).

[2] The parties stipulated to, and the court ordered, consolidation.

We adopt the findings of fact set forth in the trial court's amended opinion. ***See*** Trial Ct. Op., 4/9/13, at 2-4.[3] To aid our disposition, we also reproduce portions of the December 10, 2009 letter from Rothrock to Surnamer:

> . . . Jerry [Potosnak] called me and asked me if he could use the airplane to teach Gregg Feinberg to get his instrument license . . . . I told Jerry okay . . . . After Gregg used the [airplane] for about 5-6 months, approx. 10-15 hours per month, Gregg called me and asked since [Surnamer is] not flying anymore, would I accept him buying [Surnamer's] 50% of the aircraft. After talking to Gregg I said it was okay with me but he would have to deal with [Surnamer] directly about the price. Shortly after that Jerry called me and said Gregg asked him (along with other people), what [Surnamer's] 50% share was worth. I myself had an idea [of] the [airplane's] value based on appraisals I had ordered . . . . I knew at the time the value of the [airplane] was about $250K, which would suggest that Gregg should have offered you $125K. I told Jerry to tell Gregg to offer [Surnamer] $140 - $150K, really believing I was helping you! About a week later Gregg called me and said he called you and offered you $140,000 and you turned him down flat and would not negotiate the price with him. I did not understand your decision and I told you so. I told Gregg to hang on and let me talk to [Surnamer] for him. . . . At our meeting at Charlie Brown[']s,[4] I brought the subject up about Gregg

[3] Some of the entries on the trial court's docket were organized by signature date. We reviewed the written descriptions within the docket to identify the actual docketing dates, which generally control. ***See*** Pa.R.C.P. 236. Additionally, the docketing dates did not always correspond to the dates time-stamped on the documents. For example, the trial court's opinion was time-stamped as filed on April 8, 2013, but it was, in fact, docketed on April 9, 2013.

[4] Charlie Brown is the name of a restaurant. N.T. Dep. of Mr. Rothrock, 11/24/10, at 20.

> purchasing the [airplane] and that I thought you made a mistake and that you should accepted [sic] Gregg's offer of $140,000.00. After convincing you that a value of $280,000.00 as a value for the [airplane] was much higher than we could get if we actually sold the aircraft in the open market. When you finally understood my point on the valuation, I gave you a way to save face with Gregg, and I stated to you: "sell it to me and I'll sell it to Gregg for $140,000", and at that time you reluctantly agreed to do so. I never told you, never intended nor did I agree to purchase your 50% of the [aircraft], but for the fact that Gregg wanted to purchase your 50%. Why would I agree to overpay you for your 50% when I knew the value of the [a]ircraft was lower? Unfortunately when I called Gregg to let him know he could purchase 50% of the [aircraft] for the amount he offered, he told me that he had already agreed to purchase a different aircraft and wasn't interested in the [aircraft] anymore at any price. . . .
>
> Now I know you have since told me that when you agreed to sell it to me to sell to Gregg, you considered it sold for $140,000 to me. Again I remind you that the only reason I suggested that you sell your 50% of the [airplane] to me was so I could sell it to Gregg at the same amount ($140,000.00), as I was trying to help you save face, it was never because I wanted to or agreed to pay you $140,000.00 for the [airplane's] 50%. I didn't try and make a profit, from you or Gregg, nor did I negotiate with you for a lower price; I was just trying to help the both of you (remember, I had already had appraisals of $250K). In any event, you know I was already committed to purchasing Weinerville and I knew it would take $5M cash of mine to complete the deal. That is the reason I was offering you an opportunity to purchase part of the Weiner deal at Charlie Brown[']s (so I would be able to keep more cash and remain more liquid). In any event, the Weiner deal and the cash required was a big reason why I was not interested at that time in purchasing your 50% of the [aircraft] myself, as I knew I had to stay as liquid as possible to pull the Weiner deal off. I also want to remind you that at the same time I was purchasing Weinerville, our national economy and the banking industry got into major trouble, which said trouble continues today. I also told you in May of this year [*i.e.*, 2009], I had to pay off

> my demand credit line of $3M at PNC Bank. At that time I told you that as soon as I'm in a better liquid cash position I would settle with you on the [aircraft] and I will; but all I asked is that you be patient! But my offer to settle with you had nothing to do with any agreement on my part to pay you $140,000.00, but rather to find mutual ground with you to purchase your 50% once I was more liquid with cash.

Rothrock's Trial Ex. 7 (Letter from Mr. Rothrock to Surnamer (Dec. 10, 2009), at 2-4).

The court rendered its verdict in favor of Rothrock and in the amount of $6,712.54, on December 18, 2012. Rothrock filed a timely post-trial motion on December 27, 2012. Surnamer filed, and the court granted, permission to file a post-trial motion for judgment notwithstanding the verdict, *nunc pro tunc*, which he did. On April 9, 2013, the court docketed its order denying all post-trial motions.

On May 6, 2013, Rothrock filed a notice of appeal from the order denying all post-trial motions.[5] On May 13, 2013, Surnamer filed a notice of cross-appeal. On June 4, 2013, the court entered judgment in favor of Rothrock and against Surnamer. The court did not order the parties to comply with Pa.R.A.P. 1925(b), but nonetheless filed a Pa.R.A.P. 1925(a) statement adopting its April 9, 2013 amended opinion.

[5] "[E]ven though the appeal was filed prior to the entry of judgment," we have jurisdiction to entertain the appeal. ***See Johnston the Florist, Inc.***, 657 A.2d at 513.

For ease of disposition, we address the following issues, which relate to liability, raised in the cross-appeal filed by Surnamer, the verdict-loser:

> Was the evidence presented at the time of trial sufficient to establish that the parties entered into a binding oral contract pursuant to which . . . Rothrock was to pay . . . Surnamer $140,000.00 for his one-half interest in the airplane at issue within sixty (60) days and/or within two (2) months of the meeting at which the contract was entered into?
>
> In the event that the evidence was insufficient to establish the time period for completion of the contract, was a precise time for consummation of the sale necessary in order to establish a binding contract?
>
> In the event that the time period was insufficiently specific, does the law require that a reasonable time period be applied to the sale?
>
> Are the issues described above with respect to the time period for consummation of the sale, valid legal grounds to conclude that no contract was entered into between the parties?
>
> Were the statements of . . . Bruce L. Rothrock, Sr., in his trial deposition and in his letter of December 10, 2009, sufficient admissions of the existence of a contract, so as to satisfy the admission required by the Statute of Frauds, 13 Pa.C.S.A. Section 2201(c)?

Surnamer's Brief at 4-5.

We summarize Surnamer's arguments for his first four issues, as they are interrelated.[6] Surnamer contends that the court disregarded the

[6] Surnamer, in the argument portion of his brief, presents one argument for his second through fourth issues. ***See*** Surnamer's Brief at 13. We note that Pa.R.A.P. 2119(a) requires that the "argument [section of the appellate

following testimony recounting the meeting at Charlie Brown's between the parties:

> [Surnamer's counsel:] Okay. I think you said a minute ago, you said to Frank [Surnamer], do it through me. Sell it to me, and I'll sell it to Gregg [Feinberg]. But I don't want to put words in your mouth. But I believe that's kind of what you just said?
>
> [Mr. Rothrock, Sr.:] Yeah. Sell it to me. If Gregg pays the 140,000, which he advised me that he would, then I'll sell it to Gregg—
>
> Q. Okay. And what was Frank's response to that?
>
> A. Reluctantly, he agreed. Reluctantly, he said all right. Okay. I'll do it.

Id. at 11 (quoting Rothrock's Trial Ex. 1, Mr. Rothrock's trial deposition transcript). Surnamer construes Mr. Rothrock's testimony as confirming an oral contract to have him purchase his one-half share of the plane. Surnamer also references the parties' actions following the restaurant meeting as confirming the existence of an oral agreement.

Rothrock, however, excerpts other portions of Mr. Rothrock's trial deposition transcript reflecting a more equivocal view of the restaurant meeting:

> [Mr. Rothrock, Sr.:] Then I brought up, I said Frank, I think you should have taken that deal from Gregg. . . .
>
> [Surnamer's counsel:] What did Frank say?

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brief] shall be divided into as many parts as there are questions to be argued[.]" ***See*** Pa.R.A.P. 2119(a).

> A. And Frank said, well, I don't think it was enough money. I said, Frank, we have estimates now. You see this. He says yeah, but them estimates are wrong. I said well, okay. I think you were foolish. I think you should have accepted when Gregg offered you the $140,000. That would make the airplane worth $280,000. And trust me, I don't believe it's worth that then or now.
>
> Q. What was his response?
>
> A. His response was, well, I disagree with you . . . and I said, look, Frank, I'll try to save face for you. If you take the $140,000, do it through me. And if Gregg buys it, I'll sell it to Gregg. But do it through me. I'll save face. You don't have to go back and argue or look bad in front of Gregg.
>
> Q. When you said do it through me, what did you mean?
>
> A. Do it through me. In other words, sell it to me. I'll sell it to Gregg. If—that's if Gregg is going to purchase it. And I knew at the time Gregg said—I said Gregg, when he told me that Frank turned him down, I said, let me talk to Frank. And I didn't go talking the next day to Frank but within the next month I did, next month, month and a half. That was this conversation.

Rothrock's Brief at 8 (quoting Rothrock's Trial Ex. 1, Mr. Rothrock's trial deposition transcript). Rothrock also quotes extensively from Mr. Surnamer's trial testimony to highlight the parties' starkly contrasting views of the restaurant meeting. ***Id.*** at 9-11. Mr. Surnamer, for example, denied that the purchase was contingent upon Mr. Feinberg agreeing to buy. ***Id.*** at 10. Rothrock highlights the parties' differing recollections of the restaurant meeting to underscore the trial court's explicit and implicit credibility determinations adverse to Surnamer. ***Id.*** at 11.

For his next three issues, Surnamer opines that even after viewing the record in Rothrock's favor, the trial court should have imputed a reasonable time for performance. He posits that because the transfer did not occur prior to the filing of his lawsuit, "the failure to transact the sale of the plane within said time period was unreasonable." Surnamer's Brief at 16.[7] We hold Surnamer has not met the significant burden of establishing a judgment notwithstanding the verdict.

We state the applicable standard of review:

> An appellate court will reverse a trial court's grant or denial of a JNOV only when the appellate court finds an abuse of discretion or an error of law. . . .
>
> 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. . . .
>
> 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

[7] We note that these three arguments presume that the only element missing from establishing an oral contract is the time-period for completion.

> record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.
>
> Questions of credibility and conflicts in the evidence are for the [fact-finder] to resolve and the reviewing court should not reweigh the evidence. If there is any basis upon which the jury could have properly made its award, the denial of the motion for judgment n.o.v. must be affirmed.

Braun v. Wal-Mart Stores, Inc., 24 A.3d 875, 890-91 (Pa. Super. 2011) (citations and quotation marks omitted), *appeal granted*, 47 A.3d 1174 (Pa. 2012).

"The elemental aspects necessary to give rise to an enforceable contract are 'offer', 'acceptance', 'consideration' or 'mutual meeting of the minds.'" ***Schreiber v. Olan Mills***, 627 A.2d 806, 808 (Pa. Super. 1993) (citations omitted). "Clarity is particularly important where an oral contract is alleged." ***Pennsy Supply, Inc. v. Am. Ash Recycling Corp. of Pa.***, 895 A.2d 595, 600 (Pa. Super. 2006) (citation omitted). "It is well settled that in the case of a disputed oral contract, what was said and done by the parties as well as what was intended by what was said and done by them are questions of fact . . . ." ***Solomon v. Luria***, 246 A.2d 435, 438 (Pa. Super. 1968) (citation omitted). "[I]t is for the [fact-finder] to ascertain the meaning to be ascribed to the words employed in an oral contract, in the light of all the circumstances, surrounding the making of the agreement." ***Id.*** (citation omitted).

Initially, because Rothrock was the verdict winner, we view the evidence in the light most favorable to them and resolve every conflict in

evidence in their favor. ***See Braun***, 24 A.3d at 890-91. After close review of the record, particularly given, *inter alia*, the factual disparities between the parties' versions of the meeting as set forth above and the fact-finder's credibility determination adverse to Surnamer, we cannot conclude "the evidence was such that no two reasonable minds could disagree that" Surnamer was entitled to judgment as a matter of law. ***See id.***; ***see Solomon***, 246 A.2d at 438. Absent clarity, we cannot conclude that the law compels us to hold that an oral contract—including inferring a reasonable time for completion—exists for Rothrock to purchase Surnamer's 50% interest of the airplane within two months and that a verdict in favor of Surnamer was "beyond peradventure." ***See Braun***, 24 A.3d at 890-91; ***Pennsy Supply, Inc.***, 895 A.2d at 600.

Finally, Surnamer contends that because Mr. Rothrock admitted to the existence of a contract, the statute of frauds was satisfied. Surnamer reiterates that Mr. Rothrock, in his December 10, 2009 letter and at his trial deposition, admitted that he offered to purchase one-half the airplane for $140,000, and resell the share to Gregg Feinberg. Surnamer states that the letter and trial deposition reflect Surnamer's agreement to this proposal. He concludes that because the facts establish the existence of an oral contract, the statute of frauds is waived. ***See*** Surnamer's Brief at 19 (citing ***Target Sportswear, Inc. v. Clearfield Foundation***, 474 A.2d 1142, 1150 (Pa. Super. 1984)).

Because Surnamer suggests an error of law, the standard of review is *de novo*. ***See Pocono Manor Investors, LP v. Pa. Gaming Control Bd.***, 927 A.2d 209, 216 (Pa. 2007). Pennsylvania statute defines the statute of frauds as follows:

> **§ 2201. Formal requirements; statute of frauds**
>
> **(a) General rule.—**Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing.
>
> * * *
>
> **(c) Enforceability of contracts not satisfying general requirements.—**A contract which does not satisfy the requirements of subsection (a) but which is valid in other respects is enforceable:
>
> * * *
>
> (2) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise **in court** that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted . . . .

13 Pa.C.S. § 2201(a), (c)(2) (emphasis added). The comment to this section states, in pertinent part, the following:

> If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional writing is necessary for protection

> against fraud. Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

13 Pa.C.S. § 2201 cmt. 7; ***see also id.*** at cmt. 3 (1953) (noting provision "giving effect to admissions in court was not found in the Sales Act but appears to be consistent with Pennsylvania law." (citing ***Zlotziver v. Zlotziver***, 49 A.2d 779 (Pa. 1947) (holding oral agreement for land enforced because seller admitted in court to existence of agreement)).

In this case, Surnamer's reliance on the statute of frauds is unavailing because Rothrock did not admit in court to the existence of a contract. ***See*** 13 Pa.C.S. § 2201(c)(2). Had Rothrock conceded in court that there was a contract, then the statute of frauds, arguably, would not operate to bar enforcement of the agreement. ***See*** 13 Pa.C.S. § 2201(a). Accordingly, we discern no error warranting entry of judgment notwithstanding the verdict. ***See Braun***, 24 A.3d at 890-91.

Having resolved the liability claims raised by Surnamer in his cross-appeal, we address the claim for insufficient damages presented by Rothrock in their direct appeal:

> Did [Rothrock] present sufficient, unrebutted testimony and documentary evidence that supported Rothrock's claim for damages in the amount of $38,594.55, plus legal interest, such that the lower court erred?

Rothrock's Brief at 2.

Rothrock claims that the court failed to consider the evidence substantiating a higher amount of damages, specifically $38,594.55, instead of the $6,712.54 the court actually awarded. Specifically, Rothrock suggests, the court disregarded "other plane related costs and expenses paid by Rothrock" and not reimbursed by Surnamer. ***Id.*** at 30. Rothrock, however, concedes that the trial court held that it established damages with respect to legal bills.[8]

Surnamer counters that the parties' agreement with respect to the plane obligated him to reimburse Rothrock for one-half of all paid expenses. Surnamer contends that the trial court correctly held that Rothrock did not establish that they actually paid the expenses, for which he would reimburse one-half to Rothrock. Surnamer concedes that there were expenses but maintains that Rothrock was obligated to establish proof that they paid the expenses. In sum:

> Rothrock . . . was not due repayment from Mr. Surnamer for bills that it did not pay. Rothrock presented a variety of different kinds of circumstantial evidence which suggested that it normally paid bills or that the bills may have been paid. But it failed to produce the documentation which would have proven, without question, what bills were, or were not paid. The [trial

[8] Rothrock, in a footnote devoid of any legal citation or argument, baldly suggests entitlement to interest on the award of damages. ***See*** Rothrock's Brief at 30. We decline to address Rothrock's suggestion, however, as it was not raised with the trial court. ***See*** Pa.R.A.P. 302; ***see generally Cresci Const. Servs., Inc. v. Martin***, 64 A.3d 254, 264-65 (Pa. Super. 2013).

> court] was fully justified in requiring that it provide the best evidence of payment.

Surnamer's Brief at 14. We hold Rothrock failed to establish entitlement to relief.

With respect to whether a new trial should be awarded on damages, we state the following:

> Because the trial court is uniquely qualified to evaluate factual matters, we will not disturb its decision absent an abuse of discretion or error of law. A trial court may only grant a new trial when the . . . verdict is so contrary to the evidence that it "shocks one's the sense of justice." A . . . verdict is set aside as inadequate where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiff.

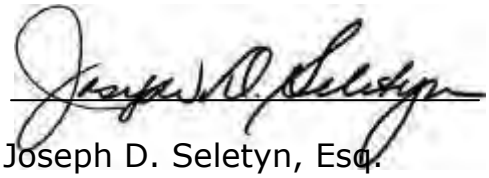
Burnhauser v. Bumberger, 745 A.2d 1256, 1260-61 (Pa. Super. 2000) (citations omitted) (affirming grant of new trial for damages in tort action because original damages award was against weight of evidence).

Instantly, after careful review of the record and acknowledging the court's implicit credibility determinations, we cannot conclude that the amount of the verdict was so inadequate as to shock our conscience. ***See id.*** The trial court essentially held that absent proof that Rothrock actually paid the third-party invoices for aircraft expenses, it could not hold Surnamer responsible for one-half of the expenses. Given these unique facts, we cannot conclude the trial court abused its discretion by declining to require Surnamer pay one-half of the alleged airplane expenses absent credible proof that Rothrock actually paid the invoiced expenses. ***See id.***

Accordingly, having viewed the record in the light most favorable to Rothrock, as the verdict-winner, ***see Braun***, 24 A.3d at 890-91, we affirm the judgment below.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/14/2014