2014 IL App (1st) 132702-U

FIRST DIVISION
June 2, 2014

No. 1-13-2702

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RADION MOGILEVSKY and NANETTE MOGILEVSKY, Plaintiffs-Appellants, v. RUBICON TECHNOLOGY, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 11 L 2858 Honorable Donald J. Suriano, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** In this landlord-tenant dispute, a jury verdict unfavorable to the landlord was not against the manifest weight of the evidence. The trial court properly instructed the jury regarding the law applicable to permanent fixtures and trade fixtures.

¶ 2 This case involves a tenant's removal of industrial fixtures from commercial property at the conclusion of its lease. A jury awarded the landlord $22,000 in damages, far less than what the landlord had sought. We affirm, rejecting the landlord's claims that the jury's verdict was unsupported by the evidence and that the instructions improperly stated the law regarding fixtures affixed to real estate.

¶ 3 **BACKGROUND**

¶ 4 In 1999, the plaintiffs, Dr. Radion Mogilevsky and his wife Nanette, bought an empty two-story industrial warehouse-style building in Franklin Park, Illinois. Initially, they leased the building to S & R Rubicon, Inc. (S & R), a company they largely controlled. S & R manufactured sapphire crystal for use in various commercial applications such as LED lighting. It purchased and installed a 2,000-amp electrical system and components of a cooling system ("system") to support the furnaces used in sapphire crystal manufacturing on the premises. The furnaces were built with a sufficiently large capacity to allow S & R to manufacture sapphire crystals of much greater size than those of its competitors.

¶ 5 While Dr. Mogilevsky, a scientist, designed the system to power the furnaces, the various components were obtained from manufacturers. The overall system included components inside, outside, and underneath the building. The cooling system itself contained an above-ground loop running water to a rooftop water tower, and a second underground loop running coolant water under the concrete building floor.

¶ 6 Christopher Moffitt initially loaned S & R $150,000 to purchase the furnaces. He also became a 20% owner of S & R. Eventually, he became more involved in the business and loaned it an additional $500,000, which S & R used to purchase the electrical and cooling systems. Moffitt testified it was never his intent that the systems would permanently remain on the premises because S & R had funded their purchase. Although they did not pay for the system, the Mogilevskys intended that it remain permanently affixed to their premises and become their own property. They had arranged for S & R to pay for the system at its own expense, ostensibly for tax reasons.

¶ 7 In 2000, the Mogilevskys and Moffitt organized Rubicon Technology, LLC (the LLC) as the successor to S & R to facilitate outside investment and eventually make the company a publicly-held corporation. As part of this transaction, S & R delivered a bill of sale dated July 1, 2000, to the LLC, and Moffitt agreed to forgive certain loans to Dr. Mogilevsky. The Mogilevskys also entered into a new lease with the LLC for the premises. The bill of sale did not specifically list any of the components of the disputed fixtures, but it did contain a preface stating that S & R intended to transfer "all assets of or used in the business." At that time, the system in question was being used to power the industrial furnaces. Moffitt invested $3.5 million in the LLC, acquired a controlling interest in it, and became the chairman of its board.

¶ 8 In January 2001, Rubicon Technology, Inc. (Rubicon), was formed as the successor to the LLC. The Mogilevskys no longer controlled this new corporation, and Dr. Mogilevsky resigned from his positions with the corporation within a year. In 2005, the Mogilevskys and Rubicon entered into a five-year lease for the premises. The lease provided, in pertinent part, that at the conclusion of the lease, Rubicon will "at once surrender the Premises to Landlord, broom clean, in good order, condition, and repair, reasonable wear and tear excepted."

¶ 9 At the end of the lease term in 2010, Rubicon surrendered the premises and abandoned the underground components of the system, but removed the major components, placing some pieces in storage and disposing of others. The removal left holes in the walls and floors which required patching, and left the premises without the 2,000-amp electrical service needed to run industrial furnaces. A 1,200-amp electrical service remained.

¶ 10 Faisal Nabulsi, a Rubicon official, testified that he directed the removal of the equipment because it was necessary for Rubicon's business and belonged to Rubicon. Otherwise, he stated, Rubicon left the property in "broom clean" condition. Dr. Mogilevsky had intended to continue

to use the premises and its existing systems for a new company he had created to produce high-purity densified alumina, which is used as a raw material to produce sapphire crystal.

¶ 11 The Mogilevskys filed this case against Rubicon, seeking damages for breach of the lease (count 1) and conversion (count 2). The Mogilevskys alleged that the cost to replace the removed system was $731,000. After including lost rent and damage repair, their claim totaled $950,000. The jury handed the Mogilevskys but a Pyhrric victory – it awarded them only $22,000 on the breach of contract count for "[c]ost to repair damage." Its itemized written verdict on that count awarded zero dollars for system replacement costs, lost rent, and sundry other expenses. The jury not only awarded nothing for system replacement costs, but also found against the Mogilevskys on the conversion count, thus inherently finding that the system was a removable trade fixture belonging to Rubicon rather than a nonremovable permanent fixture belonging to the Mogilevskys.

¶ 12 The Mogilevskys were holding a $39,000 security deposit from Rubicon and claimed it as an offset to their damages. Rubicon had counterclaimed for return of the security deposit, but by agreement of the parties, the jury did not consider the counterclaim. Instead, the trial court offset the $39,000 counterclaim with the $22,000 damage award, resulting in an ultimate judgment of $17,000 in favor of Rubicon. The court later denied the Mogilevsky's motion for judgment *n. o. v.*, and this appeal followed.

¶ 13 **ANALYSIS**

¶ 14 We have jurisdiction over this appeal pursuant to Illinois Supreme Court Rule 303(a)(1), as the plaintiffs are appealing a final judgment entered on a jury verdict. On appeal, the Mogilevskys claim that: (1) the jury's finding that the system was not a permanent fixture, but rather a trade fixture, was against the manifest weight of the evidence; (2) the court should have

given the jury a so-called "prioritizing" instruction; (3) this court should not only reverse the verdict, but award them $950,000 based on the evidence presented.

¶ 15 We must first address a procedural question. Rubicon asks us to dismiss the appeal because the Mogilevskys failed to provide any of the marked trial exhibits in the record. At the trial, twelve exhibits were introduced into evidence and published to the jury. Because the central issue in this case is whether the instructions regarding fixtures were justified based on the evidence and applicable law, some of the exhibits, particularly the lease and bill of sale, are particularly relevant to this analysis. Jury instructions are based not merely on the underlying causes of action, but also on any evidence presented. We may reverse a jury verdict based upon erroneous instructions only where the instructions resulted in prejudice to the appellant. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 28. A reviewing court cannot normally determine whether the jury instructions were prejudicial without reviewing the full record of the trial.

¶ 16 Supreme Court Rules 321 and 324 require an appellant to provide a complete record on appeal, including a bound and certified copy of the report of proceedings and "*any documentary exhibits offered and filed by any party*." (Emphasis added.) See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994), R. 324 (eff. May 30, 2008). Providing what are claimed to be copies of the exhibits within an appendix to the appellate brief is not permitted, if those exhibits are not included in the certified record. *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 679 (2000)[1].

[1] The table of contents of the record contained in the appendix provides page citations for some, but not all, of the exhibits. However, the page citations correspond to the page of the transcript of the trial where the court announced that the exhibit was admitted, not to an actual marked copy of the trial exhibit. Additionally, the table of contents of the record is largely incomplete. It lists only eight documents, all exhibits or jury instructions. It omits every pleading and order filed in the case, as well as the entire contents of five volumes of the ten-volume record. Supreme Court Rule 342(a) requires that the appendix include "a complete table of contents" of the entire record, including, among other things, "the nature of each document, order, or exhibit" and the date of filing or entry of all "pleadings, motions, notices of appeal, orders, and judgments."

¶ 17 The burden of providing a sufficient record on appeal rests with the appellants. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). The Mogilevskys' failure to include in the record the actual marked exhibits given to the jury provides us with a basis to dismiss the appeal. See *id.* However, the record is straightforward, and nothing in it suggests that the bill of sale and lease presented to the jury were any different than the corresponding unmarked copies which do appear in the record four and nine times, respectively, as exhibits to various motions. We therefore decline to dismiss the appeal entirely. We will, however, resolve any doubts arising from the incomplete record against the Mogilevskys and "indulge every reasonable presumption in favor of the judgment appealed from." *Foutch*, 99 Ill. 2d at 391-92; *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006).

¶ 18 We may reverse a jury verdict only if it is against the manifest weight of the evidence. *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). To reverse a jury verdict as against the manifest weight of the evidence, we must find that: (1) it is unreasonable, arbitrary, and not based on the evidence; or (2) the opposite conclusion is readily apparent. *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 179 (2008).

¶ 19 We begin with the well-recognized principle that there are essentially two kinds of fixtures attached to real estate: permanent fixtures and trade fixtures. A tenant may not remove "permanent fixtures" from leased property, as they become part of the real estate. A permanent fixture is "a former chattel which, while retaining its separate physical identity, is so connected with the reality that a disinterested observer would consider it a part thereof." *St. Louis v. Rockwell Graphic Systems, Inc.*, 153 Ill. 2d 1, 4 (1992). "[I]t has always been the law of this state that where personal property is permanently attached to real estate with the intention that it

shall become part of the freehold title thereto passes to the owner of the freehold." *White Way Electric Sign & Maintenance Co. v. Chicago Title & Trust Co.*, 368 Ill. 482, 484-85 (1938); accord *National Boulevard Bank of Chicago v. Citizens Utilities Co. of Illinois*, 107 Ill. App. 3d 992, 1001 (1982). To determine whether an item is a tenant's personal property and not part of the realty, courts consider three factors: (1) the nature of its attachment to the realty; (2) its adaptation to and necessity for the purpose for which the premises are devoted; and (3) whether it was intended that the item in question be considered part of the realty. *Jewelers Mutual Insurance Co. v. Firstar Bank Illinois*, 341 Ill. App. 3d 14, 20 (2003) (citing *A & A Market, Inc. v. Pekin Insurance Co.*, 306 Ill. App. 3d 485 (1999)). Intent is the "preeminent factor; the other considerations are primarily evidence of intent." *A & A Market*, 306 Ill. App. 3d at 488.

¶ 20 There are no pattern jury instructions regarding fixtures on real estate, so the trial court used non-pattern instructions. The court instructed the jury regarding permanent fixtures as follows:

> "For property to be a fixture, it must be equipment that is intended to be attached to become part of the building on the premises.
>
> In deciding whether the 2000-amp electrical system and portions of the cooling system constitute fixtures, you should consider the following factors:
>
> 1. Whether it was the intent to make the *** system be permanently attached to and become part of the building upon installation at the building. Intent is the critical factor to be considered in determining whether the item is a fixture or personal

> property. The other considerations are primarily evidence of intent.
>
> 2. The *** system's adaptation to and necessity for the purpose for which the building was devoted.
>
> 3. How the *** system [was] attached to the building."

This instruction accurately tracked Illinois law regarding permanent fixtures. See *supra* ¶ 19.

¶ 21 A "trade fixture" is also affixed to the real estate, but differs from a "permanent fixture" in two respects: (1) it must be personal property of the tenant; and (2) it is affixed to the realty for purposes of carrying on the tenant's business. *Village of Palatine v. Palatine Associates, LLC*, 406 Ill. App. 3d 973, 979-80 (2010). There is a rebuttable presumption that items installed by a tenant for the purpose of carrying on a trade are trade fixtures. *Id.* The test to determine whether a fixture is a trade fixture is essentially identical to the test used for permanent fixtures. See *id.; B. Kreisman & Co. v. First Arlington National Bank*, 91 Ill. App. 3d 847, 852 (1980). A trade fixture is the tenant's property and may be removed by the tenant if the removal does not damage the real estate. *Village of Palatine*, 406 Ill. App. 3d at 979-80.

¶ 22 The trial court instructed the jury regarding trade fixtures as follows:

> "A trade fixture is personal property of the tenant that is attached by the tenant for the purposes of carrying on the tenant's business. If the *** system[s] are personal property designed for purposes of trade, then they are trade fixtures, and the tenant's own property. A tenant may remove its trade fixtures if the removal does not materially damage the real estate. Injury caused by the

> removal must be material and substantial to prevent the item from remaining a trade fixture.
>
> There is a rebuttable presumption that items installed by a tenant for the purpose of carrying on a trade are trade fixtures. A rebuttable presumption is one that may be overcome by the introduction of contrary evidence. It is a legal presumption that holds good until evidence contrary to it is introduced."

This instruction accurately tracked Illinois law regarding trade fixtures. See *supra* ¶ 21.

¶ 23 The Mogilevskys contend here that because the evidence in their favor was undisputed, this case involves only legal issues to which we should apply *de novo* review. While the record shows that much of the main evidence was undisputed, important aspects of it were strongly disputed.

¶ 24 The jury did hear evidence regarding the manner in which the system was attached to the building and the necessity of the system for Rubicon's manufacturing process. The jury also learned that the property began as an empty warehouse which, as a "white shell," could be converted to any number of uses. Rubicon's predecessor corporation had paid for the equipment in the first place, and the equipment was specially made for and required by manufacturers of sapphire crystals. Some key evidence, though, was clearly disputed. On the critical element of intent, Dr. Mogilvevsky and Moffitt had sharply differing opinions regarding the intent of the parties at the time of installation. That intent was never memorialized in writing, so the jury was only able to ascertain intent through the testimony of the witnesses for each party. As the trier of fact, the jury was entitled to determine which witness's testimony was more credible, and we cannot disturb that finding. *Boyd v. City of Chicago*, 378 Ill. App. 3d 57, 70 (2007). The fact

that the tenant paid for the installation is quite relevant to the issue of intent. *Village of Palatine*, 406 Ill. App. 3d at 979. The property began as an empty warehouse and was returned to that condition, with the exceptions of $22,000 in damage caused by the removal of the system and the presence of installed underground lines which would not have affected the usability of the building for other purposes. Based on all this evidence, the jury was entitled to determine that the system was a removable trade fixture, and that Rubicon was not liable for conversion. In sum, neither the verdict on the breach of contract count nor the verdict on the conversion count was against the manifest weight of the evidence.

¶ 25 The Mogilevskys raise an additional issue regarding a third jury instruction which they proposed. They did not object to the second instruction which defined trade fixtures. Their counsel did not "have a problem" with the two instructions, but instead pressed to add a third "prioritizing" instruction. The proposed "prioritizing instruction" would have read "[i]f you decide from the evidence that the property removed from the building were fixtures, then you must find that they were not personal property or trade fixtures."

¶ 26 We review a trial court's decision to grant or deny a jury instruction for abuse of discretion. A court does not abuse its discretion if the instructions, taken as a whole, are sufficiently clear so as not to mislead and they fairly and correctly state the law. *Studt*, 2011 IL 108182, ¶ 13.

¶ 27 Besides confusingly conflating the terms "personal property" and "fixtures," the "prioritizing" instruction was largely duplicative of the first instruction. The evidence showed that Rubicon's corporate predecessor purchased the system. Accordingly, the system was presumptively a trade fixture. *Village of Palatine*, 406 Ill. App. 3d at 979. The other instructions already explained to the jury that it must look at the intent of the parties to determine "whether

the item is a fixture or personal property." See *supra* ¶ 20. Because the first two instructions precisely tracked existing Illinois law regarding permanent and trade fixtures, we cannot find that the trial court abused its discretion by refusing the additional "prioritizing" instruction.

¶ 28 Finally, the Mogilevskys press the issue of their replacement costs and ask us to enter a judgment for $911,000 in their favor. This is a somewhat puzzling request. Had we found that the instructions were improper, the correct remedy would be to remand the case for a new trial before a different jury. See, *e.g.*, *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 237 (1996) (reversing jury verdict and remanding for new trial because of incorrect jury instructions). Additionally, the amount of damages to be assessed is peculiarly a question of fact for the jury. When the jury is properly instructed on the measure of damages, we cannot substitute our judgment for that of the jury regarding the sum to be awarded. *Baird v. Chicago, Burlington & Quincy R.R. Co.*, 63 Ill. 2d 463, 472-73 (1976). Once the jury had determined that the system was a removable trade fixture, the scope of damages became limited only to those caused by the removal of the fixtures. The jury's determination that those damages amounted to $22,000 was hardly against the manifest weight of the evidence.

¶ 29 **CONCLUSION**

¶ 30 For these reasons, we affirm the judgment of the circuit court.

¶ 31 Affirmed.