SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

REBECCA BROADWAY LIMITED PARTNERSHIP,

Plaintiff,

-against-

MARC THIBODEAU,

Defendant.

Index No.: 653659/2012
Mot. Seq. No.: 006
Decision and Order

Masley, J.:

Following trial, a jury found defendant Marc Thibodeau liable for tortious interference with the business relationships of plaintiff Rebecca Broadway Limited Partnership (RBLP), and awarded RBLP damages in the amount of $85,000 for that claim. RBLP now moves, pursuant to CPLR 4404 (a), for an order setting aside only the damages verdict, leaving the liability verdict intact, and directing a new trial on those damages.

Background

The following facts are drawn from the evidence presented at trial. This action arises from the failed creation of a Broadway show, *Rebecca – The Musical* (Show). Sprecher Organization, LLC, the principle of which is Ben Sprecher, and Louise Forlenza Productions, Inc., the principle of which is Louise Forlenza (collectively, Producers), formed RBLP to finance, produce, and manage the Show. The Producers engaged Thibodeau to serve as the Show's press publicist in 2008, and he served in that role until 2012. The Producers' efforts to raise the capital needed to open and

sustain the Show were plagued with numerous issues, delaying the opening several times, and eventually leading to the cancellation of the Show altogether.

In early 2012, after the Show's production and opening were delayed due to insufficient capitalization, the Producers entered into a consulting agreement with Mark Paul Hotton, who was originally named as a defendant in this action, and who was criminally convicted of wire fraud for his involvement in a fraudulent investment scheme. Hotton provided the Producers with four investors, one of whom—Paul Abrams—became RBLP's largest single investor. Abrams agreed to invest more than $4 million in the Show; however, that investment money was never sent after Abrams reportedly died suddenly of malaria overseas. Following Abrams's alleged death, the Show's opening was again delayed, and the press questioned whether RBLP would reach its capitalization target. In the aftermath of Abrams's suspicious death, reporters for the New York Times and the New York Post published negative articles detailing the nature of Abrams's investment, and the Producers' difficulties securing that investment from Abrams's estate.[1]

The Producers subsequently procured new investors, including individual Lawrence Runsdorf, who committed to invest $2.5 million, and entity DC Tours, which committed $1.3 million. Runsdorf's investment, memorialized in a September 19, 2012 agreement, was conditioned upon RBLP meeting its $12 million minimum capitalization target by October 5, 2012. DC Tours's commitment was also contingent upon RBLP reaching the $12 million minimum capitalization target, but by November 20-30, 2012.

[1] Subsequently, the press reported that Abrams was fictitious, as was his purported $4 million commitment to RBLP.

Following Abrams's alleged death, Thibodeau became suspicious of Hotton, the Abrams affair, and RBLP's investment efforts, and conducted an independent investigation. Thibodeau found that Hotton had a history of being sued for fraud, that Abrams was not a real person, and that Abrams's investment was likely a sham. After discussing what he found with the Producers, Thibodeau—using the false name "Bethany Walsh"— sent two emails to Runsdorf's attorneys, alerting them to a September 25, 2012 article in the New York Times that suggested Abrams was not real. In the first email, Thibodeau stated that the article was important to read; in the second, Thibodeau indicated that there may be a fraud. After a September 26, 2012 article in the New York Post reported that Abrams was likely fictitious, and that RBLP was having difficulty reaching its target capitalization, Thibodeau sent an email directly to Runsdorf, using a new false name. Thibodeau, as "Sarah Finkelstein," wrote to Runsford that it was "a near certainty" that Abrams was a fiction devised to defraud other investors, implicated Sprecher in the Abrams fraud, and warned Runsford that the "walls are about to cave in" on RBLP due to anemic ticket presales, bad press, and financial troubles. Runsdorf then retracted his investment, and the Show's opening was canceled on September 30, 2012. At trial, Runsdorf testified that the Sarah Finkelstein email was the "last straw" which caused him to pull his investment back from RBLP.

A jury trial on RBLP's three causes of action—breach of contract, tortious interference with business relationships, and defamation—against Thibodeau commenced on April 24, 2017. The jury: (1) awarded $5,000 in damages for the breach

of contract claim[2]; (2) found that Thibodeau had tortiously interfered with RBLP's business relationships, and awarded RBLP $85,000 in compensatory damages for that claim; and (3) found Thibodeau had not defamed RBLP.

During the trial, the parties negotiated the court's charge to the jury pertaining to the tortious interference claim (*see* trial transcript [tr] at 1301-1306 [NYSCEF Doc. No. 195]). The parties also provided the court with proposed verdict sheets, each of which contained, in general terms only, inquiries to ascertain whether RBLP is entitled to compensatory and punitive damages if the jury found Thibodeau liable for tortious interference. After summations and the court's instructions, a verdict sheet was distributed to the jury; the actual verdict sheet used in this trial is not significantly different from the proposed verdict sheets submitted by the parties (*compare* NYSCEF Doc. Nos. 133, 135 *with* 172).

Following deliberations, including further examination of trial evidence, all six jurors found Thibodeau liable for tortiously interfering with the Runsdorf contract, five of the six jurors determined that $85,000 is the amount "of the damages that [RBLP] sustained as a result of . . . Thibodeau's interference," and none of the six jurors found that RBLP is entitled to punitive damages (court exhibit XVI at 1-5 [NYSCEF Doc. No. 172]).

Discussion

Under CLPR 4404 (a), the court may vacate a jury's verdict, as a matter of law, where the evidence is legally insufficient—that is, where "there is simply no valid line of

[2] Thibodeau's liability for the breach of contract claim was decided as a matter of law before trial, leaving the jury to determine only damages for that cause of action.

reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). CPLR 4404 (a) further codifies the court's authority to set aside a jury verdict, and direct a new trial, where the verdict is contrary to the weight of the evidence.

"[T]he question of whether a jury verdict is against the weight of the evidence . . . is essentially a discretionary and factual determination involving a balancing of many factors" (*Yalkut v City of New York*, 162 AD2d 185, 188 [1st Dept 1990], citing *Cohen*, 45 NY2d at 498-499). "[T]he court must consider all of the proof adduced in assessing whether the verdict fairly reflects the evidence in the case[, and] . . . . must proceed with considerable caution, affording great deference to the fact-finding function of the jury" (*Martin v McLaughlin*, 162 AD2d 181, 184 [1st Dept 1990]), and such discretionary authority is providently exercised only where "the jury could not have reached its verdict on any fair interpretation of the evidence" (*Yalkut*, 162 AD2d at 188, citing *Nicastro v Park*, 113 AD2d 129, 495 [2d Dept 1995]; *see also Moffatt v Moffatt*, 86 AD2d 864, 864 [2d Dept 1982], *affd* 62 NY2d 875 [1984] [applying same standard to verdict in favor of plaintiff on tort claim]).

> "[T]he court must cautiously balance the great deference to be accorded to the jury's conclusion . . . against the court's own obligation to assure that the verdict is fair, and the court may not . . . unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty" (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 205-207 [1st Dept 2004] [internal quotation marks and citations omitted]).

RBLP now seeks to set aside the jury's damages verdict for the tortious interference claim, leaving the liability verdict intact, and directing a new trial on

damages, alone. It argues that the $85,000 figure awarded by the jury is contrary to the weight of the evidence and could not have been rationally derived from any of the evidence presented at trial. RBLP takes the position that, given the evidence presented at trial, the jury could have awarded only either: (1) one of, or some combination of, the exact amounts that RBLP claimed as lost commitments and out-of-pocket expenses; or, (2) no damages, as Thibodeau's trial theory was that, regardless of any interference, the minimum capitalization target would not have been reached, RBLP would have forfeited the Runsdorf and DC Tours investments, the Show would not have opened, and RBLP did not sustain any damages from any alleged interference.

Thibodeau responds that the damages verdict should not be disturbed and is not contrary to the weight of the evidence. He argues that the trial evidence establishes that RBLP never refunded the $5,695,365 investment funds it received prior to the Runsdorf agreement; indeed, no investor requested a refund in the 4¼ years after the Show was canceled, and RBLP had no written obligation to issue refunds (*see* plaintiff-RBLP's trial exhibit [ptx] 96).

Thibodeau further responds that the jury could have fairly interpreted the evidence and found that RBLP would not have attained its minimum capitalization target, regardless of whether Thibodeau had sent the Runsdorf email; therefore, RBLP would not have secured the Runsdorf and DC Tours funds, and the Show would not have opened. Specifically, the trial evidence establishes that, as of September 26, 2012—five days before rehearsals were set to begin, and nine days before the October 5, 2012 deadline to secure the full $12 million capitalization needed—RBLP's

capitalization total[3] was at least $965,000 shy of the $12 million minimum (*see* ptx 80). At trial, Sprecher and Forlenza testified that the $12 million threshold would have been met through loans or investments from a friend or relatives, but there was no documentary evidence submitted at trial demonstrating that such agreements had been entered.

Finally, Thibodeau contends that the jury could have fairly interpreted the evidence and found that the sole damages sustained by RBLP resulting from the tortious interference were those relating "out-of-pocket expenses" incurred from October 1, 2012 to December 31, 2016 (*see* ptx 94 [balance sheet listing expenses]). Thibodeau further asserts that the only expense that RBLP would not have incurred if the Show had opened is the $178,418.87 cost of scenery/costume storage; thus, the jury could have fairly found Thibodeau liable for two of the approximately 4¼ years of claimed storage costs, which amounts to $83,961.84—a figure that approximates the jury's $85,000 award.

RBLP replies that Thibodeau's damages theory is a faulty exercise in reverse engineering that is unsupported by the trial evidence. RBLP reiterates its argument that the damages award must have been either: (1) an award in the amount of one or more of RBLP's claimed damage figures; or (2) $0, as Thibodeau argued at trial. According to RBLP, "[t]here can be no middle ground" (RBLP's reply mem at 9).

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[3] RBLP had control of some of the investment funds, some funds were held in escrow accounts (with release to RBLP contingent upon, for instance, the $12 million capitalization target being reached by a date certain), and other promised funds were simply outstanding (*see* ptx 80; *e.g.* ptx 24 [outlining conditions through which the DC Tours investment of $1.3 million could be increased to up to $2 million]).

The court declines to exercise its discretion to set aside the jury's damages verdict. Although the $85,000 award is significantly lower than the approximately $10.5 million in total compensatory damages sought by RBLP on this claim, a fair interpretation of the evidence presented at trial supports the $85,000 award. For example, the jury could have reasonably found from the evidence that the tortious interference did not cause RBLP to lose the benefit of the Runsford or DC Tours agreements, and that RBLP did not, and had no obligation to, refund the $5,695,365 of pre-Runsford deal funds that RBLP had raised. The trial evidence also supports the jury's damages verdict inasmuch as the jury could have fairly found that Thibodeau's tortious interference caused damages to RBLP for only a limited period of time—i.e., from the date of Thibodeau's email to Runsford through the deadline for RBLP to reach its minimum capitalization target in connection with either the Runsford agreement, DC Tours agreement, or both; likewise, the jury could have calculated the damages through the date the Show was intended to open or begin rehearsals.

Additionally, the jury could have fairly interpreted the evidence as establishing that the tortious interference was one of many causes of RBLP's failure to achieve its capitalization and open the Show. Specifically, the trial evidence supports a finding that RBLP's capitalization efforts were plagued with problems for years prior to Thibodeau's email to Runsford, and RBLP's precarious finances were connected to dubious consultants and mysterious investors. Moreover, around the time of the interference, the press reported that the Show was unlikely to open on schedule, and that RBLP's greatest single investor suddenly, and suspiciously, died of malaria. The press subsequently reported that the deceased investor had never existed in the first place.

The evidence at trial also supports the $85,000 award insofar as the jury could fairly have found that Thibodeau's interference caused only a portion of RBLP's damages; for example, a percentage of the $620,766 of out-of-pocket expenses.

In the end, the exact reason that the jury awarded $85,000 does not matter; it had evidence before it by which RBLP claimed it had sustained more than $10 million in damages, broken down into four categories. A fair interpretation of the trial evidence supports the jury's damages award, even though the award is only a fraction of the overall sum sought. Furthermore, that the reasoning behind the jury's award is a mystery to RBLP is RBLP's own fault, for failing to present additional evidence of its damages, and for failing to pose more specific questions in its proposed verdict sheet.

Accordingly, the court declines to set aside the jury's award of damages for the tortious interference claim. The court further notes that the relief sought by RBLP—a retrial solely on the issue of damages—would not be appropriate, even if the court were to find, as RBLP argues, that the verdict is not rationally-related to the trial evidence. If there is no evidence to support the jury's award for damages, the entire verdict—including the liability aspect—would appear to be the product of an improper jury compromise (*see e.g. Nakasato v 331 W. 51st Corp.*, 124 AD3d 522, 524–525 [1st Dept 2015] [improper juror compromise implicated where liability was "sharply contested," the plaintiff was partially at fault, and "inexplicably low" damages were awarded despite evidence of plaintiff's severe injuries]). Where an improper jury compromise is likely, a "retrial on all issues is mandated" (*see id.*, citing *Moreno v Thaler,* 255 AD2d 195, 196 [1st Dept.1998]).

Here, however, the jury's damages verdict is supported by a fair interpretation of the trial evidence, and the award does not indicate a likelihood that the jury reached an improper compromise in finding Thibodeau liable for tortious interference in exchange for an "inexplicably low" damages award. The award here is not inexplicably low; much of the trial evidence as to RBLP's claimed $10.5 million of sustained damages was, variously, speculative, unsupported, and contradicted. Moreover, there is nothing in the record, including the jury's notes, that indicates a deadlock on liability or damages for tortious interference. Indeed, the jury unanimously found Thibodeau liable for tortious interference, five of six jurors found RBLP sustained $85,000 in damages as a result of that interference, and not a single juror found RBLP is entitled to punitive damages (court exhibit XVI at 1-5 [NYSCEF Doc. No. 172]).

The court also notes that a new trial on damages alone is not appropriate where, as here, the issues of liability and damages are inextricably interwoven. Unlike a personal injury case, for instance, in which a defendant's liability for the accident is typically separate and distinct from the degree of injuries/amount of damages sustained by the plaintiff, liability and damages in this tortious interference claim are not readily distinguishable. Specifically, RBLP's claimed damages extend beyond the Runsdorf agreement, with which Thibodeau interfered, and include damages which purportedly resulted from the domino-effect caused by the loss of Runsdorf agreement. The issues of liability and damages are interwoven and dependent upon the circumstances of the entire production; thus, even if the court were to find that the damages verdict is contrary to the weight of the evidence, an entire new trial to determine liability and damages for tortious interference would be necessary.

Accordingly, it is

ORDERED that the motion of plaintiff Rebecca Broadway Limited Partnership is denied.

DATED: May 18, 2018

ENTER:

HON. ANDREA MASLEY