200695 Ontario, Inc. v Goodrich Aerospace Can., Ltd.
2022 NY Slip Op 35246(U)
September 8, 2022
Supreme Court, Erie County
Docket Number: Index No. 810322/2018
Judge: Timothy J. Walker
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

200695 ONTARIO, INC.,

Plaintiff,

- against

GOODRICH AEROSPACE CANADA, LTD.,
DINO SOAVE,

Defendants.

8TH JUDICIAL DISTRICT
COMMERCIAL DIVISION
DECISION AND ORDER
Index No. 810322/2018

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **ZDARSKY, SAWICKI & AGOSTINELLI LLP**
Joseph E. Zdarsky, Esq., Of Counsel
David E. Gutowski, Esq., Of Counsel
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Attorneys for Plaintiff

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WALKER, J.

The jury trial in this matter commenced on July 11, 2022, and continued on July 12, 13, 14, 15, 18, 19, concluding on July 21, 2022, for a total of eight (8) trial days. The jury returned a unanimous verdict for the Defendants, having answered the following questions "NO":

> Do you find, by clear and convincing evidence, that Defendants made representations of material fact to 2Source?
>
> Did Defendants, without justification and solely to harm Plaintiff,

intentionally act in a manner that would otherwise be lawful?

(Doc. 804, pp. 1, 10).

Plaintiff has applied for an order (Motion 13; Doc. 810) "for judgment in Plaintiff's favor, notwithstanding the verdict, on the first element of Plaintiff's fraud cause of action and a new trial on the remaining elements of that claim, or in the alternative, awarding a new trial an (sic) all the elements of Plaintiff's fraud claim, together with such other and further relief this Court deems just and proper" (*Id.*).

STANDARDS OF REVIEW

At trial, Plaintiff bore the burden to prove its fraud claim by clear and convincing evidence. Such elements are: (i) the representation of a material existing fact; (ii) falsity; (iii) scienter; (iv) deception; and (v) damages (*Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 NY2d 403, 406-07 [1958]).

Plaintiff's request to set aside the verdict is governed by CPLR 4404(a), which provides, in relevant part, as follows:

> After a trial of a cause of action . . ., upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law . . . .

An application to overturn a jury verdict on the basis that it was not supported by sufficient evidence as a matter of law should be granted where there is "'no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial'" (*Harwood v. Hinds*, 295

AD2d 949 [4th Dept 2002], quoting *Cohen v. Hallmark Cards*, 45 NY2d 493, 498-99 [1978]). "The test is a harsh one because a finding that a jury verdict is not supported by sufficient evidence leads to a directed verdict terminating the action without resubmission of the case to a jury" (*Nicastro v. Park*, 113 AD2d 129, 132 [2d Dept 1985]).

CPLR 4404(a) also addresses post-trial applications seeking a new trial and provides, in relevant part, as follows:

> After a trial of a cause of action . . ., upon the motion of any party or on its own initiative, the court may . . . order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice . . . .

The criteria for setting aside a jury verdict as contrary to the weight of the evidence "are necessarily less stringent an application [than the criteria seeking judgment as a matter of law], for such a determination results only in a new trial and does not deprive the parties of their right to ultimately have all disputed issues of fact resolved by a jury" (*Nicastro*, 113 Ad2d at 132-133). Whether a jury verdict should be set aside on this basis requires a discretionary balancing of many factors; it is not a question of law (*Id.*, at 133).

In exercising its discretion in this matter, the trial court must avoid "freely interfer[ing] with any verdict that is unsatisfactory or with which it disagrees" (*Id.*). Rather, the court must exercise its discretionary power to set aside a jury verdict and order a new trial,

> with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. Fact finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and 'unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty.'

(*Id.*, quoting *Ellis v. Hoelzel*, 57 AD2d 968, 969 [3d Dept 1977]).

Generally,

> particular deference has traditionally been accorded to jury verdicts in favor of defendants in tort cases [such as this one] because the clash of factual contentions is often sharper and simpler in those matters and the jury need not find that a defendant has prevailed by a preponderance of the evidence but rather may simply conclude that the plaintiff has failed to meet the burden of proof requisite of establishing the defendant's culpability.

(*Id.*, at 134).

Finally, the purpose of CPLR 4404(a) is "to ensure that justice is done" (*Provenzano v. Peters*, 242 AD2d 266, 266 [2d Dept 1997]).

DISCUSSION

Preliminarily, the court rejects Defendants' contention that Plaintiff's request for judgment notwithstanding the verdict on the first element of its fraud claim is waived and unpreserved for post-verdict review. Defendants' reliance on *Smith v. Woods Const.* (309 AD2d1155 [4th Dept 2003]), *Sessa v.Seddio* (132 AD3d 656 [2d Dept 2015]), and similar authority (Doc. 820, pp. 8-9) is unavailing. The holdings in such decisions are that a party's failure to seek a directed verdict at trial precludes the party from raising the issue on appeal. In the instant matter, however, the parties are not at the appellate level.

According to the late Professor David D. Siegel,

> A party may make a CPLR 4404 motion after the trial even though he made no CPLR 4401 motion during it, or move for judgment n.o.v. after the verdict without having moved for judgment before it. One is not a condition precedent to the other.

(Post-Trial Motion for Judgment, Siegel, NY Prac., §405 [6th ed.]).

While Professor Siegel did not support his pronouncement with case citations, it appears sound to the court, and Defendants have not cited (controlling) authority to support their position of a procedural irregularity.

Plaintiff's Request for Judgment Notwithstanding the Verdict

Plaintiff seeks judgment notwithstanding the verdict on the first element of its fraud claim, which is that Defendants allegedly made material misrepresentations of fact to Plaintiff.

Plaintiff principally relies on the following testimony of Robert Glegg, 2Source's then Chief Executive Officer, Catherine King, 2Source's then Vice President of Sales and Operations, and several electronic mail transmissions ("E-Mails") in support of its application:

- In February 2016, Mr. Glegg called Defendant, Dino Soave (Goodrich's then Senior Sourcing Machining Manager, Aircraft Systems & APS Segments) to inquire as to whether Goodrich was interested in negotiating a new long-term agreement that would take effect when the current agreement, negotiated in 2014, expired on December 31, 2016 (Doc. 812, p.12).
- Mr. Soave was "enthusiastic" and responded that Goodrich was "absolutely" interested in negotiating a new long term agreement that would take effect on January 1, 2017. They scheduled April 14, 2016 for a face-to-face meeting ("First Lunch Meeting") (*Id.*, at p. 13).
- Mr. Glegg and Ms. King attended the First Lunch Meeting on behalf of 2Source. The following individuals attended on behalf Goodrich: Mr. Soave; Harshal Naik; Harpal Singh; and an unidentified gentleman (*Id.*; Doc. 813, p.12). Plaintiff

characterizes Goodrich's attendees as "high-ranking members of Goodrich's corporate hierarchy," which "represented that Goodrich wanted to have a serious discussion" (Doc. 815, p. 7).

- Mr. Soave stated that Goodrich was "very interested" in entering into a new long term agreement with 2Source (Doc. 812, p.14), and Messrs. Glegg and Soave discussed potential material terms that would be included in a new agreement.
- Mr. Soave suggested a fifteen (15) year agreement, consistent with agreements Goodrich had in place with several of its other suppliers, and Mr. Glegg suggested a shorter term based on market conditions that were subject to fluctuation. Mr. Soave indicated that Goodrich would be willing to include a contract provision mandating a review of pricing every five (5) years (*Id.*, at pp. 14-15; Doc. 813, pp. 13-14).
- Messrs. Glegg and Soave also discussed whether Goodrich was interested in increasing its bushing spend (i.e., purchases) with 2Source from 66% to 100% of Goodrich's worldwide requirements, and Mr. Soave indicated that 2Source should submit pricing proposals (Doc. 812, p.15; Doc. 813, pp. 14-15).
- Mr. Naik directed Ms. King to use the quote package that Goodrich previously sent 2Source in 2013, because the information Ms. King needed to prepare a pricing proposal was contained therein. Mr. Naik also told Ms. King that she could reach out to him directly to obtain any information needed in order to prepare and submit the pricing proposals that Messrs. Glegg and Soave had discussed (Doc. 812, p.15; Doc. 813, pp. 15-16).

- The participants at the First Lunch Meeting also discussed Goodrich's "supplier gold program" ("Program"), which was a group of those suppliers Goodrich identified as superior. Member suppliers of the Program received certain benefits from Goodrich not available to suppliers outside the Program (Doc. 812, p.16; Doc. 813, p. 16).
- The participants at the First Lunch Meeting also discussed Goodrich sending 2Source its contract documents to enable 2Source to review and redline them and return them to Goodrich reflecting proposed changes (Doc. 812, pp. 16-17).
- On May 10, 2016, 2Source (by Ms. King) followed up the First Lunch Meeting by sending Mr. Soave an E-Mail request for a copy of a sample long term agreement for 2Source to review. Within a few hours, Mr. Soave responded that Mr. Singh "will send today" (Doc. 755).
- On June 30, 2016, Mr. Glegg and Ms. King attended a second lunch meeting with representatives of Goodrich, including Messrs. Soave and Naik, and David Gordon ("Second Lunch Meeting") (Doc. 812, p. 18; Doc. 813, p. 20).
- The participants at the Second Lunch Meeting further discussed potential pricing proposals, a potential new long-term agreement, the term of such a new agreement, and whether 2Source might qualify for the Program. Goodrich's representatives indicated they were looking forward to continuing negotiations to ensure that a new long term agreement was in place before the existing agreement expired on December 31, 2016 (Doc. 812, pp. 19; Doc. 813, pp. 21-22).
- On July 5, 2016, Mr. Glegg sent an E-Mail to the participants of the Second

Lunch Meeting for the purpose of memorializing the discussions had at the meeting. It provides, in relevant part, that,

> We look forward to working with you on the following, as discussed:
>
> 1. Quoting you on providing all of your . . . landing gear bushing needs throughout UTAS Landing Systems in a new multi-year LTA. We will quote you by July 30.
>
> 2. Receiving your latest terms and conditions and providing our comments.
>
> 3. Working towards obtaining Gold Supplier Status.
>
> 4. By separate email this morning, I will send you and Bhav Rai an email requesting 2% net 10 terms for our invoices dated from July 1through December 31of 2016.

(Doc. 596).

- Three (3) days later, on July 8, 2016, Ms. King sent an E-Mail to Mr. Soave requesting Goodrich's standard terms contract template so that she could start reviewing it and marking it up. On July 15, 2016, Defendants sent her the template (Doc. 600).
- Six (6) days later, on July 21, 2016, Mr. Soave sent Ms. King an E-Mail wherein he inquired as to how she was "progressing with the template", because "[o]ur intention would be to review the document internally with our legal [team] . . . and hopefully find a time [the] week of August 15th or 22nd to have a face to face with 2Source" (*Id.*).

Mr. Soave's testimony stands in stark contrast to the testimony and electronic mails Plaintiff relies on:

- Mr. Soave did not recall receiving a telephone call from Mr. Glegg in February 2016 regarding whether Goodrich was interested in negotiating a new long-term agreement (Doc. 817, p. 120).
- Nonetheless, representatives of 2Source and Goodrich met for the First Lunch Meeting (*Id.*).
- Mr. Soave's recollection of the events of the First Lunch Meeting was far different than Mr. Glegg's recollection. There was no agenda set in advance of the First Lunch Meeting, and most of the meeting was spent on small talk, such as summer plans, boating, and children's activities. Business was not discussed until the participants were exiting the restaurant (*Id.*, at pp. 120-122).
- In response to Mr. Glegg asking whether 2Source might continue to be a supplier for Goodrich in 2017, Mr. Soave responded that Goodrich "was not in a position to discuss anything" (*Id.*, at p. 122; Doc. 627).
- When Mr. Glegg brought up "2Source want[ing] to quote" for "a hundred percent of Goodrich's bushings," Mr. Soave responded that 2Source was "welcome to send in a quote" (Doc. 818, pp. 58-59).
- Mr. Soave acknowledged participating in the Second Lunch Meeting, but again testified that, similar to the First Lunch Meeting, no agenda was circulated prior to the meeting and most of the meeting was spent on small talk (Doc. 817, pp. 123-124; Doc. 627).
- When the Second Lunch Meeting turned to business, Mr. Glegg brought up the potential for 2Source to reach Supplier Gold status, which was something he

"would always bring up . . . in any discussion" he had with Mr. Soave or Goodrich (Doc. 817, p. 125), and he asked Mr. Soave about the potential for "extending his LTA" beyond the current agreement's expiration in December 2016. Mr. Soave responded by making it clear that "whatever is going to happen in 2017 would require the supplier[,] whoever it would be[,] to sign up to our T&C's [i.e., terms and conditions] exclusively" (*Id.*; Doc. 627). Goodrich "would not be in a position to negotiate and come to lesser terms" as it had done during the 2014 negotiations (Doc. 627). Mr. Soave also confirmed, with respect to unlimited consequential damages, the supplier would be required to "take it or leave it" (Doc. 817, pp. 125-126). Finally, Goodrich agreed to send Mr. Glegg "a copy of [its] updated terms for his review," as they had "changed since [Goodrich] had added some additional terms" (Doc. 627).

- On August 11, 2016, 2Source sent an E-Mail to Goodrich seeking a new long term agreement with a fifteen (15) year term and a cap on consequential damages. Goodrich, however, had previously made it clear that it would not accept a cap on consequential damages going forward into 2017. Neither 2Source, nor Goodrich were willing to budge on the issue. Thus, on August 23, 2016, Goodrich informed 2Source that there would be no further extension of the long term agreement set to expire on December 31, 2016 (Doc. 703; Doc. 817, pp. 135-139).

Mr. Glegg's trial testimony, when considered in a vacuum, may be construed as favorable to Plaintiff. However, it did not occur in a vacuum. Rather, Mr. Glegg's testimony is significantly tempered by Mr. Soave's testimony. To the extent the jury largely or fully credited

Mr. Soave's testimony over Mr. Glegg's testimony, which they were entitled to do as the arbiter of credibility, there is no basis to overturn the jury's verdict *(Fekry v. New York City Trans. Auth.*, 75 AD3d 616, 617 [2d Dept 2010] ["It is for the trier of fact to make determinations as to the credibility of the witnesses, and great deference is accorded to the fact finders, who had the opportunity to see and hear the witnesses"]). If the jury were to believe his testimony, Mr. Soave did not make any promises to enter into a new long term agreement at either lunch meeting.

In addition, the jury was aware that the lunch meetings occurred in the context of prior discussions had between 2Source and Goodrich in 2014 and 2015 regarding 2Source's less than favorable prospects of securing a new long term agreement in 2017. Mr. Soave testified that, in December 2014 when the parties were finalizing the 2015-2016 long term agreement, he advised Mr. Glegg that Goodrich was agreeing to a two (2) year agreement, as opposed to the five (5) year agreement 2Source sought, and that 2Source would be treated as a "not strategic" supplier, because 2Source refused to agree to Goodrich's terms and conditions (Doc. 817, pp. 100-101).

Despite the history of difficult negotiations between 2Source and Goodrich - most notably over whether to cap consequential damages, in August 2017 - 2Source proceeded in precisely the same manner by (i) refusing to agree to Goodrich's terms and conditions regarding a cap on consequential damages and (ii) proposing a fifteen (15) year term. Goodrich and 2Source's respective positions over these issues were diametrically opposed, and neither party was willing to compromise.

Indeed, Mr. Soave testified that when he received 2Source's proposal for a new long term agreement in August 2017, which contained no cap on consequential damages, and a fifteen (15) year term, he "kind of almost thought it was a joke" (*Id.*, at p. 138). Mr. Suave explained that none of Goodrich's contracts with other suppliers were for as many as fifteen (15) years. Goodrich endeavored to have consistent terms in all of its suppliers' contracts (including the length of the contract) and the contracts were generally for a period of five (5) years (*Id.*). 2Source's prior agreement was limited to two (2) years (not five), because 2Source insisted on a cap on consequential damages.

Mr. Soave further testified that the proposal 2Source submitted in August 2017 failed to include pricing and that 2Source was not in possession of drawings it would have needed to include pricing. The lack of pricing rendered the proposal a nonstarter, because Goodrich was unable to agree to a proposal that did not include pricing (*Id.*, at pp. 136-137).

The jury was vested with the unfettered discretion to believe Mr. Soave's testimony, and to reject Mr. Glegg's and Ms. King's contrary testimony. As Mr. Soave testified at trial, at no point did he represent to 2Source that Goodrich was ready and willing to move forward with negotiating a new long-term agreement. To the contrary, he testified that he was very clear with Mr. Glegg from the beginning about the consequences of 2Source's failure to agree to uncapped consequential damages in 2014 and 2015: that is, 2Source would be treated as a "not strategic" supplier, it would be "identified as an exit," and 2Source's entire "statement of work [would] go into a passport" process to be shopped to competitors (*Id.*) (*Fekry*, 75 AD3d at 617 [on a motion to set aside a jury verdict, the court shall avoid interfering with the jury's "determinations as to the credibility of witnesses"]). Nonetheless, Goodrich gave 2Source the opportunity to extend the 2015-2016 long term agreement, and 2Source submitted a proposal that was a nonstarter by suggesting a fifteen (15) year term; insisting on a cap on consequential damages; and failed to include pricing.

Plaintiff seeks to discredit Mr. Soave's trial testimony as being inconsistent with an affidavit (sworn to on August 19, 2019), wherein he stated that he never expressed to 2Source any "intent to negotiate and come to terms . . . on a new deal" (Doc. 760, ¶27). Plaintiff contends that such statement is so materially inconsistent with Mr. Soave's July 21, 2016 E-Mail to Ms. King (which referred to a "potential extension" of the long term agreement), that Defendants committed fraud against 2Source (Doc. 600). The court disagrees, and credits (as did the jury, apparently) Mr. Soave's testimony that when he sent the July 21, 2016 E-Mail, he believed there was some possibility of "negotiating a possible extension" (Doc. 814, p. 66).

The statements in the August 19, 2019 affidavit and in the July 21, 2016 E-Mail are not inconsistent. Nor do they provide a basis for setting aside the jury's verdict. Rather, they reflect that, during the summer of 2016, 2Source had a bonafide chance of extending the then existing long term agreement, provided it was willing to drop its insistence on a consequential damages cap. Upon 2Source's refusal to do so, negotiations abruptly came to an end (which 2Source should have anticipated).

From the court's review of the evidence - a second time (once at trial and again in the context of the pending application), this is not a case about fraud and misrepresentation. Rather, it is a case about sophisticated commercial parties negotiating, providing each other with firm terms and conditions, and ultimately being unable to reach an agreement, in this specific case because neither party would budge on the issue of a cap on consequential damages.

Plaintiff's Challenge to the Verdict as Against the Weight of the Evidence

In assessing a challenge seeking to overturn a jury verdict as against the weight of the evidence, the court may not supplant the role of the factfinder. "It is for the trier of fact to make determinations as to the credibility of the witnesses, and great deference" is owed to its determinations (*Fekry*, 19 AD3d at 617). Where, as here, the evidence is "in sharp conflict" and "the issue presented was one of pure credibility," any "issues regarding the credibility of witnesses and the accuracy of their testimony are for the jury to determine" (*Sheps v. Frank B. Hall & Co.*, 112 AD2d 281, 283 [2d Dept 1985]). So long as "the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Shehata v. Koruthu*, 201 AD3d 761, 763-64 [2d Dept 2022]).

The jury was squarely within its right to credit Mr. Soave's testimony over Mr. Glegg's testimony. In doing so, the jury's ultimate verdict was rational, legally permissible, and constituted a "fair interpretation of the evidence" that provides no basis for an order to set aside the verdict (*Fekry*, 19 AD3d at 617).

In addition, Mr. Glegg's testimony was, at times, inconsistent with other trial evidence. For instance, Mr. Gleg's testimony that 2Source's track record was "incredible" (Doc. 819, p. 27) was belied by internal 2Source E-Mails, including, *inter alia*, an E-Mail from Mr. Glegg to Ms. King and others, dated February 19, 2015, which stated the following, in relevant part:

> What is happening with respect to QUALITY at 2Source is simply unacceptable to me -- and I will not allow us to continue to operate as we are today. Unless immediate corrective action is taken, I will shut down 2Source.
>
> Eric and Arthur -- you have been jointly leading our QUALITY operations for a while. I understand that UTAS did an audit of 2Source yesterday, and that in reviewing three travellers all three had issues! Stop right there! Think please! This is not OK! These issues are a direct result of our inability to implement standard work (write correct procedures, train and hold accountable to follow such procedures) - notwithstanding the fact the resources were made available several years ago and again recently

> to get standard work implemented - lots of talk, lots of work done, very little completion. If I cannot understand and be satisfied by tomorrow that we have a definitive plan to put standard work in place throughout 2Source and/or if we cannot stick to this plan, it is game over. I am not going to keep on begging for the implementation of standard work.

(Doc. 689).

The next day (February 20, 2015), Mr. Glegg sent an E-Mail to the same 2Source employees that, in the event the concerns over quality expressed in his February 19, 2015 E-Mail were not addressed immediately, he would "shut down 2Source next week . . . [because] I am not prepared to have 2Source operate the way it is today" (*Id*). The February 20, 2015 electronic mail began, as follows:

> Dear All:
>
> THIS IS NOT A THREAT IT IS A PROMISE -- TRUST ME ON THIS !!!!!!

(*Id.*) (all caps and exclamation marks in original).

Finally, the jury was within its right to determine that Goodrich's representations regarding its mere intent to negotiate were not material.

"Materiality is the key threshold question," without which "no action will lie for fraud or deceit" (*Jonari Mgmt. Corp. v. St. Paul Fire & Marine Ins. Co.*, 87 AD2d 540, 541 [1st Dept 1982]). "[T]he question of materiality," no less than the other elements of fraud, presents "a question of fact for the jury" (*Giuliani v. Metro. Life Ins. Co.*, 269 AD 376, 381 [4th Dept 1945]; *see also, Nuss v. Sabad*, 976 FSupp2d 231, 250 [NDNY 2013] ["Under New York Law, the question of whether a statement was material presents a question of fact for the jury"]).

Generalized statements, including those that are "so trifling as to be legally inconsequential" fail to establish the materiality element of a fraud claim (*Gaidon v. Guardian Life Ins. Co. of America*, 94 NY2d 330, 350 [1999]).

A generalized statement of intent to negotiate is the sort of claim that the jury could have reasonably found to be immaterial (*Inside Swing v. Le Chase*, 236 AD2d 884 [4th Dept 1997] [dismissing fraud claim where "complaint allege[d] that defendants asserted their intention to enter into a lease agreement with plaintiff but failed to do so. Although a false representation as to a state of mind may be a false representation of a material fact, it does not follow that every broken promise acted upon is actionable. Mere promissory statements as to what will be done in the future are not actionable"] [internal citations and quotations omitted]).

In light of the foregoing, it is hereby

ORDERED, that Plaintiff's application is denied in all respects.

This constitutes the Decision and Order of this court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this court shall not constitute notice of entry.

Dated: September 8, 2022
Buffalo, New York

HON. TIMOTHY J. WALKER, A.S.C.J.
Presiding Justice, Commercial Division
8th Judicial District