[Cite as *Yellow Book Sales & Distrib. Co., Inc. v. Niederst Mgt., Ltd.*, 2011-Ohio-210.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94693

YELLOW BOOK SALES & DISTRIB. CO., INC.

PLAINTIFF-APPELLANT

vs.

NIEDERST MANAGEMENT, LTD., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-689619

BEFORE: Sweeney, P.J., Jones, J., and Rocco, J.

RELEASED AND JOURNALIZED: January 20, 2011

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JAMES J. SWEENEY, P.J.:

{¶ 1} Plaintiff-appellant Yellow Book Sales and Distribution Co., Inc. ("Yellow Book"), appeals the judgment rendered after a bench trial in favor of defendants-appellees, Niederst Management, Ltd. and Michael Niederst ("Niederst"), on Yellow Book's claim for breach of contract on an account. For the reasons that follow, we affirm.

{¶ 2} Yellow Book commenced this action against Niederst for breach of contract on an account relating to advertising services. The matter proceeded

to a bench trial in January of 2010 where the following evidence was presented:

{¶ 3} John Iosue, an account executive of Yellow Book, testified that he began contacting Niederst in 2006 attempting to sell Yellow Book's marketing services. Iosue recalled making approximately nine visits to Niederst before he ultimately filled out the contract and the copy sheets. According to Iosue, Plaintiff's Exhibit 1 is a copy of said contract. Iosue stated that Mr. Niederst signed the contract dated October 13, 2006 pertaining to advertising in the 2008 Cleveland directory. That directory was to be published in June of 2007 and would run through May of 2008.

{¶ 4} Iosue identified Plaintiff's Exhibit 2 as a copy sheet, upon which he recalled pasting an advertisement in Niederst's presence. Iosue testified that Mr. Niederst signed the copy sheet after Iosue affixed the advertisement to it. Iosue maintained that he pasted advertisements to Plaintiff's Exhibits 3, 4, and 5 prior to obtaining Mr. Niederst's signature on them. He did not make copies for Niederst but gave him the carbon copies, which were blank.

{¶ 5} Thereafter, Iosue had no further contact with Niederst except for a phone call from a Niederst employee who notified him that the phone numbers contained in the advertisements were incorrect, rendering the entire advertisement worthless.

{¶ 6} Iosue said by the time he received that call, the time for proof changes had expired. When asked if there was "anything indicating on this paperwork when the proof changes had to be submitted," Iosue responded, "Not on this paperwork." According to Iosue, he received the phone call on April 1, 2007 and the deadline for proof changes was the end of March. The phone call was about three days past the alleged proof change deadline. Iosue said the proof change deadline is "sent out on the actual proof itself." Iosue did not know what the proof looked like that was sent to Niederst. And, Yellow Book did not present a copy of the proof that was sent to Niederst.

{¶ 7} Iosue does not follow up on the proof changes unless the customer contacts him. Although Iosue could not recall what he told Niederst about proof changes, he confirmed that he did not inform Niederst of a specific deadline.

{¶ 8} The advertisements were printed with the incorrect phone number as reflected in Plaintiff's Exhibits 6, 7, and 8.

{¶ 9} Nicholas Saenz is a paralegal and custodian of records for Yellow Book. Saenz testified that Yellow Book does not keep copies of the proofs that were sent. Yellow Book does not have a copy of the proofs sent to Niederst. Saenz confirmed there are no copies of the proofs that were sent to Niederst with any of the information or date said to be returned.

{¶ 10} The defense presented the testimony of Michael Niederst ("Mr. Niederst"). He confirmed that he signed the contract and proof sheets. Mr. Niederst explained that he showed Iosue examples of their advertising material from other sources but instructed Iosue to obtain each phone number from the company website for use in the proofs. Mr. Niederst recalled that Iosue gave him blank proofs and denied that Iosue pasted anything to the proofs. Mr. Niederst later received proofs in the mail around November of 2006. They contacted Yellow Book to inform it of the incorrect phone numbers contained in the proofs but were told the deadline for changes had passed. Niederst recalled contacting Yellow Book within five days of receiving the proofs to notify it that the proofs were unacceptable and also contained the incorrect phone number. He explained he never sent anything back to Yellow Book because he is not an artist and could not create the advertisement. Niederst did not have a copy of the proofs. Iosue never contacted him after the contract was signed and Niederst never received any follow up phone calls about the proofs. Niederst later contacted Iosue directly in May but nothing was corrected.

{¶ 11} Shawn Whiteman, the Vice President of Niederst Management, testified that he saw the Yellow Book proofs in November of 2006 and they contained "a lot of mistakes." Among the mistakes in the advertisement, the phone number was wrong. He participated in a phone call to Yellow Book in

November that notified Yellow Book of the problem with the phone numbers. Yellow Book never followed up on the matter. Whiteman also recalled another phone call being placed to Yellow Book in April. Whiteman stated that they did not send changes because they were awaiting a final proof with the corrected information. They were not advised in November that there was a proof change deadline.

{¶ 12} The trial court entered judgment in favor of Niederst, which Yellow Book appeals assigning the following error for our review:

{¶ 13} "The trial court's judgment in favor of Appellees and against Appellant at the bench trial of this matter was against the manifest weight of the evidence."

{¶ 14} Judgment rendered after a bench trial will not be reversed as being against the manifest weight of the evidence in a civil case where the judgment is supported by competent, credible evidence in the record. *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273. The applicable standard requires the appellate court to give "the trial court's decision a presumption of correctness" and we may not substitute our judgment for that of the trial court. Id.

{¶ 15} The crux of Yellow Book's argument is that Niederst's failure to provide written notice of its requested corrections violated the terms of the

contract and entitled Yellow Book to judgment. Yellow Book relies upon paragraph 7(B) of Plaintiff's Exhibit 1, which provides:

{¶ 16} "It is Customer's responsibility to notify Publisher, in writing, of any and all name, address or telephone number changes prior to the applicable deadline of each Directory. If Customer fails to do so, Customer will remain obligated to make payments for its advertisement, regardless of whether Publisher was able to make the necessary changes."

{¶ 17} Iosue testified that the applicable deadline for making telephone number changes was contained in the proofs that were sent to Niederst. Iosue acknowledged that he did not know the specific deadline for making changes. Further, the subject proofs were not submitted into evidence. Iosue confirmed that he did not notify Niederst about any deadline. And, Whiteman and Mr. Niederst both testified that they contacted Yellow Book within days of receiving the proofs informing it that the proofs were unacceptable, including that they contained incorrect phone numbers. At that time, Yellow Book did not advise them to submit anything in writing nor did Yellow Book inform Niederst of any deadline for making changes. There is no evidence of the deadline referenced in the above-quoted excerpt from Yellow Book's standardized terms and conditions. As such, the paragraph is rendered meaningless in this case because it essentially required Niederst to submit written changes prior to a non-existent deadline. There is testimony in the

record that Niederst was awaiting a final proof. Niederst found the mailed proofs unacceptable, including, but not limited to, the wrong phone number. Whiteman testified that upon contacting Yellow Book in November, they were told corrections would be made and submitted to Niederst. That never occurred.

{¶ 18} There is no dispute that Yellow Book was advised, albeit orally, again on April 1, 2007 of the problems with the proofs. This was only three days past the alleged deadline for making changes and the advertisements ran with the incorrect information, rendering their value worthless to Niederst. Notably, Yellow Book provided no documentary evidence whatsoever to substantiate the alleged March 2007 deadline for making corrections.

{¶ 19} To the extent Yellow Book objects that the trial court admitted the testimony of a third party concerning his course of dealings with Yellow Book, we find no error. The testimony of the subject witness was brief and not probative of any determinative facts in this case. In particular, the witness testified that a sales representative (other than Iosue) obtained his signature on blank copy sheets for advertisements. Even assuming the evidence was admitted in error, "the law presumes that in a bench trial the court considers only relevant, material, and competent evidence." *State v. Bays* (1999), 87 Ohio St.3d 15, 27, 716 N.E.2d 1126, citing *State v. Post* (1987), 32 Ohio St.3d 380,

384, 513 N.E.2d 754. There is no indication that the trial court relied on this testimony in reaching its verdict.

{¶ 20} There is competent, credible evidence in the record to support the trial court's judgment and it was not against the manifest weight of the evidence.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, PRESIDING JUDGE

LARRY A. JONES, J., and
KENNETH A. ROCCO, J., CONCUR

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