IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

SECURITY FIRST ALARM, INC., a Florida corporation,

Appellant,

v.

CASE NO.: 2011-CV-082-A-O
Trial Court Case No.: 2010-CC-5432-O

WEYAND EAST FOOD SERVICE, LLC, a Florida limited liability company d/b/a WEYAND EAST FOOD SERVICE,

Appellee.
_____/

Appeal from the County Court,
for Orange County,
Wilfredo Martinez, County Judge.

Christopher H. Morrison, Esquire,
for Appellant.

Donald H. Whittemore, Esquire, and
Shannon Rodriguez, Esquire,
for Appellee.

Before HIGBEE, LAUTEN, and MIHOK, JJ.

PER CURIAM.

FINAL ORDER AND OPINION REVERSING TRIAL COURT

Appellant Security First Alarm, Inc. ("Security First") timely appeals the trial court's "Final Judgment for Defendant Weyand East Food Service, LLC," entered on September 21, 2011, in favor of Appellee Weyand East Food Service, LLC ("Weyand"). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). Pursuant to Florida Rule of Appellate Procedure 9.400, sections 57.105(7) and 59.46, Florida Statutes, and

provisions of the contracts at issue in the instant matter, Weyand requests an award of appellate attorney's fees and costs.

Facts and Procedural History

On April 16, 2010, Security First filed its complaint against Weyand, asserting three counts for breach of contract. Security First alleged that it had entered into three separate contracts with Weyand to provide alarm monitoring services at the same property owned by Weyand, and it attached the three alleged written contracts to its complaint—dated July 10, 2002 ("Exhibit A"); September 19, 2002 ("Exhibit B"); and May 21, 2003 ("Exhibit C"). Security First alleged that each contract provided for an automatic renewal for three year periods, that each contract contained an acceleration clause allowing Security First to declare the remaining balance due and payable upon Weyand's failure to make payment, and that Security First had made repeated demands for payment from Weyand and Weyand breached each contract by failing to pay monies owed.

Weyand admitted that it owned the subject property and that Security First provided alarm monitoring services to Weyand at the property. However, other than stating that each documentary exhibit speaks for itself, Weyand denied the remainder of Security First's substantive allegations. In addition, Weyand asserted several affirmative defenses, including, significantly: (1) Weyand effectively cancelled the agreements and paid Security First all sums due for services actually provided by Security First; and (2) Security First waved its claims when, after Weyand notified Security First that it no longer needed alarm monitoring services, Security First accepted payment for services rendered and discontinued services and the sending of invoices to Weyand.

At the trial, a representative of Weyand testified that she contacted Security First by

telephone on October 8, 2008, to notify Security First that Weyand was closing its business. She further testified that, during the phone call, a representative of Security First told her that if Weyand wanted to terminate business with Security First, they would have to put it in writing and mail it to Security First. Finally, the Weyand representative testified that she prepared and mailed a letter to Security First stating that Weyand wished to terminate business with Security First. Counsel for Security First objected on the basis of the best evidence rule, arguing that, if the witness is going to testify about the contents of a document, then the document itself is the best evidence to prove its contents. Counsel for Weyand responded that her understanding of the best evidence rule is that it applies to the instance in which a party attempts to submit a duplicate into evidence and there is a dispute as to the validity of the document. The trial judge overruled Security First's objection.

Later in the trial, the trial judge admitted the first alleged contract, Exhibit A, into evidence. However, when Security First offered Exhibit B for admission into evidence, Weyand objected on the basis of the best evidence rule, arguing that Security First offered a duplicate of the alleged contract for admission into evidence, an original exists, and Security First made no effort to even look for the original. Counsel for Weyand stated that she believed that this scenario presents the most appropriate use of the best evidence rule, and additionally, she certainly did not believe that Security First should be allowed to pursue a breach of contract claim on a copy of a document when a primary material term is illegible. Counsel for Security First responded that there has been no suggestion that the duplicate is not a true and accurate copy of the original document, and while he agreed that a material term was difficult to read, it was not entirely illegible. The trial judge stated that the court deals with originals, unless the original is possibly unavailable, and because Security First presented a duplicate and made no

effort to locate the original, the trial court sustained Weyand's objection and refused to admit Exhibit B into evidence. Likewise, when Security First offered a duplicate of the third alleged contract as Exhibit C, Weyand objected, and the trial judge asked whether there would be any different testimony regarding a lack of effort to locate the original. When counsel for Security First answered that there would be no different testimony—i.e., Security First does not claim to have attempted to locate the original—the trial judge again sustained Weyand's objection and refused to admit Exhibit C into evidence.[1]

Finally, Security First's owner testified that the last payment from Weyand received by Security First occurred in August 2008, and Security First stopped rendering services to Weyand on October 1, 2008, because Weyand stopped paying their invoices. However, the owner testified that he believed that Security First was still entitled to payment from Weyand until the end of the then-current three-year renewal period under the contracts.

The parties' closing arguments focused on the provisions of the alleged contracts controlling renewal, termination, and the appropriate method of providing notice of termination. Specifically, paragraph 2.2 of all three identical form agreements provides, in pertinent part:

> This Agreement shall be for an initial term of three (3) years and shall automatically be renewed for like periods at the same monitoring rate, unless either party notifies the other by certified mail of its intention to terminate this Agreement, not less than thirty (30) days prior to the expiration of the original term or renewal term thereof.[2]

Additionally, paragraph 23 provides, in pertinent part: "All notices to be given hereunder shall be

[1] All three alleged contracts—Exhibit A, which was admitted into evidence, and Exhibits B and C, which were excluded from evidence—are identical, fill-in-the-blank form contracts, and the only difference between the three of them are the dates on which they were executed and the monthly amount due from Weyand to Security First for alarm system monitoring services and the frequency at which payments must be made (e.g., monthly or quarterly.) Furthermore, though there is no evidence on the face of any of the alleged agreements that they are each for different and distinct types of monitoring services, the owner and principal of Security First testified at trial that Exhibit A was a contract for a fire alarm system, Exhibit B was a contract for a burglar alarm system, and Exhibit C was for an employee access monitoring system.

[2] See Record on Appeal at pages 7-9.

in writing and may be served by certified mail[.]"[3]

The trial court found that Exhibit A was, in fact, a binding contract between Security First and Weyand, but it did not consider the other two alleged agreements because the written instruments were not admitted into evidence. The court found that paragraph 2.2 was ambiguous regarding termination and renewal of the contract—specifically, whether it addressed and controlled all possible terminations of the contract or only termination with regards to renewal (i.e., terminating at the end of a three-year period and preventing renewal.) The court found that this ambiguity must be construed against the drafter of the agreement, which was Security First, and therefore, the court found that paragraph 2.2 "relates only to termination of the agreement with regards to renewal, not with regards to terminating the agreement."[4] Furthermore, because paragraph 2.2 was the only provision of the contract providing for termination and it only applies to termination at the end of a three-year term to prevent renewal, the court found that the contract was ambiguous as to whether Weyand may terminate the contract early. Therefore, the trial court concluded that this ambiguity must also be construed against Security First and that Weyand was entitled to terminate the contract at any time. Finally, the court found that, though paragraph 2.2 required notice of termination to be provided by certified mail, paragraph 2.2 only applied to terminations as to renewal and not early terminations, and therefore, the provisions of paragraph 23—in which *all* notices under the contract *shall* be in writing and *may* be served by certified mail—controls notice of early termination.

The trial court believed the testimony of the Weyand representative regarding the October 8, 2008, phone call and letter to Security First regarding termination of services. Furthermore, because paragraph 23 provided that all notices *shall* be in writing, but only stated

[3] See Record on Appeal at pages 7-9.
[4] See Record on Appeal at pages 195.

that they *may* be served by certified mail, the trial court found that Weyand was not required to serve its notice of early termination by certified mail and that Weyand had successfully and permissibly terminated the contract by mailing the termination letter in early October 2008. Therefore, the trial court entered a final judgment in favor of Weyand and against Security First, and this appeal followed.

Discussion of Law

On appeal, Security First argues that the trial court erred in allowing the Weyand representative to testify as to the contents of a document over Security First's objection based on the best evidence rule. Furthermore, Security First argues that the trial court erred in refusing to accept copies of the second and third alleged contracts, offered as Exhibits B and C, in lieu of originals. Finally, Security First asserts that the trial court erred in determining that the contracts were terminable at will, contrary to the plain language of the contracts.

In response, Weyand argues that the trial court correctly admitted testimony from the Weyand representative regarding her preparation and mailing of the termination letter, over Security First's best evidence rule objection, because the original document was unavailable and the testimony was not offered to prove the contents of the letter. Additionally, Weyand asserts that the trial court correctly excluded the contract copies from evidence because Security First was able, but failed, to produce the originals. In the alternative, even if the copies were improperly excluded, Weyand argues that such error was harmless because the trial court's finding that Weyand properly terminated the first contract would likewise apply to the identical second and third contracts. Finally, Weyand argues that trial court correctly found that Weyand had appropriately terminated the service contract with Security First.

Evidentiary Arguments and the Best Evidence Rule

"A trial court has wide discretion in determining the admissibility of evidence, and, absent an abuse of discretion, the trial court's ruling on evidentiary matters will not be overturned." LaMarr v. Lang, 796 So. 2d 1208, 1209 (Fla. 5th DCA 2001) (citing Dale v. Ford Motor Co., 409 So. 2d 232, 234 (Fla. 1st DCA 1982)). Furthermore, even when a trial court's ruling on an evidentiary matter is determined to be erroneous, the appellate court must examine the entire record to determine whether the error was harmless. Id.

I. The Trial Court Abused Its Discretion by Allowing the Weyand Representative to Testify to the Contents of a Document Over Security First's Best Evidence Rule Objection, but the Error Was Harmless

Section 90.952, Florida Statutes (2011), provides that "[e]xcept as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." This statutory provision is commonly called the "Best Evidence Rule." Therefore, the Weyand representative's testimony as to the contents of the letter that she sent to Security First is inadmissible to prove the contents of that letter, unless an exception to the best evidence rule applies.

Weyand argues that the best evidence rule does not apply to its representative's testimony because she only testified as to the existence and mailing of the "*termination* letter" and not regarding the contents of the letter. However, even if this were true and the witness never purposely testified as to the contents of the letter, by describing the letter as a "*termination* letter," one reveals that the contents of the letter included a "termination" of some sort. Furthermore, the Weyand representative went beyond this and clearly testified as to the contents of the letter. She testified, "I typed up a letter *stating that we wished to terminate business with*

[Security First.]"[5] Therefore, the representative's testimony that she prepared and mailed a letter is admissible, but her testimony as to what the letter stated or that it was a "*termination* letter" is barred by the best evidence rule.

In the alternative, Weyand argues that its representative's testimony was appropriately admitted because it is undisputed that the letter was unavailable. Section 90.954(1), Florida Statutes (2011), provides an exception to the best evidence rule in that an original writing is not required, and other evidence of its contents is admissible, when all originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith. However, Weyand's argument fails, and the "lost or destroyed document" exception does not apply, for two reasons.

First, it was not undisputed that the letter was unavailable. Rather, the very existence of the letter was disputed. Security First's owner testified that Security First never received a phone call from Weyand inquiring about terminating services and never received any termination letter.

Second, and more importantly, this argument was not considered before the trial court. The trial court never found, as a matter of fact, that the letter was unavailable, and it was not the basis of the trial court's decision to allow the testimony. Weyand's counsel responded to Security First's best evidence rule objection by asserting that it was her understanding that the best evidence rule applies when a party attempts to submit a duplicate into evidence and there is a dispute as to the validity of the document. Based on Security First's objection and Weyand's counsel's response, the trial court overruled the objection and allowed the testimony. This was error and an abuse of discretion.

Nonetheless, the error is harmless because other admissible testimony constituted competent substantial evidence that the letter contained a request to terminate the service

[5] See Record on Appeal at page 133.

contracts between Weyand and Security First. The trial court stated that it believed the Weyand representative's testimony that she called Security First to terminate the alarm monitoring services, that a representative of Security First instructed her to put the termination request in writing, and that she prepared and mailed a letter to Security First. This admissible testimony creates a reasonable foundation to conclude that the letter prepared and mailed to Security First was the written request for termination that Security First instructed the Weyand representative to provide by mail.

II. The Trial Court Abused Its Discretion and Committed Reversible Error by Excluding the Duplicates Presented as Exhibits B and C Based on Weyand's Best Evidence Rule Objection

Section 90.953, Florida Statutes (2011), provides that a duplicate is admissible to the same extent as an original, unless: (1) the document is a negotiable instrument, security, or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that is transferred by delivery in the ordinary course of business with any necessary endorsement or assignment; (2) a genuine question is raised about the authenticity of the original or any other document; or (3) it is unfair, under the circumstances, to admit the duplicate in lieu of the original.

The trial court excluded the duplicates presented as Exhibits B and C because, according to the trial court, courts deal with originals unless they are unavailable, and there was no testimony that the originals are unavailable, but rather, Security First made no attempt to locate the originals. This was clear error and an abuse of discretion. There was no challenge presented as to the authenticity of the originals or duplicates, nor was any argument presented pursuant to either of the other two exceptions to the rule that duplicates are admissible to the same extent as originals.

On the other hand, Weyand's assertion that a potentially material term of the contract was illegible on the duplicate presented as Exhibit B could be construed as an argument that admission of that duplicate would be unfair under the circumstances, pursuant to section 90.953(3). However, that argument was never articulated, and the trial court never construed it as such. Rather, the trial court based its decision upon the erroneous assertion that originals are required, and duplicates are inadmissible, unless the originals are unavailable.

However, Weyand argues that this error was harmless because the trial court's determination that Weyand had properly terminated the contract presented as Exhibit A would likewise apply to the identical alleged contracts presented as Exhibits B and C. Nonetheless, this argument fails because we disagree with the trial court's conclusion that the contract is ambiguous regarding early termination, and therefore, we disagree with the trial court's construal of the contract as providing that Weyand was entitled to terminate the contract at-will.

Interpretation of the Contract

"The interpretation or construction of a contract is a matter of law, not one of fact, and an appellate court is not restricted in its ability to reassess the meaning and effect of a written agreement." Jaffe v. Jaffe, 17 So. 3d 1251, 1253 (Fla. 5th DCA 2009) (citing Leseke v. Nutaro, 567 So. 2d 949, 950 (Fla. 4th DCA 1990)). Therefore, appellate courts "review the legal effect of a contractual provision *de novo* as an issue of law." Burzee v. Park Avenue Ins. Agency, Inc., 946 So. 2d 1200, 1202 (Fla. 5th DCA 2006) (citing Cox v. CSX Intermodal, Inc., 732 So. 2d 1092 (Fla. 1st DCA), review denied, 744 So. 2d 453 (Fla. 1999). Furthermore, "[t]he standard of review applicable to the question of whether a contract is ambiguous is de novo." Garcia v. Tarmac American, Inc., 880 So. 2d 807, 809 (Fla. 5th DCA 2004) (quoting V & M Erectors, Inc. v. Middlesex Corp., 867 So. 2d 1252 (Fla. 4th DCA 2004)).

I. The Trial Court Erred in Concluding That the Contract Is Ambiguous Regarding Early Termination and That Weyand Was Entitled to Terminate the Contract at At-Will

Paragraph 2.2 of the contract clearly provides that the agreement shall have an initial term of three years and shall automatically renew for like periods, unless either party notifies the other by certified mail of its intention to terminate the agreement, not less than 30 days prior to the expiration of the then-current three-year period. Paragraph 2.2 is the only provision of the contract addressing how and when a party may terminate the service agreement. Therefore, we disagree with the trial court's conclusion that the contract is ambiguous regarding early termination. The contract clearly provides that the service agreement may only be terminated at the end of the then-current three-year period by notice provided not less than 30 days prior to the end of the three-year period, and therefore, early termination is not permissible under the contract.

The trial court's conclusion that paragraph 2.2 applies only to the prevention of automatic renewals and not to termination in general was erroneous. First, it would render paragraph 2.2 nearly meaningless because even if one party failed to prevent automatic renewal by failing to provide notice not less than 30 days prior to the end of the then-current three-year period, that party could just terminate the agreement in the method approved by the trial court on the first day of the renewal period. Second, the trial court's conclusion presents a type of false dichotomy by separating prevention-of-renewal from termination-in-general and determining that paragraph 2.2 applies to the former and not the latter. As a matter of law, we find that paragraph 2.2 provides for the prevention of renewal *as* the only form of termination. This is not an ambiguity, but rather, a common form of service contracts. Each party commits to perform its duties under the contract for a definite period of time, and the contract automatically renews for another definite period of time unless one party timely notifies the other of its intent to forgo renewal.

Furthermore, Weyand's argument on appeal that paragraph 17 of the contract provides that either party may terminate the contract for any reason does not avail. Paragraph 17 provides, in pertinent part: "Upon termination of this Agreement for any reason, [Weyand] shall permit [Security First] or its agent to enter [Weyand's] premises and [disconnect the monitoring service and remove Security First's equipment]."[6] Weyand's reading of that provision is inaccurate and self-serving. Paragraph 17 does not provide that the contract may be terminated "for any reason," but rather, it provides that when the contract is terminated, regardless of the reason, Weyand shall permit Security First to disconnect the service and retrieve its equipment. The purpose of paragraph 17 is to provide for the disconnection of service and retrieval of equipment, irrespective of the reason for terminating the agreement. Furthermore, even if paragraph 17 could be read to provide that the contract may be terminated for any *reason*, paragraph 17 does not provide that the contract may be terminated *at any time*. Under the contract, the only time that Weyand could terminate the contract is at the end of the then-current three-year period of service, and only by notice provided to Security First not less than 30 days prior to the end of the three-year period.

II. Paragraph 2.2's Provision That Notice of Termination *Must* Be Served by Certified Mail Is Apparently Repugnant to Paragraph 23's Provision That *All* Notices *May* Be Served by Certified Mail, but We Interpret the Contract in a Manner That Reconciles the Provisions and Gives Reasonable, Lawful, and Effective Meaning to All of Its Terms

Paragraph 2.2 requires that notices of termination be served by certified mail. Paragraph 23 provides that "all notices" under the contract shall be in writing and "may" be served by certified mail. Because a notice of termination would fall under paragraph 23's classification of "all notices" under the contract, these service provisions of paragraphs 2.2 and 23 appear to conflict.

[6] See Record on Appeal at pages 7-9.

"When provisions in a contract appear to be in conflict, they should be reconciled, if possible." Whitely v. Royal Trails Prop. Owners' Ass'n, 910 So. 2d 381, 385 (Fla. 5th DCA 2005) (citing Seabreeze Restaurant, Inc. v. Paumgardhen, 639 So. 2d 69, 71 (Fla. 2d DCA 1994)). "An interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." Id. (quoting Seabreeze Restaurant, 693 So. 2d at 71).

We interpret the contract as providing that notices of termination pursuant to paragraph 2.2, the only contractual term providing for termination of the agreement, must be served by certified mail, while all other notices under the contract may be served by certified mail or by other means of serving written notices. This interpretation gives a reasonable, lawful, and effective meaning to both contractual provisions, and it reconciles them better than any other possible interpretation. If we were to interpret the contract as providing that notices of termination may be served by certified mail or any other means of serving written notices, then it would render portions of paragraph 2.2 ineffective, a result which is to be avoided.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Final Judgment for Defendant Weyand East Food Service, LLC," entered on September 21, 2011, is **REVERSED**; the "Appellee's Motion for Attorney's Fees and Costs" is **DENIED**; and this case is **REMANDED** to the trial court for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the 13th day of December, 2013.

/S/_____
HEATHER L. HIGBEE
Presiding Circuit Judge

LAUTEN and MIHOK, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished on the 16th day of December, 2013, to the following:

Christopher H. Morrison, Esq.
Pratt and Morrison, P.A.
1215 Louisiana Avenue
Suite 200
Winter Park, Florida 32789

Donald H. Whittemore, Esq.
Shannon Rodriguez, Esq.
Phelps Dunbar, LLP
100 South Ashley Drive
Suite 1900
Tampa, Florida 33602-5311

/S/_____
Judicial Assistant