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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2225-09T1

ESTOK CORP., t/a
MIDDLESEX TRENCHING CO.,

Plaintiff-Appellant,

v.

BILL WESTERVELT ASPHALT
PAVING, INC.,

Defendant-Respondent.

Argued January 11, 2011 - Decided April 29, 2011

Before Judges Carchman and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-6792-07.

John E. Lanza argued the cause for appellant (Lanza & Lanza, LLP, attorneys; Mr. Lanza, of counsel and on the brief).

Robert J. McGuire argued the cause for respondent (Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chattman, P.C., attorneys; Thomas G. Aljian, Jr., and Mr. McGuire, on the brief).

PER CURIAM

Following a bench trial, the judge entered judgment dismissing plaintiff Estok Corp., t/a Middlesex Trenching Co.'s complaint and awarding defendant/counterclaimant Bill Westervelt

Asphalt Paving Inc. $92,065.82 in damages and interest. Plaintiff appeals alleging 1) that the judge committed a series of errors in his evidentiary rulings; and 2) that defendant breached the contract between the parties and therefore was not entitled to judgment as a matter of law. We have considered these arguments in light of the record and applicable legal standards. We affirm.

I.

Plaintiff was the general contractor for an industrial development project owned by Bridgewater Ventures LLC (the owner) located at 9 Finderne Avenue, Bridgewater. Plaintiff entered into a written subcontractor agreement (the contract) with defendant to pave a 39,055 square yard parking lot; after changes to the original asphalt profile were ordered by the project engineer, the parties agreed on a total contract price of $885,294.91.[1] The contract included design specifications requiring defendant to complete the work in accordance with certain standards regarding the thickness of the underlying base and asphalt coating. The total thickness of the asphalt required by the contract was increased from five to seven inches by various change orders executed by the parties.

[1] The parties stipulated to this amount as reflecting all approved change orders.

Defendant had almost completed the contract work when the owner advised plaintiff that a portion of the rear of the parking lot was deficient and that it would not make final payment. Plaintiff contacted defendant, but the parties could not agree on the nature or scope of the alleged deficient performance, leading plaintiff to commence suit.

At the time plaintiff filed its single-count complaint alleging breach of contract, it had paid defendant $796,765.42 in accordance with the contract but had retained 10% of the contract price as security for defendant's performance. Plaintiff sought compensatory and consequential damages. Defendant filed an answer and counterclaim denying it had breached the contract, and demanded payment of the contract balance together with interest, counsel fees and costs.

During discovery, in answers to interrogatories, defendant identified as its expert, "SOR Testing Laboratories/SOR Consulting Engineers [(SOR)]," and attached a copy of its report. In an interrogatory asking for defendant's "version of the occurrences refer[enced] in the [c]omplaint," defendant responded that it had "hired SOR Testing to independently perform an analysis" and "[a]n area of pavement was found to be deficient in thickness and [defendant] ha[d] agreed to overlay this area with 1.0"-1.5" of" asphalt. Defendant was also asked

to provide the "proof which will be offered . . . at the trial . . . to support" its defenses and counterclaim, "or any other allegations set forth in these [a]nswers to [i]nterrogatories." Defendant identified, among other things, the "[r]eports of SOR testing[.]" In answering a third interrogatory, defendant "acknowledge[d] the total amount of paving materials supplied was short by approximately .5 to 1 inch," and it had "repeatedly offered to either relay the missing material or credit the account of defendant." Lastly, defendant asserted in another interrogatory answer that it was "entitled to the full contract price upon completing the necessary relaying to make up the difference in materials due. In the alternative, [defendant] is entitled to the full contract price less the value of the missing .5-1 inch of paving material."

Immediately before trial commenced, defendant noted that plaintiff had identified its principal, William Gulya, as an expert witness. Defense counsel specified, however, that the pre-trial judge, who was not the trial judge, had ordered plaintiff to furnish an expert's report and none had been furnished.

Plaintiff's counsel objected, arguing that defendant's interrogatories never asked for an expert's report and that the

pre-trial order did not require plaintiff to serve any report.[2] Plaintiff's counsel claimed that defendant knew the gist of Gulya's testimony from interrogatory answers, that there was no surprise, and that defendant's motion to bar Gulya's as an expert was untimely.[3]

The judge, however, reviewed the pre-trial order and concluded that it required plaintiff to furnish a report by a date certain and none had been furnished. He reserved decision on defendant's motion until Gulya's testimony "crosses from facts to opinion."

In his opening statement, plaintiff's counsel explained plaintiff's claim for damages. These included the cost of replacing 19,800 square yards of allegedly deficient paving in the rear of the lot, an additional $46,000 that plaintiff expended to repair a second, smaller area where "the paving started to fail," and monies that plaintiff expended to secure a "five year bond" so that a certificate of occupancy could be issued permitting the owner to occupy the premises.

Defense counsel explained his client's position in his opening statement. Specifically, defendant contended that

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[2] The pre-trial order is not in the record.

[3] It would appear that no depositions were conducted by either side.

plaintiff was responsible for the "remediation" of subsurface materials, and failed to do so, resulting in the alleged deficiencies in the parking lot. Defendant alleged that it had performed in accordance with the contract, and it sought full payment of monies owed.

Gulya testified that he had been plaintiff's president for twenty years and had worked for the business a total of thirty-six years. He prepared the bids for the majority of plaintiff's projects. However, as Gulya began to express opinions regarding certain industry standards, defendant objected. After an extended colloquy with both counsel, the judge granted defendant's motion to bar Gulya as an expert, concluding that plaintiff had failed to provide any expert report in discovery as requested by defendant's interrogatories, and had violated the pre-trial discovery order. The judge reiterated that Gulya could provide testimony, but not "expert opinions."

After some further testimony, plaintiff's counsel asked Gulya to review reports of tests performed by CTL Laboratories (CTL), which had been hired by the owner. Gulya was asked "whether or not the results of those tests showed that the sub-grade passed or failed the inspection[.]" Defendant objected, on hearsay grounds, and the judge sustained the objection. Plaintiff's counsel's persistence regarding a second CTL report

resulted in another objection, which was also sustained. Plaintiff's counsel then asked Gulya if the township engineer had approved the "rolling" of the sub-grade. Another hearsay objection was sustained.

Gulya identified a letter he sent to the owner's representative after receiving a complaint about the paving and the owner's expert reports. Attached to the letter was a report from ANS Consultants, Inc. (ANS), a firm hired by plaintiff to test ten "core sample[s]" over an area of 19,500 square yards in the parking lot. In the letter, Gulya advised that an "average composite" of the samples demonstrated a "variance . . . well within acceptable standards." The letter further noted "[t]he standard DOT [Department of Transportation] tolerance is 0.70 inches. The deviation on this project is only 0.32 inches." In his testimony, Gulya claimed that he sent the letter to "protect [defendant]." Gulya commissioned further testing performed by ANS nearly three months later, which revealed results that were "far worse." In a letter to defendant, Gulya directed it "to make all necessary repairs and correct all deficiencies." Gulya advised no further payment would be made to defendant.

When Gulya attempted to testify regarding the cost associated with making the repairs allegedly resulting from defendant's deficient performance, the judge again sustained

objections based upon his prior ruling barring any expert testimony. Plaintiff's subsequent motion for reconsideration was denied. However, Gulya was permitted to testify that the contract price was computed on defendant laying a layer of asphalt seven inches deep, and that defendant installed only an average of "6.2 inches."

Plaintiff next called Terry Kifer, the general manager of CTL. Defendant objected to Kifer testifying as an expert witness because he was named in discovery as a fact witness. The judge initially overruled the objection and permitted Kifer to explain the work CTL was hired to do by the owner, i.e., compaction tests. However, when plaintiff attempted to introduce CTL's test results as a "business record," defendant renewed its objection. The judge concluded that the report contained opinion testimony, that the samples upon which the report was based had been taken by a CTL technician who was not produced as a witness; he sustained the objection.

Gulya was recalled as a witness and identified various reports issued by ANS over the signature of its president, Atul Shah, an engineer. Although it is not entirely clear from the record whether Shah was present to testify, the attorneys stipulated that Shah had not secured the samples that were the basis of his report, but rather, the samples were taken by an

unnamed technician and Shah analyzed them. Defense counsel argued that Shah's testimony would be hearsay, and, further, that Shah was named as a fact witness in discovery, not an expert. The judge concluded, consistent with his prior rulings, that he "would sustain the objection if . . . Shah was brought in."

Plaintiff produced no further testimony but introduced defendant's interrogatory answers outlined above. Plaintiff sought to introduce the SOR report as an "adoptive admission." Specifically, the SOR report included measurements of "Total Asphalt Thickness" of a sampled 15,000 square yard area. The conclusion reached by SOR was that there were "thickness deficiencies . . . greater than . . . the thickness acceptance testing limit of 6.30 inches for a specified total pavement thickness of 7.0 inches."

Defendant objected, noting that the specific answers to interrogatories provided some language from the SOR report but that defendant never adopted the entire report as an admission. The judge concluded, after extensively reviewing the relevant case law, that based upon the interrogatory answers defendant had only adopted certain portions of the report as "admission[s] . . . as . . . factual contention[s]." He denied plaintiff's request to enter the SOR report in evidence.

Defendant's motion for a directed verdict was denied, and defendant rested without calling any witnesses. The judge reserved decision until he could review the transcripts of the trial testimony and the written summations of the attorneys.

The judge later placed his oral decision on the record. The judge found that plaintiff had proven that a "small portion" of the paving had cracked and had obtained an estimate for repairs in the amount of $45,579, but that Gulya had estimated the "expense was somewhere between $10,000 to $15,000." However, "plaintiff . . . failed to present any testimony regarding the cause of the cracking, or in any way causally connecting the work of . . . defendant to the cracking." Regarding the "claims for . . . asphalt thickness," the judge determined that plaintiff's claim was limited to "only . . . 19,800 square yards, or 50 percent of th[e] project." Referring to Gulya's testimony, the judge noted:

> [W]hen the issue first arose, . . . plaintiff advised the owner . . . that the paving thickness . . . met all of the appropriate standards of the DOT [Department of Transportation], and that there was no problem with regard to the thickness.
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> . . . [P]laintiff also advised the owner that the DOT specification 404 provided that the tolerance for the asphalt thickness was .7 inches, and that the deviation on this project was only .32 inches. Well within the specifications.

. . . .

> [D]efendant did acknowledge that certain areas of the lot may have had thickness of one half to one inch less than the seven inches specified, but noted that pursuant to the DOT specification 404, the minimum amount of asphalt required to meet the specification is 6.3 inches.
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> . . . .
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> [P]laintiff did not present proofs to which areas of the rear lot, if any, were outside the DOT specification, with . . . the exception of the testimony of . . . Gulya that the rear area had an average of 6.2 . . . inches of asphalt in what . . . defendant maintains is .1 inch less than the 6.3 inches required by the DOT specifications.
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> . . . .
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> I find, not sufficient evidence to actually demonstrate the actual amount of asphalt that was laid in the rear parking lot. There were no testing results, . . . no eye[]witnesses . . . who performed the testing, no witnesses who placed a ruler next to the asphalt. And so, I find that the evidence is indeed lacking.
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> And the only competent evidence may be the defendant's admission that in the rear lot there may . . . have been short by one half to one inch. However, . . . plaintiff has presented no evidence as to which specific areas of the rear lot may be short materials.

Addressing an assertion made by plaintiff in its written summation that an "adverse inference" should be drawn from defendant's failure to produce any testimony, the judge

concluded "plaintiff could have called representatives of defendant[] . . . in their case if there was evidence to be presented that would help the plaintiff." He determined "the missing witness doctrine" did not apply.

Turning to the counterclaim, the judge determined that defendant had proven the amount "left unpaid on the contract." He entered judgment in that amount, together with interest calculated from the day the trial ended to the date the order was entered.

II.

We initially note that our review of the factual findings made by the trial judge in a non-jury trial is quite limited. Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 400 (App. Div. 2007). "'[W]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence.'" Mountain Hill, L.L.C. v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (quoting State v. Barone, 147 N.J. 599, 615 (1997)). In general, the judge's factual "findings . . . should not be disturbed unless they are so wholly insupportable as to result in a denial of justice." Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974) (quotations omitted). However, "[a] trial court's interpretation of the law and the legal consequences that flow

from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

Plaintiff's allegations may be divided into two discrete areas. One involved the deficient performance by defendant that led to the cracking of a small area of the lot. We agree entirely with the trial judge that there was no evidence causally linking the failure of this area of the parking lot to defendant's performance. Even if plaintiff prevailed on the claims of error regarding the evidentiary rulings by the judge, the proofs were insufficient as a matter of law because no witness supplied the necessary expert opinion that defendant's alleged deficient performance -- laying too little asphalt -- was causally related to the cracking pavement.

Plaintiff's second claim of breach related to the alleged shortage of asphalt laid by defendant. We limit our consideration of the issues raised on appeal to that contention.

In Points I, III and IV of its brief, plaintiff challenges certain evidentiary rulings made by the judge. Specifically, plaintiff contends: 1) that Gulya should have been permitted to testify "regarding the method and cost of fixing the parking lot" because such testimony was not "expert opinion"; 2) that the SOR report should have been admitted as an "adoptive

admission[]"; and 3) that the CTL and ANS reports should have been "admitted into evidence as business records." We find no reversible error based on any of these contentions.

"In reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for abuse of discretion." Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008) (citation omitted). We therefore accord "'substantial deference to a trial court's evidentiary rulings.'" Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999) (quoting State v. Morton, 155 N.J. 383, 453 (1998)), certif. denied, 163 N.J. 79 (2000). "[I]n making relevance and admissibility determinations," the trial judge's exercise of his "broad discretion" "will not [be] disturb[ed], absent a manifest denial of justice." Lancos v. Silverman, 400 N.J. Super. 258, 275 (App. Div.), certif. denied sub nom., Lydon v. Silverman, 196 N.J. 466 (2008). However, we accord no such discretion to a ruling that is "inconsistent with applicable law." Pressler & Verniero, Current N.J. Court Rules, comment 4.6 on R. 2:10-2 (2011).

We employ a similar standard of review to the judge's rulings regarding discovery violations. Bender v. Adelson, 187 N.J. 411, 428 (2006); Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div.), certif. denied, 185 N.J. 296 (2005). We

generally will not disturb the decision unless it reflects a clearly mistaken exercise of discretion or "a mistaken understanding of the applicable law." Rivers, supra, 378 N.J. Super. at 80.

We consider plaintiff's arguments in the reverse order presented. Business records are exempted from the hearsay rule and are defined as follows:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.
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> [N.J.R.E. 803(c)(6).]

As noted, however, the rule is subject to N.J.R.E. 808, which in turn provides:

> Expert opinion which is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the trial judge finds that the circumstances involved in rendering the opinion, including the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion, tend to establish its trustworthiness.

The CTL and ANS reports were based upon samples secured by technicians who were never produced as witnesses. Contrary to plaintiff's assertions, the reports contained expert opinions regarding the density and compaction of the asphalt. The ANS report, in particular, included nine specific conclusions that were based upon scientific testing performed in the laboratory on core samples taken by its technician. Moreover, plaintiff never named any representative of either CTL or ANS as an expert witness during discovery, and, indeed, continued to assert at trial that the report was factual, not opinion, evidence. We see no error in the judge's decision to exclude the reports because they were not admissible as business records.

Plaintiff next asserts that the SOR report should have been admitted in evidence as an "adoptive admission[]" of defendant. See N.J.R.E. 803(b)(2). Plaintiff relies primarily on our opinion in Sallo v. Sabatino, 146 N.J. Super. 416 (App. Div. 1976), certif. denied, 75 N.J. 24 (1977). In that case, in response to an interrogatory that "asked for a detailed description of the nature, extent and duration of all [the plaintiff's] injuries," the response provided was "'See Doctor's Reports.'" Id. at 418. We concluded that the opinions expressed in the attached report were adopted by the plaintiff. Id. at 419.

We have since noted, however, that "[i]n determining whether the submission of an expert's report is an adoptive admission, courts have focused on the wording of the interrogatory." Corcoran v. Sears Roebuck & Co., 312 N.J. Super. 117, 127 (App. Div. 1998). In Corcoran, we held that "[e]xpert's reports are statements but, unlike answers to interrogatories, are not statements of a party and therefore cannot be treated as an admission simply because a party furnished them in discovery." Id. at 126 (citing Skibinski v. Smith, 206 N.J. Super. 349, 353 (App. Div. 1985)). We further concluded that the defendant had never answered an interrogatory, "'see my expert's report,'" or answered an interrogatory by using the content of the report. Id. at 128. If he had, "the report or answer would have been admissible." Ibid.; see also Pressler & Verniero, supra, comment 1.3.2 on R. 4:17-1 (citing Skibinski, supra, and noting that following the holding in Sabatino, supra, the "rule was . . . substantially qualified").

Here, the trial judge carefully examined the questions and answers posed in the interrogatories. He permitted plaintiff to introduce defendant's answers, which, in part, included an acknowledgment that based upon the tests SOR performed, "[a]n area of pavement was found to be deficient in thickness."

However, after thoroughly reviewing the relevant case law, the judge determined that defendant never provided an answer that indicated it was adopting all of the opinions or data contained in the SOR report. We see no reason to disturb the judge's decision.

Lastly, plaintiff argues that the judge should have permitted Gulya to testify as an expert, or, alternatively, that he was qualified to render a "lay opinion" as to the "method and cost of fixing the parking lot." We disagree.

First, although Gulya's name was supplied as the expert witness plaintiff intended to rely upon at trial, he never furnished a report. Plaintiff contends that defendant's interrogatories never asked for a report, and, moreover, defendant never moved pre-trial to obtain the report.

We have not been supplied with the interrogatories or plaintiff's answers, but the judge determined that defendant had requested the report. More importantly, a pre-trial case management order was entered requiring plaintiff to furnish an expert report by a date certain. It is undisputed that plaintiff never did. Given the standard of review we apply to discovery issues and sanctions for violation of court-ordered discovery, we find no error.

As to the second aspect of plaintiff's argument, we gather it is limited to Gulya's proposed testimony regarding the costs of laying a certain amount of asphalt based upon unit prices. Given Gulya's extensive experience in the field, this "simple arithmetic" was not "expert opinion" testimony. However, to the extent this was error, it does not compel reversal because, in the end, the judge concluded that plaintiff's proof regarding what area of the lot required additional asphalt was insufficient. In other words, even if Gulya testified as to the "simple arithmetic" regarding the costs associated with laying additional asphalt, it would not have mattered. Since, as we discuss below, the judge determined defendant had not breached the contract, excluding this proof of damages was harmless error, if error at all.

III.

In Points II and V, plaintiff essentially contends that it had proven defendant's breach of the contract in failing to lay the required amount of asphalt. Plaintiff argues that it proved a breach through the admissions made by defendant in its answers to interrogatories, in conjunction with the "missing witness doctrine." Additionally, plaintiff contends that since defendant breached the contract, plaintiff was entitled to

judgment in its favor, and defendant was, as a matter of law, unable to recover on its counterclaim.

As to the claim that plaintiff was entitled to an adverse inference because defendant produced no witnesses, we note initially that the issue was not raised until plaintiff filed its written summation. A party seeking an adverse inference must comply with the procedure adopted by the Supreme Court in the seminal case of State v. Clawans, 38 N.J. 162 (1962). In particular, "the party seeking to obtain a charge encompassing such an inference [must] advise the trial judge and counsel out of the presence of the jury, at the close of his opponent's case, of his intent to so request and . . . the reasons for the conclusion that the[] [witness] ha[s] superior knowledge of the facts." Id. at 172 (emphasis added); see also Nisivoccia v. Ademhill Assocs., 286 N.J. Super. 419, 429 (App. Div. 1996) (quotations omitted) (noting "the better practice . . . suggests that an attorney who seeks to comment upon the nonproduction of a witness advise the trial judge and opposing counsel of his intention before summation"). "A judge may not give a charge relating to the non-production of a witness unless he is satisfied that a sufficient foundation for drawing such an inference has been laid in accordance with the above-mentioned rules." Wild v. Roman, 91 N.J. Super. 410, 415 (App. Div.

1966). Whether to provide an adverse inference charge rests with the sound discretion of the court. Clawans, supra, 38 N.J. at 170.

We find no abuse of discretion in this regard and the balance of plaintiff's contentions regarding an adverse inference to be drawn from defendant's decision not to call any witnesses is without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).[4]

We turn to plaintiff's final argument. In essence, plaintiff contends that it proved both parts of its claim for breach, i.e., the cracking of some of the pavement and the shortage of material, based upon defendant's interrogatory answers. As to the first issue, as already stated, plaintiff failed to produce any evidence linking any shortage of material to the cracking of the pavement. Any admission made by defendant in its answers to interrogatories did not supply the missing causal relationship.

[4] We note parenthetically that plaintiff was free to call defendant's representatives as witnesses in its case in chief. Furthermore, it most likely could have forced the author of the SOR report to testify since defendant identified the company as its testifying expert. See Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 302 (2006) (holding that a party may call an adversary's expert as its own witness when the expert has been "designated a 'testifying expert'").

As to the second claim, the judge concluded that plaintiff failed to establish whether the admitted shortage of material existed in the portion of the lot that was at issue. More importantly, the judge concluded that plaintiff failed to establish that the DOT standards had not been met. Because both parties acknowledged that those standards permitted a variance of .7 inches of asphalt, and that the contract was to be performed in accordance with those standards, defendant's answer to interrogatories — admitting a shortage of .5 to 1 inch — failed to establish by a preponderance of the evidence that defendant had breached the contract.

Given our standard of review regarding the trial judge's factual findings, including his ability to judge the credibility of Gulya and Gulya's prior acknowledgement to the owner that the contract had been performed in compliance with DOT standards, we find no basis to reverse.

Affirmed.