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KEVIN SMITH vs. COURANT PUBLICATIONS, INC.

14-P-1729.

APPEALS COURT OF MASSACHUSETTS

88 Mass. App. Ct. 1116; 41 N.E.3d 332; 2015 Mass. App. Unpub. LEXIS 1135

December 9, 2015, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

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JUDGES: Cohen, Grainger & Wolohojian, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE

1:28

The defendant, Courant Publications, Inc. (Courant), appeals from a Superior Court corrected judgment for the plaintiff, Kevin Smith, a former employee, following a four-day jury trial on Smith's claim against Courant for breach of his employment agreement (agreement). Courant maintains that no reasonable jury could have found that Smith performed his assigned duties to a reasonably acceptable level, as the agreement required, and that the jury impermissibly found that Courant breached the contract first, thereby excusing further performance by Smith. Courant also challenges the award of prejudgment interest, and for the first time on appeal raises two additional issues that we do not address.

For procedural background and the facts as the jury could have found them, we refer to Smith's brief, at pages 2 to 7. To summarize, Smith was employed by Courant as its executive vice-president of sales and marketing, pursuant to the parties' February 27, 2008, agreement, with his primary responsibility being "to increase print and web advertising sales" for Courant's newspaper, the Boston Courant. Smith claimed that he was hindered in performing his duties because Courant failed to provide a Web site, as promised, to support its print publication.

The jury were asked to decide whether Courant breached the agreement with Smith when it terminated him on April 9, 2009, allegedly for failing to perform at a

reasonably acceptable level. The jury were also instructed, without objection, that if one party materially breached the agreement, the nonbreaching party was excused from further performance. The jury found in Smith's favor and awarded the amount of his salary for the remainder of his three-year contract.

1. *Courant's breach.* Courant complains that the jury impermissibly found that Smith was excused from the agreement's requirement of reasonably acceptable performance because Courant failed to provide the promised Web site. Our review of the record revealed sufficient evidence to support a finding that Courant's promise to provide a Web site was part of the agreement and that Courant materially breached the agreement by failing to provide the Web site after Smith began his employment.

Courant argues on appeal that the agreement was unambiguous and that its express terms did not require that Courant develop a Web site. However, Courant failed to preserve the issue for appeal.

Courant did not object to introduction of parol evidence of the promised Web site and did not object to the jury instruction that a material breach by one party to a contract excuses further performance by the other. Moreover, the record indicates that Courant acquiesced in allowing the jury to decide the agreement's terms and whether the breach was material. Indeed, it appears that Courant itself provided the judge with proposed jury instructions regarding the interpretation of an ambiguous contract, and Courant argued at the charge conference that the instructions were needed because of Smith's position that the promised Web site was part of the agreement. As a result, those instructions became the law of the case. See *Bisson v. Eck*, 40 Mass. App. Ct. 942, 943-944, 667 N.E.2d 276 (1996); *Aimtek, Inc. v. Norton Co.*, 69 Mass. App. Ct. 660, 667, 870 N.E.2d 1114 (2007). Thus the jury were free to consider evidence of the parties' negotiations to help "ascertain the intent and expectation of the parties," if the agreement was not clear, in accordance with the judge's instructions. Based on the foregoing, we need not reach Courant's argument that no reasonable jury could have found that Smith performed the agreement at a reasonably acceptable level.

2. *Verdict form.* As to Courant's assertion that the judge should have included additional questions regarding its affirmative defenses in the special verdict form, it is well established that the "nature, scope, and

form of special questions submitted to a jury" are within the trial judge's discretion. *Solimene v. B. Grauel & Co., KG*, 399 Mass. 790, 802, 507 N.E.2d 662 (1987). See *Draghetti v. Chmielewski*, 416 Mass. 808, 818, 626 N.E.2d 862 (1994). "We view the questions submitted to the jury in light of the instructions given by the judge." *Ibid.* The judge thoroughly and adequately instructed the jury as to just cause for Smith's termination, and Courant did not object to those instructions, but only to the verdict form. We are satisfied that "[t]he instructions enabled the jury to understand their duty in answering the questions on the verdict form." *Id.* at 818-819. See *Solimene v. B. Grauel & Co., KG, supra* (judge's thorough instructions on causation and proximate cause obviated the need to include causation in special questions).

3. *Jury confusion.* Courant challenges the judge's treatment of a question submitted by the jury during deliberations. Courant claims that the judge's handling of the matter caused jury confusion. But Courant raised no objection at the time, and Courant fails to persuade us that the objection by Smith's counsel preserved the issue for Courant's appeal. In any event, the judge repeated the instructions she gave in her charge, and as Courant did not object to those instructions when first given, nor when repeated by the judge in response to the jury's question, Courant has no basis to challenge the judge's actions on appeal. Contrast *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 118-119, 731 N.E.2d 1075 (2000) (new trial ordered for defendant because judge gave erroneous instruction in response to jury's question, over defendant's objection).

4. *Prejudgment interest.* Courant claims that the judge erred in awarding prejudgment interest from the date of the breach, as provided in *G. L. c. 231, § 6C*. Relying on *Sterilite Corp. v. Continental Cas. Co.*, 397 Mass. 837, 494 N.E.2d 1008 (1986), Courant argues that interest should have been awarded based on the pay periods following Smith's termination, reflecting the dates that Smith would have earned the remainder of his salary.

We note that *Sterilite Corp.* involved recovery of damages for an insurer's failure to pay defense costs under a liability insurance policy. *Id.* at 838. The insurer's duty to defend was a continuing one, and the insurer's failure to pay the various legal bills constituted "multiple points of breach" each time the insured was billed and the insurer failed to pay. *Id.* at 840. Where multiple breaches

were involved in an ongoing contract, interest on the total amount of damages awarded would have unfairly penalized the defendant because it would encompass periods before some of the breaches even occurred. In that instance, it was deemed proper that prejudgment interest on the award be calculated based on the various dates on which legal fees were paid by the insured. *Id. at 842.*

Courant urges us to apply that principle here, so that prejudgment interest would be calculated based on the dates that Smith would have received each week's salary, if he had not been fired. In this case, however, there was a single breach that ended the parties' contractual relationship and, as the judge explained, there were no continual breaches of the agreement after the date that Smith was let go. Courant fails to persuade us that the

principle of *Sterilite Corp.* should be applied in this context.

As to Courant's remaining arguments, regarding Smith's alleged waiver of Courant's breach and his status as an at-will employee, those points are raised for the first time on appeal and we deem them waived. *Carey v. New England Organ Bank*, 446 Mass. 270, 285, 843 N.E.2d 1070 (2006).

Corrected judgment affirmed.

By the Court (Cohen, Grainger & Wolohojian, JJ.¹),

1 The panelists are listed in order of seniority.

Entered: December 9, 2015.

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