UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-4258

IN THE MATTER OF: NET FRESH, INC., d/b/a GOLDEN TRIANGLE SEAFOOD PROCESSING, a/k/a TEXAS DOCKS UNLIMITED, INC., Debtor,

TECHCO 2 SYSTEMS CORPORATION, CARBONIC IND. CORP., TOMCO 2 SYSTEMS EQUIPMENT CO.,

Appellants,

VERSUS

NET FRESH, INC., d/b/a GOLDEN TRIANGLE SEAFOOD PROCESSING, a/k/a TEXAS DOCKS UNLIMITED, INC., Debtor,

Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
1:91 CV 794

June 4, 1993

Before WISDOM and DUHÉ, Circuit Judges, and HAIK,[1] District Judge.

DUHÉ, Circuit Judge:[2]

Plaintiff-Appellee Net Fresh, Inc. aspired to process Gulf shrimp and crawfish. It bought cryogenic freezing equipment from Defendant-Appellants Carbonic Industries Corp., Tomco-2 Equipment Co., Techco-2 Systems Corp., based on representations and

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[1] District Judge of the Western District of Louisiana, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

warranties that the freezers could freeze 4,000 pounds of shrimp per hour in five-pound boxes. The freezers never succeeded in freezing more than 2,000 pounds per hour. Business failing, Net Fresh sued Defendants under the Texas Deceptive Trade Practices Act (DTPA). Defendants countersued for the balance due on the purchase price of the freezers. A jury awarded Plaintiff $1,000,000 on the DTPA claim. On the counterclaim, the jury awarded Defendants the balance due on the purchase price. Finding the verdict inconsistent, we reverse and remand for a new trial.

I.

We first address Defendants' contention that the verdict on the DTPA claim should be set aside for lack of proof that Plaintiff mailed or otherwise delivered the prerequisite notice under the DTPA. Tex. Bus. & Com. Code Ann. § 17.505 (West Supp. 1993). Our review of the record reveals that this issue was not submitted to the jury, either as a special interrogatory or through an instruction that notice is a prerequisite to a DTPA damage award. Under Rule 49, the issue is deemed found by the court in accordance with the judgment for the Plaintiff.[3]

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[3] In submitting a special verdict to a jury,

> The court shall give to the jury such explanation and instruction . . . as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Fed. R. Civ. P. 49(a). Although Defendants mentioned the notice

Ample evidence in the record supports this finding. Foremost, Plaintiff's attorney testified that he "gave the Deceptive Trade Practice notice" (6R.597). Additionally, a representative of one of the defendant companies acknowledged having received notice of suit, and Plaintiff introduced various demand letters. Because the implicit finding of DTPA notice was not clearly erroneous, we will not set aside the judgment for Plaintiff on that basis. See, e.g., Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1069-70 (5th Cir. 1985) (reviewing implied finding under Rule 49 under clearly erroneous standard).

II.

Finding for Plaintiff on the DTPA claim (Interrogatory no. 1), the jury found that Defendants "breached a warranty, made a false representation or failed to disclose information and that such breach of warranty, false representation, or failure to disclose was a producing cause of financial injury to Plaintiff." 2R.366. The jury found for Defendants on the counterclaim (Interrogatory no. 4), that Defendants "are entitled to recover [a] balance due from Plaintiff, NET FRESH, INC., on its freezers" in the amount of the balance of the purchase price. 2R.369.

This Court is bound to reconcile or harmonize apparently inconsistent answers to interrogatories if it can reasonably do so. Stockton v. Altman, 432 F.2d 946, 951 (5th Cir. 1970), cert.

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issue in objecting to the combination of three separate DTPA claims with an alternative U.C.C. claim in a single interrogatory, Defendants did not demand that the DTPA notice issue be submitted to the jury.

denied, 401 U.S. 994 (1971); McVey v. Phillips Petroleum Co., 288 F.2d 53, 59 (5th Cir. 1961). If "we find that there is no view of the case which makes the jury's answers consistent and that the inconsistency is such that the special verdict will support neither the judgment entered below nor any other judgment, then the judgment must be reversed and the cause remanded for trial anew." Mercer v. Long Mfg. N.C., Inc., 665 F.2d 61, 65 (5th Cir. Unit A 1982) (quoting Griffin v. Matherne, 471 F.2d 911, 915 (5th Cir. 1973)).

In attempting to reconcile special verdicts, we must consider the court's instructions. Mercer, 665 F.2d at 66 (citing Griffin, 471 F.2d at 915, and McVey, 288 F.2d at 59). The court instructed the jury to award Defendants money on their counterclaim if the jury did not find for Plaintiff on the DTPA claim:

> If you should find this fact [whether plaintiff owes defendants a balance on the freezers] in favor of the defendants and against the plaintiffs and do not find against the defendants on the grounds which the Court has charged you as contended by the plaintiff to give them a right to recover then you would answer interrogatory number four by answering the amount of money--giving the amount of money--the balance that you think the defendant is entitled to.

6R.882. The jury was thus instructed to award a dollar amount in answer to Interrogatory no. 4 only if it did not find for Plaintiff ("against defendants") on Interrogatory no. 1. Under this instruction, the jury's award under Interrogatory no. 4 is inconsistent with the finding for Plaintiff on Interrogatory no. 1.

Defendants ask us to "harmonize" the verdict rather than to remand for a new trial. Defendants argue that we should strike the

DTPA award for Plaintiff, because their award on the contract counterclaim suggests that the freezers fully complied with all warranties and representations. Lochabay v. Southwestern Bell Media, Inc., 828 S.W.2d 167 (Tex. App.--Austin 1992, n.w.h.), on which Defendants ultimately rely, ruled against a DTPA claimant, not because the opposing party succeeded on its contract claim, but because the DTPA claimant was not a "consumer" as is required for relief under the DTPA. Lochabay, 828 S.W.2d at 171-72. Thus Lochabay does not require us to reconcile the verdict by striking the DTPA award as Defendants argue. Because the jury's responses on Interrogatory no. 1 and Interrogatory no. 4 cannot be reconciled, we reverse and remand. See Mercer, 665 F.2d at 65 (judgment must be reversed and the cause remanded for new trial).

III.

Defendants also contend that no evidence will support the DTPA damage award and contest the adverse attorney's fees and prejudgment interest awards. We need not reach these issues in view of the need for a new trial.

IV.

Because of the irreconcilable verdict, we reverse the judgment and remand the case for a new trial.

REVERSED and REMANDED.