UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1978

September Term, 2014

MUNDI ENTERPRISES, INC.

v.

SERVICE ENERGY, LLC

Meredith,
Graeff,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: January 7, 2016

In this appeal, Mundi Enterprises, appellant, asserts that the Circuit Court for Charles County erred in a variety of ways when it ruled that appellant owed Service Energy, LLC, appellee, $93,518.38 for gasoline deliveries made to appellant's gas station in the spring of 2010.

QUESTIONS PRESENTED

Appellant presents the following assertions for our review:

1. The lower court erred in allowing appellee to enter in evidence a chart showing a debt to appellee in the amount of $152,359.62 without proper foundation.

2. The lower court erred in placing the burden of proof on the appellant to prove that gasoline shipments were made rather than [] placing the burden of proof on the appellee[.]

3. The lower court erred in entering a judgment of $93,518.38 against appellant because the alleged actions giving rise to appellee's claim for damages occurred prior to the April 13, 2010 through May 7, 2010 time period stated in the complaint[.]

Because we conclude that the Circuit Court for Charles County did not commit the asserted errors, we will affirm.

FACTS AND PROCEDURAL HISTORY

Appellant owned and operated a gas station called "Stemmers Run Power Fuel," in Essex, Maryland. Appellee is in the fuel distribution business, and sold gas to appellant's gas station for a number of years. Donald Steiner, appellee's president, testified that his company had done business with appellant for about five years, and had made "a considerable number" of fuel deliveries to the Stemmers Run station in that time. Mr. Steiner testified to the normal procedure:

> [BY MR. STEINER]: We, well Mundi was an unbranded station, so, in that case it would be that we would, they would call us and say we need a load of gas on Tuesday. We would call around, our salesmen would call around to the five or six or eight people we buy gasoline from and say what's the best price you get. He would in turn tell us what that price was. We would call Mundi and say we can deliver it for this amount of money and they would say that price is good enough, go. And in some cases after your relations, have your relationship long enough the person sometime will just order the gas and not request a price. And just trust us to give them the best price.

Mr. Steiner testified that his company, which sold the gas, contracted with Murphy Transportation to deliver the gas to the station that had ordered it. Murphy Transportation would first pick up the requested gasoline at the Crown Refinery in Baltimore, and then, upon arrival at the gas station in question, would either check the current levels in the underground tanks by consulting an inventory system called TLS, located inside the gas station, or (and sometimes in addition to) manually inserting a type of dipstick called a "Veeder-root" into the underground tanks. To prevent overflow, it was essential for the delivery person to know how much gasoline was already in an underground tank before the requested load of gas went in. To make sure there were no underground leaks, it was also required that the driver measure how much was in the tank after the gas was off-loaded. To that end, the driver would record the tank level before and after the gas was delivered on a delivery ticket.

Appellee would then generate a bill to the gas station based upon the information on the delivery ticket. Mr. Steiner testified that truck drivers deliver gasoline to gas stations both during and outside of business hours, calling it a "common practice" to deliver when the station was not open, *i.e.*, when no one was there to sign the paperwork. In such a case,

the only real difference in the procedure is that the driver would have to check the capacity of the underground tanks via the Veeder-root method, because he would have no access to the inventory system inside the station. But a bill would still be generated based upon the information on the delivery ticket.

Mr. Steiner testified that, until November or December of 2009, these were the procedures that were followed, and appellant paid timely on its account. This case is concerned specifically with certain deliveries of gasoline that were made to the Stemmers Run station operated by appellant in April and May of 2010. Appellee contended that it sold gasoline to appellant and had it delivered by Murphy Transportation in accord with the parties' customary routine on the following dates: April 13, 2010; April 17, 2010; April 25, 2010; May 1, 2010; and May 7, 2010. Appellee billed appellant for each of the deliveries, but appellant — after a period of time in which it was making partial payments on account — stopped making payments, and the instant suit was filed.

The complaint recited that appellant was billed as follows: for the April 13 delivery, $21,387.00; for the April 17 delivery, $21,502.00; for the April 25 delivery, $23,939.98; for the May 1 delivery, $22,559.61; and for the May 7 delivery, $21,290.79. These bills added up to $110,679.38. Appellee asserted that appellant had made payments on account that reduced the outstanding balance by $13,160.00, and therefore, appellee requested a judgment in the amount of $97,519.38.

At the bench trial of this case, which occurred on October 2, 2014, appellee relied on the testimony of its president, Mr. Steiner, and also introduced several exhibits documenting the gasoline deliveries at issue.

Exhibit 1 consisted of five pages. It pertained to a gasoline delivery made to appellant's Stemmers Run station on April 13, 2010. It reflected that 7000 gallons of 87 octane (regular) unleaded gas, and 500 gallons each of 89 (mid-grade) and 93 (premium) gas were made on that date, and that appellant was billed $21,387.00 for this delivery. Exhibit 1 was admitted into evidence without objection.

Exhibit 2 likewise was admitted into evidence without objection. It pertained to a gasoline delivery made to appellant's gas station on May 1, 2010, and reflected that appellee had Murphy Transportation deliver $22,559.61 worth of gas on that date. Appellant stipulated to having received this shipment.

Exhibit 3 pertained to a gasoline delivery made on April 17, 2010. It reflected that appellee had Murphy Transportation deliver 7000 gallons of 87 regular gas, and 500 gallons of 89 mid-grade gas to appellant's station on that date, and that appellant was billed $21,502.00 for that delivery. Appellant objected to the admission of Exhibit 3 into evidence on the basis that "it doesn't have a signature that is recognized as an employee and it doesn't indicate the delivery was made to the location, the exact location. It just says Stemmers station, Essex. And even though some of the others indicate the exact station, this one does not." After Mr. Steiner testified that, in fact, the fuel shipment reflected in Exhibit 3 was made to appellant's station on April 17, 2010, the exhibit was admitted into evidence.

Exhibit 4 consisted of four pages, pertaining to a gasoline delivery made by appellee to appellant on April 25, 2010. It reflected that 7523 gallons of regular gas, and 1004 gallons of mid-grade gas, were delivered to appellant's Stemmers Run station on that date, and that appellant was billed $23,939.98. As he did with the previous exhibits, Mr. Steiner testified and confirmed that the exhibit reflected the fact that a gasoline delivery in the specified quantity had been made on the specified date to appellant's gas station. Appellant objected to Exhibit 4 "for the same reasons. They don't recognize the signature as an employee and there's no exact address indicated as to where this delivery took place." Exhibit 4 was admitted into evidence.

Exhibit 5 pertained to the final gasoline delivery at issue. It contained four pages, and reflected that, on May 7, 2010, appellee had Murphy Transportation deliver to appellant's station 7132 gallons of regular gas, 504 gallons of mid-range gas, and 504 gallons of premium gas, and that appellee billed appellant $21,290.79. Mr. Steiner explained what each of the pages of the exhibit documented, and confirmed that what the exhibit meant overall was that gasoline in the specified quantity was delivered to appellant's station on May 7, 2010. Appellant objected to Exhibit 5, contending that "there's no exact address again as to where the delivery is only to Stemmers, Essex. And there is no signature by anyone accepting this particular delivery even though the delivery was at apparently . . . 7:50 a.m." Exhibit 5 was received in evidence.[1]

[1]We note that appellant's stated reason for objecting to Exhibits 3, 4, and 5 was that there was no exact address given and appellant's witness claimed not to recognize the (continued...)

Exhibit 6 was a chart prepared by appellee's counsel, with the assistance of Mr. Steiner. It was titled "Mundi Enterprises Account Summary 3/13/10 - 4/8/10," and was divided into two sections. The first was titled "Charges to Mundi Enterprises' Account," and it listed fuel deliveries, and charges for those deliveries, on the following dates: 3/14/10 (invoice amount: $21,345.00); 3/18/10 (invoice amount: $22,242.00); 3/22/10 (invoice amount: $20,232.32); 3/25/10 (invoice amount: $22,167.00); 3/29/10 (invoice amount: $20,116.60); 4/3/10 (invoice amount: $23,326.70); and 4/8/10 (invoice amount: $23,532.00). For three of those deliveries (3/25/10, 3/26/10, and 4/3/10), there was either no signature on the paperwork, or an illegible signature. The second section of Exhibit 6 demonstrated, however, that appellant nevertheless paid those invoices. Under the heading "Payments Received from Mundi Enterprises," appellant paid the invoice for the March 25 delivery via check in the amount of $22,167.00 on April 27. The March 25 delivery ticket had an illegible signature. Appellant paid the invoice for the March 29 delivery via check in the amount of $20,116.00 on April 30. The March 29 delivery ticket had an illegible signature. Appellant paid the invoice for the April 3 delivery via check in the amount of $23,326.70 on May 7. The April 3 delivery ticket had no signature.

At trial, appellant explained its objection to the admission of Exhibit 6 as follows:

[1](...continued)
signature on each as being an employee. Appellant did not object to Exhibits 1 and 2, which also just say "Stemmer's Run Essex, MD." There was likewise no precise street address given on those exhibits. And there was no testimony that an employee of the gas station had to sign for a gasoline delivery. Appellee's witness, Mr. Steiner, testified that "it's common practice" in the gas-delivery industry to deliver when there is no one at the station to sign paperwork.

> [BY COUNSEL]: Your Honor, I object. They're offering exhibit number 4 and exhibit number 4 contains invoice dates, delivery dates, places of delivery, invoice amounts, etc.[2] But they're, and I'm looking at the top now of the one that says charges to Mundi Enterprises accounts. Not the payments received from. But there, there have been no documents whatsoever presented to the [appellant] that would substantiate the invoices from 3/14/2010 to 4/8/2010. And in fact, this case is not about those invoices. This case is about all of the deliveries that were between, in April and May of 2010. Now, if counsel is to rely on the fact that there was an outstanding bill of $152,359.62, it's never referenced in the complaint that this is how we're getting at the amount of money that is owed, whether it's the 110 or the 97,000. There's no reference in the complaint to that at all. There's no documentation as to invoices or records like the ones introduced from exhibits 1 through 5. We're simply being presented with a chart that was made up, maybe from records but we don't have those records. No way to substantiate that. So, I'm objecting to that, well the entire exhibit because of lack of documentation.

Appellee's counsel reminded appellant's counsel that, in fact, all the underlying documentation supporting Exhibit 6 had been provided to counsel on September 18, 2014, in a supplemental discovery response. Appellant's counsel then conceded that the documents had been sent to him, but maintained his objection because the dates referenced in Exhibit 6 were prior to the dates referenced in the complaint. Appellant stipulated "that the payments that are reflected on exhibit 6 are in fact the true and accurate statement of all payments that were received," but objected to the admission of the exhibit "as it's not supported by the complaint in this case." The court admitted Exhibit 6 into evidence. Appellant contends on appeal that this was error.

Appellant called one witness in its case: Regina Mundi, the president of Mundi Enterprises. Ms. Mundi's testimony was brief. She did not contend that the fuel deliveries

[2] Counsel apparently misspoke in referring to Exhibit 4, which had been previously admitted. The chart he was objecting to was Exhibit 6.

at issue were not made. She simply testified that her brother-in-law ran the location in question.[3]

At the conclusion of the case, the court found in favor of appellee, noting "I've not heard any serious dispute from [appellant] that this money is owed." The court entered judgment against appellant in the amount of $93,518.38.[4] This appeal followed.

STANDARD OF REVIEW

This was a bench trial, and therefore, our review is governed by Rule 8-131(c), which provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

DISCUSSION

I. Exhibit 6

In its first question presented on appeal, appellant asserts that the trial court erred in admitting Exhibit 6 into evidence "without proper foundation." It argues to this Court that the amount reflected in Exhibit 6 "was wholly unsupported by any evidence submitted to the

[3]The deposition of the brother-in-law, Jaswinder Singh, was admitted into evidence pursuant to Rule 2-419(a)(2) as Exhibit 9. Mr. Singh's deposition indicated that he knew nothing about the invoices involved here, and did not even know if there were records kept at the station. Ms. Mundi had testified in her deposition that Mr. Singh was the vice-president of Mundi Enterprises, and that he was required to keep the fuel records mandated by federal and State law. Mr. Singh did not know he was vice-president.

[4]Appellant made a $4,000 payment after the filing of the complaint, which reduced the amount claimed by appellee to $93,518.38.

Court." The documentation supporting each of the deliveries listed in Exhibit 6 was admitted into evidence as Exhibit 7. Appellant's counsel stipulated to the accuracy of Exhibits 6 and 7.

In general, decisions on the admission of evidence are committed to the sound discretion of the trial judge, and we will not reverse unless there has been an abuse of discretion. *Brown v. Daniel Realty Co.*, 409 Md. 565, 583 (2009). Not only does Exhibit 7 provide an adequate foundation for Exhibit 6, but appellant stipulated at trial to the accuracy of Exhibit 6 and Exhibit 7. We see no abuse of discretion by the court in admitting Exhibit 6.

II. The burden of proof

In its second question on appeal, appellant contends that the court somehow shifted to it the burden of proving that the gasoline deliveries were not made, rather than making appellee prove its case. Appellant argues that Exhibit 6 was not "adequate documentation that gas was indeed delivered to Stemmer's Run Service Station," and asserts that it was "placed in the position to prove that [Exhibit 6] was actually incorrect." But, as noted above, appellant stipulated at trial to the accuracy of Exhibit 6. It objected only to the relevancy of Exhibit 6 to the proceedings. Appellant has waived any argument that Exhibit 6 "was actually incorrect."

Furthermore, there was no burden-shifting here. Appellee asserted in its complaint that appellant owed it money for five gasoline deliveries in April and May 2010. It introduced into evidence Exhibits 1 through 5, reflecting the deliveries at issue. It also introduced into evidence Exhibit 6, which demonstrated that, historically, appellant had

customarily paid for gas that had been delivered without a legible signature (or even a signature at all). Appellee also introduced into evidence Exhibit 7, which included all the documents underlying the deliveries shown on Exhibit 6, and appellee introduced into evidence Exhibit 8, which was a summary chart of the April and May 2010 deliveries at issue in this case. Appellant also stipulated to the accuracy of the payments shown on Exhibit 8. As the trial court put it in its ruling, the background evidence provided in Exhibits 6, 7 and 8 indicated that "[appellant] has a pattern of making payment[s] on his invoices for deliveries that are documented the exact same way that the deliveries that are alleged in the complaint are documented." This evidence of a course of dealing undercut the argument by appellant that it would not pay an invoice unless one of its employees signed it, and in fact such an argument was not supported by any evidence at trial.

In its defense, appellant introduced into evidence no exhibits. Its only witness, Ms. Mundi, testified she did not run the Essex station and offered no material information about it. Appellant stipulated that two of the five disputed deliveries were, in fact, made, and provided no evidence to counter appellee's evidence that the other three disputed deliveries were also, in fact, made. Contrary to the suggestion in its brief, appellant was not being asked to prove a negative. Appellee made a *prima facie* showing that the deliveries were made as reflected in its exhibits and the testimony of Mr. Steiner. Appellant did not persuade the court to disregard this evidence.

In sum, the court's conclusion that appellee had proven that it was more likely than not that it had made five fuel deliveries to appellant in April and May, 2010, and that appellant had a balance due of $93,518.38, was not clearly erroneous.

III. The judgment amount

Appellant's argument regarding the amount of the judgment again fails to persuade us of any clear error on the part of the trial court. As noted above, Exhibit 6 deals with deliveries made prior to the dates alleged in the complaint, and it illustrates, in part, that appellant did not require an employee to sign off before accepting a gasoline delivery. The exhibit is divided into two parts. The top shows deliveries on seven dates in March and April 2010. The amount due for those seven deliveries was $152,359.62. The second section of Exhibit 6 shows payments made by appellant. Those payments reduced the $152,359.62 billed amount to a balance remaining due in the amount of $22,840.00. Mr. Steiner explained that it was his company's practice to apply any payments received to the oldest balance then outstanding. Exhibit 6 reflects that, although the second section of the chart begins with a balance of $152,359.62, it was reduced by each payment. Indeed, the amounts of the payments made April 27, April 30, and May 7 correspond exactly to the amounts billed for deliveries made on March 25, March 29, and April 3 respectively. To the extent appellant argued that these payments should have been applied to the invoices for deliveries made between April 13 and May 7, it was not clearly erroneous for the trial court to reject that contention.

After reviewing the documentary evidence of deliveries by appellee and payments made by appellant, the trial judge found as a fact: "To me, the math adds up and I have no hesitation concluding it's more likely than not that in fact there is a balance owed to the Plaintiff of $93,518.30." The court further found: "I've not heard any serious dispute from the Defense that this money was owed."

The evidence was sufficient to persuade the trial court that appellant owed appellee $93,518.38. We therefore conclude that judgment was properly entered in that amount.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.