IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

KEVIN A. EVANS,	)	
	)	No. CPU6-10-000073
Plaintiff,	)	
	)	
vs.	)	
	)	
ELMER PERRY and	)	
BELINDA PERRY,	)	
	)	
Defendants.	)	

Submitted June 27, 2011
Decided July 29, 2011

Brian M. Ellis, Esquire, Attorney for Plaintiff
David C. Hutt, Esquire, Attorney for The Perrys

DECISION AFTER TRIAL

Trial was held in this matter on April 20, 2011. The parties subsequently submitted written closing arguments. After considering the relevant credible evidence, testimony, and the parties' post-trial submissions, the Court finds in favor of the Plaintiff for the reasons set forth below.

Facts

Plaintiff Kevin Evans ("Evans") is the principal of his family's farming operation, which has farmed in Sussex County since the 1940s. The Perrys Elmer and Belinda Perry (collectively "The Perrys") own a large tract of land in

the county that includes tillable acreage. The Perrys do not farm the acreage; they rent it out to farmers.

Sometime before 2001, Evans, wishing to expand his existing farming operation, negotiated an agricultural lease with the Perrys at an annual rent of $50.00 per tillable acre. Although the exact amount of tillable acres is in dispute, both parties estimate the number to have been between 50 and 60 acres of non-irrigated land at the time of the agreement. Because the parties did not execute a written memorandum of the arrangement, the agreement was controlled by Title 25, Section 6702 of the *Delaware Code*, which provides, in pertinent part, that all verbal leases of agricultural land have a term of one year, ending December 31, and are automatically renewable annually unless a party provides written notice of termination at least four months in advance.

Evans farmed the Perrys' land in 2001, but, because it was dry, he experienced only moderate success. Evans approached the Perrys and asked permission to install a well on their land so that he could purchase and run an irrigation system on the crops. However, given the cost of irrigation equipment, it would take Evans approximately seven years to "break even" on the total investment. Thus, he sought assurance from Perry that his one-year lease would be renewed for at least that amount of time. Evans also recognized that the shape of the tillable land made it difficult to maneuver a pivoting irrigation system. Evans, therefore, asked Perry to consider timbering approximately seven acres of his vast woodland from the property so that the pivot irrigation system

would function properly and efficiently. In addition to eliminating the trees, this proposition would require the Perrys to pay the expense of raking and clearing the land of stumps so that it would be tillable for Evans.

Although Mr. Perry testified that he and his family enjoyed hunting in the wooded areas of the tract, after speaking with a timbering expert Evans recommended, the Perrys decided to timber both the needed seven acres as well as an additional large portion of woodland, at a significant profit. Some of those profits were used by the Perrys to rake and clear the seven additional acres to rent to Evans.

In summary, the Court finds from the evidence that the Perrys verbally agreed with Evans that they 1) would continue to rent the tillable acreage to him for at least seven years at $50.00 an acre, 2) would timber, clear and rake, and then rent to Evans, an additional seven tillable acres to enable maximum efficient use of the irrigation system Evans intended to purchase, 3) would permit Evans, at his own expense, to install, as a permanent fixture and improvement on the Perrys' property, an irrigation well and subterranean piping necessary to operate the irrigation equipment.

The Perrys paid the approximate $14,500.00 cost of raking and clearing the seven additional farm acres out of the $40,200.00 profits received from all the timbering they performed on the property. Evans paid about $12,000.00 for the installation of the irrigation well and supporting infrastructure and permits. Evans purchased, under a conditional sales/lease contract, portable pivot

irrigation equipment to use on the rented land at a cost of $24,400.00. The irrigation equipment is not a fixture; it is portable and movable from farm to farm within reasonable distances.

From 2002 until 2008, the parties largely properly performed under this verbal understanding. However, Evans made inconsistent annual rental payments to the Perrys. The payments made during this period ranged from $2,043.00 to $3,107.61 each year. Evidence was offered that some rent payment at times was made by grain transfer in lieu of cash. The parties also had an on-going dispute about the exact acreage of tillable land available, which would affect the rent due.

In late 2008, the end of the seventh year of the verbal agreement, Evans met with Mr. Perry at his home to discuss both the parties' future business relationship and Evans' inconsistent annual payments. At this time, Perry demanded that Evans begin paying an irrigated land rate of $175.00 per acre[1]—a demand that Evans refused. This refusal was based on Evans' belief that, as owner of the irrigation equipment, Perry had no right to charge him an irrigated land rate. Evans' position, therefore, was that the rent should remain at a dry land rate closer to the $50 per acre rate of the previous seven years.

The parties also disagreed regarding the rental payments. Evans testified at trial that, at the outset of the rental agreement, he believed the total acreage of

[1]The evidence shows that, at the time, $50 an acre was the approximate going rent amount for non-irrigated farmland, while irrigated land, with its much higher crop yield, rented for $150.00 - $175.00 an acre. However, tenant-farmers generally paid that amount to rent farmland with irrigation provided by the landlord.

the Perrys' property to be approximately 52 acres. Although his annual payments were inconsistent in amount, Evans believed that he overpaid. This belief was based on his understanding that annual rent was fixed at $50.00 multiplied by 52 acres. It was Perry's belief, on the other hand, that he possessed 56 tillable acres. With that basis of understanding, Perry believed that Evans owed outstanding rent in the amount of $1,149.39.

Finally, in the conversation the Perrys asserted that the parties' verbal agreement included the provision that, at the end of the seven years of leasing the farmland, the irrigation equipment would become the property of The Perrys. Evans vehemently denies any such agreement.

The surfacing of these disagreements prompted Perry to terminate the parties' landlord-tenant relationship. But, because The Perrys did not provide Evans the proper notice, Evans invoked his statutory right to remain on the land for a final harvest in 2009.[2]

Evans concluded his farming operations on the Perrys' farm in late 2009. Under Delaware law, Evans leasehold rights terminated on December 31, 2009. At that time, Evans attempted to retrieve his irrigation equipment. During this attempt, Evans realized that the moist conditions of the farmland would not allow removal of the equipment without causing significant damage to The Perrys' land. Accordingly, Evans waited until early January 2010 to make

[2] *See* 25 *Del. C.* § 6702(b). Since the agricultural lease was not reduced to writing, Defendants had to give Evans four months' advance notice of termination, even though the seven years specified in their verbal agreement was at an end.

another retrieval attempt, at which time the ground was frozen. During this attempt, Evans requested the presence of law enforcement to assist him because he feared that The Perrys' would interfere. Upon entering the land, Belinda Perry asserted to Evans that he no longer had any contractual right to enter the the Perrys' property, and refused to surrender the irrigation equipment.

In 2010, Evans farmed a nearby non-irrigated parcel. Evans argued at trial that he was unable to irrigate the land because he was not permitted to retrieve his irrigation equipment. At the same time, The Perrys used the irrigation equipment on their own land, in renting it to a new farmer.

Evans filed suit for replevin of his irrigation equipment: (1) one Goulds 6D H0h0-5 stage sub-pump; (2) one irrigation well; (3) one eight-inch pivot structure; (4) three 180 foot spans; (5) one C.A.M.S. select panel; (6) one 82-foot overhang; (7) six tires on 12-inch galvanized rims; (8) one pressure transducer; (9) one end gun test switch; (10) one strobe running light; (11) one SR100 end gun; (12) Senninger low-angle plastic impacts; and (13) any removable pipe and wire installed for the irrigation system.

In addition, Evans seeks damages for expenses associated with the irrigation system's removal and expenses related to Evans' arrangement of the presence of law enforcement authorities during his final attempt at retrieving the irrigation structure.

Although missing from the complaint's prayer for relief, Evans also requested in his pretrial worksheet lost profits of approximately $40,000 for his

inability to use the irrigation equipment on a nearby farm. Evans' pretrial worksheet also noted his intention to recover damages for the use of the irrigation system by The Perrys during the period following Evans tenancy on the land.

Finally, The Perrys filed a counterclaim against Evans for outstanding rent in the amount of $1,149.39.

Discussion

Replevin is a form of action "for the recovery of the possession of personal property which has been taken or withheld from the owner unlawfully."[3] To make a *prima facie* case for replevin, a plaintiff must show by a preponderance of the evidence that he or she has the right of immediate possession of the property subject of the suit.[4] Title is not necessary to maintain a replevin action.[5]

Evans satisfied the *prima facie* elements of replevin. The parties do not dispute that Evans used his own money to lease and, ultimately, purchase the irrigation equipment. He was the sole user of the equipment while leasing and farming the Perrys' property. He maintains that the Perrys wrongfully withheld the equipment when he returned at the expiration of the final lease term to retrieve it.

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[3] *Harlan & Hollingsworth Corp. v. McBride,* 69 A.2d 9, 11 (Del. 1949).
[4] *Id.*
[5] *Paul v. Sturevant,* 2006 WL 1476888 (Del. Com. Pl. May 19, 2006) (citing *Willey v. Wiltbank,* 567 A.2d 424 (Del. 1989)).

In rebuttal, the Perrys offered for the Court's consideration two defenses to Evans' *prima facie* case. First, the Perrys contend that, as part of their overall agreement, Evans agreed to relinquish ownership and possession of the irrigation equipment to the Perrys at the conclusion of the final lease term. Second, the Perrys argue that, even if Evans did not, in fact, promise to relinquish ownership and possession of the equipment, he is not entitled to immediate possession because he has not paid the rent in full for the lease period. This last contention is also the basis for the Perrys' counterclaim for breach of the rental agreement.

A promise is enforceable at law if it is based on mutual assent and consideration. The promise made must also "be reasonably definite and certain in its terms."[6] Because the Perrys raise the existence of a contract as a defense, they have the burden to prove these elements.

While the interpretation of contractual language is a question of law,[7] the Court must have at its fingertips facts sufficient to make a legal ruling. If, at the conclusion of trial, a proponent of a contract fails to prove facts necessary to satisfy the elements of a contract, a trial court must conclude that the promise alleged is unenforceable at law.

The Perrys argued at trial that Evans promised to relinquish to them possession and ownership of the irrigation equipment in exchange for (1) seven

[6] *Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons of Del. v. Hiram Grand Lodge Masonic Temple,* 80 A.2d 294, 295 (Del.Ch. 1951).
[7] *Klair v. Reese,* 531 A.2d 219, 222 (Del. 1987).

renewals of the one-year lease term at a non-irrigated land rate and (2) The Perrys' act of removing several acres of timber and clearing the land so that it may be suitable for farming. This being an oral agreement, The Perrys did not support their argument with any writing. Instead, the Court is asked to accept the testimony of Elmer Perry as to all of these facts.

As the finder of fact, the Court must weigh the credibility of the parties. In so doing, the Court considers each witness' means of knowledge, opportunity to observe, strength of memory, reasonableness or unreasonableness of testimony, consistency of testimony, and biases, prejudices and interests.

There is an obvious issue of credibility when the proponent of a contract submits the only testimony regarding the contract's existence. In that scenario, biases exist as to information, selective memory, and interpretation of facts. While none of these biases involve dishonesty or lying, they do affect the weight of a witness's testimony. When testimony is the only evidence a Court has at its disposal, its weight is a significant factor.

Evidence of the course of subsequent performance of the parties corroborates and proves to the Court's satisfaction most of the terms of the parties' 2002 verbal business agreement. Evans did indeed rent the Perrys' farmland for seven years at $50.00 an acre. The Perrys cleared seven acres to enable Evans to install and use a pivot irrigation system for those seven years. Evans installed the well and infrastructure and purchased and used the irrigation equipment on the Perrys' property for those seven years. The only alleged term

of the verbal agreement *not* overwhelmingly supported by the evidence is the Perrys' assertion that they were to retain all of the irrigation equipment at the end of the lease. Mr. Perry testified it was part of the agreement. Mr. Evans testified it was not part of the agreement.

The parties urge the Court to draw differing inferences from the circumstantial evidence of the economic sense of their competing views. Perry argues that he timbered and cleared his land to make way for Evans' pivot at an expense of approximately $14,500.00 and also agreed to rent his land at a non-irrigated rate for seven years.[8] On the other hand, Evans points out that he affixed permanent wells and piping to the Perrys' land in addition to the irrigation system that will benefit Perry in perpetuity and that these fixtures were the basis of the bargain—not relinquishment of the removable irrigation equipment.

After consideration of both parties' arguments and the supporting evidence, the Court does not find it likely that a farmer would willingly agree to surrender $24,400.00 of irrigation equipment, after only seven years' use, with many years of useful life left. The Court does not find The Perrys' economic arguments persuasive. The only direct evidence of an agreement to relinquish the irrigation equipment is Mr. Perry's testimony. The Court finds no meeting of

[8] Defendants argue that maintaining the land at a non-irrigated rate of $50.00 supplied additional consideration for the agreement and is further evidence that Evans intended to surrender his irrigation equipment. At trial, however, the Court heard credible testimony that $50.00 per acre was approximate to industry standard for non-irrigated land at the time. Because the irrigation equipment was purchased by Evans, Defendants had no justification for charging anything more than a non-irrigated land rent. Thus, the Court does not find that a promise to maintain a non-irrigated rate schedule supplied consideration for any promise to relinquish irrigation equipment.

the minds proven as to this term. The Perrys failed to meet their burden of proof.

Even if the Court did find the Perry's evidence credible and persuasive, the alleged oral agreement violates the statute of frauds found in 6 *Del. C.* § 2-201. Under that statute, a contract for the sale of goods (in this case, the irrigation equipment) is not enforceable "unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought ..." or an exception applies.[9]

In this case, no writings evidence the sale or transfer of the irrigation system to Perry in exchange for consideration. Thus, it would seem that the statute of frauds bars enforcement of any promise that might have existed in that regard.

The Perrys argue, however, that the partial performance exception to the statute of frauds permits enforcement. The partial performance exception provides that a contract is enforceable "with respect to goods for which payment has been made and accepted or which have been received and accepted."[10] The Perrys contend that their *payment* for the irrigation system includes (1) their performance of clearing several acres of land for farming and (2) maintaining a rental rate of $50.00 per acre for seven years. The Perrys argue that Evans *accepted* this payment by agreeing to the $50.00 per acre term.

[9] 6 *Del. C.* § 2-201(1).
[10] 6 *Del. C.* § 2-201(3)(c).

While the performance cited above, if true, would evidence *an* agreement, the proposed terms do not evidence an agreement related to the irrigation equipment. The cited partial performance would show only that, in exchange for a fixed rental term and the clearing of some acreage, Evans agreed to pay $50.00 per acre. The cited performance does not prove that Evans agreed to pay $50.00 per acre *and* surrender $24,400.00 worth of irrigation equipment. Again, the Court cannot enforce a term that is not proven.

The Perrys failed to prove by a preponderance of the evidence their defense that Evans agreed to relinquish ownership and possession of the irrigation equipment by enforceable oral contract.

The Perrys' second defense is that Evans is not entitled to immediate possession of the irrigation equipment because he has outstanding rent due. This factual allegation is also the basis for The Perrys' counterclaim for breach of their rental agreement. Both the defense and the counterclaim, however, fail because the Perrys have not convinced the Court that rent is due in a reasonably ascertainable amount.

Again, the Perrys have the burden of proving their counterclaim that Evans owes outstanding back rent. The parties do not dispute that the rental rate for the seven years was $50.00 per acre each lease term. The parties *did* dispute the amount of acreage, however. Elmer Perry testified at trial that, at the time of the agreement, the Perrys' land contained 56 tillable acres. If that is true, Evans underpaid The Perrys $1,149.39 over the seven-year period. However,

Evans testified that the agreement was based on 52 tillable acres—not 56— and submitted as further proof a satellite image of The Perrys' property from the United States Department of Agriculture taken after the seven-year period, which showed only 51.5 tillable acres. Under Evans' computation, he overpaid The Perrys by $51.00.

The Court accepts the satellite image as the best direct evidence of the tillable acreage, even though it post-dates the lease term. Although the Court is only concerned with the parties' understanding at the outset of the seven-year period, the evidence is still probative of the acreage at the time of the agreement. The Perrys offered no explanation why the tillable acreage might have decreased from 56 acres at the outset of the agreement to 51.5 acres at the time of the satellite photograph. Without such explanation, the Court finds, based on the documentary evidence of the satellite image together with Evans' testimony, that the tillable acreage remained constant at 51.5 tillable acres during the seven rental terms. At that measurement, no rent remains unpaid. The Perrys have failed to prove both their counterclaim and defense based on unpaid rent.

In his complaint, Evans prayed for recovery of the irrigation equipment less any chattel permanently affixed to the land, such as the piping and test wells.[11] In his pretrial worksheet, Evans also requested relief in the form of lost profits caused by Evans' inability to use the irrigation equipment and

[11] Evans also sought "Damages for [his] expenses associated with the attempted removal of irrigation equipment that [he] was wrongfully forbidden to remove;" and "All expenses associated with arranging for the presence of law enforcement authorities to prevent further interference by Perrys in such removal." The Court finds, however, that Evans did not submit any evidence related to these alleged damages and cannot award this relief.

consequential damages caused by The Perrys' wrongful use of the irrigation equipment after the conclusion of the seven lease terms. Evans estimates these damages at an amount of $40,000.00.

The Court rejects these claims. Plaintiff did not request lost profits in the prayer of his Complaint. Lost profits that are a natural, but not necessary result of the act complained of are special damages that must be pleaded pursuant to Court of Common Pleas Civil Rule 9(g).[12] Even if he had properly requested them, "lost profits will be allowed only if [the] loss is capable of being proved, with a reasonable degree of certainty. No recovery can be had for loss profits which are determined to be uncertain, contingent, conjectural, or speculative."[13] There are not many things in this world more speculative than crop profits, dependent as they are on weather, soil conditions, and farmers' luck. Although Evans testified as to his experienced differences in average yields between irrigated and non-irrigated fields, the Court found Plaintiff's evidence insufficient to support an award of lost profits.

As for Evans' claim for consequential damages relating to the Perrys' wrongful use of the irrigation equipment, the Court finds Evans' supporting testimony likewise speculative and unreliable. Evans did not submit any reliable expert testimony regarding the actual loss of value caused by his or The Perrys' sporadic and inconsistent use of the equipment. Evans himself testified that depreciation of the equipment did not occur at a normal rate because he used the

[12] *See Twin Coach Co. v. Chance Vought Aircraft, Inc.*, 163 A.2d 278, 286 (Del. 1960).
[13] *Callahan v. Rafail*, 2001 WL 283012 (Del. Super. Ct. Mar. 16, 2001).

equipment sparingly. Evans, furthermore, submitted no evidence of the extent of use by The Perrys after the final lease term concluded.

CONCLUSION

Plaintiff Kevin A. Evans is the lawful owner, and has the right to possession of the following personalty currently in the possession of, and wrongfully withheld by The Perrys Elmer Perry and Belinda Perry:

1. One Goulds 6d H0h0-5 stage sub-pump;
2. One irrigation well;
3. One eight-inch pivot structure;
4. Three 180-foot spans;
5. One C.A.M.S. select panel;
6. One 82-foot overhang;
7. Six tires on 12-inch galvanized rims;
8. One pressure transducer;
9. One end gun test switch;
10. One strobe running light;
11. One SR100 end gun;
12. Senninger low-angle plastic impacts; and
13. Any removable pipe and wire installed for the irrigation system.

The Perrys failed to prove the existence of an agreement granting them ownership of the property.

The Court finds the value of the withheld property to be $24,400.00. Judgment in that amount is entered in favor of Plaintiff Kevin A. Evans and against Elmer Perry and Belinda Perry. However, if The Perrys return, or permit Plaintiff to retrieve, the above-listed property by August 31, 2011, and provide notice of same to the Court by September 1, 2011, this Order and Judgment will

be deemed satisfied. If The Perrys do not return the property by August 31, 2011, post-judgment interest will begin to accrue as of that date at the legal rate. A Notice of Appeal of this matter will be considered an appeal of a judgment of $24,400.00 plus interest. This order will become final on September 1, 2011 for purposes of any appeal. Costs are assessed against the Perrys.

IT IS SO ORDERED.

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Kenneth S. Clark, Jr.
Judge