IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ARWAY LINEN & UNIFORM RENTAL SERVICE, INC.,	:	**FEBRUARY TERM, 2011**
Plaintiff,	:	**NO. 2481**
vs.	:	**COMMERCE PROGRAM**
NORTH PHILADELPHIA SULLIVAN'S, INC., ET AL.,	:	
Defendants.	:	

OPINION

BY: Patricia A. McInerney, J. June 28, 2013

Judgment having been entered, these are cross appeals from, *inter alia*, the order striking any award of contractual or prejudgment interest, but otherwise denying the defendant's motion for post-trial relief.

I. BACKGROUND

On February 21, 2011, Arway Linen & Uniform Rental Service, Inc. ("Arway") commenced an action against North Philadelphia Sullivan's Inc. t/a Sullivan's Steakhouse ("Sullivan's") for breach of a linen rental contract. In the complaint, Arway averred that on March 10, 2008, the parties entered into a written agreement for it to furnish Sullivan's with linens as well as a few other items such as floor mats. (*See* Compl. ¶¶ 3-5, Exs. A-B.) Arway further averred that on or about June 1, 2010, Sullivan's advised Arway that it would no longer honor the parties' agreement and unilaterally terminated acceptance of services, breaching the agreement and causing Arway to sustain damages. (*See* Compl. ¶¶ 6-7.) The ad damnum clause

sought damages in the amount of $141,778.01, plus prejudgment interest at the statutory rate of six percent.

On November 14, 2011, Sullivan's filed a motion for summary judgment. In its motion, Sullivan's argued it was entitled to summary judgment because it followed the procedure outlined in the parties' agreement for the customer to terminate the contract. (Def.'s Summ. J. Mot. ¶ 24.) Sullivan's asserted there were two key sections in the agreement that established the grounds for a proper termination of the contract; Sections 6 and 7. (Def.'s Summ. J. Mem. p. 2.) Section 6 addresses the quality of merchandise and processing and states: "The Company[, Arway,] agrees that its quality of merchandise and processing shall be comparable to the generally accepted standards of industrial laundries. The Company further agrees to promptly replace any merchandise that, in it's [sic] sole opinion, does not meet such standards at no cost to the Customer[, Sullivan's]." (Rental Agreement § 6.) Section 7 addresses customer termination and provides:

> The Customer expressly waives the right to terminate this Agreement during the initial term or any extension thereof for claimed deficiencies in service and/or quality of merchandise which Customer claims does not meet the above standards unless (1) the claims are made promptly in writing to the Company, (2) the Company is afforded a minimum of thirty (30) days from date of receipt of the written claim to resolve the claimed deficiency and (3) the Company does not resolve the claimed deficiency within that period of time. All written notices regarding claimed deficiencies in service, quality of goods and/or notice to terminate under this Agreement shall be sent by certified mail, return receipt requested, by Customer to the Company at the above address and the signed certified mail receipt shall constitute the sole proof of delivery of said notice.

(Rental Agreement § 7.) According to Sullivan's, it followed this procedure for a deficiency it claimed existed with the linens and thus properly terminated the agreement, regardless of whether there was a disagreement between the parties as to whether the linens were within the generally accepted standards of industrial laundries. (*See* Def.'s Summ. J. Mem. pp. 5-9.)

Sullivan's also argued it was entitled to summary judgment because if there were any ambiguity in the agreement, it must be construed against Arway as the drafter. According to Sullivan's,

> Section 7 of the agreement at issue fails to define a "claimed deficiency." Sullivan's believed if the customer found a deficiency it would be remedied to its satisfaction in a timely manner. If this remedy did not occur, the customer then had the right to terminate the agreement. Plaintiff argues that there was no deficiency and therefore the agreement should not have been terminated. Arway reads Section 7 to only allow termination where Arway agrees a deficiency existed. Sullivan's and Arway read Section 7 of the Rental Agreement differently regarding proper termination. The meaning of Section 7 is unclear and could be understood in multiple ways. Therefore, because Arway drafted the Rental Agreement, the same should be construed against Arway and [s]ummary [j]udgment granted in favor of [Sullivan's].

(Def.'s Summ. J. Mem. pp. 8-9.)

On December 19, 2011, Arway filed a response in opposition to summary judgment. In its response, Arway argued that where a contract is ambiguous, parol evidence is admissible and interpretation is to be left to the fact finder. (Pl.'s Resp. to Summ. J. Mem. p. 6.) Arway argued that parties' agreement was at a minimum ambiguous because its interpretation of the contract was at variance with Sullivan's interpretation. (*See* Pl.'s Resp. to Summ. J. Mem. p. 6.) Specifically, Arway argued:

> Under paragraph seven (7) of the agreement Sullivan['s] can claim a deficiency that the service or quality of the merchandise does not meet the standards in paragraph six (6). However, it is the sole option of Arway which is determ[in]ative whether the standard is met. Sullivan interprets the agreement giving it the decision as to whether the standard has been met. Arway interprets the agreement giving it the decision regarding deficiencies[.]

(Pl.'s Resp. to Summ. J. Mem. p. 7.)

On April 10, 2012, this court denied Sullivan's motion for summary judgment. On October 4, 2012, the case proceeded to bench trial before this court. The following facts were adduced at trial.

Arway is a Pennsylvania corporation that provides linen and uniform rentals to approximately 600 customers—restaurants, country clubs, dining facilities, and retirement homes. (N.T. 31-32.) Sullivan's operates a steakhouse in King of Prussia, and is part of a larger company that operates Sullivan's Steakhouses in locations including Wilmington, Delaware and Baltimore, Maryland. (*See* N.T. pp. 11, 17-19, 103-04, 128-29.)

On March 10, 2008, Arway and Sullivan's entered into a rental agreement. (Stipulation ¶ 1.) The agreement was for a term of five years and provided for the rental of black napkins and black table cloths as well as a few other items such as floor mats. (Stipulation, Ex. A.) The rental agreement was drafted by Arway and there were no alterations made to it by Sullivan's. (Stipulation ¶ 2.)

Arway purchased new black napkins and table cloths for Sullivan's exclusive use. (*See* N.T. pp. 33-34.) The linens were picked up and delivered to Sullivan's three times per week. (N.T. p. 34.) Sullivan's black linens were not mixed with any of Arway's other customer's linens because they were purchased for Sullivan's exclusive use—Sullivan's linens were kept separate, washed separately, and delivered back separately. (N.T. p. 34.)

In February 2010, George Skipper was a regional manager for the larger company that operates Sullivan's and became responsible for directly reporting between Sullivan's and the home office of the larger organization. (*See* N.T. pp. 103-04.) Mr. Skipper testified that as soon as he started managing Sullivan's he noticed shading issues with the linens. (N.T. p. 104.) Specifically, Mr. Skipper testified: "there was severe shading, multiple shades of the color black across any given table in the dining room. So you had some napkins that almost looked gray compared to the darkness and quality of the other napkins or tablecloths." (N.T. p. 104.) Regarding the significance of the shading issue, Mr. Skipper testified:

> At this check average, people when they come in and pay $65 to $70, it has to be a precise and a great experience or it's not going to lead people to come back to us. If they come into a dirty restaurant or torn linens or shaded linens that are multiple colors, they're prone not to come back.

(N.T. p. 109.)

Prior to being managed by Mr. Skipper, Sullivan's was managed by a general manager named Rich Furino. (N.T. pp. 116-17.) Mr. Furino, however, was promoted within the larger organization to general manager of the company's Del Frisco's Steakhouse in Center City, Philadelphia. (N.T. pp. 117-18.) Mr. Skipper did not recall Mr. Furino expressing any concerns regarding Arway's service prior to his promotion. (*See* N.T. p. 122.)

On or about April 8, 2010, Sullivan's sent Arway an undated certified letter asserting deficiencies in service and quality of merchandise. (N.T. 106-07, 114-15; Stipulation ¶ 3.) On or about April 13, 2010, a meeting regarding the linens took place between David Newman and Louis DiDonato from Arway and Mr. Skipper from Sullivan's. (N.T. pp. 19-20, 36-38, 107-08; Stipulation ¶ 4.)

At the meeting Mr. Skipper indicated he felt there were shading differences between the napkins and table cloths. (N.T. p. 37.) Mr. Skipper indicated the shading differences by generally motioning with his hands to tables around the restaurant. (N.T. p. 37.) He did not point to any specific table. (N.T. p. 37.) The meeting lasted ten to fifteen minutes and no other complaints were expressed. (N.T. pp. 19-21, 107-08.) Messrs. Newman and DiDonato did not agree with Mr. Skipper's concerns, but "to keep the customer happy" Arway ordered new napkins and table cloths for Sullivan's. (N.T. pp. 20, 41, 51.)

On or about May 26, 2010, Arway received a second undated certified letter from Sullivan's; this one terminating the rental agreement as of June 1, 2010. (N.T. 115; Stipulation ¶ 5, Ex. C.) This letter claimed that the table cloths were still gray and faded compared to the rest

of the linens. (N.T. p. 45.) Between the April 13, 2010 meeting and receipt of the second letter in May 2010, Arway had installed new napkins and was phasing in new black table cloths. (N.T. pp. 41-46, 71-76.) By mid-May 2010, Arway had delivered 600 new black napkins and was phasing in eight dozen black table cloths for Sullivan's. (N.T. pp. 41-46, 71-76.)

Other than the second certified mailing, Mr. Skipper made no attempts to communicate with Messrs. DiDonato or Newman following their April meeting. (N.T. p. 121.) Between sending the first and second letters, Mr. Skipper did, however, obtain bids to replace Arway's services. (N.T. p. 126-128.) Mr. Skipper testified this was done "to make sure in case Arway didn't live up to their end of the contract." (N.T. p. 128.)

Despite Mr. Skipper's alleged concern about the condition of the linens, and that Arway would not remedy the problem, Mr. Skipper did not himself take on the task of obtaining bids to replace Arway's services. (N.T. p. 126-128.) Rather, Mr. Skipper entrusted Sullivan's executive chef, Dwayne Burton, whom he would fire shortly thereafter for repeated performance and tardiness issues, and who had signed the original contract with Arway, with the task. (N.T. pp. 15, 35, 126-128.)

After terminating Arway's services, Sullivan's contracted with Linens of the Week to supply the linens for the restaurant. (N.T. pp. 129-130.) Linens of the Week had already been servicing the Sullivan's Steakhouse restaurants in Wilmington and Baltimore. (N.T. pp. 128-29.) And Linens of the Week is now owned by Alsco, a national company that now services all the Sullivan's Steakhouses across the country. (N.T. p. 129.)

Following the conclusion of the bench trial, this court issued findings of fact and conclusions of law. This court found the testimony of Messrs. Newman and DiDonato credible and the testimony of Mr. Skipper not credible. This, coupled with the fact that both of the

certified letters were undated, led this court as the fact finder to find that Mr. Skipper intended to terminate the parties' agreement by whatever means and ultimately award Arway $112,800 in damages, plus interest at a contract rate of 18% per annum from June 1, 2010 until the date of the court's decision.

On December 14, 2012, Sullivan's filed a timely motion for post-trial relief. In its motion, Sullivan's made a number of arguments, including that this court erred "in finding that the credibility of the witnesses at trial had any relevance regarding proper termination of the Rental Agreement[;]" "in awarding damages as [Arway] failed to introduce any documentation into evidence at trial to support its claims for damages[;]"and

> in its award of interest of 18% per annum allegedly based on the subject contract. The Court applied the percentage rate included in paragraph 12 of the Rental Agreement which dealt with services on credit which is not applicable to the case at bar. The Rental Agreement states in paragraph 15 that the sole recovery in the event of a breach includes only the "loss of bargain" and attorney fees, "[t]he parties acknowledge and agree to this limitation of damages in the event of a breach of this agreement by Customer, and it shall be the sole and exclusive recovery by the Company, thereby waiving consequential and special damage." Thus, the Agreement at issue specifically precludes the imposition of interest as awarded in this case.

(Def.'s Post-Trial Mot. ¶¶ 15, 18, 20.)

Sullivan's having already briefed the matter, the court directed Arway to brief the matter by order dated December 17, 2012. Arway complied and filed a brief in opposition, which addressed Sullivan's arguments with the exception of the interest issue. On March 26, 2013, the court entered an order removing any award of contractual or prejudgment interest from its findings of fact and conclusions of law, but otherwise denying Sullivan's post-trial relief.

Sullivan's and Arway filed timely notices of appeal and this court ordered each file a Pa. R. App. P. 1925(b) statement. In its 1925(b) statement, Sullivan's delineated the following twelve complaints of error:

1. The Court erred as a matter of law in denying Defendant's Motion for Summary Judgment which was filed on November 17, 2011 as Plaintiff failed to meet its burden in establishing a violation of Section 7 of the Rental Agreement at issue.

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Plaintiff did not meet its burden as there were no issues of material fact as the Contract at issue was terminated appropriately and the Contract was unclear regarding Plaintiff's alleged remedy. Therefore, summary judgment was appropriate.

2. This Honorable Court erred as a matter of law as it concluded that Sullivan's termination of the Contract at issue was somehow a breach of the agreement. The stipulated facts in the case at bar firmly established that the cancellation clause of the agreement at issue was met by Defendants. All parties agreed that Defendant gave proper notice and then proper termination via certified mail after the defects in service were not remedied.

3. The Court erred as a matter of law in finding that the agreement at issue had no ambiguity. The issue of remedy when a notice of termination was sent is not clearly addressed in the agreement at issue. In fact, it was not addressed at all by Plaintiff who solely drafted the Contract at issue. Any ambiguity in the Contract must be found against the drafter, the Plaintiff. Thus, as a matter of law the termination by Defendant was appropriate.

4. The evidence presented at trial did not substantiate an award in favor of Plaintiff.

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5. The Court verdict was in error as Plaintiff did not produce any evidence at trial which established that Defendant failed to adhere to the conditions precedent for a proper termination of the Arway Rental Agreement at issue.

6. The Court erred as a matter of law in finding that the credibility of the witnesses at trial had any relevance regarding the proper termination of the Rental Agreement.

7. The Court erred as a matter of law as the stipulation of facts presented to the Court clearly establishes the proper termination of the agreement at issue.

8. The Court erred as a matter of law in denying Defendant's Motion for Non-Suit. Once Plaintiff had concluded its case in chief there was not sufficient evidence to avoid the entry of a non-suit as the contract at issue was property terminated by Defendant.

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Plaintiff in the case at bar did not supply the Court with any damages documentation or liability legal memorandum to support its claim.

9. The Court erred in its Conclusions of Law which states that Arway, "cured" Sullivan's alleged claims for deficiency by ordering and delivering new black napkins and table cloths by Mid-May, 2010 prior to the second Sullivan's letter. There was no testimony from any party that all new linen was provided to Sullivan's prior to their termination.

10. The Court erred in awarding damages as Plaintiff failed to introduce any documentation into evidence at trial to support its claims for damages during its case in chief. Arway representative, Mr. DiDonato testified that the formula for loss of bargain damages was the average number of weeks remaining on the agreement times the weekly volume divided in two which would be 50%. However, he did not have documentation to support the weekly expenditures or number of weeks used in his calculation of the loss of bargain damages at the time of trial.

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11. The Court erred in admitting evidence from Plaintiff Arway via its representative, Louis DiDonato, regarding his opinion as to the "industry accepted standard" of linens.

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Mr. DiDonato was not offered as an expert. Thus, he should not have been permitted to testify based on the specialized knowledge regarding the industry accepted standard of linens. Additionally, Plaintiff failed to present expert testimony defining the industry standard.

12. The Court erred as a matter of law in admitting evidence elicited from Plaintiffs counsel during the questioning of Mr. Skipper regarding Sullivan's Steakhouse's linen company retained after the termination of Plaintiff Arway.

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Any information regarding the linen company that Sullivan's hired to replace Arway Linen is wholly irrelevant and allows evidence that in no way relates to the determination of whether Sullivan's adhered to the conditions precedent for termination of the agreement.

(Def.'s 1925(b) Statement (citations omitted).)

Arway had but one complaint of error: "The Court erred as a matter of law in denying [Arway] prejudgment interest from the date of [Sullivan's] breach on June 1, 2010 to the Court Findings of Fact and Conclusions of Law on November 30, 2012[, because] [i]n contract cases, a

successful [p]laintiff is entitled to prejudgment interest at the statutory rate as a matter of right...." (Pl.'s 1925(b) Statement.)

We issue this opinion in support of the order denying Sullivan's summary judgment and the order striking the award of contractual or prejudgment interest, but otherwise denying Sullivan's post-trial relief.

II. DISCUSSION

A. Standards and Scopes of Review

"The entry of summary judgment is only proper where the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Rush v. Philadelphia Newspapers, Inc.*, 732 A.2d 648, 650-51 (Pa. Super. Ct. 1999). "[I]n determining whether summary judgment should enter, the record is...viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Manzetti v. Mercy Hosp. of Pittsburgh*, 776 A.2d 938, 945 (Pa. 2001). Additionally, summary judgment should only be granted "in those cases which are free and clear from doubt." *Washington v. Baxter*, 719 A.2d 733, 737 (Pa. 1998). An appellate court's scope of review of an order granting or denying summary judgment is plenary, and its standard of review is clear: "the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion." *QBE Ins. Corp. v. M & S Landis Corp.*, 915 A.2d 1222, 1225 (Pa. Super. Ct. 2007), *quoting Pappas v. Asbel*, 768 A.2d 1089, 1095 (Pa. 2001).

Judgment n.o.v. is an extreme remedy and should only be entered in the clearest of cases. *Moure v. Raeuchle*, 604 A.2d 1003, 1007 (Pa. 1992). "There are two bases upon which a

judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." *Id.* (citations omitted). "An appellate court will reverse a trial court's grant or denial of a JNOV only when the appellate court finds an abuse of discretion or an error of law." *Dooner v. DiDonato,* 971 A.2d 1187, 1193 (Pa. 2009).

A new trial should only be granted when the verdict is so contrary to the evidence so as to shock one's sense of justice. *Barrack v. Kolea*, 651 A.2d 149, 152 (Pa. Super. Ct. 1994). The decision of the trial court to refuse to grant a new trial will only be reversed when "there has been a clear abuse of discretion or an error in law determinative to the outcome of the case." *Id.*

During a bench trial, "[q]uestions of credibility and conflicts in the evidence are for the trial court to resolve and the reviewing court should not reweigh the evidence." *Adamski v. Miller*, 681 A.2d 171, 173 (Pa. 1996). "Absent an abuse of discretion, the trial court's determination will not be disturbed." *Id.*

B. Sullivan's Appeal

Sullivan's 1925(b) statement delineates twelve complaints of error. This court reduced Sullivan's complaints to the following three categories: (1) breach of the agreement; (2) damages; and (3) summary judgment.

1. Breach of the Agreement

This case involves interpretation of a contract. Sullivan's complains this court erred in concluding its termination of the rental agreement "was somehow a breach of the agreement" because it complied with the termination provision of the agreement by sending the requisite written notices by certified mail: that is, the written notice of a claimed deficiency in quality of the goods and the written notice to terminate the agreement. (*See* Def.'s 1925(b) Statement ¶ 2.)

"The interpretation of any contract is a question of law for the [c]ourt." *Pocono Summit Realty, LLC v. Ahmad Amer, LLC*, 52 A.3d 261, 269 (Pa. Super. Ct. 2012). In interpreting the language of a contract, the court will attempt to ascertain the intent of the parties and give that intent effect. *LJL Transp., Inc. v. Pilot Air Freight Corp.*, 962 A.2d 639, 647 (Pa. 2009). "When the words of an agreement are clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement, which will be given its commonly accepted and plain meaning." *Id.* at 647 (citations omitted). "Additionally, in determining the intent of the contracting parties, all provisions in the agreement will be construed together and each will be given effect." *Id.* Thus, the court "will not interpret one provision of a contract in a manner which results in another portion being annulled." *Id.* at 648. "[T]he court will adopt an interpretation which under all circumstances ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished." *Weisman v. Green Tree Ins. Co.*, 670 A.2d 160, 163 (Pa. Super. Ct. 1996).

While Sullivan's complied with the termination provision of the agreement by sending the requisite written notices by certified mail, there was no error in concluding that they had breached the agreement. Instantly, the initial term of the contract was five years. (Rental Agreement § 4.) After expiration of the initial term, the agreement automatically extended for terms of one year unless it was "terminated by either party by giving written notice to the other party no less than sixty (60) days from the expiration of the initial term or any successive term...." (Rental Agreement § 4.)

In section six, Arway agreed that "its quality of merchandise and processing [would] be comparable to the generally accepted standards of industrial laundries." (Rental Agreement § 6.) Arway further agreed in section six that it would "promptly replace any merchandise that, in it's

[sic] sole opinion, [did] not meet such standards...." (Rental Agreement § 6.) Sullivan's, on the other hand, in section seven, "expressly waive[d] the right to terminate [the] [a]greement during the initial term or any extension thereof for claimed deficiencies in service and/or quality of merchandise which [it] claim[ed] [did] not meet the above standards" unless certain conditions precedent were met. (Rental Agreement § 7.)

Regarding whether it properly terminated the agreement, Sullivan's focused primarily on section seven, the termination provision, arguing "[t]here was no dispute at trial [that] [it] followed the conditions precedent to proper termination" as it sent written notice of a claimed deficiency by certified mail; allowed more than thirty days to pass; and then sent its written notice to terminate by certified mail. (Def.'s Post-Trial Mem. p. 7.) Sullivan's also argued section seven "fails to define a 'claimed deficiency,' or which party determines if there was a curing of the claims." (Def.'s Post-Trial Mem. p. 10.) Sullivan's argued that this created an ambiguity that had to be construed against Arway as the drafter of the agreement. (Def.'s Post-Trial Mem. p. 10.) As a result of the asserted ambiguity, Sullivan's argued this court had to accept its "claim that the deficiencies were not cured...as part of the proper termination of the [a]greement." (Def.'s Post-Trial Mem. p. 10.) Thus, under Sullivan's approach, it would not matter whether there was any disagreement between the parties as to whether the linens were within the generally accepted standards of industrial laundries; if it asserted there was a deficiency that was not cured, its assertion would have to be accepted and its termination deemed proper. If that was to be the proper interpretation, the contract's term of years would be rendered superfluous and its actual standard for quality of merchandise would be ignored.

Arway, on the other hand, focused on section six, arguing that it "provides for Arway to be the sole entity to determine whether the quality and processing meets industrial standards"

and in turn "whether if there be a[n] alleged deficiency it is cured since Arway, in its sole opinion, determines whether the quality of merchandise...meets generally accepted standards of industrial laundries." (Pl.'s Post-Trial Mem. p. 6.) Thus, under Arway's approach, if it determined that there was no deficiency or that the deficiency had been cured, its determination would have to be accepted and a termination based thereupon deemed improper. If that was to be the proper interpretation, the contract's termination provision would be rendered superfluous and its actual standard for quality of merchandise would be ignored.

Accordingly, in interpreting the contract, and construing all of the provisions of the agreement together and giving each effect, this court did not agree with either party's approach. In general, where a contract does not fix its duration in express terms, it may be terminated at the will of either party. *See Cummings v. Kelling Nut Co.*, 84 A.2d 323, 325 (Pa. 1951) (stating that "[t]he general rule is that when a contract provides that one party shall render services to another..., but does not specify a definite time or prescribe conditions which shall determine the duration of the relation, the contract may be terminated by either party at will.") Here, the instant contract was for an initial term of five years and, thus, was not terminable at will, but rather only terminable with cause.

Section six contractually established the quality of the merchandise that Arway was required to provide Sullivan's throughout the duration of their contract: "comparable to the generally accepted standards of industrial laundries." (Rental Agreement § 6.) Section six further established a contractual obligation on the part of Arway to replace merchandise at no cost to Sullivan's when it determined the above standard was not being met. (*See* Rental Agreement § 6 ("The Company further agrees to promptly replace any merchandise that, in it's [sic] sole opinion, does not meet such standards at no cost to the Customer[, Sullivan's].")

Contrary to Arway's argument, however, section six did not give it cart blanche to determine whether that standard was being met and prevent Sullivan's from terminating the contract if it in fact was receiving substandard merchandise. The "in its sole opinion" language of the clause merely prevented Sullivan's from being able to contractually force Arway to replace merchandise it did not agree was substandard during the term of the contract. The standard, however, remained the standard and if Sullivan's was in fact receiving substandard linens, it could properly terminate the agreement if it followed the conditions precedent to termination found in the termination provision. Here, however, Sullivan's argued that because the termination provision fails to define a "claimed deficiency" or which party determines if the claimed deficiency has been cured, the agreement is ambiguous and its assertions that there was a deficiency and that it was not cured just have to be accepted and it can never be found in breach for terminating the agreement on this basis. (*See* Def.'s Post-Trial Mem. p. 10.)

Section seven provided that Sullivan's "waive[d] the right to terminate [the] [a]greement during the initial term...for claimed deficiencies in...quality of merchandise which [it] claims [did] not meet the above standard[]" unless certain conditions are met. (*See* Rental Agreement § 7.) Section seven is not ambiguous and is not silent as to whether cause is required for termination. While "claimed deficiency" is not defined in the agreement, its plain meaning as relevant here is clear: it is just Sullivan's assertion that merchandise it is being provided is not up to industry standards. *See* Merriam Webster's Collegiate Dictionary (10th ed. 1995) (defining claim as "to ask for [especially] as a right" and "to assert in the face of possible contradiction" and defining deficiency as "the quality or state of being deficient : INADEQUACY").

Sullivan's would read "claimed deficiency" to mean that it does not matter whether there is actually a deficiency or not, it is enough just that it says there is, and then follows the steps for

termination and continues to claim that there is a deficiency. Such a reading, however, does not give effect to all of the contract's provisions. If that was indeed the case, there would be no need to establish a term of five years for the agreement or provide Arway with an opportunity to cure because the agreement would essentially be terminable at will by Sullivan's. Nor would there be a need to establish an objective standard for the merchandise that it was to be provided—i.e., that the merchandise be comparable to generally accepted standards. "[A] contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction." *State Farm Fire & Cas. Co. v. MacDonald*, 850 A.2d 707, 710-11 (Pa. Super. Ct. 2004). An ambiguity exists only when a contract is reasonably susceptible to being read in more than one way. *Id.* Sullivan's construction of the contract was unreasonable as was Arway's.[1]

Further, we do not find the agreement to be ambiguous such that it should be construed against the drafter as it does not matter that section seven does not state which party determines if the claimed deficiency has been cured. Pursuant to section seven, Sullivan's could terminate the agreement if Arway did not resolve the claimed deficiency within "a minimum of thirty (30) days from the date of receipt of the written claim to resolve the claimed deficiency" and other conditions were met. (*See* Rental Agreement § 7.) Contractually, it was not for either party to determine if the claimed deficiency had been cured. Instead, it was a factual issue for this court to determine in deciding whether there was a breach of contract in this case. Just as was done here, if Sullivan's believed there was a deficiency and that it had not been cured, it could terminate the contract. But that does not mean Arway could not sue it for breach of contract if it believed there was never a deficiency or that the deficiency had been resolved. The problem

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[1] Equally unreasonable was Arway's construction of the contract giving it cart blanche to determine whether the standard was being met and prevent Sullivan's from terminating the contract even if it was supplying substandard merchandise.

here for Sullivan's was that the linens were within industrial standards and there was no error in so finding.

At trial, the court accepted the testimony of Mr. DiDonato that the linens were within industry standards. (*See* N.T. p. 52.) Sullivan's, however, complains this court erred in admitting this testimony because Mr. DiDonato was not offered as an expert and, thus, "should not have been permitted to testify based on the specialized knowledge regarding the industry accepted standards of linens." (Def.'s 1925(b) Statement ¶ 11.)

Pennsylvania Rule of Evidence 701 provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Pa. R. Evid. 701. Rule 701, however, "contemplates admission of lay opinions rationally based on personal knowledge that are helpful to the trier of fact." *Gibson v. W.C.A.B. (Armco Stainless & Alloy Products)*, 861 A.2d 938, 944 (Pa. 2004).

"At common law, witnesses not qualifying as experts were generally permitted to testify regarding those things that they had seen, heard, felt, tasted, smelled, or done." *Id.* (quotations omitted). But our Supreme Court from very early on "interpreted the rules of evidence to permit individuals not qualified as experts, but possessing experience or specialized knowledge, to testify about technical matters that might have been thought to be within the exclusive province of experts." *Id.* When proffering such a witness, however, "the proponent of technical lay opinion testimony must show that the testimony is based on sufficient personal experience or the specialized knowledge of the witness." *Id.* at 945.

Here, Mr. DiDonato had been in the linen business for 35 years and had been overseeing Arway's sales and service department for the past 14 years. (N.T. p. 31.) Moreover, when stating that the linens were within industry standards, Mr. DiDonato had personally observed the linens in the restaurant and testified that they were just being replaced to keep the customer happy. (N.T. pp. 51-52.) Arway demonstrated Mr. DiDonato's opinion that the linens were within industry standards in terms of shading was within his personal and specialized knowledge. Accordingly, there was no error in allowing this testimony as suggested by Sullivan's.

Nor was there any error in (1) allowing testimony regarding the linen company Sullivan's retained after it terminated its agreement with Arway or in (2) finding that the credibility of the witnesses at trial was relevant. (*See* Def.'s 1925(b) Statement ¶¶ 6, 12.)

The decision to admit or exclude evidence lies within the sound discretion of the trial court; absent an abuse of discretion or error of law the decision will not be overturned. *Winschel v. Jain*, 925 A.2d 782, 794 (Pa. Super. Ct. 2007). "Generally, a trial judge should admit all relevant evidence unless a specific rule bars its admission." *Valentine v. Acme Mkts.*, 687 A.2d 1157, 1160 (Pa. Super. Ct. 1997). "Evidence is relevant if it tends to make the fact at issue more or less probable or intelligible...." *Id.*

In this case, the testimony regarding the linen company Sullivan's retained after it terminated its agreement with Arway was relevant to attack Mr. Skipper's credibility and, ultimately, to show whether the linens were really deficient (i.e., shaded) as he claimed. Under Pennsylvania Rule of Evidence 611(b), "a party in a civil case may be cross-examined on all relevant issues and matters affecting credibility." Pa. R. Evid. 611(b) (comment), *citing Agate v. Dunleavy,* 156 A.2d 530 (Pa. 1959) and *Greenfield v. Philadelphia,* 127 A. 768 (Pa. 1925).

Questions concerning improper motive go to the credibility of the witness. *Com. v. DeJesus*, 860 A.2d 102, 107 (Pa. 2004).

Here, Arway presented evidence on direct that prior to Mr. Skipper assuming management of the restaurant Sullivan's had no real issues concerning the quality of the merchandise. Arway also presented evidence that shortly after Mr. Skipper became involved with the management of the restaurant he claimed that there was a deficiency in terms of shading issues with the linens, but in fact the linens were not shaded, were within industry standards, and were being replaced just to keep the customer happy. Arway also presented evidence that in spite of the fact that the linens were not shaded, were within industry standards, and were being replaced, Arway received an undated certified letter addressed from Mr. Skipper asserting that a shading issue still remained and terminating the parties' rental agreement—i.e., evidence that Sullivan's breached the parties' agreement by terminating it without cause.[2]

During Sullivan's case in chief, Mr. Skipper, however, contested the fact that there were no shading issues with the linens. Then on cross-examination counsel for Arway elicited from him that after he terminated the contract with Arway he contracted with the same company that was servicing other Sullivan's Steakhouse restaurants in the region and ultimately the whole country.

This testimony, coupled with the fact that the letter terminating the parties' agreement was undated, led this court to find that Mr. Skipper was not a credible witness and intended to terminate the parties' agreement by whatever means so as to consolidate the linen servicing in the region with one company. There was no error in admitting this testimony as it went to Mr.

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[2] Under the court's interpretation of the contract, this is evidence that precluded non suit and substantiated an award in favor of Arway. (*See contra* Def.'s 1925(b) Statement ¶¶ 4, 8.)

Skipper's motive and credibility and was ultimately relevant in determining the linens were really deficient as he claimed.[3]

Nor was there error in finding that the credibility of the witnesses at trial was relevant in general. As discussed above, this court did not agree with Sullivan's interpretation of the parties' agreement wherein it would not matter whether there was actually a deficiency or not in deciding whether it had breached the agreement. And as neither party preserved any of the linens for trial, the court was left with weighing the conflicting testimony in deciding whether or not the linens were shaded, and credibility of the witnesses was crucial thereto.

Lastly, in terms of breach of the agreement, there was no error in concluding Arway had cured Sullivan's claim of a deficiency by ordering and delivering new black napkins and table cloths by mid-May 2010. Sullivan's claims error here because there was no testimony that all the linens had been changed out prior to Sullivan's termination of the agreement. (*See* Def.'s 1925(b) Statement ¶ 9.) There was no error as this court determined there was no deficiency to cure in the first place. Therefore, it did not matter whether there was testimony all new linens had been provided by that point.

Secondarily, there was no error because even if the court had determined there initially was a deficiency, Arway had replaced a substantial portion of the linens prior to Sullivan's termination. "A breach of contract occurs when a party to the contract performs improperly or fails to perform any contractual duty it has expressly or impliedly undertaken to do or the party otherwise violates an obligation, engagement, or duty." Pa. SSJI (Civ) 19.60 (2003). Not

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[3] Moreover, "[t]o constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful to the complaining litigant." *Id.* Here, Sullivan's does not even allege any harm as the result of the admission of this testimony. As such, there is no reversible error related thereto.

every nonperformance, however, is to be considered a breach of contract. *Id.* If the nonperformance was immaterial, and thus the contract was substantially performed, there is no breach of contract. *Id.* Accordingly, there was no need for there to be testimony that all new linens had been provided. If there had been a deficiency to resolve, failing to have replaced a few of the linens would not have constituted a material breach of the parties' agreement.

2. Damages

Plaintiff complains that this court erred in not granting nonsuit and then later awarding damages where Arway "failed to introduce any documentation into evidence at trial to support its claim for damages...." (Def.'s 1925(b) Statement ¶¶ 8, 10.) Specifically, Sullivan's challenges that Mr. DiDonato did not have documentation at trial to support his $94,000 loss-of-bargain damages calculation. (*See* Def.'s 1925(b) Statement ¶ 10.)

As a general rule, the plaintiff bears the burden of proof as to damages where it has asserted there has been a breach of contract. *Omicron Systems, Inc. v. Weiner*, 860 A.2d 554, 564 (Pa. Super. Ct. 2004). "The determination of damages is a factual question to be decided by the fact-finder." *Id.* In determining damages, "[t]he fact-finder must assess the testimony, by weighing the evidence and determining its credibility, and by accepting or rejecting the estimates of the damages given by the witnesses." *Id.* The fact-finder may not render a verdict based solely on conjecture or guesswork. *See id.* at 565.

In this case, the agreement contained a liquidated damages provision to be used in the event that there was a breach of contract on the part of Sullivan's. (Rental Agreement § 15.) The provision in relevant part stated:

> [Sullivan's] shall pay to [Arway] as liquidated damages and not as a penalty, the sum of fifty percent (50%) of the product of the number of weeks remaining under the agreement or any extension thereof from the date of breach to the expiration date, times the...the actual weekly billing at the time of termination....

(Rental Agreement § 15.)

At trial, Mr. DiDonato testified Arway's damages under this provision were 50% of $188,000, or $94,000. (N.T. p. 49.) While a verdict may not be based solely on conjecture or guesswork, Mr. DiDonato testified to a specific dollar amount of damages, and this court found his testimony credible and accepted his estimate of the loss-of-bargain damages.

Sullivan's did not question Mr. DiDonato as to how he arrived at the figure, it only asked whether he had any documentation at trial to support exactly what numbers he used for the weekly expenditure amount and the number of weeks. (*See* N.T. p. 64.) There may have been a shortcoming on the part of Sullivan's in terms of cross-examination, but there was not an error on the part of the court in accepting the testimony as it was elicited.

3. Summary Judgment

Sullivan's complains this court erred in denying its motion for summary judgment because it followed the procedure for termination laid out in section seven of the parties' agreement. (*See* Def.'s 1925(b) Statement ¶ 1; Def.'s Mot. for Summ. J. Mem. pp. 6-7.)

At summary judgment, the parties had the same positions regarding contract interpretation as discussed above. Namely, Sullivan's argued that under the terms of the contract, it did not matter whether a question of fact existed regarding whether there was really a deficiency, it followed the procedure for termination laid out in section seven and thus properly terminated the agreement. While Arway argued, under the terms of the contract, it did not matter whether a question of fact existed regarding whether there was really a deficiency, its opinion that there was no deficiency or that the deficiency had been cured was determinative and any termination based thereupon would be improper.

In this case, the matter was not free and clear from doubt. The court did not agree with either party's interpretation of the contract and there were issues of fact that needed to be resolved. Therefore, there was no error in denying Sullivan's motion for summary judgment.

C. Arway's Appeal

Arway had but one complaint of error: "The Court erred as a matter of law in denying [Arway] prejudgment interest from the date of [Sullivan's] breach on June 1, 2010 to the Court Findings of Fact and Conclusions of Law on November 30, 2012[, because] [i]n contract cases, a successful [p]laintiff is entitled to prejudgment interest at the statutory rate as a matter of right...."[4, 5] (Pl.'s 1925(b) Statement.)

"[E]ven where a party's right to the payment of interest is not specifically addressed by the terms of a contract, a nonbreaching party to a contract may recover, *as damages*, interest on the amount due under the contract...." *TruServ Corp. v. Morgan's Tool & Supply Co., Inc.*, 39 A.3d 253, 263 (Pa. 2012) (emphasis original). Our Supreme Court refers to this as prejudgment interest. *Id.*

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[4] On December 17, 2012, this court ordered Arway to file a brief in opposition to Sullivan's motion of post-trial relief. Arway's brief in opposition was void of any response to Sullivan's argument that this court erred in awarding interest as the parties' agreement contained a liquidated damages provision that did not provide for interest.

In this court's opinion, by failing to brief the issue, Arway has waived the issue. *See, e.g., Jackson v. Kassab*, 812 A.2d 1233, 1235-36 (Pa. Super. Ct. 2002)(Lally-Green, J., concurring)(joining "in the well-reasoned opinion of the majority that when the trial court requests briefs respecting issues raised in a motion for post-trial relief, the parties are to comply with that request or risk having all unbriefed issues waived.") In the event the Court does not find the issue waived, we provide our reasoning for not awarding prejudgment interest in this case.

[5] Arway does not challenge the striking of the contractual interest that it had originally been awarded in error. *See generally TruServ Corp. v. Morgan's Tool & Supply Co., Inc.*, 39 A.3d 253, 261-65 (Pa. 2012) (comparing and contrasting prejudgment interest and contractual interest). It just asserts it should have been awarded prejudgment interest at the statutory rate.

"Many jurisdictions have enacted statutory provisions for interest as damages." *Id.* In Pennsylvania, our Supreme Court adopted Restatement (First) of Contracts § 337(a) in 1962 as the law of this Commonwealth with respect to the recovery of interest as damages in breach of contract actions. *Id.* at 263 n.10. Section 337 provides in part:

> **If the parties have not by contract determined otherwise,** simple interest at the statutory legal rate is recoverable as damages for breach of contract...[w]here the defendant commits a breach of a contract to pay a definite sum of money...interest is allowed on the amount of the debt or money value from the time performance was due, after making all the deductions to which the defendant may be entitled.

Restatement of Contracts (First) § 337(a) (emphasis added). Then in 1998, the Court adopted the amended and renumbered Section 354 of the Restatement (Second) of Contracts, *TruServ*, 39 A.3d at 263, which provides in part: "If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled." Restatement (Second) of Contracts § 354(1). With regard to prejudgment interest, the Court has explained, "interest has been defined to be a compensation allowed to the creditor for delay of payment by the debtor, and is said to be impliedly due whenever a liquidated sum of money is unjustly withheld." *TruServ*, 39 A.3d at 264 (quotations omitted)(emphasis added).

In its post-trial motion, Sullivan's argued the parties' agreement precluded the imposition of interest because the liquidated damages provision stated that "'it shall be the sole and exclusive recovery by [Arway], thereby waiving consequential and special damage.'" (Def.'s Post-Trial Mot. ¶20, *quoting* Rental Agreement § 15.) This court agreed.

While we could not find a Pennsylvania appellate court decision that addressed awarding prejudgment interest as damages where there is a liquidated damages provision that states the

liquidated damages are to be "the sole and exclusive recovery, thereby waiving consequential and special damages," our Supreme Court has said that liquidated damages are only impliedly due when a liquidated sum of money has been unjustly withheld. It was the opinion of this court that where a contract states the liquidated damages are to be the "sole and exclusive recovery," the exclusive remedy the parties fashioned should be honored and no prejudgment interest awarded as the parties have by contract expressly determined otherwise.

And while we could not find a Pennsylvania appellate court decision that addressed the issue, we did find a case from a sister jurisdiction that addressed the issue where the liquidated damages were stated to be the "sole remedy." In *J. D'Addario & Company, Inc. v. Embassy Industries, Inc.*, 980 N.E.2d 940 (N.Y. 2012), the Court of Appeals of New York held that where the parties' contract language specified that a seller of real estate's "sole remedy" against a defaulting purchaser was liquidated damages, the parties' contract language trumped statutory language directing that statutory interest be awarded in a contract dispute. In reaching this holding, New York's high court reasoned "parties to a civil dispute are free to chart their own course and, unless public policy is affronted, they may fashion...how damages are to be computed without interference by the courts." *Id.* at 943 (quotations omitted). The same is true here. And accordingly, as the words of the agreement were clear and unambiguous that the liquidated damages were to be Arway's sole and exclusive recovery, thereby waiving consequential and special damages, the terms of the parties' agreement controlled and thereunder Arway was not entitled to prejudgment interest at the statutory rate as a matter of right.

WHEREFORE, for the above mentioned reasons, this court's orders should be affirmed.

BY THE COURT:

McINERNEY, J