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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1447**

Murphy Dressen Consulting, LLC,
Respondent,

vs.

CloudCover, Ltd.,
Appellant,

CloudCover Risk Solutions, Inc., et al.,
Defendants.

**Filed May 20, 2019
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-CV-17-5350

Karl L. Cambronne, Chestnut Cambronne PA, Minneapolis, Minnesota (for respondent)

David E. Albright, Albright Law Group, Burnsville, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Jesson,
Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

This appeal arises from a consulting agreement between two businesses. A Hennepin County jury found that one party committed a breach of contract by not paying the other party approximately \$150,000 in consulting fees. The limited issue on appeal is

whether the evidence is sufficient to support the jury's verdict. We answer that question in the affirmative and, therefore, affirm.

FACTS

CloudCover, Ltd. (CC) is, according to its appellate brief, "a pre-revenue, digital start-up business engaged in the internet security business." CC is the parent company of two subsidiary companies: CloudCover Risk Solutions, Inc. (CCRS) and CloudCover RE, Inc. (CCRE). Murphy Dressen Consulting, LLC (MDC) is a consulting firm with "expertise and experience in the business of business development, partner relations and technology project development and integration."

On January 3, 2011, CC and MDC entered into a written agreement by which MDC agreed to provide consulting services to CC. The compensation that CC was to pay to MDC is governed by section 4 of the agreement, which provides as follows:

All compensation hereunder shall be payable to Murphy Dressen Consulting, LLC (Consultant) by the 15th of each month for the previous month's work as described Addendum B. Company agrees to pay the Consultant at an hourly rate of 100.00 (per hour) for hours expended by Consultant on behalf of the Company [and] such other compensation, commissions or bonuses as mutually agreed to in writing between the Parties, in the future. (See Addendum B)

The Company agrees and the Consultant will accept a deferred payment schedule during the Term of this Agreement. The Company will issue 24,000 Warrant shares equaling the value of fifty-five cents (\$0.55) per share for each month that the Consultant's (Murphy Dressen Consulting, LLC) payment is deferred (See Addendum B). For each month that the Consulting fee is deferred, Warrants of "like-value" shall be provisioned (in escrow until issued on a quarterly basis) in the name of Murphy Dressen Consulting. The Warrants shall be provided at eighty-five cents (\$0.85) per exercise price with an

exercisable sunset of five (5) years from the issuance date in the name of (the Consultant) Murphy Dressen Consulting, LLC.

For purposes of computing compensation pursuant to this Agreement, each Warrant of common stock of CloudCover, Ltd. a Minnesota domestic corporation share shall have the agreed and declared value of fifty-five cents (\$0.55). Each Warrant share shall have an exercise price of eighty-five cents (\$0.85) and shall be exercisable at any time within five (5) years of the date of issue. Warrant shares hereunder shall be issued at least once each calendar quarter throughout the Term of this Agreement.

The Company agrees to pay the Consultant in full, immediately upon the Company receiving any investor (bridge) funding exceeding three million dollars, (\$3,000,000) or as the Company otherwise determines, and will continue to pay the Consultant each month from then on until the end of the Term or cancellation by either party to this Agreement. The terms of compensation may change by mutual, written agreement between Murphy Dressen Consulting and CloudCover.

The agreement specified a termination date of March 31, 2011, but also stated that it could be renewed by agreement of the parties. On April 1, 2011, the parties agreed in writing to extend the consulting agreement to June 30, 2011. After that date, MDC continued to perform services until December 2011.

MDC sent invoices to CC on a monthly basis. CC made partial payments totaling approximately \$62,000 in March, May, June, September, October, and November 2011, leaving a balance of approximately \$150,000. CC issued some warrants to MDC during the period in which it made partial payments.

On January 31, 2012, CCRS and MDC entered into a written agreement by which MDC agreed to provide consulting services “with emphasis on managing systems

integration services.” With respect to compensation, the 2012 agreement provided, “All compensation hereunder shall be payable to Consultant by the 15th of each month for the previous month’s work,” without any reference to investor funding. MDC sent invoices to CCRS between March and August 2012, but it appears that CCRS did not make any payments to MDC. It further appears that CC, CCRS, and CCRE issued some warrants to MDC between 2012 and 2014.

In April 2017, MDC commenced this action against CC, CCRS, and CCRE, alleging that the defendants breached the 2011 and 2012 agreements by not paying MDC’s invoices in full. The defendants asserted counterclaims of fraud, breach of contract, and civil theft. CC and CCRS also commenced a separate action against Kevin Murphy and Jon Dressen, the principals of MDC. The district court later consolidated the two cases. In March 2018, the district court denied CC, CCRS, and CCRE’s motion for summary judgment on MDC’s breach-of-contract claims and granted MDC’s motion for summary judgment on CC, CCRS, and CCRE’s counterclaims.

The case was tried to a jury on three days in May 2018. At the outset of trial, MDC voluntarily dismissed its claims against CCRE. MDC’s remaining claims were three breach-of-contract claims, two claims against CC (one for each half of 2011) and one claim against CCRS (for 2012). In a special verdict, the jury found that CC is liable to MDC in the amount of \$150,185 for services performed pursuant to the 2011 agreement and that CCRS is liable to MDC in the amount of \$59,350 for services performed pursuant to the 2012 agreement. The district court entered judgment, including interest, in the amounts of

\$153,084 against CC and \$60,017 against CCRS. Neither CC nor CCRS filed a post-trial motion. CC appeals.

DECISION

CC argues in its five-page informal brief that the judgment should be reversed on the ground that CC is not yet obligated to pay MDC's invoices because CC has not yet received \$3,000,000 in investor funding, which CC asserts is a condition precedent to its contractual obligation to pay the full amount of MDC's invoices. Because CCRS has not appealed, we need not review the jury's verdict with respect to the 2012 agreement.

We begin by identifying the principles that guide our appellate review. Because CC did not file a post-trial motion for judgment as a matter of law, *see* Minn. R. Civ. P. 50.02, our review is limited to determining “whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment.” *Gruenhagen v. Larson*, 246 N.W.2d 565, 569 (Minn. 1976). The latter question—whether the findings sustain the conclusions of law and the judgment—is presumed because CC does not argue that the district court erred in its jury instructions. Accordingly, the instructions that were given “are the law of the case,” *Wolner v. Mahaska Indus., Inc.*, 325 N.W.2d 39, 42 (Minn. 1982), and the sufficiency of the evidence is “determined by application of the rules of law laid down in the charge,” *Coenen v. Buckman Bldg. Corp.*, 153 N.W.2d 329, 334 (Minn. 1967). In determining whether the evidence is sufficient to satisfy the criteria stated in the jury instructions, we consider the evidence in a light most favorable to the prevailing party. *See Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 229 (Minn. 2010); *Lester Bldg. Sys. v.*

Louisiana-Pac. Corp., 761 N.W.2d 877, 881 (Minn. 2009); *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 155 (Minn. 1982).

Before addressing CC's arguments, we note that our review is further limited by appellant's decision not to order a transcript. In general, the appellant is responsible for ordering the necessary transcripts of district court proceedings. Minn. R. Civ. App. P. 110.02, subd. 1(a); *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995). The appellant must order the transcripts that are "sufficient to show the alleged errors and all matters necessary for consideration of the questions presented." *Truesdale v. Friedman*, 127 N.W.2d 277, 279 (Minn. 1964). In this case, CC ordered a transcript of only some of the trial, specifically, some (but not all) of the testimony of MDC's principals, Kevin Murphy and Jon Dressen.

The partial transcript reveals that MDC's principals testified that CC was contractually obligated to pay MDC's invoices in full. Dressen testified that CC was obligated to pay MDC's invoices as they became due and that the \$3,000,000 investor-funding clause was not a condition precedent to CC's payment obligation. Dressen testified further that the \$3,000,000 clause, which he called a "backstop clause," required CC to immediately pay off any outstanding invoices upon receiving \$3,000,000 in investor funding. Similarly, Murphy testified that "the agreement was to pay on the 15th and that the understanding was that [CC] would make best efforts upon the cash available to pay." Murphy also testified that the purpose of the \$3,000,000 clause was to ensure immediate payment of any outstanding invoices if and when CC received \$3,000,000 in investor funding. Both Dressen and Murphy specifically testified that the \$3,000,000 clause was

not a condition precedent to CC's payment obligation. MDC also introduced exhibits to prove that CC had made partial payments of some of MDC's invoices.

Before trial, CC submitted proposed jury instructions, including the following proposed instruction on the law concerning a condition precedent:

A condition precedent is one which must occur before the duty to perform a contract or part of a contract. The existence of conditions precedent calls for performance of some act or the happening of some event after the contract is entered into, and upon performance or happening of which an obligation to perform is made to depend. Indeed, no rights or obligations accrue to a party unless each condition precedent is performed or otherwise occurs. When a condition precedent is not satisfied, it relieves the party to a contract of any obligation to perform. No particular words are needed to form an express contractual condition.

The district court did not use the condition-precedent instruction requested by CC. We do not know why because CC did not provide this court with a transcript of the instructions conference. But the district court incorporated CC's theory of the case in the instructions to some extent by instructing the jury as follows:

A contract term is ambiguous if it is reasonably susceptible to more than one interpretation.

The first contract between Murphy Dressen Consulting, LLC and CloudCover, Ltd. (January 3, 2011) contains an ambiguity as to the terms of payment. Plaintiff claims the amounts billed were to be paid monthly unless the company lacked sufficient funds to pay, in which case payment could be deferred but the amounts billed remained due and owing. Defendant claims no payment is due to Murphy Dressen Consulting, LLC, until such time as CloudCover, Ltd. obtains \$3,000,000 in bridge funding.

The jury should resolve this ambiguity in the contract by considering evidence of the mutual intent of the parties at

the time the contract was executed. The jury may also consider as part of the evidence the contract terms that are not ambiguous.

If the intent of the parties cannot be determined from the evidence, the ambiguous terms may be construed against the drafter.

In its special verdict, the jury found that CC breached the 2011 agreement with respect to the first half of 2011 and that CC owes MDC \$74,025 for those services. The jury also found that CC agreed to extend the 2011 consulting agreement until the end of 2011, that CC breached the extended agreement by failing to pay for services performed in the second half of 2011, and that CC owes MDC \$76,160 for those services.

CC seeks reversal based primarily on legal argument concerning the meaning of section 4 of the 2011 agreement. But the district court determined that the agreement was ambiguous and asked the jury to resolve the ambiguity by considering the evidence of the parties' intent. To prevail, CC must show that MDC's evidence is insufficient to prove, as a factual matter, that the parties intended that CC would be obligated to pay MDC's invoices as they were issued. To reiterate, we must consider the evidence in the light most favorable to the prevailing party. *See Kidwell*, 784 N.W.2d at 229; *Lester Bldg. Sys.*, 761 N.W.2d at 881; *Hudson*, 326 N.W.2d at 155. We conclude that the evidence in the limited appellate record—specifically, the testimony of MDC's principals, Murphy and Dressen—is more than sufficient to prove that CC was obligated to pay each of MDC's monthly invoices by the 15th day of the following month.

Thus, the evidence is sufficient to support the jury's verdict.

Affirmed.