

To snag \$2.3M defense verdict, pair must overcome bad facts

Client alleged breach of buyout agreement

By Pat Murphy

patrick.murphy@lawyersweekly.com

No lawyer wants to open a trial by acknowledging that his client's actions were "stupid and reckless."

But as Boston attorney Kurt B. Fliegauf can attest, sometimes it's the only way to proceed.

"If you have bad facts, get them out to the jury quickly, acknowledge them, and try to take the air out of it," Fliegauf said. "Then move on to your issues and fight on that battleground."

Fliegauf put that philosophy to the test recently during opening arguments in a hotly contested business case in Essex Superior Court, deliberately not skirting the fact that his client, Lawrence Shutzer, was the subject of a damning contempt order.

The decision to address the contempt issue head on paid off for Fliegauf and his Conn Kavanaugh co-counsel, Andrew R. Dennington. The jury was able to put Shutzer's acknowledged wrongdoing to one side and award the 90-year-old entrepreneur \$2,317,000 on his breach-of-contract counterclaim against the clothing business Shutzer once co-owned, Red Rock Trading Co.

Fast-track case

Shutzer has been a mover and shaker in the clothing industry for more than a half-century. The Swampscott resident is perhaps best known for building up his family's clothing company, William Barry.

In 2011, Shutzer joined with Ronald Petrucci to start Red Rock, an outdoor apparel company based in Salem. The relationship soured, and in November 2014 Petrucci agreed to buy out Shutzer's 50 percent ownership stake in Red Rock.

Under the terms of the deal, the parties agreed that the purchase price would be based on Red Rock's 2014 net profit, with a maximum price of \$2.9 million.

In March 2015, Red Rock and Petrucci sued in Essex Superior Court, alleging that Shutzer had set up a competing company that was attempting to sell clothing based on Red Rock's designs.

The plaintiffs' suit included claims for misappropriation of trade secrets, conversion, breach of



Merrill Shea

Boston lawyers Andrew R. Dennington (left) and Kurt B. Fliegauf

fiduciary duty, breach of contract, and unfair and deceptive trade practices in violation of G.L.c. 93A.

Shutzer filed a counterclaim for breach of contract, alleging that Petrucci refused to pay him what he was owed for his shares of Red Rock under the terms of the buyout.

According to Fliegauf, several strategic decisions he and Dennington reached during the course of the litigation were in consideration of their client's advanced age.

First, they filed a motion to place the matter on the court's fast track trial calendar under a state law allowing for expedited proceedings in cases involving parties 65 and older.

"Given Larry's age, we thought that justice delayed would be justice denied," Fliegauf said.

The court initially scheduled trial for December 2015, later postponing the date to April.

"It was pretty remarkable to have a complex case like this tried in 13 months," Dennington said.

Before trial, the plaintiffs sought to hold Shutzer in contempt for violating a preliminary injunction entered in the case to protect Red Rock's clothing designs. Last October, Judge Richard E. Welch III found Shutzer in contempt for engaging in an "extensive scheme" with certain employees of Red Rock in an attempt to "steal" and "pirate" Red Rock's designs.

In awarding the plaintiffs' attorneys' fees and expenses, Welch wrote that it was "clear and undoubted" that Shutzer was in contempt of the court's order prohibiting the use of Red Rock proprietary information.

According to Fliegauf, he and Dennington decided not to seek a stay while Shutzer appealed the contempt finding since it was not in their client's best interest to delay the trial given his advanced age.

The defense attorneys did file motions in limine to exclude or limit the introduction of evidence of the contempt findings at trial, but Judge James F. Lang ruled that Welch's findings were admissible in their entirety with the exception of certain credibility determinations.

Head-on approach

Fliegauf said he didn't underestimate the challenge posed by the admission of the contempt findings.

"We certainly recognized that we had an uphill battle and that we were probably starting the trial down by a couple of points," he said.

The defense team decided to acknowledge the contempt findings up front while underscoring the fact that Welch had been unable to find any damages flowing from Shutzer's wrongful conduct.

In his opening statement at trial, Fliegauf told the jury in plain terms that his client's actions were "stupid and reckless."

By adopting that strategy, he and Dennington felt they would be in a better position to put the issue behind them and turn to the unfairness of allowing Petrucci to retain the benefit of 100 percent ownership of Red Rock without paying for it.

"Part of the strategy was to make the jury impatient at the fact that Red Rock was going to beat a dead horse by continuing to talk about the contempt decision when we acknowledged what we did was wrong," Dennington added.

At trial, the plaintiffs argued that an implied term of the buyout agreement was Petrucci's exclusive use of Red Rock's designs, and that Shutzer had breached the contract by attempting to use those designs in a competing business.

But Fliegauf disputed any notion that his client had breached the buyout.

"The buyout agreement did not have a noncompete in it, and when the buyout agreement was be-

VERDICT REPORT

Action: Unfair and deceptive trade acts in violation of G.L.c. 93A (plaintiff's claim); breach of contract (defendant's counterclaim)

Injuries alleged: Attempted theft of clothing designs (plaintiff's claim); breach of corporate buyout agreement (defendant's counterclaim)

Case name: *Red Rock Trading Co., Inc., et al. v. Shutzer, et al.*

Court/case no.: Essex Superior Court, No. 2015-00341-B

Judge: James F. Lang

Amount: \$682,750 (for the plaintiff); \$2,317,000 (for the defendant)

Date: April 25, 2016

Attorneys: Anthony M. Metaxas, Keith L. Sachs and Shaun Khan, of Metaxas, Brown, Pidgeon, Beverly (for the plaintiff); Kurt B. Fliegauf and Andrew R. Dennington, Conn, Kavanaugh, Rosenthal, Peisch & Ford, Boston (for the defendant)

ing negotiated, Larry indicated that he intended to continue working. So our point was that that buyout agreement was limited to the purchase of Larry's stock and did not control or affect the future relationship between the parties," Fliegauf said.

Fliegauf credited the fact that Shutzer was convincing when he told the jury that, while he regretted what he had done, at the time he thought his actions regarding the Red Rock clothing designs were permissible.

Control or cede

Veteran trial attorneys agree that dealing with bad facts directly is often the best course if the lawyer has confidence in the way the client will handle the tough questions.

"You either control the narrative or you cede the narrative," said commercial litigator Daniel J. Lyne of Murphy & King in Boston. "If they don't get an answer to a bad fact, juries will provide their own answer. And that's dangerous."

Lyne credited Fliegauf and Dennington for addressing a "terrible" fact head on and acknowledging that their client did something inappropriate,



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— Daniel J. Lyne, Boston

while at the same time pointing out to the jury that the contempt finding was not relevant to their client's entitlement to enforce the buyout agreement.

Trial attorneys also can try deflection when facing a bad set of facts — pointing to "good" facts about the client or bad facts about the other side, said Springfield business litigator James F. Martin. But when settlement is not an option, Martin agreed that it's often best to deal with bad facts in a straightforward manner.

"I'll advise my client that we need to be ahead of the curve on these negative facts because whether it's a judge or a jury, if they're hearing it for the first time from the other side, it's much more powerful," the Robinson Donovan lawyer said.

Unfinished business

After a three-week trial in April, the jury deliberated for seven hours over two days, concluding that Shutzer had not breached his buyout agree-

ment. Based on Red Rock's actual net profits for 2014, the jury found that Shutzer was entitled to \$2.317 million under the terms of the buyout.

However, the jury also found that Shutzer had engaged in unfair business practices and awarded the plaintiffs \$300,000, doubling the award to \$600,000 under Chapter 93A. It also awarded the plaintiffs a total of \$82,750 in damages on various related claims, leaving Shutzer ahead by \$1,634,250.

Fliegauf said both sides will file motions for judgment notwithstanding the verdict.

The plaintiffs contend the jury's award of contract damages to Shutzer was inconsistent with its finding that the plaintiffs were not in breach of the buyout agreement. But Fliegauf said there was no inconsistency since there could be no breach until the jury determined the final purchase price based on Red Rock's 2014 net profits, making the \$2,317,000 currently due and payable.

The plaintiffs were represented by Beverly attorneys Anthony M. Metaxas, Keith L. Sachs and Shaun Khan.

Sachs told Lawyers Weekly that Lang indicated at a May 23 status conference that he would not include in the final judgment the \$2.317 million entered on the jury's verdict form for Shutzer.

But Fliegauf said the judge had not made an explicit ruling on the issue. He added that he was confident his client would get the money the jury said he was owed when all is said and done.

Fliegauf said his client also will file a motion for judgment notwithstanding the verdict with respect to the \$600,000 awarded to the plaintiffs on the 93A claim. According to Fliegauf, the plaintiffs failed to introduce any evidence of damages from Shutzer's attempt to copy Red Rock's designs, meaning that they cannot establish an essential element of a claim for relief under G.L.c. 93A, §11.

Welch's contempt findings could be critical on that issue and ultimately helpful to Shutzer's cause, Fliegauf said.

"We also got from Judge Welch's contempt decision the acknowledgement that there were no lost sales as a result of the use of Red Rock's designs," Fliegauf said, noting that the plaintiffs stipulated that there was no diminution in the value of Red Rock's trademark as a result of the defendant's actions.

"We don't think they presented evidence of any kind of damages whatsoever," Fliegauf said. **MLW**

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