

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN N. XEREAS,	:	
	:	
Plaintiff,	:	Docket No. CA 12-456
	:	
vs.	:	Washington, D.C.
	:	Friday, November 16, 2018
	:	3:21 p.m.
MARJORIE A. HEISS, ET AL,	:	
	:	
Defendants.	:	
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TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE DEBORAH A. ROBINSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: ERIN GLAVICH, Esquire
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Silver Spring, MD 20910

For the Defendant: WILLIAM T. O'NEIL, Esquire
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Court Reporter: CRYSTAL M. PILGRIM, RPR, FCRR
United States District Court
District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

1 P-R-O-C-E-E-D-I-N-G-S

2 THE DEPUTY CLERK: This is civil case year 2012-456,
3 John N. Xereas versus Marjorie A. Heiss et al. For the
4 plaintiff, Erin Glavich. For the defense William O'Neil. This
5 is a continuation of a jury trial.

6 THE COURT: Good afternoon to all of you. As you
7 know, we received a note from the jury. Ms. Lesley has already
8 shared the note with you. It of course reads quote, "Are there
9 specific jury instructions on deliberations for the affirmative
10 defenses?"

11 In our effort to speak with you and ultimately to
12 resolve this question, we realized again that again the jurors
13 may have identified typographical errors in the verdict sheet.
14 I note that the page with the caption defendant's affirmative
15 defenses is misleading to the extent that there is only a
16 single affirmative defense. The page captioned plaintiff's
17 affirmative defenses likewise suggest that there is an
18 affirmative defense other than failure to mitigate.

19 Additionally, in our abbreviated review of the portion of
20 the transcript of the instructions, transcribed by the court
21 reporter who was present at the time, it appears that I
22 inadvertently omitted the instruction proposed by the
23 defendants regarding mitigation. We were looking as of a
24 moment ago to find what instruction you proposed, Ms. Glavich,
25 on behalf of Mr. Xereas. As of the time we took the bench, we

1 had not yet located it. Can you address that please? In other
2 words, whether the plaintiff proposed an instruction. Good
3 afternoon.

4 MS. GLAVICH: Good afternoon.

5 I am not sure if we had previously proposed one, but we
6 are okay using the one that the defendants proposed.

7 THE COURT: It would be necessary for me to edit the
8 instruction the defendants proposed and read the edited version
9 so that it applies to plaintiff because as written, the
10 instruction concerns the defendant's assertion of an
11 affirmative defense. Do you acknowledge that?

12 MS. GLAVICH: Yes.

13 THE COURT: Bear with me just one moment.

14 (Pause.)

15 THE COURT: I believe it is appropriate to read the
16 first paragraph, but not the second. As I read the second
17 paragraph and would you look at the second paragraph, a single
18 sentence Mr. O'Neil please since it is you who drafted this.

19 Do you have your copy Ms. Glavich?

20 MS. GLAVICH: I have it on my computer.

21 THE COURT: Thank you.

22 The second paragraph reads quote, "If defendants prove
23 all elements of this defense by a preponderance of the
24 evidence, then defendants are not liable for plaintiff's
25 resulting damages." That sentence is, that sentence could be

1 regarded as inconsistent with the final sentence of the first
2 paragraph which I believe more accurately states the governing
3 law and that is quote, "Plaintiff Xereas may not recover
4 damages for any portion of his injury which he could have
5 avoided through the exercise of reasonable care and prudence."
6 As written, the second sentence suggests there's no recovery at
7 all.

8 MR. O'NEIL: Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MR. O'NEIL: We agree and we would agree to strike
11 the second paragraph.

12 THE COURT: Thank you. In that event, this is what
13 the Court will read: Defendants have asserted as an
14 affirmative defense that if plaintiff successfully proves a
15 breach of contract claim, then his damages are limited by his
16 failure to mitigate his damages.

17 The law requires that an injured party take all the
18 reasonable steps it can to avoid further injury and reduce its
19 loss. Plaintiff Xereas may not recover damages for any portion
20 of his injury which he could have avoided through the exercise
21 of reasonable care and prudence.

22 Plaintiff has asserted as an affirmative defense that if
23 defendants successfully prove a breach of contract claim, then
24 their damages are limited by their failure to mitigate their
25 damages.

1 The law requires that an injured party take all the
2 reasonable steps it can to avoid further injury and reduce its
3 loss. Defendants may not recover damages for any portion of
4 their injury which they could have avoided through the exercise
5 of reasonable care and prudence. Is that satisfactory, Ms.
6 Glavich?

7 MS. GLAVICH: Yes, Your Honor.

8 THE COURT: Mr. O'Neil?

9 MR. O'NEIL: Yes, Your Honor.

10 THE COURT: Thank you.

11 (Jury present.)

12 THE COURT: Members of the jury, good afternoon.

13 THE JURY: Good afternoon.

14 THE COURT: Members of the jury, we received the note
15 which reads as follows quote, "Are there specific jury
16 instructions on deliberations for the affirmative defenses?"
17 The answer to that question is yes. I will read the
18 instruction now. Do not be alarmed if you are not able to
19 write it verbatim because again, we will ensure that a printed
20 copy of the instruction is given to you within the next few
21 minutes.

22 The instruction reads, the instruction has two parts
23 because defendants and plaintiff asserted the same affirmative
24 defense. Defendants have asserted as an affirmative defense
25 that if plaintiff successfully proves a breach of contract

1 claim, then his damages are limited by his failure to mitigate
2 his damages.

3 The law requires that an injured party take all the
4 reasonable steps it can to avoid further injury and reduce its
5 loss. Plaintiff Xereas may not recover damages for any portion
6 of his injury which he could have avoided through the exercise
7 of reasonable care and prudence.

8 Plaintiff has asserted as an affirmative defense that if
9 defendants successfully prove a breach of contract claim, then
10 their damages are limited by their failure to mitigate their
11 damages.

12 The law requires that an injured party take all the
13 reasonable steps it can to avoid further injury and reduce its
14 losses. Defendants may not recover damages for any portion of
15 their injury which they could have avoided through the exercise
16 of reasonable care and prudence. That completes the
17 instruction.

18 I realize, all of us realize that there may have been some
19 confusion generated by the plural defenses on the verdict form.
20 In other words, there is a page which reads defendant's
21 affirmative defenses and plaintiff's affirmative defenses.
22 That may have left you to wonder what the other affirmative
23 defenses are. Again, you have through your diligence, your
24 attention to this matter identified a typographical error and I
25 will suggest that you simply strike the "s" after defense.

1 That way the verdict sheet, the caption will be consistent with
2 the verdict sheet. In other words, the heading of that page
3 will read defendant's affirmative defense. The other page will
4 read plaintiff's affirmative defense.

5 Thank you so very much. I will ask you to please return
6 with the marshal to resume your deliberations, thank you.

7 Excuse me, just one moment. When Ms. Lesley brings you
8 the printed instruction, she will also ask you about your
9 preference for how late you would like to continue today.
10 Thank you so much.

11 (Jury excused to resume deliberations @ 3:35 p.m.)

12 THE COURT: I thank all of you very much. When we
13 have a further response to that question that I posed at the
14 end, we will of course share it with you immediately.

15 (Recess pending verdict @ 3:36 p.m.)

16 (Trial resumed @ 4:09 p.m.)

17 THE COURT: Good afternoon. We received a note
18 advising that the jury has reached a verdict. So we are ready
19 to proceed. We take the verdict essentially through the Deputy
20 Clerk of Court who will proceed in the customary format. My
21 intention given the lateness of the hour and the length of time
22 that the jurors have served is to thank them for their service
23 and excuse them to return to the jury lounge.

24 Is there anything anyone wishes to address before the
25 jurors enter, Ms. Glavich?

1 MS. GLAVICH: No, Your Honor.

2 THE COURT: Mr. O'Neil?

3 MR. O'NEIL: No, Your Honor.

4 THE COURT: Very well, thank you very much.

5 (Jury present.)

6 THE COURT: Members of the jury, thank you. Please
7 be seated.

8 We received your note indicating that you have reached
9 a verdict. Ms. Lesley as Deputy Clerk will now inquire of you.

10 THE DEPUTY CLERK: Will the foreperson of the jury
11 please rise.

12 Has the jury agreed upon a verdict?

13 JURY FOREPERSON: Yes.

14 THE DEPUTY CLERK: May I have the form please.

15 Has plaintiff John Xereas proven by a preponderance of the
16 evidence that defendants breached the written term of the
17 operating agreement?

18 JURY FOREPERSON: Yes.

19 THE DEPUTY CLERK: Has plaintiff John Xereas proven
20 by a preponderance that he suffered damages as a result of
21 defendant's breach?

22 JURY FOREPERSON: Yes.

23 THE DEPUTY CLERK: What is the total damages
24 plaintiff is entitled to recover for this claim?

25 JURY FOREPERSON: One hundred and six thousand

1 dollars plus legal fees.

2 THE DEPUTY CLERK: Have defendants proven by a
3 preponderance of the evidence that Mr. John Xereas failed to
4 mitigate his damages by not taking reasonable steps to avoid
5 further injury and reduce his loss?

6 JURY FOREPERSON: No.

7 THE DEPUTY CLERK: If you awarded plaintiff John
8 Xereas damages and answered Number One above affirmatively, by
9 what amount of monetary damages do you decrease his award as a
10 result of plaintiff's failure to mitigate damages, if any,
11 reduce damages?

12 JURY FOREPERSON: None.

13 THE DEPUTY CLERK: Have defendants proven by
14 preponderance of the evidence that plaintiff breached the
15 written terms of the operating agreement?

16 JURY FOREPERSON: No.

17 THE DEPUTY CLERK: The verdict is for the plaintiff.
18 Have defendants proven by a preponderance that they
19 suffered damages as a result of plaintiff's breach?

20 JURY FOREPERSON: We said no, so we don't answer,
21 right?

22 THE DEPUTY CLERK: I apologize.

23 Have defendant's proven by a preponderance of the evidence
24 that plaintiff John Xereas breached his duty of good faith and
25 fair dealing?

1 JURY FOREPERSON: No.

2 THE DEPUTY CLERK: Have defendants proven by a
3 preponderance that they suffered damages as a result of
4 plaintiff's breach?

5 JURY FOREPERSON: No.

6 THE DEPUTY CLERK: The verdict is for the plaintiff.
7 Have defendants proven by a preponderance of the
8 evidence that plaintiff John Xereas has knowledge, had
9 knowledge of and intentionally interfered with defendant's
10 existing business relationships in a way that caused a third
11 party to breach or end the relationship with defendants?

12 JURY FOREPERSON: No.

13 THE DEPUTY CLERK: Have defendants proven by a
14 preponderance of the evidence that Mr. John Xereas had
15 knowledge of and intentionally interfered with defendant's
16 prospective business relationships in a way that caused a third
17 party to breach or in the relationship with the defendants?

18 JURY FOREPERSON: No.

19 THE DEPUTY CLERK: Have defendants proven by a
20 preponderance of the evidence that plaintiff John Xereas owed
21 fiduciary duties to the LLC?

22 JURY FOREPERSON: No.

23 THE DEPUTY CLERK: Have defendants proven by a
24 preponderance of the evidence that plaintiff John Xereas is
25 liable for conversion?

1 JURY FOREPERSON: Yes.

2 THE DEPUTY CLERK: If you answered yes to question 7,
3 what is the total damages defendants are entitled to recover
4 for this claim?

5 JURY FOREPERSON: Return of computer.

6 THE DEPUTY CLERK: Has plaintiff proven by a
7 preponderance of the evidence that defendants failed to
8 mitigate their damages by not taking reasonable steps to avoid
9 further injury and reduce their loss?

10 JURY FOREPERSON: No.

11 THE DEPUTY CLERK: Your deliberations have now ended.

12 THE COURT: Now members of the jury beginning with
13 the person seated in the first seat, Juror Number 1. I will
14 ask whether the verdict as announced by your foreperson is
15 indeed your verdict.

16 Juror Number 1?

17 The Juror: Yes.

18 Juror Number 2?

19 THE JUROR: Yes.

20 THE COURT: Juror Number 3.

21 THE JUROR: Yes.

22 THE COURT: Juror Number 4?

23 THE JUROR: Yes.

24 THE COURT: Juror Number 5. Juror Number 6?

25 THE JUROR: Yes.

1 THE COURT: Juror Number 7?

2 THE JUROR: Yes.

3 THE COURT: And Juror Number 8?

4 THE JUROR: Yes.

5 THE COURT: Madam Foreperson, you may be seated,
6 thank you very much.

7 At this time I extend my thanks on behalf of the entire
8 Court for the exemplary manner in which you have served. You
9 have been here for two weeks. You have been available for
10 proceedings even when all of us were not in place to begin at
11 the designated time.

12 You have listened quite carefully and attentively to a
13 week's worth of evidence, to the arguments of counsel and to my
14 instructions and taken very carefully the obligation to truly
15 deliberate, to consult with each other, to ask questions of me
16 when you had questions and to work to arrive at a verdict. For
17 all of that we all thank you. Your service has ended.

18 I'm told that the jury lounge has closed for the day.
19 Otherwise, I would have directed you to check in with the jury
20 lounge. Ms. Lesley will leave a message to ensure that the
21 jury lounge officials, the jury office officials know that your
22 service has ended. Unless you receive an instruction from
23 Ms. Lesley or someone in the jury office, there is no further
24 action that is necessary for you to take.

25 I'm sure all of you have belongings in the jury

1 deliberation room. This is your opportunity to gather them
2 before you are excused. Again, we offer our profound thanks
3 for your service. Thank you.

4 The marshal will assist you in gathering your belongings
5 and, as I said, after that you are free to go. Thank you so
6 much. Everyone have a good weekend and I hope you're looking
7 forward to an enjoyable Thanksgiving.

8 THE JURY: Thank you.

9 (Jury excused @ 4:20 p.m.)

10 THE COURT: Now counsel, is there anything further,
11 Ms. Glavich?

12 MS. GLAVICH: No, Your Honor.

13 THE COURT: Anything further on behalf of the
14 defendant, Mr. O'Neil?

15 MR. O'NEIL: Not at this time, Your Honor.

16 THE COURT: Are there motions that either side
17 contemplates?

18 MR. O'NEIL: Yes, Your Honor.

19 THE COURT: Should we set a date at this time?

20 MR. O'NEIL: Twenty-eight days.

21 THE COURT: The two of you may take a moment and
22 confer. I believe it is -- my preference is to have an entire
23 briefing schedule; in other words, the date for any motion that
24 either side intends to file, the corresponding opposition and
25 the reply, particularly in view of the upcoming holidays. So

1 we will go off the record for one moment. I will just ask that
2 you speak with each other please so that our record will be
3 clear.

4 (Pause.)

5 THE COURT: Let me ask whichever one it is to make
6 the proposal to approach the podium microphone please.

7 MR. O'NEIL: Your Honor, as we discussed defendant's
8 motion will be December 17th, the proposed date and an
9 opposition on January 17th, with a reply due two weeks from
10 that which I think is the 31st.

11 THE COURT: Do you believe we should schedule
12 argument? Will that be a request?

13 MR. O'NEIL: Yes, Your Honor.

14 THE COURT: Very well, I believe we should strive to
15 put the date on the calendar now. Give us just one moment
16 please to look for a date in February for oral argument.

17 Would the two of you agree upon a date and time during
18 the first or second week of February please.

19 Mr. O'Neil?

20 MR. O'NEIL: Can we do Thursday the 7th of February?

21 THE COURT: Ms. Glavich?

22 MS. GLAVICH: Yes, Your Honor that works.

23 THE COURT: Did you agree upon a time?

24 MR. O'NEIL: Whatever works best for Your Honor.

25 THE COURT: I will suggest 10:30 a.m. or 2 p.m.

1 MS. GLAVICH: Ten-thirty works for me.

2 MR. O'NEIL: Ten-thirty is fine, Your Honor.

3 THE COURT: Very well, 10:30 a.m. on Thursday,
4 February 7th.

5 MR. O'NEIL: Thank you, Your Honor.

6 THE COURT: Twenty nineteen.

7 Is there anything further on behalf of the plaintiff?

8 MS. GLAVICH: No, Your Honor.

9 THE COURT: Thank you very much, Ms. Glavich.

10 Mr. O'Neil, is there anything further on behalf of the
11 defendants?

12 MR. O'NEIL: No, Your Honor.

13 THE COURT: Very well, I thank all of you very much.
14 Before you excuse yourselves, I will ask you to make yourselves
15 available to Ms. Lesley should she have questions of you
16 concerning any aspect of the record. She will file the verdict
17 form. If you would like to look at it now you certainly may,
18 but I will ask you to do so at her desk please so that you'll
19 all be mindful not to make any markings on it or otherwise
20 alter it since she must file it as written.

21 Anything further?

22 THE COURT: Ms. Glavich, Mr. O'Neil?

23 MR. O'NEIL: No, Your Honor.

24 THE COURT: Very well, I thank all of you. I thank
25 the parties very much. This has been an experience which I'm

1 sure all of you regard as a demanding one. We have been here
2 essentially for two continuous weeks from morning through
3 evening. I will say morning through evening and beyond since I
4 have had occasion to keep you here even after the jury was
5 excused. Everyone please have a safe holiday and we will
6 proceed in accordance with the schedule that we just set.
7 Thank you very much.

8 (Proceedings adjourned at 4:30 p.m.)

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1 CERTIFICATE

2 I certify that the foregoing is a true and correct
3 transcript, to the best of my ability, of the above pages, of
4 the stenographic notes provided to me by the United States
5 District Court, of the proceedings taken on the date and time
6 previously stated in the above matter.

7 I further certify that I am neither counsel for, related
8 to, nor employed by any of the parties to the action in which
9 this hearing was taken, and further that I am not financially
10 nor otherwise interested in the outcome of the action.

11
12 _____
/s/ Crystal M. Pilgrim, RPR, FCRR

Date: December 8, 2018

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