

SUNDANCE SPAS, INC., Plaintiff

v.

CLARK MANUFACTURING, INC., Roland Clark, Galvin Bartlett, and Charles Johnson, Defendants.

CLARK MANUFACTURING, INC., Roland Clark, Galvin Bartlett, and Charles Johnson, Cross-Complainants

v.

JACUZZI INC., Sundance Spas, Inc., Ernst & Young, LLP, The Swenson Corporation, and The Swenson Group, Cross-Defendants.

SUNDANCE SPAS, INC., Cross-Complainant

v.

CLARK MANUFACTURING, INC., Roland Clark; Charles Johnson; and Galvin Bartlett, Cross-Defendants.

Superior Court of Riverside County, Riverside, CA. May 5, 2004

George J. Barron, Catherine M. Lee, and Jonathan McNeil Wong, Donahue Gallagher Woods LLP, Oakland, CA for Plaintiff, Cross-Defendant and Cross-Complainant Sundance Spas, Inc. and Cross-Defendant Jacuzzi Inc.

James L. Hudgens and Michael W. McCann, Cappello & McCann, LLP, Santa Barbara, CA for Defendants, Cross-Complainants, and Cross-Defendants Clark Manufacturing Inc., Roland Clark, Galvin Bartlett, and Charles Johnson.

John M. Caron, Reback, McAndrews & Kjar, Manhattan Beach, CA for Cross-Defendants The Swenson Corporation and The Swenson Group.

Robert B. Hubbell and Deborah Rosenthal, Heller Ehrman White & McAuliffe, LLP, Los Angeles, CA for Cross-Defendant Ernst & Young, LLP.

JUDGE: Commissioner Joan F. Ettinger

ALLEGATIONS

Plaintiff Sundance Spas, Inc. alleges breach of contract against defendant Clark Manufacturing, Inc. for failure to pay warranty claims. Sundance claimed that it was owed \$7,535,920 (less vendor credits of \$158,159) for payments made on warranty claims on customers' spas manufactured by Clark Manufacturing.

Clark Manufacturing, Roland Clark, Charles Johnson, and Galvin Bartlett cross-complained against Sundance and Jacuzzi Inc. alleging breach of contract and fraud and claimed damages of approximately \$50 million for lost profits. The Clark Parties also cross-complained against Ernst & Young alleging professional negligence and negligent misrepresentation, and against The Swenson Corporation and The Swenson Group alleging professional negligence, breach of contract, and breach of fiduciary duty.

FACTS

On June 3, 1998, plaintiff Sundance (Chino), purchased the assets of Clark Manufacturing (Corona), a spa manufacturing business, for approximately \$30 million. Pursuant to the asset purchase agreement, Clark Manufacturing was obligated to reimburse Sundance for any money paid on valid warranty claims relating to spas it manufactured. Subsequently, Sundance claimed that Clark Manufacturing failed to pay money owed for warranty claims under the asset purchase agreement.

Sundance sued Clark Manufacturing and its owners/officers, Roland Clark, Galvin Bartlett, and Charles Johnson, alleging breach of contract. The Clark Parties then filed a cross-complaint against Sundance and its parent company, Jacuzzi Inc. (West Palm Beach, Fla.), alleging breach of contract and fraud; against Ernst & Young, the accounting firm who conducted an independent audit of Clark Manufacturing in May 1998, alleging

professional negligence and negligent misrepresentation; and against their own accounting firm, The Swenson Corporation (Rancho Cucamonga) and the investment advisory group hired to advise them regarding the asset purchase agreement, The Swenson Group, alleging professional negligence, breach of contract, and breach of fiduciary duty.

Sundance contended that Clark Manufacturing breached the asset purchase agreement by failing to pay money owed under it for warranty claims on spas, and that the individual defendants had to indemnify Sundance for all damages due to this failure to pay.

The Clark Parties contended that Sundance and Jacuzzi violated the asset purchase agreement and defrauded them into signing the agreement. The Clark Parties alleged that payments of warranty claims under the asset purchase agreement was supposed to be consistent with how Clark Manufacturing processed and paid previous warranty claims. They asserted that Sundance was overly generous with the way it handled customers' warranty claims.

Ernst & Young contended that the Clark Parties were not its clients. Therefore, they were not permitted under California law to assert a claim of professional negligence against Ernst & Young. Ernst & Young also asserted that it was not negligent in the performance of the audit and did not make any negligent misrepresentations.

The Swenson parties denied that they breached their fiduciary duty to the Clark Parties and contended that they met the professional standard of care for accountants.

RESULT

Prior to trial, the Clark Parties dismissed their cross-complaint against the Swenson parties. At the conclusion of the evidence, the Honorable Commissioner Joan F. Ettinger

granted Ernst & Young's motion for directed verdict after finding that there was no sufficient evidence of causation or that Ernst & Young made any negligent misrepresentation.

On January 21, 2004, the jury found for Sundance on its Complaint against the Clark Parties and awarded \$6,902,049. After subtracting \$3,239,398 in stipulated deductions (\$1.5 million holdback from the purchase price pursuant to the asset purchase agreement and \$1,739,398 for warranty reserve account), the net verdict was \$3,662,651.

On the Clark Parties' cross-complaint, the jury and the Court found for Sundance.

Sundance filed motions for indemnification, attorney fees and costs, which were granted, and was awarded \$1,473,797 against all the Clark Parties. The Court determined the accrued interest on the holdback amount and reduced the verdict by \$225,411. The Court awarded Sundance prejudgment interest of \$249,551 which was added to the judgment for a total judgment of \$5,160,588.

The Clark Parties' motion for new trial against Ernst & Young was denied and the Clark Parties have filed an appeal. The Clark Parties' motions for new trial and for judgment notwithstanding the verdict against Sundance were also denied.

TRIAL DATA

The trial lasted for 4 months and the jury deliberated for 5 days. The jury poll was 12-0 for breach of contract claim; 10-2 for damages; and 12-0 for breach of contract and fraud cross-claims.