D/a 12-7-88

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

FILED
SEP 1988
CLERK, SUPREME COURT
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W. W. GAY MECHANICAL CONTRACTOR,
INC., ETC.,

Petitioner,

vs.

CASE NO. 72,357

WHARFSIDE TWO, LTD., and
CHANEN CONSTRUCTION COMPANY, INC.,

Respondents.

BRIEF OF PETITIONER
W.W. GAY MECHANICAL CONTRACTOR, INC.

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STATEMENT OF THE CASE AND FACTS

Reference to Appendix will be by "A- ."

This case essentially revolves around two problems with the domestic water supply system of the Sheraton at St. Johns Place (hereafter, "the Hotel"): an odor in the water, and corrosion to the pipes, causing leaks. These two problems, in turn, arise out of the construction and use of the domestic water supply system for the Hotel, which opened for business on October 6, 1980. (T:119-120).

Gay was the plumbing subcontractor under the general contractor, Chanen. Gay operated under a written contract (PX:1). Gay's plumbing sub-contract was completed October 4, 1980, only two days before the hotel opened for business. Chanen Construction Company withheld $230,000.00 from the final payment to Gay, although Chanen was paid in full by the owner, Wharfside (T:133,1204). Gay timely filed a proper Mechanics' Lien on the hotel property (PX:3).

Gay filed one suit in the Circuit Court, Duval County, Florida, against both Wharfside and Chanen (R:1-19). The suit against Wharfside, as owner was to foreclose the Mechanics' Lien. The count against Chanen was to recover the balance due under the contract, with interest, costs, and attorney's fees which were provided for in the subcontract (PX:1). Wharfside counterclaimed against Gay for damages (R:33-38), Chanen counterclaimed against Gay for damages, (R:71-77).

By agreement of the Court and the parties, the Mechanics'

Lien foreclosures and the action against Chanen by Gay, along with the countersuits and cross-action were all tried before one jury. In effect, the Court used the jury verdict as advisory in ruling on the Mechanics' Lien foreclosure.

The testimony at the trial revealed that Wharfside had expended or would probably expend more than $30,000.00 in repairs to leaks in the plumbing (T:231) and technical assistance over a period of time after Gay's warranty time had expired. See also (T:501 and T:514).

The trial lasted nine days and the jury returned a verdict, the form of which was proposed by Defendants (R:458-460). The effect of the verdict was to award Gay $200,000.00 from both Chanen and Wharfside, together with interest; to award Wharfside, the owner, $30,000.00 against Chanen, the General Contractor, together with interest.

Thereafter, on November 3, 1986, the trial court rendered its Final Judgment (R:537-540), awarding the damages, interest, costs, and attorneys fees. An appeal was taken from that Final Judgment to the District Court of Appeal, First District, which reversed the trial Court with opinion.

The First District Court of Appeal held (A-1) that the trial court should have admitted proffered evidence of lost profits sustained by the hotel. The admission of this testimony was denied by the trial court as too speculative. The District Court of Appeal found that while there was no "track record", certain projected occupancy rates should have been sufficient for the jury

to consider whether loss of profits due to occupancy less than the projected rates were provable, even though this was a new hotel without any record of profits.

The District Court of Appeal also held that the jury verdict was inconsistent when it awarded the owner $30,000.00 damages from the General Contractor while at the same time holding that the subcontractor, Gay, had done no wrong.

Petitioner seeks here a reversal of the opinion of the District Court of Appeal, First District, and a reinstatement of the Final Judgment rendered by the Trial Court.

SUMMARY OF ARGUMENT

The Petitioner contends that the testimony proferred by the owner on the subject of lost profits was so speculative as to require the Trial Court to exclude it from consideration by the jury. The Defendant's hotel had just opened for business and had no track record, nor any real basis for a computation of lost profits. The Petitioner contends that the award of $30,000.00 to the Owner-Defendant from the General Contractor, without a jury finding that Plaintiff-Subcontractor was negligent, was supportable by facts showing that the Owner-Defendant has been required to expend approximately $30,000.00 on repairs to leaking water pipes, where there was evidence that the leaks were due to circumstances outside any action by Plaintiff-Subcontractor.

ARGUMENT

POINTS OF ARGUMENT

POINT ONE: DID THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA, ERR IN ITS HOLDING THAT THE PROFFERED EVIDENCE ON LOST PROFITS WAS NOT SO SPECULATIVE AS TO REQUIRE ITS EXCLUSION.

POINT TWO: DID THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA, ERR IN ITS HOLDING THAT THE AWARD OF $30,000.00 IN DAMAGES TO THE OWNER, CO-DEFENDANT, FROM THE GENERAL CONTRACTOR, CO-DEFENDANT, WAS SUCH A FLAW IN THE VERDICT AS TO REQUIRE RE-TRIAL OF THE ISSUES; AND REPRESENTED AN INCONSISTENCY IN THE JURY'S VERDICT.

POINT ONE

DID THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA, ERR IN ITS HOLDING THAT THE PROFFERED EVIDENCE ON LOST PROFITS WAS NOT SO SPECULATIVE AS TO REQUIRE ITS EXCLUSION.

The Defendant's hotel had no "track record". It was a new hotel in Jacksonville, Florida and any number of attributes could affect its occupancy.

> "The general rule is that the anticipated profits of a commercial business are too speculative and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to this rule, however, to the effect that the loss of profit from the interruption of an established business may be recovered where the plaintiff makes if reasonable certain by competent proof what the amount of his actual loss was. Proof of the income and of the expenses of the business for a reasonable time anterior to the interruption charged, or facts of equivalent import, is usually required."
>
> New Amsterdam Caualty Company v. Utility Battery Mfg. Co., 122 Fla. 718, 166 So. 856 (1935).

The trial court in the present case held that there were too many speculative items. The Defendant contended that prospective hotel guests were staying away because of the odor in the domestic water system. It had no hard proof that this was so--just speculation. This speculation involved:

(a) Was there an objectionable odor?

(b) Was an objectionable odor caused by Plaintiff?

(c) Did any prospective guests refuse to come?

(d) Did the guests who might have refused to come do so because of an odor in the water?

(e) How many prospective guests refused to come?

(f) Were there other reasons such as room rates, or other complaints which could have influenced prospective guests?

(g) What amount of profit could have been lost?

The jury would have been required to guess about most, if not all, of these items.

There could not possibly have been such certainty as was indicated as necessary in the case of Twyman v. Roell, 123 Fla. 2, 166 So. 215 (1936).

There are three general principles which the courts apply to determine when lost profits will be allowed as compensation:

> 1. In both tort and contract actions, lost profits will be allowed only if their loss is proved with a reasonable degree of certainty.
>
> 2. ...lost profits will be allowed only if the court is satisfied that the wrongful act of the defendant caused the loss of profits.

> 3. In contract acting lost profits will be allowed only if the profits were reasonably within the contemplation of the defaulting party at the time the contract was entered into. 17 Fla. Jur.2d 82, Sect. 76.

As a rule when recovery of loss of profits is denied, the profits are those contingent on changing conditions and speculations and not those which constitute the difference between the agreed price of something contracted for and its ascertainable cost or value. 17 Fla. Jur.2d 83. See Welbilt Corp. v. All State Distributing Co., 199 So.2d 127. See also Hernandez v. Leiva, 391 So.2d 292. The former Manager of the hotel, called as a witness for Defendants, stated that there are many reasons why occupancy of a hotel may be low (T:1106).

The proffered testimony of the defendants expert, Dr. Joseph Perry, was:

> "I can't pinpoint any cause." (T:1172).

The Defendants attempted to introduce evidence that a certain projected occupancy rate was prepared prior to construction for the purpose of seeking financing for the construction; that after opening for business the hotel did not meet that projected rate. Using this deficiency Defendants then multiplied the loss of rate by the room rent it would have charged, and then wanted to take a percentage of that loss as lost profit. The trial court held that this approach was too speculative, particularly in light of admissions that there might be any number of reasons why people would choose not to come to the hotel, and insufficient proof as to the cause of low occupancy.

> "Proof of income and of the expenses of the business for a reasonable time anterior to the interruption charged, or of facts of equivalent import is usually required. However, recovery for lost profits is not generally allowed for injuries to a new business with no history of profits. The prospective profits of a new business are generally regarded as being too remote, contingent, and speculative to meet the legal standards of reasonable certainty."

Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So.2d 958 (Fla. 4th DCA 1984).

It was held in the case of Daytona Migi of Jacksonville, Inc. v. Daytona Automotive Fiberglass, Inc., 388 So.2d 228 (Fla. 5th DCA 1980) that:

> "In order to recover lost profits, there must be an ongoing business with established sales record and proven ability to realize profits at an established rate."

See also Innkeepers International, Inc. v. McCoy Motels Ltd. and McCoy Motels, Inc., 324 So.2d 676 (Fla. 4th DCA 1975), and F.A. Conner v. Atlas Aircraft Corporation, 310 So.2d 382, (Fla. 3d DCA 1975).

A series of cases from the Third District Court of Appeal have clearly held that:

> "It is axiomatic that to establish lost profits, a litigant must prove that his business has earned profits for a reasonable time anterior to the breach."

E.F.K. Collins Corp. v. SMMG, Inc., 464 So.2d 214 (Fla. 3d DCA 1985).

See also Liza Danielle, Inc. v. Jamko, Inc., 408 So.2d 735 (Fla. 3d DCA 1982).

See also Wash-Bowl, Inc. v. Leonard L. Wroton, 432 So.2d 766 (Fla. 2d DCA 1983).

The case of F. A. Conner v. Atlas Aircraft Corporation, cited above states:

> "The guidelines for establishing lost profits of an established business...are set out in the landmark case of Twyman v. Roell, 1936, 123 Fla. 2, 166 So. 215. Such damages are recoverable if the loss of prospective profits is the natural result of the wrong and the amount can be established with reasonable certainty."

The proferred evidence failed on both counts.

POINT TWO

> DID THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA, ERR IN ITS HOLDING THAT THE AWARD OF $30,000.00 IN DAMAGES TO THE OWNER, CO-DEFENDANT, FROM THE GENERAL CONTRACTOR, CO-DEFENDANT, WAS SUCH A FLAW IN THE VERDICT AS TO REQUIRE RE-TRIAL OF THE ISSUES; AND REPRESENTED AN INCONSISTENCY IN THE JURY'S VERDICT.

The Appellant Chanen, in the Distrist Court, spends much time and effort discussing pipe corrosion, galvanic action, dielectric connectors, etc., but all of these items were part of conflicting testimony heard by the jury in reaching its final determination that the Appellee, Gay, should be paid for its work--not the full amount claimed but some portion of it. It was obvious that the portion not be paid was what the jury found was paid or likely to be paid for repairs. The testimony of the witness, Katherine Michels, indicated that a total of some $21,345.12 had been spent on leaks, $4,000.00 for new water treatment, and $7,400.00 for expert investigation and consultation. (T:501, 514, 517, and

531).

The defendant's own witness, Mr. Jack Seale, Vice President and Eastern Regional Manager of Chanen Construction Company, testified that there was not sufficient water pressure to flush the system properly (T:721) and then further, in answer to questions stated: (T:769-770)

> "Q.: You felt as an Engineer and as Project Manager and general over-all person in charge, you felt that W. W. Gay did an excellent job, did you not?
>
> A.: I did and I've said it many a time... .
>
> Q.: That they did an excellent job?
>
> A.: Yes, Sir.
>
> Q.: And actually there were no complaints about the workmanship?
>
> A.: None on my part.
>
> Q.: Or none that you know anything about?
>
> A.: No,Sir."

The witness, Carl Bowles, testified that the job was done in accordance with the plans and specifications (T:1372) and that the use of dielectric connectors was not the prevailing practice (T:1375-1377), that all work done by Gay was approved by both the project engineers and the architects (T:1403). This testimony was corroborated by the witness, Richard Tison. (T:1410-1412).

The District Court of Appeal found that the award of $30,000.00 damages from Chanen, the contractor, to Wharfside, the owner, was inconsistent with the jury's finding that the subcontractor, Gay, had done no wrong. The District Court of

Appeal reasoned that if Gay had done no wrong there could be no reason for the jury awarding the owner any damages from the general contractor who could only be liable vicariously because of fault in the subcontractor.

This feature of the opinion of the District Court of Appeal, while not directly conflicting with other opinions is ancillary to the main decision, and not supported, as stated by the case of North American Catamaran Racing Association, Inc. v. McCallister, 480 So.2d 669 (Fla. 5th DCA 1985) which held that party must object to the inconsistency before the jury is discharged.

Wharfside should get this $30,000.00 back from Chanen and that Gay should get $200,000.00 on its subcontract. By this arithmetic, the jury was deciding that out of the $230,000.00 remaining in Chanen's hands, Gay should receive $200,000.00, and Wharfside should recover $30,000.00, which it had already paid Chanen. The witness, Chanen, testified that Wharfside had paid the cost of repairs. (T:1209). By using the form of verdict supplied by the Defendants, the jury accomplished exactly that. The complaint of Appellants about the jury's comment on interest to be awarded is of no consequence. The trial court handled the matter of interest when it rendered the Final Judgment.

There was no indication whatever of any passion of prejudice involved in the verdict. It was clearly an effort to give each party what it was entitled to.

CONCLUSION

The evidence offered by the Defendants Wharfside and Chanen on the subject of lost profits was so uncertain and speculative as to be inadmissable. The verdict of the jury was not inconsistent. the decision of the First District Court of Appeal should therefore be reversed and the judgment of the trial court allowed to stand.

Respectfully submitted

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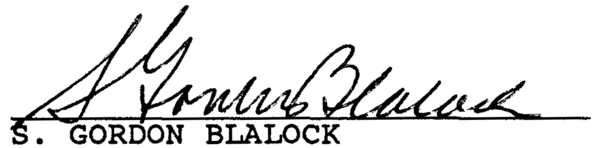
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to ROBERT C. GOBELMAN, ESQ., 1500 American Heritage Life Bldg., Jacksonville, FL 32202-3385; and J. RICHARD MOORE, ESQ., 500 N. Ocean Street, Jacksonville, FL 32202, by U.S. Mail, this 29th day of September, 1988.



S. GORDON BLALOCK