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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001189-MR
AND
NO. 2005-CA-001251-MR

T.A. BLAIR, INC. APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 01-CI-01065

FIDELITY CONSTRUCTION COMPANY, INC. APPELLEE/CROSS-APPELLANT

OPINION AFFIRMING IN PART
AND VACATING AND REMANDING IN PART

** ** ** ** ** ** ** **

BEFORE: WINE JUDGE; BUCKINGHAM AND EMBERTON SENIOR JUDGES.[1]

BUCKINGHAM, SENIOR JUDGE: T.A. Blair, Inc., appeals and Fidelity Construction Company, Inc., cross-appeals from an order of the Warren Circuit Court in which the court, pursuant to a prior remand from this court, ordered Blair to pay $90,135.53 in lost expectation damages as a result of Blair's breach of repair contracts between the parties.

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[1] Senior Judges David C. Buckingham and Thomas D. Emberton sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Blair contends that the circuit court failed to follow this court's directions upon remand and erroneously awarded expectation damages. In its cross-appeal, Fidelity contends that the court erred by failing to award additional expectation damages for the lost overhead component built into the contract prices. For the reasons stated below, we affirm the circuit court in Blair's appeal, but vacate and remand in Fidelity's cross-appeal.

FACTUAL AND PROCEDURAL BACKGROUND

This is the second time this case has been before this court. In the prior appeal and cross-appeal, Case Nos. 2003-CA-000935-MR and 2003-CA-001035-MR, this court remanded the case for a determination of whether Fidelity met the requisites for entitlement to expectation damages. See Fidelity Construction Company, Inc. v. T.A. Blair, Inc., WL 1699770 (Ky.App. 2004)(Fidelity I).

The parties agree that the relevant facts are accurately recounted in this court's opinion in Fidelity I. Those facts may be summarized as follows.

Fidelity and Blair are both Kentucky corporations headquartered in Warren County, Kentucky. Tim Howell is the president of Fidelity, and Tom Blair is the sole shareholder in Blair. Fidelity is primarily engaged in the business of general contracting, while Blair owns several commercial properties in and around Bowling Green that it leases to various businesses.

On April 16, 1998, a severe hail storm struck the Bowling Green area and damaged several properties owned by Blair. In order to maximize recovery from Blair's property insurer, Westfield, Tom Blair contracted with Scott deLuise, a public adjustor, to assist Blair in its negotiations with Westfield. At some point, deLuise asked Howell to prepare storm damage repair estimates on behalf of Fidelity.

In mid-July 1998, Fidelity submitted written repair proposals for four of Blair's properties. These included the Greenwood Plaza property, the Big B Cleaners property, the Bluegrass Copy Products property, and the South Central Bell property. All four proposals contained detailed repair estimates and included figures taking into account a 10% profit margin and a 10% charge for overhead expenses. In addition, all four proposals contained "acceptance" language and a clause subjecting the proposals to "additional terms and conditions" in a separately executed construction agreement. Both Howell and Tom Blair signed the proposals on behalf of their respective companies.

On July 17, 1998, Howell and Blair signed a document entitled "Agreement." Among other things, Article 2 of this document specifically incorporated the four written proposals that had previously been signed by both Howell and Blair. According to the terms of the 1998 agreement, Fidelity would repair the damage done to the four properties for a total price of $738,387.37.

At trial, Blair testified that he entered into this agreement solely for the purpose of enabling his company to present Westfield with repair estimates during their settlement negotiations. He further testified that any work to be performed by Fidelity was conditioned upon him giving Fidelity the "green light" to begin repairs. However, Howell testified that at all times he expected to eventually perform the work specified in the 1998 agreement. Regardless of the parties' differing beliefs, it is undisputed that Blair never gave Fidelity permission to commence the repair work under the 1998 agreement.

On July 21, 1998, Fidelity submitted another written repair proposal for Blair's FiServ property. Blair signed this proposal on December 10, 1998, and the repair work for this property was completed in early summer 1999 for the agreed price of $38,908.00. Unlike the previous four signed proposals, the FiServ proposal was not made subject to the "additional terms and conditions" in the separately executed construction agreement.

On April 5, 2000, Fidelity submitted yet another written repair proposal for Blair's National City Bank property, which Blair signed on April 10, 2000. In addition to containing the similar "acceptance" language that was present in the first four written proposals, the National City Bank proposal contained a handwritten note stating that the proposal was "subject to previously executed AIA agreement." Both Howell and Blair signed their initials next to this handwritten language. The price of this proposal totaled $352,504.15.

Throughout August, September, and October 2000, Howell sent Blair several inquiries via letters and facsimiles regarding the planned repair work at the National City Bank property. These correspondences generally inquired as to when Fidelity would be given permission to begin the repair work. In addition, one of these inquiries explained that Blair could choose between two methods for repairing the roof at National City Bank. At trial, Blair testified that during this time period, he informed Fidelity that he was not ready to proceed with the work at that time.

In December 2000 Blair finally settled all its insurance claims with Westfield. In May 2001 Howell once again sent Blair a letter asking when Fidelity could commence repair work on the National City Bank property. On June 18, 2001, after this latest inquiry purportedly went unanswered, attorneys for Fidelity sent Blair a letter stating that Fidelity had suffered damages as a result of Blair's alleged breach of the April 10, 2000, agreement (2000 agreement). This notice informed Blair that a legal action would be filed by Fidelity unless Blair was willing to discuss a settlement of Fidelity's alleged damages.

On August 20, 2001, Fidelity filed a civil complaint in the Warren Circuit Court alleging that Blair had breached the 2000 agreement. Specifically, Fidelity alleged that Blair had “wrongfully refused, without legal or factual justification or excuse, to permit Fidelity to perform repairs” as specified in the 2000 agreement.

Approximately one year later, after a good deal of discovery had taken place, Fidelity filed an amended complaint alleging that Blair had also breached the 1998 agreement. Therein, Fidelity alleged that Blair had “wrongfully refused” to permit Fidelity to perform the repairs specified in the 1998 agreement.

On February 4-5, 2003, after still more discovery had taken place, a bench trial was held in the Warren Circuit Court. After the trial was concluded, and after both parties were given time to submit written memoranda in support of their respective positions, the court entered findings of fact, conclusions of law, and judgment on March 12, 2003. The court found that Fidelity and T.A. Blair had entered into two binding contracts, and, that by “preventing Fidelity's performance”, Blair had breached both the 1998 and 2000 agreements. On the issue of damages, the trial court awarded Fidelity reliance damages, but it declined to award expectation damages; i.e., the court declined to award Fidelity damages for its lost profits under the agreements. The court gave Fidelity 30 days in which to submit proof regarding its reliance damages.

Fidelity subsequently filed a motion to alter, amend, or vacate the judgment. Specifically, it asked the court to add a finding that Fidelity did perform some repair work for Blair between the signings of the 1998 and 2000 agreements. In addition, Fidelity once again asked the court to award expectation damages.

On April 14, 2003, the court entered an order granting Fidelity's motion in part and denying it in part. The court entered a finding that Fidelity did perform repair work on Blair's FiServ property between 1998 and 2000. However, the court denied Fidelity's request that it be awarded expectation damages.

On April 23, 2003, by an agreed order of the parties, the court noted that Fidelity had declined to take proof on the issue of reliance damages, and it entered an order declaring the March 12, 2003, judgment to be final and appealable. Fidelity's appeal and Blair's cross-appeal followed.

On July 30, 2004, this court rendered an unpublished opinion in this case. The opinion upheld the circuit court's determination that Blair had breached the 1998 and 2000 agreements. However, the opinion concluded that the circuit court had failed to properly consider Fidelity's request for expectation damages. This court remanded the case for a determination by the circuit court of whether Fidelity satisfied the "foreseeabilty" and "reasonable certainty" requirements for entitlement to expectation damages.

Following remand, in an order entered on February 23, 2005, the circuit court determined that Fidelity had met the requisites for entitlement to expectation damages. The court awarded expectation damages of $90,135.53, which represented the sum of the line-items designated as "profit" in the agreements. The court, however, rejected Fidelity's request for an additional $96,737.25 in expectation damages for line-items designated as "overhead." These appeals followed.

T.A. BLAIR APPEAL – CASE NO. 2005-CA-001189-MR

Blair first contends that the circuit court failed to follow this court's instructions upon remand in Fidelity I. The general idea of this argument is that upon remand the circuit court was to consider "**all**" facts and circumstances surrounding the execution of the contracts in determining whether the foreseeability and reasonable certainty requirements had been met and that the court failed to do so. We disagree.

The mandate of the this court's opinion in Fidelity I was that, upon remand, the circuit court should make findings regarding whether the foreseeability and reasonable certainty prerequisites for expectation damages had been met in this case and, if so, to make an award for such damages. The court complied with this mandate. The court's understanding of this mandate is well-illustrated by the following discussion at the outset of the court's February 23, 2005, order:

> The Court of Appeals remanded this case so that this Court could determine two things. First, this Court must determine whether Fidelity is entitled to recover expectation damages. Second, if Fidelity is entitled to expectation damages, this Court must then decide how much Fidelity is entitled to recover.

> The Court of Appeals held that Blair improperly prevented Fidelity from performing under the contracts it entered into with Blair. To recover expectation damages in the form of lost profits, the non-breaching party must prove two things. First, the non-breaching party's lost profits must have been reasonably foreseeable at the time the parties entered into the contract. Kentucky Consumers Oil Co. v. General Bonding Warehousing Corp., Ky., 184 S.W.2d 972, 974 (1945). Second, the amount of the non-breaching party's lost profits must be proven to a degree of reasonable certainty. Illinois Valley Asphalt, Inc. v. Harry Berry, Inc., Ky., 578 S.W.2d 244, 245-246 (1979). Mere uncertainty as to the amount does not preclude one's right of recovery or prevent a jury decision awarding damages. Johnson v. Cormney, Ky.App., 596 S.W.2d 23, 27 (1979), *overruled on other grounds by* Marshall v. City of Paducah, Ky.App., 618 S.W.2d 433 (1981). Under this analysis, Fidelity has sufficiently shown it is entitled to recover expectation damages. The total amount due Fidelity from Blair is $90,135.53.

The foregoing demonstrates that the court properly understood and implemented this court's mandate upon remand. In support of its argument, Blair cites to various statements made by the court in the course of the hearings upon remand; however, in light of the plain language of its February 23, 2005, order as cited above, and upon review of the order as a whole, we are unpersuaded that the statements cited by Blair establish a misunderstanding by the court of its duties upon remand.

Blair also argues that the court erred in awarding damages because Fidelity failed to prove its damages were foreseeable based on the circumstances in which the contracts were executed and, moreover, failed to prove any damages with reasonable certainty.

We begin our discussion of this argument by noting that the issue of expectation damages was tried by the circuit court sitting without a jury. The issue is before this court upon the circuit court's findings of fact and conclusions of law and upon the record made before it. Accordingly, appellate review of the circuit court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. Ky. R. Civ. P. 52.01; Largent v. Largent, 643 S.W.2d 261, 263 (Ky. 1982).

"A factual finding is not clearly erroneous if it is supported by substantial evidence." Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002). "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." Id. The circuit court's application of law is, of course, reviewed de novo. Monin v. Monin, 156 S.W.3d 309, 315 (Ky. App. 2004).

The court addressed Fidelity's entitlement to expectation damages in its February 23, 2005, order as follows:

> Fidelity has proven that at the time it submitted the proposals and signed the contracts with Blair that it intended to earn a profit on the work that would be performed. First, the nature of the relationship between the parties was commercial. These proposals by Fidelity to Blair were proposals for work to be done. The record does not reflect that Fidelity undertook to do these repairs for free. Therefore, a profit motive would have been reasonable. Second, a profit calculation was part of the proposals. On four of the five contracts, after a subtotal was derived, a ten per cent (10%) profit margin was added to the price. Therefore, at the time of contracting, it was foreseeable that profits were expected, as they were included in the final price of each proposal. Sagamore Coal Co. v. Clark, Ky., 109 S.W.2d 349, 352 (1908).
>
> Second, Fidelity has proven its lost profits to a degree of reasonable certainty. Although a clause in each of the contracts states that Blair has the ability to increase or decrease the amount of work Fidelity would complete on each of the proposals, such clause does not negate the fact that a

stated profit was contemplated at contract formation. Although contracts attempt to freeze in time the terms of a contract, sometimes forces beyond the contracting parties' control interfere and may cause the cost of performance to exceed what was originally anticipated. It is even conceivable that cost of performance may sometimes be less than projected. Because of this, there is an inherent fluidity to the performance of contracts that nevertheless requires the contracting parties to abide by the terms to which they mutually agreed, absent changes so extreme and unexpected as to make rescission of the contract the proper equitable remedy. However, that is not the situation with which this Court is faced.

There was always the potential for the *final* profit earned by Fidelity to be something more or less than what was contracted for in the bid because of the clause that allowed Blair to unilaterally alter portions of the proposals. This change, though, is hypothetical and speculative. Fidelity was able to show, to the penny, what it expected its profit to be had performance been completed in accordance with the proposals it submitted, and Kentucky case law does not seem to require a more detailed calculation.[[2]]

Therefore, as a starting point, the contract amount of $186,878.78 represents the profit and overhead sought by Fidelity as expectation damages. However, overhead is not the same as profit. In fact, the two items are polar opposites. Overhead includes business expenses, such as rent or insurance, that cannot be charged to a particular part of the work or product. They constitute monetary outlays Fidelity would have had to incur as another cost of performing the work it planned to do for Blair.[[3]] Profit, on the other hand, is

[2] Here, the order contained a footnote which stated as follows: "'Profits which would have been realized if a contract had been performed may be recovered as damages for its breach, provided they are susceptible of being ascertained with reasonable certainty and are not remote, conjectural and speculative.' Eastern Ky. Lumber & Development Co. v. Waddell, Ky. 239 S.W.2d 68, 71 (1951). The profit quote from the proposal is about as certain as the profit expectation can be. That estimate is not conjectural or speculative despite the fact that the ultimate profit may vary."

[3] Here, the order contained a footnote which stated as follows: "It is unfortunate that Fidelity, in its proposals to Blair, computed the 10% profit *before* adding 10% for overhead. Had Fidelity

the amount of revenue that remains after all costs (of which overhead is one) have been paid. Profit is income. Overhead is an expense. Therefore, because Fidelity was able to avoid having to pay overhead because it never performed work for Blair, and because it has not shown that it has incurred costs for overhead in anticipation of performing for Blair, overhead cannot be awarded as part of an expectation damages recovery. Only money that Fidelity expected to pocket at the end of the day is recoverable as lost profits.

The respective profits sought on each of the five proposals are as follows:

1025 Lovers Lane	$6,064.00
Bluegrass Products	$ 9,829.00
Southern Lanes	$40,829.00
Big B Cleaners	$ 4,173.90
National City Bank	<u>$29,125.35</u>
Total Profit	**$90,135.53**
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This figure is the maximum profit Fidelity is entitled to recover as expectation damages. However, Blair argues that there are at least three downward adjustments that should be made to this figure should the Court decide to award any damages at all. These proposed adjustments will be addressed individually.

First, Blair argues that the profit from the Greenwood Plaza proposal (including Big B Cleaners) should be subtracted because the property had been sold and Blair was therefore not required to make any repairs under the purchase contract. This argument is without merit in computing Fidelity's expectation damages. Although it makes a huge difference to Blair that it is not obligated to make repairs to a building it no longer owns, this fact is of little consequence to Fidelity who expected to perform work on the building for which it prepared repair proposals. If the building had been sold at the time Blair entered into these contracts with Fidelity, then Blair should have been forthcoming with the information that

charged Blair 10% for overhead first (with the other costs of production), and then 10% for profit, the amount Fidelity would have recovered under this Court's award of lost profits would have been much higher."

the estimates it sought from Fidelity were only for insurance purposes – not for potential work to be completed by Fidelity. There is no evidence in the record that Fidelity knew, at the time it entered into its contracts with Blair, that it would not be allowed to complete the work for which it drafted proposals. Therefore, the profit for these particular projects should remain unchanged.

Second, Blair argues that recovery by Fidelity for the air conditioning units Blair had replaced before Fidelity submitted its National City Bank proposal would be inappropriate. Although this is a more convincing argument for a reduction in profits, it is also without merit. Blair argues that Fidelity should not be allowed to profit for work Fidelity did not perform (and would have never performed) because the air conditioners were functional at the time the proposals were submitted. The logic that Fidelity should not be paid for an item that Blair would have removed from the proposals is very appealing. Ideally, Blair would have utilized its contractual right to decrease the amount of work done when it came to the newly replaced air conditioners.

However, to grant this particular credit to Blair requires mind reading by this Court as to what Blair "obviously" would have done. The Court cannot engage in entertaining hypothetical situations that have the effect of altering the clear terms of the contract. It is conceivable that Blair would have told Fidelity not to perform work on the air conditioners, as they were not damaged. However, if the air conditioners were functional at the time Fidelity submitted its proposal to Blair, it begs the question of why Blair allowed Fidelity to quote a price to repair air conditioners that were not broken in the first place. This Court cannot impute to Fidelity knowledge that it knew the air conditioners were in working order because nothing in the record would substantiate such an imputation. Fidelity contracted to perform the work listed on the proposals and that is the work for which it would have profited. Therefore, this Court denies Blair's request for a credit as to the air conditioners at Greenwood Plaza and the National City Bank Building.

Finally, Blair argues that Fidelity's profit, as far as the National City Bank Building proposal is concerned, should be

> limited to only those costs relating to the roof and caulking. The basis for this assertion is a letter written by Howell to Blair that states, "the roof and caulking was all [Howell] was interested in." Although this statement expresses Fidelity's exasperation in its dealing with Blair, this statement does **not** create a counteroffer anticipating an acceptance. The original contract executed between Fidelity and Blair always remained in play, and the contracted-for profits on the National City Bank project should not be disturbed, regardless of Fidelity's apprehension and impatience of work not yet begun. Fidelity expected to do *all* of the work on the National City Bank proposal, and that amount is what he is entitled to under an expectation damages recovery.

As noted in this court's opinion in Fidelity I, in Kentucky it is well-settled that in an action for breach of contract, the measure of damages "is that sum which will put the injured party into the same position he would have been in had the contract been performed." Perkins Motors, Inc. v. Autotruck Federal Credit Union, 607 S.W.2d 429, 430 (Ky.App. 1980). Further, where the breaching party has prevented the plaintiff from performing any part of the contract, the measure of damages is the net profit which would have been made; that is, the difference between the contract price and the reasonable cost of performance. See, e.g., Koplin v. Faulkner, 293 S.W.2d 467, 469 (Ky. 1956). In setting expectation damages upon remand, the court's task was to comply with the foregoing.

The court's factual determination that expectation damages were recoverable because lost profits were both foreseeable and ascertainable to a degree of reasonable certainty is supported by substantial evidence and, accordingly, is not clearly erroneous. The court based its decision upon the agreement as contained within the four corners of the contracts executed by the parties. The contracts themselves are sufficient evidence to support the court's finding that Fidelity is entitled to expectation damages in this case.

Further, the court's determination that expectation damages should include the $90,135.53 delineated in the contracts as profit margin is not clearly erroneous. The amount is derived directly from line-items contained in the contracts. As such, the figure is supported by substantial evidence.

In opposition to the court's finding that the full $90,135.53 profit-margin amounts listed in the contract should not be allowed, Blair cites to various evidence in the record which supports its contention that it would not have had some of the work specified in the contract performed under provisions of the contract that provided it with the right to make change orders. However, as noted in the opinion in Fidelity I, the right retained by Blair was "the right to make *reasonable* additions to or subtractions from the contemplated repair work."

The circuit court's findings that there should be no deductions for the sale of Greenwood Plaza subsequent to the execution of the contracts, the National City Bank air conditioners based upon their purported lack of a need of repair, and the National City Bank roofing based upon a letter that Blair had sent to Howell falls within the circuit court's province as fact-finder. The fact is that the contracts called for that work to be done, and Fidelity expected to earn profits under the contracts for doing that work. Moreover, Blair's approach to making adjustments is one-sided and speculative. Had the contracts actually been performed, there may have been countervailing change-orders to *increase* certain aspects of the repairs, with corresponding *upward* adjustments in the contract price.

In short, the method used by the circuit court in determining the profit component of expectation damages – the sum of the profits stated within the contracts - was not clearly erroneous. We are accordingly bound by the finding.

FIDELITY CONSTRUCTION COMPANY APPEAL –
CASE NO. 2005-CA-001251-MR

In its cross-appeal Fidelity contends that the court erred by denying its request for an additional $96,727.25 in expectation damages associated with overhead charges contained in the cost estimates.[4] Fidelity argues that if it is to be placed in the same position it would have been in had the contracts been performed – as is required under Kentucky law – then it must also be awarded the overhead component of the cost estimates. We agree.

We begin by recapitulating the circuit court's discussion of the issue in its February 23, 2005, order:

> Therefore, as a starting point, the contract amount of $186,878.78 represents the profit and overhead sought by Fidelity as expectation damages. However, overhead is not the same as profit. In fact, the two items are polar opposites. Overhead includes business expenses, such as rent or insurance, that cannot be charged to a particular part of the work or product. They constitute monetary outlays Fidelity would have had to incur as another cost of performing the work it planned to do for Blair.[[5]] Profit, on the other hand, is

[4] Blair's argument that Fidelity failed to preserve this issue for appellate review is without merit.
[5] Here, the order contained a footnote which stated as follows: "It is unfortunate that Fidelity, in its proposals to Blair, computed the 10% profit *before* adding 10% for overhead. Had Fidelity charged Blair 10% for overhead first (with the other costs of production), and then 10% for

> the amount of revenue that remains after all costs (of which overhead is one) have been paid. Profit is income. Overhead is an expense. Therefore, because Fidelity was able to avoid having to pay overhead because it never performed work for Blair, and because it has not shown that it has incurred costs for overhead in anticipation of performing for Blair, overhead cannot be awarded as part of an expectation damages recovery. Only money that Fidelity expected to pocket at the end of the day is recoverable as lost profits.

In short, the circuit court denied overhead on the basis that the amounts represented costs associated with "performing the work [Fidelity] planned to do for Blair" and "because Fidelity was able to avoid having to pay overhead because it never performed work for Blair."

In Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795 (3rd Cir. 1967), the court held:

> In general, overhead '. . . may be said to include broadly the continuous expenses of the business, irrespective of the outlay on a particular contract.' Grand Trunk W.R.R. Co. v. H. W. Nelson Co., 116 F.2d 823, 839 (C.A.6, 1941). Such expenses would include executive and clerical salaries, property taxes, general administrative expenses, rent, insurance, etc.

Id. at 798. As noted by the circuit court in this case, rent and insurance are also examples of overhead.

In summary, overhead generally represents *fixed expenses* that will be incurred by a business independent of the volume of work it performs and regardless of whether it performs a particular job. The general idea of allocating overhead to a

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profit, the amount Fidelity would have recovered under this Court's award of lost profits would have been much higher."

particular job, such as the jobs here, is to recover from each job performed over the course of a year a pro rata share of dollars sufficient to pay the fixed overhead expenses.

For this reason, we conclude that the circuit court's finding that "Fidelity was able to avoid having to pay overhead because it never performed work for Blair" is erroneous. In fact, even though the Blair work was not performed, Fidelity nevertheless had to incur its ongoing fixed overhead expenses such as executive and clerical salaries, property taxes, general administration expenses, rent, insurance, etc.

Fidelity expected to generate dollars out of the overhead component of its cost estimates on these jobs for the purpose of paying its fixed overhead expenses. When Blair breached the agreements, Fidelity was deprived of those dollars and, in order to pay the expenses, was constrained to pay the overhead expenses out of the profit margins from other projects.

As previously noted, in Kentucky it is well-settled that in an action for breach of contract, the measure of damages "is that sum which will put the injured party into the same position he would have been in had the contract been performed." Perkins, 607 S.W.2d at 430. If Fidelity is denied sums it anticipated recovering from the overhead component of its cost estimates it, simply put, will not be placed in the same position as if the contracts had been performed.

Neither party has cited us to any case directly on point. Nor could we find any Kentucky case directly addressing the issue. However, we agree with the conclusion of the Third Circuit in Vitex Manufacturing:

> Although there is authority to the contrary, we feel that the better view is that normally, in a claim for lost profits, overhead should be treated as a part of gross profits and recoverable as damages[.]

377 F.2d at 798. See also Buono Sales, Inc. v. Chrysler Motors Corp., 449 F.2d 715, 719-20 (3rd Cir. 1971) ("where a plaintiff's overhead or fixed expenses are not affected by defendant's breach of agreement, no deduction should be made for them in calculating profits which plaintiff would have made had it not been for the breach"); Forney v. Missouri Bridge and Concrete, Inc., 112 S.W.3d 471, 474 (Mo.App.W.D. 2003) ("in the absence of proof that the contractor/plaintiff saved overhead expenses as a result of the owner's breach of contract, overhead expenses are included in the lost profits damages award"); and Magnet Resources, Inc. v. Summit MRI, Inc., 723 A.2d 976, 986 (N.J.Super.App. 1998) (administrative expenses and plant overhead, to the extent reasonably allocable to a contract, are deductible from gross revenue to determine lost profits from breach of contract only if they are costs that have been "saved" because the non-breaching party has been excused from future performance under the contract).

Accordingly, we vacate and remand for entry of a judgment of an award to Fidelity for the overhead component of its cost estimates. However, if any of the overhead costs included in the cost estimates were variable in nature and were not incurred because Fidelity did not actually perform the Blair contracts, those amounts should not be included in the award. Magnet Resources, Inc. v. Summit MRI, Inc., supra.

For the foregoing reasons, we affirm upon the issues raised by T.A. Blair in its appeal. Upon Fidelity's cross-appeal, we vacate and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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