

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MALICH MOTORS, INC., a Washington
State Corporation d/b/a POWERBOATS
NORTHWEST,

Appellant,

v.

REGAL MARINE INDUSTRIES, INC., d/b/a
REGAL BOATS, a Florida State Corporation;
KYLE MAZANTI and “JANE DOE”
MAZANTI, and the marital community
comprised thereof,

Respondents.

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UNPUBLISHED OPINION

Armstrong, P.J. — Malich Motors, Inc., doing business as Powerboats Northwest (PBNW), appeals the summary dismissal of its breach of contract action against Regal Marine Industries, Inc. PBNW contends that the trial court erred in ruling that it provided insufficient proof of actual damages to bring the matter to trial. Finding no error, we affirm.

FACTS

PBNW was in the business of selling high performance boats and yachts. After boat manufacturer Regal approached it about becoming a Regal dealer, the two companies entered a one-year sales and service agreement in June 2004. The 2004 agreement described PBNW’s

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primary marketing area as “the area local to” the Tacoma-based business. Clerk’s Papers (CP) at 74, 169. Under the 2004 agreement, PBNW sold approximately 24 Regal boats primarily in the Tacoma-Seattle area and one boat in Whatcom County.

In 2005, Regal representative Kyle Mazanti and Joe Malich, the owner of PBNW, discussed entering a new agreement. According to Mazanti, Regal proposed that PBNW’s marketing area would be the Seattle business trading area, which included the Seattle-Tacoma area and its contiguous counties: Grays Harbor, Thurston, Pierce, Kitsap, King, Mason, and Snohomish. But when Malich proposed a new satellite location in Whatcom County and asked Regal to add the county to PBNW’s marketing area, Regal agreed to that.

The June 2005 agreement established a three-year term with June 30, 2008, as its expiration date. The 2005 agreement also stated that Regal could revise PBNW’s marketing area on an annual basis. The 2005 agreement added, however, that Regal could not appoint another authorized dealer in PBNW’s territory as long as PBNW complied with the agreement, and it gave PBNW time to cure any default. The 2005 agreement specified that PBNW’s primary marketing area, in which it would be the sole authorized dealer of Regal boats, would include these counties: Grays Harbor, King, Kitsap, Mason, Pierce, Snohomish, Thurston, and Whatcom.

In June 2006, PBNW lost its Tacoma lease. It had 30 days to find a new facility and moved in July to a larger and more expensive facility in Fife that increased its monthly overhead from \$2,500 to \$30,000. A subtenant initially shared that overhead but left in July 2007. PBNW never opened a facility in Whatcom County, but it did open new dealerships in Gig Harbor and Kirkland in 2007 and 2008. PBNW carried inventory from at least five different boat lines,

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including Regal.

PBNW became one of the top sellers of Regal boats, but it did not sell any of those boats in Whatcom County after entering the 2005 agreement. In August 2006, Sun Chaser Yachts, a boat dealer in Whatcom County, contacted Mazanti about selling Regal boats. In September 2006, before finalizing any deal with Sun Chaser, Mazanti presented PBNW with a new sales agreement that would run until September 2009 and would supersede the 2005 agreement. The revised marketing area in the proposed agreement did not include Whatcom County. After learning that Sun Chaser was to be the Regal dealer in Whatcom County, Malich refused to sign the proposed 2006 agreement.

Sun Chaser then entered an agreement with Regal that included Whatcom, Skagit, and Island counties in its marketing area, as well as parts of British Columbia. Both Sun Chaser and PBNW displayed Regal yachts at the 2007 Seattle Boat Show. Malich allegedly complained to Regal later that year about Sun Chaser's ability to sell products in Whatcom and King counties. But during its agreement with Regal, PBNW advertised and sold Regal boats throughout Washington and into Canada.

PBNW's sales of Regal boats were "booming" as late as September 2007, but by December 2007, boat sales in general were nonexistent. CP at 265, 350. Due in large part to its inability to obtain financing, PBNW was out of business by June 2008. It sued Regal for breach of contract in December 2008, and Malich filed for personal bankruptcy later that month. Textron, one of PBNW's creditors, subsequently obtained a \$400,000 judgment against the company.

In its complaint against Regal, PBNW alleged that the manufacturer breached the 2005 agreement by appointing Sun Chaser as an authorized dealer in Whatcom County and that the breach caused at least \$1 million in damages. Regal moved for summary judgment, arguing that it did not breach the 2005 agreement by contracting with Sun Chaser because the agreement allowed it to unilaterally revise PBNW's marketing area. Regal also argued that PBNW could not prove damages related to the loss of Whatcom County from its marketing area.

The trial court denied Regal's motion for summary judgment, finding material issues of fact regarding its alleged breach of the 2005 agreement. The court requested a new motion and response on the issue of damages, however, because Regal's position appeared to have merit. Regal argued that summary judgment was appropriate because any damages that PBNW suffered as a result of Sun Chaser's ability to sell Regal boats in Whatcom County were speculative. PBNW responded that its damages could be measured by calculating the gross profits it would have received from the 42 boats Regal sold Sun Chaser during the term of the 2005 agreement. PBNW also argued that it had suffered additional damages from Regal's breach in the form of increased overhead from the bigger facility it had leased after entering the 2005 agreement.

The trial court rejected PBNW's argument, concluding that its claim of damages was "pure speculation" given its financial condition, the market conditions, and the loss of its ability to obtain financing. Report of Proceedings (RP) at 12. The trial court granted Regal's motion and dismissed PBNW's complaint. The sole issue on appeal is whether PBNW provided proof of damages resulting from the alleged breach of the 2005 agreement sufficient to withstand Regal's motion for summary judgment.

ANALYSIS

I. Standard of Review

When reviewing a summary judgment decision, we engage in the same inquiry as the trial court. *Marshall v. Bally's PacWest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999). Summary judgment can be granted only if the pleadings, affidavits, depositions, and admissions on file show the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Marshall*, 94 Wn. App. at 377. The court must consider the facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 198, 943 P.2d 286 (1997).

Once the moving party meets its burden of showing that there is no issue of material fact and that it is entitled to judgment as a matter of law, the burden shifts to the nonmoving party to establish specific facts giving rise to a genuine issue of material fact. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). The nonmoving party may not rely on speculation, conclusory statements, or unsupported assertions that unresolved factual issues remain. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); *Marshall*, 94 Wn. App. at 377. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994).

II. Proof of Damages

A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Nw. Indep. Forest Mfrs. v.*

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Dep't of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995). The plaintiff must prove that the amount of damages claimed is necessary to place the plaintiff in the position it would have occupied had the duty been fulfilled. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 757 n.3, 162 P.3d 1153 (2007). Damages must be proved with reasonable certainty or supported by competent evidence in the record. *Hyde v. Wellpinit Sch. Dist. No. 49*, 32 Wn. App. 465, 470, 648 P.2d 892 (1982). Evidence of damage is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 510, 728 P.2d 597 (1986).

PBNW argues that it provided sufficient proof of damages related to both Regal's sale of 42 boats to Sun Chaser during the term of the 2005 agreement and the added expenses it incurred in moving to a larger facility. In a separate but related claim, PBNW argues that it was damaged by the profits lost due to the existence of another Regal dealer in its territory.

A. Sale of 42 Boats

Regal does not dispute that it sold 42 boats to Sun Chaser through June 30, 2008, the date that the 2005 agreement between PBNW and Regal expired. Regal sold these boats for \$3,370,804.00, and Malich stated in a supplemental declaration that PBNW's standard profit margin on sales of Regal boats was 21.5 percent through 2006. Therefore, according to PBNW, the damages due to Regal's breach in selling boats to Sun Chaser during the term of its agreement with Regal totaled \$724,722.86.

Regal challenges this claim on several grounds. It first cites Malich's deposition testimony

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attributing PBNW's demise to a lack of financing and the economic recession. Malich admitted that by 2008, PBNW was selling boats at "fire sale prices" to get rid of them due to pressure from Textron and other creditors. CP at 351-52. (PBNW was "out of trust" with its creditors because it had applied sales proceeds to other expenses instead of repaying its creditors. CP at 354.) Malich also asserted that a portion of PBNW's losses was due to losing Whatcom County as a primary marketing area, but when he was asked how to distinguish the damage due to that loss from the damage due to the economic recession, Malich replied, "It's almost impossible to figure." CP at 352. He then admitted that any such measure of damages would be speculative:

Q: I'm trying to figure out, really the question was, do you agree that you would have to speculate to come up with what kind of loss you experienced in 2008 that was attributable to not having Whatcom County as one of your primary marketing areas?

A: Yes.

Q: And same for 2007, right?

A: Yes.

CP at 352-53.

Regal argues that Malich's subsequent declaration about the damages related to its sale of 42 boats to Sun Chaser should not be allowed to contradict this clear deposition testimony. *See Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002) (when party has given clear answers to unambiguous deposition questions that negate the existence of a genuine issue of material fact, that party cannot create an issue of fact with an affidavit that contradicts, without explanation, his previous testimony). On appeal, PBNW attempts to explain Malich's deposition testimony by stating that the questioning there was directed not to the damages created by Regal's sale of boats to Sun Chaser during the contract period but to the losses PBNW suffered to its own

sales due to Sun Chaser's territorial competition. Even if this explanation is accurate, it undermines PBNW's related claim of damages based on Sun Chaser's competition in its marketing area.

Regal maintains that Malich's deposition testimony correctly characterized PBNW's damage claims because any damages resulting from the 42 boat sales are completely speculative. Given PBNW's problems in obtaining financing, Regal argues that it is pure conjecture to contend that the dealer could have found a way to purchase an additional \$3.3 million in inventory. Regal asserts that PBNW engages in further speculation by declaring that it could have sold all 42 boats at a high profit margin in the midst of the worst recreational boating retail sales market in history. PBNW's 2008 tax return showed a profit margin of less than 10 percent, and its creditors eventually repossessed at least 30 unsold boats. Although PBNW can show with certainty how many boats Regal sold to Sun Chaser, it is far less certain that PBNW could have purchased and resold those boats, or that the Northwest Washington and Southwest British Columbia retail customers who bought boats from the Blaine-based Sun Chaser would have purchased boats in Fife from PBNW. (Indeed, PBNW's position that it could have sold boats in these areas conflicts with its assertion that Regal dealers had exclusive marketing rights to the areas outlined in their agreements. As Regal points out, some of the Sun Chaser sales were to customers in areas that were never included in PBNW's marketing area. Thus, under PBNW's reading of its agreement with Regal, it would have had no ability to secure those sales.)

PBNW admits that it had trouble obtaining financing for additional boat purchases but contends that this problem did not surface until well after Regal installed a competing dealer in its

territory. PBNW argues that it has at least proven the fact that it was damaged, and it supports this claim by citing *Gaasland Co., Inc. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 257 P.2d 784 (1953). The *Gaasland* court explained that the doctrine regarding certainty in proving damages is concerned more with the fact of damage than with the extent or amount of damage. *Gaasland Co.*, 42 Wn.2d at 712. The court then gave an additional explanation of this principle:

Since the basic function of the rule of certainty is to assure that one will not recover where it is highly doubtful that he has been damaged in the first instance (as where he claims loss of profits in a business which is not shown to have any established record of earnings), the jury does not commit forbidden speculation when, once the fact of damage is established, it is permitted to make reasonable inferences based upon reasonably convincing evidence indicating the amount of damage.

Gaasland Co., 42 Wn.2d at 713.

Here, PBNW's evidence does not establish even the fact of damage. PBNW had no track record of prior sales in Whatcom County or the other areas included in Sun Chaser's marketing area and thus no established record of earnings from which it could be discerned that the sales to Sun Chaser displaced sales to PBNW. Furthermore, even if such displacement occurred, the amount of damages claimed remains speculative. Lost profits are recoverable only if proven with reasonable certainty. *Golf Landscaping, Inc. v. Century Constr. Co.*, 39 Wn. App. 895, 903, 696 P.2d 590 (1984); *see also United States v. DeBlasio Constr., Inc.*, 588 F.2d 259, 263 (9th Cir. 1978) (trial judge has discretion to reject claim for lost profits where the alleged loss cannot be proved adequately and remains speculative). PBNW claims it would have enjoyed a 21.5 percent profit margin on the 42 boats Regal sold to Sun Chaser through June 2008. Its 2008 tax return showed a profit margin of less than 10 percent, however, and its sales stalled at the end of 2007.

Therefore, using the 21.5 percent figure to calculate damages suffered until the 2005 agreement expired in 2008 is unjustifiable. Further undermining PBNW's entitlement to damages reflecting this gross profit figure is the principle that a plaintiff in an action for breach is entitled only to the net gain he would have made under the contract, or to the benefit of his bargain. *Platts v. Arney*, 50 Wn.2d 42, 46, 309 P.2d 372 (1957). In his deposition, Malich agreed that in calculating damages, PBNW was entitled only to its net profit. Consequently, PBNW's claim of more than \$700,000 in damages from Regal's sale of boats to Sun Chaser lacks both legal and factual support.

B. Damages Due to Competition

In a related argument, PBNW claims damages for lost profits due to the existence of another Regal dealer in its territory. It points to the following statement from Malich's declaration in arguing that these damages can be calculated with specificity at trial:

After Sun Chaser opened as a Regal dealer in Western Washington, PBNW's Regal profit margin dropped significantly. I was asked during my deposition to calculate PBNW's specific losses due to the nearby Regal dealer, which I could not do at that time off the top of my head. It is possible, however, to take the sales figures that were provided to Defendants and calculate out the percentages of PBNW overhead attributable to each different boat brand we sold, and then to figure the per boat cost versus the overhead. This will show the specific losses attributable to decreased Regal sales.

CP at 441.

Here again, the basis for any such calculation is speculative. There is no way to determine whether the decreased Regal sales were due to Sun Chaser's presence in Whatcom County or to the wider economic factors at play, as Malich conceded during his deposition. In addition, as Regal asserts, the notion of exclusive marketing territories is largely spurious. PBNW advertised

and sold Regal boats beyond its marketing area during the term of the 2005 agreement. Indeed, by undercutting Sun Chaser's prices, PBNW obtained some of Sun Chaser's sales and may have benefited from Sun Chaser's presence in Whatcom County as a Regal dealer. PBNW sold only one boat in Whatcom County in 2004, and none under the 2005 agreement even before Regal's arrangement with Sun Chaser. There is simply no way to attribute PBNW's decreased Regal sales to Sun Chaser's presence with the requisite degree of certainty.

C. Move to Fife

Finally, PBNW claims that it suffered damages because it moved to a larger facility in Fife in reliance on the 2005 agreement, which allegedly guaranteed that it would be the sole Regal dealer in several counties, including Whatcom County. This claim again contradicts the deposition testimony in which Malich explained that the move was due to the fact that PBNW lost its Tacoma lease in June 2006 and had to find a new facility within 30 days. Malich testified that the only way PBNW could afford the larger facility and its five-year lease was to take on a subtenant. A car dealer leased 35-40 percent of the Fife facility for one year but did not renew its lease. Although Malich stated in a subsequent declaration that PBNW would not have moved to Fife had it not been given exclusive Regal selling rights in all of the counties listed in the 2005 agreement, his deposition reveals that different or at least additional factors prompted the move, which occurred a year after PBNW and Regal entered the 2005 agreement. *See Overton*, 145 Wn.2d at 430 (party cannot create issue of fact with affidavit that contradicts previous deposition testimony). And, even if the 2005 agreement was an impetus for the move, Regal reasonably contends that it is not entirely responsible for a leasing gamble that did not succeed, and the

problem of measuring damages remains.

The trial court concluded that PBNW's claim of damages was based on pure speculation because of PBNW's financial situation, the market conditions, and PBNW's inability to obtain financing. The record supports that conclusion. We affirm the order granting Regal's motion for summary judgment and dismissing PBNW's complaint for breach of contract.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Hunt, J.

Johanson, J.