COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 04-0794
04-0795
04-0796

Cir. Ct. Nos. 03SC003239
03SC003241
03SC003242

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

04-0794
EDWARD M. MORAN,

PLAINTIFF-APPELLANT,

V.

PROPERTY MANAGEMENT CONCEPTS, KAY KESSLER, KEN MAR ENTERPRISES, THOMAS L. DAHLBY, MARK E. NELSON, TIMOTHY R. WICHELT AND MR PROPERTIES LACROSSE,

DEFENDANTS-RESPONDENTS.

04-0795
EDWARD M. MORAN,

PLAINTIFF-APPELLANT,

V.

LAKEVIEW INVESTMENTS, MARION J. REBHAN AND PROPERTY MANAGEMENT CONCEPTS,

DEFENDANTS-RESPONDENTS.

04-0796
EDWARD W. MORAN,

PLAINTIFF-APPELLANT,

V.

PROPERTY MANAGEMENT CONCEPTS, LAKEVIEW INVESTMENTS AND MARION J. REBHAN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Edward Moran appeals the dismissal of three separate small claims actions, which we have consolidated for purposes of this appeal. Each of these small claims actions alleged that Moran had entered into a contract in January 2003 to provide lawn services and remove sidewalk snow at particular locations. Each complaint named Property Management Concepts as a defendant, as well as naming other defendants, and each complaint alleged that the defendants had breached the contract.

¶2 The trial court held one hearing on all three contracts and, after hearing the evidence presented by Moran, dismissed all three complaints. The court concluded that none of the defendants except Property Management Concepts was a party to any of the contracts, and also concluded that Moran had

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

not presented sufficient evidence to demonstrate the net gain he would have realized had the alleged breach of contracts not occurred.

¶3 We conclude the court did not erroneously exercise its discretion in hearing the three cases together and afforded Moran a full and fair opportunity to present his case. We also conclude the trial court did not err in determining that Moran presented insufficient evidence to establish the amount of profits he would have received had the contracts not been breached as he alleged. Because the trial court assumed the contracts were breached, it is unnecessary for us to discuss Moran's arguments regarding the evidence that shows there was a breach of the contracts. We also do not discuss the issue of whether any defendant besides Property Management Concepts was a party to the contract: the court's determination on the insufficiency of the evidence on damages supports a dismissal of all three complaints, regardless of which defendants were parties to the contracts.

I. Fairness of the Proceeding

¶4 Moran argues that there should have been a separate trial for each case because there was a different contract and different defendants in each case. He asserts that this prejudiced him in two ways: (1) the numerous exhibits were not fully considered and understood by the court, and (2) he could have improved the proof he presented on his expenses in a second or third trial.

¶5 In a small claims action the trial court is to "conduct the proceeding informally, allowing each party to present arguments and proofs and to examine witnesses to the extent reasonably required for full and true disclosure of the facts." WIS. STAT. § 799.209(1). The court is also to establish the procedure for

the trial in a "manner consistent with the ends of justice and the prompt resolution of the dispute…." Section § 799.209(4). We conclude the trial court's decision to hear all three cases in one hearing was consistent with its duty under these provisions and a reasonable exercise of its authority.

¶6 The same return date and time was scheduled for all three actions, and apparently all three were scheduled for trial at the same time. Although Moran stated at the beginning of the trial that he wanted three separate trials because there were three separate contracts, he gave no reason other than there were three different contracts and he had filed three separate actions. When the court stated that Moran "might as well" present evidence on all three contracts, Moran said "okay" and did not indicate he was not prepared to do so. The record shows that he did present evidence with respect to all three contracts and that the court did consider the relevant evidence he presented. Finally, in this court Moran moved to consolidate the three cases, stating that "the cases are similar in nature, and … the main body of evidence for each trial case … consists of similar evidence." This underscores the reasonableness of the trial court's decision to hear all three cases at once in the absence of any indication by Moran that he was not prepared to proceed on all three.

¶7 As for Moran's arguments in his reply brief that, had the trials been separate, he could have improved his presentation of evidence, this is not a proper consideration in deciding whether the trial court properly heard the three cases together. The "improvement" he refers to is not to the evidence on the second and third contracts, but the proof of expenses as to all three contracts. Apparently Moran did not understand until the court ruled at the close of his evidence that he had to prove lost profits rather than simply lost revenues. The avenue open to him

for relief from his mistake on this point was to request the court to allow him to present additional evidence on expenses, a request that would have been within the discretion of the court to grant or deny. However, Moran's mistaken understanding does not make the court's decision to have one trial rather than three either unreasonable or unfair.

II. Sufficiency of Evidence on Damages

¶8 At the close of Moran's evidence, the court made this ruling on damages:

> [E]ven assuming that there was a -- a breach of this contract by the defendants, there is no proof on this record that I can establish the damages. The plaintiff, Mr. Moran, has basically given reasonable efforts of what the lost revenue is. There is no evidence, though -- the law does not allow compensation for lost revenue. It allows compensation for lost profits and, you know, I'd just have to guess what percentage of the revenue is profit. It's certainly something, as in any business, substantially less than the revenue, even assuming there's a breach, which we haven't heard any defense to.
>
> And those damages have to be proved by a reasonable certainty, and (reading) possibilities that leave the resolution of the issue for damages for future profits in the field of speculation or conjecture to such an extent as to afford no basis for an inference; and, in the absence of the inference, there is no sufficient basis for awarding damages for future profits.

¶9 The court was correct in ruling that, assuming a breach of contract, Moran was entitled to lost profits, that is, the revenues he would have received by performing under the contract less the expenses that he would have incurred. *See* ***Thorp Sales Corp. v. Gyuro Grading Co., Inc.***, 111 Wis. 2d 431, 439-40, 331 N.W.2d 342 (1983). It was Moran's obligation to show the amount of lost profits

to a reasonable degree of probability. ***Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977).

¶10 As the court indicated, Moran presented detailed evidence of the sums he had received in preceding years from providing lawn and snow removal services to these properties. However, the only testimony he offered on expenses was testimony that he spent approximately five to ten dollars per week for gas on these properties. In answer to the court's questions, Moran said that he did have a business truck, lawn mower, and snow blower, and that he was insured commercially. It is reasonable to infer from this testimony that Moran had expenses greater than those for gas, and we must accept the reasonable inferences drawn by the fact finder. *See* ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989) (reviewing court accepts all reasonable inferences drawn from the evidence by the fact finder). However, Moran provided no evidence from which the court could determine the expenses he incurred for the insurance, the truck, and the equipment.

¶11 In his brief on appeal, Moran argued that his insurance cost only one dollar per day, he uses his truck and equipment for personal as well as business purposes, and he has other customers, which, he asserts, means that all his business expenses are not attributable to the properties involved in these three contracts. None of this evidence was presented in the trial court. Moreover, the fact that the entire expenses of his insurance, truck and equipment are not properly allocated to the properties at issue does not mean that no portion should be.

¶12 We conclude the trial court did not err in determining that the evidence Moran presented was insufficient to permit the court to determine the amount of profits he lost, assuming the three contracts were breached.

III. Attorney Fees for Appeal

¶13 Property Management Concepts asks that we award it attorney fees for this appeal under WIS. STAT. § 809.25(3) because Moran's positions on appeal are frivolous. We may not award attorney fees under § 809.25(3) unless the entire appeal is frivolous. ***Manor Enters., Inc. v. Vivid, Inc.***, 228 Wis. 2d 382, 402-03, 596 N.W.2d 828 (Ct. App. 1999). We conclude Moran's argument on the sufficiency of the evidence on damages is not frivolous. Although we have decided the trial court did not err in determining that the evidence was insufficient to award any lost profits, we are not persuaded that there is no reasonable basis for arguing to the contrary.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.