

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000303-MR

TRINITY INDUSTRIAL CORPORATION
OF AMERICA

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY PAYNE, JUDGE
ACTION NO. 96-CI-00346

SEOUL BARBECUE, INC.

APPELLEE

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON AND TACKETT, JUDGES.

EMBERTON, JUDGE: Trinity Industrial Corporation of America filed this action against Seoul Barbecue, Inc., to collect a debt allegedly owed under a contract to design, fabricate and install an exhaust system to be used in a Korean Restaurant owned by Seoul Barbecue. Seoul Barbecue counterclaimed alleging that Trinity failed to perform its duties under the contract and that such failure caused it damages. Following a bench trial, the trial court found that Trinity failed to substantially perform the contract and that as a direct result of Trinity's failure, Seoul Barbecue suffered damages in the amount of \$438,613.27. On

appeal, Trinity does not contest the trial court's finding that it failed to substantially perform the contract. The primary issues on appeal are the admission of the testimony of Seoul Barbecue's expert and the measure of damages.

From 1984 through 1994, a restaurant known as the China Kitchen was operated in the Gardenside Shopping Center in Lexington. In 1990, and until 1994, the restaurant was owned by OK Ja Im (Emo) and OK Bun Kim. In 1994, Kim sold her interest to Emo who later entered into a partnership with Jeff Wilson to begin a new restaurant at the same location. The new restaurant was named Seoul Barbecue, and although most things remained substantially the same as the China Kitchen, Korean food was added to the menu. To cook the Korean food, Jenn Air-type grills were installed in the dining room.

In the fall of 1994, Emo approached Nick Ochai, president of Trinity, about installing charcoal grills. It was believed the Korean food cooked on the grills would taste better and, too, a new restaurant, Arirang Gardens, was opening in Lexington where Korean food would be cooked on charcoal grills. Trinity agreed to design, fabricate and install a smoke exhaust system that would remove smoke generated from the charcoal grills for \$13,425. No permits were obtained from the building inspector's office, nor the Fire Marshall's office as required by law. The installation was completed on December 7, 1994, and the grills were first used three weeks later after the electrical facilities were completed. Upon turning the system on it was

determined to be completely ineffective in removing the smoke from the restaurant.

From January through May 1995, Trinity unsuccessfully attempted to remedy the defects. Although there is some dispute as to whether Seoul Barbecue tendered payment for the system conditioned on Trinity's remedying the problem with the exhaust system or if Seoul Barbecue simply wrote checks drawn on insufficient funds. In either event, Seoul Barbecue did not pay Trinity the \$13,425 owed on the contract.

In January 1996, Trinity filed this action against Seoul Barbecue seeking recovery of the amount owed on the contract.¹ Shortly after Trinity filed this action, an estimate was obtained from another contractor as to the cost of making the system usable. The contractor informed Seoul Barbecue that the present system was completely inadequate and quoted Seoul Barbecue the sum of \$40,000 to install a proper exhaust system.

Trinity argues that Seoul Barbeque accepted the defective system and therefore waived any right to object to its performance. Relying on Shreve v. Biggerstaff,² the trial court held that no waiver had occurred. In Shreve, supra, the court recited that a "waiver may occur under certain circumstances, for instance where the contractee, having knowledge of the defects has stood by silently and then accepted the work as sufficient compliance with the contract and later raises objection." We

¹ Trinity also sought \$197.50 for work done other than on the exhaust system. This amount was awarded to Trinity and is not relevant to the present issues.

² Ky. App., 777 S.W.2d 616 (1989).

find no abuse of discretion in the trial court's finding that there was no waiver by Seoul Barbecue. Seoul Barbecue was not silent but continually voiced its position that the exhaust system was inadequate.

Next, Trinity argues that the trial court erred when it admitted the testimony of Debra Walker, or alternatively, failed to grant a continuance. In 1996, Trinity served interrogatories requesting the identity of, and information regarding, expert witnesses and their opinions. In its response, served on September 17, 1996, Seoul Barbecue identified Debra Walker, C.P.A., as a witness who would testify as to Seoul Barbecue's income tax returns.

On October 21, 1997, twenty-one days prior to the scheduled trial date, Trinity took Walker's deposition. At that time, Walker testified that she would be testifying at trial as to the damages sustained by Seoul Barbecue, and that she believed the "minimum" figure would be approximately \$209,742.55. However, Walker expressly stated that after she further reviewed the books and records, she would furnish a top line loss amount. Although she assured each party that a copy of her final report would be sent, she did not state a date it would be completed nor did Trinity seek to impose a deadline.

On the afternoon of November 10, 1997, Walker faxed a five page calculation of damages stating that the highest amount of loss was \$475,630.11.³

³ Trinity suggests that Walker submitted losses of \$1,020,199.14, when actually she submitted three theories of loss
(continued...)

Trinity filed a motion with the trial court to preclude admission of Walker's latest calculations, or in the alternative, for a continuance. Trinity also informed the court that its own expert witness, George Helton, would be unable to attend the trial and there was insufficient time to prepare a rebuttal to Walker's testimony. The trial court denied Trinity's motion.

Although Trinity argues that this was a trial by ambush, the trial court found that Trinity simply failed to prepare for the attack. On April 17, 1997, a pretrial order was entered stating that experts were to be disclosed and discovery completed by September 1, 1997, "unless otherwise extended by agreement or further orders of this court." Trinity did not depose Walker until October 21, 1997, and prior to that date, if it did not know the exact content of Walker's testimony, it certainly knew that she would testify that Seoul Barbecue's damages were at least \$209,742.53. Yet, from October until the November trial, it did nothing to prepare a rebuttal.

There was complete disregard by both parties as to discovery deadlines imposed by the trial court and preparation for trial was obviously "last minute." A party who fails to comply with discovery deadlines and waits until the final hours to conduct its discovery has a difficult task of persuading the trial court that it was prejudiced by surprise in the content of a witness's testimony. "A party is not entitled to a

³(...continued)
each concluding a different figure. Trinity apparently added the total losses from each theory to arrive at the figure in excess of one million dollars.

postponement of trial because it neglected to make the best use of common discovery techniques.”⁴ We find no abuse of discretion in the trial court’s refusal to strike the testimony of Walker or grant a continuance.

Although we find that the pretrial procedure irregularities did not preclude the admission of Walker’s testimony, we agree with Trinity that her testimony does not support the damages awarded. Walker’s calculation of damages was based on the use of profit figures from the China Kitchen and the first six months of Seoul Barbecue’s operation. It is Seoul Barbecue’s position that immediately after the installation of the system, its sales dropped markedly, ultimately resulting in the demise of the business. In support of this hypothesis, Seoul Barbecue’s customers testified that when the charcoal grills were operated, the smoke was so overwhelming that customers would not patronize the restaurant.

Damages for breach of contract are awarded so that the non-breaching party can be placed in the same position it would have been in had the party fully performed the contract.⁵ In the context of a business, lost profits are recoverable if established with reasonable certainty. As explained in Pauline’s Chicken Villa v. KFC Corporation:⁶

⁴ Kentucky Farm Bureau Mut. Ins. Co. v. Burton, Ky. App., 922 S.W.2d 385, 388 (1996).

⁵ Evergreen Land Co. v. Gatti, Ky. App., 554 S.W.2d 862, 866 (1977).

⁶ Ky., 701 S.W.2d 399, 401 (1985).

[T]he test is not whether the business is a new or unestablished one, without a history of past profits, but whether damages in the nature of lost profits may be established with reasonable certainty. Comment b in the Restatement, *supra*, sums it up as follows:

However, if the business is a new one . . . proof will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business record of similar enterprises, and the like.

The court continued to state that:

No court, including this one, can elucidate a single definition of "reasonable certainty" which may be used as a yardstick in all cases. However, this is a case containing factors and elements which eliminate virtually all the uncertain variables. This is a national franchisor, with uniformity of national advertising, uniform quality control, earnings and expense figures on nearby and comparable locations, and an available history concerning success and failure ratios. The franchisee, likewise, is experienced in the field and with the specific product, with a proven record of operation and management, a history of profit and loss, with two current operations in the general area, etc.⁷ (Citations omitted).

None of the factors in Paulines, *supra*, are present in this case, and as a consequence, it is impossible to eliminate the variables which could reasonably account for the loss of profits sustained by Seoul Barbecue. To project the future income of Seoul Barbecue, Walker relied on the past profits of China Kitchen, which was a different restaurant, one which did not have to compete with restaurants opened since 1994 in the Lexington area, and one with different owners. Her assumption

⁷ Id. at 401-402.

that Seoul Barbecue would have experienced a 25% increase in the first year and a 50% increase in the second year after the installation of the charcoal grills is not based on statistics, analysis, or business records of similar restaurants, but only her hunch that if a wider menu is offered, more customers would be attracted. This is simply insufficient to meet the difficult reasonable certainty requirement imposed.⁸

We also note that the \$438,613.27 damage award is apparently based on the trial court's misunderstanding of the nature of the damages to be awarded. It is axiomatic that to recover for a breach of contract the damages must have naturally arisen from the breach and be within the contemplation of the parties to the contract.⁹ The damages which would naturally arise from the improper installation of the exhaust system, which from the evidence affected only the ability to cook food on the grills, would be only the income found to be generated from the use of the grills. The reasons for the entire financial collapse of the restaurant cannot reasonably be related to the installation of the exhaust system. The restaurant prospered prior to their installation, and unless turned on, no smoke was generated. It is likely, as suggested by Trinity, that other intervening factors between the time the exhaust system was installed and the loss of revenue to Seoul Barbecue, that caused the decrease in profits. There is simply no evidence which

⁸ Id. at 401.

⁹ Hogg v. Edley, 236 Ky. 142, 32 S.W.2d 744 (1930).

establishes the amount of damages caused by the inability to use the grills.¹⁰

The evidence establishes that Seoul Barbecue bargained for an operational exhaust system and that it received nothing. Seoul is entitled to recover from Trinity the amount it would cost to have the work properly performed, \$40,000.¹¹ There is no evidence that establishes to a reasonable certainty that it sustained damages in excess of that amount. Since Trinity failed to substantially perform the contract, it is not entitled to recover, set off, or credit for its labor in installing the exhaust system.

This case is reversed and remanded for entry of an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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ORAL ARGUMENT FOR APPELLANT:

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¹⁰ Roadway Express, Inc. v. Don Stohlman & Assoc., Inc., Ky., 436 S.W.2d 63, 65-66 (1968).

¹¹ Beaver Dam Coal Co. v. Brashear, 246 Ky. 69, 54 S.W.2d 609 (1932).