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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001065-MR
AND
CROSS-APPEAL NO. 2002-CA-001142-MR

CITY OF LOUISVILLE

APPELLANT/CROSS-APPELLEE

v. APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 00-CI-06189

BARGAINS GALORE, INC.

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING
** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: This appeal and cross-appeal arise from a judgment by the Jefferson Circuit Court in favor of Bargains Galore, Inc. on a claim involving the loss of certain merchandise and records while it was in the possession of the City of Louisville. The City alleges that the trial court improperly awarded damages for lost profits caused by the loss

of the business records, while Bargains Galore contends that the trial court undervalued its missing inventory. Because we agree with the arguments presented by both the City and Bargains Galore, we affirm the judgment in part, reverse it in part, and remand for entry of additional findings of fact and a new judgment.

The undisputed facts of this case are set forth in the trial court's opinion as follows:

On March 27, 1996, the Louisville Police Department, pursuant to a valid search warrant for Kentuckiana Lease Department, Inc d/b/a B-Mart, took possession of a large amount of inventory owned by Bargains Galore, Inc. Bargains Galore is a wholesale business and goods were sold to customers all over the country. The inventory that was seized was not placed in the usual Police property room, but was stored in a building located at 340 West Chestnut Street, Louisville, Kentucky

The Commonwealth Attorney's Office and Alvin Borowick, the owner of Bargains Galore, entered into negotiations to resolve this criminal matter. The resolution was that certain confiscated items would be returned to the plaintiffs and other items would be destroyed. Richard Borowick, who is the son of Alvin Borowick, is an employee of Bargains Galore and is the primary buyer for the corporation. The corporation entered a guilty plea. However, this plea was not entered until December 19, 1997, although it is clear that the parties had been in negotiations regarding this matter for some time. On January 8, 1998, Richard Borowick and the representatives from the Police Department, including Detective David James who testified in this matter, went to the facility so that Mr. Borowick could

retrieve the items. However, when they arrived at the facility, [they discovered that] some of plaintiff's inventory had been stolen.

Bargains Galore filed this action against the City seeking damages for the value of its lost inventory and business records, as well as reimbursement for delivery expenses and interest paid on a loan that it took out to purchase replacement inventory. The parties stipulated to what items were lost, and they agreed that the inventory should be valued based upon its fair market value as of the date of the loss - January 8, 1998. However, the parties disagreed about the amount of inventory in each of the lost boxes, the fair market value of those items, and the value of the lost business records. The City also contested Bargains Galore's claims for interest paid on the loan.

The court conducted a bench trial on February 13 and 14, 2002. The parties submitted the contested issues to the court based on the evidence and post-trial briefs. On March 20, 2002, the trial court issued findings of fact and a judgment awarding damages to Bargains Galore in the total amount of \$52,971.00. The court's findings broke the damages down as follows: \$13,230.00 for lost inventory; \$4,791.00 for delivery expenses incurred; \$4,950.00 for interest paid on the loan; and \$30,000.00 for the lost profits due to the loss of its business records. This appeal and cross-appeal followed.

Regarding the appropriate standard of review, this Court stated in Bealert v. Mitchell:¹

As in any case that is tried without the intervention of a jury, the findings of fact of the trial court should not be reversed unless they are determined to be clearly erroneous. In making such consideration the appellate court must keep in mind that the trial court had the opportunity to hear the evidence and observe the witnesses, so as to judge their credibility, and therefore, is in the best position to make findings of fact. 7 W. Clay, Kentucky Practice, CR 52.01.²

Although the City downplays any negligence on its part, it has conceded liability for the loss of the inventory while in its possession. Nevertheless, Bargains Galore still had the burden of proving the amount of its damages. In its direct appeal, the City contends that the evidence did not support the trial court's award of \$30,000.00 for lost profits due to the loss of the business records. In its cross-appeal, Bargains Galore argues that the trial court undervalued its lost inventory, particularly in light of the parties' stipulation that the measure of damages was the fair market value of the inventory. We will first address the issues raised in the cross-appeal.

¹ Ky. App., 585 S.W.2d 417 (1979).

² Id. at 418.

When the merchandise and records were seized, the City conducted an inventory of the items. However, most of the merchandise remained in their shipping cases, and the City did not attempt to determine what was in each of the boxes.³ Consequently, the parties were able to agree which boxes were missing, but they could not agree about what the boxes contained or how much the merchandise was worth. The largest quantity of items that were lost was 39 cases of cigarette rolling papers. The City, however, questioned whether each case was a full case and whether the cases contained "premium" or lesser quality rolling papers. The trial court noted that there was no evidence conclusively establishing these facts. Officer David James, who was present when the items were initially seized, testified that approximately 300 to 350 boxes were removed from the warehouse. He stated that some of the cigarette rolling papers were separate, some were in packages or boxes similar to cigarette cartons, and others were in a case. However, he was not sure of the difference between a case and a box.

Bargains Galore's inventory records were also lost, and Bargains Galore did not contact the manufacturers to re-

³ In addition, there was testimony that the police officers packed some of the seized inventory and records into boxes without any organized method.

create the inventory list.⁴ Michael Carden, a regional sales manager for one of the manufacturers, testified regarding the cost of the various types of cigarette rolling papers. In addition, Richard Borowick testified from memory concerning the value of the missing inventory. The trial court found the testimony of Richard Borowick and Michael Carden regarding the value of the rolling papers to be credible.

Bargains Galore asserted that the total value of the lost inventory, including the rolling papers, amounted to \$52,281.75, and that those items would have sold for \$63,738.05. Nevertheless, the court declined to accept this figure as the measure of damages for the lost inventory. Rather, the court noted that in February 1997, Alvin Borowick accepted the offer of a loan from his friend, Harry Edelstein, for \$40,000.00. According to both Edelstein and Borowick, the purpose of the loan was to allow Bargains Galore to purchase new inventory to replace what was taken. Consequently, the trial court concluded

that this assessment by the parties, at the time the inventory was taken, is the most reliable indication of what the parties believed the inventory was worth. Based upon the evidence submitted by the plaintiff reflecting a profit margin of roughly 17%, this would result in the inventory being sold for approximately \$49,000.00. However,

⁴ Richard Borowick also testified that Bargains Galore had never kept detailed records showing how much inventory it had in stock at any given time.

this loan was for all the inventory seized as opposed to only part of the inventory that was to be returned. According to Exhibit "A" of the complaint, which is a list of the missing items, approximately eighty boxes were missing. This has been adjusted somewhat by the parties, but roughly speaking, it appears that approximately 27% of the inventory that should have been returned was not returned to Bargains Galore.

Therefore, if the \$40,000.00 inventory would have sold for approximately \$49,000.00, then of that amount, 27% is attributable to the lost inventory. The Court therefore, determines that the value of the lost inventory is \$13,230.00.

Bargains Galore argues that this valuation was not supported by the evidence presented at trial. We agree. Prior to trial, the parties properly stipulated to what items were lost while in the City's possession. The parties further agreed that the measure of damages would be the fair market value of the lost merchandise.⁵ However, as noted above, there was

⁵ See Amlung v. Bankers Bond Co., Ky., 411 S.W.2d 689 (1967) which states: "[t]he traditional measure of damages for the conversion or destruction of personal property is the fair market value of the property at the time and place of the loss, with interest, in the discretion of the jury, from the time of the conversion. . . . Where property is destroyed, or is converted, so that the title either is, or is regarded as, out of the former owner, damages are the pecuniary representative of the property, and take its place. The plaintiff has lost or abandoned his claim to the property; his claim against the defendant is for an equivalent sum of money. In this point, a conversion very nearly resembles a sale. . . . In an action for the conversion of personal property, the measure of damages is the value of the property at the time of the conversion, with interest. . . ." Id. at 693 (*citations and internal quotations omitted*).

tremendous disagreement about the value of the merchandise, particularly the cigarette papers. Furthermore, Bargains Galore presented very little in the way of documentary evidence to support its valuation. Consequently, the trial court concluded that the \$40,000.00 loan from Edelstein represented the value which Alvin Borowitz had placed on all of the confiscated merchandise at the time of the loss. Because the plea agreement only required the City to return approximately 27% of the confiscated merchandise, the trial court valued the converted inventory as 27% of the amount for which the entire inventory would have sold.

There are several problems with this assessment. First, the trial court assumed that the \$40,000.00 loan from Edelstein was intended to finance the replacement of all of the confiscated merchandise. This assumption is not necessarily unreasonable, except that it overlooks the reason why the merchandise came to be in the City's possession in the first place. The basis for the initial seizure of the merchandise was the Commonwealth's allegation that Bargains Galore was selling drug paraphernalia. Under the terms of the plea agreement, the Commonwealth would confiscate and destroy items that were clearly paraphernalia, such as glass pipes and powders. The parties agreed to negotiate the status of other items which could be used with illegal drugs, but were not

clearly contraband. And finally, the Commonwealth agreed to return items such as cigarette rolling papers, baggies, and detoxifiers which could not be classified as drug paraphernalia.⁶

In finding that the proceeds of the \$40,000.00 loan were used to replace all of the confiscated merchandise, the trial court also implies that Bargains Galore simply replaced all of what was seized with identical merchandise - including merchandise which the Commonwealth had classified as drug paraphernalia. Given the nature of the charges pending at the time, it seems unlikely that Bargains Galore would do this.⁷ At most, the \$40,000.00 loan can only reasonably be viewed to represent the replacement cost of legal merchandise, not all of the seized merchandise.

The more fundamental problem, however, is that the \$40,000.00 loan cannot be reasonably viewed to represent the value of the missing inventory. The trial court also assumed that all of the confiscated merchandise was of equivalent value, and that the lost merchandise was of proportionate value to all of the confiscated merchandise. While this assumption might have been justified had the inventory been unidentified or of

⁶ See KRS 218A.500 *et seq.*

⁷ Indeed, Richard Borowick testified that the new inventory which Bargains Galore purchased after the seizure did not include merchandise which the Commonwealth had categorized as drug paraphernalia.

similar nature, the parties had stipulated to what items had been confiscated, which items the City was required to return, and which of these items had been stolen while in the City's possession. Consequently, the evidence did not support the trial court's method of valuing them based upon their proportion to the whole.

Moreover, the trial court's finding that Bargains Galore used the proceeds of the \$40,000.00 loan to purchase new inventory does not support the conclusion that Bargains Galore used the loan proceeds to replace the seized inventory. As noted by the trial court, Bargains Galore's business is entirely wholesale - it purchases merchandise from suppliers and resells it to retailers at a profit. In turn, a significant portion of the sales proceeds is used to purchase new merchandise. After its inventory was seized, Bargains Galore needed an infusion of capital to remain in business. Edelstein's loan provided that needed capital. In short, the \$40,000.00 loan represents Bargains Galore's capital investment in new inventory, not replacement inventory.⁸ Based on the foregoing, we conclude that

⁸ Edelstein testified that he loaned the money "for inventory, to rebuild the stock so they [Bargains Galore] could stay in business." 30-5-02 VCR 013A at 14:48:49. Richard Borowick testified that, due to monetary constraints, Bargains Galore was not able to replace the missing items with identical merchandise. 30-5-02 VCR 013A at 12:17:35. Along similar lines, Alvin Borowick also testified that the loan was necessary

the trial court relied on several erroneous premises in valuing all of the seized inventory at \$40,000.00. As a result, the trial court clearly erred in finding that the fair market value of the converted merchandise was \$13,230.00.

Although Bargains Galore did not present particularly strong proof concerning the fair market value of these latter items, Richard Borowick testified that the cost of non-cigarette-paper merchandise was \$12,969.75, and that these items would have wholesaled for \$18,732.05.⁹ The City takes issue with this figure, noting that Bargains Galore did not support these values with any documentation. Nevertheless, Richard Borowick testified that he was the primary buyer for the corporation, and that he was familiar with the cost of all these items. Moreover, the trial court specifically found that he was able to properly testify as to the value of these items. In the absence of any contradictory evidence, the trial court should have found the fair market value of these items to be \$18,732.05.

to allow Bargains Galore to purchase sufficient inventory to remain in business. 30-5-02 VCR 013A at 15:12:30.

⁹ These values include Bargains Galore's cost and the wholesale value of loose boxes and packs of cigarette papers, as well as lesser quality cigarette papers which were in stock. However, the City only contested the value of the whole cases, not the separate paper. In addition to the merchandise, Bargains Galore also alleged that the police had taken a two-wheel dolly from its warehouse which was also not returned. Bargains Galore did not claim that it had any wholesale value above its cost.

As noted above, the City did contest the value of the 39 cases of cigarette rolling papers that should have been returned to Bargains Galore. Officer James testified that on January 8, 1998, when they discovered that the merchandise was missing, Richard Borowick estimated the value of the cigarette rolling papers at between \$200.00 and \$600.00 a case. At trial, however, Borowick testified that Bargains Galore paid \$1,008.00 a case for "premium" cigarette papers, and that they would have wholesaled for \$1,154.00 a case. Although the trial court was undoubtedly frustrated by the lack of documentary evidence in this case, there was sufficient evidence of at least a range of values for these papers. Because factual findings are outside of the scope of this Court's review, we shall remand this matter for the trial court to assign a fair market value to these cigarette rolling papers.

In its direct appeal, the City argues that the trial court clearly erred in finding that Bargains Galore had suffered a \$30,000.00 loss due to the loss of its business records. The City correctly notes that Bargains Galore did not challenge the validity of the original seizure in March of 1996. Rather, Bargains Galore claimed that its damages accrued after January 8, 1998, when the City was required to return the records but was unable to do so. However, Bargains Galore's proof of damages consisted of tax records from fiscal years 1996 and

1997, and the testimony of its accountant, Ivan O’Koon. O’Koon testified that Bargains Galore lost \$62,000.00 in profits during the fiscal year ending June 30, 1997. The City points out that these losses were sustained before it was required to return any merchandise or records. While O’Koon testified that Bargains Galore sustained additional losses in the following year from the loss of its business records, the City further argues that he did not specifically attribute any amount of damage to the loss of the business records. Consequently, the City contends that the trial court erred by finding that Bargains Galore suffered \$30,000.00 from the loss of its records.

In response, Bargains Galore notes that most of the missing records were customer lists - names and records relating to existing customers, as well as the contact information for prospective customers. Bargains Galore did not seek its lost profits from sales to these customers, but rather sought to be compensated for the loss of its customer base. While it may not be possible to precisely determine the amount of damage directly attributable to this loss, Bargains Galore contends that it presented sufficient evidence to establish the fact of its injury. Bargains Galore concludes that the trial court properly relied on this evidence in making the award.

In Roadway Express, Inc. v. Don Stohlman & Associates., Inc.,¹⁰ the former Court of Appeals set out the standard for proving the type of losses claimed by Bargains Galore

The test of whether there can be a recovery for loss of anticipated revenues or profits is not whether the amount thereof can be ascertained with exactness or certainty, but whether the cause of the damage or injury can with reasonable certainty be attributed to the breach of duty or wrongful act of the defendant. If it is established with reasonable certainty that damage has resulted from a breach of duty or a wrongful act of defendant, mere uncertainty as to the amount will not preclude recovery, particularly where, from the nature of the case, the extent of the injury and the amount of damage are not capable of exact and accurate proof. ... But no recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made or from other sources.¹¹

Turning to the present case, there is no question that Bargains Galore has been damaged by the loss of its customer records. It has been long recognized that customer lists are essential to the conduct of any business.¹² Furthermore, customer lists constitute a significant work-product of any

¹⁰ Ky., 436 S.W.2d 63 (1968).

¹¹ Id. at 65 (*citations omitted*).

¹² Progress Laundry Co. v. Hamilton, 208 Ky. 348, 270 S.W. 834, 835-36 (1925).

business. As such, they are the property of Bargains Galore, and it is entitled to compensation for the City's wrongful conversion of the records. Therefore, we agree with the trial court that Bargains Galore has been damaged by the loss of these customer lists.

The problem, however, is proving that this loss flowed from the wrongful conversion of these records while they were in the City's possession, rather than from the City's initial (and lawful) seizure of the records. In this case, there was a twenty-two month interval between the City's initial seizure of the business records (March of 1996) and the date when the City was required to return the records (January 8, 1998). Furthermore, Bargains Galore concedes that the original seizure of the records was pursuant to a valid search warrant.

Most of O'Koon's testimony and the tax records related to Bargains Galore's losses during fiscal years 1996 and 1997 - before the City was required to return the records. Although the tax return for fiscal year 1998 showed lost profits of approximately \$30,000.00, O'Koon testified that it was not possible to determine which of Bargains Galore's lost profits stem from the loss of its customer lists and which stem from its lost inventory. And while O'Koon opined that Bargains Galore's sales would have increased if the City had returned its customer lists in 1998, he admitted that this conclusion was "pure

conjecture.”¹³ Consequently, Bargains Galore failed to prove with certainty that it incurred damages after January 8, 1998, due the City’s negligence in losing its business records, and the trial court clearly erred in so finding.

In conclusion, we agree with Bargains Galore that the trial court’s findings of fact concerning the value of the wrongful conversion of its inventory were clearly erroneous. On remand, the trial court shall enter a judgment for Bargains Galore in the amount of \$18,732.05, representing the value of the uncontested merchandise, and the court shall make additional findings and enter a judgment to compensate Bargains Galore for the value of the cigarette rolling papers. We further agree with the City that the trial court clearly erred in finding that Bargains Galore had sustained losses in the amount of \$30,000.00 from the wrongful conversion of its business records, and that portion of the judgment is vacated. The other portions of the judgment that have not been appealed will remain undisturbed.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed in part, reversed in part, and remanded for additional findings and a judgment consistent with this opinion.

ALL CONCUR.

¹³ 30-5-02 VCR 013A at 14:35:50.

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