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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000935-MR
AND
CROSS-APPEAL NO. 2003-CA-001035-MR

FIDELITY CONSTRUCTION COMPANY, INC. APPELLANT/CROSS-APPELLEE

v.

APPEALS FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 01-CI-01065

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

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Fidelity Construction Company, Inc. has appealed from a judgment of the Warren Circuit Court entered on March 12, 2003, which, following a bench trial, determined that T.A. Blair, Inc. had breached two agreements with Fidelity, and awarded Fidelity reliance damages. Fidelity appeals from that portion of the trial court's judgment denying a damage award for expectation damages, or lost profits. T.A. Blair has cross-

appealed from that portion of the trial court's judgment which found that it had breached the two agreements. Having concluded that the trial court did not err by determining that T.A. Blair had breached the two agreements, we affirm that portion of the trial court's judgment. However, having further concluded that the trial court erred by determining that Fidelity was not entitled to expectation damages, we reverse that portion of the trial court's judgment and remand for further proceedings.

For the most part, the relevant facts of this case are not in dispute. Fidelity and T.A. 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 T.A. Blair. Fidelity is primarily engaged in the business of general contracting, while T.A. Blair owns several commercial properties in and around Bowling Green, which it leases to various businesses.

On April 16, 1998, a severe hail storm struck the Bowling Green area, which damaged several properties owned by T.A. Blair. In order to maximize recovery from T.A. Blair's property insurer, Westfield, Tom Blair contracted with Scott deLuise, a public adjustor, to assist T.A. 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 T.A. Blair's properties, which 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 Tom Blair signed a document entitled "Agreement."[1] Among other things, Article 2 of this document specifically incorporated the four written proposals which had previously been signed by both Howell and Tom 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, Tom Blair testified that he entered into this agreement solely for the purpose of enabling T.A. Blair to present Westfield with repair estimates during their settlement negotiations, and that any work to be performed by Fidelity was

[1] The 1998 agreement was prepared by using an American Institute of Architects (AIA) form agreement as a model.

conditioned upon Tom Blair giving Fidelity the "green light" to begin repairs. However, Howell testified that at all times he expected to eventually perform the work called for in the 1998 agreement. Regardless of the parties' differing beliefs, it is undisputed that Tom Blair never gave Fidelity permission to commence the repair work called for under the 1998 agreement.

On July 21, 1998, Fidelity submitted another written repair proposal for T.A. Blair's FiServ property. Tom 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 T.A. Blair's National City Bank property, which Tom 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 Tom Blair signed their initials next to this handwritten language. The price of this proposal totaled $352,504.15.[2]

Throughout August, September, and October 2000, Howell sent T.A. 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 T.A. Blair could choose between two methods for repairing the roof at National City Bank. At trial, Tom 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 T.A. Blair finally settled all of its insurance claims with Westfield. In May 2001 Howell once again sent T.A. 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 T.A. Blair a letter stating that Fidelity had suffered damages as a result of T.A. Blair's alleged breach of the April 10, 2000, agreement (2000 agreement). This notice informed T.A. Blair that a legal action

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[2] An addendum was added to this proposal, which had an original value of $349,562.41. The addendum was also made "subject to previously executed AIA agreement," and added a $2,500.00 repair proposal for "copper stain removal." This addendum was signed and dated by both Howell and Tom Blair.

would be filed by Fidelity unless T.A. Blair was willing to discuss a settlement of Fidelity's alleged damages.

On August 20, 2001, Fidelity filed a complaint in the Warren Circuit Court alleging that T.A. Blair had breached the 2000 agreement. Specifically, Fidelity alleged that T.A. Blair had "wrongfully refused, without legal or factual justification or excuse, to permit Fidelity to perform repairs" as called for in the 2000 agreement. Approximately one year later, after a good deal of discovery had taken place, Fidelity filed an amended complaint alleging that T.A. Blair had also breached the 1998 agreement. Once again, Fidelity alleged that T.A. Blair had "wrongfully refused" to permit Fidelity to perform the repairs as called for 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 trial court entered findings of fact, conclusions of law, and judgment on March 12, 2003. The trial court found that Fidelity and T.A. Blair had entered into two binding contracts, and that by "preventing Fidelity's performance," T.A. Blair had breached both the 1998 and 2000 agreements. On the issue of damages, the trial court awarded Fidelity reliance damages, but declined to award expectation damages, i.e., the

trial court declined to award Fidelity damages for its lost profits under the agreements. The trial court gave Fidelity 30 days in which to submit proof regarding its reliance damages.

On March 19, 2003, Fidelity filed a motion to alter, amend, or vacate the trial court's judgment. Specifically, Fidelity asked the trial court to add a finding that Fidelity did perform some repair work for T.A. Blair between the signings of the 1998 and 2000 agreements. In addition, Fidelity once again asked the trial court to award expectation damages. On April 14, 2003, the trial court entered an order granting Fidelity's motion in part and denying it in part. The trial court entered a finding that Fidelity did perform repair work on T.A. Blair's FiServ property between 1998 and 2000. However, the trial court denied Fidelity's request that it be awarded expectation damages.

On April 23, 2003, by an agreed order of the parties, the trial court noted that Fidelity had declined to take proof on the issue of reliance damages, and entered an order declaring the March 12, 2003, judgment final and appealable. Fidelity's appeal and T.A. Blair's cross-appeal followed.

The parties have raised a number of issues on appeal. We first turn to T.A. Blair's claim that the trial court erred by determining that it had breached the 1998 and 2000 agreements. In support of this argument, T.A. Blair first

argues that under the express terms of the agreements, Fidelity's performance in repairing the storm damage was conditioned upon T.A. Blair giving Fidelity the "green light" to commence the repair work. In particular, T.A. Blair argues:

> The clear import of the language used by the parties in the [1998 and 2000 agreements] was to preserve [T.A. Blair's] control over when and how much of the storm repair work would be undertaken by Fidelity. The work could not begin until [T.A. Blair] so instructed, and [T.A. Blair] had the right to make "any and all changes" with corresponding changes in the contract price. These provisions clearly entitled [T.A. Blair] to elect not to have the work performed and negate any claim by Fidelity that [T.A. Blair] breached the contract.

We disagree and hold that according to the express terms of the 1998 and 2000 agreements, T.A. Blair was not entitled "to elect not to have the work performed."

The construction and interpretation of a contract is a question of law which is subject to de novo review on appeal.[3] In the absence of an ambiguity, we give the words used in a contract their plain and ordinary meaning.[4] As we mentioned previously, both the 1998 and 2000 agreements consisted of written proposals submitted by Fidelity and a form construction agreement. All four written proposals in the 1998 agreement and

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[3] Frear v. P.T.A. Industries, Inc., Ky., 103 S.W.3d 99, 106 (2003).

[4] Id.

the written proposal in the 2000 agreement contained the following language:

> Acceptance of Proposal:
>
> The above prices, specifications, and conditions are satisfactory and are hereby accepted[.] Fidelity Construction Co., Inc. is authorized to perform work as specified [emphasis added].

In addition, all five written repair proposals contained language making the proposals subject to the "additional terms and conditions" in the separately executed construction form agreement.[5] Finally, all of the proposals were signed by both Howell and Tom Blair on behalf of their respective companies.

Turning to the construction agreement, which was also signed by both Howell and Tom Blair, we highlight the following provisions:

> WITNESSETH, That [Fidelity] hereby agrees to furnish to [T.A. Blair] all labor and material and perform all work required for STORM DAMAGE REPAIR AND RENOVATIONS in accordance with [Fidelity's specifications] [emphasis added].
>
> NOW, THEREFORE, [Fidelity] and [T.A. Blair], for and in consideration of the mutual and reciprocal obligations

[5] The proposals for the Greenwood Plaza property, the Big B Cleaners property, the Bluegrass Copy Products Property, and the South Central Bell property contained pre-printed language subjecting those proposals to the form construction agreement. The proposal for the National City Bank property contained handwritten language, which was initialed by both Howell and Tom Blair, subjecting that proposal to the same construction agreement.

hereinafter stipulated, do contract and agree as follows [emphasis added]:

ARTICLE 1. [Fidelity] hereby agrees . . . to complete the work specified in this Contract in all respects as is herein required by [T.A. Blair] [emphasis added].

. . .

ARTICLE 2. [Fidelity] hereby certifies that [it] has examined all the plans, drawings and specifications prepared by [T.A. Blair] for the entire work covered by this Contract. Said plans and specifications are hereby referred to and made a part of this Contract [emphasis added].

. . .

ARTICLE 3. It is understood and agreed by and between the parties hereto, that the work included in this Contract is to be done under the direction of [T.A. Blair], and that [its] decisions as to the true construction and meanings of the plans and specifications shall be final.

. . .

ARTICLE 5. [Fidelity] hereby agrees to make any and all changes and furnish the materials and perform the work that [T.A. Blair] may require, without nullifying this Agreement, at a reasonable addition to, or deduction from, the contract price [emphasis added].

. . .

ARTICLE 7. [Fidelity] hereby agrees that the work under this Contract is to be provided for immediately, and shall be begun when notified in writing by [T.A. Blair], and completed upon the mutual agreement of

> [T.A. Blair] and [Fidelity] [emphasis added].
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> . . .
>
> ARTICLE 13. [T.A. Blair] hereby agrees to pay [Fidelity] for such labor and material herein undertaken to be done and furnished for the work as mentioned above the sum of $738,234.11, subject to additions and deductions as hereinbefore provided.
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> . . .
>
> ARTICLE 20. All previous negotiations, proposals, discussions and/or agreements are null and void.

Hence, while the agreements did provide that T.A. Blair retained the right to make reasonable additions to or subtractions from the contemplated repair work, there is no language indicating that T.A. Blair retained the right to unilaterally elect not to have any of the work performed. Indeed, as the trial court noted, if the agreements were construed in such a manner as to give T.A. Blair the right to unilaterally cancel the contemplated repair work, there would have been no legally binding contract between the parties.[6] Such a construction would be contrary to the clear intent of the parties as expressed by the specific language in the agreements.[7]

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[6] Kovacs v. Freeman, Ky., 957 S.W.2d 251, 254 (1997)(stating that "[m]utuality of obligations is an essential element of a contract, and if one party is not bound, neither is bound").

[7] Puckett v. Hatcher, 307 Ky. 160, 163, 209 S.W.2d 742, 744 (1948)(stating that "[t]he rule is universal that the intention which the writing itself shows the parties contemplated is the one to be applied and enforced by courts").

Thus, we reject T.A. Blair's claim that it was entitled "to elect not to have the work performed" as specified in the 1998 and 2000 agreements. Therefore, according to the express terms of the 1998 and 2000 agreements, T.A. Blair was bound to permit Fidelity to perform the repair work as contemplated in those agreements.

T.A. Blair next argues that in determining the parties' intentions under the 1998 and 2000 agreements, the agreements must be construed by taking into account the surrounding circumstances which existed when the agreements were executed. T.A. Blair points to three factors in support of its contention that the parties entered into the agreements solely for the purpose of enabling T.A. Blair to present Westfield with repair estimates during settlement negotiations. First, T.A. Blair notes that it had tentatively agreed to sell two of the properties covered by the 1998 agreement (the Greenwood Plaza property and the Big B Cleaners property) prior to the hailstorm, and that when these property transfers were completed after the 1998 agreement had been signed, there was no mention in the property transfer agreements of an obligation on the part of T.A. Blair to repair any storm damage. Thus, T.A. Blair argues that "[i]t simply defies common sense that [T.A. Blair] would have entered into an unconditional contract for

[$500,000.00] worth of repairs to these properties when [it] had no obligation to make the repairs."

Second, T.A. Blair argues that both parties knew when the 1998 and 2000 agreements were signed that the repair estimates were "inflated quite a bit." Third, T.A. Blair claims that "some of the work covered by the [submitted repair] proposals had already been [completed]" when the 1998 and 2000 agreements were signed. Hence, T.A. Blair asserts that these three factors all lead to a conclusion that the 1998 and 2000 agreements were executed solely for the purpose of enabling T.A. Blair to present Westfield with its own damage repair estimates during their settlement negotiations. We disagree with T.A. Blair and conclude that there is no need to resort to considering "surrounding circumstances" in determining the parties' intentions in executing the 1998 and 2000 agreements.

It is true that when determining the intentions of the parties to a contract, a court may under certain circumstances consider the "subject matter of the contract, the objects to be accomplished, the situation of the parties and the conditions and circumstances surrounding them[.]"[8] However, "where the instrument is so clear and free of ambiguity as to be self-interpretive, it needs no construction and will be performed or

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[8] McHargue v. Conrad, 312 Ky. 434, 437, 227 S.W.2d 977, 979 (1950).

enforced in accordance with its express terms."[9] An ambiguous contract is one that is susceptible to more than one reasonable interpretation.[10] In the case at bar, we hold that the 1998 and 2000 agreements are free of ambiguity and that the parties' intentions may therefore be gleaned from the express terms.

As we stated previously, there is no language, either in the signed repair proposals or in the form construction agreement, indicating that Fidelity and T.A. Blair intended the 1998 and 2000 agreements to be merely "tentative" agreements, or documents solely for T.A. Blair to use during its settlement negotiations with Westfield.[11] To the contrary, the language of the agreements leads to only one reasonable construction, i.e., that while T.A. Blair retained some control over how the repair work would proceed, Fidelity would in fact eventually be given permission to begin and complete the contemplated repair work. Indeed, T.A. Blair has failed to point to any specific provision or provisions in the 1998 and/or 2000 agreements which are allegedly unclear or ambiguous.

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[9] Ex parte Walker's Executor, 253 Ky. 111, 68 S.W.2d 745, 747 (1933).

[10] Central Bank & Trust Co. v. Kincaid, Ky., 617 S.W.2d 32, 33 (1981).

[11] Tom Blair admitted during his testimony that there is no language in the 1998 or 2000 agreements supporting his contention that the parties entered into those agreements solely for the purpose of enabling T.A. Blair to present Westfield with repair estimates during settlement negotiations.

In reviewing contractual agreements, a court is not permitted to create an ambiguity where none exists,[12] and "an otherwise unambiguous contract does not become ambiguous" merely because one of the parties asserts, post-hoc, that the contract failed to state what the parties truly intended.[13] Therefore, since the terms of the agreements are free of ambiguity, the parties' intentions may be determined solely from the agreements' express terms. Accordingly, we reject T.A. Blair's claim that in determining the parties' intentions under the 1998 and 2000 agreements, the circumstances surrounding the execution of those agreements must be taken into account.

In a closely-related argument, T.A. Blair contends that the true intent of the parties may be determined by examining their "course of performance" with respect to the 1998 and 2000 agreements. In support of this argument, T.A. Blair notes (1) that Fidelity never demanded in writing to begin performance under the 1998 agreement; (2) that the repair work which was completed on the FiServ property was not governed by the form construction agreement; (3) that prior to executing the 2000 agreement, Howell sent T.A. Blair a letter allegedly

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[12] First Commonwealth Bank of Prestonsburg v. West, Ky.App., 55 S.W.3d 829, 836 (2000).

[13] Frear, 103 S.W.3d at 107 (stating that "an otherwise unambiguous contract does not become ambiguous when a party asserts--especially post hoc, and after detrimental reliance by another party--that the terms of the agreement fail to state what it intended").

stating that T.A. Blair might wish to "cancel" the agreement;[14] and (4) that after signing the 2000 agreement, Howell continued to send communications to T.A. Blair regarding proposed methods for repairing the National City Bank property.[15] T.A. Blair argues that these factors show that it "had the right to determine if and when the [repair] work would be done" under the 1998 and 2000 agreements. Once again, we disagree.

The so-called "doctrine of contemporaneous construction [ ] embraces no more than the practice of looking to the voluntary and positive acts of the parties in executing and fulfilling the terms of the contract."[16] However, the doctrine may only be invoked where the contract at issue is ambiguous and susceptible to more than one reasonable

[14] This letter was accompanied by a repair proposal for the National City Bank property. The precise language of this letter, which was dated March 4, 2000, approximately one month prior to the execution of the 2000 agreement, stated in part:

> This agreement between us can be increased or decreased [through] change orders, also the scope of work can be changed [through] changes of orders. You [T.A. Blair] may wish to cancel the contract in its [entirety] for your convenience, if that is the case, YOU & I can agree on a lump sum settlement.

In short, it is not at all clear which "contract" Howell was referring to when he stated that T.A. Blair might wish to "cancel the contract" in its entirety for its "convenience," since the 2000 agreement had not at that time been finalized.

[15] The fact that Howell continued to send letters to T.A. Blair regarding options on how it might wish to proceed with the repair of the National City Bank property is, notwithstanding T.A. Blair's argument to the contrary, consistent with the 2000 agreement. As we mentioned above, T.A. Blair retained some control over how the repair work was to be completed.

[16] William S. Haynes, Kentucky Jurisprudence, Contracts § 15-11, p. 268-69 (1986).

interpretation.[17] As we stated previously, the 1998 and 2000 agreements are not ambiguous, and T.A. Blair has not argued to the contrary. Thus, the doctrine of contemporaneous construction is not applicable and the intentions of the parties may be gleaned solely from the express terms of the agreement. Therefore, having concluded that, according to the express terms of the 1998 and 2000 agreements, T.A. Blair was bound to permit Fidelity to perform the repair work as called for under those agreements, we turn to the trial court's finding that T.A. Blair breached the agreements by preventing Fidelity's performance.

In its brief to this Court, T.A. Blair has not argued that the trial court erred by finding that it prevented Fidelity from performing the repair work as called for under the 1998 and 2000 agreements. Rather, T.A. Blair has argued that it was entitled "to elect not to have the work performed" under the terms of those agreements. However, as we stated previously, this interpretation is at odds with the express terms of the agreements in question. Accordingly, we affirm that portion of the trial court's order which found that T.A. Blair had breached the 1998 and 2000 agreements.

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[17] See Wathen v. Schleicher, Ky., 510 S.W.2d 22, 23 (1974)(stating that "[i]n order for the doctrine of contemporaneous construction to be utilized, the contract first has to be ambiguous"); and Haynes, supra at 269 (noting that "the doctrine of contemporaneous construction is inapplicable to contract terms which are clear and unambiguous").

We now consider Fidelity's argument on its appeal that the trial court erred by denying its request for expectation damages. As Fidelity points out, the trial court offered three primary reasons for declining to award expectation damages. First, the trial court placed a great deal of emphasis on the fact that Fidelity never began performance under the 1998 or 2000 agreements, and concluded that "the [c]ourt declines to compensate Fidelity for doing nothing." Second, the trial court denied Fidelity's request for expectation damages on grounds that such an award would result in "disproportionate compensation." Third, the trial court denied Fidelity a recovery for lost profits under the 2000 agreement on grounds that those losses were "foreseeable" and "avoidable." Fidelity claims that all of the grounds stated were improper reasons for denying its request for expectation damages. We agree.

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."[18] 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

[18] Perkins Motors, Inc. v. Autotruck Federal Credit Union, Ky.App., 607 S.W.2d 429, 430 (1980).

contract price and the reasonable cost of performance."[19] Simply stated, the trial court did not cite, and our own research has not disclosed, any authority which stands for the proposition that where a breaching party has improperly prevented performance under a contract, the non-breaching party must have actually begun performance before a recovery for expected lost profits will be available. To the contrary, both Koplin and Janin v. Herron,[20] involve situations in which the non-breaching parties were permitted to recover lost profits despite the fact that they had not yet began performance when the breaching party improperly prevented them from performing under the contracts at issue. Accordingly, the trial court erred by making this distinction as grounds for denying Fidelity an award for expectation damages.

Similarly, the trial court's ruling that under the facts of the case at bar, an award for lost profits would result in "disproportionate compensation" was not a proper basis for denying Fidelity's request for expectation damages. In making its ruling, the trial court apparently relied on Section 351(3)

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[19] See, e.g., Koplin v. Faulkner, Ky., 293 S.W.2d 467, 469 (1956).

[20] 206 Ky. 171, 266 S.W. 1058, 1059 (1924).

of the Restatement (Second) of Contracts,[21] which reads in full as follows:

> A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

Comment f to Section 351 suggests that this limitations provision is most applicable to situations in which the contract arose in an informal or non-commercial setting, or where there is "an extreme disproportion" between the amount of the losses claimed and the value of the services at issue.[22] Clearly, neither situation is present under the facts of the instant case. The 1998 and 2000 agreements were executed by two

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[21] Neither the trial court nor the parties were able to cite a published Kentucky case adopting this section of the Restatement. Likewise, our own research did not reveal a reported Kentucky decision citing this particular provision of the Restatement.

[22] Comment f reads in pertinent part as follows:

> It is not always in the interest of justice to require the party in breach to pay damages for all of the foreseeable loss that he has caused. There are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that, although there was no such assumption, it would be unjust to put the risk on that party. One such circumstance is an extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question. The fact that the price is relatively small suggests that it was not intended to cover the risk of such liability. Another such circumstance is an informality of dealing, including the absence of a detailed written contract, which indicates that there was no careful attempt to allocate all of the risks.

experienced businessmen in a commercial setting, and Fidelity's request to recover approximately 17% of the total value of both agreements as lost profits does not amount to an "extreme disproportion" between the losses claimed and the value of the services in question.[23] Therefore, even if Section 351(3) were controlling, the trial court erred in its application of that section to the facts of the case at bar.

Finally, the trial court denied Fidelity's request for expectation damages for the 2000 agreement on the grounds that any lost profits under this agreement were "foreseeable" and "avoidable" due to T.A. Blair's unwillingness to proceed with the repair work under the 1998 agreement. Once again, this was an improper basis upon which to deny Fidelity an award for expectation damages. As we will explain in further detail below, in the context of awarding expectation damages, the doctrine of foreseeability requires that before lost profits will be awarded, the non-breaching party's damages must have been reasonably foreseeable to the parties at the time of contracting. Hence, the trial court erred with respect to its foreseeability analysis. Therefore, having concluded that all

[23] The total value of both agreements was $1,090,891.51. Fidelity's request to recover $186,872.78 in expectation damages represents approximately 17% of the total value of both agreements. For a case in which the trial court relied upon the "extreme disproportion" language found in § 351(3) as a basis for denying a party's request for "compensatory damages," see International Ore & Fertilizer Corp. v. SGS Control Services, Inc., 743 F.Supp. 250, 257 (S.D.N.Y. 1990)(denying plaintiff's request for $2,400,000.00 in damages where the contract price was only $150.00, which represented "a ratio of 16,000 to one").

of the trial court's stated grounds for denying Fidelity an award for expectation damages were erroneous, we turn to the question of whether an award for lost profits under the facts of the case sub judice was proper.

Where a party has been improperly prevented from performing under a contract, there are essentially two requirements that must be met before the non-breaching party will be entitled to an award for expectation damages. First, the non-breaching party's lost profits must have been reasonably foreseeable at the time the parties entered into the contract. In Kentucky Consumers Oil Co. v. General Bonding Warehousing Corp.,[24] the former Court of Appeals stated:

> "In addition to general damages, the injured party is entitled to recover special damages which arise from circumstances peculiar to the particular case, where those circumstances were communicated to or known by the other party at the time the contract was made; that is, he may recover such damages as are the reasonable and natural consequences of the breach under the circumstances so disclosed, and as may reasonably be supposed to have been in the contemplation of both parties. In such case, the special circumstances become an

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[24] 299 Ky. 161, 165-66, 184 S.W.2d 972, 974 (1945)(quoting Baker v. Morris, 168 Ky. 168, 172, 181 S.W. 943, 945 (1916)). See also Warren Post No. 23, American Legion v. Jones, 302 Ky. 861, 865, 196 S.W.2d 726, 728 (1946)(stating that "'[a]s a general rule, 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 their loss may reasonably be supposed to have been within the contemplation of the parties when the contract was made, as the probable result of its violation'")(quoting 15 Am.Jur. Damages, § 151).

> implied element of the contract, and of the duty thereby imposed."
>
> . . .
>
> "Loss of profits growing out of an existing collateral or subordinate agreement may be recovered where they were within the contemplation of the parties when the original contract was made; but, as in other cases of special damage, the defendant must have had notice of such collateral contract at that time."

Second, the amount of lost profits must be proven to a degree of reasonable certainty. In Illinois Valley Asphalt, Inc. v. Harry Berry, Inc.,[25] our Supreme Court discussed this requirement:

> Loss of anticipated profits as an element of recoverable damages for breach of contract is fully recognized in Kentucky. Mere uncertainty as to the amount will not preclude recovery. There must be presented, however, sufficient evidence on which a reasonable inference as to the amount of damage can be based [citations omitted].

Furthermore, it has been held that "uncertainty which prevents a recovery is uncertainty as to the fact of damage and not as to its amount. Where it is reasonably certain that damage has resulted, mere uncertainty as to the amount does not preclude one's right of recovery or prevent a jury decision awarding damages."[26]

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[25] Ky., 578 S.W.2d 244, 245-46 (1979).

[26] 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).

During the proceedings below, the trial court denied Fidelity's request for expectation damages without considering whether Fidelity had satisfied either of the two aforementioned requirements for recovering lost profits. Consequently, the trial court made no factual findings with respect to this issue. Hence, a remand of this matter for further fact-finding is necessary. Accordingly, we reverse that portion of the trial court's judgment denying Fidelity's request for expectation damages, and remand this matter with instructions to consider whether Fidelity has satisfied the "foreseeability" and "reasonable certainty" requirements discussed above.

Based on the foregoing, the judgment of the Warren Circuit Court is affirmed in part and reversed in part and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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