STATE OF MICHIGAN

COURT OF APPEALS

WIMSATT BUILDING MATERIALS CORP.,

Plaintiff-Appellant,

v

TERRY D. BREEST, RSI WHOLESALE, INC., and ALLIED BUILDING PRODUCTS CORPORATION,

Defendants-Appellees,

and

TERRY O'DONNELL,

Third-Party Defendant-Appellee.

UNPUBLISHED
March 2, 2001

No. 218434
Wayne Circuit Court
LC No. 97-739810-CZ

Before: Saad, P.J. and Griffin and R. B. Burns*, JJ.

PER CURIAM.

Following a bench trial, the trial court determined that defendant Breest had breached a covenant not to compete with plaintiff, but that plaintiff failed to prove that it suffered any damages as a result of the alleged breach. The court also enjoined defendant Breest from competing against plaintiff in violation of the agreement through September 15, 2000. Plaintiff appeals as of right. We affirm.

Plaintiff first argues that the trial court should have found a breach based on defendant Breest's use or disclosure of confidential information. However, we agree with the trial court that, apart from plaintiff's subjective belief, there was no competent evidence that defendant Breest used or disclosed any confidential information. Although the court rejected that particular theory, it found that there had been a breach of the agreement. We therefore consider plaintiff's next argument, that being that the court erred in failing to award damages. We disagree.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

It is well settled that, "[i]n order to recover prospective profits, a plaintiff must establish proof of lost profits with a reasonable degree of certainty." *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997). An award of lost profits "cannot be based solely on mere conjecture and speculation; however, mathematical certainty is not required, and even where lost profits are difficult to calculate and are speculative to some degree, they are still allowed as a loss item." *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988). "The type of uncertainty which will bar recovery of damages is 'uncertainty as to the fact of damages and not as to its amount . . . [since] where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery.'" *Bonelli*, *supra* at 511.

However, "[i]n order for past profits to be safely taken as a measure of future profits, all the various contingencies by which such profits could be affected should be taken into account by the [trier of fact] and allowed such weight as [it], in the exercise of good sense and sound discretion, believes they are entitled to." *Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 391; 385 NW2d 797 (1986). For example, in *Sullivan Inds, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 349; 480 NW2d 623 (1991), the plaintiff's proofs were deemed insufficient because the plaintiff "presented no evidence from which the court could distinguish sales lost because of the recession in the early 1980s from sales lost because of [defendant's breach]." Further, the plaintiff "presented no evidence concerning what the profit margin would have been on the lost sales" and, without such evidence, an award would have been speculative and improper. *Id.* at 349-350.

Similarly, in *Joerger*, the Court found that the plaintiffs' proofs were insufficient because they were based on large projected increases in the amount of future sales and in the size of the plaintiff's client base. *Joerger*, *supra* at 176. Additionally, as to data concerning an allegedly similar business, the plaintiffs "failed to present any information concerning [its] profitability," failed to "present any witnesses . . . with personal knowledge regarding . . . sales or profits," and admitted that they had "never reviewed any financial information" concerning the other business' "accounts or monthly sales . . . ." *Id.* at 176-177.

In the present case, plaintiff did not call its accountant to testify, nor any of its customers, RSI's accountants, or any experts. Rather, it introduced three exhibits detailing the gross sales and gross profits generated by its core group of twenty customers, and one exhibit concerning defendant Breest's gross sales for defendant RSI in 1998. Plaintiff did not attempt to present or analyze any other financial data concerning RSI. Plaintiff argued that it was either entitled to the decrease in lost profits allegedly shown by its exhibits, or to the profit it presumed that defendant RSI made from Breest's sales. Plaintiff computed RSI's profit margin at 14.3 percent.

After reviewing the record, we conclude that the exhibits show a decrease in plaintiff's gross sales and gross profits, which started when Breest was still working for plaintiff. There was no evidence that any of the customers bought materials from RSI that they would have otherwise purchased from plaintiff. Further, we agree with the trial court that plaintiff's calculation of its lost profits based upon a 14.3 percent profit margin was "totally unjustified" in light of testimony that about seventy percent of commercial roofing sales are vendor direct, and result in only about a one to three percent profit margin. Plaintiff also failed to offer credible

evidence of its own lost profits. Accordingly, we find no clear error in the trial court's determination that plaintiff failed to prove its damages with a reasonable degree of certainty. See *Poirier v Grand Blanc Township (After Remand)*, 192 Mich App 539, 548-550; 481 NW2d 762 (1992).

Plaintiff next argues that the trial court erred in denying its post-trial motion to extend the duration of the non-competition agreement. However, because plaintiff expressly requested at trial that Breest only be enjoined until September 2000, we find that this issue has been waived. See *Phinney v Perlmutter*, 222 Mich App 513, 537-538; 564 NW2d 532 (1997).

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns