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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-128**

VoiceStream Minneapolis, Inc.,
d/b/a T-Mobile,
a Delaware corporation,
Respondent,

vs.

RPC Properties, Inc.,
defendant and counter plaintiff,
Appellant.

**Filed January 5, 2010
Affirmed
Crippen, Judge***

Ramsey County District Court
File No. 62-C4-04-008028

Tamara O'Neill Moreland, Larkin, Hoffman, Daly & Lindgren, Ltd., 1500 Wells Fargo Plaza, 7900 Xerxes Avenue South, Bloomington, MN 55431-1194 (for respondent)

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Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Crippen,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CRIPPEN, Judge

Respondent VoiceStream Minneapolis, Inc., d/b/a T-Mobile, was a rooftop tenant in a building owned by appellant RPC Properties, Inc. In September 2005, the district court ordered performance of respondent's April 2005 agreement to remove equipment from appellant's premises. Appellant, although successful in getting the 2005 order to enforce its agreement, disputes a current district court order holding that it failed to adequately prove causation for the damages it claims were caused by respondent's delayed removal of its equipment. Appellant also challenges the district court's determination that its right to damages for respondent's breach of the settlement agreement must be confined to delays during the five-month time period between the 2005 settlement and the date when the court ordered it enforced. Because the evidence supports the district court's measure of damages and its finding that no damage was proven, we affirm.

FACTS

In November 2000, respondent entered into a five-year rooftop lease with appellant to lease space for cell phone antenna. In spring 2004, appellant claimed that respondent caused damage to the roof during performance of an equipment upgrade. On April 29, 2005, pursuant to mediation, the parties entered into a memorandum of understanding to settle their dispute.

In pertinent part, the April settlement provided that respondent was to relocate equipment to permit inspection and repair of parts of the roof. On September 22, 2005,

the district court granted appellant's August motion and ordered respondent to remove and relocate its antenna arrays as agreed in the settlement agreement. The order granted attorney fees and costs but did not address breach-of-contract damages, which appellant had proposed could be "established in a subsequent evidentiary hearing."

Appellant disputed the judgment, arguing that the district court erred because it did not award or discuss consequential damages. In an opinion issued February 20, 2007, this court held that the district court's silence on appellant's request for consequential damages constituted a denial. *VoiceStream Minneapolis, Inc. v. RPC Props., Inc.*, No. A06-394, 2007 WL 509621 (Minn. App. Feb. 20, 2007). The Minnesota Supreme Court reversed, holding that the district court had to either grant a hearing on consequential damages or explicitly deny the claim for damages and indicate that no material facts are in controversy. *VoiceStream Minneapolis, Inc. v. RPC Props., Inc.*, 743 N.W.2d 267, 273 (Minn. 2008). The supreme court stated, "We leave it to the district court to determine whether [respondent's] unreasonable delay in performance under the settlement agreement caused any damages." *Id.*

In a remand hearing in July 2008, the district court limited the scope of the hearing to damages that were caused by the breach between the settlement date in April 2005 and the enforcement order in September. The owner of appellant testified that although respondent moved the equipment, it failed to make any of the subsequent repairs.

When asked about damages related to the five-month period, the owner testified that Tom Babcock, a CPA, left the building due to leakage in his office space. Babcock's lease ran from June 2005 through May 2008, but Babcock exercised a 90-day escape

clause in his lease to leave in May 2006. The owner stated that he did not know if Babcock had told him that he was leaving by the end of September 2005, but that “he had talked about it.” The owner stated that after Babcock left, another tenant expanded into a portion of the space.

The owner also testified that in June 2006, Adelphi Mortgage, a tenant in the building, moved to a smaller, less expensive space across the hall where there was no leak. When Adelphi signed the lease for the larger space on January 1, 2006, they had occupied that space “for quite some time.” Adelphi signed a separate lease for the smaller space on March 23, 2006.

When asked specifically about damages incurred by August or September 2005, the owner stated, “There is no way you can—you can say that because of their non action, in this small period of time, the consequences down line, you can’t do that.”

Appellant’s operations manager testified that the damages incurred as a result of Adelphi’s move to a smaller space totaled \$8,828.91, consisting of a decrease in rent and the pro rata expenses of the building. The manager admitted that he remembered leaking in the Adelphi space since he started working for appellant in March 2001. The manager testified that appellant sustained losses of \$68,800 as a result of Babcock’s departure before his lease term was over.

Thomas Babcock testified that he discussed leaving with the owner in August or September 2005, but did not leave at that time because it was the firm’s “busy season.” Asked what “finally precipitated” his decision to leave, Babcock said that the water damage unnerved him, and that he had been thinking of moving for a long time to shorten

his commute. He added that the water “was certainly a factor” in the move decision but, “I don’t know if the water was the final thing that made us move.” Babcock also testified that he specifically remembered leaking in his space in 2003, and was “sure it leaked” in 2002 as well.

The district court concluded that appellant failed to meet its burden of proving consequential damages, and denied appellant’s motion.

D E C I S I O N

1.

Appellant disputes the district court’s decision to limit the scope of the damages hearing to damages resulting from the breach during the five months before removal was ordered. Appellant contends that damages are typically computed through the day of trial, but it cites no legal authority to dispute the scope of the claim permitted by the court. The district court noted that its decision was permitted by the remand instruction.

The district court’s duty on remand is to execute the mandate of the remanding court “strictly according to its terms,” without alteration. *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982). Still, the district court has broad discretion to determine how to proceed on remand, and may act in any way not inconsistent with the remand instructions. *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005).

The supreme court’s remand instructions address the claim for “consequential damages,” leaving it to the district court “to determine whether [respondent’s] unreasonable delay in performance under the settlement agreement caused any damages.”

Voicestream, 743 N.W.2d at 273. The plain language of the instruction does not address the timeframe for the damages inquiry. We observe that the appeal claims addressed damages claimed in 2005 and the remand refers to consequential damages.

The district court did not abuse its discretion when it limited the scope of the damages hearing to harm done during the five-month period in 2005. The only determination of respondent's fault, its breach of the settlement agreement, was in September 2005. Nothing in the remand instruction required the district court to determine respondent's liability for damages inflicted after September 2005, and there was no further pleading in respect to such damages. *See In Re Estate of Boysen*, 351 N.W.2d 398, 401 (Minn. App. 1984) (holding that the district court could not examine the revocation of decedent's 1975 will on remand when remand instruction was to determine whether decedent intended to die intestate or to revive his 1964 will).

2.

Appellant also disputes the district court's conclusion that it failed to prove any damages attributable to the five-month period in question. In holding that appellant failed to meet its burden in proving damages, the district court concluded that appellant did not suffer a loss as a result of Babcock exercising his legal right to vacate the premises, and that appellant failed to establish why Adelphi moved to a smaller space. The court further noted that both Adelphi's original lease and subsequent lease for a smaller space were signed long after the September 22, 2005 hearing.

A damages award for a breach of contract claim should put the injured party in the position in which it would be had the contract been performed. *Lesmeister v. Dilly*, 330

N.W.2d 95, 102 (Minn. 1983). In civil actions, the plaintiff has the burden of proving damages caused by defendant by a fair preponderance of the evidence. *Canada by and through Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997). A reviewing court will not disturb a damages award “unless its failure to do so would be shocking or would result in plain injustice.” *Hughes v. Sinclair Mktg., Inc.*, 389 N.W.2d 194, 199 (Minn. 1986).

Consequential damages are those that flow naturally from the breach of a contract, or may be reasonably contemplated by the parties as a probable result of the breach. *Indieke v. Blenda-Life, Inc.*, 363 N.W.2d 121, 125 (Minn. App. 1985), *review denied* (Minn. Apr. 26, 1985). Also, the harmed party has the duty to take reasonable measures to mitigate damages. *County of Blue Earth v. Wingen*, 684 N.W.2d 919, 924 (Minn. App. 2004). The harmed party has the burden to demonstrate consequential damages “with a reasonable degree of certainty and exactness.” *Id.* To be recoverable, damages must not be speculative, remote, or conjectural. *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn. 1980).

On the evidence of record, the district court did not err in concluding that appellant failed to prove damages resulting from respondent’s delay. Appellant failed to prove that the leakage that occurred during the five-month period in question caused harm. The operations manager testified that the roof had been leaking as far back as 2001. In order to recover, appellant had to identify “with a reasonable degree of certainty and exactness” damages incurred after the settlement agreement but before the court issued the order enforcing the agreement. *See County of Blue Earth*, 684 N.W.2d at 924.

When asked to specifically identify the damages that occurred during this limited time period, the owner testified that he was unable to isolate the damages incurred during the five-month period because the results of respondent's breach "carri[ed] on for a period of time."

More particularly, the district court did not err in responding to the claims appellant associated with conduct of other tenants, Babcock and Adelphi. Although Babcock testified that the leakage was "certainly a factor" in his decision to move, he stated that there were other reasons for the termination. Moreover, Babcock did not move out until May 2006, eight months after the order to enforce the settlement. Appellant presented no evidence regarding the reasons why Adelphi made this request other than the owner's testimony. And Adelphi signed the lease for the smaller space on March 23, 2006, six months after respondent was ordered to move its equipment.

The district court did not err in denying appellant's motion for consequential damages.

3.

Respondent, spared from liability for damages, argues that the district court abused its discretion when it denied respondent's request for attorney fees. "On review, this court will not reverse a [district] court's award or denial of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

The rooftop lease provides that the "substantially prevailing party" in any litigation arising under the lease shall be entitled to attorney fees and costs, including

those for appeals. Following the damages hearing on remand, the district court declined to award attorney fees to either party.

Respondent does not specifically identify the scope of its claim, arguing on this appeal that it is “entitled as a matter of law to all attorneys’ fees and costs incurred with respect to [a]ppellant’s alleged damages claim.” The scope of the remand was confined to proceedings on the claims for damages. On the damages hearing, the district court reasoned, “[e]ven though the Court found that the consequential damages were not proven by [appellant], the Court does not feel that attorney’s fees should be awarded to either party for the last hearing on consequential damages.”

Respondent argues that the district court erred in not determining the “substantially prevailing party.” It is evident that the district court determined, following the occasion when both parties clearly stated their positions on the issue, that neither party was the “substantially prevailing party” entitled to fees under the rooftop lease. This coincides with the facts that respondent initially suffered a final decision that it had breached its April 2005 agreement; appellant was then awarded \$2,550 in fees and costs; the supreme court subsequently decided that appellant (not respondent) was entitled to a damages hearing; and the supreme court awarded judgment costs of \$300 and disbursements of \$1,301.75 in favor of appellant.

In addition to respondent’s prior setbacks in the case, the district court’s decision adequately takes into account the remand proceedings. Although appellant failed to ultimately prove damages, its claim for consequential damages was not frivolous, as indicated by the supreme court’s decision to remand. *See Glarner v. Time Ins. Co.*, 465

N.W.2d 591, 597 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991) (“Costs and attorney fees may be awarded against a party who acts in bad faith, asserts a frivolous claim or unfounded position or commits a fraud upon the court.”).

In sum, the court implicitly held that respondent was not the “substantially prevailing party,” and the court’s order was not an abuse of discretion. Respondent’s district court motion also referenced fees associated with appellant’s “unauthorized submissions” to the district court seeking a damages hearing. Insofar as respondent continues to request an award on this topic, we view it as one within the scope of the district court’s order denying fees for respondent on the damages hearing itself, which we affirm.

Affirmed.