[Cite as *Nieman v. Bunnell Hill Dev. Co., Inc.*, 2010-Ohio-1519.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

GLENN NIEMAN,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-04-109
	:	O P I N I O N
- vs -		4/5/2010
	:	
BUNNELL HILL DEVELOPMENT COMPANY, INC.,	:	
	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2005-07-2229

The Drew Law Firm Co., LPA, Anthony G. Covatta, One West Fourth Street, Suite 2400, Cincinnati, Ohio 45202, for plaintiff-appellant

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BRESSLER, P.J.

{¶1} Plaintiff-appellant, Glenn Nieman, appeals a decision of the Butler County Court of Common Pleas, entering a directed verdict in favor of defendant-appellee, Bunnell Hill Development Co., Inc.

{¶2} In December 1996, Nieman leased a 1,250-square foot space in a strip center called Bethany Station, which was owned by Bunnell Hill. Nieman used the space to open a

pizzeria called "Big Dog's Pizza" in May 1997. The lease agreement between the parties contained a clause allowing Nieman a right of first refusal before the space on either side of Nieman's pizzeria could be leased. However, in September 2000, Bunnell Hill leased the space immediately to the north of Big Dog's Pizza to Putter's Tavern & Grill. The lease between Bunnell Hill and Putter's Tavern & Grill included space for which Nieman had been granted the right of first refusal.

{¶3} In April 2002, Nieman closed Big Dog's Pizza in Bethany Station and terminated his lease with Bunnell Hill. In May 2003, he opened a Big Dog's Pizza at Lakota Plaza, which is approximately two to three miles away from Bethany Station.

{¶4} Nieman brought a breach of contract action against Bunnell Hill, which he voluntarily dismissed pursuant to Civ.R. 41(A). On July 11, 2005, he re-filed his action against Bunnell Hill, alleging that Bunnell Hill breached the terms of the parties' lease when it rented the space immediately north of his former pizzeria at Bethany Station to Putter's Tavern & Grill, without allowing him to exercise his right of first refusal as to that space.

{¶5} On May 22, 2007, the trial court held a jury trial on Nieman's claim. At the close of evidence and arguments, the jury found Bunnell Hill breached its contract with Nieman by violating the right of first refusal clause of the parties' lease. The jury awarded Nieman $162,500 in damages as a result of the breach, and the trial court entered judgment against Bunnell Hill for that amount.

{¶6} Bunnell Hill appealed that judgment, and on October 27, 2008, this court reversed the trial court's judgment and remanded the matter for a new trial to determine: (1) what Nieman's lost profits would have been had the contract breach not occurred; and (2) what damages Nieman incurred, if any, as a result of his having to move his pizzeria out of the location in Bethany Station and build-out and move into his new location in Lakota Plaza. See *Nieman v. Bunnell Hill Development Co., Inc.*, Butler App. No. CA2007-07-174, 2008-

Ohio-5541 ("*Nieman I*").

{¶7} After this court remanded the matter, the trial court held a status report hearing, but Nieman's counsel failed to attend. The trial court ordered both parties to make personal appearances at a pretrial conference on January 5, 2009, but Nieman's counsel again failed to appear in person. Nieman's counsel appeared via telephone to request a later conference so Nieman could obtain new counsel. At a pretrial conference on January 20, 2009, Nieman indicated he wished to name expert witnesses, provide an update as to his alleged damages, and retain new counsel. At this time, the trial court ordered Nieman to file a motion naming his expert witnesses and updating discovery, and to serve this motion on Bunnell Hill. After Nieman failed to file such a motion, Bunnell Hill moved the court to preclude Nieman from naming additional expert witnesses and updating discovery. At that time, Bunnell Hill's counsel filed an affidavit summarizing the trial court's orders and stating that Nieman failed to name expert witnesses or update discovery.

{¶8} On February 10, 2009, the trial court issued an entry finding that Nieman failed to respond to its order to name experts and update discovery. Further, the court noted that the trial was to begin in nine days, Nieman's counsel had not moved to withdraw as counsel, no other counsel had filed a notice of appearance on behalf of Nieman, Nieman failed to file a pretrial statement, and Nieman had not named any additional witnesses. The court held that it would be unfair to permit Nieman to name an expert witness only nine days before the trial, and held that Nieman would not be permitted to present expert testimony regarding the issue of lost profits.

{¶9} On February 17, 2009, Nieman's counsel moved to withdraw as counsel and to continue the trial, and Nieman's new counsel entered his appearance on March 2, 2009. When Nieman's new counsel attempted to identify expert witnesses, the trial court declined to vacate its previous decision denying Nieman the opportunity to present expert witness

testimony on lost profits.

{¶10} On March 18, 2009, a jury trial began, and Bunnell Hill moved for a directed verdict at the close of Nieman's case-in-chief. The trial court granted Bunnell Hill's motion. Nieman appeals the trial court's decision, raising two assignments of error.

{¶11} Assignment of Error No. 1:

{¶12} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING PLAINTIFF THE RIGHT TO PRESENT ANY EXPERT TESTIMONY REGARDING DAMAGES."

{¶13} In Nieman's first assignment of error, he argues the trial court prevented him from complying with this court's remand instructions by improperly denying him the opportunity to present expert witnesses at trial on the issue of damages.

{¶14} When a judgment is reversed and remanded for further proceedings, the trial court may take up the matter where the first error was committed. *In re C.P.*, Franklin App. Nos. 09AP-823, 09AP-854, 2010-Ohio-346, ¶19, citing *In re G.N.*, 176 Ohio App.3d 236, 2008-Ohio-1796, ¶11. "In other words, the cause is reinstated in the trial court in precisely the same condition it was in before the action that resulted in the appeal and reversal." *In re C.P.*, ¶19. See, also, *Armstrong v. Marathon Oil Co.*, (1987), 32 Ohio St.3d 397, 418.

{¶15} The decision to grant an extension of time for purposes of naming an expert lies within the sound discretion of the trial court. *Allegro Realty Advisors, Ltc. v. Orion Assoc., Ltd.*, Cuyahoga App. No. 87004, 2006-Ohio-4588, citing *Miller v. Lint* (1980), 62 Ohio St.2d 209. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶16} Nieman argues the holdings in *Armstrong* and *Allegro* required the trial court to allow him the opportunity to identify experts and conduct additional discovery. Nieman's

reliance on these cases is misplaced, as neither case involved facts similar to this case.

{¶17} In *Armstrong*, the Ohio Supreme Court found that during a *preliminary* stage of the proceedings, the trial court ruled that one of the parties was ineligible to proceed. The court held that when the appellate court remanded the matter to the trial court, "[the improperly dismissed party] should have been permitted to continue the presentation of its case from its last procedural position prior to dismissal. This would have entitled [the improperly dismissed party] to a reasonable discovery period to prepare its case. Specifically, the correct procedure here would have been to continue all of the cases for a reasonable period of time." *Armstrong*, 32 Ohio St.3d at 418.

{¶18} In *Allegro*, the Eighth Appellate District considered whether the trial court erred in denying a party's motion to reopen discovery to designate an expert witness for purposes of determining damages in a case involving a breach of contract. The appellate court found that, "[t]he trial court 'closed' discovery on October 14, 2004, due to the fact that the trial was scheduled for November 17, 2004, a ruling well within the discretion of the court. However, for various and assorted reasons, none having to do with the presentation of an expert report, the trial in this matter was continued until May 2005 and ultimately until August 2005." 2006-Ohio-4588 at ¶47. Further, the court found, "[o]n December 6, 2004, the trial court granted summary judgment on the liability issue, rendering the only remaining issue one of damages. The trial court would not permit Orion to obtain an expert report on that sole issue, however, even though the case was not heard for some eight months. Under these *narrow and somewhat unusual circumstances*, * * * the refusal to 'extend' or 'reopen' discovery on the only remaining issue to be an abuse of discretion significant enough to justify a remand for a new trial upon the issue of damages only." Id. at ¶48. (Emphasis added.)

{¶19} In this case, the action that resulted in the appeal and reversal was allowing the original jury to determine damages based on the evidence Nieman presented at the trial.

Despite Bunnell Hill's insistence that Nieman was not entitled to conduct additional discovery or identify new expert witnesses as he had a full and fair opportunity to do this prior to the commencement of the original trial, Nieman had the opportunity to name expert witnesses after we remanded the matter. This court announced its decision in *Nieman I* on October 27, 2008. Months later, as of the pretrial conference on January 20, 2009, Nieman still had not named expert witnesses and the court ordered Nieman to file a motion naming any expert witnesses he wished to call by January 23, 2009. Nieman failed to do so, and finally, on February 10, 2009, the trial court denied Nieman the opportunity to name expert witnesses as the trial date was scheduled for nine days later. Contrary to Nieman's assertion, the trial court did nothing to prevent him from "complying with this court's remand instructions," as this court did not order Nieman to utilize expert witnesses in proving his damages. If Nieman believed it necessary to utilize expert witnesses to prove his damages, it was his sole responsibility to do so within the time allowed by the trial court. Nieman simply failed to take advantage of a *second* opportunity to do this. Accordingly, we find the trial court did not abuse its discretion in denying Nieman the opportunity to name expert witnesses nine days before the trial date after having the opportunity to do so both before the original trial and in the months following this court's remand in *Nieman I.*

{¶20} Nieman's first assignment of error is overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ERRED WHEN IT GRANTED BUNNELL HILL'S MOTION FOR A DIRECTED VERDICT."

{¶23} In his second assignment of error, Nieman argues the trial court improperly granted a directed verdict in Bunnell Hill's favor, as he claims reasonable minds might reach a different conclusion based upon the evidence presented.

{¶24} The standard for granting a directed verdict is set forth in Civ.R. 50(A)(4), which

provides: "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶25} If reasonable minds could come to more than one conclusion as to the evidence presented, a trial court should permit the issue to go to the jury. *Rockwood v. West Chester Nursing and Rehab. Residence, L.L.C.*, Butler App. No CA2006-10-250, 2007-Ohio-7071, ¶8, citing *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St.3d 39, 45. When the party opposing a motion for a directed verdict has failed to adduce any evidence on the essential elements of the claim, a directed verdict is appropriate. *Brown v. Senor Gringo's, Inc.*, Defiance App. No. 4-09-18, 2010-Ohio-985, ¶28, citing *Cooper v. Grace Baptist Church* (1992), 81 Ohio App.3d 728, 734. The issue to be determined involves a test of the legal sufficiency of the evidence to allow the case to proceed to the jury and constitutes a question of law. *Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 2006-Ohio-3550, ¶18. Accordingly, a reviewing court must conduct a de novo review of the trial court's judgment, and like the trial court, must construe the evidence most strongly in favor of the party against whom the motion is directed. *Rockwood* at ¶9.

{¶26} In *Neiman I*, 2008-Ohio-5541, we reversed the trial court's judgment with respect to the award of damages to Nieman, and remanded the matter for a new trial to determine: (1) what Nieman's lost profits would have been had the contract breach not occurred; and (2) what damages Nieman incurred, if any, a result of his having to move his pizzeria out of the location in Bethany Station and build-out and move into his new location in Lakota Plaza.

{¶27} As we stated in *Nieman I* at ¶16, quoting *Charles R. Combs Trucking, Inc. v.*

Internatl. Harvester Co. (1984), 12 Ohio St.3d 241, paragraph two of the syllabus, "[l]ost profits may be recovered by the plaintiff in a breach of contract action if: (1) profits were within the contemplation of the parties at the time the contract was made, (2) the loss of profits is the probable result of the breach of contract, and (3) the profits are not remote and speculative and may be shown with reasonable certainty."

{¶28} Further, this court in *Nieman I* at ¶17-18 stated:

{¶29} "As to the third prong of the *Combs* test, the Ohio Supreme Court subsequently held that '[i]n order for a plaintiff to recover lost profits in a breach of contract action, the *amounts* of lost profits, as well as their existence, must be demonstrated with reasonable certainty.' (Emphasis added.) *Gahanna v. Eastgate Properties, Inc.* (1988), 36 Ohio St.3d 65, syllabus.

{¶30} "'In Ohio a new business may recover lost profits in a breach of contract action but such lost profits must be established with reasonable certainty.' *AGF, Inc. v. Great Lakes Heat Treating Co.* (1990), 51 Ohio St.3d 177, paragraph two of the syllabus. 'A new business may establish lost profits with reasonable certainty through the use of such evidence as expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts.' Id. at paragraph three of the syllabus."

{¶31} At the second trial, Nieman testified his profits at the Bethany Station location would have been $159,062. Nieman testified this amount is the profit he would have earned had the breach not occurred, had he been offered the right to roughly triple the space of his pizzeria, and had he actually expanded the pizzeria. Nieman explained the method of reaching this amount as follows. First, Nieman took the amount of his actual profit from his last full year at Bethany station in 2001, which was $18,194, and tripled that figure to reach $54,582. Nieman maintains this amount of $54,582 is the amount of profit he would have

earned each year if not for the breach. Since Nieman actually made a profit of $18,194 in 2001, he deducted that amount from $54,582 and alleged his lost profit for 2001 to be $36,388. In 2002, Nieman's pizzeria did not earn a profit, but instead lost $11,121. Nieman added the amount lost to $54,582 to reach $65,703 in lost profits for 2002. Likewise, in 2003, Nieman's pizzeria lost $2,389 so he added that amount to $54,582 to reach $56,971 in lost profits for 2003. Nieman added up his alleged lost profits from 2001 to 2003 and concluded the profits he would have earned these years in an expanded pizzeria in Bethany Station totals $159,062.

{¶32} After reviewing the record de novo, we find Nieman has not demonstrated his lost profits with reasonable certainty. First, in determining the amount of lost profit per year Nieman simply assumes that his profits would triple simply because the space of his pizzeria would have tripled. Nieman has failed to demonstrate this method as reliable, and has otherwise failed to provide any support for using this method, other than asserting he used it because his rent is dependent on the square footage of the pizzeria. Further, Nieman failed to provide any evidence of the additional expenses he would have incurred had the breach not occurred and had he expanded the pizzeria. Nieman even admitted that he did not even know what his property and liability insurance was at Bethany Station as it existed before he moved out, let alone what it would have been had he expanded his pizzeria. Likewise, Nieman did not present any evidence as to what his increased rent, utilities, personnel, and common area maintenance charges would be for an expanded pizzeria.

{¶33} Nieman maintains he was precluded from using expert testimony to demonstrate lost profits with reasonable certainty and that he did so to the best of his ability given this limitation. However, as we found above, Nieman was not precluded from naming an expert until nine days before the trial on damages, despite having the opportunity to do so both before the first trial, and after this court remanded the matter for a new trial on

damages. Moreover, the use of expert testimony is only one of several methods of demonstrating lost profits with a reasonable degree of certainty. See *AGF, Inc.*, 51 Ohio St.3d at paragraph two of the syllabus. Even without expert testimony, Nieman could have provided economic data, market surveys and analysis, or business records of similar enterprises. Id. Instead, Nieman merely provided incomplete financial information and speculation, despite being given a second opportunity to present evidence that he should have presented at the original trial. Accordingly, the trial court properly directed the verdict in Bunnell Hill's favor with respect to Nieman's alleged lost profits, as the evidence he presented was not legally sufficient to be submitted to the jury.

{¶34} Also, Nieman presented evidence indicating his expenses related to moving his pizzeria from the Bethany Station location to the Lakota Plaza location, including building modifications necessary for operating the pizzeria at Lakota Plaza, totaled $59,707.26. However, just as he failed to do in the original trial, Nieman did not provide evidence of the costs he would have incurred in expanding his pizzeria at Bethany Station. With respect to this issue, Nieman merely concluded, without any supporting evidence, that his build-out costs at Bethany Station would have been nothing because the costs would not have exceeded a $50,000 build-out allowance provided in the lease agreement. In fact, Nieman testified that he did not hire an architect, engineer, or contractor to estimate the build-out costs at Bethany Station had the breach not occurred.

{¶35} As we stated in *Nieman I*, 2008-Ohio-5541 at ¶24, "[w]ithout receiving evidence of what Nieman's build-out costs would have been at an expanded pizzeria at Bethany Station, it was impossible for the jury to determine with reasonable certainty what Nieman's *net* lost profits would have been had the breach not occurred." (Emphasis sic.) Since the jury in the second trial would not have been able to determine with reasonable certainty what Nieman's build-out costs would have been had the breach not occurred and had he

expanded his pizzeria, the trial court properly directed the verdict in Bunnell Hill's favor with respect to Nieman's move-out, move-in, and build-out costs, as the evidence he presented was not legally sufficient to be submitted to the jury.

{¶36} Nieman's second assignment of error is overruled.

{¶37} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

[Cite as *Nieman v. Bunnell Hill Dev. Co., Inc.*, 2010-Ohio-1519.]