Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00447-CV

8305 BROADWAY INC. and Changing Surface, Inc.,
Appellants

v.

J&J MARTINDALE VENTURES, LLC d/b/a Big Hops Growler Station,
Appellee

From the County Court at Law No. 10, Bexar County, Texas
Trial Court No. 386551
Honorable David J. Rodriguez, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: June 28, 2017

AFFIRMED IN PART; REVERSED AND RENDERED IN PART

8305 Broadway Inc. and Changing Surface, Inc. appeal a judgment signed by the trial court after a bench trial. Changing Surface contends the trial court erred in awarding J&J Martindale Ventures, LLC $3,090.00 in damages for loss of value and the evidence is insufficient to support the trial court's award of $1,573.48 in lost profits. 8305 Broadway contends the trial court erred in refusing to award it attorney's fees. We reverse the portion of the trial court judgment awarding Martindale $3,090.00 in damages for loss of value and $1,573.48 in lost profits and render

judgment that Martindale is only awarded $3,065.52 in damages. The remainder of the trial court's judgment is affirmed.

BACKGROUND[1]

The underlying lawsuit arose out of disputes relating to a commercial property lease and a contract to build out the leased space. In December of 2012, Martindale and 8305 Broadway signed a lease for a commercial space. Martindale intended to use the space to operate a "Growler Station" where customers are allowed to sample craft beer on tap and to take beer home in closed containers called growlers. Renovations to the leased space were necessary in order to make the space suitable to operate a Growler Station.

8305 Broadway was jointly owned by Jo Ann Karambis and her mother. Karambis also owned Changing Surface, a contractor engaged in renovating leased space. Karambis was the president of and controlled the operations of both entities.

Karambis rejected several bid proposals Martindale obtained from other contractors to renovate the space. Believing Karambis would reject any bid proposal other than one submitted by her own company and wanting to open for business, Martindale entered into a contract with Changing Surface on January 4, 2013, agreeing to pay Changing Surface $31,750 for the necessary renovations. The contract stated the renovations would be complete in three to four weeks.

On February 13, 2013, the posting of Martindale's liquor license was complete, and it was eligible to begin sales. Although Martindale had paid the full contract price for the renovations by January 18, 2013, the renovations were not complete. Sometime in February of 2013, subcontractors began walking off the job. On or about February 28, 2013, Changing Surface claimed the renovations were complete; however, the city's inspectors refused to issue a certificate

[1] Portions of the background incorporate the trial court's findings of fact.

of occupancy because the work was not up to city code and had been performed without obtaining the necessary permits. Martindale expended $3,065.52 to complete the work and obtain the necessary permits.

Martindale finally opened for business on March 18, 2013. Around that same date, Changing Surface presented Martindale with a change order, claiming Martindale owed Changing Surface an additional $7,225.00 for the renovations. Martindale refused to pay the change order.[2]

On March 28, 2013, Changing Surface filed a lien against the property in the amount of the change order. On March 29, 2013, 8305 Broadway sent Martindale a letter stating Martindale violated the lease agreement by causing a lien to be filed against the property. As a result, 8305 Broadway seized Martindale's security deposit and ordered Martindale to pay the remaining balance of the lien and replenish the security deposit or face eviction. This demand and seizure were contrary to the provisions in the lease which gave Martindale twenty days after receipt of a demand from 8305 Broadway to take action to discharge a lien Martindale caused to be filed against the property. After receiving 8305 Broadway's letter, Martindale retained counsel and filed the underlying lawsuit.

In April of 2014, the entire property on which the leased space was situated experienced a sewer leak. The cost of the repair totaled $30,483.66 of which insurance paid $14,269.00, leaving a balance of $16,214.66. On August 15, 2014, 8305 Broadway sent Martindale a letter, representing the total cost of the repair was $35,179.00, and demanding Martindale pay 30% of the $21,910.00 that was not paid by insurance.[3] 8305 Broadway also demanded payment for additional common expenses incurred in 2013 in the amount of $1,780.50. This amount

[2] The trial court subsequently found the change order was not a valid contract.
[3] Under the terms of the lease, Martindale was responsible for the payment of certain common expenses.

erroneously included a charge for life insurance and charges for legal fees for which Martindale was not responsible.

Before trial, Martindale and 8305 Broadway stipulated that Martindale was liable for a breach of the lease as it related to unpaid rents and owed 8305 Broadway $7,875.25 in unpaid rent. They further stipulated the trial court would determine the amount of attorney's fees to be awarded to 8305 Broadway, if any, and both parties were permitted to submit evidence regarding the attorney's fees incurred and any defenses to the award of attorney's fees.

After a bench trial, the trial court found Changing Surface breached its agreement with Martindale and awarded Martindale a total of $7,229.00[4] in damages, consisting of: (1) $3,065.52 in damages for the costs necessary to complete the renovations; (2) $3,090.00 in loss of value of the contract based on Changing Surface's failure to complete the work in the timeline promised; and (3) $1,573.48 in lost profits. Based on the parties' stipulation, the trial court awarded 8305 Broadway $7,875.75[5] in damages which was then reduced by the $3,000 security deposit 8305 Broadway seized. The trial court refused to award 8305 Broadway attorney's fees, making various findings of fact and conclusions of law in support of its refusal.

CHANGING SURFACE'S APPEAL

Changing Surface first contends the trial court erred in awarding Martindale $3,090 for "loss of value." Changing Surface notes the $3,090 award was based on the trial court's finding that Martindale was required to pay $3,090 in rent between February 13, 2013, when it could begin sales under its liquor license, and March 18, 2013, when it was able to open for business. Changing Surface also contends the evidence is insufficient to support the trial court's award of lost profits.

[4] The findings of fact correctly added the individual damage awards to total $7,729.00; however, the judgment awarded Martindale $7,229.00 in damages.

[5] Although the parties stipulated the amount owed was $7,875.25, the judgment awarded 8305 Broadway $7,875.75 in damages.

Three general damage measures exist for breach of contract claims: expectancy, reliance, and restitution. *Chung v. Lee*, 193 S.W.3d 729, 733 (Tex. App.—Dallas 2006, pet. denied); *O'Farrill Avila v. Gonzalez*, 974 S.W.2d 237, 247 (Tex. App.—San Antonio 1998, pet. denied). Expectancy damages award the benefit of a plaintiff's bargain, while reliance damages compensate for the plaintiff's out-of-pocket expenditures. *Geis v. Colina Del Rio, LP*, 362 S.W.3d 100, 112 (Tex. App.—San Antonio 2011, pet. denied). "Benefit of the bargain" damages "'serve to protect the promisee's 'expectation interest,' or his interest in having the benefit of his bargain by being put in as good a position as he would have been had the contract or promise been performed.'" *Transitional Entity LP v. Elder Care LP*, No. 05-14-01615-CV, 2016 WL 3197160, at *6 (Tex. App.—Dallas May 27, 2016, no pet.) (mem. op.) (quoting *Bechtel Corp. v. CITGO Products Pipeline Co.*, 271 S.W.3d 898, 927 (Tex. App.—Austin 2008, no pet.)). Lost profits is one example of expectancy damages because "benefit of the bargain" damages "'compensate[] for the profits that would have been made if the bargain had been performed as promised.'" *Id*. (quoting *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 55 (Tex. 1998)).

In this case, Changing Surface does not challenge the trial court's award of reliance damages which awarded Martindale the out-of-pocket expenses it incurred in completing the renovations. Instead, Changing Surface contends the trial court could not award Martindale his "loss of value" damages separate from the award of lost profits. We agree.

Lost profits are damages for the loss of net income to a business and reflect income from the lost business activity less expenses that would have been attributable to that activity. *Hunter Bldgs. & Mfg., L.P. v. MBI Glob., L.L.C.*, 436 S.W.3d 9, 18 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Barton v. Resort Dev. Latin Am., Inc.*, 413 S.W.3d 232, 236 (Tex. App.—Dallas 2013, pet. denied). In this case, the trial court's award of "loss of value" damages was based on

the amount of rent Martindale was required to pay from February 13, 2013 to March 18, 2013. This expense, however, was part of the equation the trial court was required to use in calculating Martindale's lost profits. In order to recover lost profits, Martindale was required to prove the amount of net income it would have generated if the bargain or renovations had been performed or completed as promised. The rent Martindale paid would be one expense taken into consideration in computing any such net income. Therefore, the trial court erred in awarding Martindale $3,090 for loss of value.

Changing Surface also contends the evidence is insufficient to support the trial court's award of $1,573.48 in lost profits. The rule concerning adequate evidence of lost profit damages is well established:

> Recovery for lost profits does not require that the loss be susceptible of exact calculation. However, the injured party must do more than show that they suffered some lost profits. The amount of the loss must be shown by competent evidence with reasonable certainty. What constitutes reasonably certain evidence of lost profits is a fact intensive determination. As a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained. Although supporting documentation may affect the weight of the evidence, it is not necessary to produce in court the documents supporting the opinions or estimates.

ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 876 (Tex. 2010) (quoting *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992)).

In this case, the following is the only evidence in the record supporting the trial court's award of lost profits:

> Q. [By Martindale's attorney] Mr. Martindale, do you know approximately how much money you made between January of 2013, January 1st, 2013 and June 30th of 2013?
>
> A. A little over 17,000 income — or profit.
>
> Q. A little over $17,000 in profit?
>
> A. Yes.
>
> Q. And that was only being open three and a half months, correct?
>
> A. Correct.

> Q. Because you didn't open until around mid March, really after mid March?
>
> A. Correct.
>
> Q. That $17,000 in three and a half months, would it be fair to say that your monthly profit was approximately $5,000 during that time?
>
> A. Correct.

During cross-examination, however, the witness further testified as follows:

> Q. [By Changing Solution/8305 Broadway attorney] So the only testimony that you have with respect to lost profits is you believe had you opened a month earlier that your first month or your average would have taken place for that month. Is that a fair statement?
>
> A. Yes.

Martindale contends the foregoing testimony is sufficient to establish lost profits with reasonable certainty because lost profits can be calculated with reasonable certainty from "past profits" or a "profit history." *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 505 (Tex. 2001). The problem with this argument, however, is that the testimony does not establish Martindale's profit history. Instead, the testimony only establishes the total profit Martindale made from its first three and one-half months of operation. No testimony was provided regarding the amount of profit Martindale made during each month of operations. Because the record contains no evidence that Martindale had a profit history in each month of operations, there is no evidence upon which the trial court could have found Martindale would have generated a profit in the month it had not been able to open. Without such testimony, the total profits from the three and a half month period is not objective evidence of a profit history sufficient to support the lost profits award. Because the evidence was not adequate to support an award of lost profits with reasonable certainty, the trial court erred in awarding Martindale lost profits.

8305 BROADWAY'S APPEAL

In its appeal, 8305 Broadway challenges the trial court's refusal to award it attorney's fees. Because Martindale stipulated its liability for breach of contract, 8305 Broadway contends the

award of attorney's fees is mandatory. Martindale responds the parties only stipulated to the amount of damages to be awarded and expressly agreed "the issue of attorney fees to be awarded to 8305 BROADWAY, INC., if any, shall be submitted to the Court and both parties may put on evidence as to attorney fees incurred and any defenses to the award of attorney fees."

"Texas adheres to the American Rule with respect to attorney's fees." *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011). "Under that rule, litigants may recover attorney's fees only if specifically provided for by statute or contract." *Id*.

8305 Broadway contends it is entitled to recover attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code which provides that a person may recover attorney's fees from an "individual or corporation" for a claim on an oral or written contract. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(a)(8) (West 2015). Based on the plain meaning of the terms "individual" and "corporation," our sister courts have held the plain language of section 38.001(a)(8) does not provide for an award of attorney's fees against limited liability companies. *Varel Int'l Indus., L.P. v. PetroDrillbits Int'l, Inc.*, No. 05-14-01556-CV, 2016 WL 4535779, at *7 (Tex. App.—Dallas Aug. 30, 2016, pet. denied) (mem. op.); *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 452-55 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 211-14 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (applying same logic to hold attorney's fees not recoverable against limited partnership). As one of these courts explained:

> In our recent opinion in *Fleming & Associates, L.L.P. v. Barton*, we held that under the plain language of section 38.001, a court could not order a partnership (specifically a limited liability partnership) to pay attorney's fees. Appellants contend that the same reasoning that applied to partnerships in that case applies to limited liability companies in the present case. In *Fleming*, we explained that neither "individual" nor "corporation" was defined in the Code Construction Act or Chapter 38, so the ordinary meaning of those terms should be applied in construing section 38.001. We then noted that research did not reveal any definition of "individual" or "corporation" that included any type of partnership, and that the

statutory interpretation doctrine "expressio unius est exclusion alterious"—meaning the expression of one concept implies the exclusion of another—suggests the legislature did not intend section 38.001 to apply to partnerships because it did not use any term encompassing partnerships.

Applying that analysis to the present case, it appears that the question of whether an LLC is contained within the term "corporation" is a closer call than whether partnership is included within "individual" or "corporation." The additional difficulty lies with the fact "company" and "corporation" are sometimes used synonymously. That cannot be said for "partnership" and "individual" or "corporation."

However, despite this loose relationship between the common usage of the terms "company" and "corporation," it is clear that as used in Texas statutes, the legal entities identified by the terms "corporation" and "limited liability company" are distinct entities with some but not all of the same features. Corporations and LLCs are indeed governed by separate titles within the Business Organizations Code. In other words, the use of one of the terms does not encompass the other type of entity.

Appellees emphasize that under both Texas law and Delaware law—the latter being the law of TMRX's creation—LLCs are treated the same as corporations for certain purposes. However, far from demonstrating that the term corporation in section 38.001 should be read as encompassing LLCs, these examples reinforce that these are distinct entities; if they were not, there would be no reason to specifically state when they should be treated the same.

The history of section 38.001 and its predecessor statute, article 2226 of the Texas Revised Civil Statutes, further supports the conclusion that use of the term "corporation" does not encompass an LLC. Article 2226 provided that "any person, corporation, partnership, or other legal entity having a valid claim against a person or corporation" could recover attorney's fees against the "persons or corporation." The fact that "corporation" is first used in a list of entities that includes "partnerships" and "other legal entities" indicates that the term was not intended to encompass those other types of entities, because to read the term otherwise would render use of these other terms meaningless. Thus, when the term is used again in the same sentence to define against whom attorney's fees could be recovered, it again should not be read as encompassing "partnerships" or "other legal entities" such as LLCs. The codification of the provision into section 38.001 was intended to be nonsubstantive in nature; therefore, the entities against whom attorney's fees can be recovered under the section still should not include "other legal entities" such as LLCs.[6]

[6] In codifying section 38.001, the Legislature changed the statutory language from allowing attorney's fees to be recovered against a "person or corporation" to allowing attorney's fees to be recovered from an "individual or corporation." *See Choice! Power, L.P.*, 501 S.W.3d at 212. Prior to codification, the statutory language had been interpreted to exclude the recovery of attorneys' fees from a governmental entity even though the Code Construction Act defined a "person" to include a governmental entity. *Id.* "[T]he revisor's notes to section 38.001 indicate that the Legislature modified the words used in section 38.001 in order to preserve the precedent of excluding governmental entities from the class of parties against whom attorneys' fees could be recovered." *Id.* at 214. "In doing so, the Legislature excluded from that class other legal entities against whom the predecessor statute had allowed attorneys' fees to be recovered." *Id.* This is so because the Code Construction Act defined "person" to include "corporation,

> Lastly, appellees point out that numerous cases have affirmed attorney's fees awards against LLCs; however, it does not appear that the appealing parties argued in any of these cases that section 38.001 did not permit such an award against an LLC. Accordingly, these cases do not stand for the proposition that section 38.001 authorizes recovery of attorney's fees against LLCs.

Alta Mesa Holdings, L.P, 488 S.W.3d at 452-55 (internal citations omitted). We agree with the analysis of our sister courts and similarly hold 8035 Broadway was not entitled to recover attorney's fees against Martindale because it is a limited liability company.[7]

Other than stating it disagrees with the analysis of our sister courts, 8305 Broadway argues that even if it cannot recover attorney's fees against Martindale, the trial court erred in refusing to award it attorney's fees against Robert Martindale and Kylie Martindale individually because they also signed the lease as tenants in their individual capacities. 8305 Broadway's argument, however, ignores that it only obtained a judgment for damages against Martindale, not against Robert and Kylie individually. Accordingly, based on the judgment signed by the trial court, 8305 Broadway was not a prevailing party as to its claims against Robert and Kylie individually and, therefore, was not entitled to recover attorney's fees against them individually. *See Intercontinental Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 654 (Tex. 2009) ("[T]o qualify as a prevailing party, a ... plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought.") (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)).

organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." *Fleming & Assocs., L.L.P. v. Barton*, 425 S.W.3d 560, 575 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

[7] 8305 Broadway also contends it was entitled to recover its costs as the successful party under Rule 131 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 131 (providing the successful party to a suit shall recover costs). This contention ignores, however, that Martindale also was a successful party with regard to its claims against Changing Surface, and the amount of costs to be awarded a successful party is determined by the clerk's bill of costs. *See In re C.L.W.*, 485 S.W.3d 537, 543 (Tex. App.—San Antonio 2015, no pet.). As a result, costs in the underlying case as determined by the clerk's bill of costs will be paid by Changing Surface.

CONCLUSION

The portion of the trial court's judgment awarding Martindale $3,090.00 in damages for loss of value and $1,573.48 in lost profits is reversed, and judgment is rendered that Martindale is only awarded $3,065.52 in damages. The remainder of the trial court's judgment is affirmed.

Marialyn Barnard, Justice