Meulrath v. Fisher, No. 3-1-07 Wmcv (Howard, J., July 16, 2008)

STATE OF VERMONT
WINDHAM COUNTY, SS.

DAVID D. MEULRATH,
Plaintiff,

v. **WINDHAM DISTRICT COURT**
DOCKET NO. 3-1-07Wmcv

CHRISTINA FISHER,
Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT

In this personal injury action for damages resulting from an automobile collision, Defendant moves for partial summary judgment contending that Plaintiff's claim for lost earnings is too speculative to permit relief. Summary judgment is appropriate if the court determines that there are no genuine questions of material fact and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3); *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In making this determination, the court views the evidence favorably to the non-moving party and gives it the benefit of all reasonable doubts and inferences. *Samplid*, 165 Vt. at 25.

The parties agree that a plaintiff who seeks to recover for lost business profits must prove their business losses with a reasonable degree of certainty. Moreover, as the Vermont Supreme Court explained in a criminal restitution case applying the civil standard for damages, proof of an actual loss is essential. *State v. May*, 166 Vt. 41,

43(1996).[1] Mathematical certainty is not required, but the loss must be easily ascertained and measurable. *Id*. at 43. Where lost profits are based on speculation and conjecture, rather than estimated from sufficient data and with reasonable certainty, no relief is proper. *Id*. at 43-45(rejecting business manager's rough estimate of profit margin made off the top of his head without accounting data to support).

In this suit, Plaintiff claims that physical injuries resulting from the accident forced him to cancel two business trips that were necessary to complete two large sales in his wholesale specialty lumber business. It is undisputed that Plaintiff is the sole proprietor of Tradewinds, a wholesale distributor of exotic woods and that he travels frequently to purchase wood, establish contacts, and maintain relationships and quality control. It is also undisputed that the automobile accident with Defendant occurred on January 5, 2004, and Plaintiff was treated for his injuries until March. Plaintiff cancelled two business trips as a result of the collision. Relying primarily on Plaintiff's own statements- gathered from deposition testimony as well as a written report Plaintiff wrote to his insurer in September 2004- Defendant contends that the sales were still too speculative and insufficiently firm for the automobile accident to be blamed with any certainty for related loss of income.

The first of the sales involved travel to the United Kingdom (U.K.) to select and arrange for the purchase of wood for a specific customer. Citing his inability to travel, Plaintiff wrote his insurer that he had lost profits of $25,000.00, an estimate he offered without any explanation for its calculation. In deposition testimony, Plaintiff also

[1] Citing *D.L. Development, Inc. v. Nance*, 894 S.W.2d 258, 261 (Mo.Ct.App.1995) (anticipated profits of established business are recoverable only when they are made reasonably certain by proof of actual facts, with present data for rational estimate of amount); *Starnes v. First American Nat'l Bank*, 723 S.W.2d 113, 119 (Tenn.Ct.App.1986) (loss of profits is recognized as item of damages depending on nature and extent of proof involved).

acknowledged that had he been able to make this trip, it was possible that the wood he was hoping to purchase would not have been of sufficient quality to make the sale: "There's always a chance. You know, nothing is ever sure in business until you get paid for the job, really. That's when, you know, and that goes with everything we do, of course."

The second trip cancelled on account of Plaintiff's injuries was a trip to Mexico to foster his growing relationship with a supplier and to prepare for future sales contemplated by his business plan. According to Plaintiff's deposition testimony, the supplier relationship grew more slowly than he would have liked, but that such a growth pattern was "more normal than abnormal in our business." After the missed trip, Plaintiff received an inquiry from a customer interested in 30 or 40,000 feet of Mexican wood and he made an unsuccessful bid for the job. In his insurance report, Plaintiff estimated the potential profit at "[w]ell over $40,000," once again omitting any reference to supporting calculations. At deposition, Plaintiff opined that the loss of this sale to a competitor was "always a risk. It's not guaranteed."

Plaintiff also acknowledged in his testimony that other factors, the economy for example, affect the success of his business and his business records confirm substantial fluctuations in his gross receipts and profits from year to year. When asked at deposition how a reliable calculation of the losses he suffered in connection with Defendant's negligence could be made, he responded, "Well, you know, that's really – that's the question, isn't it?....I don't know if you can come up with something that is rock solid."

Rather than specifically disputing the facts or statements relied on by Defendant in opposition to the motion for summary judgment,[2] Plaintiff offers additional facts supported by a recent affidavit of his own and one by Jim Lorette, the owner of the business with whom Plaintiff was negotiating the U.K. deal. According to these affidavits, the sale of lumber from the U.K. was intended for a personal residence in Maine, a building that had been in progress since 2000 and for which Mr. Lorette required approximately 15,500 board feet of English Brown Oak to build custom interiors. Mr. Lorette had worked with Plaintiff for many years before beginning work for this particular house. He had already purchased sample logs, had made several site visits to Plaintiff's business during 2003, and had worked through a material specification list for the Maine residence. Plaintiff also had a history of working with his U.K. supplier who had been able to gather high quality English Brown Oak for him on previous occasions and had gathered the supplies for the current project for Plaintiff's anticipated inspection and approval. The order with Mr. Lorette's client was cancelled when Plaintiff was unable to travel to the U.K. to assure the material specifications and schedules would be met and the homeowner compromised with lesser materials because too much lead time had been lost. However, both Mr. Lorette and Plaintiff specifically opined that if Plaintiff had been able to travel, the order would have been completed. Finally, using the estimate of 15,500 board feet and specific rates for the cost of the lumber, its shipping, drying and handling, as well as its selling price, Plaintiff calculated the lost profits on the sale at $87, 325.00.

[2] Plaintiff did not file a statement which clearly corresponds with Defendant's undisputed facts or which directly contradicts them, choosing instead to file a statement of material facts in dispute that reads more like an alternative statement of undisputed fact. The court will address the merits of the motion, still being able to determine undisputed facts from the filings.

With regard to the trip planned to Mexico, Plaintiff explained in his own affidavit that he had been working with his Mexican supplier since 2001 and was to inspect his operation to understand what lumbers and in what quantities and qualities he could supply as well as to work out pricing and transportation logistics for future sales. The inquiry he received in February 2004 came from a regular customer and Plaintiff opined that if he had made the planned trip in January he would have been able to provide a timely quote and would more probably than not would have gotten the order. Using 35,000 board feet for his estimate as well as anticipated acquisition costs, shipping, drying and sale prices, he calculated the profit lost at $43,750.

As a procedural matter, Defendant initially asks the Court to disregard both affidavits offered by Plaintiff claiming they must be excluded under the sham affidavit doctrine.[3] As defined in *Shelcusky v. Garjulio*, 797 A. 2d 138(N.J. 2002), a leading case cited by Defendant, the doctrine refers

> to the trial court practice of disregarding an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony….[and] calls for rejection of the affidavit where the contradiction is unexplained and unqualified by the affiant. In such circumstances, the alleged factual issue in dispute can be perceived as a sham, and as such is not an impediment to a grant of summary judgment.

Id. at 144(citation omitted)(tracing doctrine to application of F.R.C.P.56 in *Perma Research & Development Co. v. Singer Co*., 410 F. 2d 572(2d Cir. 1969) and noting its widespread adoption by federal circuits and most states). However, notwithstanding this

[3] Defendant also moves the Court to strike Plaintiff's opposition to her request to disregard the affidavits contending that the opposition is an unpermitted surreply to the motion for summary judgment. While the Court agrees that the Rules of Civil Procedure do not grant opponents a right of surreply, in this matter where Defendant had moved, for the first time, to exclude proffered evidence, Plaintiff was entitled to reply. V.R.C.P. 78(b)(1); cf. *In re Central Vermont Medical Center*, 174 Vt. 607, 616 n. 2(2002)(mem.)(in appellate setting, surreply which itself urged court to disregard opponent's documents not permitted). The motion to strike surreply is **DENIED**.

strong precedent in other jurisdictions, in Vermont courts an affidavit may not be excluded solely on the ground that it conflicts with a previously offered deposition. *Northern Security Insurance Company, Inc. v. Rossitto*, 171 Vt. 580, 581(2000) (mem.)citing *Pierce v. Riggs*, 149 Vt. 136, 139(1987)(alleged contradictions merely create issue of credibility).

Even assuming the sham affidavit rule applies, in practice it requires only that the trial court exercise its traditional evaluative role to separate actual factual issues from issues about which there is no serious dispute. *Shelcusky*, 797 A. 2d at 148-49(rejecting mechanistic application of rule).

> Critical to its appropriate use are its limitations. Courts should not reject alleged sham affidavits where the contradiction is reasonably explained, where an affidavit does not contradict patently and sharply the earlier deposition testimony, or where confusion or lack of clarity existed at the time of the deposition questioning and the affidavit reasonably clarifies the affiant's earlier statement.

Id. at 149.

When considered in the light of the affidavits Plaintiff offers, it is apparent that there is no direct or unexplained contradiction with prior sworn testimony. Although there appears to be a direct contradiction in the amount of profits lost in the U.K. deal between the insurance report Plaintiff drafted in 2004 and his 2008 affidavit (variously $25,000 and $87,325), the lower estimate was not attributed to Plaintiff's deposition and the sham affidavit rule would not be triggered. More importantly with regard to Plaintiff's deposition statements describing the uncertainties of his business and his lack of detail on particular elements, the proffered affidavits lend clarification which is responsive to the specific transactions and legal issue raised by Defendant. Likewise it is reasonable to infer that Defendant's initial difficulty estimating his business losses stems

from the fact that he was referring more broadly to the overall interruption of his business activities for which he could not point to a specific and measurable loss rather than to those two transactions for which he claims relief. For these reasons, even the sham affidavit rule would not bar consideration of the affidavits and all the evidence they contain.

Concluding that Plaintiff's request to disregard Defendant's affidavits must be rejected, the Court advances to its central inquiry: whether Plaintiff has produced enough evidence that his business losses were sufficiently certain and not too speculative to support a claim for relief as a matter of law. As to the U.K. sale the question can be answered in the affirmative. Giving Plaintiff the benefit of any doubts, as is appropriate at summary judgment, and even though the sale had not yet been consummated by any formal contract, Plaintiff has produced specific evidence from which a jury could conclude the sale was reasonably certain to occur and from which it could determine its terms and profit margins. Plaintiff's prior transactions with both Mr. Lorette and the U.K supplier, the substantial advance work already completed on the deal both to identify the homeowner's needs and the marketable timbers, and Mr. Lorette's confidence that the deal would have been completed corroborate Plaintiff's assessment of its likelihood. The use of mathematically based calculus of profit completes a picture that is not based on general speculation about future sales but actual facts with specific data that supports a rational estimate of value.

With regard to the Mexican deal, though, even according Plaintiff the positive inferences which may be drawn from the evidence, there is insufficient reason to conclude that the sale was anything more than a potential but speculative outcome of

Plaintiff's business plan. As Plaintiff describes it, the loss associated with his accident was not the fruition of a deal long in progress but the opportunity to make a competitive bid in a new market he was hoping for a bigger share of. While Plaintiff can place a number on the amount of lumber he hoped to sell, there is no substantial evidence from which a fact finder might conclude that the would-be bid was more likely than not to be accepted nor that other factors beyond Plaintiff's control would not have arisen on his trip which would have hampered or eliminated his ability to negotiate the marketplace. Unlike the far more detailed and supported evidence of the UK effort and relationship, the Mexican sale remained purely speculative and as such can not support an award of damages.

Accordingly, Defendant's motion for summary judgment is denied with respect to the sale of English Brown Oak and granted with respect to the sale of Mexican wood.

ORDER

Defendant's Motion for Summary Judgment is **DENIED** as to the loss of profits with respect to the sale of English Brown Oak and **GRANTED** as to the loss of profits with respect to the sale of Mexican wood.

Signed at Newfane, VT this _____ day of July 2008.

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David Howard
Presiding Judge