

[Cite as *Brunetto v. Curtis*, 2011-Ohio-1610.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Rick Brunetto,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 10AP-799
v.	:	(M.C. No. 2009 CVI 026311)
	:	
Tiffany Curtis,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 31, 2011

Richard Ganulin, for appellant.

APPEAL from the Franklin County Municipal Court.

FRENCH, J.

{¶1} Plaintiff-appellant, Rick Brunetto ("Brunetto"), appeals the judgment of the Franklin County Municipal Court, which sustained the objection of defendant-appellee, Tiffany Curtis ("Curtis"), to a magistrate's decision, and entered judgment in favor of Brunetto in the amount of \$240, plus interest, on Brunetto's claim for breach of contract. For the following reasons, we reverse.

{¶2} On or around November 29, 2008, Brunetto, the band leader of the Rick Brunetto Big Band (the "Band"), entered into a written contract (the "Contract") with

Curtis for the Band to perform at Curtis' wedding reception on June 7, 2009. The Contract, printed on a form supplied by the American Federation of Musicians of the United States and Canada (the "Federation") and the Central Ohio Federation of Musicians, includes a header that identifies the Band. The Contract, "for the personal services of musicians," calls for a three-hour performance by the Band, described as a "17 piece big band," and two additional hours of piano music at the reception. In exchange, Curtis was to pay Brunetto \$2,550 on the date of the reception. The Contract identifies the contracting parties as "the undersigned purchaser of music [Curtis] and the undersigned musician or musicians [Brunetto]." Additionally, it states: "This contract, and the terms and conditions contained herein, may be enforced by the Purchaser, and its agents, and by each musician who is [a] party to this contract or whose name appears on the contract or who has, in fact, performed the engagement contracted for (herein called 'participating musician (s)'), and by the agent or agent (s) of each participating musician, including the Local Union." Curtis stipulated to the execution and validity of the Contract.

{¶3} On May 22, 2009, approximately two weeks before the wedding, Brunetto received an e-mail from Curtis stating that she no longer required the Band's services and that she had no intention of performing under the Contract. In a follow-up telephone call from Curtis' fiancé, Brunetto learned that the couple had hired another band for the reception. Curtis stipulates that she breached the Contract. Brunetto testified that the Band was unable to book an alternative engagement for the weekend

of Curtis' wedding, as most jobs for an orchestra of the Band's size book six months to a year in advance.

{¶4} On June 16, 2009, Brunetto filed a pro se complaint in the Franklin County Municipal Court, Small Claims Division, alleging an anticipatory breach of the Contract by Curtis and requesting damages of \$2,550, plus filing fees, court costs, and post-judgment interest. A magistrate heard Brunetto's case on January 28, 2010. The only evidence submitted was Brunetto's testimony, the Contract, and Curtis' e-mail acceptance of the Contract. On February 24, 2010, the magistrate issued a decision in favor of Brunetto, stating that Brunetto "is entitled to the amount provided for in the contract." An amended magistrate's decision, filed March 3, 2010, corrected an error in the earlier decision to reflect a judgment amount of \$2,550. The trial court adopted the amended magistrate's decision on March 9, 2010, and entered judgment in favor of Brunetto in the amount of \$2,550, plus costs, and post-judgment interest.

{¶5} After each of the magistrate's decisions, Curtis filed an objection and requested findings of fact and conclusions of law. She argued that Brunetto was only entitled to recover the portion of the contract price that he was personally entitled to retain. In response, Brunetto argued that the magistrate properly awarded the contract price as damages for Curtis' stipulated breach.

{¶6} The magistrate issued findings of facts and conclusions of law on March 29, 2010. The magistrate found that Brunetto is the proprietor of the Band; that Brunetto and Curtis entered into the Contract; that "[Brunetto subsequently] contacted the musicians in his band and reserved this date for the upcoming wedding," and that

Curtis cancelled the Contract. The magistrate relied on Brunetto's testimony to conclude that Brunetto was entitled to recover the contract price of \$2,550. The magistrate rejected Curtis' argument that Brunetto was not entitled to recover portions of the contract price he would have paid to the other musicians; "Brunetto indicated that, although he has not paid the musicians, he feels that he is required to pay them and it is, in fact, his intention to pay the musicians. * * * Brunetto is responsible to pay the other musicians and the Magistrate finds that he gave credible testimony regarding his inability to secure other employment during [the] very busy month of June."

{¶7} Curtis objected to the magistrate's conclusions of law, again arguing that Brunetto was only entitled to recover the portion of the contract price he would have been entitled to retain for his own services. Curtis argued that the record contained no evidence that Brunetto was contractually obligated to pay the other musicians and that Brunetto's damages "should be limited to the profit that [he], as the only plaintiff, would have received had he performed under the contract."

{¶8} On July 29, 2010, the trial court sustained Curtis' objection. Based on the contractual language, the court concluded that only Brunetto was entitled to enforce the Contract, and that Brunetto "cannot act as the agent for the 16 musicians who never performed." The court stated, "[Brunetto] provided undisputed testimony that if [Curtis] had performed, sixteen performers would have earned \$120 per person on the union's 'minimum wage scale,' the piano player would have earned an additional \$200 for extended performance time, and [Brunetto], as band leader, would have earned the union minimum of \$240 for contracting and organizing." The court concluded that

Brunetto would have personally earned \$240 had the Contract been performed and entered judgment in favor of Brunetto for that amount, plus interest.

{¶9} Brunetto filed a timely notice of appeal. In his single assignment of error, he asserts:

The Municipal Court Erred In Reversing the Reasonably Foreseeable Amount of Damages Awarded to Brunetto by the Amended Magistrate's Decision.

Curtis did not file an appellate brief.

{¶10} We generally review a trial court's adoption, denial or modification of a magistrate's decision for an abuse of discretion. *Constr. Sys., Inc. v. Garlikov & Assoc., Inc.*, 10th Dist. No. 09AP-1134, 2010-Ohio-3893, ¶19, citing *O'Connor v. O'Connor*, 10th Dist. No. 07AP-248, 2008-Ohio-2276; *Burkart v. Burkart*, 173 Ohio App.3d 252, 2007-Ohio-3992, ¶20. Where an appeal from the trial court's action on a magistrate's decision, however, presents only a question of law, such as a question of contract interpretation, we review that question de novo. *Shah v. Smith*, 181 Ohio App.3d 264, 2009-Ohio-743, ¶7.

{¶11} Brunetto has alleged an anticipatory breach, or more appropriately an anticipatory repudiation, of the Contract by Curtis. An anticipatory breach of contract occurs when a contracting party clearly and unequivocally declares that he or she will not perform and thereby repudiates his or her contractual duty before the time for performance. *Metz v. Am. Elec. Power Co., Inc.*, 172 Ohio App.3d 800, 2007-Ohio-3520, ¶35, citing *McDonald v. Bedford Datsun* (1989), 59 Ohio App.3d 38, 40. Upon an anticipatory breach, the injured party can immediately maintain an action for the breach.

Id. "To prevail on a claim of anticipatory breach of contract, a plaintiff must establish that there was a contract containing some duty of performance not yet due and, by word or deed, the defendant refused future performance, causing damage to the plaintiff." *Metz* at ¶35.

{¶12} The trial court aptly noted that the only disputed issue here is the amount of damages recoverable as a result of Curtis' stipulated anticipatory breach of the Contract for the Band's performance. Because Brunetto is the only musician who is a party to the Contract and the only individual musician named in the Contract, and because the cancellation of the contracted engagement precludes the existence of " 'participating musician (s),' " the trial court correctly concluded that Brunetto was the only individual entitled to maintain an action to enforce the Contract. Nevertheless, the Contract required Brunetto to provide the services of the Band, which consisted of 17 musicians, and entitled Brunetto to collect the entire contract price of \$2,550 from Curtis. That other Band members could not directly enforce the Contract does not mandate the conclusion that Brunetto could recover only the portion of the contract price he would ultimately, personally retain where he, as "the representative of the [B]and," contracted to provide the Band's services. (Tr. 11.)

{¶13} Damages for breach of contract are designed to place the aggrieved party in the same position it would have been in had the contract not been breached. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, ¶26, citing *Schulke Radio Prod., Ltd. v. Midwestern Broadcasting Co.* (1983), 6 Ohio St.3d 436, 439, and *Stratton v. Kent State Univ.*, 10th Dist. No. 02AP-887, 2003-

Ohio-1272, ¶44. A plaintiff "is entitled to those damages which might have been expected by the parties as a natural result of a breach; those damages which might have been in the contemplation of the parties at the time of the breach, having in mind all the circumstances known to them when they dealt with one another." *R & H Trucking, Inc. v. Occidental Fire & Cas. Co. of N. Carolina* (1981), 2 Ohio App.3d 269, 272; see also *Wells v. C.J. Mahan Constr. Co.*, 10th Dist. No. 05AP-180, 2006-Ohio-1831, ¶11, citing *The Toledo Group, Inc. v. Benton Industries, Inc.* (1993), 87 Ohio App.3d 798, 806. Loss of anticipated profits may be recoverable if the evidence shows that they were reasonably within the contemplation of the parties as a natural consequence of the breach and are not remote or speculative. *J.R. Trueman & Assoc., Inc. v. McFadden* (Nov. 26, 1976), 10th Dist. No. 76AP-172, citing *Cleveland Punch & Shear Works Co. v. Consumers' Carbon Co.* (1906), 75 Ohio St. 153.

{¶14} The Supreme Court of Ohio set forth rules governing the recovery of damages for an anticipatory breach or repudiation of a contract in *Allen, Heaton & McDonald v. Castle Farm Amusement Co.* (1949), 151 Ohio St. 522. Where a defendant repudiates a contract before the plaintiff substantially performs and thereby relieves the plaintiff of the obligation to perform, the plaintiff may maintain an action on the contract to recover damages for the defendant's breach. Those "damages may include the further compensation [the] plaintiff would have received under the contract if it had been performed, less the value to [the] plaintiff of his being relieved of the obligation of completing performance." *Id.* at paragraph one of the syllabus. The trial court acknowledged that standard, as quoted by this court in *Dugan & Meyers Constr.*

Co., Inc. v. Ohio Dept. of Adm. Servs., 162 Ohio App.3d 491, 2005-Ohio-3810, ¶48. In such a case, the plaintiff must prove "not only (a) what he would have received under the contract from the performance so prevented, but also (b) what such performance would have cost him (or the value to him of relief therefrom)." *Allen, Heaton & McDonald* at paragraph three of the syllabus.

{¶15} In its determination of damages, the trial court did not apply the two-part standard stated in *Allen, Heaton & McDonald*, pursuant to which the plaintiff must first establish the amount he would have received under the contract for performance. *Id.* Had the Band performed the engagement, the entire contract price was payable to Brunetto. Therefore, Brunetto would have received \$2,550 under the Contract from the cancelled performance. Apparently based on its conclusion that only Brunetto was entitled to enforce the Contract, the trial court, instead, considered only the portion of the contract price Brunetto would have been entitled to retain as his personal profit had the Band performed. While a non-breaching party is only entitled to damages that might have been expected by the parties as a natural result of the breach, here, it cannot be contended seriously that the parties expected that a breach would obligate Curtis to pay only Brunetto's personal portion of the Band's fee. Rather, the contract price for the Band's performance should reasonably have been within the parties' contemplation as a natural consequence of any breach of the Contract by Cutris. The contract price is, therefore, the starting point for a determination of recoverable damages.

{¶16} Nevertheless, Brunetto may not be entitled to recover the entire contract price because any value realized from not having to perform under the Contract must be

deducted from the recovery. See *Allen, Heaton & McDonald* at paragraph one of the syllabus. The evidence of the value to Brunetto of not having to perform under the Contract is not entirely clear, but Brunetto testified that he already owned all necessary equipment, as well as a truck to transport it, and suggested he would not have incurred costs for renting any other equipment had the performance gone forward. The record suggests that, if any savings were realized, those savings would have related to Brunetto's payment of the other Band members.

{¶17} The Band works under the Federation's minimum wage scale. Brunetto testified that he pays the other musicians like sub-contractors and that, under the minimum wage scale, 17 musicians and a set-up person were each owed approximately \$120, the pianist was entitled to \$200 for additional playing time, and he, as the band leader, was entitled to \$240 for securing the job and contracting. At the time of trial, Brunetto had not paid his musicians but stated, "[m]y intention is to [pay them] because * * * once I give them a date, * * * they turn down work from other people, because they freelance and work with other musicians and other bands." (Tr. 7.) Brunetto testified that the 18 individuals lost wages for the evening of Curtis' wedding.

{¶18} Based on Brunetto's testimony, the magistrate concluded that Brunetto was responsible for paying the other Band members. If, as the magistrate found, Brunetto remained obligated to pay the other Band members despite the repudiation, those amounts would certainly be part of Brunetto's resultant lost profits. In its decision on Curtis' objection, however, the trial court did not consider that question. Without any such determination, we must conclude that the trial court failed to apply the appropriate

measure of damages and, accordingly, erred in sustaining Curtis' objection to the magistrate's decision.

{¶19} For these reasons, we sustain Brunetto's assignment of error, reverse the judgment of the Franklin County Municipal Court, and remand this matter to that court for further proceedings consistent with this decision and the law and, specifically, for a determination of damages owed to Brunetto.

*Judgment reversed;
cause remanded with instructions.*

KLATT and CONNOR, JJ., concur.
