[Cite as *Top Notch Excavating, L.L.C. v. Peterman*, 2012-Ohio-5266.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Top Notch Excavating, LLC	Court of Appeals No. E-11-073
Appellee	Trial Court No. 2006-CV-219
v.	
Karen S. Peterman, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: November 9, 2012

* * * * *

C. Ross Smith III, for appellee.

Barry W. Vermeeren, for appellants.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment issued by the Erie County Court of Common Pleas, in a suit for breach of a construction contract. Because we conclude that the trial court erred in calculating the amount of damages, we reverse in part and remand.

{¶ 2} On August 12, 2005, appellants, Glen Peterman and Karen S. Peterman, contracted with appellee, Top Notch Excavating, LLC, for the excavation and installation of storm and sanitary sewers, manholes, catch basin, swales, detention pond, testing procedures, 8" water main, fire hydrants and valves, water services, and a "sub-base" for a new road in a real estate subdivision. Ronald and Valerie Speer were the representatives and owners of Top Notch. The contract and addendum listed the price for the work at $82,000, with an initial draw at the beginning of the project and additional "reasonable" draws tendered within two business days after being requested during the construction. The remaining balance for the project was to be tendered on January 3, 2006. Appellants also agreed to reimburse appellee for materials purchased for the project.

{¶ 3} The following was specifically excluded from the $82,000 contract: all material costs, installation of any erosion fabric, all rock excavation and equipment for rock, any grading of all lots, and any seeding and mulching. Appellants agreed to pay appellee an additional amount to excavate and remove rock from the site, to be determined as necessary, to complete the primary contract. Appellee began work on September 6, 2005. Two days later, pursuant to the contract, it requested its first draw of $50,000 to cover materials ordered and delivered to the work site and some labor. Appellant paid that draw without incident. In late September, appellee requested a second draw of $30,000, which appellant paid on October 21, 2005. Each draw was used to reimburse appellee for items *not* included in the original $82,000 contract, i.e.,

materials purchased and labor and equipment pertaining to the rock removal, with the remainder applied to the original contract amount.

{¶ 4} Approximately a month later, appellee requested reimbursement for $16,092.94 paid for materials that had already been ordered or delivered to the site. Appellee also requested an additional $40,000 draw to continue working on the project. When appellants failed to pay the amounts requested, the parties arranged to meet at appellants' place of business. Although some details differed, the Speers sought payment as requested under the contract and provided documentation of the materials purchased. The Speers told Glen that the project could not go forward until reimbursements for materials were paid and the next draw was issued. The meeting quickly dissolved into a heated argument between Ronald and Glen. Ultimately, Glen ordered Ronald and Valerie to leave his property and said he was going to find someone else to finish the project.

{¶ 5} A few days later, on November 21, 2005, Valerie faxed a copy of the payment request to Glen, hoping that he had "cooled off," would issue payment, and the work could continue. Glen never responded and Top Notch did not complete any further work. In December 2005, Top Notch filed a mechanics' lien for $24,912.63 for material and labor furnished as of November 17, 2005, against the property owned by the Petermans. On March 10, 2006, Top Notch filed suit against the Petermans to enforce payment of the mechanics' lien and for an additional $40,000 in damages related to

"inconvenience, loss of time, loss of business opportunity, and damage to the business relationships" of Top Notch.[1]

{¶ 6} Appellees answered and later were permitted to file a counterclaim. On November 9, 2009, the parties presented evidence to the magistrate regarding the performance of the contract. Each party claimed that the other party had breached the contract, causing ensuing damages to each. During trial, appellee submitted the following as its claimed damages:

1. Rock removal:	
1. Equipment:	$11,310.30
2. Labor:	$10,500.00
Total:	$21,810.30
2. Cost of material delivered to site:	$41,459.10
3. Value of work done:	$82,000.00
Grand Total:	$145,269.40
Less amount paid to Top Notch	- 80,000.00
Balance Due:	$65,269.40

The cost for rock removal and materials delivered to the site were costs in addition to the original contract amount of $82,000. Both parties agreed that the project was not finished at the time of the meeting in November 2005.

[1]Appellee also included First National Bank of Bellevue as a defendant in the suit. The bank is not a party to this appeal.

{¶ 7} On February 12, 2010, the magistrate issued a decision which found that appellants breached the contract by refusing to communicate with appellee or pay as designated in the contract. The magistrate further found as follows:

1.) An unambiguous contract existed between the parties.

2.) Defendants failed to make a reasonable response to Plaintiff's request for a draw.

3.) Judgment is rendered for Plaintiff jointly and severally against Defendants.

4.) Plaintiff is awarded damages in the amount of $65,269.44.

5.) Defendants' counterclaim be [sic] dismissed with prejudice at Defendants' cost.

6.) Attorneys Richard Koch and Barry Vermeeren should deliver to Plaintiff all sums being held by them in exchange for Mechanics Lien Release.

{¶ 8} On April 30, 2010, appellants filed objections to the magistrate's decision and transcripts of the hearing were prepared. On November 23, 2010, appellants were permitted to file a supplement to their objections. On July 25, 2011, the court overruled appellants' objections, adopted the magistrate's decision, and added interests and costs to the amount awarded.

{¶ 9} Appellants now appeal from that decision, arguing the following sole assignment of error:

The Trial Court erred in awarding the Plaintiff damages in the amount of $65,269.44.

{¶ 10} An appellate court may not reverse the trial court's decision determining damages absent an abuse of discretion. *Kaufman v. Byers*, 159 Ohio App.3d 238, 2004-Ohio-6346, 823 N.E.2d 520, ¶ 37 (11th Dist.). An abuse of discretion is defined as unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). In addition, an appellate court presumes the trier of fact's findings of fact are correct, which means evidence susceptible to more than one interpretation must be construed in a manner consistent with the trial court's judgment. *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 226, 638 N.E.2d 533 (1994).

{¶ 11} Generally, a court's determination of whether a party has materially breached a contract is a question of fact. *Ahmed v. University Hospitals Health Care System, Inc.*, 8th Dist. No. 79016, 2002-Ohio-1823, at ¶ 41; *Unifirst Corp. v. M & J Welding & Mach., Inc.*, 4th Dist. No. 95CA2401, 1996 WL 547948 (Sept. 27, 1996), citing *Bradley v. Pentajay Homes*, 4th Dist. No. CA 1458, 1991 WL 122853 (July 3, 1991), citing Farnsworth, Contracts 612, Section 8.16 (1982); 6 Williston, Law of Contracts (3d Ed.1962) 297, Section 866. *See also Mays v. Hartman*, 81 Ohio App. 408, 77 N.E.2d 93 (1st Dist.1947) (whether the defendants by withholding payment or the plaintiffs by stopping work committed the breach of the contract is an issue for the trier of fact). If the court finds only one party has materially breached the contract, the non-breaching party is entitled to recover restitution or damages for its expectation interest.

Yurchak v. Jack Boiman Constr. Co., 3 Ohio App.3d 15, 443 N.E.2d 526, paragraph one of the syllabus (1st Dist.1981).

{¶ 12} The function of a damage award should be to put the injured party in as good a position as full performance of the contract would have done. *Bowlander v. Bowlander*, 6th Dist. No. OT-93-50, 1995 WL 155161 (Apr. 7, 1995), citing *Ed Stinn Chevrolet, Inc. v. Natl. City Bank*, 28 Ohio St.3d 221, 233, 503 N.E.2d 524 (1986); *F. Ent. v. Kentucky Fried Chicken Corp.*, 47 Ohio St.2d 154, 161, 351 N.E.2d 121 (1976). Therefore, the measure of damages for the breach of a contract should be the sum of the actual and incidental or consequential losses arising from the breach less any cost that the injured party avoided by not having to perform. *F. Ent., supra*; *D'Andrea v. Sturges*, 10th Dist. No. 89AP-1336, 1990 WL 72611 (May 31, 1990), and Restatement of the Law 2d, Contracts (1981) 112, Measure of Damages in General, Section 347.[2]

{¶ 13} "Lost profit" is a well established measure of damages for a breach of construction contract. *Jones v. McAlarney Pools, Spas & Billiards, Inc.*, 4th Dist. No. 07CA34, 2008-Ohio-1365, ¶ 20, citing Calamari & Perillo, Contracts (2d Ed.1977) 559, § 14-28 (Even if no work was done, the contractor is entitled to the profit he would have

[2]The Restatement (Second) of Contracts Section 347 (1981) 112 states:

> [T]he injured party has a right to damages based on his expectation interest as measured by (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform.

made measured by the difference between the contract price and the cost of performance). Lost profits are recoverable as a consequential loss: "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 the contract, and (3) the profits are not remote and speculative and may be shown with reasonable certainty." *Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co.*, 12 Ohio St.3d 241, 466 N.E.2d 883 (1984), paragraph two of the syllabus. *See also AGF, Inc. v. Great Lakes Heat Treating Co.*, 51 Ohio St.3d 177, 555 N.E.2d 634 (1990), paragraph three of the syllabus (lost profits may be established through expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts) and *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65, 521 N.E.2d 814 (1988), syllabus, *Charles R. Combs Trucking, supra*, explained; Restatement of the Law 2d (1981) 146, Contracts, Section 352, Comment b.

{¶ 14} Both the existence of the loss and the dollar amount of the loss must be proven to a reasonable certainty. *Gahanna, supra*. The issues of the existence of lost profits and the actual amount of the lost profits are factual issues for the trier of fact. *WRG Servs., Inc. v. Eilers*, 11th Dist. No. 2008-L-057, 2008-Ohio-5854, ¶ 44, citing *Bowlander, supra; Kosier v. DeRosa*, 169 Ohio App.3d 150, 2006-Ohio-5114, 862 N.E.2d 159, ¶ 33 (6th Dist.), citing *Bowlander, supra*; *Royal Elec. Constr. Corp. v. The Ohio State Univ.*, 10th Dist. Nos. 93AP-399 and 93AP-424, 1993 WL 532013 (Dec. 21, 1993), *rev'd on other grounds*, 73 Ohio St.3d 110, 652 N.E.2d 687 (1995).

{¶ 15} In this case, the trial court determined that appellants breached the contract. Therefore, the trial court could award appellee its lost expectancy of profits as if the contract had been fully performed. We decline to disturb this factual finding, since it is supported by some competent, credible evidence.

{¶ 16} At the time of the breach, appellee presented evidence that it had expended $63,269.40 for rock removal and materials delivered to the work site. Subtracting the $80,000 in draws paid by appellants, this leaves only $16,730.60 attributable to the original $82,000 contract. In other words, if appellee had been able to complete performance on the contract, absent no more material costs, appellants would have paid the balance of $65,269.40. Consequently, appellants' suggestion that they are only liable for the $16,092.94, the amount appellee requested as owed for only materials at the time of the breach, is without merit. Appellants breached the contract and appellee is entitled to receive its full expectancy interest had it been able to complete performance on the contract.

{¶ 17} Nevertheless, as a measure of the lost profits, the trial court simply awarded the $65,269.40, the balance of the full contract price of $82,000, without consideration of any costs or overhead which appellee may have had to expend to complete the project. In addition, appellant may have suffered other consequential damages which may be added back. Therefore, although the trial court's award of appellee's loss profits or expectancy interest was supported by the evidence, once it

decided on the type of damages it would award, the court should have conducted a hearing to determine the proper amount of the damages award.

{¶ 18} Accordingly, appellant's sole assignment of error is well-taken insofar as the amount awarded does not take into consideration the expenses appellee would have had to finish the project or other consequential damages to appellee.

{¶ 19} The judgment of the Erie County Court of Common Pleas is reversed in part and remanded for a hearing on the amount for expenses which should be deducted from the remainder of the contract price and any consequential damages incurred by appellee. Appellants and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

Judgment reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE