Palau Marine Indus. Corp. v. Seid, 11 ROP 79 (2004)

PALAU MARINE INDUSTRIES CORP.,
Appellant,

v.

ALAN SEID,
Appellee.

CIVIL APPEAL NO. 03-020
Civil Action No 221-92

Supreme Court, Appellate Division
Republic of Palau

Argued: January 19, 2004
Decided: February 12, 2004
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Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Kevin Kirk

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

MILLER, Justice:

Palau Marine Industries Corporation ("PMIC") appeals from the trial court's judgment declining to award it additional damages on a breach of contract claim against Alan Seid ("Seid"). On appeal, PMIC seeks an award of damages payable by Seid in the amount of $108,000, plus interest, representing a lost profit of $2700 on each of the 40 fishing licenses at issue in this case. Because we find no clear error in the Trial Division's conclusion that PMIC failed to prove any additional damages to a reasonable degree of certainty, we affirm.

BACKGROUND

This case is before us for the second time. *See Palau Marine Indus. Corp. v. Seid*, 9 ROP 173 (2002) (hereinafter *PMIC I*). A fuller recitation of the facts is set forth in our prior opinion, and we therefore limit our discussion to the facts pertinent to this appeal. In brief, PMIC and Seid entered into a contract that provided that Seid would receive an exclusive right to supply 40 Japanese longline fishing boats to PMIC, and in return, PMIC would provide the licenses necessary for the boats to fish in Palauan waters. Seid agreed to pay $4000 for each license, or a total of $160,000, and the contract set certain dates by which Seid was to pay for the licenses

and/or present the license applications to PMIC. Seid paid $10,000 to PMIC upon execution of the contract between the parties, but he failed to make any of the other payments due under the contract and he never supplied PMIC with any license applications for any boats.

At the time of the execution of its contract with Seid, PMIC had a contract with the Palau Maritime Authority ("PMA") under which it agreed to pay $63,000 for the fishing permits for 70 longline fishing vessels under 50 gross-ton capacity to fish in Palau. Further, the contract stated that PMA could issue fishing permits for boats in excess of the initial 70 boats, but not to exceed 120 boats, and that the fee charged for these additional permits would be subject to negotiation. Specifically, the PMIC-PMA contract provided in relevant part as follows:

> The level of fee charged on said additional vessels shall be determined during the consultations thirty (30) days prior to end of the one year period; Provided that, at no event such fee be lower than the fee imposed on those vessels licensed under the lump sum scheme during the same licensing period.

In other words, for any license over the contract minimum of 70, PMIC would be required to pay not less than $900. Although ⊥81 PMIC could have issued a total of 120 licenses to boats in 1991 under its contract with PMA, it was able to secure only 68 boats that year. There is no evidence in the record of any consultation ever being held between PMIC and PMA to determine what the fee would have been for any licenses in addition to the first 70 licenses issued under the lump sum agreement.

In its first opinion, the trial court held that Seid had breached his contract with PMIC, but concluded that because PMIC failed to mitigate its damages, it was not entitled to any recovery beyond the $10,000 initial payment by Seid. PMIC appealed. In our opinion of August 20, 2002, we vacated the trial court's judgment and remanded the case to allow the trial court to "either make particularized findings concerning PMIC's ability to mitigate its damages or enter an appropriate judgment in favor of PMIC." *PMIC I*, 9 ROP at 177-78. On remand, the trial court held that because PMIC was able to secure 68 boats in 1991, Seid was liable only for the shortfall between the number of licenses PMIC could have obtained from PMA for the price of $900 and the number of boats actually secured, or two licenses. The trial court reasoned that PMIC failed to prove to a reasonable degree of certainty what its damages were for any licenses over the minimum of 70 because it could not predict what it would have paid for any additional licenses. It therefore concluded that Seid's total liability was $5400, or the profit that PMIC stood to gain from two fishing licenses.[1] However, because the trial court found that PMIC was entitled to keep the $10,000 payment made by Seid at the time of execution, the court held that PMIC was not entitled to any additional payment from Seid as any liability it incurred was covered by the initial $10,000 payment.

STANDARD OF REVIEW

[1]The difference between the price Seid agreed to pay for each fishing license ($4000) and the price to PMIC for the first 70 licenses ($900) was $3100. From this difference the trial court also subtracted the $400 rebate per license that PMIC promised to pay to Seid. Thus, it concluded that PMIC could reasonably expect a profit of $2700 on each of the licenses.

We have never expressed a standard for our review of a lower court's determination that a plaintiff failed to prove its damages to a reasonable degree of certainty. However, other courts have held that a finding of fact concerning damages will not be set aside unless it is clearly erroneous. *Ngirmekur v. Airai*, 1 ROP Intrm. 22, 28 (T.T. High Ct. 1982); *see also O's Gold Seed Co. v. United Agri-Products Fin. Servs., Inc.*, 761 P.2d 673, 677 (Wyo. 1988) (applying clearly erroneous standard to trial court's finding that award of damages was calculated with a reasonable degree of certainty). We accordingly apply that standard here.

ANALYSIS

On appeal, PMIC raises essentially two challenges to the trial court's finding that the cost of the 50 additional licenses, and therefore the profit it could have gained from selling those licenses to Seid, was not proven with reasonable certainty.[2] First, PMIC ⊥82 asserts that the price of those licenses "was proven to be $900." We disagree. PMIC has pointed to no evidence in the record either of an agreement with PMA as to the price of those additional licenses or from which the trial court could have inferred with reasonable certainty what the cost of those licenses would have been. PMIC attempts to turn a vice into a virtue by suggesting that the lack of proof as to any agreement or negotiations with PMA about the cost of those licenses means that they would have cost $900. But this suggestion simply ignores the plain language of the PMIC-PMA agreement, *see supra* p. 80, which makes clear that the fee was to be determined "during . . . consultation" and which establishes only that the per-license cost would "at no event . . . be lower" than $900, i.e., that they could have cost more. Likewise, its suggestion that "[t]he minimum price of $900 in the PMIC-PMA contract is a specific price on which PMIC can calculate its damages" ignores the meaning of the word "minimum." *Black's Law Dictionary* 1010 (7th ed. 1999) (defining minimum as "[o]f, relating to, or constituting the smallest acceptable or possible quantity in a given case"). We conclude that the trial court's finding that PMIC failed to prove its damages as to those licenses to a reasonable degree of certainty was not clearly erroneous.

PMIC also appears to argue that the impact of the uncertainty as to the cost of the additional licenses should be on Seid; in other words, that it was Seid's burden to show that they would have cost more than $900. Again, we disagree. As we said in our previous opinion, the burden of pleading and proving mitigation falls on the party in breach. *PMIC I*, 9 ROP at 177. And indeed, the trial court found that Seid had failed to meet that burden. But as our prior opinion also makes clear, it was PMIC that had the burden of proving its damages in the first

[2]At one point in its reply brief, PMIC attempts to bypass this finding altogether by arguing that the Court need only look at its per-license cost for the first 70 licenses because those licenses were "more than enough" for PMIC to provide Seid with the 40 licenses called for under their contract. PMIC points out that because the $900 cost for each of the first 70 licenses was certain, the net profit derived from selling 40 of those licenses to Seid was also certain. However, this assertion simply ignores the fact that PMIC used 68 of those licenses in connection with other boats. Thus, the first 70 licenses were simply *not* sufficient to provide licenses for the 40 boats promised by Seid. Therefore, we cannot avoid the question of whether the price for the additional 50 licenses, and thus the amount of PMIC's lost profits, was proven to a reasonable degree of certainty.

instance. *See id.* at 176 (concluding that PMIC had failed to meet its burden as to "the vast majority" of the lost profits it claimed). Insofar as PMIC failed to do so, its recovery was appropriately limited.[3]

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CONCLUSION

For the foregoing reasons, we affirm the judgment of the Trial Division.

[3]PMIC also makes the somewhat different contention that it was inconsistent for the trial court to take into account the 68 licenses that it provided to other boats while ruling against Seid on the issue of mitigation. Again, however, the significance of the 68 boats relates not to mitigation, but to PMIC's entitlement to recover damages in the first place. When a seller has only one item to sell and finds an alternative buyer who will purchase it at the same price, then he has covered his loss and is not entitled to recover from the buyer in breach for the lost sale. A seller can only recover expectation damages if he can show that he could and would have profited from both transactions. *See generally* Restatement (Second) of Contracts § 347 cmt. f (1981). Here, the question was whether, notwithstanding its sales of licenses to other boats, PMIC still could have gone forward with and profited from the sale of the 40 licenses to Seid. The trial court's finding, which we uphold, was that, but for the last two licenses, it could not have done so, at least not for the same or a reasonably certain profit.