Palau Marine Indus. Corp. v. Seid, 9 ROP 173 (2002)

PALAU MARINE INDUSTRIES CORP.,
Appellant,

v.

ALAN SEID,
Appellee.

CIVIL APPEAL NO. 01-53
Civil Action No. 221-92

Supreme Court, Appellate Division
Republic of Palau

Argued: April 19, 2002
Decided: August 20, 2002

[1] **Appeal and Error:** Clear Error; Standard of Review

Trial court findings of fact are reviewed under a clearly erroneous standard.

[2] **Appeal and Error:** Standard of Review

A trial court's decision on a motion to amend the pleadings is reviewed for abuse of discretion.

[3] **Appeal and Error:** Standard of Review

A lower court's conclusions of law are reviewed *de novo*.

[4] **Damages:** Standard of Proof

Damages are only recoverable to the extent that they can be proven with a reasonable degree of certainty.

[5] **Constitutional Law:** Equal Protection

The Equal Protection Clause does not assure uniformity of judicial decisions or immunity from judicial error.

[6] **Contract:** Damages; **Damages:** Contract

Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been had the contract been performed.

[7] **Contract:** Breach

The mere fact that a party to a contract can walk away from the contract after the breach of the other party is not a sufficient reason to deny it the benefit of its bargain.

[8] **Damages:** Mitigation

While a party cannot recover in a breach of contract case for losses which could reasonably have been avoided, a failure to mitigate does not preclude a party from recovering for losses which it could not have taken reasonable steps to avoid.

[9] **Damages:** Mitigation

The burden of pleading and proving mitigation falls on the party in breach.

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.

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

MILLER, Justice:

Appellant Palau Marine Industries Corporation ["PMIC"] appeals from the trial court's judgment declining to award monetary relief on a breach of contract claim against Appellee Alan Seid because PMIC failed to mitigate damages. We vacate in part, and remand for further consideration.

BACKGROUND

In 1990, Palau Maritime Authority granted the "authorized member vessels" of PMIC a right to fish in the fishery zones of Palau "upon receipt of a valid permit approved and issued by the authority pursuant to this agreement." PMIC was therefore interested in signing up vessels to fish in Palau under its aegis. To that end, PMIC and Seid[1] executed three documents; a Memorandum of Understanding, an Addendum, and an Agreement; all of which were signed November 17, 1990. These documents are not a model of clarity, but the essence of the agreement was that Seid was obligated to present "a minimum" of 10 fishing boat applications to

[1]The agreement called for Seid to establish a corporation, Pacific Area Fishing Company ("PAFCO") to take over his duties under the contract. It is undisputed that PAFCO was never incorporated and that Seid remains personally liable for his contract obligations.

PMIC by January 31, 1991,[2] and "a minimum" of thirty applications within 90 days after the execution of the agreement (i.e., February 17, 1991). These applications were to cost $4,000 "for each fishing license and dockage." The term of the Memorandum of Understanding concerning the forty fishing boats was said to have "a validity until April 30, 1995." We will refer to these documents collectively as "the contract."

Seid made a $10,000 down payment at the time of the contract's execution, and was required to make three subsequent payments totaling $150,000 within 180 days after the date of execution of the contract. A price schedule was also included in the contract, setting fees for services PMIC could provide the licensed boats, and established charges for petroleum products, water, ice, fish handling, freezer space, blast freezing, entry fees, pilot fees and vessel maintenance fees. There was, however, no minimum quantity of goods or services that had to be purchased.

PMIC filed suit in 1992 because Seid made no payments after the initial $10,000, and tendered no license applications at all. Seid originally filed a *pro se* answer. Very shortly before trial, defense counsel moved to amend the answer to assert the affirmative defenses of mitigation and release or waiver. The trial court conditionally granted the motion, and continued the trial date to afford PMIC the opportunity to conduct additional pre-trial discovery to ensure that it was not prejudiced by the late-in-the-day amendment. Ultimately, the trial court granted the motion to amend in part, permitting the addition of the mitigation defense but denying it as to the defenses of release or waiver.

At trial, PMIC contended that Seid's breach of contract cost it nearly $11 million in lost profits. PMIC calculated its damages as the sum of the payments still due from the original forty applications, the fees due for forty applications for each of the remaining ⊥175 years of the contract, and lost revenue for servicing the vessels that should have been provided. Seid argued that PMIC had failed to prove damages, that the claims were too speculative to permit a damage award, and even if there were damages, PMIC could have completely mitigated them. The trial court ruled in PMIC's favor on the question of breach but concluded that because it could have but failed to mitigate all of its damages, it was not entitled to any recovery. This appeal followed.

STANDARD OF REVIEW

[1-3] Trial court findings of fact are reviewed under a clearly erroneous standard. ROP R. Civ. Pro. 52(a). A trial court's decision on a motion to amend the pleadings is reviewed for an abuse of discretion. *Gibbons v. ROP*, 1 ROP Intrm. 634, 645 (1989). A lower court's conclusions of law are reviewed *de novo*. *See Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

ANALYSIS

[4] PMIC begins its appellate brief by asserting that it "proved that it suffered damages in the

[2]The Addendum, apparently in error, recites the date of January 31, 1990.

amount of $10,905,600 and was entitled to judgment . . . ." We disagree. Damages are only recoverable to the extent that they can be proven with a reasonable degree of certainty. *See NECO v. Rdialul*, 2 ROP Intrm. 211, 220 (1991); Restatement (Second) of Contracts § 352. With one exception, PMIC failed to meet this burden as to the damages it claimed. The only evidence in the record addressing alleged damages is the testimony of PMIC's executive secretary, Ruby Pineda, who testified regarding Plaintiff's Exhibit 10, which PMIC now characterizes as "a detailed evidentiary presentation." But this exhibit was only admitted by the trial court for "illustrative purposes," purportedly as a summary of Pineda's testimony. It is not, therefore, to be accorded any independent legal significance.

Moreover, the vast majority of the nearly $11 million PMIC wishes to claim as lost profits are based on assumptions about the charges it would have collected for fees and services from the vessels that were to have been provided by Seid. However, even were there a valid basis for those assumptions – a matter we need not address – the wording of the contract does not support such a claim since the contract does not require the vessels to procure any minimum quantity of goods or services from PMIC, or even to fish in Palau once a license is obtained. We thus agree with Appellee that "[t]he only profit that PMIC could have reasonably expected under the [contract] was the mark up in price on the sale of the licenses to the vessels." Appellee's Brief at 15; *see* n.5 *infra*. With that exception, it is not possible to determine with any certainty just what PMIC's lost profits might have been, and we therefore reject its suggestion that we simply direct the trial court to enter judgment for the full amount of its claim.

Having now determined the portion of PMIC's claim that may be considered, we turn to the other issues on appeal. PMIC argues that the trial court's decision to allow an amendment to the answer was an abuse of discretion when contrasted with the trial court's decision to deny leave to amend in a case where PMIC was the Defendant: *Pacific Call Investments, Ltd. v. Palau Marine Industries Corp.* , Civil Action No. 166-92, *aff'd*, 9 ROP 67 (2002). PMIC also argues that granting the motion to amend here is a violation of equal protection because the motion to amend was denied in that previous case when made by the Defendant. It further ⊥176 asserts that the trial court's decision to deny damages was clearly erroneous and, again when contrasted to the damages award entered in *Pacific Call* , also violated Appellant's rights afforded by the Equal Protection Clause.

Factually, the contention is frivolous because the cases are not in conflict. The standards for granting motions to amend pleadings are well-known and need not be repeated here. [3] Suffice it to say that in the case where PMIC was the Defendant, it waited until the Plaintiff had rested before asking for leave to adopt a new strategy. The trial court properly denied the motion. Here, the Defendant moved to amend the answer before trial, and the court allowed the Plaintiff an additional period to prepare for the new defense – a period that PMIC does not contend was insufficient. Second, in the previous case the record was "replete with concrete, detailed evidence concerning Pacific Call's anticipated gross profits, off-setting expenses, and other factors that allowed for a definite and specific determination of damages." *Palau Marine*, 9 ROP at 72. In this case, as already noted, PMIC provided little or nothing regarding evidence of

[3] *See Palau Marine*, 9 ROP at 70; Wright Miller & Kane, Federal Practice and Procedure: Civil 2d § 1488 (2d ed. 1990); *Inter'l Trading Corp. v. Johnsrud*, 1 ROP Intrm. 569, 571 (1989).

damages and much of the claim was unjustified considering the contract's wording.

[5] Furthermore, as a matter of law, this Equal Protection argument is unsupportable. The Equal Protection Clause "does not assure uniformity of judicial decisions or immunity from judicial error." *Beck v. Washington* , 82 S. Ct. 955, 962-63 (1962) (internal quotations and citations omitted); *see also Milwaukee Elec. Ry. & Light Co. v. Wisconsin ex rel. Milwaukee* , 252 U.S. 100, 106 (1920); *Alford v. Rolfs* , 867 F.2d 1216, 1219 (9th Cir. 1989); *Bishop v. Mazurkiewicz*, 634 F.2d 724, 726 (3d Cir. 1980); *Lavasek v. White*, 339 F.2d 861, 863 (10th Cir. 1965); *King v. White*, 839 F. Supp. 718, 730 (C.D. Cal.1993); *Fenner v. Bruce Manor, Inc.* , 409 F. Supp. 1332, 1347 (D. Md. 1976); *Davis v. Behagen*, 321 F. Supp. 1216, 1219 (S.D.N.Y. 1970); *People v. Davidson* , 514 N.E.2d 17, 26 (Ill. Ct. App. 1987); *Moyer v. State* , 452 A.2d 948, 950 (Del. Supr. 1982); *State v. Boone* , 543 P.2d 945, 949 (Kan. 1975); *State v. Dziggel* , 492 P.2d 1227, 1229 (Ariz. Ct. App. 1972); *Crouch v. Justice of the Peace Court of Sixth Precinct* , 440 P.2d 1000, 1006 (Ariz. Ct. App. 1968). PMIC's allegations therefore do not make out an Equal Protection Claim. This argument is frivolous and appears to be sanctionable.[4]

We lastly turn to the issue concerning the trial court's finding that PMIC failed to mitigate its damages.[5] The trial court found that PMIC "had an obvious 'out'" – "terminating the agreement and negotiating ⊥177 with other suppliers" and concluded that since PMIC "did not mitigate the extent of damages caused by [Seid's] breach of the agreement," it was not entitled to any recovery other than retaining the $10,000 that Seid had paid initially. Because the trial court did not indicate how Seid met his burden to show that the lost revenue PMIC reasonably expected from the mark-up in the sale of fishing licenses was subject to mitigation, we remand for further proceedings.

[6-9] We note first, as did the trial court, that

> [c]ontract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been had the contract been performed.

Restatement (Second) of Contracts § 347, cmt. a. Thus, the mere fact that PMIC could have walked away from the contract when it became apparent that Seid was not performing is not a sufficient reason to deny it the benefit of its bargain – here, as noted above, "the mark up in price on the sale of the licenses to the vessels."[6] Moreover, while a party cannot recover in a breach of

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[4]In a separate order, counsel for PMIC will be ordered to show cause why sanctions should not be imposed regarding this argument.

[5]Contrary to the dissent's charge that we are raising this issue *sua sponte*, *see infra* at 178, we believe that a fair reading of Appellant's trial presentation and appellate brief indicates that this issue was properly preserved and presented, albeit without as much clarity as would have been optimal. Furthermore, although the dissent says that Appellee did not have a fair opportunity to respond to this argument, pages 15-17 of Appellee's response brief are in fact dedicated to defending the trial court's findings on the mitigation question.

[6]The difference between the price Seid agreed to pay for each fishing license ($4000) and the price to PMIC ($900) was $3100. From this difference must also be subtracted the $400 rebate per license that

contract case for losses which could reasonably have been avoided, *see* Restatement (Second) of Contracts § 350(1), a failure to mitigate does not preclude a party from recovering for losses which it could not have taken reasonable steps to avoid. *See id.* at cmt. b. [7] As the trial court properly noted, the burden of pleading and proving mitigation falls on the party in breach: "[o]nce it is established that a duty to mitigate is present, the burden falls on the wrongdoer to show that the damages were lessened or might have been lessened by the Plaintiff." On our review of the record, and focusing on the single item of damages that we have found to be recoverable, we are doubtful that Seid met his burden in this regard. Since the trial court did not have the opportunity to focus on this point, we vacate the trial court's judgment and remand for further proceedings: the trial court should either make particularized findings concerning PMIC's ability to mitigate its ⊥178 damages[8] or enter an appropriate judgment in favor of PMIC.

CONCLUSION

For the foregoing reasons, the trial court's judgment, which declined to award damages to PMIC, is vacated to that extent, and this case is remanded to the trial court for further proceedings in accordance with this opinion.

SALII, Justice, concurring:

I write separately to address an issue left open by Justice Miller's opinion. Below and on appeal, PMIC has argued that it is entitled to recover for license payments not made by Seid over the four-year life of the contract. But as I read it, nothing in the contract obligates Seid to renew any of the 40 licenses for which he was required to pay a total of $160,000. Therefore, I would

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PMIC promised to pay to Seid for each license. Thus, PMIC could reasonably expect a profit of $2700 for each license that the contract obligated Seid to purchase.

[7] In addition, as the Restatement explains,

> [t]he mere fact that an injured party can make arrangements for the disposition of the goods or services that he was able to supply under the contract does not necessarily mean that by doing so he will avoid loss. If he would have entered into both transactions but for the breach, he has 'lost volume' as a result of the breach.

Id. at cmt. d. Thus, the question is not only whether PMIC could have found other purchasers for the licenses that it expected Seid to purchase, but whether any such sales could have been made in addition to the sales to Seid or would have been a true "substitute" for those sales. And, of course, the burden of proof for this question lies on Seid.

[8] Although we leave this issue for the trial court in the first instance, we are skeptical of the argument advanced by Seid at oral argument that PMIC's damages from Seid's failure to provide the requisite license applications cannot be ascertained with certainty because of the need to account for PMIC's overhead expenses in providing the dockage facilities, an amount for which there is no evidence in the record. The general rule is that in a case where a party's overhead expenses are not materially altered by the breaching party's breach, overhead need not be deducted from a damages award. *See Cal. Trucking Assoc. v. Bhd. of Teamsters & Auto Truck Drivers, Local 70* , 679 F.2d 1275, 1291 (9th Cir. 1981) (citing *Edwin K. Williams & Co. v. Edwin K. Williams & Co.-East* , 542 F.2d 1053, 1062 (9th Cir. 1976)); *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795, 798 (3d Cir. 1967); Restatement (Second) of Contracts § 347, illus. 11.

limit PMIC's recovery to the payments for those 40 licenses only (subtracting, of course, for the cost of the licenses and the rebates to Seid). As this is an issue the trial court did not squarely address below, and as I am in complete agreement with the substance of Justice Miller's opinion, I concur in the decision to vacate and remand.

MICHELSEN, Justice, concurring in part and dissenting in part:

I concur with the majority opinion's resolution of the issues with one important exception. Although the majority opinion presents a sensible, logical argument based on the contract wording that some of PMIC's damages may not be subject to mitigation, this argument was not made by Appellant. I therefore dissent from that part of the opinion discussing that argument and remanding for further fact-finding.

PMIC raised only two arguments concerning mitigation. The first was that the Court erred in allowing the answer to be amended to add the mitigation defense. The second was that because PMIC was not permitted to present a mitigation defense in the *Pacific Call* case, it is a denial of Equal Protection to permit a mitigation defense in this case. Appellee had no difficulty demonstrating why those arguments were meritless, and the Court rightly rejected Appellant's position. As hard as I look at Appellant's brief, however, I cannot find anything resembling the Court's additional mitigation issue that "the trial court did not indicate how Seid had met his burden to show that the lost revenue PMIC reasonably expected from the mark-up in the sale of fishing licenses was subject to mitigation." *Supra* at 177. To have the Court *sua sponte* raise this matter, then remand for additional fact-finding is troubling for a number of reasons.
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This Court may, in its discretion, reach and decide an issue not raised below, if: (1) it is raised by the appellant; (2) involves a matter that this court reviews *de novo* ; and (3) is considered at a stage where the Appellee has an opportunity to respond. *See, e.g.*, *ROP v. S.S. Enters., Inc.* , 9 ROP 48, 52 (2002). Here, the issue now of concern to the Court was never mentioned by Appellant. Issues not timely raised are considered abandoned. *See, e.g.* , *Liquidation Comm. v. Orientex Palau, Inc.* , 8 ROP Intrm. 321 (2001) (holding that because the appellant did not raise the law of the case doctrine at the trial level, the Court would not address the issue even though the point appeared to have merit). Furthermore, the added issue here is not reviewed *de novo*, but must be remanded for further fact-finding. If Appellant believed that the Trial Division's findings of fact were insufficiently detailed with respect to Seid's efforts at proving PMIC's duty to mitigate, it was authorized to file a motion for further fact-finding pursuant to ROP R. Civ. Pro. 52(b). No such motion was made. In summary, Appellant made no objection to the scope of the Court's findings of fact at the trial level, presented no argument to the trial court suggesting that the original license income was not subject to mitigation, and failed to preserve the point in this Division. Hence, Appellant is not entitled to a remand on an issue that it has never previously found of any interest.

Lastly, this approach is unfair to Appellee. Counsel for Seid was never placed on notice that he had to address an alleged inadequacy of the Trial Division's findings on mitigation. This lack of notice distinguishes this case from *S.S. Enterprises* , where the appellee was placed on notice by the appellant's brief that the government was attempting to make the necessary

showing to the Court that it should reach an issue not raised below. Here, although Appellee's response brief defended the trial court's findings on mitigation in passing, such a reference does not change the fact that Appellant did not raise that issue. Indeed, if it had been raised, one of Appellee's strongest points would have been that since Appellant did not argue that the mitigation defense was inapplicable to the initial 40 licenses, the argument cannot be raised for the first time on appeal. *See, e.g.*, *In re Estate of Rengiil* , 8 ROP Intrm. 118 (2000); *Ngiraked v. Media Wide, Inc.* , 6 ROP Intrm. 102 (1997); *Badureang Clan v. Ngirchorachel* , 6 ROP Intrm. 225, 226 (1997) (finding prejudice to the appellee "because it would require a remand to the trial court to make the necessary factual findings that could have been made at trial"). But one cannot lodge an objection to an issue being raised for the first time on appeal when it is not in the appellant's brief. Although an appellee is responsible for meeting all of the issues raised by an appellant, that party should not additionally be required to venture a guess which of the issues abandoned by that appellant may be of interest to the court, and subsequently allocate a portion of its brief to countering such issues.

Because none of the issues of Appellant have merit, I would sustain the trial court in all respects.