SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 22-01376

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

BUFFALO RIVERWORKS LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN SCHENNE, P.E., AND JOHN SCHENNE, P.E., DOING BUSINESS AS SCHENNE & ASSOCIATES, DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered July 27, 2022. The order denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as it seeks damages for loss of profits/business, and as modified the order is affirmed without costs.

Memorandum: Plaintiff and defendants entered into an oral contract pursuant to which defendants were to provide engineering services for plaintiff's construction project. Completion of the project was delayed, and plaintiff commenced this action asserting claims for negligence and breach of contract and seeking damages for, inter alia, "loss of profits/business" (lost profits) and additional construction costs incurred with respect to the project. Defendants now appeal from an order denying their motion for summary judgment dismissing the complaint.

We reject defendants' contention that Supreme Court erred in denying the motion insofar as it sought summary judgment dismissing plaintiff's claim for damages based on additional construction costs it incurred. Assuming, arguendo, that defendants met their initial burden with respect to that part of the motion, we conclude, contrary to defendants' contention, that plaintiff, through its general ledger, deposition testimony, invoices, and affidavits, tendered sufficient admissible evidence to create a triable issue of fact whether it incurred additional construction costs as a result of defendants' alleged negligence or breach of contract (*see* CPLR 4518 [a]; *Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1027-1028

[4th Dept 1995]).

We agree with defendants, however, that the court erred in denying the motion insofar as it sought summary judgment dismissing plaintiff's claim for damages for lost profits, and we therefore modify the order accordingly. To recover damages for lost profits, "it must be shown that: (1) the damages were caused by the breach; (2) the alleged loss must be capable of proof with reasonable certainty[;] and (3) the particular damages were within the contemplation of the parties to the contract at the time it was made" (*Ashland Mgt. v Janien*, 82 NY2d 395, 404 [1993]; *see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986] [*Kenford I*]).

We conclude that defendants met their initial burden on the motion of demonstrating that damages for lost profits were not within the parties' contemplation at the time they entered into their contract. Here, the oral contract between the parties made no provision for the recovery of lost profits and it did not provide that the construction was to be completed by a date certain. In the absence of any provision in the contract for such damages, "the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject" (*Kenford I*, 67 NY2d at 262; *see Val Tech Holdings, Inc. v Wilson Manifolds, Inc.*, 119 AD3d 1327, 1329 [4th Dept 2014]). "In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered" (*Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989] [*Kenford II*]; *see Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183-184 [1st Dept 2007], *affd* 14 NY3d 791 [2010]), i.e., " 'what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made' " (*Kenford II*, 73 NY2d at 319, quoting *Globe Ref. Co. v Landa Cotton Oil Co.*, 190 US 540, 544 [1903]). Under the circumstances of this case, we conclude that "[i]t would be highly speculative and unreasonable to infer an intent to assume the risk of lost profits in what was to be a start-up venture" (*Awards.com*, 42 AD3d at 184). We further agree with defendants that it is immaterial whether they became aware of project deadlines during weekly project meetings after the contract was formed inasmuch as the relevant inquiry is whether "the particular damages were within the contemplation of the parties to the contract at the time it was made" (*Ashland Mgt.*, 82 NY2d at 404).

Further, even assuming, arguendo, that defendants contemplated liability for lost profits at the time they made the contract, we conclude that defendants met their initial burden of establishing that plaintiff's damages are not "capable of measurement based upon known reliable factors without undue speculation" (*id.* at 403) and that plaintiff failed to raise a triable issue of fact in opposition. Plaintiff did not "identif[y] any benchmark in the form of comparable businesses to permit a factfinder to determine that the claimed lost profits are reliable or demonstrated with reasonable certainty" (*Awards.com*, 42 AD3d at 185), nor did it adduce any expert proof. The lay assumption by plaintiff that it would have earned the same net

profit during the months in which completion of the project was delayed as it did during the same months of the following year is too speculative to support a calculation of damages (*see Ashland Mgt.*, 82 NY2d at 403).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court