Spring 4-8-2013

Order on Defendants' Motion to Exclude Plaintiff's Expert and Defendants' Motion for Summary Judgment on Plaintiff's Claim for Lost Royalty Damages

Alice D. Bonner

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

EZGREEN ASSOCIATES, LLC,	)	
Plaintiff,	)	
v.	)	**Civil Action File No.**
	)	**2009-CV-168743**
GEORGIA-PACIFIC CORPORATION,	)	
GP CELLULOSE LLC (FORMERLY)	)	
KOCH CELLULOSE, LLC), and	)	
BLUEYELLOW LLC,	)	
Defendants.	)	
	)	

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ORDER ON DEFENDANTS' MOTION TO EXCLUDE PLAINTIFF'S EXPERT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR LOST ROYALTY DAMAGES

This matter is before the Court on remand from the Georgia Court of Appeals, who found a material issue of fact as to whether Defendants Georgia Pacific Corporation, its assignees, GP Cellulose, LLC, and BlueYellow, LLC (collectively, "GP") used commercially reasonable efforts in fulfilling obligations under an agreement with Plaintiff EZGreen Associates, LLC ("EZG"), and whether GP breached the contract when it unilaterally terminated the agreement.

On April 30, 2004, EZG and GP entered into a Restated Engineered Seed System Agreement (the "Agreement") regarding a proprietary system for applying grass seed. The Agreement provided that, for a period of five years, EZG would license its product to GP, which would use "commercially reasonable efforts" to develop, manufacture, and sell the product in the U.S. retail market. EZG was responsible for marketing and selling the product internationally, while another entity was responsible for selling the product in the U.S. golf course and commercial market.

EZG alleges that GP breached the agreement by failing to use commercially reasonable efforts in performing its duties under the contract and by unilaterally terminating the Agreement prior to the expiration of its term.

On June 21, 2011, this Court granted Defendants' Motion for Summary Judgment and denied Plaintiff's Motion for Partial Summary Judgment, finding that EZG had failed to come forth with evidence that "Defendants' efforts to sell the product were less than a reasonable business entity would have made under the circumstances" and further finding that GP's conduct in ceasing production was permitted under the Agreement and therefore, did not amount to a termination.

The Court of Appeals reversed, finding conflicts in the evidence regarding whether GP's conduct was commercially reasonable. Specifically, the Court of Appeals pointed to evidence in the parties' agreement that established a safe harbor of what the parties deemed commercially reasonable based on a certain yearly volume of sales, which had not been met. The Court of Appeals also cited GP's conduct in creating specialized subsidiaries to market the product, which it inferred caused the difficulty in partnering with a major retailer, as well as evidence that the individuals chosen to run the subsidiary had little experience in the relevant business area and were unduly preoccupied with GP's pulp division.

Based on these findings, the Court of Appeals determined a fact issue existed as to GP's commercial reasonability and further found that GP did not have a unilateral right to terminate the contract, although fact issues surrounding GP's conduct around

the time of termination precluded summary judgment in favor of EZG on this issue. The case was remanded for trial on EZG's claims for breach of contract.

On February 8, 2013, this Court held a conference call with the parties to discuss how to proceed following the resolution of the appeal. After the call, the Court entered a Scheduling Order directing the parties to submit supplemental briefing identifying the issues left for court determination prior to trial.

On March 11, 2013, the parties submitted supplemental briefs, asking the Court to rule on 1) Defendants' Motion to Exclude the Expert Opinion and Testimony of Dr. Bruce A. Seaman; and 2) that portion of Defendants' Motion for Summary Judgment pertaining to Plaintiff's claim for lost royalty damages.

1. Defendants' Motion to Exclude the Expert Opinion and Testimony of Dr. Bruce A. Seaman

As evidence to support its claim for lost royalties, EZG relies on the opinion of its expert, Dr. Bruce Seaman, a professor of economics at Georgia State University. Dr. Seaman opines that EZG is entitled to damages between $22 million to $133 million as a result of GP's failure to act in a commercially reasonable manner in pursuing sales of the product in the domestic retail market.

To come up with these figures, Dr. Seaman found the average rate of royalty and commission payments paid to EZG per acre of the product sold. Then he multiplied the average number by three separate sales projections of the number of acres of product that the parties may sell over the life of the Agreement.

The first projection is called "EZG Most Likely Case," and it was modeled on a spreadsheet EZG created in 2003 when the parties were negotiating the Agreement.

The second projection is called the "BrightHouse Study," and it is taken from a presentation from a marketing consultant hired by GP during the summer of 2003. The third projection is based on Section 7.3(a) of the Agreement, which provides that the achievement of certain sales volumes would amount to "commercially reasonable efforts." It is undisputed that all of these projections were made before the product entered the retail market.

GP attacks Dr. Seaman's methodology for four reasons. First, it complains that his analysis is too simplistic and required no expertise. Second, GP takes issue with the fact that Dr. Seaman did not deduct EZG's expenses from projections that included sales in the international market, the market in which EZG had exclusive sales responsibility. Third, Dr. Seaman did not base his damages on an established track record. Finally, GP contends that Dr. Seaman did not provide a basis on which to calculate EZG's damages with reasonable certainty.

O.C.G.A. § 24-7-702 provides: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact."

GP does not dispute Dr. Seaman's qualifications. Accordingly, the Court will not address this matter, and will focus instead on GP's attack on the reliability of Dr. Seaman's methods.

GP's most compelling arguments highlight the speculative nature of the assumptions on which Dr. Seaman rests to form his opinions. Under Georgia law, "[t]he general rule is that the expected profits of a commercial business are too uncertain, speculative, and remote to permit a recovery for their loss." MTW Inv. Co. v. Alcovy Properties, Inc., 228 Ga. App. 206, 207-208 (1997).

> The profits recoverable in such cases are limited to probable, as distinguished from possible benefits. Profits which are remote, or speculative, contingent or uncertain are not recoverable. The profits of a commercial business are dependent on so many hazards and chances, that unless the anticipated profits are capable of ascertainment, and the loss of them traceable directly to the defendant's wrongful act, they are too speculative to afford a basis for the computation of damages.

Id. Lost royalties are a subset of lost profit damages. Aronwitz v. Health-Chem Corp., 513 F.3d 1229, 1239 (11th Cir. 2008).

Although Georgia law is resistant to an award of lost profits to new business ventures, Georgia courts have made an exception where the new business can demonstrate a sufficient track record of profits in order to calculate an estimate of damages with reasonable certainty. See, e.g.,Johnson Cnty. Sch. Dist. v. Greater Savannah Lawn Care, 278 Ga. App. 110, 113 (2006).

Here, rather than consider the track record of sales to base an estimate of EZG's damages, Dr. Seaman uses sales projections made before the product was manufactured or taken to market, untethered from any actual market activity. The Court

finds no support for this approach under Georgia law, which requires at a minimum at least some evidence of a proven sales record on which to ground a future profits estimate. See Johnson Cnty. Scho. Dist., 278 Ga. App. at 113 ("We fail to see how [prospective service fees] show with reasonable certainty the probable gain that [plaintiff] lost due to the defendants' conduct."). In fact, even in the authority cited by EZG, the expert relied on a business's actual track record to calculate a lost profits estimate. See Main Street Mortgage, Inc. v. Main Street Bancorp, Inc., 158 F. Supp.2d 510 (E.D. Pa. 2001). Accordingly, the Court finds Dr. Seaman's opinion, based nothing more on sales projections removed from any actual sales activity, unreliable.

Dr. Seaman defends his use of the projections by countering that the track record in this case is "tainted" due to GP's misconduct. While that may be the case, and the Court recognizes that Dr. Seaman is allowed to assume that GP did not act in a commercially reasonable manner, this nevertheless fails to bolster the reliability of his own analysis. And the Court finds that, at a minimum, the projections must have some basis in the reality of the product's activity in the marketplace to meet the "reasonable certainty" threshold necessary for a reliable lost profits analysis. See MTW Investment Co. v. Alcovy Properties, 228 Ga. App. 206 (1997) (reversing the trial court for allowing the plaintiff to admit a property's appraisal in an effort to prove lost profits without at least looking to the reality of whether an actual purchaser existed).

Moreover, with respect to the projection based on Section 7.3 of the Agreement, just because the parties may have contemplated a projected sales figure and deemed such figure proof of "commercially reasonable efforts" does not automatically satisfy the

"reasonable certainty" standard or render the track record requirement obsolete to automatically entitle EZG lost profits. See Radlo of Georgia, Inc. v. Little, 129 Ga. App. 530 (reversing an award of lost profits based on a projection made at the time of contract because it did not reflect the post-contract reality).

Accordingly, the Court **GRANTS** Defendants' motion. Dr. Seaman's testimony and opinions as to lost royalties are hereby excluded.

2. Defendants' Motion for Summary Judgment on Plaintiff's Claim for Lost Royalties.

Defendants ask the Court for summary judgment on EZG's claim for lost royalty damages because they contend that EZG has failed to prove its claim with the specificity required under Georgia law.

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the nonmovant, warrant judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

On June 18, 2010, prior to the expiration of discovery, this Court denied Defendants' request for summary judgment on the basis that EZG's damages were too speculative, finding that "while requiring proof and explanation, and while subject to the rigors of cross examination and the rules of evidence, the damages EZG seeks could 'be proved with reasonable certainty.'" At the time, EZG advised the Court that it had "an established track record of royalties upon which to base recovery." Accordingly, the

Court allowed EZG to continue to marshal its case for lost royalty damages through the conclusion of the discovery process.

Now, EZG has come forth with expert testimony to support its claim for lost royalties. The Court has found such evidence to be unreliable for the reasons set forth above.

Accordingly, the Court **GRANTS** Defendants' motion to the extent EZG relies on Dr. Seaman's opinions or the projections on which his calculations are based. EZG is limited to the recovery of only nominal damages on its claim for breach of contract unless it presents evidence at trial based on the actual track record of sales of the product and is able to prove lost royalties with reasonable certainty. See Duke Galish LLC v. Manton, 308 Ga. App. 316 (2011).

SO ORDERED this 8 day of April, 2013.

for ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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