



March 14, 2012

**APPELLATE DIVISION IN A CONSTRUCTION DISPUTE DISMISSES BREACH OF CONTRACT ACTION SEEKING LOST PROFITS AND IN DOING SO HIGHLIGHTS THE NEED TO METICULOUSLY PREPARE A DAMAGES CALCULATION AND PROFFER EXPERT TESTIMONY**

**By: Gary F. Werner and Ryder T. Ulon**

In an unpublished but potentially significant opinion that may impact the manner in which parties to a breach of construction contract dispute quantify damages, the Appellate Division recently affirmed the dismissal of a contractor's claim because the construction manager did not provide expert testimony on projected lost profits. C.H.S. Construction Co., Inc. v. Mast Construction Services, No. A-1261-10T2 (App. Div. 2012) (slip. op. at \*4).

The facts of the case reveal that plaintiff, C.H.S. Construction Co., Inc. ("CHS") agreed to participate with defendant Mast Services, Inc. ("Mast") in providing work around the Prudential Center, in Newark, New Jersey ("Project"). Mast submitted two (2) proposals for the Project which were rejected and then submitted a third proposal for \$1,160,590, which was approximately one-third of the initial bid price. Significantly, the first proposal indicated that CHS was a thirty-five (35) percent participant in the project. The second proposal listed CHS as a twenty (20) percent participant while the third proposal did not mention CHS as a participant.

Correspondence between CHS and Mast alluded to a Teaming Agreement which had been discussed but unsigned by CHS because it did not contain the thirty-five percent participation purportedly agreed to. Despite the lack of an executed agreement, CHS performed work at the Project and sent monthly invoices to Mast. In total, CHS received payment in the amount of \$93,051 for its work at the Project.

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In its Complaint, CHS contended that it was entitled to a thirty-five percent (35%) participation in the Project even though there was no written agreement memorializing the purported agreement. CHS also alleged that Mast did not permit CHS to employ the requisite number of employees to reach its thirty-five percent share. CHS's causes of action sounded, inter alia, in breach of contract and estoppel. As damages, CHS sought thirty-five percent of Mast's gross revenues (\$1,268,663.11), minus what it had been paid, or \$351,981.08.

Following the close of discovery, Mast moved for summary judgment. The Trial Court, for the purpose of its decision, assumed the existence of a contract between CHS and found that the measure of damages would be lost profits as opposed to lost revenues. CHS's claim, however, made no adjustments for any expenses it avoided and did not otherwise calculate its purported profits. CHS took the position that it could offer its owner to testify as to lost profits at trial. The Trial Court rejected CHS's position and integral to its decision to grant summary judgment to Mast was CHS's failure to provide expert opinion on projected lost profits.

The Appellate Division affirmed. Commencing its analysis, the court reiterated well settled New Jersey law requiring that lost profits be established within a reasonable degree of certainty. Echoing the concerns expressed by the Trial Court, the Appellate Division noted that CHS had numerous opportunities to calculate its lost profits during the course of discovery and proffer expert testimony but it failed to do so. In the view of the Appellate Division, CHS's failures in that regard mandated summary judgment in favor of Mast.

This case is instructive in several respects. First, it is a reminder that the proper measure of damages for breach of construction contract cases where work contracted for is not performed is lost profits. Second, while the case does not stand for the proposition that expert testimony is required to prove lost profits in construction cases, the Trial Court's dismissal and the Appellate Division's affirmance certainly demonstrate the propriety of proffering expert testimony on the issue. Third, the case is instructive as to the pitfalls in failing to provide specific answers to discovery requests. The Appellate Division's decision noted that interrogatories served by Mast sought an itemized calculation of damages suffered by CHS. CHS, however, did not provide a calculation of lost profits. Accordingly, in the event a litigant seeking lost profits opts not to proffer expert opinion on the issue, the litigant should certainly provide a calculation of lost profits during the course of discovery to avoid a dismissal of the claim. Of course, the calculation, if not performed by a qualified expert, must be performed by someone who is well versed enough to draw the sometimes subtle distinction between revenue and profits.

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