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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000555-MR

U.S. FOAM CORPORATION — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 00-CI-02873

FOAM DESIGN, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: U.S. Foam Corporation appeals from a Judgment Notwithstanding the Jury Verdict (JNOV) entered in Fayette Circuit Court. It contends that the trial court erred in concluding that the jury verdict and damage award was not supported by the evidence. For the reasons stated below, we affirm the JNOV.

[1] Senior Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In November 1998, U.S. Foam purchased from Foam Design a Baumer Wapora sponge grinding machine for $87,500. The machine is used to produce sponges for commercial sale, and had a "top hole grinder" allowing it to mill a hole in the top of each sponge.

At the time of the sale, the parties entered into an agreement giving U.S. Foam a right of first refusal to purchase a second sponge grinding machine with top hole grinder owned by Foam Design. In February, 2000, Foam Design sold this second grinding machine to a third party, Hydra Sponge, Inc. Hydra Sponge also purchased from Foam Design a third machine without a top hole grinder, which was not subject to U.S. Foam's right of first refusal. Hydra Sponge paid $80,000 for both machines.

U.S. Foam filed the instant action against Foam Design in Fayette Circuit Court alleging that Foam Design failed to honor U.S. Foam's right of first refusal, and that U.S. Foam suffered damages as a result. The matter proceeded to a jury trial, whereupon a verdict was entered in favor of U.S. Foam. The jury awarded damages in the amount of $51,423, representing "the difference between the market price at the time U.S. Foam learned that the used machine had been sold and the actual price Hydra paid for the used machine."[2]

[2] The jury instructions provided an alternate basis for relief, i.e., if Foam Design's alleged breach of the agreement reasonably caused U.S. Foam to purchase another machine from a different source. U.S Foam did purchase such

Foam Design subsequently filed a motion for a JNOV. It argued that U.S. Foam did not produce any evidence as to the fair market value or market price of the grinder sold to Hydra Sponge. It also maintained that the only evidence in the record on this issue was its witness's testimony that the price paid by Hydra Sponge was the same as the fair market value.

After hearing proof on the motion, the trial court entered the JNOV. It held that U.S. Foam produced no evidence as to the market price of the used machine sold to Hydra Sponge, and that the only evidence on this issue was the testimony of Foam Design's witness John Von Ahn, who stated that the fair market value of the grinder at issue was the same as the price paid by Hydra Sponge. The circuit court set aside the jury verdict, and this appeal followed.

U.S. Foam now argues that the circuit court erred in finding that no evidence was produced at trial as to the fair market value of the grinder at issue. It notes that undisputed testimony was presented at trial that it bought the original machine from Foam Design in November 1998 for $87,500, and that this machine was essentially the same machine as the second grinder, which was subject to the right of first refusal. It also points to the testimony of a Foam Design witness who opined that the value of the second machine was $60,000. And finally,

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a machine after the alleged breach, but the jury found that the purchase was not done without unreasonable delay.

it relies on its conclusion that because the two machines sold to Hydra Sponge were valued together at $80,000 (one of which being the machine subject to U.S. Foam's right of first refusal), the value of the machine at issue must be half of that amount or $40,000. In sum, U.S. Foam argues that evidence was presented sufficient to withstand Foam Design's motion for a JNOV. It seeks an order vacating the JNOV and reinstating the jury verdict and damage award.

We have closely examined U.S. Foam's argument and find no error in the judgment on appeal. The dispositive issue before us is whether the trial court properly concluded that insufficient evidence was tendered at trial upon which the jury could reasonably rely in measuring U.S. Foam's damages. Under instruction number two, the jury was charged with basing a damage award on the difference between the fair market price of the machine at the time U.S. Foam learned that it had been sold and the actual price that Hydra Sponge paid for the machine. This measure of damages was used because the jury had previously concluded U.S. Foam did not purchase another machine from a third party within a reasonable period of time after learning of Foam Design's alleged breach.

The circuit court concluded that the "only evidence with respect to its market price was the $60,000 figure testified by Defendant's witness, John Von Ahn, which was the

same as the sales price to Hydra Sponge Corporation." Our review of the record reveals no basis for tampering with this conclusion. U.S. Foam relies to great degree on the price it paid for the first machine it bought ($87,500) as a basis for fixing the value of the second machine. The first machine, though, was not identical in either form or condition to the second machine, and could at best provide only a basis for speculating as to the second machine's value. Similarly, the $80,000 sum paid by Hydra Sponge for the second machine and an additional machine is of little help because, as U.S. Foam's witness Jerry Schoch stated at trial, it only means that the second machine was worth either $80,000 or something less than $80,000.

A motion for a judgment notwithstanding the verdict shall not be granted unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ.[3] On review, an appellate tribunal must consider the evidence in strongest light in favor of party against whom motion was made, and must give such party the advantage of every fair and reasonable inference that the evidence can justify.[4]

[3] Bierman v. Klapheke, 967 S.W.2d 16 (Ky. 1998).

[4] Sutton v. Combs, 419 S.W.2d 775 (Ky. 1967).

Even when viewing the evidence in the strongest light in favor of U.S. Foam, and giving U.S. Foam the advantage of every fair and reasonable inference that the evidence can justify, we cannot conclude that the evidence was sufficient to support the jury's determination of damages. Arguendo, even if the jury could determine the price that Hydra Sponge paid for the second grinder, which it cannot do because it was sold in conjunction with another grinder, nothing in the record would lead to the conclusion that it differed from the market value on the date that U.S. Foam learned of the breach. We find no basis for holding that the circuit court's disposition of Foam Design's motion was anything but proper, and accordingly find no error.

For the foregoing reasons, we affirm the judgment notwithstanding the jury verdict of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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