FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JIM L. CARSON, Appellant,	)	Filed December 28, 1977
v.	)	
BROWN ENGINEERING COMPANY, Appellee.	)	294 2-58783

Appeal from Polk District Court - John N. Hughes, Judge.

Plaintiff appeals from directed verdict in civil damage action; defendant cross-appeals claiming trial court erred in its jury instructions, causing an inadequate award on the counterclaim. Both appeals affirmed.

Virgil Moore, of Des Moines, for appellant.

Burns H. Davison II, of Jones, Hoffman & Davison, of Des Moines, and Claude H. Freeman, of Grefe & Sidney, of Des Moines, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiff, Jim L. Carson, brought this action to recover damages allegedly caused by defendant Brown Engineering Company's negligence in preparing plans for a mobile home park. Carson complains that Brown Engineering's negligence created zoning problems, which caused delays in opening the park. He asserts that, due to the delays, he has lost profits in two respects. First, he lost income during the period between the scheduled opening of the park and actual commencement of business. Second, the delay allowed other parks to open before Carson's, which he claims has had an adverse effect on his park's occupancy rate during its entire operation.[1] Trial court granted defendant's motion for directed verdict on the basis that there was no adequate showing of damages so that any verdict would be the product of conjecture and speculation.

Brown Engineering counterclaimed for payment under its contract with Carson for preparation of plans and specifications for development of the mobile home park. The jury rendered a verdict on the counterclaim for $395.18 which defendant now assails on cross-appeal as inadequate. We deal first with plaintiff's appeal.

I. Carson's appeal.

The standards for adequacy of proof of damages were set forth in Patterson v. Patterson, 189 N.W.2d 601, 605 (Iowa 1971) and repeated approvingly in Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 857 (Iowa 1973). Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220, 233 (Iowa 1977). Particularly persuasive in this case is the rule that "[d]amages should be proved with all the certainty the case permits." Sexton v. Lauman, 244 Iowa 570, 583, 57 N.W.2d 200, 207 (1953) quoting 25A C.J.S. Damages § 162(2).

Carson sought to introduce, as plaintiff's exhibit 11, a calculation of the difference between the park's actual revenues and the amount of rent which would have been received if it had been fully occupied. The same information was, in substance, presented to the jury in another form. Plaintiff testified to the actual income for the years 1971 through 1975; he testified to the monthly rental charge per lot, and that the park would accommodate 70 units.

[1] Plaintiff also asserted, at trial, that the delay caused an increase in construction costs of the project. He does not, however, pursue this claim on appeal.

In addition, during his offer of proof in support of exhibit 11, Carson testified as to expenses incurred in operating the park, stating that garbage pickup cost $2 per month per unit and water averaged about $3. All other expenses, according to Carson, stayed constant, regardless of occupancy.

Even considering the additional information provided in the offer of proof, plaintiff's evidence failed to establish "a reasonable basis from which the amount [of his damages] can be inferred or approximated." Patterson v. Patterson, 189 N.W.2d 601, 605 (Iowa 1971). There was no showing that plaintiff's park would ever have been fully occupied under the best of circumstances. An examination of the record shows that evidence on this point was available. Two other mobile home parks were opened at nearly the time which plaintiff had set as a target date. One such park was within one-half mile of plaintiff, while the other was two miles away. Testimony showing the percentage of occupancy of those facilities and their desiribility as compared to plaintiff's park would have given the jury some reasonable basis upon which to assess whether plaintiff had suffered any loss, and, if so, what was that loss. Leoni v. Bemis Co. Inc., 255 N.W.2d 824 (Minn. 1977), which plaintiff cites, supports our conclusion. The plaintiff in that case made a showing regarding the success of his business in states other than California during the critical period. That showing served the purpose which evidence of other parks' business would accomplish here. It gave the jury a reasonable basis for making its judgment.[2]

Whether other evidence was available is not shown by the record. But it is clear that damages were not proven "with all the certainty the case [would permit]." Trial court was correct in directing the verdict on plaintiff's claim.

II. Brown Engineering's cross-appeal.

Brown Engineering complains trial court erred in instructing the jury that if they found Brown Engineering's efforts to be without value to Carson, that would be an adequate defense for Carson. The argument is that the counterclaim was for a breach of contract and that value of the contract services to Carson was irrelevant. The

[2] We have considered City of Corning v. Iowa-Nebraska Light & Power Co., 225 Iowa 1380, 1388-89, 282 N.W. 791, 796 (1938) and Lakota Girl Scout Council, Inc. v. Harvey Fund-Raising Management, Inc., 519 F.2d 634, 640-41 (8th Cir. 1975), and find them to be consistent with the result reached here.

proper recovery, in such a case, would be the contracted for benefits. In sum, Brown Engineering asserts that trial court erroneously inserted a quasi-contract theory into a contract case. The record shows otherwise.

Instructions must be read as a whole. Miller v. International Harvester Co., 246 N.W.2d 298, 306 (Iowa 1976). While the term "value" may not have been the best choice, trial court carefully defined it in a manner which made submission proper. By following the instructions, the jury could find the work done by Brown Engineering was without value in one of two ways: first, if the plans did not conform to the plan accepted by the City Planning and Zoning Commission and the City Council as pleaded in paragraph 4(a) of the Recast Answer to Counterclaim; and second, if Brown Engineering failed to "employ that degree of skill. . . ordinarily exercised by professional consulting engineers under like circumstances. . . ."

Brown Engineering cannot be fairly said to have informed trial court of any complaint other than that the court's value instruction inserted an unpleaded defense into the case. It specifically acquiesed in the final paragraph of instruction seven, which informed the jury of trial court's second definition of "value" as delineated above. Tr. 418, ll. 21-24. Because the defense which it protested was pleaded, the contention is without merit.

AFFIRMED.