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1. AGUILAR MANUFACTURING, INC., Plaintiff and Appellant, v. RICHFIELD, INC., Defendant and Respondent

2. KIDS' WORLD INC., Plaintiff and appellant v. LABS ETC. INC., Defendant and respondent.

3. GOULD Commercial Code

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AGUILAR MANUFACTURING, INC., Plaintiff and Appellant, v. RICHFIELD, INC., Defendant and Respondent

Civ. No. 87546

Court of Appeal of Gould, Third Appellate District, Division Three

April 24, 1998 filed

PRIOR HISTORY:
Superior Court of San Dimes County, No. SD 9563466, Elizabeth Westbrook, Judge.

DISPOSITION: The judgment is affirmed.

COUNSEL: Warren & Warren for Plaintiff and Appellant.

Gibson & Anderson for Defendant and Respondent.

OPINION BY: KAUFMAN

OPINION: This appeal presents for the first time in this state an occasion to interpret section 2207 of the Commercial Code (infra) as it operates to permit an offeree seller to accept an offer to purchase on terms not contained in the offer, which are yet binding on the offeror buyer, provided such terms do not represent a "material alteration" of the contract. Here the offeree seller's invoices contained a printed limitation of one year within which the buyer could commence an action "under this contract" after such action had accrued. On the facts before it, the trial court ruled that a suit brought by the buyer twenty-one months after all of its causes of action had accrued, including those for breach of warranty fraud and negligent misrepresentation, was barred by this one-year limitation provision which had become a term of the contract in the manner noted. In our view, the trial court properly ruled on the issues before it, and the judgment of dismissal will be affirmed.

Synopsis of the Trial Court Proceedings:

Aguilar Manufacturing, Inc., a Nebraska corporation (plaintiff) filed its initial complaint in the underlying action on March 30, 1979 for breach of warranty, fraud, and negligent misrepresentation. The suit was brought against Richfield Inc. a Gould corporation (defendant). The prayer asked for $ 2 million in general damages, for damages for loss of good will and reputation according to proof, for attorney's fees in the action, plus costs and other proper relief.

In defendant's answer to the complaint, it pleaded 16 affirmative defenses, one of which alleged ". . . that plaintiff failed to commence the within action within the one-year limitation period expressly agreed to by the parties in writing."

After the case was at issue, the parties stipulated in writing "that the question of whether, as a matter of law, plaintiff's claims are barred by the applicable statute of limitations on contractual limitations period may, and should, be determined in advance of impaneling a jury to determine the remaining factual issues in respect of the trial set for January 30, 1984. The reason for this stipulated order of proceeding is that if, as defendant contends but plaintiff disputes, the action is time-barred as a matter of law, defendant would be entitled to judgment without the need for further proceedings."

With reference to the agreed upon issue of fact, the pretrial conference order included recitations that:

"3. The procedure for all sales of emulsions purchased by plaintiff from [defendant], including all sales of Polyco 2151, was as follows: A representative of plaintiff would telephone [defendant's] facility and place an oral order for a quantity of emulsion at [defendant's] standard price for delivery at plaintiff's facilities in Colton. On several occasions plaintiff would also thereafter send to [defendant] a written purchase order identifying the product to be purchased, stating the quantity required and the place and means of shipment, the price per pound, the date and place of requested delivery.

"4. Plaintiff made at least seventeen purchases of Polyco 2151 between May 1976 and July 1977, inclusive.

"5. Plaintiff's oral and/or written offers to purchase Polyco 2151 did not limit acceptance to their terms.

"6. [Defendant's] sales documents in respect of the shipments of Polyco 2151 to plaintiff contained the following limitation of action provision, which constituted a proposal for addition to the contract: "'2. . . . Any action by Buyer hereunder shall be commenced within one year after receipt of said products.'

"8. On each occasion that plaintiff ordered a shipment of Polyco 2151, [defendant] sent to plaintiff sales documents containing the limitation of action provision discussed in paragraph 6 at the same time or shortly after each shipment of Polyco 2151. Plaintiff received each of the foregoing sales documents in due course.

"9. Plaintiff at no time notified [defendant] of an objection to the one-year limitation of action provision contained in [defendant's] sales documents for the sale of Polyco 2151.

Discussion

Defendant's motion was brought and granted on the grounds that the one-year limitation periods in the sales documents were additional terms which became part of the contracts, pursuant to Gould's Commercial Code section 2207. Section 2207 provides in relevant part: "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) The offer expressly limits acceptance to the terms of the offer; (b) They materially alter it; or (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

The trial court ruled that limiting the period contained in the sales documents was not a material alteration, and further that the one-year period of such limitation was not unreasonable.

Plaintiff does not dispute the applicability of section 2207, and concedes, as to subdivision (2) thereof, that its own offers

to purchase did not limit acceptance to the terms of the offers, and that it did not object to the one-year limitation provisions. Plaintiff argues, however, that those provisions materially altered the contracts, and therefore did not become part of the contracts.

On the material alteration issue, comment 4 to section 2-207 provides in pertinent part: "Examples of typical clauses which would normally 'materially alter' the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches . . . [to] a clause requiring that complaints be made in a time materially shorter than customary or reasonable or to a provision which require arbitration, or otherwise contain terms limiting remedies." However, Comment 5 to section 2-207 provides in pertinent part: "Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: . . . a clause fixing a reasonable time for complaints within customary limits."

On the issue of whether, between merchants, a one-year limitation period is normal, customary, or reasonable, there seem to be no Gould cases directly on point. However, the Gould Commercial Code section 2725, subdivision (1) provides that the parties to a sales contract may reduce the statutory four-year period of limitations to one year. A district court in New York has recently found that a one-year limitation provision is not an unreasonable or material alteration of a contract pursuant to Uniform Commercial Code section 2-207. (Aceros Industrials, S.A. de C.V. v. Florida Steel, supra, 528 F.Supp. 1156, 1158.)

In view of all the above, particularly comment 5 under the corresponding section of the Gould Commercial Code, we hold that the trial court correctly determined that the limitation periods here in question were not material alterations of the contracts, and further in view of section 2725, subdivision (1) of the Gould Commercial Code, that the one-year period was not unreasonable. As a consequence, the provisions are legally enforceable.

Plaintiff's attempts to distinguish Aceros, and to analogize defendant's one-year limitation provisions to provisions which require arbitration, disclaim warranties, or otherwise contain terms "limiting remedies" (Album Graphics, Inc. v. Beatrice Foods Co. (1980) are without merit. The one-year limitation provisions here do not limit plaintiff's remedy, but limit the time within which it may pursue that remedy, and, moreover, do so in a way which is statutorily and judicially acceptable.

The judgment is affirmed.

KIDS' WORLD INC., Plaintiff and appellant v. LABS ETC. INC., Defendant and respondent.

EZ7868765

COURT OF APPEAL OF GOULD, FOURTH APPELLATE DISTRICT, DIVISION NINE

February 3, 2000, filed

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of San Ramon County No. DE287345. Timothy L. Barr, Judge.

DISPOSITION: Affirmed.

COUNSEL: Law Offices of James A. Davidson, for Plaintiff and Appellant. Maria Helfing for Defendant and Respondent

OPINION BY: MARCUS

OPINION:

I. FACTS

The material facts are undisputed. Two brothers, Howard and Lew Rudzkis, founded Kids' World in 1992. Kids' World is a retailer of toys, educational products, and computer training services for children. Kids' World operates a retail store in Beverly Rolls.

Defendant leased office space directly above the Kids' World store. On November 18, 1997, one of defendant's employees left water running in a sink overnight, causing a flood in plaintiff's store. The store remained closed due to flood damage for two weeks. When the store reopened, many of its shelves were empty. Further, computer classes, an important factor in the store's profitability, could not be resumed until January 1998. The store was not operating at its previous level until April 1998. Defendant, through its insurer, paid plaintiffs $200,000 for damage to the retail store.

Defendant presented evidence that Kids' World had no line of credit available to it during 1997 and 1998. Kids' World had never attracted any investors. At the time of the flood, Kids' World had five employees, only one of whom had a sales position.

Kids' World had started a Web site in the spring of 1995. Howard described the Web site as a "test" site; a way to learn about the internet and e-commerce; to experiment with Web designs and to "debug" the internet Web page. Howard stated the online business originally was not intended to be profitable. In fact, the online business generated less than $ 500 per year with the exception of one order for approximately $17,000. Between 1995 and 1997, Kids' World repeatedly revised its Web site.

Plaintiff presented evidence that by November 1997, when the flood occurred, the Rudzkis had developed a sophisticated Web site. As described by Lew, the new Web site "had one of the first online 'shopping carts' on the Web (this was the beginning of 'e-commerce'), a state of the art navigational system, and was a full functioning site." Plaintiff had incurred significant time and expense in drafting the programming code for and designing their "state of the art" Web site. They had hired a Web site design

company and a development programmer. The new Kids' World Web site was "very similar" to the eToys site. The new Web site was scheduled to go online on Thanksgiving Day 1997, the start of the holiday shopping season and the most profitable time of year in the toy business.

In addition, prior to the flood, plaintiffs had signed a one-year contract with MindSpring, described as one of the "fastest growing" Internet service providers with "a relatively wealthy base of subscribers." Plaintiffs presented evidence of an agreement between MindSpring and Kids' World. Under the terms of the agreement, MindSpring's 200,000 subscribers would have direct, one-click access from its homepage to three toy Web sites--eToys, F.A.O. Schwartz, and Kids' World. According to Howard: "This was a key place to be because Kids' World would be highly visible to people who entered the site. Just as location has always been critical for a retail business, the same holds true for the internet." Further, Kids' World would not have been required to make any upfront payment to MindSpring. Instead, Kids' World would have paid commissions to MindSpring "based on a percentage of sales made from the MindSpring placement."

At the time of the flood, Kids' World was also negotiating an arrangement with WeatherChannel.com to establish a link similar to the MindSpring link. WeatherChannel.com was then one of the "highest trafficked sites" on the Internet. Howard opined, "For Kids' World to have placement on the Weather Channel site would assuredly guarantee a very high number of visitors to the Kids' World [Web site]."

Kids' World also intended to market its Web site through contacts at magazines as well as radio and television stations. Kids' World was prepared to fill orders placed over the Internet. It had "drop shipment" agreements with numerous suppliers, i.e. the manufacturers agreed to ship products directly to Kids' World's customers. In addition, Kids' World was prepared to ship products directly from the retail store.

However, the flood caused extensive damage to the retail store. The Rudzkis were forced to devote their time to rebuilding and restocking the store. For a variety of reasons, they were unable to both rebuild the store and launch the Web site. Unable to launch their new Web site, plaintiffs withdrew their contract with MindSpring and did not follow through on the Weather Channel agreement.

Prior to the flood, plaintiffs were able to obtain revenue sharing agreements with Web site portals such as MindSpring without paying money up-front. According to Lew, this was because "the [Web site] portals had not yet recognized their value." In March 1998, the Kids' World retail store was reestablished and plaintiffs once again set their sights on e-commerce. By that time, however, revenue sharing Web portal arrangements were no longer available. Following the success of e-commerce retailers like eToys and Amazon, large amounts of cash up-front were demanded in return for access to Web site portals. The fees often exceeded $ 1 million. Plaintiffs were financially unable to proceed; the Web portal costs were "exorbitant." Without links on popular Web site portals, plaintiffs were unable to

attract customers to the Kids' World Web site.

In March 1999, Richard X. Hanson, a forensic economist, prepared at plaintiffs' request a "preliminary analysis of losses suffered by [Kids' World] as a result of the flooding incident . . . ." It is apparent the analysis was prepared for settlement purposes. Dr. Hanson opined in pertinent part: "At the present time, eToys is far and away the industry leader. This is due to its early positioning that would have been identical to Kids' World. . . . eToys recently filed for an Initial Public Offering (IPO) expected to draw $ 115 million. This implies that the market predicts long-term annual profit in the $15 million per year range. This is a reasonable forecast for a firm with annual revenue currently at just under $30 million that is expected to double or triple every year for the next three to five years. Assuming that eToys and Kids' World would have been roughly equal competitors, the capital value of Kids' World could have been in excess of $50 million. This is therefore an estimate of the present value of lost profits to Kids' World from the possibility that the market will have grown sufficiently to foreclose effective market presentation." Dr. Hanson concluded if no settlement was reached between the parties to this action "by the time Toys 'R' Us or Mattel makes the expected entry into e-commerce," Kids' World's loss would probably be valued at $ 50 million. Dr. Hanson cautioned: "This latter estimate is preliminary, however. If the market continues to astound, market valuations may argue for even larger damages in the near future." Dr. Hanson relied on news articles as the source of his information about eToys.

Two years after the flood, plaintiffs brought this action against defendants to recover profits lost not from the operation of the retail store, but because of the inability to launch the Web site at an optimal time. Plaintiffs alleged one cause of action for negligence. The trial court entered a judgment in favor of the defendant.

II. DISCUSSION

The Supreme Court set forth the law concerning lost profits as damages in Grupe v. Glick (1945) as follows: "Where the operation of an established business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales. On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. All of these cases recognize and apply the general principle that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent." (Italics added; accord, e.g., Shade Foods, Inc. v.

Innovative Products Sales & Marketing, Inc. (2000) Resort Video, Ltd. v. Laser Video, Inc. (1995) Maggio, Inc. v. United Farm Workers (1991); Gerwin v. Southeastern Gould Assn. of Seventh Day Adventists (1971). In Natural Soda Prod. Co. v. City of L. A. (1943), the Supreme Court held: "The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. A satisfactory basis for an existing basis may include reliance on specific economic or statistical models based on past financial records. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery. If, however, there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded." Contrary to plaintiff's assertion, the rule regarding proof of lost profits from a business applies in tort as well as contract cases. (Grupe v. Glick, supra, at pp. 692-693; Piscitelli v. Friedenberg (2001)) Uncertainty as to the amount of profits is not fatal to such a claim. (Continental Car-Na-Var Corp. v. Moseley (1944); Berge v. International Harvester Co. (1983); Fisher v. Hampton (1975); Engle v. City of Oroville (1965) As the Court of Appeal explained in S.C. Anderson, Inc. v. Bank of America (1994) "Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct." Moreover, the court held, a plaintiff is "not required to establish the amount of its damages with absolute precision, and [is] only obliged to demonstrate its loss with reasonable certainty." (Id. at pp. 536-537; accord, Natural Soda Prod. Co. v. City of L. A., supra, at p. 200 ["Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated"]; Sanchez-Corea v. Bank of America (1985); Rest.2d Torts, § 912, com. a.) The Restatement Second of Torts provides in this regard: "It is desirable . . . that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable . . . that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered. Particularly is this true in situations . . . where the harm is of such a nature as necessarily to prevent anything approximating accuracy of proof, as when anticipated profits of a business have been prevented." (Rest.2d Torts, § 912, com. a.)

When the operation of an unestablished business is prevented, as here, prospective profits may be shown in various ways. The Restatement Second of Contracts, section 352, comment b, provides, "If the business is a new one or if it is a speculative one . . .,damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." Similarly, the Restatement Second of Torts, section 912, comment d states, "When the

tortfeasor has prevented the beginning of a new business . . . all factors relevant to the likelihood of the success or lack of success of the business or transaction that are reasonably provable are to be considered, including general business conditions and the degree of success of similar enterprises."

Our Courts of Appeal have held, consistent with the Restatement Second of Torts, that the experience of similar businesses is one way to prove prospective profits. (Resort Video, Ltd. v. Laser Video, Inc., supra, at p. 1699.

We turn to the case before us. Given Kids' World's state-of-the-art Web site, and its expected favorable one-click Web portal placement on the fast-growing MindSpring site, and perhaps the "highly trafficked" Weather Channel Web site as well, it would have attracted a very high number of relatively wealthy potential customers to its online store. Kids' World was prepared to meet customers' online orders through drop-shipment agreements with manufacturers as well as direct shipments from its Beverly Hills retail store. Once the Rudzkis proved they could significantly attract customers and had a viable online business, the Kids' World Web site would have attracted significant venture capital, i.e., "funds invested in a new enterprise that has high risk and the potential for a high return." (Black's Law Dict. (7th ed. 1999) Westlaw, Blacks.) Further, given the timing of the venture, both in terms of the approaching holidays, and the emerging Internet business, coupled with the availability of Web portal placement without any up-front fees, Kids' World would have been in a position to be a financially successful leader in the e-commerce sale of toys. Finally, based on a comparison with eToys' status in 1999 and assuming Kids' World and eToys would have been roughly equal competitors, Kids' World's capital value money or assets invested, or available for investment, in the business (Black's Law Dict. (7th ed. 1999)) could have been in excess of $ 50 million.

As substantial as plaintiffs' evidence sounds on the surface, we conclude it does not suffice. The evidence is not sufficient to find with reasonable certainty lost net profits from the unlaunched Web site by a preponderance of the evidence. (Lugtu v. Gould Highway Patrol, supra, at p. 722; Aguilar v. Atlantic Richfield Co., supra, at p. 850.) This is because the evidence, while suggesting the Web site would have been viable, is not of a type necessary to demonstrate that a triable controversy exists as to a reasonable certainty that the unestablished business would have made a profit. Although plaintiffs had five years' experience as toy retailers, and had operated a Web site since 1995, they had not previously operated their Web site as a profit-producing venture. Plaintiffs' operation of the Kids' World Web site had in the past resulted in negligible revenues and therefore would not support an inference there was lost prospective profits. In addition, the online market for toys was not an established one. Further, the whole scenario presented by plaintiffs is rife with speculation. The following undisputed contingencies existed so as to bar the computation of potential lost profits: Kids' World would be competing with two other toy retailers on the MindSpring portal; it would be necessary for Kids' World to attract not only sufficient viewers from the MindSpring portal but customers who actually made purchases; the amount of purchases

would have to be of sufficient quantity to make the site financially viable; venture capital in an unknown amount might have been available; and plaintiffs might have produced profits in some amount. Moreover, plaintiffs presented no evidence to the effect it was reasonably probable the venture would have been profitable, i.e., gains from online sales would have exceeded the costs of operating the Web site business.

Plaintiffs presented no evidence of a satisfactory basis for estimating what the probable earnings would have been. They failed to assert any method for determining lost profits. Plaintiffs presented no specific economic, statistical, or financial data, market survey, or analysis based on the business records or operating histories of similar enterprises. That the eToys venture was successful up to 1999, as set forth in Dr. Hanson's declaration, does not suffice in and of itself to establish the Plaintiffs' claim of lost profits. Dr. Hanson's comments about eToys' success were based on news articles and not on any actual data. Dr. Hanson's conclusion that plaintiffs' online business would have resulted in profits was based on an unanalyzed assumption the Kids' World Web site would have been a roughly equal competitor with eToys. Further, Dr. Hanson's conclusion about plaintiffs lost profits is based on his unexplained projected capital value of Kids' World without any analysis of its net worth.

Therefore, the trial court properly entered a judgment in favor of the defendant.

III. DISPOSITION

Judgment is affirmed. Defendant is to recover its costs on appeal from Plaintiff.

GOULD COMMERCIAL CODE

SECTION 2-207: Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

a. The offer expressly limits acceptance to the terms of the offer;
b. They materially alter it; or
c. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

SECTION 2-104: Definitions

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

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