# STATE OF MICHIGAN

# COURT OF APPEALS

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MUSTAFA MISSILMANI, FATME MISSILMANI and M & A PETROLEUM, INC.,

Plaintiffs-Appellees,

v

CITY OF DETROIT and CITY OF DETROIT WATER & SEWERAGE DEPARTMENT,

Defendants-Appellants.

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UNPUBLISHED
November 22, 1996

No. 178675
LC No. 93-302876-CC

Before: Markman, P.J., and Smolenski and G. S. Buth,* JJ.

PER CURIAM.

Defendants appeal by right a 1994 judgment for plaintiffs. We reverse.

Plaintiffs owned a gas station. In March 1990, defendants informed plaintiffs of a planned sewer project and sought easements on the gas station property. On April 9, 1990, plaintiffs signed a stipulation granting defendants a permanent easement to accommodate the sewer system, as well as a temporary easement to accommodate the construction. In addition to a $5,560 compensation for the easements, the stipulation provided:

> An additional compensation for business disruption (if any) caused by the construction project will be negotiated and offered within a reasonable time after completion of construction.

Defendants began the construction project in December 1990. Pursuant to a request by plaintiffs for interim business disruption compensation, defendants sent them an offer on December 19, 1991 in the amount of $32,091 for the period of January through September 1991. This offer stated that review of plaintiffs' claim "will continue as information becomes available." Plaintiff Mustafa Mussilmani testified that he closed the gas station in March 1992[1] and that he received the $32,091 payment from defendants in April 1992. Unsatisfied with the amount of this interim payment, plaintiffs

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* Circuit judge, sitting on the Court of Appeals by assignment.

filed the present complaint for mandamus, inverse condemnation and breach of contract on January 29, 1993. This matter was tried to a jury in April 1994. At the close of plaintiffs' proofs and again at the close of their own proofs, defendants moved for a directed verdict on the basis that plaintiffs had failed to present evidence that defendants breached the contract. The trial court denied both motions. The jury found the damages owing to plaintiffs to be $604,417.50, "plus the removal of the [gasoline] tanks."

On appeal, we first consider the trial court's denial of defendants' motions for directed verdict. In *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 639; 540 NW2d 777 (1995), this Court set forth the applicable standard of review:

> In reviewing the denial of a motion for a directed verdict, this Court examines the evidence presented in the light most favorable to the plaintiff and gives the plaintiff the benefit of every reasonable inference that may be drawn from the evidence. If reasonable minds could differ in regard to whether the plaintiff has met the burden of proof, a motion for a directed verdict should be denied.

Here, the stipulation between plaintiffs and defendants provided that "compensation for business disruption (if any) caused by the construction project will be negotiated and offered within a reasonable time *after completion of construction*." (Emphasis added.) Plaintiffs produced evidence at trial indicating that the parties considered quarterly business disruption compensation payments during the construction period but never executed an agreement making such an arrangement. We understand plaintiffs' position that they needed interim business disruption compensation payments to sustain the station during the construction period, but that is not the deal plaintiffs struck. According to the unambiguous terms of the stipulation, defendants were not obligated to compensate plaintiffs for any business disruption until a reasonable time *after* completion of the project. At the time plaintiffs filed the present action, the construction project was not complete. While not contractually obligated to do so, defendants chose to provide the $32,091 interim payment for the January through September 1991 period in response to plaintiffs' requests. Defendants clearly indicated in its offer of the interim payment that it would continue to review plaintiffs' claims for business disruption compensation. According to the stipulation, a final accounting of plaintiffs' business disruption losses and compensation therefore was not due until a reasonable time after completion of the construction project. Accordingly, as a matter of law, defendants could not have breached the business disruption compensation terms of the contract as of time plaintiffs filed the complaint.

Under the terms of the stipulation, reasonable minds could not differ regarding whether defendants had breached the contract with respect to business disruption compensation. Accordingly, the trial court erred in denying defendants' motions for directed verdict. Our resolution of this issue makes it unnecessary for us to address the other issues raised by defendants.

However, in order to guide the parties in resolving this matter, we note a legal error in the proceedings below. At trial, plaintiff presented evidence regarding both plaintiffs' business interruption damages and plaintiffs' going concern damages. "It should be clear that recovery for business

interruption damages and recovery for going concern value are mutually exclusive since one assumes the continuation of the business and the other assumes its loss." *Detroit v Michael's Prescriptions*, 143 Mich App 808, 819 n 2; 373 NW2d 219 (1985). See also *Detroit v Larned Associates*, 199 Mich App 36, 42; 501 NW2d 189 (1993). This legal error undermines the validity of the jury determination of plaintiffs' damages even as a benchmark for settlement negotiations.

For these reasons, we reverse the trial court's order denying defendants' motions for directed verdict. Plaintiffs' breach of contract count is accordingly dismissed. Defendants are, of course, ultimately bound to comply with the terms of the contract. If defendants fail to provide "compensation for business disruption (if any) caused by the construction project . . . within a reasonable time after completion of construction," plaintiffs may then bring a breach of contract action. We remand this matter for resolution of the remaining counts of plaintiffs' complaint.[2]

Reversed and remanded. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth

[1] He admitted that he suffered an accident shortly before closing the gas station.

[2] Plaintiffs' complaint includes inverse condemnation and mandamus counts. However, at trial, plaintiffs' counsel stated, "We're not talking about a taking case here." The trial court decided not to instruct the jury regarding the taking of property stating, "This Court feels and plaintiff contends that this is a contract claim." Accordingly, the current status of plaintiffs' inverse condemnation and mandamus counts is unclear from the record.