Eighth Circuit overturns Jury Verdict for Contractor and Counterclaim Jury Verdict for Equipment Lessor

by

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Reaching an unusual result, the Eighth Circuit Court of Appeals recently overturned both a jury verdict for a contractor and in the same case overturned the counterclaim jury verdict for the contractor's equipment lessor, sending the case back to the district court for a retrial on only the lessor's counterclaim. The case is *Graham Construction Services v. Hammer & Steel, Inc.*, 755 F.3d 611 (8th Cir. 2014), decided June 13.

The trial was in federal court in St. Louis, Missouri.

The dispute arose between contractor Graham Construction Services, Inc. ("Graham"), located in Eagan, Minnesota, and lessor Hammer & Steel, Inc. ("H&S"), headquartered in Hazelwood, Missouri. The lease was for drilling equipment for the construction of an underground water shaft.

Due to unsatisfactory performance of the equipment, Graham sued H&S for negligent misrepresentation. H&S filed counterclaims for payments not made under the lease and the cost of an auger lost during drilling.

The jury awarded Graham $420,194.40 in economic losses on its negligent misrepresentation claim. The jury awarded H&S $197,238.00 for breach of contract, and the district court added an additional award of $52,387.00 for the value of the lost auger. Both the contractor and the lessor appealed.

The project was the construction of the raw water intake structure for the City of Parshall, North Dakota. The project required the construction of an underground shaft for a water storage unit. This required drilling a 96-foot deep and 14-foot wide shaft and lining it with concrete.

Graham discussed the project with a representative of H&S who allegedly stated that it "could provide a drill rig to do the job." Graham entered into a lease agreement with H&S for a SANY SR 250 drill and a 60-inch auger.

A representative of Graham signed the lease agreement but did not read the fine print because he was confident that H&S was providing appropriate equipment for the project. The lease included a clause whereby Graham acknowledged that it had selected the equipment based entirely and solely on

Graham's judgment and that it was not relying on H&S regarding the proper use of the equipment.

During drilling, Graham encountered several problems including a component of the drill called the "Kelly bar" which broke, resulting in the 60-inch auger falling to the bottom of the shaft and being lost. The Kelly bar broke on two more occasions. H&S removed the drill from the project. Graham had to abandon the shaft, locate a replacement drill rig, and redrill a new shaft.

Graham's claim was based on assurances and representations from H&S about the suitability of the drilling equipment for this particular project.

The Eighth Circuit concluded that Missouri's economic loss doctrine barred Graham from recovering under a negligent misrepresentation theory. The economic loss doctrine prohibits a party from seeking recovery in tort (negligent misrepresentation is a tort claim) for economic losses that are contractual in nature. Recovery for economic damages is limited to cases where there is personal injury, damage to property other than that sold, or destruction of the property sold due to some violent occurrence.

The Eighth Circuit agreed with H&S that Graham's remedy was based on the lease. The apparent problem with the lease, from Graham's point of view, is that it contained limiting language that essentially precluded Graham from recovery if the drill did not work as intended.

The jury also returned a verdict in favor of H&S on its breach of contract claim. Graham argued on appeal that the district court abused its discretion in refusing to instruct the jury on Graham's defense that H&S failed to mitigate its damages. Missouri law requires that someone who is damaged by breach of contract must make reasonable efforts to minimize the resulting damages. A party may not recover damages that that party could have avoided.

H&S had hired a testing service to determine the cause of the first Kelly bar break. The testing service issued a report that called into question the viability of the metal that composed the Kelly bar. The salesperson for H&S sent an e-mail to H&S's co-owner stating that Graham's drilling exceeded the capacity of the leased drill and that other damage could result from using the machine in excess of its rated capacity.

H&S did not inform Graham of the test results or the e-mail sent to H&S's co-owner.

The Eighth Circuit concluded that a jury could have reasonably inferred that Graham would not have continued to operate the leased equipment had H&S disclosed the test results or the e-mail, thereby potentially reducing or eliminating H&S's damages under the lease agreement.

The Eighth Circuit decided the district court abused its discretion by not issuing a jury instruction on Graham's defense of failure to mitigate. This means there will be another trial on damages only on H&S's counterclaim.

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