IN THE COURT OF APPEALS OF IOWA

No. 9-442 / 08-1580
Filed January 22, 2010

ROBERT W. KRAMER, III d/b/a
CIS INTERNET SERVICES,
Petitioner-Appellant,

vs.

ATW AXTELL TECH WHOLESALE, INC.,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, C.H. Pelton, Judge.

A plaintiff appeals the district court's award of damages in his favor, contending that the amount awarded is inadequate. **AFFIRMED.**

David M. Pillers of Pillers & Richmond, Dewitt, for appellant.

Megan M. Antenucci, Drew J. Gentsch, and Karin J. Derry of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

Robert W. Kramer III, d/b/a CIS Internet Services, appeals an award of damages for breach of contract and breach of warranty. He asserts the award was too low.

I. Background Facts and Proceedings

Robert Kramer owned and operated CIS Internet Services, a local internet service provider. CIS initially provided dial-up internet services to several communities in Iowa and Illinois. In 2002, CIS had over 4000 dial-up customers, but did not have a high-speed internet option for these customers. Kramer decided to upgrade the network to provide wireless broadband as a high-speed option.

Kramer contacted ATW Axtell Tech, a company that distributes wireless network components, and designs and engineers networks. Kramer proposed to offer a 2.4 GHz frequency for residential users of his network and a 5.8 GHz frequency for commercial users. He anticipated providing initial service to over 3000 customers.

Axtell selected several towns with high water or antennae towers that could be leased to accommodate the network. Axtell also installed the equipment. The network became operational at the 2.4 GHz range but was fraught with problems. It did not become operational at the 5.8 GHz range.

Kramer sued Axtell for damages. Following trial, the district court determined that the parties entered into an oral contract and Axtell breached that contract as well as warranties of fitness for a particular purpose. The court awarded Kramer damages as follows:

> Kramer should be reimbursed $50,000 for what he paid Axtell for the cost of mismatched and improper equipment that had to be replaced and repaired and the faulty installation that had to be redone. Kramer was damaged $10,000 for his additional personal time and services attempting to make the faulty system operational. Kramer was damaged $15,000 for the cost of tower rental that he paid when the system was inoperable. Kramer was damaged for lost profits (not lost gross revenue) in the amount of $20,000. Any amount of lost profits beyond this amount is too speculative because of two other competitors' broadband installations during the same time, marketing circumstances, and the inherent limitations of the line of sight wireless internet service system. Thus, total damages are $95,000.

On appeal, Kramer contends these damages were inadequate. Our review is "to determine whether [the damage award] was not supported by substantial evidence or was induced by an improper application of the law." *Tow v. Truck Country of Iowa, Inc.*, 695 N.W.2d 36, 38 (Iowa 2005).

II. Damages

In awarding damages, the district court did not distinguish between those damages that were for breach of contract and those that were for breach of express and implied warranties of fitness for a particular purpose. On appeal, Kramer does not argue that the measure of damages differs under each of these theories. *See* Iowa Code § 554.2714 (2003); *William C. Mitchell, Ltd. v. Brown*, 576 N.W.2d 342, 351 (Iowa 1998) (noting jury "had two theories of recovery from which to choose which involved essentially the same elements of damages"). Therefore, we will assume the damages for breach of warranty are coextensive with the damages for breach of contract.

When a contract is breached, the non-breaching party is generally entitled to be placed in as good a position as the party would have occupied had the contract been performed. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579

N.W.2d 823, 831 (Iowa 1998). The damages "must have relation to the nature and purpose of the contract itself, as viewed in connection with the character and extent of the injury." *Id.* (quoting 22 Am. Jur. 2d *Damages* § 44 (1988)). The damages also must have been foreseeable. *Id.*

A. Cost to Repair Network

Kramer first challenges the adequacy of the district court's $50,000 award for the cost of repairing and replacing the network. He argues that CIS "contracted for a wireless broadband internet network that was operable in the 2.4 and 5.8 GHz ranges" and the evidence demonstrated that it would cost $108,858.29, rather than $50,000, to redeploy the network at these ranges. Axtell counters that the $108,858.29 figure was simply a "wish list" of equipment Kramer desired.

Substantial evidence supports the district court's determination that the network was operational at the 2.4 GHz range but "never operated properly" at the 5.8 GHz range. Substantial evidence also supports the $50,000 damage award for repair of the network. Kramer acknowledged that his estimate of $108,858.29 represented "a list of everything that is going to be required to put the network in place to provide 2.4 gigahertz subscribers access and 5.8 gigahertz subscribers access." This figure was too high, as it included replacement hardware and labor costs associated with service in the 2.4 GHz range, which was operational, albeit with problems. Additionally, this figure apparently included the cost of replacing hardware that Kramer conceded he had

already replaced.[1] While a defense expert did not specifically address Kramer's $108,858.29 figure or evaluate the underlying documentation, that documentation at most only listed $28,948.05 of new hardware to support service in the 5.8 GHz range.[2] With the addition of the corresponding labor costs as well as some money to cover the costs of replacing non-functioning items for service in the 2.4 GHz range, we believe the damages were close to the damage figure of $50,000 selected by the district court. *See Hawkeye Motors, Inc. v. McDowell*, 541 N.W.2d 914, 918 (Iowa Ct. App. 1995) ("[P]recision is not required. We will uphold an award of damages so long as the record discloses a reasonable basis for which the award can be inferred or approximated."). Accordingly, we affirm this aspect of the award.

B. Consequential Damages

Kramer next asserts that he is entitled to more than the $15,000 the district court awarded for tower leases and the $10,000 awarded for the time he spent trying to repair the network. Axtell does not dispute that these types of consequential damages are allowable, but responds that the amounts the court ordered are "within a reasonable range of evidence." We agree with Axtell.

Kramer claimed $24,300 in damages for tower rentals. We cannot determine what lease period Kramer used to arrive at this figure. The district court found that fourteen months elapsed between installation of the network and

[1] Kramer produced a hand-written list of items that were replaced, but the list contained no corresponding cost or labor figures and no indication of whether the items were duplicative of items used to calculate the $108,858.29 figure.

[2] This figure includes the cost of 5.3GHz backhaul links, which Kramer testified were needed to provide complete access at the 2.4 and 5.8 GHz ranges and to avoid interference with the 5.8 GHz subscriber.

preliminary operability. Assuming without deciding that the court used this period to calculate the tower lease damages, the award of $15,000 was reasonable.

Even if the appropriate lease period was longer, the district court essentially found that Kramer impeded Axtell's efforts to quickly correct the problems. Under these circumstances, the district court reasonably could have concluded that a lesser amount for tower leases was appropriate.

We turn to Kramer's request for $26,000 in damages for personal time expended "to deal with the breach." Kramer arrived at this figure by multiplying 400 hours of his time by $65 per hour. However, Kramer conceded that he typically charged residential customers $35 per hour for his time. Use of this lower number would place the damage award at $14,000, which is still higher than the $10,000 the district court awarded. However, Kramer conceded that his 400-hour estimate was a ballpark figure. He stated, "400 hours is an estimation of my time, time I spent up on the towers . . . I could be off by 500 hours." Based on this testimony, the district court reasonably could have concluded that Kramer over-estimated the time he spent on the matter and a reduced award of $10,000 was appropriate.

C. Lost Profits

Finally, Kramer challenges the adequacy of the district court's award of $20,000 in lost profits. The general rule on lost profits is as follows:

> [P]rofits which would have been realized had the contract been performed are recoverable if their loss was within the contemplation of the defaulting party at the time the contract was made, and the profits can be proved with reasonable certainty.

Employee Benefits Plus, Inc. v. Des Moines Gen. Hosp., 535 N.W.2d 149, 156 (Iowa Ct. App. 1995). Recovery for lost profits is denied when the evidence suggests that the profits are "speculative, contingent, conjectural, remote, or uncertain." *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 797 (Iowa 1984) (quoting *Shinrone, Inc. v. Tasco, Inc.*, 283 N.W.2d 280, 286 (Iowa 1979)).

The district court was faced with evidence from the defense expert that the request for lost profits was too speculative and evidence from Kramer that he was entitled to $2.6 million in lost profits. In selecting $20,000, the court stated:

> Kramer was damaged for lost profits (not lost gross revenue) in the amount of $20,000. Any amount of lost profits beyond this amount is too speculative because of two other competitors' broadband installations during the same time, marketing circumstances, and the inherent limitations of the line of sight wireless internet service system.

The court's award and its reasoning are supported by the evidence. To arrive at his lost profits estimate, Kramer projected the new customers he would acquire on a monthly basis and multiplied that figure by the average monthly rate that he would charge those customers. Axtell's expert criticized the figure and the approach, stating:

> There is no supporting documentation found in any of the depositions that details total number of customers related to the wireless internet business, how those customers are broken down by classification (residential vs. business) or geography (which tower they communicate to) or how the total number of customers has changed over time—pre Axtell Tech installation or post Axtell Tech installation.

He continued,

> You need to know customer projections. You need to know actual customer experience. You need to know all the costs associated with the business. You would have to make accurate projections

> about what—how those costs change over time. I didn't have anything like that in any of the documents that I reviewed.

While the record contains more documentation of lost profits than the expert was willing to acknowledge, we agree with the expert that Kramer's figures were "overly ambitious." Kramer testified that he expected seventy-five percent of his customer base of 4000 customers to sign up for his high-speed service. However, he acknowledged that his numbers were "aggressive." His own testimony, therefore, coincides with the defense expert's.

We conclude that the district court's award of $20,000 in lost profits was supported by the evidence.

We affirm the court's damage award in its entirety.

AFFIRMED.