

Kansas City Court of Appeals. Missouri.
SECURITY STOVE & MFG. CO.

v.

AMERICAN RY. EXPRESS CO.

No. 17560.

May 23, 1932.

51 S.W.2d 572

BLAND, J.

This is an action for damages for the failure of defendant to transport, from Kansas City to Atlantic City, New Jersey, within a reasonable time, a furnace equipped with a combination oil and gas burner. The cause was tried before the court without the aid of a jury, resulting in a judgment in favor of plaintiff in the sum of \$801.50 and interest, or in a total sum of \$1,000.00. Defendant has appealed.

The facts show that plaintiff manufactured a furnace equipped with a special combination oil and gas burner it desired to exhibit at the American Gas Association Convention held in Atlantic City in October, 1926. The president of plaintiff testified that plaintiff engaged space for the exhibit for the reason "that the Henry L. Dougherty Company was very much interested in putting out a combination oil and gas burner; we had just developed one, after we got through, better than anything on the market and we thought this show would be the psychological time to get in contact with the Dougherty Company"; that "the thing wasn't sent there for sale but primarily to show"; that at the time the space was engaged it was too late to ship the furnace by freight so plaintiff decided to ship it by express, and, on September 18th, 1926, wrote the office of the defendant in Kansas City, stating that it had engaged a booth for exhibition purposes at Atlantic City, New Jersey, from the American Gas Association, for the week beginning October 11th; that its exhibit consisted of an oil burning furnace, together with two oil burners which weighed at least 1,500 pounds; that, "In order to get this exhibit in place on time it should be in Atlantic City not later than October the 8th. What we want you to do is to tell us how much time you will require to assure the delivery of the exhibit on time."

Mr. Bangs, chief clerk in charge of the local office of the defendant, upon receipt of the letter, sent Mr. Johnson, a commercial representative of the defendant, to see plaintiff. Johnson called upon plaintiff taking its letter with him. Johnson made a notation on the bottom of the letter giving October 4th, as the day that defendant was required to have the exhibit in order for it to reach Atlantic City on October 8th.

On October 1st, plaintiff wrote the defendant at Kansas City, referring to its letter of September 18th,

concerning the fact that the furnace must be in Atlantic City not later than October 8th, and stating what Johnson had told it, saying: "Now Mr. Bangs, we want to make doubly sure that this shipment is in Atlantic City not later than October 8th and the purpose of this letter is to tell you that you can *have your truck call for the shipment between 12 and 1 o'clock on Saturday, October 2nd for this.*" (Italics plaintiff's.) On October 2d, plaintiff called the office of the express company in Kansas City and told it that the shipment was ready. Defendant came for the shipment on the last mentioned day, received it and delivered the express receipt to plaintiff. The shipment contained 21 packages. Each package was marked with stickers backed with glue and covered with silica of soda, to prevent the stickers being torn off in shipping. Each package was given a number. They ran from 1 to 21.

Plaintiff's president made arrangements to go to Atlantic City to attend the convention and install the exhibit, arriving there about October 11th. When he reached Atlantic City he found the shipment had been placed in the booth that had been assigned to plaintiff. The exhibit was set up, but it was found that one of the packages shipped was not there. This missing package contained the gas manifold, or that part of the oil and gas burner that controlled the flow of gas in the burner. This was the most important part of the exhibit and a like burner could not be obtained in Atlantic City.

Wires were sent and it was found that the stray package was at the "over and short bureau" of defendant in St. Louis. Defendant reported that the package would be forwarded to Atlantic City and would be there by Wednesday, the 13th. Plaintiff's president waited until Thursday, the day the convention closed, but the package had not arrived at the time, so he closed up the exhibit and left. About a week after he arrived in Kansas City, the package was returned by the defendant.

[...] Plaintiff asked damages, which the court in its judgment allowed as follows: \$147.00 express charges (on the exhibit); \$45.12 freight on the exhibit from Atlantic City to Kansas City; \$101.39 railroad and pullman fares to and from Atlantic City, expended by plaintiff's president and a workman taken by him to Atlantic City; \$48.00 hotel room for the two; \$150.00 for the time of the president; \$40.00 for wages of plaintiff's other employee and \$270.00 for rental of the booth, making a total of \$801.51.

[...] We think, under the circumstances in this case, that it was proper to allow plaintiff's expenses as its

damages. Ordinarily the measure of damages where the carrier fails to deliver a shipment at destination within a reasonable time is the difference between the market value of the goods at the time of the delivery and the time when they should have been delivered. But where the carrier has notice of peculiar circumstances under which the shipment is made, which will result in an unusual loss by the shipper in case of delay in delivery, the carrier is responsible for the real damage sustained from such delay if the notice given is of such character, and goes to such extent, in informing the carrier of the shipper's situation, that the carrier will be presumed to have contracted with reference thereto. [...]

Defendant contends that plaintiff "is endeavoring to achieve a return of the status quo in a suit based on a breach of contract. Instead of seeking to recover what he would have had, had the contract not been broken, plaintiff is trying to recover what he would have had, had there never been any contract of shipment"; that the expenses sued for would have been incurred in any event. It is no doubt, the general rule that where there is a breach of contract the party suffering the loss can recover only that which he would have had, had the contract not been broken, and this is all the cases decided upon which defendant relies, including *C., M. & St. P. Ry. v. McCaull-Dinsmore Co.*, [253 U. S. 97, 100](#). But this is merely a general statement of the rule and is not inconsistent with the holdings that, in some instances, the injured party may recover expenses incurred in relying upon the contract, although such expenses would have been incurred had the contract not been breached. [...]

In [Sperry et al. v. O'Neill-Adams Co. \(C. C. A.\) 185 F. 231](#), the court held that the advantages resulting from the use of trading stamps as a means of increasing trade are so contingent that they cannot form a basis on which to rest a recovery for a breach of contract to supply them. In lieu of compensation based thereon the court directed a recovery in the sum expended in preparation for carrying on business in connection with the use of the stamps. The court said, *loc. cit.* 239:

"Plaintiff in its complaint had made a claim for lost profits, but, finding it impossible to marshal any evidence which would support a finding of exact figures, abandoned that claim. Any attempt to reach a precise sum would be mere blind guesswork. Nevertheless a contract, which both sides conceded would prove a valuable one, had been broken and the party who broke it was responsible for resultant damage. In order to carry out this contract, the plaintiff made expenditures which otherwise it would not have made. *** The trial judge held, as we think rightly, that plaintiff was entitled at least to recover these expenses to which it had been put in order to secure the benefits of a contract of which defendant's conduct deprived it."

[...] The case at bar was to recover damages for loss of profits by reason of the failure of the defendant to transport the shipment within a reasonable time, so that it would arrive in Atlantic City for the exhibit. There were no profits contemplated. The furnace was to be shown and shipped back to Kansas City. There was no money loss, except the expenses, that was of such a nature as any court would allow as being sufficiently definite or lacking in pure speculation. Therefore, unless plaintiff is permitted to recover the expenses that it went to, which were a total loss to it by reason of its inability to exhibit the furnace and equipment, it will be deprived of any substantial compensation for its loss. The law does not contemplate any such injustice. It ought to allow plaintiff, as damages, the loss in the way of expenses that it sustained, and which it would not have been put to if it had not been for its reliance upon the defendant to perform its contract. There is no contention that the exhibit would have been entirely valueless and whatever it might have accomplished defendant knew of the circumstances and ought to respond for whatever damages plaintiff suffered. In cases of this kind the method of estimating the damages should be adopted which is the most definite and certain and which best achieves the fundamental purpose of compensation. 17 C. J. p. 846; [Miller v. Robertson, 266 U. S. 243, 257](#). Had the exhibit been shipped in order to realize a profit on sales and such profits could have been realized, or to be entered in competition for a prize, and plaintiff failed to show loss of profits with sufficient definiteness, or that he would have won the prize, defendant's cases might be in point. But as before stated, no such situation exists here.

[9] While, it is true that plaintiff already had incurred some of these expenses, in that it had rented space at the exhibit before entering into the contract with defendant for the shipment of the exhibit and this part of plaintiff's damages, in a sense, arose out of a circumstance which transpired before the contract was even entered into, yet, plaintiff arranged for the exhibit knowing that it could call upon defendant to perform its common law duty to accept and transport the shipment with reasonable dispatch. The whole damage, therefore, was suffered in contemplation of defendant performing its contract, which it failed to do, and would not have been sustained except for the reliance by plaintiff upon defendant to perform it. It can, therefore, be fairly said that the damages or loss suffered by plaintiff grew out of the breach of the contract, for had the shipment arrived on time, plaintiff would have had the benefit of the contract, which was contemplated by all parties, defendant being advised of the purpose of the shipment.

The judgment is affirmed.