

**IN THE CIRCUIT COURT OF ST. LOUIS
COUNTY, MISSOURI
21st JUDICIAL CIRCUIT**

For File Stamp Only

Midwest Coal,)
Plaintiff,) July 20, 2011
)
vs) 09SL-CC03997
)
Tom Cabanas,)
Defendant.) Division 20

**Order Granting Defendant's Motion for
Summary Judgment**

Cause called for hearing on April 26, 2011 on defendant's motion for summary judgment. Parties appear by counsel; motion heard and submitted.

Plaintiff brought suit against defendant for lost profits it allegedly sustained as a result of defendant's fraudulent misrepresentation. Plaintiff was negotiating to buy coal fines from Alternate Fuels. (Plaintiff's petition ("Pet.") para. 24). Defendant represented to plaintiff that the sale would require a permit change from DNR and that defendant would make sure such a change would never happen. (Pet. para. 26). Defendant's statement was false. (Pet. para. 28). As a result of that statement, believing it to be true, plaintiff decided not to buy the coal fines from Alternate Fuels.

Alternate Fuels also brought suit against defendant. The parties have included most of the pleadings, rulings, trial transcript and appellate opinions rendered in that case, in which the jury found for Alternate Fuels and against defendant. It appears from the record filed in this case beyond dispute that the jury found defendant's statements were false, that plaintiff had agreed to purchase a proven amount of coal fines from Alternate Fuels at a purchase price of \$7.50 per ton, that when defendant told plaintiff he would make certain the sale could not go through, that plaintiff decided not to go through with the purchase and Alternate Fuels was damaged by defendant's statement. Plaintiff alleges in this case, that as a result of its decision not to go forward, no permit change was ever requested and that it lost the profits it would have earned from purchasing and then selling Alternate Fuel's coal fines. (Pet. para, 48, 49).

The court finds plaintiff has failed to raise a genuine dispute of a material fact: whether it sustained damages. Plaintiff has failed to produce evidence sufficient to allow the trier of fact to find that plaintiff suffered lost, or anticipated, profits.

Unlike the evidence adduced in the case brought by Alternate Fuels, plaintiff here has failed to show that it had, or would have had, buyers for the coal fines. Alternate Fuels presented the jury with evidence that, but for defendant's statements, Midwest Coal would have bought its coal fines. In this case, plaintiff has produced no such evidence.

In response to defendant's statement of uncontroverted fact 28: "Midwest Coal has no documentary evidence of actual sales of slurry", plaintiff responded with a denial and stated: "Midwest Coal did not maintain a separate document to show when the fines that was blended Midwest Coal's Tiger Mine coal was shipped to Tigren. (sic) However, shipment of blended coal would be reflected in shipping records maintained by Midwest Coal in the normal course of its business", citing to deposition excerpts of its president, Michael King. These excerpts provide no details of exactly what was shipped, how much, how often or at what price and the "shipping records" were not attached to the denial.

In response to defendant's statement of uncontroverted facts 37, 38 and 39, plaintiff admits that its damages expert, economist John Ward, calculated plaintiff's purported lost or anticipated profits and that he relied on the accuracy of the statements that "such a market" (a market for coal fines) existed and that he relied on the information he received from Michael King, i.e., that plaintiff could buy the slurry for \$7.50 per ton and then sell it for an average of \$29.56 per ton, to calculate plaintiff's lost profits.. However plaintiff has produced no evidence that it ever actually sold slurry to a buyer at a profit, or that it ever had any agreements, contracts, deals or purchase orders, or anything else, which would allow the issue of lost profits to be submitted to the trier of fact.

An existing business must show a history of profitability as a threshold requirement for recovering lost profits. Gesellschaft Fur Geratebau v. GFG Am. Gas Detection, Ltd., 967 S.W.2d 144, 147-48 (Mo. App. E.D. 1998). Plaintiff admits it has never shown a profit. If plaintiff is a new business, even more exacting proof is required, such as proof of an existing buyer, not simply the hypothetical value of the resource while still in the ground. Tipton v. Mill Creek Gravel, Inc., 373 F.3d 913 (8th Cir. 2004). Plaintiff has failed to provide such proof.

Defendant's motion for summary judgment is granted. Local Rule 33.6 provides "a party filing a motion for summary judgment shall file, together with such motion, a draft of a proposed judgment which would be appropriate in the event the motion is sustained." Defendant is ordered to file a proposed judgment in accordance with this order within 30 days.

SO ORDERED: _____
Colleen Dolan, Judge

Copy to:

Mark Kempton, Attorney for Plaintiff
Joel Poole, Attorney for Defendant