

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN**

Cite as: [Unpublished]

J.P. Hering Distributing Company, Inc., Debtor

Bankruptcy Case No. 02-16113-11

Quality Beverages of Wisconsin, Inc., Debtor

Bankruptcy Case No. 02-16114-11

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

June 4, 2003

J. David Krekeler, Krekeler Strother, S.C., Madison, WI and Terence R. Collins, Collins, Quillin & Knothe, La Crosse, WI for Debtor

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

This matter comes before the Court on the Motion of the Plaintiff, Western Wisconsin Water, Inc., d/b/a LaCrosse Premium Water (“Western”), to Amend the Judgment against the Defendant, Quality Beverages of Wisconsin, Inc. (“Quality”).¹ For the reasons set forth below, Western’s motion is denied in part and granted in part.

On March 27, 2003, I issued a memorandum decision and judgment awarding Western damages against Quality for Quality’s breach of a contract to give Western a first right of refusal to acquire certain 5-gallon water bottle distributorship accounts. In mitigating its damages, Western recovered 400 of the 552 accounts that Quality should have offered. I awarded Western \$112,514.96 in lost profits based on the 152 accounts that Western did not recover and \$94,080.00 in mitigation expenses.² The first element consisted of lost profits from the resale of the accounts at \$550 each (\$83,600.00) plus lost profits from exclusive distributorship agreements (\$85,983.36) minus the cost of repurchasing the accounts (\$57,068.40).

¹Quality and J.P. Hering Distributing Company, Inc. are debtors in this matter.

²The Court also awarded Western \$12,000.00 for an account payable from Quality.

Western now moves to amend the judgment on two theories. First, Western argues that profits from the resale of the 400 accounts that it recovered should be included in its damages because the market for the accounts evaporated after Quality's actions. Western states that it showed that it could resell the 400 accounts for \$94,080.00. Therefore, the Court should add to Western's damages the difference between the value of all 552 accounts before Quality's breach (\$550 each; \$303,600.00 total) and the value of the 400 accounts recovered after Quality's breach (\$235.20 each; \$94,080.00 total).

Second, Western contends that its mitigation expenses were \$138,046.00, not \$94,080.00. Western states that \$94,080.00 represents an estimate of the net profit Western would have realized in the future from its mitigation efforts but \$138,046.00 represents Western's actual mitigation costs. Western states that \$138,046.00 was its out-of-pocket expense in establishing its own distributorship. In Exhibit C to Plaintiff's Exhibit 44, Western identified the \$94,080.00 as its "net mitigation amount" and the \$138,046.00 as its "start-up cost."

Federal Rule of Civil Procedure 59(e) allows a movant to bring to a court's attention a manifest error of law or fact, or newly discovered evidence.³ See Bordelon v. Chicago School Reform Bd. of Trustees, 233 F.3d 524, 529 (7th Cir. 2000); see also Fed. R. Civ. Pro. 60(b). Rule 59(e) is not a vehicle for a party to advance arguments that could have and should have been presented prior to judgment. Id.

At trial, the plaintiff bears the burden of establishing damages for breach of contract. Thorp Sales Corp. v. Gyuro Grading Co., Inc., 319 N.W.2d 879 (Wis. Ct. App. 1982) (citing Schubert v. Midwest Broadcasting Co., 85 N.W.2d 449 (Wis. 1957)). Such damages may include lost profits to the extent that they may be computed with reasonable certainty. E.g., Reiman Assoc., Inc. v. R/A Advertising, 306 N.W.2d 292 (Wis. Ct. App. 1981).

Western's first claim amounts to a request for damages that Western did not make successfully at trial and, therefore, is not a proper use of Rule 59(e). Western seeks the profits that it claims it cannot realize from the resale of the recovered accounts because of the effects of Quality's actions on the market. However, at trial, Western did not establish that Quality's actions affected the market in the manner and to the extent now claimed. Western also failed to show that it could resell the recovered accounts for a total of only \$94,080.00. Exhibit 44 identified that figure as Western's "net mitigation amount." While expected net profit would have likely affected the market price, Western did not demonstrate that expected net profit is,

³Fed. R. Civ. P. 59(e):

Any motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgement.

in fact, the market price.⁴

Western essentially seeks a windfall. If Western received the profits from the resale of all 552 accounts at \$550 each and retained the recovered accounts, Western would be in a better position than if Quality had performed the contract. Western's attempt to address this problem—by suggesting that the recovered accounts' market value, \$94,080.00, be subtracted from the resale profits—is insufficient because Western did not demonstrate that \$94,080.00 is the recovered accounts' market value. The potential windfall of retaining the recovered accounts and receiving the profits from the resale of the recovered accounts is inconsistent with Wisconsin's application of the expectation interest in breaches of contract. See Kramer v. Board of Education, 625 N.W.2d 857 (Wis. Ct. App. 2001) (stating party is not entitled to be placed in better position because of breach than if contract had been performed); Thorp, 319 N.W.2d at 346 (applying expectation interest).

Western's second argument is more properly aimed at the goals of Rule 59(e). Mitigation damages in a breach of contract are an injured party's actual expenditures made in reasonable efforts minimize its losses. Ross, 166 N.W.2d at 248. In its motion and in arguments before the Court, Western clarified that it incurred expenses of \$138,046.00 in establishing a new distributorship and mitigating its damages. My confusion on this point arose from Exhibit 44's reference to the \$94,080.00 as Western's "net mitigation amount" and reference to the \$138,046.00 as Western's "start-up-costs." The confusion was furthered by counsel's repeated reference to \$94,080.00 as the amount of "mitigation." Even now, the nature of the \$94,080.00 figure is somewhat unclear. Western itself argued that the amount represents the recovered accounts' market value, though Exhibit 44 does not identify the figure as such. Nonetheless, it now appears that a manifest factual error has been made and that the cost of mitigation was closer to \$138,046.00 than to \$94,080.00. As there is no other evidence supporting or refuting the actual cost of mitigation incurred, the figure of \$138,046.00 will be adopted.

⁴It is the breaching defendant's burden to establish matters asserted in mitigation, including the injured party's failure to mitigate damages and the reasonableness of the injured party's mitigation efforts. E.g., Kuhlman, Inc. v. G. Heilman Brewing Co., 266 N.W.2d 382 (Wis. 1978); Wingad v. John Deere & Co., 523 N.W.2d 274 (Wis. Ct. App. 1994). In a breach of contract, mitigation damages are the injured party's actual expenditures in reasonable efforts to minimize its losses. E.g., Ross v. Smigelski, 166 N.W.2d 243 (Wis. 1969). Here, Western's losses from its inability to resell the recovered accounts at \$550 each are not "expenditures made in reasonable efforts to minimize its losses" and it was not Quality's burden to establish that Western's claim to those losses was unreasonable. Id.

CONCLUSION

For the reasons set forth above, Western's motion is denied in part and granted in part and judgment shall be amended to reflect an additional sum of \$43,966.00 as damages for mitigation.