

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
March 25, 2014 Session

**NATIONAL DOOR & HARDWARE INSTALLERS, INC.**  
**v. HASSAN MIRSAIDI ET AL.**

**Appeal from the Chancery Court for Davidson County**  
**No. 08-1408-III Ellen Hobbs Lyle, Chancellor**

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**No. M2013-00386-COA-R3-CV - Filed June 30, 2014**

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A subcontractor filed this breach of contract action to recover damages against a general contractor for two types of damages: work performed but unpaid and damages resulting from delays caused by the general contractor. The plaintiff alleged the general contractor breached the contract by failing to make the appropriate progress payments and otherwise withholding payments without cause. It further alleged that the general contractor failed to properly supervise the project and failed to maintain proper working conditions on the job site which caused the construction to drag on for nine months beyond the agreed-upon completion date. While suit was pending, the general contractor was terminated by the owner and a different contractor was hired to complete the project; the new contractor hired the plaintiff to complete the job. The plaintiff completed its work for which it was paid more than the balance owing on the subcontract. Following a bench trial, the court found the former general contractor had breached the subcontract but the plaintiff had failed to prove damages flowing from these breaches. The trial court specifically determined that the subcontractor recouped its damages for work performed but unpaid through the completion subcontract, and that it did not prove damages flowing from the delay of construction. The plaintiff appeals. Having determined that the evidence does not preponderate against the trial court's findings, we affirm the trial court in all respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

FRANK G. CLEMENT, JR., P. J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, J.J., joined.

Larry L. Crain, Brentwood, Tennessee, for the appellant, National Door & Hardware, Inc.

Jarrold W. Stone and J. Thomas Martin, Nashville, Tennessee, for the appellee, Hassan Mirsaidi d/b/a Mirsaidi Construction.

## OPINION

On August 1, 2006, Hassan Mirsaidi, a sole proprietor doing business as Mirsaidi Construction (“Mirsaidi”), entered into a construction contract (the “Prime Contract”) with the Metropolitan Development and Housing Agency (“MDHA”) to renovate a public housing apartment complex.<sup>1</sup> Subsequently, Mirsaidi entered into a subcontract (the “Subcontract”) with National Door and Hardware, Inc. (“Plaintiff”), a company formed in Bowling Green, Kentucky, by Susan Jost and her husband, Kevin Alford.<sup>2</sup> Pursuant to the Subcontract, Plaintiff agreed to furnish labor and material for the price of \$2,733,283.90<sup>3</sup> and to complete its portion of the work within 365 days. The Subcontract provided that Plaintiff would submit invoices for progress payments, less 10% retainage, on the 25<sup>th</sup> of each month. Additionally, as a result of inadequate space on the job site, the parties agreed that Plaintiff would store purchased materials that were customized for the job at three of its warehouses located in Bowling Green. The Subcontract price included fees associated with the storage, handling, and delivery of the materials, which comprised a significant portion of the Subcontract.

Plaintiff commenced work on the project on September 5, 2006, and the scheduled completion date for its work was September 4, 2007. Soon thereafter, the parties became involved in several disputes regarding timely payment and conditions on the job site. Plaintiff submitted its invoices for progress payments, less 10% retainage, as required by the Subcontract; however, Mirsaidi’s payments were never in the amount stated on Plaintiff’s invoices, and the payments were always late.

Plaintiff informed MDHA of these deficiencies and additionally complained to MDHA of sub-standard working conditions on the job site due to Mirsaidi’s failures to supply a schedule for the subcontractors to coordinate their work, to provide an on-site superintendent, to provide a builder’s risk insurance policy to cover the job site, to provide security on the job site resulting in vandalism and theft, and to provide heating within the apartment units during winter months. These deficiencies continued throughout the course of Plaintiff’s work and well beyond the agreed-upon completion date of September 4, 2007.

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<sup>1</sup>The original Prime Contract was for \$10,577,500 and granted Mirsaidi 500 days to complete the project, but was increased to \$11,624,055.85 during the project pursuant to change orders.

<sup>2</sup>Susan Jost acted as President, and she was involved in the oversight, administration, and management of the company. Kevin Alford served as Plaintiff’s project manager on several different jobs, including the project in dispute.

<sup>3</sup>This price also reflects several change orders that occurred during the life of the project.

For the foregoing reasons, Plaintiff ceased work on the job site on May 23, 2008, nine months after its scheduled completion date; it demobilized from the project on June 15, 2008. Plaintiff commenced this action on June 26, 2008, naming Mirsaidi and Ohio Farmers Insurance Company, which provided the payment bond on the project,<sup>4</sup> as defendants.

On July 22, 2008, while this action was pending, MDHA fired Mirsaidi due to many deficiencies in its work. Two months later, MDHA entered into a new prime contract with a different general contractor to complete the project (the "Completion Contract"). The new general contractor (the "Completion Contractor") agreed to complete the project for \$3,337,102.52, which equaled the remaining balance of the Prime Contract that had not been paid to Mirsaidi. The Completion Contract provided in pertinent part:

Completion Contractor shall be liable and responsible for all retainage due the subcontractors or suppliers including, without limitation, retainage accruing for work performed by any subcontractor or supplier prior to the date of this Agreement ("Subcontractor and Supplier Retainage"). Completion Contractor shall also be liable and responsible for all payables for labor and materials for work performed on the project to date (the "Outstanding Payables"). A list of those Outstanding Payables currently known to Surety is attached hereto as Exhibit C. Completion Contractor acknowledges that the Completion Price includes all Subcontractor and Supplier Retainage, the Outstanding Payables, cost of completion of the Project and the cost of work required pursuant to Change Order 2.

Exhibit C lists the subcontractors and the amount currently due each subcontractor, balance to complete work, and the retainage due to each. By requiring Completion Contractor to pay the subcontractors these amounts, the Completion Contract essentially picked up where Mirsaidi had left off when terminated.

In November 2008, the Completion Contractor entered into a new contract with Plaintiff to complete its portion of the work (the "Completion Subcontract"). Because Plaintiff's suit against Mirsaidi was pending, both the Completion Contract and the Completion Subcontract included "carve outs" to address its claims for damages. Paragraph 1.01 of Completion Contract provides:

Surety and Principal expressly agree that Completion Contractor shall not be liable for any and all claims submitted by [Plaintiff] against Surety and

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<sup>4</sup>For public works in Tennessee, Tenn. Code Ann. § 12-4-201 requires issuance of a payment bond. Ohio Farmers provided the bond on this project in the amount of the Prime Contract.

Principal, including but not limited to claims for unpaid invoices for work performed prior to the termination of Principal, delay damages, extended overhead, loss of profits, acceleration, additional supervision costs, or any other claim asserted in the dispute between [Plaintiff] and Surety and Principal provided, however, that Completion Contractor shall be responsible for payment to [Plaintiff] for all amounts listed on the attached Exhibit C.

Plaintiff is listed on Exhibit C, and the amount currently due, the balance to complete work, and the retainage due for Plaintiff were to be determined at a later date, but they were not.

Under the Completion Subcontract, the parties agreed that Plaintiff was not waiving any rights or remedies against Mirsaidi. The Completion Subcontract specifically provided:

It is expressly understood that the Lump Sum Contract amount is for work to complete by [Plaintiff] under this Subcontract, and is in no way an assumption by [Completion Contractor] of the claims asserted by [Plaintiff] against [Mirsaidi], nor a waiver or satisfaction in whole or in part, by [Plaintiff] of its claims against [Mirsaidi] or its surety.

Pursuant to the Completion Subcontract, Plaintiff agreed to furnish the labor and material that remained to be provided pursuant to its original subcontract with Mirsaidi, for the lump sum price of \$650,000. Over the next few months, Plaintiff fulfilled its responsibilities under the Completion Subcontract, and it was paid by the Completion Contractor as agreed upon. In addition to the above payments, Ohio Farmers made two separate payments to Masterbuilt Cabinets, one of Plaintiff's suppliers, totaling \$42,825.85 for cabinets Masterbuilt provided to Plaintiff for the job under the original subcontract. Thereafter, Plaintiff focused its attention on its claims against Mirsaidi.

Specifically, Plaintiff sought to recover the following damages from Mirsaidi: (1) unpaid work as of June 15, 2008, the date Plaintiff demobilized, totaling \$412,993.12 plus interest; and (2) damages Plaintiff incurred due to Mirsaidi's delay of the project past the September 2007 completion date, totaling \$289,603.68 plus interest. Plaintiff additionally alleged that Mirsaidi had violated the Tennessee Trust Fund Statute, codified at Tenn. Code Ann. § 66-11-138, by transferring funds from Mirsaidi's business bank account to third parties while Mirsaidi still owed Plaintiff progress payments.

At trial, Plaintiff relied, in part, upon the carve outs in the Completion Contract and Completion Subcontract to prove that it had not recouped its damages for unpaid work. As for its delay damages, Plaintiff presented a "Summary of Extended Overhead," which itemized the categories of its incurred costs; however, Plaintiff did not provide any checks,

invoices or other documentation to corroborate the summary exhibit. To prove its delay damages, Plaintiff relied upon the testimony of some of its employees and an expert witness.

In its defense, Mirsaidi asserted that Plaintiff sustained no damages for unpaid work and retainage because it was made whole for work it performed pursuant to the Completion Subcontract. Specifically, Mirsaidi contended that the \$650,000 paid to Plaintiff under the Completion Subcontract included all sums owing for unpaid work and retainage, as the Completion Contract expressly required that the Completion Contractor pay the subcontractors, including Plaintiff, the amounts due, including retainage, as well as the balance to complete the work. As for its claim for delay damages, Mirsaidi asserted that Plaintiff failed to provide competent evidence to prove any alleged delay damages.

Following the bench trial, the court issued its Memorandum and Order in which it found that Mirsaidi breached its subcontract with Plaintiff by routinely underpaying Plaintiff and by not providing suitable working conditions, including its failure to have a full-time, on-site superintendent to coordinate work among subcontractors, failing to provide a controlled temperature environment that caused damage and delay in installing flooring, failing to resolve disputes between suppliers and subcontractors, failing to address problems with homeless people on site, failing to provide adequate dumpsters for waste disposal, and failing to provide adequate security on the job site.

Although the trial court found that Mirsaidi breached its subcontract in several ways, the court ruled that Plaintiff was not entitled to recover damages. This ruling was based on two key findings: one, the court found that Plaintiff had been fully compensated pursuant to the Completion Subcontract for the previously unpaid work and retainage, and, two, the trial court found that Plaintiff's proof regarding delay damages was simply insufficient. As for Plaintiff's claim that Mirsaidi violated the Tennessee Trust Fund Statute by transferring funds from its business bank account to third parties while Mirsaidi still owed Plaintiff progress payments, the trial court found that Mirsaidi did not intend to defraud Plaintiff; thus, it dismissed that claim. Plaintiff filed a timely appeal as to the dismissal of its claims against Mirsaidi; it does not appeal the dismissal of its claims against the surety, Ohio Farmers.

#### **STANDARD OF REVIEW**

The standard of review of a trial court's findings of fact is *de novo*, and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact,

it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999).

## ANALYSIS

### I. DAMAGES CAUSED BY MIRSAIDI'S BREACH OF THE SUBCONTRACT

In a breach of contract action, the plaintiff is responsible for proving “(1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of contract.” *BancorpSouth Bank, Inc. v. Hatchel*, 223 S.W.3d 223, 227 (Tenn. Ct. App. 2006) (quoting *Custom Built Homes v. G.S. Hinsen Co., Inc.*, No. 01A01-9511-CV-00513, 1998 WL 960287, at \*3 (Tenn. Ct. App. Feb. 6, 1998)). It is undisputed that an enforceable contract existed and that Mirsaidi breached its subcontract with Plaintiff; thus, the issue on appeal is limited to the third factor, damages caused by Mirsaidi's breaches of the Subcontract.

“The purpose of assessing damages in breach of contract cases is to place the plaintiff as nearly as possible in the same position she would have been in had the contract been performed, but the non-breaching party is not to be put in any better position by recovery of damages for the breach of the contract than he would have been if the contract had been fully performed.” *Lamons v. Chamberlain*, 909 S.W.2d 795, 801 (Tenn. Ct. App. 1993). Therefore, the injured party is not entitled to profit from the defendant's breach. *Action Ads, Inc. v. William B. Tanner Co., Inc.*, 595 S.W.2d 572, 575 (Tenn. Ct. App. 1979).

Our courts permit the recovery of damages that are the normal and foreseeable result of a breach of contract. *Wilson v. Dealy*, 434 S.W.2d 835, 838 (Tenn. 1968); *Moore Const. Co., Inc. v. Clarksville Dep't of Elec.*, 707 S.W.2d 1, 14 (Tenn. Ct. App. 1985); *Bush v. Cathey*, 598 S.W.2d 777, 783 (Tenn. Ct. App. 1979). In the context of a construction contract, it is “reasonably foreseeable that a contractor whose ability to complete its work is impaired by the general contractor and whose performance is thereby substantially delayed will suffer direct damages and that the extent of these damages will depend upon the unique facts of each case.” *Moore*, 707 S.W.2d at 15. Such damages can include increased payroll and other labor costs, increased material costs, loss of efficiency of the use of equipment, extended bonding and insurance coverage, and other increased overhead items that can reasonably be attributed to the performance of the work that was delayed. *Id*; see generally *Foster & Creighton Co. v. Wilson Contracting Co.*, 579 S.W.2d 422, 428 (Tenn. Ct. App. 1978).

When called upon to evaluate a trial court's ruling regarding the damages component of a breach of contract action, we adhere to the following:

Determinations concerning the amount of damages are factually driven. Thus, the amount of damages to be awarded in a particular case is essentially a fact question. However, the choice of the proper measure of damages is a question of law to be decided by the court.

*Beaty v. McGraw*, 15 S.W.3d 819, 827 (Tenn. Ct. App. 1998) (internal citations omitted).

Plaintiff contends the trial court erred in failing to award it damages for work it performed under the Subcontract for which Mirsaidi failed to pay, and for damages it incurred due to delays in construction caused by Mirsaidi. We address each issue in turn.

#### A. WORK PERFORMED BUT UNPAID

The trial court specifically found that Mirsaidi owed Plaintiff \$412,933.12 as of June 15, 2008, when Plaintiff demobilized from the job site. This sum includes \$247,852 of retainage owed by Mirsaidi, and an additional \$165,082 for work completed but not paid. The foregoing notwithstanding, the court found that Plaintiff was made whole for the work it performed under the original Subcontract when the Completion Contractor paid Plaintiff \$650,000 for all of the labor and materials Plaintiff provided pursuant to the original Subcontract and the Completion Subcontract. Referring to the "carve outs" in the Completion Contract and Plaintiff's Completion Subcontract, the trial court stated in its Order:

These contract recitals, the Court concludes, are not dispositive. The mere act of carving out and saying in the Completion Contract and Subcontract that the parties would not at that time iron out and resolve whether the payments made under the Completion Subcontract compensated the Subcontractor for what was owed by the GC does not constitute proof of such. More proof is needed.

In so finding, the trial court accredited the testimony of Gus Yogmour, the Senior Bond Claims Counsel for Ohio Farmers, who was involved in the negotiation of the Completion Contract with MDHA and the Completion Contractor. Mr. Yogmour testified that the parties entered into the Completion Contract in order to complete the project for the remaining balance. Moreover, he testified that the contract was entered into to pay the amounts due to subcontractors like Plaintiff when Mirsaidi was removed from the project, the balance to complete the work, and the retainage due to the subcontractors.

As the trial court noted and Mr. Yogmour testified, the Completion Contract states that “Completion Contractor shall be liable and responsible for all retainage due the subcontractors or suppliers including, without limitation, retainage accruing for work performed by any subcontractor or supplier prior to the date of this Agreement . . . and Completion Contractor shall also be liable and responsible for all payables for labor and materials for work performed on the project to date[.]” The trial court specifically acknowledged the provision in the Completion Subcontract regarding Plaintiff’s preservation of its claims against Mirsaidi; nevertheless, the court found that this provision was not sufficient, standing alone, to prove that Plaintiff suffered compensable damages.

Plaintiff, however, contends the trial court should have relied on the clear and unambiguous language in the Completion Subcontract, and that it was error to review the previous negotiations between MDHA, Completion Contractor, and its bonding company in creating the Completion Contract. Plaintiff asserts that when a court is resolving a dispute regarding a contract, it is “to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the language used,” rather than analyze their prior negotiations. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). Moreover, Plaintiff asserts the trial court erred in relying on the Completion Contract, because the Completion Subcontract expressly provides that when there is “any inconsistency between [Completion Contract] and this written agreement, this agreement shall control.”

It is undisputed that the scope of labor and material for the original Subcontract and Completion Subcontract are the same, and the trial court found a substantial similarity between the amount of Plaintiff’s Completion Subcontract, which was \$650,000, and the amount Plaintiff would have received under the Subcontract, \$644,956.15. The trial court accredited the testimony of the principal of the Completion Contractor to establish the \$650,000 figure. In addition, Mr. Yogmour testified that he arrived at \$650,000 by calculating the amount due to Plaintiff when Mirsaidi was fired by MDHA, the retainage it was owed and the balance to complete the work to be performed by Plaintiff. The sum of \$644,956.15 is based on evidence provided by Mirsaidi, evidence provided by the bonding company, and Plaintiff’s April 25, 2008 Affidavit. Pursuant to the affidavit, Plaintiff claimed it was still owed \$687,782 when it demobilized in June 2008. The foregoing notwithstanding, the bonding company subsequently paid \$42,825.85 to one of Plaintiff’s suppliers, Masterbuilt Cabinets, for material it had furnished to Plaintiff, thereby reducing the amount Plaintiff was owed pursuant to the original subcontract with Mirsaidi.<sup>5</sup> Thus, the evidence

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<sup>5</sup> In addition, Mr. Alford admitted on cross-examination that the \$42,825.85 should be deducted from the amount owed Plaintiff.



does not preponderate against the trial court's finding that the total owed to Plaintiff when it demobilized was \$644,956.15, and that Plaintiff was subsequently paid the lump sum price of \$650,000 for fulfilling its obligations on the project.

Nevertheless, Plaintiff contends the above finding is error for it ignores the testimony of Mr. Alford, Plaintiff's representative, who testified that the lump sum price of \$650,000 included \$250,000-\$255,000 remaining on the original Subcontract to be billed for the "Balance to Finish," an estimated overhead cost of approximately \$330,000-\$340,000 for another year, plus another estimated \$60,000 of profit, as well as any repairs necessary to complete Plaintiff's scope of work. We respectfully disagree for, as the trial court found, Plaintiff failed to produce competent evidence to support these calculations. For example, proper documentation was not introduced into evidence to establish Plaintiff's overhead expenses during the completion period. Further, although Mr. Alford stated that the price of the Completion Subcontract included the cost of materials needed to perform repairs on the project, he could not identify the cost of these materials, and he failed to produce any documents to support such a claim. Mr. Alford also stated in interrogatory responses that Plaintiff was paid an additional \$14,000 over and above the \$650,000 sum as compensation for the repairs, which contradicted his testimony.

The record also reveals that the contract price for Plaintiff's original Subcontract totaled \$2,733,283.90, and it is undisputed that Mirsaidi paid Plaintiff \$2,065,585.74. By adding the \$650,000 paid pursuant to the Completion Subcontract to these undisputed payments, plus the \$42,825.85 paid to Plaintiff's supplier, Plaintiff received the total sum of \$2,758,411.59, which is more than the original contract amount of \$2,733,283.90.

A plaintiff who seeks damages caused by a breach of contract "is responsible for proving . . . the damages caused by the breach of contract," *BancorpSouth Bank, Inc.*, 223 S.W.3d at 227, and when assessing a claim for damages, our goal "is to place the plaintiff as nearly as possible in the same position she would have been in had the contract been performed," and "the non-breaching party is not to be put in any better position by recovery of damages for the breach of the contract than he would have been if the contract had been fully performed." *Lamons*, 909 S.W.2d at 801.

Based on the foregoing principles, we have concluded that the evidence does not preponderate against the trial court's finding that Plaintiff was fully compensated for work performed. Therefore, we affirm the trial court's denial of damages pertaining to work "performed but unpaid" by Mirsaidi. We now turn our attention to Plaintiff's claim for damages resulting from delays caused by Mirsaidi's breaches.

## B. DAMAGES CAUSED BY DELAYS DUE TO MIRSAIDI'S BREACHES

Plaintiff contends it incurred additional costs as a result of delays caused by Mirsaidi's breaches of the Subcontract. Specifically, Plaintiff claims it incurred greater overhead costs, including warehouse and on-site storage; salaries for employees; cell phone bills; truck and utility trailer rentals and gas; tool and lift rental; workers' compensation and general liability insurance; maintenance and car insurance for vehicles; office rent; and utilities for both the office and warehouses. Plaintiff states that it incurred these additional costs over 284 days, a period of 40.6 weeks, from September 5, 2007 (beginning the day after agreed-upon completion date) until June 15, 2008 (the date Plaintiff demobilized from project).

The trial court, however, found that Plaintiff failed to prove its delay damages. The court found the evidence unreliable. More specifically, the court stated the "proof presented by [Plaintiff] consisted of estimates, guessing and speculation even though more reliable sources existed to quantify actual loss." Further, the trial court found that Plaintiff failed to provide back-up documentation of actual overhead expenses such as checks, financial statements and invoices. The court also found that Mirsaidi's actions and inactions were not the sole cause of delay, for example, it found there were additional unanticipated design problems that were outside of Mirsaidi's control.<sup>6</sup>

There is no dispute that the completion of Plaintiff's work was delayed through no fault of its own. In fact, the trial court found that Mr. Alford, Plaintiff's representative, did not materially contribute to the delay in his capacity as the interior manager for the project. The trial court also found that Mirsaidi breached the covenant of good faith and fair dealing by failing to provide suitable work conditions, failing to have a full-time, on-site superintendent to coordinate work among subcontractors, failing to provide a controlled temperature environment that caused damage and delay in installing flooring, failing to resolve disputes between suppliers and subcontractors, failing to address problems with homeless people on site, failing to provide adequate dumpsters for waste disposal, and failing to provide adequate security on the job site. It is also undisputed that all of these breaches contributed to Plaintiff's delay in the completion of its work.

We have previously acknowledged that "in certain situations, a contractor whose performance is delayed unreasonably is entitled to both an extension of time and damages."

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<sup>6</sup>These design changes included "the issue of chase walls which required unanticipated demolition of each apartment's common wall, an I-beam on a column system, steel stud framing, drywall, cutting the chase and routing geothermal piping and plumbing through the floor up underneath the wall and to the mechanical room," as well as "a cardinal change of replacement water lines." These design problems added \$1 million to the Prime Contract and resulted in changes to the Subcontract.

*Moore*, 707 S.W.2d at 13. Thus, if Plaintiff's ability to complete its work was impaired by Mirsaidi, and Plaintiff's performance was thereby substantially delayed, then Plaintiff is entitled to recover damages that it can prove flowed from such breaches. *See Moore*, 707 S.W.2d at 15.

Several employees of Plaintiff testified to the ubiquitous nature of Mirsaidi's actions that resulted in delay of their work. In addition, Plaintiff's expert witness, Steven Page, testified that the delays caused by Mirsaidi were so systemic and pervasive in nature that it was impossible to associate each incident with a particular delay consequence. Moreover, it is undisputed that Plaintiff was on the project nine months longer than agreed upon.

Courts will allow damages for breach of contract even where it is impossible to prove the exact amount of damages, *Provident Life and Accident Ins. Co. v. Globe Indemnity Co.*, 3 S.W.2d 1057, 1058 (Tenn. 1928), and proof within a reasonable degree of certainty is all that is required, *Buice v. Scruggs Equip. Co.*, 267 S.W.2d 119, 125-26 (Tenn. Ct. App. 1953). However, "uncertain, contingent, or speculative damages" should not be awarded. *Maple Manor Hotel, Inc. v. Metro. Gov't of Nashville and Davidson Cnty.*, 543 S.W.2d 593, 599 (Tenn. Ct. App. 1975).

Plaintiff entered into evidence a "Summary of Extended Overhead" through its expert witness, Mr. Page. This exhibit outlined several categories of extended overhead and their weekly rates. Mr. Page testified that he based his calculations on conversations with Plaintiff's employees, prominently Mr. Alford, and also used numbers from actual bills to create a reasonable estimate of damages, but he did not calculate the actual out-of-pocket costs over the nine-month delay period.

The trial court denied recovery upon the finding the proof presented by Plaintiff consisted of "estimates, guessing and speculation even though more reliable sources existed to quantify actual loss." In so finding, the trial court accredited the testimony of the bond company's expert witness, Jack Nicholson, an expert in construction accounting, who testified that the summary of extended overhead was not a reliable source for calculating damages because there was no back-up documentation of actual overhead expenses, such as checks, financial statements or invoices. For several reasons, we agree.

A similar circumstance was addressed in *Moore Constr. Co., Inc. v. Clarksville Dep't of Elec.*, 707 S.W.2d 1 (Tenn. Ct. App. 1985). In that case, we analyzed the sufficiency of proof presented for delay damages by a contractor whose completion of work was delayed through no fault of its own. The plaintiff, a contractor, brought a claim for several categories of delay damages against a co-contractor, including additional supervisory and central office labor expenses. Regarding that category of damages, we held:

The additional salaries of [contractor's] foreman and project superintendent were taken from the company's weekly cost records and represent the actual amount of time they were on the job. However, the salaries of the other two employees were determined based upon a factor relating to the balance of the unpaid amount of this contract when compared to the total amount of other business the company had at the time. While the proof of the additional salary [the contractor] was required to pay its foreman and project superintendent is competent and provides an adequate basis upon which to award damages, the manner in which the additional payroll costs for the other four employees was determined was not.

*Id.* at 16. The *Moore* court ruled that the plaintiff contractor could not recover delay damages that were not substantiated by competent proof of costs incurred. The reasoning in *Moore* is consistent with the trial court's determination that Plaintiff's proof was inadequate because it was based on "estimates, guessing and speculation."

We also note that some of the damages claimed pertain to costs associated with Plaintiff's warehouses,<sup>7</sup> office, and several work trucks which were owned by Plaintiff; however, the only proof submitted on these damages was based on Internet searches of the reasonable rental rate in the area which, without more, is not competent evidence.

Furthermore, Plaintiff's claim for delay damages is undermined due to the fact it failed to prove that its overhead costs were allocated to the project in dispute. Employees of Plaintiff testified that Plaintiff was working on at least two other projects during the delay period, and another project lasted for at least 20 weeks during the 40 week delay period. The evidence is further undermined by the fact that Plaintiff failed to establish that the warehouse expenses and the equipment costs were incurred due to the delay and that they would not otherwise have been incurred, which was at issue in *Moore*. Despite finding that the contractor was using the equipment on the job, we found "there [was] no proof that the equipment was purchased primarily for use on this job or that its cost was being allocated entirely to this job." *Id.* Because the contractor did not prove the equipment cost was incurred due to the delay caused by the defendant, its claim was denied. *Id.*

Much like the plaintiff contractor in *Moore*, Plaintiff failed to distinguish overhead consumed by the Subcontract with Mirsaidi from unrelated projects. For example, Plaintiff requested damages for the use of several employees' cell phones; however, it failed to establish that the cell phone costs were attributable to delays on this project. Moreover, Plaintiff admitted that the cell phones were used for other projects and personal calls.

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<sup>7</sup>Plaintiff owned two of the three warehouses used to store the materials at issue; it rented the third.

A trial court's "[d]etermination concerning the amount of damages are factually driven. Thus, the amount of damages to be awarded in a particular case is essentially a fact question." *BancorpSouth Bank, Inc.*, 223 S.W.3d at 228 (quoting *Beatty*, 15 S.W.3d at 827). Thus, we shall review the trial court's holding according to Tenn. R. App. P. 13(d).

Based on the foregoing, we find the evidence does not preponderate against the trial court's finding that Plaintiff's proof was insufficient to prove damages. Therefore, we affirm.

## II. TENNESSEE'S TRUST FUND STATUTE

Plaintiff contends that Mirsaidi misapplied contract payments in violation of Tenn. Code Ann. § 66-11-138, Tennessee's Trust Fund Statute. Specifically, Plaintiff asserts that Mirsaidi diverted MDHA's payments from his operating account when he still owed payments to Plaintiff. The statute provides in pertinent part:

(a)(1) Any prime contractor or remote contractor who, with intent to defraud, uses the proceeds of any payment made to that contractor on account of improving certain real property for any purpose other than to pay for labor performed on, or materials, services, equipment, or machinery furnished by that contractor's order for the real property, and overhead and profit related thereto, while any amount for the labor, materials, services, equipment, machinery, overhead, or profit remains unpaid shall be liable to an injured party for any damages and actual expenses incurred, including attorneys' fees, if the damages and expenses incurred are the result of the misapplication of the payment.

Tenn. Code Ann. § 66-11-138(a)(1) (2007).

The above statute is to be read in conjunction with Tenn. Code Ann. § 66-11-140, which provides:

Use of the proceeds as enumerated in §§ 66-11-137 -- 66-11-139 for any purpose other than either payment pursuant to written agreement between the parties or in accordance with the allocation of costs and profits under generally accepted accounting principles for construction projects shall be prima facie evidence of intent to defraud. Use of a single business bank account for multiple projects shall not be evidence of intent to defraud.

Tenn. Code Ann. § 66-11-140 (2007).

The trial court found that Mirsaidi was a sole proprietor who used only one checking account for both business expenditures and personal draws, that Mirsaidi used both this checking account and a business savings account on the project, and that he would transfer funds to the savings account in order to accrue interest on the deposits. The trial court also found a legitimate, non-fraudulent basis for the transfers in issue. The court found that Mirsaidi held the majority of his money in his business savings account in order to ensure the safety of funds, and that he would transfer money between the checking and savings account to cover payments while keeping the bulk of his funds in the savings account. In addition, the trial court found that “at all times during the project, [Mirsaidi] maintained through his business checking account and business savings account combined sufficient funds to pay all claims against the funds held by the business.” More importantly, the trial court found the balance of Mirsaidi’s operating account exceeded the amount of any payment that was allegedly owed to Plaintiff during the vast majority of the life of the Subcontract.

The trial court accredited Mirsaidi’s testimony that he never intended to defraud MDHA or Plaintiff and noted that he testified that his failure to pay sums allegedly owed to Plaintiff stemmed from disputes with Plaintiff as to the quality and quantity of work performed under the Subcontract. The trial court also accredited the testimony of several MDHA employees, who testified that they did not believe Mirsaidi was attempting to defraud MDHA or Plaintiff.

Intention to defraud is a question of fact. *Keith v. Murfreesboro Livestock Mkt., Inc.*, 780 S.W.2d 751, 754 (Tenn. Ct. App. 1989) (citing *Metro. Life Ins. Co. v. Hedgepath*, 185 S.W.2d 906, 907 (Tenn. 1945); *Mann v. Russey*, 49 S.W. 835, 836 (Tenn. 1898)). A trial court’s findings of fact are often dependent on the credibility of witnesses, and we give great weight to a trial court’s determinations of the credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Thus, the trial court’s finding that Mirsaidi did not intend to defraud Plaintiff will be affirmed unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). We have determined the evidence does not preponderate against the finding that Mirsaidi did not intend to defraud Plaintiff. Therefore, the trial court’s finding is affirmed.

#### IN CONCLUSION

The judgment of the trial court is affirmed in all respects and this matter is remanded with costs of appeal assessed against the appellant, National Door.

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FRANK G. CLEMENT, JR., JUDGE