2015 IL App (1st) 141794-U

THIRD DIVISION
June 30, 2015

No. 1-14-1794



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| SELECTED FURNITURE, LLC, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County, Illinois. |
| v. | ) | |
| | ) | No. 12 M2 000300 |
| GEORGIA'S RESTAURANT AND | ) | |
| PANCAKE HOUSE, INC., | ) | Honorable |
| | ) | Roger G. Fein, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

**ORDER**

¶ 1 *Held*: Seller of furniture brought breach of contract suit against buyer who failed to pay for the furniture it purchased. Buyer countersued, alleging that seller's untimely delivery of the furniture caused buyer to lose profits. Because buyer accepted the furniture, it was contractually obligated to pay for it, but trial court incorrectly computed buyer's lost profits on its counterclaim.

¶ 2 Defendant Georgia's Restaurant and Pancake House, Inc., planned to open for business on April 15, 2011. It contracted to purchase restaurant booths, chairs, and tables from plaintiff Selected Furniture, LLC, to be delivered by April 4. Selected did not complete delivery until May 5, thus delaying the restaurant opening to May 23. Also, Georgia's claimed that the tables

were defective and refused to pay for them. Selected sued Georgia's for breach of contract. Georgia's counterclaimed, alleging that Selected breached the agreement by failing to deliver furniture that met the contract specifications in a timely fashion. Following a bench trial, the trial court entered judgment for Selected on its claim for the balance due, finding that Georgia's accepted the furniture by keeping and using it. The trial court also entered judgment for Georgia's on its counterclaim and awarded it lost profits for the delay in opening the restaurant. Georgia's now appeals, arguing that the trial court erred (1) in determining that Georgia's accepted the allegedly defective tables and was contractually bound to pay for them and (2) in calculating Georgia's lost profits and other damages. We affirm the trial court's judgment for Selected on its breach of contract claim, but we find that the trial court incorrectly calculated Georgia's lost profits and remand for recalculation of the proper amount.

¶ 3 BACKGROUND

¶ 4 Selected is a manufacturer and seller of restaurant and bar furniture. On February 28, 2011, Harry Kulubis, acting on behalf of Georgia's, ordered booths, chairs, and tables from Selected. Selected quoted a price of $33,739.41 for the furniture. Georgia's made a down payment of $13,739.41. The delivery date specified in the contract was April 4.

¶ 5 By April 4, the furniture was ready to be delivered, but Georgia's had not yet paid the full cost of the order. According to Tomer Shlafrok (known as Tommy), Selected's owner, Selected "[n]ever ever" ships on open credit to a client who is not a national chain or a dealer. Thus, Selected did not ship on April 4.

¶ 6 On April 11, Georgia's paid Selected an additional $10,000. Selected delivered the booths, chairs, and a sample table on April 12 and 14, and it delivered the remaining tables on

May 3 and 5. Kulubis expressed dissatisfaction with the tables, and Tommy agreed to replace them with tables that used a different kind of wood and a different kind of finish.

¶ 7 When Selected completed the replacement tables, Kulubis stated that he wanted to test them in the field for a period of time before paying. Selected refused. Thus, the replacement tables were never delivered. They were still sitting in Selected's warehouse, and Georgia never paid the final $10,000 of the original contract price. At the time of trial, Selected sought $12,559.46 in damages rather than $10,000 because the former amount reflected the modifications that were made to the original order.

¶ 8 Georgia's disputed that its nonpayment of the balance was the reason delivery of the furniture was delayed. On April 1, Kulubis went to Selected to see the furniture. He observed that the upholstered backs and seats of the booths were completed, but none of the booth frames were assembled. He did not see any tables. A Selected foreman told Kulubis that Selected could not complete his order by April 4 but could complete it by April 8. Although Kulubis objected to this late delivery, he did not cancel his order. If he canceled it and ordered furniture from a different vendor, it would take at least four or five weeks to deliver. He felt that he had no choice but to allow Selected to deliver the furniture as quickly as it could.

¶ 9 Selected did not actually deliver any furniture until April 12, when it delivered some booths and chairs. The booths were falling apart because the screws fastening them were too short. On April 14, Selected delivered the remaining booths and chairs, as well as a sample table. The booths had the same problem as the earlier ones, but Kulubis did not refuse them. As for the tables, Kulubis called Tommy on April 15 to tell him that the sample table looked good and that Selected should complete the order. Tommy said that Selected would finish the tables

over the weekend. But when Georgia's started using the table, Kulubis saw small scratches all over the table. He informed Tommy of this problem on April 18.

¶ 10 Selected delivered the remainder of the tables on May 3, 5, and 11. There were visible scratches on the tables, and several had noticeable white cracks. Kulubis told Tommy that the tables were defective. Tommy told Kulubis that he should take the tables and open the restaurant, and within a couple weeks, Selected would send replacements made from a different kind of wood. Despite the obvious defects in the tables, Georgia's did not return them. Kulubis did not believe Georgia's had any choice due to its advertised opening. Kulubis maintained that he never agreed to accept the tables as-is, but did so in order to get the restaurant open and because he could not have secured substitute tables without further delay.

¶ 11 On August 18, Selected advised Georgia's that the replacement tables were ready. The letter requested that Georgia's pay the balance of its original invoice and also invited Kulubis to come and check on the order. Kulubis went to Selected twice, but on both occasions the employees said that they knew nothing about his order. Kulubis then stopped all communication with Selected and started soliciting bids from other companies to replace his tabletops. He eventually purchased new tabletops that were shipped on February 24, 2012. Only the tops of the tables were replaced; Georgia's continued to use the bases provided by Selected. Kulubis admitted that Georgia's only paid $23,739.41 of the originally agreed-upon $33,739.41 purchase price of the furniture and never returned the defective tabletops to Selected.

¶ 12 Regarding the profits that Georgia's lost as a result of its delayed opening, Kulubis presented a net cash flow statement which reflected that Georgia's made a net profit of $43,087 in the 39-day time period between May 23 and June 30, after subtracting taxes, the cost of goods and labor, and expenses. The information on that sheet was compiled by Kulubis and typed up

by his son, neither of whom are accountants. In the statement, the total cost of goods was listed as $40,780. Kulubis stated that this figure was not exact and ultimately agreed that the figure was "debatable."

¶ 13 Georgia's also sought recovery of carpenter fees because of Selected's failure to deliver the furniture on time. On six occasions before April 12, Selected promised to deliver furniture on a certain date but did not show up. For each of those occasions, Kulubis had called his carpenter the night before and told him to be at the restaurant the next day to install the furniture. Hiring the carpenter cost $750 per day, for a total of $4,500 in carpenter fees.

¶ 14 Harry P. Kulubis, Kulubis's son and the president and general manager of Georgia's, also detailed the defects in the tabletops delivered by Selected, but admitted that Georgia's used them until late 2011 or early 2012, when it replaced them with new tables from another vendor. The tables from Selected were stored in Harry's garage and were never returned to Selected. Georgia's still uses Selected's booths and chairs.

¶ 15 Harry testified in some detail regarding the costs and lost profits that Georgia's incurred as a result of the delay. The costs included property taxes, landscaping services, and Comcast service fees. Regarding lost profits, Harry stated that he helped prepare the net cash flow statement. He also presented sales and use tax returns that Georgia's filed with the state of Illinois. In its May return (which represented only the time between May 23 and May 31), Georgia's reported $43,520 in total receipts. In June, Georgia's reported $125,368 in total receipts. On cross-examination, Harry acknowledged that according to Georgia's 2011 federal tax return, Georgia's had a total of $15,816 in ordinary business income for the year.

¶ 16 The trial court found that although the original delivery date was April 4, 2011, Georgia's waived performance of that due date by not canceling the order. Also, Georgia's accepted the

goods, as evidenced by the fact that it used the tables until February 2012 and continued to use the booths and chairs through the time of trial. Accordingly, the trial court found in favor of Selected on its breach of contract claim and awarded $12,559.16 in damages. In the alternative, it found that Georgia's was unjustly enriched by unreasonably retaining goods without payment.

¶ 17 The trial court also ruled in favor of Georgia's on its counterclaim, finding that Selected's failure to deliver the furniture on time caused a 38-day delay in the opening of the restaurant. Regarding Georgia's lost profits, the trial court found that the net cash flow statement lacked credibility and reliability. Accordingly, the trial court disregarded that statement and calculated Georgia's lost profits based solely upon its 2011 federal income tax return. In doing so, the court made the rather generous assumption that Georgia's daily profit during its first month of operation would have been the same as its daily profit later in the year when it had an established clientele. Georgia's made $15,816 in net profit over 223 days of operation in 2011, for an average daily profit of $70.92. Multiplying that number by 38 days (*i.e.*, the number of days between April 15 and May 22) produced a total of $2,694.96 in lost profits.

¶ 18 The trial court denied most of Georgia's other damage claims. The court reasoned that fixed expenses such as rent, expenses due under the lease, and property taxes were not recoverable, since those expenses would be subtracted when calculating net profit. The cost of purchasing new tabletops was not recoverable, since Georgia's voluntarily elected to purchase from a third party even though Selected had promised to replace the tabletops. Finally, the carpenter fees could easily have been avoided by waiting to call the carpenter until the furniture was actually delivered. The court did award $65 to Georgia's for a banner that it purchased in anticipation of its April 15 opening. Thus, the court awarded Georgia's a total of $2,759.96 on its counterclaim. Georgia's now appeals.

¶ 19 ANALYSIS

¶ 20 Georgia's argues that the trial court erred (1) in finding that Georgia's breached the contract with Selected, (2) in finding that Georgia's was unjustly enriched by keeping the goods, and (3) in computing Georgia's damages on its counterclaim. We consider these contentions in turn. In doing so, we will not disturb the trial court's findings of fact unless they are against the manifest weight of the evidence, meaning that an opposite conclusion is apparent or the findings are unreasonable, arbitrary, or not based on evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). On mixed questions of law and fact, we defer to the trial court on findings of fact but undertake *de novo* analysis of the legal issues involved. *Midwest Builder Distributing, Inc. v. Lord and Essex, Inc.*, 383 Ill. App. 3d 645, 668-69 (2007).

¶ 21 Breach of Contract

¶ 22 Georgia's raises two arguments in support of its contention that it did not breach its contract with Selected by refusing to pay the full contract price for its furniture. First, Georgia's argues that it rejected the tables due to their defective condition and was therefore not obligated to pay for them. (Georgia's admits that it accepted the booths and chairs.) Second, Georgia's argues that Selected materially breached the contract by failing to deliver the furniture in a timely fashion. Selected argues that Georgia's accepted the tables, as evidenced by the fact that it kept them and used them in its business for nine months before replacing them, and all extensions of the original delivery date were mutually agreed upon by the parties.

¶ 23 The Uniform Commercial Code provides that once a buyer accepts goods, it is bound to pay the contractually agreed-upon price for them. 810 ILCS 5/2-607(1) (West 2012). Acceptance does not prevent the buyer from suing for damages caused by breach of contract, but it does prevent the buyer from later rejecting the goods based on contractual shortcomings that it

knew about at the time of acceptance, unless it reasonably believed that those shortcomings would be seasonably cured. 810 ILCS 5/2-607(2) (West 2012); *Midwest Builder Distributing*, 383 Ill. App. 3d at 669. Thus, if Georgia's accepted the tables despite their allegedly defective condition, those defects would not relieve Georgia's of its obligation to pay the full purchase price.

¶ 24 Section 2-606 of the UCC defines acceptance as follows:

> "(1) Acceptance of goods occurs when the buyer
>
> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
>
> (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
>
> (c) does any act inconsistent with the seller's ownership ***.
>
> (2) Acceptance of a part of any commercial unit is acceptance of that entire unit."

810 ILCS 5/2-606 (West 2012).

A buyer's use of nonconforming goods does not automatically constitute acceptance of those goods. *Alden Press, Inc. v. Block & Company, Inc.*, 173 Ill. App. 3d 251, 261 (1988); *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 987 (1980). Rather, courts apply a "rule of reasonableness" in assessing a buyer's conduct, considering such factors as the economic harm that the buyer would suffer if it did not use the goods, the degree of prejudice to the seller, and whether the seller acted in bad faith. *Alden Press*, 173 Ill. App. 3d at 261, 263; *Frank's Maintenance & Engineering*, 86 Ill. App. 3d at 987. In particular, courts

acknowledge that " 'in certain situations continued use of goods by the buyer may be the most appropriate means of achieving mitigation, *i.e.*, where the buyer is unable to purchase a suitable substitute for the goods.' " *Alden Press*, 173 Ill. App. 3d at 263 (quoting *Fablok Mills, Inc. v. Cocker Machine & Foundry Co.*, 310 A.2d 491, 494 (1973)). "[W]hether conduct has amounted to an acceptance or a rejection of goods is a question of fact to be determined within the framework of facts of each particular case." (Internal quotation marks omitted.) *Id.* at 262.

¶ 25 In this case, the trial court found that Georgia's accepted and did not reject the tables. Under the facts of this case, we cannot say that the trial court's finding is against the manifest weight of the evidence.

¶ 26 The record reflects that the tables delivered by Selected had visible scratches, cracks, and chips. But Kulubis did not want to return them and order new ones, because new tables would take at least four to five weeks to deliver, and he did not want to further delay the opening of the restaurant. Also, Tommy told Kulubis that he should take the tables and open the restaurant, and Selected would manufacture replacements free of charge. Under these circumstances, Georgia's initial decision to open its restaurant with those tables may have been consistent with a finding that Georgia's did not accept the tables. But the same cannot be said of Georgia's later conduct. Even after cutting off all communication with Selected, Georgia's continued to use Selected's tables for approximately six more months before obtaining replacements from a third party on February 24, 2012. There is no explanation in the record for why Georgia's continued to use the allegedly defective tables for so long, especially in light of Kulubis's earlier statement that new tables would take four to five weeks to deliver. We agree with the trial court that Georgia's actions were both unreasonable and inconsistent with Selected's ownership under section 2-606(1)(c).

¶ 27 In this regard, this case is analogous to *Basselen v. General Motors Corp.*, 341 Ill. App. 3d 278 (2003), overruled on other grounds by *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1 (2006).[1] Although *Basselen* deals with revocation of acceptance, rather than rejection, the same standard of reasonableness applies. *Id.* at 283-84. The *Basselen* plaintiffs purchased a van from defendants. *Id.* at 281. Plaintiffs experienced numerous problems with the van and complained to defendants on multiple occasions. *Id.* at 282. Around a year after purchase, plaintiffs sought to revoke their acceptance, telling defendants that if they could not fix the van, they should keep it and give plaintiffs a new one. *Id.* Defendants refused. At this time, the van had 23,000 miles on it, and plaintiffs later drove it an additional 19,000 miles. Plaintiffs provided no evidence that they could not have purchased another van or used alternate means of transportation. *Id.* at 284. Under these facts, the *Basselen* court found that the plaintiffs' revocation was ineffective, since their continued and extensive use of the vehicle was unreasonable as a matter of law. *Id.* at 285-86; see also *Davidson v. Wisconsin Chair Co.*, 333 Ill. App. 426, 432 (1948) (where tables ordered from plaintiff are installed and used for their intended purpose, and defendant pays two-thirds of the purchase price, defendant will ordinarily be deemed to have accepted the goods). Similarly, in the present case, Georgia's use of the tables over a period of many months was unreasonable where Georgia's was no longer expecting to get replacement tables from Selected and Georgia's could have obtained new tables in around four or five weeks.

¶ 28 Furthermore, Georgia's did not replace the tables in their entirety. Kulubis testified that Georgia's purchased new tabletops from a third-party vendor, but it continued to use the bases that it had purchased from Selected and was apparently still using them at the time of trial. Section 2-606(2) provides that "[a]cceptance of a part of any commercial unit is acceptance of

[1] *Kinkel* overruled *Basselen* on the definition of substantive unconscionability, which is not at issue in this case. *Kinkel*, 223 Ill. 2d at 31.

that entire unit." 810 ILCS 5/2-606(2) (West 2012). For this reason as well, the trial court did not err in finding that Georgia's accepted the tables and could not refuse payment based on purported defects.

¶ 29 Georgia's next argues that Selected materially breached the contract by failing to deliver the furniture on time, thus excusing Georgia's nonpayment. Selected argues, and the trial court found, that Georgia's nonpayment was not excused because all extensions of the delivery date were mutually agreed upon by the parties.

¶ 30 We agree with Selected. It is true that when Selected failed to deliver the furniture on time, Kulubis was upset and made his displeasure known to Selected's agents on multiple occasions. But Kulubis did not cancel the order at any time, because he believed it would take too long to obtain substitute furniture from a third party vendor. In his words, "I have committed myself that I have to work with [Selected] to open up my restaurant." Under these facts, the trial court found that Georgia's accepted the furniture despite its untimely delivery, and we cannot say that this finding is against the manifest weight of the evidence. Thus, Georgia's is obligated to pay the contractually agreed-upon price for the furniture. See 801 ILCS 5/2-207(2) (West 2012) (when a seller delivers goods to a buyer, and payment is both due and demanded, the buyer does not have the right to keep the goods unless it pays the seller). We note that this does not preclude Georgia's from suing to recover the damages caused by Selected's late delivery—which, in fact, it did. *Midwest Builder Distributing*, 383 Ill. App. 3d at 669 (citing 810 ILCS 5/2-607(2) (West 2006)).

¶ 31 Georgia's cites *June G. Ashton Interiors v. Stark Carpet Co.*, 142 Ill. App. 3d 100 (1986), for the proposition that where time is of the essence, a delay in delivering goods may constitute a

material breach of the contract. *Ashton* is readily distinguishable because the buyer in that case canceled the contract and never accepted the goods. *Id.* at 106.

¶ 32 Accordingly, the trial court did not err in finding that Georgia's breached its contract with Selected by refusing to pay the contract price for the furniture it bought. Because the trial court addressed unjust enrichment only as an alternate ground of recovery, we need not reach Georgia's arguments on that issue.

¶ 33 Georgia's Damages on its Counterclaim

¶ 34 Georgia's final contention is that the trial court incorrectly calculated the damages on its counterclaim. Specifically, it argues that (1) the trial court miscalculated the damages Georgia's incurred by having its opening date delayed from April 15, 2011, to May 23, 2011, and (2) the trial court erred in denying Georgia's $4,500 in fees spent to hire a carpenter on days when Selected promised to deliver furniture but failed to do so.

¶ 35 An award of damages in a breach of contract case should place the nonbreaching party in the position it would have been in if the contract had been fully performed. *Sterling Freight Lines, Inc. v. Prairie Material Sales, Inc.*, 285 Ill. App. 3d 914, 917 (1997). Lost profits are recoverable for a breach of contract, but only if they can be proved with reasonable certainty. *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 316 (1987); *F.E. Holmes & Son Construction Co., Inc. v. Gualdoni Electric Service, Inc.*, 105 Ill. App. 3d 1135, 1141 (1982). We review the trial court's damages award under the manifest weight of the evidence standard. *Sterling Freight Lines*, 285 Ill. App. 3d at 917-18.

¶ 36 With regard to its lost profits, Georgia's first argument is that the trial court erred in finding its net cash flow statement not to be credible. We disagree. Credibility decisions are the province of the trial court, which has a superior opportunity to review evidence and observe the

demeanor of witnesses. *City of Chicago v. Old Colony Partners, L.P.*, 364 Ill. App. 3d 806, 818 (2006). In this case, the trial court's credibility determination was amply supported by the record. The statement was prepared by Kulubis and his son, neither of whom are accountants, nor was it prepared with the help of an accountant. Additionally, Kulubis admitted that the total cost of goods listed on that statement was "[n]ot to the exact amount" and "debatable." In light of these facts, the trial court's determination that the net cash flow statement was not a reliable basis on which to calculate lost profits was not against the manifest weight of the evidence. At the very least, in light of Kulubis's admissions, the statement did not provide "reasonable certainty" of lost profits, as required for an award of damages. (Internal quotation marks omitted.) *Midland Hotel Corp.*, 118 Ill. 2d at 316.

¶ 37 Georgia's next assertion is that the trial court erred when it deducted Georgia's fixed overhead expenses, such as rent and real estate taxes, from its gross revenue. Selected does not specifically address this argument, relying instead on the general assertion that the trial court's damage award was supported by the evidence.

¶ 38 Damages assessed for lost profits are based on net profits. *Sterling Freight Lines*, 285 Ill. App. 3d at 918. This court has explained the proper method of calculating net profits:

> "Net lost profits are determined by subtracting the expenses necessary for plaintiff's full performance from the contract price because these expenses are generally avoided by the defendant's breach. Plaintiff's cost of performance is comprised of direct costs (labor and materials) and indirect costs (overhead). The direct costs and that portion of indirect costs which can be avoided by defendant's breach, called variable indirect costs, are deducted from the contract price. In contrast, that portion of indirect costs which cannot

> be reduced by defendant's breach, called fixed indirect costs, are not subtracted from the contract price." *Holmes*, 105 Ill. App. 3d at 1141.

Fixed indirect costs are not deducted from gross revenue because, by definition, they cannot be reduced by defendant's breach, so the plaintiff has already incurred and paid them. If they were also deducted from gross revenue in computing lost profits, then the plaintiff would, in effect, be paying those costs twice, which would run contrary to the goal of restoring the plaintiff to the position it would have been in if the contract had been fully performed. *Sterling Freight Lines*, 285 Ill. App. 3d at 917.

¶ 39 A simple example helps to illustrate this principle. Suppose that, if the contract had been fully performed, plaintiff would earn $100 in gross revenue and incur $20 in variable indirect costs and $30 in fixed indirect costs. This leaves plaintiff with $50 in net profit. In the event the contract is breached, plaintiff avoids having to pay the variable indirect costs but still has to pay $30 in fixed indirect costs. In the resulting suit for breach of contract, the court should award gross revenue ($100) minus variable indirect costs ($20), for an award of $80. After receiving the $80 award and paying $30 in fixed indirect costs, the plaintiff is left with $50—which is exactly what it would have if the contract had been performed. If the court were to additionally deduct fixed indirect costs from the award, then plaintiff would be undercompensated for its loss.

¶ 40 In this case, the trial court computed Georgia's lost profits by calculating Georgia's average daily profit in 2011, as indicated by the ordinary business income listed in its 2011 federal tax return, and then multiplying that figure by 38 days. Georgia's asserts, and Selected does not dispute, that the ordinary business income figure used by the trial court deducts *all* costs, including rent, real estate taxes, and other fixed indirect costs that could not have been and were not reduced by Selected's failure to deliver the furniture on time. Thus, the trial court's use

of this figure was erroneous as a matter of law. See *id.* at 918-19 (trial court committed reversible error where it deducted plaintiff's fixed overhead expenses from its gross revenue in calculating net profits). We therefore remand for the trial court to recalculate Georgia's lost profits according to the standard articulated in *Holmes* and *Sterling Freight Lines—i.e.*, subtracting from gross revenues the costs which could have been avoided by Selected's breach (*e.g.*, labor and supplies), but not subtracting fixed overhead, such as lease payments and taxes, that could not have been avoided by the breach.

¶ 41 Georgia's final contention is that the trial court erred by not awarding damages for the carpenter fees it incurred. Kulubis testified that on six occasions, Selected promised to deliver furniture on a particular date but then did not deliver. On the night before each of these dates, Kulubis hired a carpenter in advance to be present at the restaurant and install the furniture. This cost Georgia's $750 per day, or $4,500 in total. The trial court did not award any amount for this item of damages, finding that Georgia's could easily have avoided these fees if it waited until the furniture was actually delivered to hire a carpenter.

¶ 42 It is well established that a plaintiff in a breach of contract suit cannot recover losses that it could reasonably have avoided. *Boyer v. Buol Properties, LLC*, 2014 IL App (1st) 132780, ¶ 67 (citing Restatement (Second) of Contracts § 350 (1981)). We agree with the trial court that most of these carpenter fees could reasonably have been avoided, since Kulubis was aware that there were problems with the order and that it might not be delivered on time. But there is one exception—the scheduled April 8 delivery. Kulubis testified that on April 1, he went to Selected and was informed that his furniture would not be ready by the originally-scheduled date of April 4, but it would be ready by April 8. After that, Kulubis called Selected three or four times a day and was assured by Selected's agents that the furniture would be ready by April 8. Given these

assurances, we find that it was reasonable for Kulubis to hire a carpenter in advance for that date and, therefore, Georgia's is entitled to $750 in carpenter fees, which should be included in the damage award on remand. But once Selected failed to deliver the furniture despite multiple assurances, it was not reasonable for Georgia's to continue to incur the $750 daily fee, and so the additional amount sought for this item is not recoverable.

¶ 43 CONCLUSION

¶ 44 The trial court did not err in finding that Georgia's accepted the furniture from Selected where, despite Georgia's verbal protestations about the quality of the furniture and the untimeliness of its delivery, Georgia's kept the furniture, used it for many months, and was still using most of it at the time of trial. Accordingly, we affirm the trial court's judgment for Selected on its breach of contract claim. We reverse the trial court's award of damages for Georgia's on its counterclaim, insofar as the trial court erroneously deducted Georgia's fixed overhead costs from its gross revenue, and we remand for the trial court to recalculate Georgia's lost profits. We also direct the trial court to award Georgia's $750 in carpenter fees. In all other respects we affirm the trial court's judgment on Georgia's counterclaim.

¶ 45 Affirmed in part, reversed in part, and remanded.