

OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

MIDWEST COAL, LLC, BY THROUGH) No. ED97479
ITS BANKRUPTCY TRUSTEE JANICE) Appeal from the Circuit Court of
STANTON, Appellant,) St. Louis County
)
vs.) Honorable Colleen Dolan
)
TOM CABANAS, Respondent.) Filed: August 28, 2012

Midwest Coal (Plaintiff) appeals the trial court's grant of summary judgment to Tom Cabanas (Defendant) on its claim for fraudulent misrepresentation. Plaintiff claims the trial court erred in granting summary judgment to Defendant because: (1) Plaintiff was not required to show a history of profitability in order to recover lost profits; and (2) genuine issues of material fact exist as to whether Plaintiff suffered lost profits. Plaintiff also contends that the trial court erred in denying its motion for partial summary judgment.

AFFIRMED.

Division Four Holds: The trial court properly granted summary judgment to Defendant because, with no history of profitability, Plaintiff could not present sufficient evidence to prove lost profits from an existing commercial business. Missouri law is clear that an established business may recover anticipated profits only where there is proof of income and expenses for the period prior to the alleged injury to the business. Coonis v. Rogers, 429 S.W.2d 709, 714 (Mo. 1968). In addition, because Plaintiff failed to allege facts demonstrating that Defendant's misrepresentation caused Plaintiff to sustain lost profits, the trial court did not err in granting Defendant's motion for summary judgment. This court grants Defendant's motion to strike Plaintiff's third point on appeal because the denial of a motion for summary judgment is not a final, appealable order.

Opinion by: Patricia L. Cohen, P.J.
Kurt S. Odenwald, J., and Robert M. Clayton III, J., concur.

Attorney for Appellant: Mark T. Kempton

Attorney for Respondent: Joel A. Poole

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