Feature Article
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Measure of Damages and Burden of Proof in Breach of Contract and Warranty Claims for Damages to a Building


A. The Measure of Damages

In Illinois, the measure of damages for a breach of contract or a breach of warranty when a builder has provided less than full performance or defective performance is the cost of correcting the defective condition. Park v. Sohn, 89 Ill. 2d 453, 464, 433 N.E.2d 651 (1982); Shaw v. Bridges-Gallagher, Inc., 174 Ill. App. 3d 680, 683, 528 N.E.2d 1349 (5th Dist. 1988). Two exceptions exist. If the defects can be corrected only at a cost unreasonably disproportionate to the benefit to the purchaser or if correcting the defects would entail an unreasonable destruction of the builder’s work, then the measure of damages is the amount by which the defects have reduced the market value of the property. Park, 89 Ill. 2d at 464-65; Arch of Ill., Inc. v. S.K. George Painting Contractors, Inc., 288 Ill. App. 3d 1080, 1082, 681 N.E.2d 1049 (5th Dist. 1997); Castricone v. Michaud, 223 Ill. App. 3d 138, 140, 583 N.E.2d 1184 (3d Dist. 1991) (finding that where the repairs would entail substantial tearing down of the contractor’s work and/or the costs are disproportionate to the contract price, the measure of damages is determined by the diminution in the value of the property resulting from the defects). The proper measure of property damage in tort is the same. LaSalle Nat’l Bank v. Willis, 378 Ill. App. 3d 307, 329-30, 880 N.E.2d 1075 (1st Dist. 2007).
B. The Damages Are Limited by Law and by the Elements Listed in the Instruction to the Jury

The Illinois Supreme Court has held that the damages awarded by a jury for breach of contract or warranty damages to a building must be measured by a legal standard, and that standard must guide the jury’s determination as to what sum would compensate the injured party. TRI-G, Inc. v. Burke, 222 Ill. 2d 218, 252, 856 N.E.2d 389 (2006). The trial court’s instructions limit the jury’s consideration to facts that are properly a part of the damages allowable. TRI-G, Inc., 222 Ill. 2d at 252; BP Amoco Chem. Co. v. Flint Hills Resources, LLC, No. 05 C 5661, 2009 WL 1033373, *5 (N.D. Ill. Apr. 17, 2009). Thus, the jury’s discretion in awarding damages is limited by the parameters of what the law will allow. TRI-G, 222 Ill. 2d at 252. In TRI-G, Inc. v. Burke, the supreme court held it was reversible error for a jury to disregard the elements of damages identified in the jury instructions. Id. at 251. A plaintiff cannot justify the jury’s award by hypothesizing categories of damages on which the jury was not instructed. Id. at 252.

C. IPI Instructions

The IPI Instructions setting forth the measure of damages for damage to real property are IPI 30.17 (Measure of Damages—Repairable Damage) and IPI 30.18 (Measure of Damages—Permanent or Continuing Damage, difference between the fair market value immediately before and after the occurrence).

A damage instruction combining IPI 30.17 with IPI 30.18 into one instruction could read: The damage to real property is determined by the reasonable expense of necessary repairs to the property that was damaged or the difference between the fair market value of the real property immediately before the occurrence and its fair market value immediately after the occurrence, whichever is less.

Fair market value is generally considered to be “the price which property would bring if it were offered for sale by a willing seller to a willing buyer,” Housing Authority v. Kosydar, 17 Ill. 2d 602, 606, 162 N.E.2d 357, 359 (1959) (quoted in Chi. City Bank & Trust Co. v. Ceres Terminals, Inc., 93 Ill. App. 3d 623, 630, 417 N.E.2d 798, 803 (1st Dist. 1981)).

D. The Jury Must Hear Evidence on Both Measures of Damage

On the issue of damages, the jury should be permitted to hear evidence on both the cost of repairs and diminution in fair market value. Arch of Ill., Inc., 288 Ill. App. 3d at 1082 (involving a suit by a factory owner against a construction contractor for defective work in a painting factory). Evidence on both measures of damage must be presented to the jury because the appropriate recovery is first the cost of repairs; diminution in value is appropriate only if exceeded by the cost of repairs. Wells v. Minor, 219 Ill. App. 3d 3d 32, 40, 578 N.E. 2d 1337 (4th Dist. 1991) (involving a breach of contract action in the building of a house). The determination of which measure of damages to apply is a jury question. Arch of Ill., Inc., 288 Ill. App. 3d at 1082.

The jury determines which measure of damages to apply because the alternative measure can be applied only after a factual finding. Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 199 Ill. 2d 325, 361-62, 770 N.E. 2d 177 (2002). See also Hills of Palos Condo. Ass’n, Inc. v. I-Del, Inc., 255 Ill. App. 3d 448, 453, 471, 626 N.E.2d 1311 (1st Dist. 1993) (involving a suit to recover damages for alleged defects in the construction of condominiums where the alternative measure of damages—reduction in the value of the property—could be applied only after a factual finding that the cost of repair was unreasonably disproportionate to its benefit or that correcting the defects would entail an unreasonable destruction of the property). If a plaintiff does not provide both the reasonable expense of necessary repairs and the difference between the fair market value of the property before and after
the occurrence, then the plaintiff fails to provide the jury with evidence of the damages allowed by law. Therefore, the plaintiff would fail to prove a necessary element of its cause of action. Park, 89 Ill. 2d at 464-65; Kim, 353 Ill. App. 3d at 460; Walker, 316 Ill. App. 3d at 596; Ollivier, 262 Ill. App. 3d at 196.

For example, in Witty v. C. Casey Homes, Inc., 102 Ill. App. 3d 619, 622, 430 N.E.2d 191 (1st Dist. 1981), the plaintiff in a breach of contract case introduced evidence of cost of repair to the face brick in his residence but did not offer any evidence that the installation of the allegedly defective brick caused a diminution in the value of the premises. The trial court in Witty entered judgment in the defendant’s favor because the plaintiff’s proposed measure of damages —cost of repair—was impractical and the plaintiff had introduced no evidence that the defective brick had diminished the value of the home. Witty, 102 Ill. App. 3d at 623. The appellate court in Witty agreed and affirmed the trial court’s entry of judgment for the defendant on the plaintiff’s complaint for breach of contract. Id. at 623-24.

In First National Bank of Elgin v. Dusold, 180 Ill. App. 3d 714, 715, 536 N.E.2d 100 (2d Dist. 1989), the plaintiffs brought an action for breach of warranty for damages to a residence and various appliances and fixtures therein. The plaintiffs, however, offered no evidence as to whether any of the appliances were capable of repair or the cost of any repairs. Dusold, 180 Ill. App. 3d at 718. The appellate court in Dusold held that even if the claim that the appliances were not repairable was accepted, the lack of testimony concerning the condition and fair market value of the property as warranted at the time of the contract less the value of the items at the time of delivery was fatal to any action to recover for its loss. Id. at 719. The appellate court held that there was no basis for awarding damages for those repairs and reversed the portion of the judgment awarding the costs of those repairs. Id. at 720.

E. The Original Contract Price Is Not the Proper Measure of Damages

The plaintiff’s original contract price is not the proper measure of damages and even comparing the cost of correcting the defect to the original contract price “is not the law.” Arch of Ill., Inc., 288 Ill. App. 3d at 1083. The test for the measure of damages calls for the use of the cost of repairs or the diminution-in-value standard. Id.; BP Amoco Chem. Co., 2009 WL 1033373, at *8 (holding that contract price is not determinative as to which damages measure applies).

Conclusion

The jury’s discretion in awarding damages is limited by the parameters of what the law allows as identified in the jury instruction. TRI-G, Inc., 222 Ill. 2d at 252. If a plaintiff does not prove either, and both, elements of damages identified in the jury instruction, the plaintiff forces the jury to disregard the elements of damage identified in the jury instruction. This result would be reversible error and would allow entry of a directed finding for the defendant as a matter of law. Id. at 251; Kim, 353 Ill. App. 3d at 461-62 (affirming the directed verdict entered in favor of the defendant, because the plaintiff failed to prove damages in his breach of warranty action); Walker, 316 Ill. App. 3d at 596 (reversing the judgment entered in favor of the third-party plaintiff and holding that the third-party defendant was entitled to a directed finding as a matter of law, because the plaintiff failed to prove damages—an essential element of a breach of contract action); Dusold, 180 Ill. App. 3d at 720; Witty, 102 Ill. App. 3d at 623-24. But cf. Mayfield v. Swafford, 106 Ill. App. 3d 610, 615-16, 435 N.E.2d 953, 957-58 (5th Dist. 1982) (remanding the case for hearing on diminution in value and ruling that the plaintiff would be entitled to judgment for the lesser amount of either the cost of repair or the diminution in value, where the plaintiff proved cost of repair but not diminution in value at trial).
About the Author

James P. DeNardo is a partner in the Chicago firm of McKenna Storer where he concentrates on equal employment litigation, labor law and appellate practice. He has litigated employment cases on behalf of employers before the Illinois Department of Human Rights, Illinois Human Rights Commission, Federal Equal Employment Opportunity Commission, in the Circuit Court of Illinois, the U.S. District Courts and the U.S. Court of Appeals, Seventh Circuit. He has litigated agent agreement contract matters before the Financial Industry Regulatory Authority (FINRA). He has litigated civil appeals before the Illinois Appellate and Supreme Courts and the United States Court of Appeals, Seventh Circuit. As a member of the United States Army Judge Advocate General’s Corps, he represented military personnel before courts-martial in Vietnam and Germany. Mr. DeNardo is a member of the Federal Trial Bar of the United States District Court for the Northern District of Illinois.

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