

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )  
 )  
Custom Performance Engineering, Inc., )  
 )  
 )  
Plaintiff, )  
 )  
 )  
vs. )  
 )  
AM Industrial Group, LLC, )  
 )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

C. A. No. 2021-CP-42-01163

**ORDER**

**RECEIVED**

**Mar 21 2022**

**SC Court of Appeals**

This matter came before the Master-in-Equity for Spartanburg County for a damages hearing on December 20, 2021 pursuant to an order of reference entered on September 28, 2021. Present at the hearing on behalf of Custom Performance Engineering, Inc. (“Custom Performance”) was Adam C. Bach, of the law firm Eller Tonnsen Bach, LLC. Present at the hearing on behalf of AM Industrial Group, LLC (“AMI”) was R. Wilder Harte of the law firm Richard Plowden & Robinson, P.A.

From the testimony and evidence presented at the hearing, it appears that Custom Performance purchased an Eaton Leonard VB076HT CNC Bender machine (the “Machine”) from AMI on August 10, 2020. The Machine did not perform as warranted. AMI provided assurances to Custom Performance that it could make the Machine work. Over the next several months, Custom Performance expended time and money on repairs or fixes suggested by AMI. Further, AMI also attempted to repair the Machine to make it perform properly. Despite these efforts, the Machine continued to fail to perform properly, and Custom Performance provided written notice of its rejection of the Machine and asked AMI to refund its purchase price. AMI refused to acknowledge Custom Performance’s rejection of the Machine or to refund the purchase price. Because the Machine failed to perform, Custom Performance was forced to purchase a

replacement machine, a YLM CNC-90 MSRSM-6A CNC Bending Machine (the “Replacement Machine”) for \$255,087.00.

Custom Performance filed suit for breach of contract, breach of express warranty, and breach of the implied warranty of merchantability. At the hearing, Custom Performance produced evidence seeking the purchase price, the costs to tool and install the Machine, the cost to “cover,” meaning the difference in price between the Machine and the Replacement Machine, the costs to install and tool the Replacement Machine, and for lost profits caused by the Machine failing to perform as warranted.

Because the Machine was moveable at the time of identification to the contract, this transaction is governed by South Carolina Uniform Commercial Code, S.C. Code § 36-2-101, *et. seq.* Additionally, because AMI is in default, AMI concedes liability. Although AMI is liable to Custom Performance for the actions alleged, Custom Performance is still required to prove its damages by a preponderance of the evidence.

At the hearing, Custom Performance testified that its lost profits were based on three purchase orders it obtained but had to cancel because the Machine could not perform the job. Following the hearing, the court exercised its discretion to leave the record open for Custom Performance to submit the cancelled purchase orders for the court’s review. Custom Performance submitted these records, and the court is satisfied that Custom Performance’s lost profits claim is supported by a preponderance of the evidence. Therefore, based on the testimony and evidence presented, the court finds that Custom Performance proved the following damages by a preponderance of the evidence:

|                                   |                     |
|-----------------------------------|---------------------|
| Price of Machine                  | \$132,000.00        |
| Costs to Install and Tool Machine | \$8,694.00          |
| Lost Profits                      | \$257,680.00        |
| <b>Total Damages</b>              | <b>\$398,374.00</b> |

The court declines to award, however, the difference in the cost of the Machine and the cost of the Replacement Machine. During cross-examination, Custom Performance's witness testified that the Replacement Machine is not identical to the Machine and contains more features not available on the Machine. Because of this, the court declines to award the cost of "cover" or the tooling and installation costs for the Replacement Machine.

The court further finds that AMI is entitled to retake possession of the Machine from Custom Performance, as well as any of the tooling AMI provided with the Machine, upon payment of the judgment amount.

THEREFORE, based on the testimony and evidence submitted,

IT IS ORDERED, judgment is entered in favor of Custom Performance and against AMI in the amount of Three Hundred Ninety-Eight Thousand Three Hundred Seventy-Four (\$398,374.00) Dollars, plus costs in the amount of \$293.80, for a total judgment of Three Hundred Ninety-Eight Thousand Six Hundred Sixty-Seven and 80/100ths (\$398,667.80) Dollars. Interest shall accrue on the judgment at the statutory rate upon entry of this Order.

IT IS FURTHER ORDERED that following payment of the judgment to plaintiff, Custom Performance shall coordinate with AMI and make reasonable accommodations for AMI to retake possession of the Machine, and any tooling AMI provided with the Machine, at AMI's expense.

AND IT IS SO ORDERED.

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Spartanburg Common Pleas

**Case Caption:** Custom Performance Engineering, Inc. VS Am Industrial Group, Llc

**Case Number:** 2021CP4201163

**Type:** Order/Damages

IT IS SO ORDERED.

s/ Shannon M. Phillips - 3087