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**IN THE
COURT OF APPEALS OF INDIANA**

DORSETTS AUTO SALES, INC. and)
DORSETT LLC,)
)
Appellants/Cross-Appellees-Defendants,)

vs.)

No. 84A01-0602-CV-64

C.H. GARMONG & SON, INC.,)
)
Appellee/Cross-Appellant-Plaintiff.)

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Barbara L. Brugnaux, Judge
Cause No. 84D05-0107-CP-5698

January 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Dorsetts Auto Sales, Inc.,¹ and Dorsett LLC (collectively, “Dorsett”) appeal the trial court’s determination that an enforceable contract existed between Dorsett and C.H. Garmong & Son, Inc. (“Garmong”). Both Dorsett and Garmong appeal the trial court’s calculation of Garmong’s damages. We affirm in part, reverse in part, and remand.

Issues

We restate the parties’ issues as follows:

- I. Whether the trial court erred in determining that an enforceable contract existed between Dorsett and Garmong; and
- II. Whether the trial court properly calculated Garmong’s damages.

Facts and Procedural History

In its judgment, the trial court found the following facts:

1. Plaintiff [Garmong] is a corporation engaged in commercial and industrial construction specializing in the design and build approach with offices in Vigo County, Indiana.
2. Defendant Dorsett LLC (DLLC) is a corporation which owns real estate located at 105 West Mayfair Drive in Vigo County, Indiana, now the site of the Dorsett Mitsubishi automobile dealership.
3. Dorsetts Auto Sales, Inc. (DASI) is a corporation which leases the real estate and building at 105 West Mayfair Drive and operates the automobile dealership.
4. Brian Dorsett is a principal in both Dorsett LLC and Dorsetts Auto Sales, Inc., acting as president of each corporation.
5. In spring or early summer of 2000, Dorsett met with at least three contracting firms to discuss construction of a new building to house the Mitsubishi dealership at 105 West Mayfair Drive. Plaintiff and G.L. Michaels, Inc. (Michaels) were two of the firms.
6. Dorsett had never previously been involved in a construction project.

¹ The cover page of the appellants’ brief lists the name of this entity as “Dorsett’s Auto Sales, Inc.” Elsewhere in the record, including the appellants’ answer to the appellee’s complaint and the trial court’s judgment, the name has no apostrophe.

7. David Hannum, Garmong chairman, met with Dorsett and Robert Lawhead, a representative of Mitsubishi Motors. Hannum explained the design and build approach and terms for a design and build contract, and Dorsett related what he wanted in the building, that he had no building plans, that his budget was \$500,000, he wanted a union job and that he wanted occupancy by December 2000.

8. Under the design build concept, a customer's ideas are put into a design and estimates for construction are developed. The process is subject to revision until the customer is satisfied.

9. In June 2000, defendants hired Myers Engineering of Terre Haute to do site survey work.

10. After several phone calls, Hannum and Dorsett met and Dorsett, according to Hannum, said, "OK, it's your job." Dorsett testified that he said, "let's go forward — get the work done the way I needed it done." He later testified that while he did not agree to a contract he did agree to have Garmong build a building. According to Dorsett, the men shook hands on the deal. At that time, Hannum gave Dorsett an example of a contract from another job so he could see the basic terms.

11. At that time, Dorsett told Hannum [that] Garmong should take over the site work from Myers as he was frustrated with what he perceived to be their delay.

12. Hannum then prepared a written document setting out the terms which had been discussed for the contract and sent it to Dorsett.

13. Dorsett asked for some changes in the contract terms which Hannum agreed to and sent the revised contract to Dorsett.

14. That contract provided that work would be completed by December 1, 2000; that plans were to be prepared by Garmong and accepted by the owner before building commenced; that a final budget would be presented following acceptance of plans; that Garmong would be reimbursed for all contractor costs plus receive a fee of 10 percent of total costs and that Garmong would not be reimbursed for its office costs, corporate overhead and accounting services.

15. Several weeks after the initial contract was delivered, Dorsett agreed by telephone that the revised version was "okay." Relying on Dorsett's verbal commitment and Dorsett's requirement that the project be completed by December, Garmong began work on the project in July 2000.

16. Garmong hired Hannum Wagle and Cline (HWC), a professional engineering firm, to provide architectural and engineering services for the project. Hannum is a principal owner of HWC.

17. Dorsett told the other construction companies he had contacted originally that he had hired Garmong.

18. The written contract was never signed by either party.

19. In mid-July 2000, Garmong's design team met with Dorsett and reviewed the Mitsubishi building requirements. Many hours of labor were expended preparing different sets of drawings. The design based on the Mitsubishi model resulted in a cost estimate of \$1.2 million which was rejected due to the cost and site concerns.

20. A second design, based on a sketch by Dorsett and a Mitsubishi representative, Robert Lawhead, had a guaranteed cost of \$750,000. Presentation of that plan took place mid-September 2000. Dorsett wanted to hire some sub-contractors directly. Garmong's price included those costs so Dorsett would know total cost of project before he committed to that design.

21. A set of the design drawings, each with a copyright notice, was provided to Dorsett. Dorsett then took those drawings to one of the contractors he had initially contacted, Michaels, and asked for a bid.

22. According to Hannum, if the \$750,000 design was not satisfactory, Garmong would have continued to work on plans until Dorsett was satisfied.

23. In late September 2000, Dorsett told Michaels that he had fired Garmong and was hiring Michaels to construct the building. On October 2, 2000, Michaels hired MMS Engineering to prepare construction drawings based on the Garmong design. Michaels did not yet have a signed contract with Dorsett.

24. On October 17, 2000, Michaels and Dorsett did execute a contract for construction of the building at a price of \$525,000 including a ten percent contractor's fee and excluding site preparation, heating and air conditioning, plumbing and electrical components, all of which Dorsett was to be responsible for paying. Michaels did not discuss those additional costs with Dorsett. The contract price was a base figure to get started.

25. At some point, Garmong representatives realized that site work was being done at the site by someone else. One subcontractor, Ted Hazeldine, called Garmong after Michaels called him for an estimate. Hazeldine recognized the similarity of design between the Michaels plan and the Garmong plan he had previously been asked to bid on.

26. In August 2001, the building was completed. Michaels' final bill was \$878,877.00. The other costs assumed by Dorsett brought the total cost to \$927,000.00.

27. The final design increased floor size but was not substantially altered from the Garmong design.

28. In January 2001, Garmong sent Dorsett an invoice for design services and for expenses Garmong incurred with Hannum Wagle and Cline in the total amount of \$31,826.34 for 520.5 hours of work.

29. The contract between Michaels and MMS called for payment of \$85.00 per hour for design work. The value of 520.5 hours of work at that rate would be \$44,242.50.

30. Dorsett refused to pay the invoice.

Appellants' App. at 7-11.

On July 19, 2001, Garmong filed a complaint against Dorsett alleging both breach of contract and unjust enrichment. On June 14 and 15, 2004, the matter was tried to the bench. On January 17, 2006, the trial court issued its findings of fact, conclusions thereon, and judgment. The trial court's conclusions read as follows:

1. By the conduct and course of dealing between David Hannum for plaintiff, and Brian Dorsett for defendants, there was an offer by plaintiff and an acceptance by defendants and meeting of the minds, such that plaintiff and defendants entered into a binding contract whereby defendants hired plaintiff to design and build a new automobile dealership building for defendants.

2. The pattern of dealing followed by Brian Dorsett for defendants in contracting with others, such as G. L. [Michaels] Construction, established that the defendants by their conduct intended to agree and that defendants were bound to the design and build contract with plaintiff.

3. The building design drawings prepared for and used by defendants were valuable and adequate consideration on the part of plaintiff under its contract with defendants.

4. The contract between plaintiff and defendants provided for plaintiff to be paid construction costs and a profit equal to 10% profit [sic] of those construction costs.

5. Garmong was justified in relying upon statements made by Brian Dorsett for defendants to plaintiff and to others that plaintiff had been hired to design and build a new automobile dealership building for defendants, and therefore to incur time and expenses to design a new building for defendants.

7 [sic]. Plaintiff performed its obligations under the contract with defendant[s].

8 [sic]. Defendants breached the contract with plaintiff by not allowing plaintiff to commence construction of the building plaintiff had designed for defendants.

9 [sic]. The changes defendants had MMS & Associates and G. L. Michaels make to the building designed by plaintiff were not material to the basic design concept provided by plaintiff to defendants. As the result of the breach of the contract by defendants, plaintiff has been damaged, and plaintiff is entitled to be placed in a position it would have been had the contract been fulfilled.

10 [sic]. Garmong's lost profit can be ascertained pursuant to the terms of its contract with defendants, which is entitled to 10% of [the] final cost of

the building. At the time Garmong commenced work on the project, its expectation of profit was 10% of \$500,000.00 or \$50,000.00.

12 [sic]. Garmong asked for a judgment of \$119,000, combining their loss of profit based on the final cost of the building as constructed by Michaels and the invoice of \$31,826.34 claimed as unjust enrichment. If Garmong had completed the project and received its profit, the design fees would not include overhead as claimed in the invoice. Therefore, the Court finds that the proper measure of damages is \$50,000 for loss of profit and \$2273.62 for Garmong employee wages and \$26,766.86 owed to HWC for actual costs to Garmong for work performed.

JUDGMENT

IT IS ORDERED that judgment be entered for plaintiff C. H. Garmong & Son, Inc. and against defendants Dorsett Auto Sales, Inc. and Dorsett LLC, and that plaintiff recover from defendants, jointly and severally, the amount of \$79,040.48, plus costs of this action.

Id. at 11-13. This appeal and cross-appeal ensued.

Discussion and Decision

I. Existence of Contract

Dorsett challenges the trial court's determination that it entered into an enforceable contract with Garmong for the design and construction of the Mitsubishi dealership. Where, as here, a party has requested special findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A), we may affirm the judgment on any legal theory supported by the findings. *Ralph E. Koressel Premier Elec., Inc. v. Forster*, 838 N.E.2d 1037, 1045 (Ind. Ct. App. 2005).

In reviewing the judgment, we first must determine whether the evidence supports the findings, and second, whether the findings support the judgment. Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. The judgment will be reversed if it is clearly erroneous. To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. We will not reweigh the evidence or assess witness credibility. Even though there is

evidence to support it, a judgment is clearly erroneous if the reviewing court's examination of the record leaves it with the firm conviction that a mistake has been made.

Id. (citations omitted). We give substantial deference to a trial court's factual findings, but we review questions of law de novo. *Purcell v. S. Hills Inv., LLC*, 847 N.E.2d 991, 996 (Ind. Ct. App. 2006). "Special findings, even if erroneous, do not warrant reversal if they amount to mere surplusage and add nothing to the trial court's decision." *Wagner v. Spurlock*, 803 N.E.2d 1174, 1179 (Ind. Ct. App. 2004).

"The essential elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages." *Fairfield Dev., Inc. v. Georgetown Woods Sr. Apts. L.P.*, 768 N.E.2d 463, 473 (Ind. Ct. App. 2002), *trans. denied*. "Contracts are formed when parties exchange an offer and acceptance." *Fox Dev., Inc. v. England*, 837 N.E.2d 161, 165 (Ind. Ct. App. 2005).

"An implied contract, that is, one wherein an agreement is arrived at by the acts and conduct of the parties, is equally as binding as an express contract, wherein the agreement is arrived at by their words, spoken or written. In either case it grows out of the intention of the parties to the transaction."

Smith v. Smith, 793 N.E.2d 282, 285 (Ind. Ct. App. 2003) (quoting *Retter v. Retter*, 110 Ind. App. 659, 663-64, 40 N.E.2d 385, 386 (1942)). Along those lines, we have stated that

[a] meeting of the minds of the contracting parties, having the same intent, is essential to the formation of a contract. The intent relevant in contract matters is not the parties' subjective intents but their outward manifestation of it. A court does not examine the hidden intentions secreted in the heart of a person; rather it should examine the final expression found in conduct. The intention of the parties to a contract is a factual matter to be determined from all the circumstances.

Zimmerman v. McColley, 826 N.E.2d 71, 77 (Ind. Ct. App. 2005) (citations omitted). “If a party cannot demonstrate agreement on one essential term of the contract, then there is no mutual assent and no contract is formed.” *Fox Dev., Inc.*, 837 N.E.2d at 165. “Whether a set of facts establishes a contract is a question of law.” *Id.*

Turning now to Dorsett’s argument, we first address its objections to finding number 10, which recounts Hannum’s and Brian Dorsett’s testimony about the latter’s desire to have Garmong design and build the dealership. *See* Appellants’ App. at 8 (“After several phone calls, Hannum and Dorsett met and Dorsett, according to Hannum, said, ‘OK, it’s your job.’ Dorsett testified that he said, ‘let’s go forward — get the work done the way I needed it done.’ He later testified that while he did not agree to a contract he did agree to have Garmong build a building. According to Dorsett, the men shook hands on the deal.”). We agree with Dorsett that the trial court’s mere recitation of the evidence does not constitute a finding of fact. *See In re Adoption of T.J.F.*, 798 N.E.2d 867, 874 (Ind. Ct. App. 2003) (“[T]he trier of fact must find that what the witness testified to is the fact. Additionally, the trier of fact must adopt the testimony of the witness before the ‘finding’ may be considered a finding of fact.”). That said, we disagree with Dorsett that finding number 10 misstates Brian’s testimony. *See* Tr. at 286 (when asked whether there was an occasion when he would have shaken Hannum’s hand “and said let’s work together or something along those lines”: “Yes, it was that meeting, that meeting where we uh, uh, I said ‘let[’]s go forward’ I assumed that they were going to be able to . . . get the work done for me. The way I needed it to be done.”); *id.* at 291 (when asked whether he recalled telling Hannum that he was “in agreement with the terms of a contract that [Hannum] had drafted”: “No, I do not recall that

I agreed to a contract. I agreed to let them go ahead and build the building.”). Consequently, we find no grounds for reversal here.

We next address Dorsett’s assertion that it intended “to be bound only after signing a written agreement[.]” Appellants’ Br. at 15. This Court has stated that “[t]he validity of a contract is not dependent upon the signature of the parties, unless such is made a condition of the agreement.” *State v. Daily Express, Inc.*, 465 N.E.2d 764, 767 (Ind. Ct. App. 1984), *trans. denied*; *see also Foster v. United Home Improvement Co.*, 428 N.E.2d 1351, 1356 (Ind. Ct. App. 1981) (“[T]he mere fact that parties who orally assent to all the terms of a contract refer to a future contract in writing does not negative the existence of a present and completed oral contract[.]”) (citation and quotation marks omitted), *trans. denied*. “[S]ome form of assent to the terms is necessary. Assent may be expressed by acts which manifest acceptance.” *Daily Express, Inc.*, 465 N.E.2d at 767 (citation omitted).

The trial court found, and Dorsett does not dispute, that Brian told Garmong “what he wanted in the building, that he had no building plans, that his budget was \$500,000, he wanted a union job and that he wanted occupancy by December 2000.” Appellants’ App. at 8 (finding 7); *see also* Tr. at 12 (Hannum’s testimony regarding Brian’s priorities, which “were pretty well stated and clear.”). Brian’s own testimony indicates that he “agreed to let [Garmong] go ahead and build the building” and “get the work done” the way he “needed it to be done.” Tr. at 291, 286. Although Brian never signed the revised written contract that Hannum gave him, he told Hannum that “everything looked fine” and that he would “sign it and bring it into the office the next time [he came] in.” *Id.* at 18. The contract “provided that work would be completed by December 1, 2000; that plans were to be prepared by Garmong

and accepted by the owner before building commenced; that a final budget would be presented following acceptance of plans; that Garmong would be reimbursed for all contractor costs plus receive a fee of 10 percent of total costs and that Garmong would not be reimbursed for its office costs, corporate overhead and accounting services.” Appellants’ App. at 9 (finding 14).

Dorsett manifested its assent to Garmong’s offer to design and build the dealership by telling Garmong “it’s your job” and to “get the work done,” instructing Garmong to “take over the site work from Myers [Engineering,]” telling “the other construction companies he had contacted originally that he had hired Garmong[,]” and participating in the design-and-build process with Garmong’s design team from July through September of 2000. Appellants’ App. at 8-9 (findings 10, 11, 17, 19, and 20). In sum, the evidence most favorable to the trial court’s judgment establishes that Dorsett did not intend to be bound only after signing a written agreement.

Finally, we address Dorsett’s argument that no enforceable contract existed because the parties never agreed on a final price or a final design. This lack of agreement, Dorsett contends, demonstrates a lack of intent to be bound. The question of whether an agreement is an enforceable contract or merely an agreement to agree involves the interrelated issues of definiteness of terms and intent to be bound. *See Wolvos v. Meyer*, 668 N.E.2d 671, 675 (Ind. 1996) (addressing option contracts). “To be enforceable, contracts must be sufficiently definite; amounts and prices must be fixed, or be subject to some ascertainable formula or standard.” *Inman’s Inc. v. City of Greenfield*, 412 N.E.2d 126, 129 (Ind. Ct. App. 1980).

Dorsett observes that by September 2000, Garmong had not yet submitted—and thus Dorsett had not yet approved—a final design within Dorsett’s \$500,000 budget and had not begun to build the dealership, which Dorsett wanted finished by December. Dorsett argues that “[i]f Garmong intended to be bound to design a [\$500,000] guaranteed maximum cost building for Dorsett, it would have submitted plans within that cost structure.” Appellants’ Br. at 14.

Dorsett’s argument misapprehends the nature of the design-and-build process, which Hannum described to the trial court (and to Brian) as follows:

[A] design buil[d] project works like a circle of design and price and re-design and re-price uh, until we get the design that he likes and the price that he wants to spend. So we, we start with throwing everything that he wants in the building uh, together on a, on a plan uh, and we call that a concept drawing, uh, then we price that. We tell him that he’s basically got his list of everything that, that’s his wish list and we say “okay, that’s going to cost this many dollars.” And we compare that to his original plan and if it’s to[o] high and it usually is, we will start taking things out until he gets another plan that he likes and then we’ll re-price that if we feel like we’re making progress on the price. So it keeps going around until we agree on a plan and then we, and then we come up with a final price on that.

....

We’ve got to make sure we know what he wants to accomplish. *And [Brian’s] priorities were pretty well stated and clear. He, he wanted, as I said, we talked about the service bays and the showroom. He wanted to spend Five Hundred Thousand Dollars (\$500,000.00) was his budget. He wanted uh, he wanted it to be a union project and he had to be uh, occupied by the end of the year. It was either the end of the year or it might have been the first of December. It was very critical to his deal with Mitsubishi that the building be ready in that time frame.*

Tr. at 10-11, 12 (emphasis added).

The evidence most favorable to the judgment establishes that both parties intended to be bound by their agreement and that Garmong was fulfilling its obligations when Dorsett got cold feet in the middle of the design-and-build process and took Garmong's copyrighted plans to another builder.² Although the parties had not yet agreed upon a final price and a final design, those terms (as well as others, such as the nature of the work and its completion date³) were sufficiently definite to constitute an enforceable contract, which Dorsett breached by changing horses midstream.⁴ We therefore affirm the trial court's ruling on this issue.⁵

² The following exchanges occurred between Dorsett's counsel and Hannum at trial:

Q [I]f Mr. Dorsett during that meeting where you said that you proposed the Seven Hundred Fifty Thousand Dollars (\$750,000.00) guarantee and presented drawings like ones you've shown here, if he had said at that point, "you know I've got a different, I've got a different model in mind now. I want it to be a different structure uh, building and I still need it to be more like Five Hundred Thousand Dollars (\$500,000.00)." Wouldn't you have just from that point continued on in the process of trying to come up with drawings that he would have eventually approved?

A Yes we would have.

Tr. at 94-95.

Q And that, at the time, at the point in time when Mr. Dorsett and Garmong parted ways in late September of 2000, it would no longer have been possible for a building to have been built so that he could have opened up his business within three (3) months. True?

A No that's not true. In, in late September we could still get it done by the end of the year.

Id. at 98.

³ See *Don Webster Co. v. Ind. W. Express, Inc.*, 161 F. Supp. 2d 959, 970 (S.D. Ind. 2001) ("Under Indiana law, in order to be valid and enforceable, a contract must be reasonably definite and certain in its terms. Terms such as the price for the work, the nature of the work, and time in which the work was to be completed should be stated clearly in the agreement.") (citation omitted).

⁴ Dorsett claims that Garmong "agreed that under the design build concept, the customer could end the process if not satisfied." Appellants' Br. at 13 (citing Tr. at 10-12). This claim is unsupported by the record. Dorsett does not specifically challenge the trial court's determination that it breached the contract.

II. Calculation of Damages

Both parties challenge the trial court's calculation of Garmong's damages. Having determined that a contract existed between Dorsett and Garmong, we need not address Dorsett's arguments regarding the proper measure of damages for an unjust enrichment claim. With respect to breach of contract damages, Dorsett first contends that because the parties never agreed on a final design or a final cost, "Garmong's expected profits could only total ten percent (10%) of its actual costs, according to the written agreement. Garmong's total costs were less than Thirty Thousand Dollars (\$30,000), therefore its lost profits would total less than Three Thousand Dollars (\$3,000)." Appellants' Br. at 20.

We disagree. "Damages are awarded to compensate an injured party fairly and adequately for the loss sustained." *INS Investigations Bureau, Inc. v. Lee*, 784 N.E.2d 566, 577 (Ind. Ct. App. 2003), *trans. denied*. "A party injured by a breach of contract may recover the benefit of the bargain." *Id.*

Where a contractor is prevented from completing a project by the owner, the contractor, as a part of its measure of damages, is entitled to its lost profit. Lost profits may be compensable if the evidence is sufficient to estimate the actual amount for profits lost with a reasonable degree of certainty.

⁵ Dorsett takes issue with the trial court's references to the "course of dealing" between Brian and Hannum and the "pattern of dealing" between Brian and G. L. Michaels Construction. Appellants' App. at 11-12 (conclusions 1 and 2). It is true, as Dorsett points out, that "course of dealing" relates only to the parties to the contract at issue, specifically as to "conduct under other transactions which occurred with regularity prior to the formation of the present contract[.]" BLACK'S LAW DICTIONARY 378 (8th ed. 2004). Be that as it may, these references are mere surplusage and do not warrant reversal. *Wagner*, 803 N.E.2d at 1179. In light of the definition of "course of dealing," we are unpersuaded by Dorsett's argument that its "intent to be bound only after signing a written agreement is ... demonstrated by Dorsett entering into a written contract with another contractor after Garmong's proposals were rejected." Appellants' Br. at 15.

Ind. & Mich. Elec. Co. v. Terre Haute Indus., Inc., 507 N.E.2d 588, 601 (Ind. Ct. App. 1987) (citation omitted), *trans. denied* (1988). “Lost profits are not uncertain where there is testimony that, while not sufficient to put the amount beyond doubt, is sufficient to enable the factfinder to make a fair and reasonable finding as to the proper damages.” *Berkel & Co. Contractors, Inc. v. Palm & Assocs., Inc.*, 814 N.E.2d 649, 659 (Ind. Ct. App. 2004). “[A]ny doubts and uncertainties as to proof of the exact measure of damages must be resolved against the defendant.” *Id.*

Had Dorsett not breached the contract and allowed Garmong to finish designing and constructing the dealership, there is no doubt that Garmong’s actual costs would have far exceeded \$30,000. Garmong is entitled to recover the benefit of the bargain, which was to be compensated for designing and building a dealership within Dorsett’s \$500,000 budget. There can be little doubt that the parties fully expected that the final cost of the project would reach the upper limits of that budget.

That \$500,000 budget, however, was to include Garmong’s fee for 10% of its construction costs. *See* Appellants’ App. at 44 (written contract drafted by Garmong stating that its “scope of work will be provided on a ‘Cost plus a fee’ basis with an agreed guaranteed maximum owner outlay.”); Tr. at 38 (Hannum’s testimony that \$750,000 price tag for second design included Garmong’s profit). For that reason, we agree with Dorsett that the trial court clearly erred in finding Garmong’s lost profits to be 10% of \$500,000, or

\$50,000. Instead, Garmong's lost profits should be \$45,454.55.⁶ Dorsett does not challenge the trial court's calculation of Garmong's costs, which it found to be \$2273.62 for employee wages and \$26,766.86 for HWC's architectural engineering services, thus bringing Garmong's total damages to \$74,495.03 ($\$45,454.55 + \$2273.62 + \$26,766.86 = \$74,495.03$).

On cross-appeal, Garmong contends that its 10% fee should be based on the dealership that was actually built, for which G. L. Michaels charged Dorsett \$878,877. In so contending, Garmong relies on the aforementioned language from *Berkel & Co.* that any doubt "as to the proof of the exact measure of damages must be resolved against the defendant." 814 N.E.2d at 659. Garmong's argument ignores the fact that Dorsett and Garmong did not agree to the design and construction of a dealership costing almost \$900,000. Instead, Garmong agreed to complete the job within Dorsett's stated budget of \$500,000. Any other figure would be purely speculative.⁷

In conclusion, we affirm the trial court's determination that an enforceable contract existed between Dorsett and Garmong. We reverse the trial court's calculation of Garmong's damages and remand with instructions to enter judgment in favor of Garmong in the amount of \$74,495.03.

Affirmed in part, reversed in part, and remanded.

⁶ If Garmong's costs equal x , then Garmong's fee equals $1/10 x$. If x plus $1/10 x$ equals \$500,000, then x equals \$454,545.45 ($\$500,000 \div 1.1 = \$454,545.45$). Rounded to the nearest cent, one-tenth of \$454,545.45 is \$45,454.55.

BAKER, J., and VAIDIK, J., concur.

⁷ Garmong points to Brian’s testimony that Dorsett’s budget was “somewhere between five and six hundred thousand” dollars. Tr. at 284. The trial court found that Dorsett’s budget was \$500,000, which is supported by Garmong’s own evidence. *See id.* at 12, 81-82 (Hannum’s testimony that Dorsett’s budget was \$500,000).