DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GENERATIONS RANCH, LLC, a limited liability company, Plaintiff/Appellant, v. RICHARD ZARBOCK and ELIZABETH ZARBOCK, individually and doing business as ARIZONZA MD BARN COMPANY, Defendants/Appellees.	1 CA-CV 10-0771 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-011463

The Honorable Jeanne Garcia, Judge

AFFIRMED

Walker & Harper, P.C. — Payson
By Michael J. Harper
Attorneys for Plaintiff/Appellant

Titus Brueckner & Levine PLC — Scottsdale
By John R. Tellier
Attorneys for Defendants/Appellees

T I M M E R, Presiding Judge

¶1 In this breach-of-contract case, plaintiff Generations Ranch, LLC, ("Generations") appeals the trial court's judgment in favor of defendants Richard and Elizabeth Zarbock and their business, Arizona MD Barn Company (collectively, "MD Barn"). Generations argues the court improperly relied on and applied the Uniform Commercial Code, as adopted in Arizona ("UCC"), and erroneously interpreted the parties' contract in ruling that MD Barn did not breach its agreement to construct a horse barn on Generations' property. For the reasons that follow, we disagree and therefore affirm.

BACKGROUND[1]

¶2 MD Barn is a dealer of modular pre-engineered steel barns manufactured by MD Enterprises, Inc. (the "Manufacturer"). On November 19, 2004, MD Barn and Generations entered into a written proposal/contract ("Contract") whereby Generations would purchase, and MD Barn would deliver and erect, modular components for an eleven-stall horse barn on Generations' ranch property outside Casa Grande. The Contract required Generations to pay MD Barn a total of $149,437, payable in essentially three stages: pre-delivery, construction progress payments, and a final payment upon completion.

[1] We view the evidence in the light most favorable to upholding the judgment. *Federoff v. Pioneer Title & Trust Co. of Ariz.*, 166 Ariz. 383, 388, 803 P.2d 104, 109 (1990).

¶3 Contrary to MD Barn's recommendations and normal business practice, it acquiesced to Generations' demand that the barn components be delivered before the concrete pad upon which the barn would be erected was laid.[2] Although it appears from the record that MD Barn typically pours the concrete as part of its normal services for customers, Generations "took the concrete work out of [the] [C]ontract[,]" and made arrangements with another party for the concrete work.

¶4 Generations paid MD Barn the requisite pre-delivery payment of $124,675, and "[a]ll the barn component parts[]" were delivered on July 11, 2005, directly from the Manufacturer. The components consisted of "two truckloads worth of materials" that, when unloaded, comprised a pile approximately one hundred yards long. Later that day, MD Barn delivered bundle-wrapped, one-inch thick sheets of foam insulation.

¶5 Around July 23, a wind storm passed through the area and "relocate[d] some [of the] insulation." A day or two later, Zarbock visited the site and drove around the property with Donald Paunil, a member of Generations who was responsible for

[2] Richard Zarbock, a principal of MD Barn, testified, "Barns are always delivered after the concrete is done. . . . And we start building and erecting the building the same day." He explained that this practice is preferred for scheduling purposes and because "[a] barn laying down on the ground will deteriorate." Zarbock further explained that when construction begins immediately after delivery, any missing parts will be discovered and quickly remedied.

construction projects on the ranch. They discovered "miles" of insulation "crumbs" that looked like "snow[.]"

¶6 Also during this visit, a dispute arose between Zarbock and Paunil regarding a purportedly missing box of fasteners needed to construct the barn. According to Generations, MD Barn accused Generations of misappropriating it while Generations maintained the Manufacturer never delivered the fasteners.

¶7 Relying on a provision in the Contract that placed any risk of loss on Generations after the barn components were delivered, on September 8 Zarbock recommended that Generations provide its insurance company with a quote to purchase and ship replacement fasteners and insulation. Generations refused to accept responsibility for the missing/destroyed materials and instead demanded MD Barn bear the replacement costs.

¶8 The dispute remained unresolved when, on September 28, the concrete was poured, and Generations requested MD Barn begin erecting the barn "as soon as possible." Generations made this request despite Paunil's concern that the concrete pad was cracking. MD Barn responded by letter dated October 11, informing Generations that its failure to pay for replacement of the insulation and fasteners constituted repudiation of the Contract. MD Barn therefore demanded reasonable and adequate assurances from Generations in the form of a certified check or

payment into escrow of an amount constituting the replacement costs plus the $24,762 balance of the Contract. Alternatively, MD Barn proposed to resolve the dispute by terminating the Contract through a mutual release so that Generations could "contract to have the barn constructed as [it] see[s] fit." Instead of providing the requested assurances that it would perform on the Contract, or agreeing to terminate the Contract, Generations demanded on October 31 that MD Barn "come out to the job site to pre-approve the concrete before beginning erection of the barn" and additionally noted, "[c]ommencing construction of the barn will indicate your acceptance and approval of the concrete and that the full barn warrantee period and warrantee coverage will be in effect." Based on Generations' refusal to provide adequate assurances, MD Barn did not commence work on the barn.

¶9 At some point, the concrete pad was ripped out and replaced, and on June 7, 2006, Generations informed MD Barn that Paunil had discovered the box of fasteners hidden in the pile of barn components. Generations stated it was "ready to move forward with the construction of the barn as soon as possible." MD Barn apparently ignored Generations, which in turn contracted

with another party to construct the barn with the assistance of the Manufacturer.[3] The barn was completed in March 2007.

¶10 On July 2, Generations filed a complaint against MD Barn for breach of contract and breach of the covenant of good faith and fair dealing. Generations prevailed at arbitration, and MD Barn appealed to superior court. After a two-day bench trial, the court ruled in MD Barn's favor on both claims. Generations unsuccessfully moved for a new trial, and this timely appeal followed.

¶11 We will defer to the trial court's factual findings unless they are clearly erroneous, but "we draw our own legal conclusions from [the] facts found or implied in the judgment." *In re Marriage of Gibbs*, 227 Ariz. 403, 406, ¶ 6, 258 P.3d 221, 224 (App. 2011) (citations and internal quotation marks omitted). We review the court's denial of Generations' motion for new trial for an abuse of discretion. *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, 135, ¶ 6, 163 P.3d 1083, 1085 (App. 2007).

[3] Once construction commenced, MD Barn delivered further components that it had stored at its facility; components Zarbock explained are typically delivered upon or near construction of the final building because they are not necessary to construction and are mobile and therefore easily stolen.

DISCUSSION

I. Applicability of UCC

¶12 Generations argues the court incorrectly relied on the UCC in reaching its decision. Specifically, Generations contends the Contract was predominantly one regarding services, not goods, thus rendering the UCC inapplicable to this case. MD Barn responds the court properly found that the Contract primarily concerned goods and therefore fell within the scope of the UCC.

¶13 The UCC applies only to transactions involving goods, not services. *See* Ariz. Rev. Stat. ("A.R.S.") § 47-2102 (2005). The Contract unquestionably concerns both goods (barn components) and services (installation). When deciding whether the UCC applies to such mixed contracts, Arizona courts first determine the predominate purpose of the contract and then apply the UCC only if the sale of goods predominates. *Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 509-10, ¶ 33, 114 P.3d 835, 841-42 (App. 2005). Determining the predominant purpose of such a contract often involves resolving issues of fact, *id*. at 510, ¶ 34, 114 P.3d at 842, but whether a contract is predominantly one for goods or services is ultimately an issue of law. *See Hall Family Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 388, 916 P.2d 1098, 1104 (App. 1995) (holding contract interpretation generally a

question of law); *MBH, Inc. v. John Otte Oil & Propane, Inc.*, 727 N.W.2d 238, 245-46 (Neb. Ct. App. 2007) (following other jurisdictions' holdings that whether sale of goods predominate a contract is generally a question of law).

¶14 The court in this case did not make specific findings regarding the predominant purpose of the Contract. Because it applied the UCC, however, we assume the court found the predominant purpose was for the sale of goods.[4] *See John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 540, ¶ 23, 96 P.3d 530, 538 (App. 2004) ("[i]mplied in every judgment, in addition to express findings made by the court, is any additional finding that is necessary to sustain the judgment, if reasonably supported by the evidence, and not in conflict with the express findings.") (citation and internal quotation marks omitted).

¶15 Applying the predominant-purpose test, we conclude the record sufficiently supports the trial court's implicit finding that the Contract was predominantly one for the sale of a good (the barn) with services (assembly) attendant thereto:

[4] Generations asserts in its reply brief that we cannot assume the trial court decided the predominant purpose of the Contract because the court failed to make any findings on the topic. Generations has waived this argument, however, because it failed to point out the alleged insufficiency of the findings to the trial court, thereby depriving that court of the ability to correct any error. *Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990).

(1) MD Barn's proposal, reflected in the initial lines of the Contract, was "for the sale . . . of MD designed modular barns, corrals, shelters, freestanding or other MD products and optional accessory items." *See Tivoli Enters., Inc. v. Brunswick Bowling & Billiards Corp.*, 646 N.E.2d 943, 948 (Ill. App. Ct. 1995) (holding introductory language in sales contract stating buyer ordering bowling lane components and equipment suggests thrust of contract is one for goods). Additionally, Paunil, one of Generations' members, "really wanted an MD Barn."

(2) MD Barn explicitly limited its proposal to the sale and delivery of specific materials and excluded installation and installation-related tasks unless otherwise noted in the Contract; the parties checked a provision in the Contract indicating MD Barn would install the barn components, but Generations remained responsible for erecting a concrete slab on which the barn would rest. This provision suggests that while the goods identified for purchase and delivery were unique and required to fulfill the Contract terms, installation of the components could have been accomplished by third parties and was therefore a less

important component of the deal struck between the parties. Indeed, a third party ultimately installed the barn components.

(3) The Contract provided "Manufacturer's Warranties" that applied to the barn's walls and roof but did not provide warranties regarding labor. *See id.* (deciding existence of warranties for goods but not labor supported conclusion that contract was primarily for goods).

(4) The Contract price included sales tax, which applies only to goods. *See Qwest Dex, Inc. v. Ariz. Dep't of Revenue*, 210 Ariz. 223, 226, ¶ 17, 109 P.3d 118, 121 (App. 2005) (holding that if dominant purpose of transaction is service, the transaction is not taxable); *Tivoli Enters.*, 646 N.E.2d at 948 (noting sales tax included in contract price indicates contract primarily for goods).

(5) Finally, the evidence reasonably supports a finding that the majority of the Contract price, $149,347, compensated MD Barn for goods rather than services. Specifically, Generations was required to pay the majority of that price, $124,675, prior to installation, leaving $24,762 owing after commencement of installation. And the third party which eventually

assembled the barn charged $30,321, which included provision of $11,771 in replacement insulation. *See MBH,* 727 N.W.2d at 247 (deciding fact that majority of purchase price of ongoing business was allocated to non-goods supports finding that UCC inapplicable).

¶16 Although, as Generations emphasizes, the Contract also provides for installation (services), which had to be accomplished to secure a finished barn and provide value to Generations, this fact alone does not mandate a conclusion that the predominate purpose of the Contract was the provision of services. If that was so, all contracts for the sale and installation of goods likely would be considered services, which is not the case. *See, e.g., Tivoli Enters.,* 646 N.E.2d at 948 (concluding contract for sale and installation of bowling lanes predominantly one for goods); *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co*., 532 F.2d 572, 580 (7th Cir. 1976) (holding contract for construction and erection of one million-gallon water tank predominantly one for sale of goods); *Cleveland Lumber Co. v. Proctor & Schwartz, Inc*., 397 F. Supp. 1088, 1092 (N.D. Ga. 1975) (concluding transaction involving sale and installation of wood drying kiln predominantly involved goods).

¶17 Generations' reliance on *Double AA Builders* does not persuade us to reach a different conclusion. In that case, a

subcontractor, which was the successful bidder to install exterior insulation on a commercial building project, refused to sign a contract or perform because it could not accommodate the general contractor's building schedule due to staffing issues. 210 Ariz. at 505, ¶ 6, 114 P.3d at 837. In the ensuing lawsuit, this court addressed the applicability of the statute of frauds, which does not apply to a contract for services, to a subcontract that contemplates both the provision of goods and services. *Id*. at 509, ¶ 32, 114 P.3d at 841. Applying the predominant-purpose test, we held that sufficient facts supported a determination that the predominant purpose of the contemplated contract was for services because the subcontractor's bid included labor and materials, and the subcontractor was required to be licensed by the Arizona Registrar of Contractors in order to perform under the agreement. *Id.* at 510, ¶ 36, 114 P.3d at 842. In the present case, although MD Barn was required to be licensed to assemble the barn, a fact that favors Generations' position, other factors exist showing that sale of goods was the predominant purpose of the Contract. *See supra* ¶ 15. Moreover, MD Barn contracted to supply a unique product – a MD Barn-designed barn – while the subcontractor in *Double AA Builders* competed with other subcontractors to supply and install the same product. 210 Ariz. at 505, ¶¶ 2-3, 114 P.3d at 837. The uniqueness of

the goods underlying the Contract further supports a conclusion that its predominant purpose was to supply goods.

¶18 Generations cites several cases from other jurisdictions to support its position that the service portion predominates in a contract for sale and installation of goods. These cases do not persuade us to reach a different result. Two of the cases involve a contract for the provision of services only, so they do not shed light on the situation before us. *See Hunter's Rune Stables, Inc. v. Triple H Constr. Co., Inc.*, 938 F. Supp. 166, 168 (W.D.N.Y. 1996) (stating that contract for construction of horse barn not governed by UCC because it did not involve a sale of any goods); *Al & Zack Brown, Inc. v. Bullock*, 518 S.E.2d 458, 462 (Ga. Ct. App. 1999) (deciding UCC inapplicable because contract not for sale of steel but for fabrication of steel supplied by others and for installation services). The remaining cases do not employ a bright-line rule that contracts involving construction are always exempted from the UCC, as Generations contends; rather, they turn on the unique facts of the particular cases. *See Wehr Constructors, Inc. v. Steel Fabricators, Inc.*, 769 S.W.2d 51, 54 (Ky. Ct. App. 1988) (deciding real estate construction contract that incorporated sale of goods not covered by UCC); *Art Metal Products Co. of Chicago v. Royal Equip. Co.*, 670 S.W.2d 152, 155-56 (Mo. Ct. App. 1984) (holding that subcontract for

installation of lockers delivered to school by third party, as arranged by subcontractor, not governed by UCC as subcontractor predominantly provided installation service); *N. Farm Supply, Inc. v. Sprecher*, 307 N.W.2d 870, 874 (S.D. 1981) (concluding contract to build a hog confinement building that did not provide for sale of raw materials a construction contract not subject to UCC); *Ames Contracting Co. v. City Univ. of N.Y.*, 466 N.Y.S.2d 182, 185 (N.Y. Ct. Cl. 1983) (noting construction contracts generally exempted from UCC and holding contract at issue exempted because it was predominantly for services), *rev'd on other grounds*, 108 A.D.2d 609 (N.Y. App. Div. 1985).

¶19 In sum, we hold the trial court did not err by implicitly finding the UCC applicable to the Contract because the sale of goods predominated.

II. Acceptance of goods

¶20 Generations next argues the court misapplied A.R.S. § 47-2601 (2005), which provides that a buyer may accept, reject, or reject in part any goods or delivery that does not conform to the sales contract. To reject all or part of the goods, a buyer must do so "within a reasonable time after their delivery" and must seasonably notify the seller. A.R.S. § 47-2602(A) (2005). A buyer is relieved of all obligations for goods rightfully rejected. *Id*. at 47-2602(B)(3). Conversely, by accepting delivered goods, a buyer waives any claim that those goods did

not conform to the contract. *Pac. Am. Leasing Corp. v. S.P.E. Bldg. Sys., Inc.*, 152 Ariz. 96, 100-01, 730 P.2d 273, 277-78 (App. 1986).

¶21 The trial court concluded Generations failed to reject the barn components after a reasonable opportunity to inspect had passed. As a result, relying on A.R.S. §§ 47-2602(A), and 47-2606(A)(2) (2005), the court ruled that Generations accepted the components and, under the terms of the Contract, assumed responsibility to safeguard them. The court decided that Generations therefore bore the risk of missing or damaged barn components.

¶22 Generations argues the court erred in its ruling because (1) the UCC does not apply to the Contract, and (2) assuming the UCC applies, Generations did not waive its right to contest that MD Barn delivered goods that conformed to the Contract because (a) MD Barn never tendered delivery or, alternatively, (b) a reasonable time to inspect the goods did not occur until erection of the barn. As previously explained, the trial court did not err by ruling that the UCC applies to the Contract; we therefore reject Generations' initial argument. Generations did not argue to the trial court that MD Barn failed to tender delivery of the barn until the barn was erected, so it has waived this issue on appeal. *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.,* 215 Ariz. 103, 109-10, ¶ 17, 158 P.3d

232, 238-39 (App. 2007) (noting party waives argument raised for first time on appeal as trial court had no opportunity to address the issue). Because Generations argued to the trial court it never accepted the barn components, it preserved that issue for appeal, and we therefore address it.

¶23 Generations asserts it was impossible for it to inspect the delivered barn components because no one conducted a formal inventory with Generations, and it had no way of knowing whether the components conformed to the Contract until the third party eventually erected the barn. As Generations points out, the components would have stretched one hundred yards when laid end to end, and Zarbock (MD Barn) admitted that customers would neither understand nor recognize the components. As a result, Generations argues it was never in a position to accept or reject the components, and the trial court erred by ruling otherwise.

¶24 What constitutes a "reasonable opportunity" for inspection depends on the circumstances of the particular case, A.R.S. § 47-1205(A) (Supp. 2010), and is generally a question of fact. *See G&H Land & Cattle Co. v. Heitzman & Nelson, Inc.*, 102 Idaho 204, 208, 628 P.2d 1038, 1042 (Idaho 1981) (collecting cases). The evidence in the record supports the trial court's finding that a reasonable opportunity for inspection passed without action by Generations.

¶25 The Contract did not provide any terms for inspection and did not obligate MD Barn to participate in conducting a formal inventory with Generations or provide an itemization of the goods. Once the barn components were delivered to Generations, it was incumbent on Generations to arrange any desired inspection. *See generally* A.R.S. § 47-2513(B) (providing that "[e]xpenses of inspection must be borne by the buyer but may be recovered from the seller if goods do not conform and are rejected"); *Heil-Quaker v. Swindler*, 255 F. Supp. 445, 449 (D.S.C. 1966) (holding that duty on buyer to inspect goods after given a reasonable opportunity to do so). Although we agree with Generations that the reasonable time to inspect the barn components was lengthened by MD Barn's refusal of Generations' request to assist in inventorying the multitude of components, we disagree this time stretched until the third party erected the barn (March 2007).[5] First, Generations does not point to any evidence regarding efforts it made to inspect the components after MD Barn's refusal. The fact the Manufacturer later supplied replacements for missing parts indicates it was possible to determine what, if anything, was missing at the time of delivery. Second, Generations was placed on notice by October 2005 that MD Barn would not erect the barn

[5] Neither party states whether Generations ever notified MD Barn of Generations' rejection of the barn components after erection of the barn.

without assurances Generations would pay for replacement fasteners and insulation. Rather than immediately retaining a third party to inspect the components in preparation for erecting the barn, thereby discovering any missing or nonconforming components, Generations waited until June 2006 to ask MD Barn again to commence erection of the barn and then subsequently hire a third party to do the job. In the meantime, the components sat outside, potentially hindering anyone's ability to accurately assess what was delivered and in what condition in July 2005. Despite the difficulty of inspecting the barn components, Generations was required to do something to complete its desired inspection. The court acted within its discretion by finding Generations failed to take action within a reasonable timeframe to complete an inspection of the goods.

¶26 Additionally, as MD Barn contends, by using the components to erect the barn, Generations accepted the components. The Contract states that "[a]ny use by customer constitutes complete and unconditional acceptance of barn/materials." More than one year after MD Barn stated it would not erect the barn without reasonable assurances Generations would pay for replacement fasteners and insulation, a third party erected the barn using the MD Barn-supplied components. At the latest, therefore, Generations accepted the barn components by that time.

III. Insurance

¶27 Generations finally argues the court erred by concluding Generations breached the Contract by failing to insure the barn components as the Contract only required Generations to insure the completed barn and materials against third party claims. But the court did not rule that Generations breached the Contract by failing to insure the barn components. Read in context, the court merely highlighted Contract provisions establishing that Generations was responsible for the barn components after delivery, thereby relieving MD Barn of any liability for the damaged insulation:

> Generations Ranch was responsible for the barn components upon delivery pursuant to the Paragraph 3 of the Contract. In addition, Paragraph 8 required Generations Ranch to insure the components. Therefore, Arizona MD Barn is not responsible for the damaged insulation.

Even assuming the Court misstated the breadth of the insurance obligation, the court's error would not mandate reversal. The pertinence of the Contract provision is to establish the time that risk of loss transferred to Generations – the date of delivery – regardless of the extent of the insurance obligation. We therefore reject Generations' argument.

Attorney's fees on appeal

¶28 Both parties request attorney's fees expended on appeal pursuant to A.R.S. § 12-341.01 (2003). We deny

Generations' request as it did not prevail. We grant MD Barn's request subject to its compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶29 For the foregoing reasons, we affirm.

_____
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

_____
Daniel A. Barker, Judge*

_____
Patrick Irvine, Judge*

*Judge Daniel A. Barker and Judge Patrick Irvine were sitting members of this court when the matter was assigned to this panel of the court. Both judges retired effective December 31, 2011. In accordance with the authority granted by Article 4, Section 3 of the Arizona Constitution and pursuant to Arizona Revised Statutes section 12-145 (2003), the Chief Justice of the Arizona Supreme Court has designated Judges Barker and Irvine as judges pro tempore in the Court of Appeals, Division One, for the purpose of participating in the resolution of cases assigned to this panel during their terms in office.