

STATE OF MICHIGAN
COURT OF APPEALS

HART ENTERPRISES INC.,

Plaintiff-Appellee,

v

VITAL CONCEPTS INC.,

Defendant-Appellant.

UNPUBLISHED

February 23, 1999

No. 207514

Kent Circuit Court

LC No. 96-011424 CK

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant Vital Concepts Inc. appeals as of right an order granting plaintiff Hart Enterprises Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

I. Basic Facts And Procedural History

Vital Concepts designs and assembles medical instruments and other products for use in the medical field. Vital Concepts began negotiating with Hart Enterprises to produce aluminum tubes in two sizes: 5 mm and 10 mm. Hart Enterprises received from Vital Concepts a request for a price quotation using a quotation from another company, Easton Inc., for the raw materials. The quotation from Easton was for raw materials that had outside diameters of approximately 5.5 mm and 9.5 mm. Hart Enterprises prepared additional price quotations and faxed Vital Concepts revised specifications regarding the outside diameter using the measurements from Easton Inc.

Hart Enterprises submitted a price quotation, which was valid for thirty days, for "5 mm" and "10 mm" tubes, which contained a delivery schedule and various terms. Vital Concepts faxed to Hart Enterprises an order purchasing "5 mm" and "10 mm" tubes at the price and quantity listed. Both parties agree that a contract was entered into upon Vital Concepts' acceptance of the offer.

In January 1996, Vital Concepts asked for samples of the tubes for sterilization and validation by a third party. In April 1996, Hart Enterprises prepared invoices and hand delivered them to Vital Concepts, which stated that 7,904 of the 5.5 mm tubes and 7,883 of the 9.5 mm tubes had been shipped, although a notation on the invoices stated that unassembled parts were awaiting receipt of customer supplied components. After sterilization and validation, Vital Concepts sent the samples to a

distributor who notified Vital Concepts that the tubes did not fit in the medical instrument. In late April of 1996, Vital Concepts' executive vice president informed Hart Enterprises' chief engineer and director of sales and marketing that the tubes were the incorrect size and to halt production.

When Vital Concepts refused to pay the balance on the contract, Hart Enterprises brought the present suit alleging breach of contract. Vital Concepts asserted in the answer that the tubes were not produced in accordance with the contract. The trial court granted Hart Enterprises' motion for summary disposition on the issue of liability for parts produced.

II. Standard of Review

Our review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The court considers the documentary evidence submitted to determine whether a genuine issue of any material fact, except as to the amount of damages, exists to warrant a trial. *Id.* In reviewing the decision on the motion, this Court must give the benefit of the doubt to the nonmoving party, then determine whether there is a genuine issue of material fact precluding summary disposition. *Quinto v Cross & Peters*, 451 Mich 358, 362-363; 547 NW2d 314 (1996)

III. Genuine Issue Of Material Fact

Vital Concepts contends the trial court erred in granting summary disposition because there was a genuine issue of material fact regarding liability dealing with the product specifications. Vital Concepts argues that when 5 mm and 10 mm tubes were ordered, these were exact measurements and the tubes should have been produced in accordance with them. Hart Enterprises, however, contends that it produced tubes that were in accordance with the specifications that were given to Hart Enterprises, and that this was confirmed by engineering drawings and referenced in specifications Hart Enterprises faxed to Vital Concepts.

We note that there was evidence that the terms "5 mm" and "10 mm" merely served as labels for tubes that actually had different outside diameters. However, there was also affidavit testimony that in the industry, 5 mm means 5.0 mm. In deciding a motion for summary disposition, "[t]he court may not make factual findings or weigh credibility." *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). Whether 5 mm and 10 mm were exact measurements or merely served as labels is a question that must be left to the trier of fact to decide. Thus, we conclude that the trial court inappropriately granted summary disposition.¹

Reversed and remanded for trial. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Richard Allen Griffin

¹ The parties have stipulated that, if this Court reverses the grant of summary disposition, the trial on remand should include the question of liability and, if appropriate, damages.