

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER MILLER d/b/a/ THE CHRIS
MILLER CO.,

UNPUBLISHED
July 23, 1999

Plaintiff-Appellant,

v

WIMSATT BUILDING MATERIALS
CORPORATION,

No. 206217
Macomb Circuit Court
Circuit Court No. 95-002333 AV
Dist. Court No. 94-043035 GC

Defendant-Appellee.

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order reversing the district court's denial of defendant's motions for directed verdict and for judgment notwithstanding the verdict in this breach of contract action. We affirm.

Plaintiff contracted with MJC Construction Management for the installation of roofing material on a 55-unit condominium project. Plaintiff purchased the first batch of materials from a supplier and completed roofing of the model home. Thereafter, defendant's sales representative approached plaintiff and quoted a price for supplying roofing material for the remainder of the project. Plaintiff placed an order for the second unit and, pending plaintiff's credit application, paid for the order by check. The check was later returned for insufficient funds.¹

Plaintiff submitted a second order on credit, but before defendant would deliver the supplies, it demanded payment on the returned check. Plaintiff paid cash and the second delivery was made. Plaintiff placed a third order. However, based on defendant's determination that plaintiff failed to timely pay the invoice for the second order and that plaintiff's check for the first order was returned for having insufficient funds, defendant exercised its right to withhold delivery according to the terms and conditions of the credit application. Defendant asserts that the October 28, 1992 order was due on November 10, 1992.² Because of plaintiff's inability to secure materials and complete the subsequent units in a timely fashion, its contract was terminated by MJC.

Plaintiff filed this action seeking damages for breach of contract based on an alleged agreement to deliver roofing materials for the entire 55-unit project.³ In support of his position, plaintiff relied upon a credit application, a personal guaranty, and the invoices for delivery of roofing materials for two units. Defendant moved for a directed verdict on the grounds that there was no enforceable written agreement for the delivery of material for all 55 units. The district court denied the motion.

The jury found that the parties had an enforceable contract for the sale of goods. The jury verdict form did not indicate whether the contract was for delivery of materials for the entire condominium project, or for a single delivery of materials. The district court denied defendant's motion for JNOV and an appeal was taken to the circuit court. The circuit court reversed the district court's denial of defendant's motions on the basis of the statute of frauds in that there was no writing evidencing the quantity of material to be delivered. Since quantity is an essential term that must be evidenced by a writing, the circuit court ruled that there was no enforceable contract for the delivery of roofing material for the entire project.

Plaintiff argues that the circuit court applied an incorrect standard of review in reversing the district court's denial of defendant's motions for directed verdict and for JNOV. We disagree. The circuit court stated in its opinion and order that it was applying the same standard as articulated by this Court in *Phinney v Perlmutter*, 222 Mich App 513, 524-525; 564 NW2d 532 (1997):

The standard of review on a motion for JNOV requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should a motion for JNOV be granted. Similarly, in deciding a motion for directed verdict, the trial court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor. This Court reviews all the evidence presented up to the time of the motion to determine whether a question of fact existed.

Consequently, we find that the circuit court applied the correct standard of review.

Next, plaintiff argues that there was an enforceable contract for the sale of goods that satisfied the writing requirements of the Uniform Commercial Code, MCL 440.2201; MSA 19.2201. Under Section 2-201, the only term that must appear in writing is the quantity term. *Lorenz Supply Co v American Standard, Inc*, 419 Mich 610, 614; 358 NW2d 845 (1984). Plaintiff produced writings representing an agreement to extend credit and for the delivery of roofing material for individual units. Plaintiff also relied on a price quotation as evidence of an agreement. The parties' conduct, however, did not evidence an intention that the quotation constituted an offer. Plaintiff failed to present any written agreement for the delivery of a specific quantity of roofing material in excess of the individual orders evidenced by the invoices presented. We believe that the circuit court was correct in finding that there was no enforceable agreement for the delivery of roofing material for the entire project.

Plaintiff argues that the statute of frauds does not apply because the second delivery of roofing materials, which was evidenced by defendant's October 28, 1992 invoice, confirmed the terms and

conditions of the line of credit. However, we find that a line of credit, absent any reference to the specifics of the contract, specifically the quantity of goods to be delivered, does not create an enforceable contract that complies with the statute of frauds.

Further, plaintiff argues that payment on the October 28, 1992 invoice was not due until December 1, 1992. As noted above, the invoice includes language that “[a]ccounts not paid by the 1st day of the month following [the] discount date are subject to a service charge of 1-1/2% per month until paid.” Also, the credit application states that accounts paid by the 10th day of the month following the date of the invoice will receive the applicable cash discount. The invoice does not contain a cash discount term. Reading these two clauses together, regardless of whether the invoice had an included discount rate, we find that such language cannot be construed as meaning the invoice amount was due thirteen days after its inception date. Plaintiff argues, an invoice presented on credit allows a buyer approximately thirty days to pay the obligation without incurring penalties. This interpretation most likely was adopted by the jury at trial, and as such, is a legitimate factual finding which will not be disturbed on review. *Hord v Environmental Research Institute of Michigan*, 228 Mich App 638, 641; 579 NW2d 133 (1998). However, according to the terms of the credit agreement, defendant had the right to withhold delivery if it believed plaintiff’s credit was impaired.⁴ Since plaintiff had made payment on the first delivery with a check that was returned for insufficient funds, defendant was entitled to withhold delivery or demand payment in advance based on that fact alone, regardless of when payment was due on the second invoice. This clause is not open to differing interpretations. Regardless of the differing interpretation of the October 28, 1992 invoice’s due date, the NSF check plaintiff used to pay for the first shipment, while possibly mistakenly prepared, was a valid reason for defendant to refuse to honor the credit agreement.

Finally, plaintiff argues that reversal is necessary because defendant filed a reply brief in the circuit court. We disagree. The circuit court’s opinion and order makes no reference to the reply brief and, to the contrary, relies on the trial transcript and the parties’ principal briefs in support of its reversal of the district court’s orders denying directed verdict and JNOV. Plaintiff has not shown that he was prejudiced by the filing of the brief and, therefore, if there was any error, the error was harmless. MCR 2.613(A).

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Kelly
/s/ Harold Hood

¹ There was testimony to the effect that the invoice was paid by a check drawn on plaintiff’s payroll account which is normally kept at a low balance thereby resulting in the check being returned for insufficient funds.

² The following language is contained in the October 28, 1992 invoice:

Accounts not paid for by the 1st day of the month following discount date are subject to a service charge of 1-1/2% per month until paid.

The back of the credit application contained the following statement:

All accounts are due and payable by the 10th of the month following the date of invoice to earn applicable cash discounts.

³ Plaintiff's amended complaint, at paragraphs 21 and 30, alleges defendant breached a contract for the supply of roofing materials for the entire 55-unit condominium project.

⁴ The credit agreement so states:

If at any time in the opinion of Seller, Buyer's credit becomes impaired, proper security for payment or payment in advance shall be furnished upon demand prior to continuation of deliveries. Seller shall have the right to consider this contract breached and to stop deliveries and to be entitled to damages if Buyer shall become in default in the payment of any sum due. Buyer agrees to pay all costs, including reasonable attorney's fees, arising from collection of past due accounts.