NO. COA01-1005

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

THE PERLMUTER PRINTING COMPANY,
Plaintiff

v.

Forsyth County
No. 98 CVD 4566

ELITE FORCE, INC.,
Defendant

Appeal by defendant from judgment entered 20 November 2000 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 24 April 2002.

Wilson and Small, by Christopher J. Small, for plaintiff-appellee.

Hough & Rabil, PA, by David B. Hough, for defendant-appellant.

WALKER, Judge.

Defendant was a mail order company for military paraphernalia based in North Carolina which ordered the printing of its 1996 Christmas catalog from plaintiff which was based in Ohio. On 18 November 1996, defendant ordered 18,000 catalogs to be printed and shipped to defendant in North Carolina "F.O.B. Cleveland, Ohio Add'l cost for freight to Raleigh, N.C. 27613 = $280" at a cost of $17,333 plus $412 for each additional thousand catalogs. Defendant was required to furnish "composite negative film, RRED, single page

format for 76pgs, dylux, colorproofs. Plus CRA for 4 center pages 1/1." The catalogs were to go to print on 26 November 1996 and were to be shipped on 3 December 1996. Defendant was to pay one half of the quoted amount prior to the print date and the remaining amount was due after thirty days.

Although the contract called for defendant to provide single page format, defendant sent double page format. Subsequently, the parties agreed that plaintiff would re-photograph the films at an additional cost of $2,737.80 to create single page format. This created a delay which changed the prospective date of printing to 4 December 1996 and the ship date to 6 December 1996. Defendant reviewed a proof of the catalog and authorized plaintiff to go to press on 20 November 1996.

Plaintiff shipped the catalogs on 9 December 1996 to its own mailing center ten miles away in Ohio, where they were held for one month. Douglas Lee, a representative of plaintiff, testified that the catalogs were shipped to the mailing center because they expected defendant to furnish a customer mailing list so that plaintiff could mail the catalogs directly to defendant's customers. Mr. Lee admitted plaintiff charges a fee for the service but no such fee was set out in the contract or invoice and there was no record showing plaintiff was to mail the catalogs to defendant's customers.

Peter Sweere, president of defendant, testified that when the catalogs did not arrive in North Carolina, he repeatedly telephoned plaintiff "and got the run around. They kept promising me that the

catalogues would be coming. They were on their way. . . . With every call I made to the Plaintiff, I was told the catalogues were coming."

Plaintiff finally shipped 19,000 catalogs to defendant in North Carolina on 9 January 1997, which arrived several days later. Mr. Sweere testified that, upon receiving the catalogs, "I immediately got my crew together and we mailed out the catalogues. I knew we were too late, but I had to do something to salvage the situation. So I mailed out the catalogues." Mr. Sweere testified that because of having missed the Christmas season, defendant lost forty percent of its annual income and had to get out of the catalog business.

Mr. Sweere further testified that, after receiving the catalogs, customers contacted him regarding the poor quality which included problems of color, margins, lettering, and other irregularities which varied from the approved proof. On 22 April 1997, Mr. Sweere sent a letter to plaintiff which stated the following:

> Recently a customer pointed out to me a misprint in our catalog. As you can see from the enclosed catalog some of the text has been cut off on the edges. When you received the film from me you informed me of the possibility of this misprint using the film I provided, I was not very concerned about it but your production manager insisted on the upgrade at my expense. I was charged $1762.80 to correct the size of the page so this very thing would not happen.
>
> Please look into this matter and let me know how you plan to resolve this matter.

On 30 December 1996, plaintiff mailed defendant an invoice for its services. The invoice showed that the total final cost for the work performed was $20,732.80 plus the cost of shipping and that defendant had already paid $11,500.00. Thus, defendant owed a balance of $9,232.80 plus $280.00 for shipping. Defendant paid a total of $17,512.80 by 14 May 1998 leaving a balance owed of $3,500.00 plus interest.

On 15 May 1998, plaintiff filed the present action to recover the remaining $3,500.00 plus interest. Defendant counterclaimed for damages alleging breach of contract by plaintiff. At the close of plaintiff's evidence and at the close of all the evidence, defendant motioned to dismiss plaintiff's claim for lack of sufficient evidence, both of which were denied. Plaintiff then motioned for a directed verdict and dismissal of defendant's counterclaim on the basis that defendant did not give notice of its contention of the late shipping date, that the contract required defendant to give notice of claims which defendant failed to do, and that defendant failed to prove damages. This motion was also denied.

The jury found defendant breached the contract and awarded plaintiff $1.00. It further found that plaintiff breached its contract with defendant and awarded defendant $17,512.80. Plaintiff motioned for judgment notwithstanding the verdict (JNOV), for dismissal of defendant's counterclaim, and for a new trial. The trial court denied plaintiff's motion for JNOV as to plaintiff's case-in-chief. However, the trial court granted the

motion for JNOV as to defendant's counterclaim and dismissed it. It further ordered "that the plaintiff's motion for a new trial is denied but, that if the judgment of this court is reversed on appeal, then a new trial is conditionally granted."

On appeal, defendant claims the trial court erred in granting plaintiff's motion for JNOV as to defendant's counterclaim and in dismissing it. "[A] motion for judgment notwithstanding the verdict is cautiously and sparingly granted." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 338 (1985). A ruling on a motion for JNOV is a question of law and thus we review *de novo*. *Bahl v. Talford*, 138 N.C. App. 119, 122, 530 S.E.2d 347, 350, *disc. rev. denied*, 352 N.C. 587, 544 S.E.2d 776 (2000). The motion should be denied if, taking the evidence in a light most favorable to the non-moving party, there is more than a scintilla of evidence presented in support of each element of the claim. Id.

Here, to survive the motion for JNOV, defendant must present evidence of a valid contract which plaintiff breached. *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). Both parties concede the existence of a valid contract. In a light most favorable to defendant, the evidence showed that the contract called for plaintiff to produce 18,000 catalogs and ship them to North Carolina on 6 December 1996 at an additional cost to defendant. The evidence further shows that on 9 January 1997, the plaintiff shipped to defendant 19,000 catalogs containing defects in coloring, margins, lettering, and other irregularities.

Plaintiff contended that it was not liable for the late shipping nor for any alleged defects in the catalogs. It first claims defendant failed to properly allege in its counterclaim plaintiff's failure to timely perform. N.C. Gen. Stat. § 1A-1, Rule 15 (2001) allows for liberal amendment of pleadings including amending pleadings to conform with the evidence presented at trial. Further, "the policy behind notice pleading is to resolve controversies on the merits, after an opportunity for discovery, instead of resolving them based on the technicalities of pleading." *Ellison v. Ramos*, 130 N.C. App. 389, 395, 502 S.E.2d 891, 895, *disc. rev. denied*, 349 N.C. 356, 517 S.E.2d 891 (1998).

Here, the emphasis on the dates of delivery clearly indicated the defendant expected the catalogs to be in the hands of its customers for the 1996 Christmas Season. The contract contained additional charges for shipping directly to Raleigh but did not specify any charges for plaintiff to mail directly to defendant's customers. Mr. Sweere testified that he repeatedly called plaintiff regarding the late delivery and the failure of the catalogs to arrive on time. Also, the contract was attached to the counterclaim. Defendant's alleging breach of contract was sufficient to put plaintiff on notice of a breach by failing to ship the catalogs to Raleigh as called for in the contract. Furthermore, there is nothing in the record to indicate that plaintiff was surprised or otherwise not prepared to defend a counterclaim for failure to deliver the catalogs to defendant in December of 1996. In light of this State's liberal rules on

amendment of pleadings and our notice pleading policy, the failure to further allege particular facts regarding the lack of timeliness in plaintiff's performance is not grounds for the trial court's grant of JNOV.

Plaintiff further contended in its motion for JNOV that defendant waived the right to sue on the claim by failing to give notice of any defects as required by the Uniform Commercial Code and the terms of the contract. The contract included the following language in part:

> All claims of any nature shall be barred unless notice thereof is given to Perlmuter at its address set forth on the reverse side hereof, in writing by certified or registered mail, postmarked within ten days after receipt of the goods, and the goods relating to such claims are held intact and properly protected, unless instructed otherwise by Perlmuter, pending inspection by Perlmuter's authorized inspector.

While parties may contract for the waiver of claims where there has been no written notice, contracts "should receive sensible and reasonable constructions and not ones leading to absurd consequences or unjust results." *Burwell v. Griffin*, 67 N.C. App. 198, 204, 312 S.E.2d 917, 921, *disc. rev. denied*, 311 N.C. 303, 317 S.E.2d 678 (1984)(*citing DeBruhl v. Highway Commission*, 245 N.C. 139, 145, 95 S.E.2d 553, 557 (1956)). Where the defect is unknown or should not have been known at the time of receipt of the goods, there is no expectation of notice being given to the other party at the time of receiving the defective goods.

Our Courts have held that "acceptance where the defect is unknown, or latent, does not waive the defective performance."

Tisdale v. Elliot, 13 N.C. App. 598, 601, 186 S.E.2d 685, 687 (1972). Whether defendant knew or should have known of the defects at the time it received the catalogs is a question to be resolved by the trier of fact. Further, whether defendant gave seasonable notice of a defect within a reasonable time as required by N.C. Gen. Stat. § 25-2-607 (3)(a) is a matter to be determined by the trier-of-fact.

In light of our finding that JNOV is inappropriate on the basis of failure to properly allege a breach of contract claim and the lack of specificity in the record, we find that the trial court erred in granting JNOV as to the counterclaim and in dismissing it. The trial court denied plaintiff's motion for JNOV as to its case-in-chief which plaintiff failed to assign as error. Therefore, we reverse and remand the case for a new trial only as to defendant's counterclaim.

New trial.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).