[Cite as *Zion Temple First Pentecostal Church of Cincinnati, Inc. v. Brighter Day Bookstore & Gifts*, 2004-Ohio-5499.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ZION TEMPLE FIRST PENTECOSTAL CHURCH OF CINCINNATI, OHIO, INC.,	:	APPEAL NO. C-030762 TRIAL NO. A-0105926
	:	*O P I N I O N.*
Plaintiff-Appellant,	:	
vs.	:	
BRIGHTER DAY BOOKSTORE & GIFTS,	:	
	:	
Defendant,	:	
and	:	
MURPHY CAP & GOWN COMPANY,	:	
	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: October 15, 2004

Arthur C. Church, for Plaintiff-Appellant,

Squire, Sanders & Dempsey L.L.P, Scott A. Kane and *Kenneth R. Craycraft, Jr.*, for Defendant-Appellee.

DOAN, Judge.

{¶1} Plaintiff-appellant, Zion Temple First Pentecostal Church of Cincinnati, Ohio, Inc. ("Zion"), filed suit against defendant-appellee, Murphy Cap and Gown Company ("Murphy"), and Brighter Day Bookstore and Gifts ("Brighter Day"). In its complaint, Zion sought rescission of a contract for the purchase of choir robes. Zion obtained a default judgment against Brighter Day, which it has not appealed. The trial court overruled Zion's motion for summary judgment and granted summary judgment in favor of Murphy.

{¶2} The record shows that Brighter Day was a retail distributor of choir robes that Murphy manufactured. Rosalind Bush of Brighter Day supplied Glenda Evans of Zion with a sample robe and a sample board from Murphy. The sample board contained descriptions of various types of fabric and samples of each fabric in various colors. A disclaimer at the end of each of the descriptions stated, "All shades subject to dye lot variations." Zion ordered choir robes and overlays out of a fabric and colors selected from the sample board.

{¶3} After receiving Zion's order, Murphy sent sample swatches to Brighter Day. Along with the swatches, Murphy sent a memorandum stating that the swatches were cut from the actual bolts of cloth from which the robes were to be manufactured and asking for authorization to proceed with the order. Bush called Evans to see if Evans wished to look at the swatches. Because Bush told Evans that the swatches looked like what Zion had ordered, Evans did not personally check the swatches. She stated that she trusted Bush's judgment. Bush told Murphy to proceed with the order.

{¶4} Murphy delivered the completed robes to Brighter Day. Evans and another individual from the church looked at the robes and paid some of the balance due. Subsequently, Bush delivered the robes to the church. Immediately upon viewing the robes, Evans and the other church members found several problems with them. They did not like the color or the material, which they claimed was different from the sample in the sample board. Evans, however, could not say whether the color and material were similar to the swatches the company had sent earlier, which she had declined to inspect. The church members also discovered that the sleeves were "backward." They found that Velcro was visible on the reversible overlays and that the tags on the overlays could be seen when the overlays were reversed. Evans stated that the robes did not resemble the sample robe they had seen and that they were very "unattractive."

{¶5} Bush contacted Murphy about the problem with the sleeves. Also, within a week, Zion wrote a letter detailing all the problems with the robes. Murphy acknowledged that, due to an error in the catalog, the sleeves on the actual garment were the reverse of the picture in the catalog. Murphy offered to fix the sleeves so that they appeared as they did in the catalog. Zion declined this offer due to the other problems with the robes. Eventually, Murphy offered to make an additional set of robes and overlays in the style of Zion's choosing with a dollar amount up to what it had paid for its original order for an additional amount of approximately $3,000. Zion declined the offer. It wished to return the robes and have its purchase money refunded.

{¶6} The trial court held that Zion could not claim that the defects in the material and the color of the robes were Murphy's fault since Murphy had sent the swatch from the actual bolt of cloth from which the robes were cut and Zion had not reviewed the swatch,

but had given its approval sight unseen. The court also held that since Murphy offered to cure the defective sleeves as set forth in R.C. 1302.52, no action for rescission existed. As to Zion's complaint about the tags on the overlay and the Velcro, the court stated that "[t]he much later complaints about the robes not registered at the time of the original rejection are untimely and thus ineffective in establishing the non-conformity of the goods under the law. * * * The merchant claiming the goods are non-conforming must make their objections in a specific and timely manner so the manufacturers can attempt to cure the alleged defects."

{¶7} Zion now presents five assignments of error for review, which we discuss out of order. In its fourth assignment of error, Zion contends that the trial court erred in its application of R.C. 1302.66, which governs revocation of acceptance. The record is not clear as to whether the trial court applied that statute. It referred at least once to Zion's action as a "rejection" pursuant to R.C. 1302.60. We agree with that characterization.

{¶8} Revocation of acceptance is a buyer's self-help remedy with many of the same procedural characteristics as rejection. Generally, a buyer that justifiably revokes acceptance has the same rights and duties as a buyer who rejects the goods. *Aluminum Line Products Co. v. Rolls-Royce Motors, Inc.*, 66 Ohio St.3d 539, 540, 1993-Ohio-219, 613 N.E.2d 990.

{¶9} But this case presents an exception to that rule. A split of authority exists as to whether a seller has the right to cure any defect that renders the goods nonconforming when the buyer has revoked his or her acceptance, instead of rejecting the goods. A majority of courts have held that the seller does not have the right to cure under R.C. 1302.52 when the buyer revokes acceptance because the statute only provides for the seller's right to cure when tender by the seller has been "rejected." Ohio courts have not

specifically addressed this issue. *Brenner Marine, Inc. v. Goudreau* (Jan. 13, 1995), 6th Dist. No. L-93-077; Annotation (2004), 36 A.L.R.4th 544, Sections 2 and 3.

{¶10} Thus, the issue of whether Zion rejected the robes or revoked its acceptance is important to our determination of this case. R.C. 1302.60 provides that if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (1) reject the whole, (2) accept the whole, or (3) accept any commercial unit or units and reject the rest. Rejection must be within a reasonable time after tender or delivery, and the buyer must notify the seller of the rejection. R.C. 1302.60; R.C. 1302.61; R.C. 1302.63; *Anixter, Inc. v. Rohr Corp.*, 1st Dist. No. C-030690, 2004-Ohio-3623, at ¶9.

{¶11} Acceptance of goods occurs when the buyer (1) "after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity"; (2) fails to make an effective rejection as provided in R.C. 1302.61(A), "but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect "the goods"; or (3) "does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him." R.C. 1302.64(A).

{¶12} "Acceptance" is "a term of art which must be distinguished from a variety of other acts which the buyer might commit." *Trustcorp Bank of Ohio v. Cox* (Sept. 13, 1991), 6th Dist. No. L-90-231. Delivery of goods does not, by itself, constitute acceptance. Acceptance is only tangentially related to possession. Normally, the buyer will have possessed the goods for some time before the buyer accepts them. Acceptance does not occur unless the buyer has had a reasonable time to inspect the goods and accept them despite any nonconformity, the buyer fails to seasonably reject them under R.C. 1302.60 and

1302.61, or the buyer does any act inconsistent with the seller's ownership. *Hooten Equip. Co. v. Trimat, Inc.*, 4th Dist. No. 03CA16, 2004-Ohio-1128, at ¶9; *F.C. Machine Tool & Design, Inc. v. Custom Design Technologies, Inc.*, 5th Dist. No. 2001CA00019, 2001-Ohio-7047; *Trustcorp Bank*, supra.

{¶13} In this case, Murphy contends that Zion accepted the robes when Evans went to Brighter Day, looked at the robes, paid some more money towards the bill, and arranged for Brighter Day to deliver the robes to the church. We disagree. The record does not show that Evans actually inspected the robes at that time. It shows that Evans and the choir members actually inspected the robes when Brighter Day delivered them and Zion found what it deemed to be nonconformities. This inspection was reasonable and was made within a reasonable time. See R.C. 1302.57; *Furlong v. Alpha Chi Omega Sorority* (1993), 73 Ohio Misc.2d 26, 34, 657 N.E.2d 866.

{¶14} Thus, Zion never accepted the robes within the meaning of R.C. 1302.64(A), but instead rejected them as not conforming to the contract. See R.C. 1302.60(A); *Furlong*, supra, at 34-35, 657 N.E.2d 866; *Trustcorp Bank*, supra. Compare *Hooten Equip. Co.*, supra, at ¶10-11. Since Zion rejected the goods, Murphy had a right to cure as provided in R.C. 1302.52. R.C. 1302.66, as it relates to revocation of acceptance, does not apply in the present case, and we, therefore, overrule Zion's fourth assignment of error.

{¶15} In its first three assignments of error, Zion essentially contends that issues of fact exist as to whether the choir robes delivered by Murphy conformed to the contract. R.C. 1302.26(A)(3) provides that "[a]ny sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model." This express warranty becomes part of the contract. *Norcold, Inc. v.*

Gateway Supply Co., 154 Ohio App.3d 594, 2003-Ohio-4252, 798 N.E.2d 618, at ¶18; Furlong, supra, at 32, 657 N.E.2d 866.

{¶16} Zion contends that it relied upon the sample board supplied by Murphy as to the color of the robes and the quality of the fabric. Essentially, it argues that the sample board created an express warranty. But a seller can limit or modify an express warranty as long as the language or conduct creating the warranty and the language or conduct tending to negate or limit the warranty are consistent. If they are not consistent, the express warranty prevails. R.C. 1302.29(A); *Barksdale v. Van's Auto Sales, Inc.* (1989), 62 Ohio App.3d 724, 728-729, 577 N.E.2d 426; *Perkins v. Land Rover of Akron*, 7th Dist. No. 03 MA 33, 2003-Ohio-6722, at ¶18.

{¶17} In this case, any warranty created by the sample board was limited by the language "[a]ll shades subject to dye lot variations." See Jones *v. Davenport* (Jan. 26, 2001), 2nd Dist. No. 18162. Further, any such warranty was also limited by Murphy's conduct of sending a swatch of the exact bolt of cloth from which the robes would be made for the buyer's approval. This conduct was not inconsistent with any warranty created by the sample board. This is not a case where the buyer needed protection from unbargained and unexpected disclaimers, which is the purpose of requiring consistency between the express warranty and any disclaimer. See *Barksdale*, supra, at 728-279, 577 N.E.2d 426; *Jones*, supra.

{¶18} Further, the swatches themselves created an express warranty as to the appearance of the material that became a part of the contract. Zion did not have the right to reject the robes based solely upon the color and feel of the material, because the material conformed to the requirements of the contract. R.C. 1302.60. Compare *Campbell v.*

Decorators Warehouse (Dec. 8, 1993), 8th Dist. No. 46850. Murphy was not liable for any assertions by Brighter Day regarding the material's quality or for any failure by Brighter Day to communicate that the swatches were from the actual bolt of cloth. That liability, if any, belonged to Brighter Day. See *Slemmons v. Ciba-Geigy Corp.* (1978), 57 Ohio App.2d 43, 56, 385 N.E.2d 298.

{¶19} As to the sleeves, the record shows that Murphy offered to cure any problem with the sleeves. R.C. 1302.52(B) provides that "[w]here the buyer rejects a non-conforming tender which the seller had reasonable ground to believe would be acceptable with or without money allowance[,] the seller may[,] if he seasonably notifies the buyer, have a further reasonable time to substitute a conforming tender." The record shows that Murphy manufactured the sleeves on the robes according to its design specifications. Due to an error in the catalog that Zion had consulted before placing its order, the sleeves as properly manufactured appeared different than the sleeves as depicted in the catalog. Murphy acknowledged the error in the catalog and offered to reverse the sleeves so that they appeared as they had in the catalog. Murphy clearly had the right to cure this nonconformity and indicated its intention to do so within a reasonable time. See *General Motors Acceptance Corp. v. Grady* (1985), 27 Ohio App.3d 321, 323-324, 501 N.E.2d 68; *Ferjutz v. Habitat Wallpaper & Blinds, Inc.* (July 3, 1996), 8th Dist. No. 69495.

{¶20} If the sleeves and the color and feel of the material were the only issues in this case, our inquiry would be at an end, and we would affirm the trial court's judgment. However, Zion had other reasons for contending that the robes did not conform to the contract. It claimed that Velcro was visible on the reversible overlays and that the tags on

the overlays could be seen when the overlays were reversed. As to these nonconformities, the trial court found that Zion's complaints were not timely raised.

{¶21} The record does not support the trial court's finding that Zion's issues with the Velcro and the tags were raised at a later time. Bush's and Evans's depositions both indicated that these issues were raised at the time Bush delivered the robes to the church. The letter Evans wrote within a week of receiving delivery of the robes, which detailed the church's objections, also raised the issue of the tags. Consequently, Zion notified Murphy of these specific objections within a reasonable time as required by R.C. 1302.61(A) and 1302.63(A). See *Gragg Farms & Nursery v. Kelly Green Landscaping* (M.C.1996), 81 Ohio Misc.2d 34, 36-37, 674 N.E.2d 785; *Furlong*, supra, at 30, 35, 657 N.E.2d 866; *Factory Industrial Maintenance Co. v. Lapine Truck Sales & Equip. Co.*, 5th Dist. No. 2001CA00076, 2001-Ohio-1971. Murphy never indicated its intention to cure these alleged nonconformities. See *Brenner Marine*, supra.

{¶22} In addition to the sample board, Murphy also provided to Zion a sample robe. That sample robe also created an express warranty that became part of the contract pursuant to R.C. 1302.26(A)(3). See *Norcold*, supra, at ¶18; Furlong, supra, at 32, 657 N.E.2d 866. Material issues of fact exist as to whether the alleged defects related to the tags and Velcro violated the express warranty created by the sample robe and whether they rendered the robes nonconforming tender subject to rejection within the meaning of R.C. 1302.60. See *Brenner Marine*, supra. Consequently, the trial court erred in granting Murphy's motion for summary judgment. See *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46; *Stinespring v. Natorp Garden Stores, Inc.* (1998), 127 Ohio App.3d 213, 215-216, 711 N.E.2d 1104.

{¶23} In its fifth assignment of error, Zion contends that the trial court erred by denying its motion for summary judgment. Since, as we have already held, material issues of fact exist for trial, the trial court properly denied Zion's motion. See *Harless*, supra, at 66, 375 N.E.2d 46; *Stinespring*, supra, at 215-216, 711 N.E.2d 1104. We overrule Zion's fifth assignment of error.

{¶24} Given our disposition of Zion's first three assignments of error, we reverse the entry of summary judgment for Murphy and remand this case for trial or further proceedings consistent with this court's opinion.

Judgment reversed and cause remanded.

WINKLER, P.J., and **GORMAN, J.,** concur.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Opinion.