IN THE COURT OF APPEALS OF IOWA

No. 0-915 / 10-0961
Filed December 22, 2010

JOCKO'S AUTO PARTS, INC.,
Plaintiff-Appellant,

vs.

DURO-LAST, INC., d/b/a
DURO-LAST ROOFING, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Jocko's Auto Parts, Inc. appeals from summary judgment granted to Duro-Last Roofing in this action alleging breach of express and implied warranties. **AFFIRMED.**

Roscoe A. Ries Jr. of Ries Law Firm, Des Moines, for appellant.

Mitchell R. Kunert of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

The following undisputed facts appear in the record: Duro-Last, Inc. is the manufacturer of a single-ply PVC roofing membrane used exclusively in flat and low-slope roofing applications. The Duro-Last roofing system consists of large panels of roofing material that are prefabricated in the factory to fit the requirements of the installer (a dealer or contractor) in the field; the material is then shipped in rolls to a building location where it is heat-welded into a seamless unit and fastened to the roof deck using various attachment methods.

Duro-Last does not install the roofing system. The roof is installed by a contractor retained by the building owner. Following installation, a Duro-Last employee conducts a visual only noninvasive inspection of the installation and, if acceptable, Duro-Last issues a comprehensive warranty.

In 1994, Jocko's Auto Parts, Inc. retained Kirk's Roofing to install a Duro-Last roofing system on its building located at 1500 Army Post Road in Des Moines, Iowa. As a result of the inspection following installation, Duro-Last issued a fifteen-year warranty, which was signed by the building's owner and reads, in part:

> **DURO-LAST, INC'S obligation during the 1st through the 15th years shall be to repair any leak in the roof** caused by any defect in the Duro-Last, Inc. membrane materials or accessories or by the workmanship of the Authorized Dealer/Contractor. **This obligation includes the repair or replacement of membrane material and accessories** and the costs of or furnishing of labor to repair said roof at the contractor list price which is in effect at the time of repair, provided the following conditions are met:
>
> 1. DURO-LAST, INC. has authorized the repair; and
> 2. An Authorized Dealer/Contractor makes the repair.

The warranty disclaimed all implied warranties and any reliance on oral representations.

Jocko's roof remained leak-free until March 6, 2003, when Jocko's reported a minor leak, which was repaired on March 10, 2003. A reported leak in March 2004 was determined to be caused by problems with the rooftop heating and cooling unit, and was not covered by the warranty. Duro-Last promptly repaired several leaks in early 2008.

On February 5, 2009, Jocko's notified Duro-Last of "concerns regarding the watertightness of the roof." On February 23, 2009, Duro-Last wrote a letter noting "the current warranty expires in 30 days." Duro-Last also wrote, in part:

> As I indicated, to the extent that there is a valid claim, Duro-Last is prepared to stand by its 15-Year Warrant. Nonetheless, Duro-Last's obligation under the 15-Year Warranty is to "repair leaks" and Duro-Last is prepared to perform a coating of the roof to restore the watertight integrity of the roofing system. You have indicated to me that you are not going to allow any repairs of the roof until Duro-Last is willing to commit to a full re-roof. Please note that Duro-Last, Inc., is not liable under this warranty unless the owner allows Duro-Last, Inc., agents or authorized dealer/contractor access to said roof.
>
> Your failure to allow us access to the roof to repair its watertight integrity is a pre-condition to Duro-Last's obligation under your warranty . . . . Duro-Last is willing to provide a coating of your roof to retain the watertight integrity of the system, or in the alternative will provide you with a material discount in the amount of $.30 off per square foot should you desire a new roof with a new warranty.

Jocko's filed this suit on March 19, 2009, asserting Duro-Last breached express and implied warranties.

On April 5, 2010, Duro-Last filed a motion for summary judgment, which was set for hearing on May 3, 2010. On April 23, 2010, the date on which its resistance was due, Jocko's filed a motion to enlarge requesting additional time

to resist the motion. On April 30, 2010, Jocko's submitted a resistance to the motion for summary judgment.

On May 3, 2010, the motion to enlarge and the motion for summary judgment came on for hearing. Jocko's did not appear, either through counsel or other representative. The court noted in its ruling, "No resistance to Defendant's Motion for Summary Judgment has been filed with the Court."

The district court entered summary judgment for Duro-Last concluding: "Plaintiff has failed to generate a genuine issue of material fact supporting its claim that the terms of the express warranty obligated Defendant to replace rather than to repair Plaintiff's roof." The court further concluded plaintiff had failed to generate fact issues in support of its claims for breaches of the implied warranties of merchantability and fitness for a particular purpose.

Jocko's now appeals contending the district court erred in granting an untimely motion for summary judgment; in failing to apply Michigan law; and in relying upon an affidavit of defendant's expert, which Jocko's claims was untimely.

Our review of a ruling on a motion for summary judgment is for correction of errors at law. *Cemen Tech, Inc. v. Three D Indus., L.L.C.,* 753 N.W.2d 1, 5 (Iowa 2008). A court should grant the motion if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). We review the evidence in a light favorable to the nonmoving party. *Cemen Tech*, 753 N.W.2d at 5. The nonmoving party cannot rely on allegations

or speculations to resist the motion but must assert specific facts showing a genuine issue of material fact. *Hlubek v. Pelecky,* 701 N.W.2d 93, 95–96 (Iowa 2005).

Contrary to Jocko's claim, Duro-Last timely filed its motion for summary judgment. The deadline for filing motions set in the scheduling order (April 2, 2010) fell on a date the courts were closed due to budget cuts, and by order of our supreme court the time to file was extended "to include the next day that the office of the clerk of court is open."

The motion for summary judgment was fully supported, and the district court concluded those filings established Duro-Last was entitled to judgment. We agree.

On appeal, Jocko's complains that Duro-Last did not pursue its affirmative defense that Michigan law applied and thus "waived its entitlement to the entry of summary judgment." Jocko's provides no authority for such an argument. While Duro-Last waived its affirmative defense, it did not waive its entitlement to the entry of summary judgment under Iowa law.

Jocko's contention that the district court was not entitled to consider the affidavit of defendant's expert is not properly before us. Jocko's did not timely resist the motion for summary judgment, did not appear at the hearing, and did not raise this contention with the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Finally, Jocko's complains that "Duro-Last misrepresented the record in this case when it stated their [sic] was no genuine issue of material fact." Jocko's then cites to its resistance. Jocko's contends it mailed its resistance to the district court for filing on April 30, 2010, and served it via email on defendant that same date. However, as acknowledged in its motion to enlarge, Jocko's resistance was due on April 23, 2010. No resistance was filed that date. Instead of a resistance, on April 23, 2010, Jocko's filed a motion to enlarge to extend the time within which to file a resistance. The motion to enlarge was resisted and fixed for hearing on May 3, 2010. Jocko's did not appear for the hearing. Under those circumstances, the court did not abuse its discretion in not addressing the motion to enlarge and in declining to consider a resistance that, even if on file by the time of the hearing, would have been untimely. We find no error and we affirm.

AFFIRMED.