STATE OF MICHIGAN

COURT OF APPEALS

THUNDER BAY MANUFACTURING CORPORATION,

Plaintiff/Counter-Defendant/
Appellant,

v

DETROIT EDGE TOOL COMPANY,

Defendant/Counter-Plaintiff/
Appellee.

UNPUBLISHED
July 9, 1996

No. 174785
LC No. 92-226367

Before: Wahls, P.J., and Hood and M.E. Clements,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of defendant's motion for summary disposition in this contract case. We affirm.

Plaintiff contracted with Chrysler Corporation to supply thirty-eight surface plates with scribe rails for installation in Chrysler's Technology Center in Auburn Hills. Although plaintiff could manufacture the surface plates, it decided to "contract out" the fabrication of the rails.

Plaintiff issued a purchase order for the fabrication of fourteen sets of rails to defendant in May, 1988, and received the first set of rails in July, 1988. Defendant completed shipment of the fourteen sets in October, 1989. Plaintiff issued a second purchase order for twenty-four sets of rails, and received the final set of rails from that order in October, 1990.

When plaintiff received the first set of rails in July, 1988, it attached the rails to the surface plates which it had manufactured. The rails "mounted nicely." The remaining sets of rails were stored upon delivery for approximately a year and a half before plaintiff began to mount the rails to the plates.

Upon installation of the surface plates and rails in Chrysler's Technology Center in August, 1991, "severe problems" were discovered with the scribed lines in the rails. It turned out that the rails

---

* Circuit judge, sitting on the Court of Appeals by assignment.

were unusable to Chrysler because the spacing between the lines was not within the specification of 100 mm on center. After Chrysler concluded that defendant was incapable of scribing the lines to specification or remedying the defects in the rails, plaintiff contracted with another supplier to provide the rails.

Plaintiff filed this suit to recover the $137,300 that it paid defendant for the rails and other expenses. In moving for summary disposition, defendant claimed the transaction between the parties was controlled by the UCC, and that plaintiff failed to notify defendant of a defect in the rails within a reasonable amount of time or within the ninety day requirement found in the agreement between the parties. The trial court granted defendant's motion.

Plaintiff argues that its contract with defendant was not governed by the UCC because it was a contract for services, and not goods. We disagree.

Article 2 of the UCC governs transactions of goods. MCL 440.2102; MSA 19.2102; *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 519; 486 NW2d 612 (1992). In a mixed transaction involving both the transaction of goods and of services, the court must determine whether the predominate factor of the transaction is for the rendition of services with goods incidentally involved, or if the transaction is for goods with labor incidentally involved. *Neibarger, supra*, p 534. Although the question of whether goods or services predominate in such a contract is generally a question of fact, a court may decide the issue as a matter of law where, as here, there is no genuine issue of material fact in dispute concerning the provisions of the contract. *Higgins v Lauritzen*, 209 Mich App 266, 269-270; 530 NW2d 171 (1995).

Here, a review of the trial court record indicates that the ultimate goal of the agreement between the parties was to supply plaintiff with a product, namely steel rails. It is true that the fabrication of the rails required defendant to provide services incidentally. However, the Supreme Court wrote in *Neibarger, supra*, p 536:

> It is difficult to imagine a commercial product which does not require some type of service prior to its purchase, whether a design, assembly, installation, or manufacture. If a purchaser were able to avoid the UCC by pleading negligent execution of one of the services required to produce the product, Article 2 could be easily and effectively negated.

Here, unlike the transaction in *Wells v 10-X Mfg Co*, 609 F2d 248 (CA 6, 1979), plaintiff did not provide defendant with the raw material, and the contract did not indicate a contract for services. Rather, the predominant goal of the transaction was for plaintiff to purchase rails that could be mounted to the surface plates and delivered to Chrysler. Accordingly, the trial court did not err in holding that the UCC applied to this transaction. *Neibarger, supra*, p 534.

Plaintiff argues that the contract's ninety day notice requirement was manifestly unreasonable and that it could not have given notice of the defects in the rails earlier. We disagree.

It is undisputed that plaintiff effectively accepted shipment of all the rails from defendant by storing the rails for over a year. Once a buyer has accepted goods, the buyer must "within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." MCL 440.2607(3)(a); MSA 19.2607(3)(a). Whenever the UCC requires an action to be taken within a reasonable time, the parties may fix by agreement any time period that is not manifestly unreasonable. MCL 440.1204; MSA 19.1204.

On the back of the sales order which defendant sent to plaintiff concerning the shipment of the rails, the following language is found:

> Detroit Edge Tool Company (Seller) warrants that products furnished on this document will be free from defects in materials and workmanship provided proper and normal use and maintenance procedures are exercised. Any claim against this warranty must be made in writing to Seller no later than 90 days after the date of shipment by the Seller at its main office.

Because plaintiff did not object to these terms in the sales order, and the terms did not materially alter the parties' agreement, these terms became part of the contract between the parties. See *Challenge Machinery Co v Mattison Machine Works*, 138 Mich 15, 24; 359 NW2d 232 (1984). It is undisputed that plaintiff did not notify defendant of any defects within ninety days of the date of shipment.

In addition, the ninety-day notification requirement was not manifestly unreasonable. The evidence indicates that the defects in the spacing between the scribed lines of the rails could be discovered with the naked eye. The defects could then be confirmed with a good ruler. Reasonable minds could not differ that a reasonable inspection of the rails would have detected the defects in the scribed lines within ninety days of the date that plaintiff received shipment of the rails. Under Michigan law, a finding of prejudice to the seller is not required for a finding that the buyer's notice to the seller of a breach was untimely. *Eaton Corp v Magnavox Co*, 581 F Supp 1514, 1532 (ED Mich, 1984). Because plaintiff failed to notify defendant of the defects in the rails within ninety days after receiving shipment, plaintiff is barred from recovering any remedy. MCL 440.2607(3)(a); MSA 19.2607(3)(a).

Finally, plaintiff argues that a genuine issue of material fact exists that it revoked its acceptance within a reasonable time after it discovered or should have discovered the defects. We disagree.

A buyer may revoke acceptance of goods whose nonconformity substantially impairs the value of the goods to the buyer if the buyer notifies the seller of his revocation within a reasonable time after the buyer discovers or should have discovered the defect. MCL 440.2608; MSA 19.2608; *Kelynack v Yamaha Motor Corp*, 152 Mich App 105, 113-114; 394 NW2d 17 (1986). However, the buyer must establish that the defects in the goods were difficult to discover. MCL 440.2608(1)(b); MSA 19.2608(1)(b); *Colonial Dodge, Inc v Miller*, 420 Mich 452, 459; 362 NW2d 704 (1984). Here, because plaintiff could have discovered the nonconformity in the scribed lines on the rails by a visual

inspection of the rails, plaintiff was not entitled to revoke its acceptance of the rails. MCL 440.2608(1)(b); MSA 19.2608(1)(b); *Colonial Dodge*, *supra*, p 459.

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Martin E. Clements