STATE OF MICHIGAN

COURT OF APPEALS

STATE MUTUAL INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, ATHLETE'S CONNECTION, INC.,

Plaintiffs-Appellants/Cross-Appellees,

v

JOHNSON SIGN COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
August 4, 1998

No. 196506
Ingham Circuit Court
LC No. 94-077808-CZ

Before: Young, P.J., and White and Wahls, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) on statute of limitations grounds. Defendant cross-appeals as of right the trial court's award of attorney fees to plaintiff. We reverse.

The plaintiff insurers, State Mutual and Allstate, insured two businesses located in the same building, one owned by Athlete's Connection, Inc., and the other by Donna Rapp. On October 11, 1992, a fire destroyed the building. The insurers satisfied losses to Athlete's Connection and Rapp, and Athlete's Connection suffered additional uninsured losses. Plaintiffs alleged that the cause of the fire was an exterior border neon accent lighting system designed and installed by defendant along the roof line of the Athlete's Connection part of the building in August or September 1989. Defendant serviced the lighting system on three occasions between its installation and February 1990.

Plaintiffs filed this action on June 27, 1994,[1] alleging negligence, breach of warranty and breach of contract against defendant and other parties. On the morning of trial, April 29, 1996, defendant filed a motion for summary disposition on the basis that the transaction at issue constituted a sale of goods, and thus the four-year statute of limitations of the Uniform Commercial Code (UCC), MCL 440.2725(1); MSA 19.2725(1), barred plaintiffs' claims. In response, plaintiffs argued that their claims were timely because the lighting system constituted an improvement to real property by defendant, and that defendant was a contractor, and therefore the six-year statute of repose, MCL 600.5805(10);

MSA 27A.5805(10), MCL 600.5839(1); MSA 27A.5839(1), applied. Plaintiffs argued that after the initial sale of the lighting system, the system required extensive maintenance, redesign and rewiring due to a fire caused by the original installation of the lighting system. Plaintiffs argued that defendant's agents came out as independent contractors to repair the damaged lighting system, did not repair it correctly, that another short circuit and a second fire resulted, and that defendant then attempted to redesign and refabricate the system to prevent another fire, installing new tubing, repairing the fire-damaged wiring, and putting a cover on the neon sign. Plaintiffs argued that a third fire occurred in October 1992, several months after plaintiff Athlete's Connection took over the premises; that that fire burned the business to the ground; and that the three fires were traceable to the negligent installation of the lighting system, and to the subsequent two negligent redesigns and reinstallations.

At the hearing on defendant's motion for summary disposition, plaintiffs requested that, if the trial court chose to hear defendant's untimely motion for summary disposition, plaintiff be allowed an opportunity to file a second amended complaint, a copy of which was submitted to the court. Plaintiffs' proposed second amended complaint specifically alleged that the lighting system was a permanent fixture and improvement to the realty, and that defendant was a contractor. Regarding the proposed second amended complaint's allegations that the two redesigns and rebuildings of the lighting system were negligent, plaintiffs argued that these claims were governed by the three-year statute of limitations governing negligence actions, MCL 600.5805(8); MSA 27A.5805(8), and thus began to run on or about the date of the fire.

The circuit court concluded that the transaction involved a sale of goods, that the four-year statute of limitations of the UCC applied, and that plaintiffs' claims were time-barred. The circuit court rejected plaintiffs' request to file an amended complaint, concluding that an amendment would be futile because a sale of goods was involved. Plaintiffs' motion for reconsideration was denied. This appeal ensued.

I

We review the circuit court's grant of summary disposition pursuant to MCR 2.116(C)(7) de novo. *Frommert v Bobson Construction Co*, 219 Mich App 735, 737; 558 NW2d 239 (1996). We must accept as true all the plaintiff's well-pleaded allegations and construe them in the plaintiff's favor. *Michigan Millers Mut Ins Co v West Detroit Bldg Co*, 196 Mich App 367, 370; 494 NW2d 1 (1992). Where the facts are not disputed, the determination whether a plaintiff's cause of action is barred by a statute of limitations is a question of law for the trial court. *Berrios v Miles, Inc*, 226 Mich App 470, 471; 574 NW2d 677 (1997).

To determine whether a contract involving a mixture of goods and services is governed by the UCC, we apply the test set forth in *Bonebrake v Cox*, 499 F2d 951, 960 (CA 8, 1974):

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved . . . .

> [*Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 534; 486 NW2d 612 (1992), see also *Higgins v Lauritzen*, 209 Mich App 266, 269; 530 NW2d 171 (1995).]

The *Neibarger* Court instructed further:

> . . . . A court faced with this issue should examine the purpose of the dealings between the parties. If the purchaser's ultimate goal is to acquire a product, the contract should be considered a transaction in goods, even though service is incidentally required. Conversely, if the purchaser's ultimate goal is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service. [439 Mich at 536.]

"Generally, the question whether goods or services predominate in a hybrid contract is one of fact." *Frommert, supra* at 738. Where there is no genuine issue of any material fact regarding the contract's provisions, a court may decide the issue as a matter of law. *Id.*

The two cases in *Neibarger, supra*, involved the design, sale and installation of cow milking systems. The Court found that the purpose of the parties' contracts was the acquisition of goods, "i.e., milking systems that incidentally required design and installation services," and thus that the UCC governed. *Neibarger*, *supra* at 534, 536-537.

In *Frommert, supra*, the defendant construction company removed the plaintiff's leaking roof and replaced it with a new roof that began leaking the following year. The contract and a letter from the defendant specified that the defendant was to remove the old roof and replace it with a new roofing system, of a specific type and with a specific insulation value. The contract was identified as a "home improvement and installment contract," and it referred to the defendant as a contractor in the contract. This Court concluded that the parties' contract was predominantly one for a service, and was not subject to the UCC:

> . . . . In this case, it is difficult to conceive of the goods being supplied, the roofing material, as the predominant purpose of the contract. That is, plaintiff needed to have a new roof installed, and the service of removing the old roof and replacing it with the new roofing system was clearly the predominant purpose of the contract.
>
> Further the contract itself is specifically identified as a 'home improvement and installment contract' and defendant is referred to as a contractor in the contract. Defendant essentially undertook to remove and replace a leaky roof. The goods were merely incidental to the purpose of the contract. Plaintiff was not contracting to purchase roofing material only, because the goods would have been of no value unless they were installed. [*Frommert*, 219 Mich App at 738-739.]

This Court reached a similar result in *Higgins, supra*, in which the defendants drilled a well and installed piping and an electrical water pump on the plaintiffs' property. The plaintiffs alleged that the

defendant improperly installed the water pump and that this affected the health of their dairy herd. Applying the *Bonebrake* test, this Court concluded that the parties' contract was predominantly one for services, even though goods were required incidentally as a result of rendering the service. The Court supported its conclusion with the facts that the plaintiffs contacted the defendants for their expertise and knowledge in the method and manner of drilling a well through rock; that the defendants decided the entire method, manner, and nature of the equipment, and the exact location of the well; and that the defendants never showed plaintiffs any type of brochure or literature regarding what type of materials they intended to use. *Id.* at 271.

In *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522; 538 NW2d 424 (1995), this Court reversed the circuit court's grant of summary disposition on statute of limitations grounds. The defendant had contracted in writing to supply a fire extinguisher system in a plant of one of the plaintiffs. The contract included "all necessary pipe[s], fittings, nozzles, system equipment, drawings, engineering and labor to install." *Id.* at 524. The system had to be designed for the specific needs of the plaintiff's plant, and was installed and found functional. *Id.* This Court concluded that a material issue of fact existed regarding whether the contract was for the sale of goods or whether the thrust of the contract was to provide a service, noting that had the contract called for the purchase of a preexisting product, with the only service being its installation, the circuit court's conclusion that the contract was one for goods would be sustainable. *Id.* at 528.

In the instant case, defendant designed and installed the neon accent lighting system. The original contract, titled an "order," indicated that defendant furnished labor and material to fabricate the system and installed it on the building. The contract separated the cost of the neon from the cost of installation. Defendant documented the next two transactions, which were free of charge, as "service orders." These involved servicing the border neon and replacing wiring and insulators. The final contract, another "order," stated that defendant furnished and installed the lexan-covered aluminum channel to encase the border neon. This order indicates one amount due, without specifying to what that amount related.

The first and last transactions clearly provided for a mixture of goods—the neon tubes, wiring and covered channel—and services—the design and installation of the lighting system. The purpose of the border lighting was to accent the exterior appearance of the building. The purchaser of the lighting told defendant that he wanted accent lighting like that of other commercial buildings in the area. Defendant determined the number of neon tubes required to span the front border of the building and installed the lighting system in a circuit. It eventually encased that tubing in the covered channels, apparently as originally recommended. Defendant acquired the neon tubes, wire and transformers from suppliers. Defendant fabricated the lexan-covered channels at its shop. Workers then installed the transformers, wired the system together and installed it. While there is evidence that plaintiff at first chose to forgo the lexan-covered channel, it otherwise relied on defendant's expertise in the design and installation of the border neon lighting system.

Based on the facts presented to the trial court, we conclude that the trial court erred in concluding that the transaction constituted a sale of goods. Rather, the facts demonstrate that the original owner of the building contracted with defendant to fabricate and install neon lighting, not to

purchase the neon tubing, wiring and transformers. The building owner relied on defendant's expertise in the design and installation of the neon lights, not its sale of the tubing and components. Unlike the plaintiff in *Neibarger*, the building owner was not purchasing a specified product, i.e., a specific type of milking system. As in *Frommert*, the neon lighting materials were useless without installation. As in *Home Ins,* there was no preexisting product, only components. The owner relied on defendant to provide the service of creating and installing the system. Therefore, the trial court erred in granting defendant's motion for summary disposition on the basis that the transaction constituted a sale of goods and that plaintiffs' claims were thus time-barred under the UCC.

In light of our disposition, we need not address plaintiffs' claims regarding the economic loss doctrine. MCL 440.2102; MSA 19.2102; *Neibarger*, *supra* at 533. Similarly, we need not address plaintiffs' assertion that defendant waived the statute of limitations defense by failing to provide it with adequate notice in accordance with the court rules, or plaintiffs' constitutional challenge to the circuit court's ruling.

Further, we do not address whether the lighting system constituted an improvement to real property, thus triggering application of MCL 600.5839(1); MSA 27A.5839(1). Plaintiffs' action was filed within three years of the October 1992 fire and six years from the lighting system's installation in 1989.

II

On cross-appeal, defendant challenges the trial court's award of attorney fees to plaintiffs. The hearing transcript makes clear that the trial court's rationale for assessing costs and fees was the untimeliness of defendant's motion; that plaintiffs had unnecessarily proceeded with the case from the time dispositive motions should have been brought under the trial court's scheduling order, until defendant brought its motion on the day of trial. That rationale is obviated by our reversal of the court's summary disposition ruling. We therefore vacate the trial court's award of attorney fees to plaintiffs.

Reversed and remanded for further proceedings.

/s/ Robert P. Young, Jr.
/s/ Myron H. Wahls
/s/ Helene N. White

[1] The parties stipulated to plaintiffs' filing a first amended complaint adding Athlete's Connection as a party. Plaintiffs filed the first amended complaint on February 1, 1995.