

STATE OF MICHIGAN
COURT OF APPEALS

MUNICIPAL SUPPLY COMPANY,

Plaintiff/Counter-Defendant/Third-
Party Plaintiff-Appellee/Cross-
Appellant,

v

CONTRACT DEWATERING SERVICES, INC.,
OHIO CASUALTY INSURANCE COMPANY,
and LISA M. JACKSON,

Defendants/Counter-Plaintiffs-
Appellants,

and

NATIONAL PIPE & PLASTICS, INC.,

Third-Party Defendant-Cross-
Appellee.

UNPUBLISHED

April 20, 2010

No. 288271

Ionia Circuit Court

LC No. 06-025069-CK

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendants appeal as of right, challenging the trial court's order granting plaintiff Municipal Supply Company's motion for summary disposition pursuant to MCR 2.116(C)(10) with respect to plaintiff's complaint and defendants' counter-complaint. Plaintiff conditionally cross appeals, challenging the trial court's dismissal of its third-party complaint against National Pipe & Plastics, Inc. ("National Pipe"), pursuant to the same order. We affirm.

I. FACTS

Defendant Contract Dewatering Services, Inc. ("CDS"), contracted with the city of Portland to install water and sewer lines. Plaintiff sold CDS the sewer pipe and fittings it needed to complete the project. With regard to size and rating, the parts sold were in accordance with the project plan's specifications. CDS had no trade materials from the manufacturers regarding installation of their products. After installation, CDS tested the system and found that certain fittings were not airtight. Inspection revealed that the fittings had cracked, but it was not known

why. After unsuccessfully trying to correct the problem with additional parts from plaintiff, CDS obtained parts from another supplier and had no further problems. CDS refused to pay plaintiff for the materials it supplied. Defendants' expert, David Hula, opined that the fitting failures were caused by pipe that was overtapered, which allowed the pipe to be inserted into the fitting past the internal stop.

The trial court granted plaintiff's motion for summary disposition of both plaintiff's complaint and defendants' counter-complaint, and also dismissed plaintiff's third-party complaint against National Pipe.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). Summary disposition of all or part of a claim or defense may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then must show by evidentiary materials that a genuine issue of disputed fact exists. *Id.*

III. IMPLIED WARRANTY CLAIMS

Defendants argue that the trial court erred in granting plaintiff's motion for summary disposition of its complaint and in also dismissing their counter-complaint. Whether plaintiff was entitled to judgment depends on the validity of defendants' claims for breach of the implied warranty of merchantability, MCL 440.2314, and breach of the warranty of fitness for a particular purpose, MCL 440.2315. In discussing these warranties, this Court has stated:

The warranty of merchantability requires that the goods sold be of average quality within the industry. A warranty of fitness for a particular purpose requires that the goods sold be fit for the purpose for which they are intended; in order to take advantage of this type of warranty, the seller must know, at the time of sale, the particular purpose for which the goods are required and also that the buyer is relying on the seller to select or furnish suitable goods.

* * *

To establish a prima facie case of breach of implied warranty, a plaintiff must show that goods were defective when they left the possession of the manufacturer or seller. Under implied warranty theory, a defect is established by proof that a product is not reasonably fit for its intended, anticipated or reasonably foreseeable use. Merchantable is not a synonym for perfect. The warranty of merchantability is that goods are of average quality in the industry As to goods accepted, the burden is on the buyer to establish any claimed breach of

warranty. [*Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 316-317; 696 NW2d 49 (2005), quoting *Guaranteed Constr Co v Gold Bond Products*, 153 Mich App 385, 392-393; 395 NW2d 332 (1986) (citations omitted in original).]

Defendants do not dispute that (1) the project plan specified the size and rating of pipe to be used; (2) CDS was required to comply with the project plan's specifications; and (3) plaintiff supplied CDS with the parts it asked for, which complied with the plan's specifications in regard to size and rating. The plan did not specify a pipe manufacturer. There was also no dispute, until defendants presented their expert's affidavit, that the pipe complied with industry and manufacturing standards, which showed that the pipe was of average quality in the industry.¹ Hula averred in his affidavit that the pipe did not meet the American Society for Testing Materials ("ASTM") standard because the standard required installation in accordance with the fitting manufacturer's recommendations, with which the pipe did not comply. In his deposition, however, Hula testified that the pipe did not deviate from any industry or manufacturing standard, including ASTM. He stated that there was no bevel restriction or blunt end requirement. The problem was lack of a standard. A witness may not create a factual dispute by submitting an affidavit that contradicts his own sworn testimony. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). Thus, the trial court properly disregarded Hula's affidavit to the extent that it conflicted with his deposition testimony.

Defendants argue that even if the pipe met all applicable standards, it was not suited for its ordinary purpose, insertion into a gasketed fitting, because it was incompatible with the fitting. Their argument relies on the fittings manufacturer's installation recommendations, which CDS admitted it did not have during work on the project. The recommendations instruct that the pipe should be inserted into the fitting until it stops, which is why it also instructs that no more than the top third of the pipe wall should be tapered. Defendants contend that following the recommendations and inserting the overtapered pipe supplied by plaintiff until it stopped resulted in overinsertion and caused the fittings to fail. Even assuming for the sake of argument that overinsertion was the cause of the fitting failures, the pipe supplied by plaintiff was perfectly compatible with the fittings as long as defendants followed the fittings manufacturer's recommendations, not the insertion instruction only. Had defendants field cut the pipe to match the recommendations, insertion into the fitting until it stopped would not have created a problem. Therefore, the pipe and fittings were not inherently incompatible. Accordingly, based on the undisputed evidence, plaintiff did not breach its implied warranty of merchantability. Therefore, the trial court properly found that plaintiff was entitled to summary disposition on this claim.

With regard to their breach of implied warranty of fitness for a particular purpose claim, defendants argue that plaintiff knew the particular purpose for which the parts were required because it had a copy of the project plan. They also assert that plaintiff knew they were relying on it to supply suitable parts. Again, their argument pertains to part compatibility. Plaintiff did

¹ Plaintiff used pipe from four manufacturers, including National Pipe, to fulfill CDS's order. The fact that at least one manufacturer had a substantially similar bevel to National Pipe's pipe supports the conclusion that National Pipe's pipe was of average quality in the industry.

not choose parts that were inherently incompatible or incompatible in the way in which it instructed CDS to use them. The parties do not dispute that plaintiff knew the particular purpose for which the pipe and fittings were intended and supplied those parts within the project plan's specifications. However, the pipe and fittings were not inherently incompatible and plaintiff made no representations with respect to how to assemble or install the parts. Therefore, defendants failed to establish a genuine issue of material fact and the trial court did not err in finding that plaintiff was entitled to summary disposition on this claim.

IV. CONCLUSION

Because defendants' counterclaim was properly dismissed, and defendants have no other defenses to plaintiff's complaint, the trial court did not err in granting plaintiff's summary disposition motion and entering a judgment in its favor. In light of our decision, it is unnecessary to address whether plaintiff was also entitled to judgment under an alternative spoliation of evidence theory. It is also unnecessary to address plaintiff's cross appeal.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell