STATE OF MICHIGAN

COURT OF APPEALS

GLIS,

Plaintiff-Appellee,

v

KAUL GLOVE AND MANUFACTURING COMPANY, d/b/a CHOCTAW-KAUL DISTRIBUTION COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 16, 2010

No. 293682
Genesee Circuit Court
LC No. 06-084124-CK

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

PER CURIAM.

Defendant appeals as of right a judgment for plaintiff in a breach of contract action. We affirm.

Defendant first argues on appeal that there was no contract between the parties. We disagree.

"We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *City of Flint v Chrisdom Properties, Ltd*, 283 Mich App 494, 498; 770 NW2d 888 (2009). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made. The trial court's findings are given great deference, as it is in a better position to examine the facts." *Chelsea Investment Group, LLC v City of Chelsea*, __ Mich App __; __ NW2d __ (Docket No. 288920, issued April 27, 2010), slip op, p 6. In addition, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613. Finally, issues regarding the formation of a valid contract are questions of fact reviewed for clear error. *In re Costs and Attorney Fees*, 250 Mich App 89, 97; 645 NW2d 697 (2002).

"The essential elements of a valid contract are the following: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005), quoting *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991).

> In order to form a valid contract, there must be a meeting of the minds on all the material facts. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. "Meeting of the minds" is a figure of speech for mutual assent. [*Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992) (internal citations omitted).]

In addition:

> The burden is on plaintiffs to show the existence of the contract sought to be enforced, and no presumption will be indulged in favor of the execution of a contract since, regardless of the equities in a case, the court cannot make a contract for the parties when none exists. [*Id*. at 549 (internal citations omitted).]

Thus, "[a]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended *manifests an intent to be bound by the offer*, and all legal consequences flowing from the offer, *through voluntarily undertaking some unequivocal act* sufficient for that purpose." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453-454; 733 NW2d 766 (2006) (internal citations and punctuation omitted; emphasis added). In this case, plaintiff concedes that its agreement with defendant is an oral contract. "Where the parties do not explicitly manifest their intent to contract by words, their intent may be gathered by implication from their conduct, language, and other circumstances attending the transaction." *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997).

Defendant argues that the basic elements of a contract claim were nonexistent. First, defendant had no need for uniforms, but rather, the uniforms went to Daimler Chrysler (DCX). Second, defendant asserts that there was no mutuality of assent on essential terms, as is required, and further, plaintiff never proved the terms of the contract. Instead, according to defendant, the trial court arbitrarily selected some recitations of alleged oral contract while ignoring others. We disagree.

Plaintiff presented several witnesses at trial who testified to the existence of a contract between plaintiff and defendant, as well as the contract's terms. Brian Jaques, an accountant who worked for plaintiff from February 2004 through 2006, testified that plaintiff had a contract with defendant and defendant, in turn, had a contract with DCX. Under the agreement, plaintiff supplied the security uniforms for 20 DCX plants across the United States and DCX paid a weekly rental charge for each uniform item. Plaintiff sent the bills to defendant, which, in turn, transmitted the bills to DCX. According to Jaques, all payments that plaintiff received came through defendant, not DCX. Bonnie Gladwish, an employee of plaintiff, similarly testified that plaintiff was to provide all of the services and on-site work for the contract, while defendant was to do the invoicing for it directly to DCX.

Although defendant argues on appeal that there was no mutuality of assent necessary for this contract, Charles Naso, defendant's vice president of operations, definitively testified at trial that there was an agreement between the parties and he was the point person for defendant. Naso explained that he assisted plaintiff in getting the DCX business. Naso acknowledged that the agreement between plaintiff and defendant required plaintiff to service defendant's contract with DCX and then submit its billing through defendant in hard copy form, after which, defendant

would put the information in an excel spreadsheet and then transmit it to DCX. In fact, Naso himself transmitted the invoices, often via e-mail. Naso confirmed that defendant received consideration as the result of this agreement: defendant got a five percent share of the gross amount of the invoice, although DCX could take a two percent discount if it paid within 45 days, still leaving defendant with three percent. Naso further confirmed that, during the course of the contract, any problems were "insignificant."

In addition, Naso acknowledged, when being cross-examined by defense counsel regarding "the contract" (defense counsel's words), that plaintiff would get paid when defendant received payment from DCX. Defendant's motion for directed verdict focused on problems with the final invoices and defense counsel stated that plaintiff had to prove that the invoices were payable but did not present anybody "who actually had present knowledge as to how *this contract* was implemented." Thus, defendant never argued during trial that there was no contract between the parties, and, more importantly, gave testimony, through Naso, of its existence. The dispute in this case, as will be discussed below, was whether defendant was in breach of this agreement. Therefore, it is clear that there was a contract between plaintiff and defendant, and furthermore, "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).

Defendant next argues that the contract, if there was one, violated the statute of frauds. We disagree.

Defendant did not raise a statute of frauds defense in the trial court, and therefore, this issue is not preserved. However, "this Court may address an unpreserved issue if it involves a question of law and the facts necessary for its resolution have been presented . . . ." *Royce v Chatwell Club Apartments*, 276 Mich App 389, 399; 740 NW2d 547 (2007). This Court reviews unpreserved issues for plain error affecting substantial rights. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 31; 772 NW2d 801 (2009).

MCL 566.132(1) provides, in relevant part:

> In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

"The statute of frauds is an affirmative defense that is not only invoked to prevent fraudulent construction of a written contract, but also to prevent disputes over what provisions were included in an oral contract." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 82; 443 NW2d 451 (1989). "The statute of frauds exists for the purpose of preventing fraud or the opportunity for fraud, and not as an instrumentality to be used in the aid of fraud or prevention of justice." *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 526; 644 NW2d 765 (2002).

Defendant asserts that the original purchase order between DCX and defendant was a one-year purchase order with an extension for an additional year. Moreover, the security uniform items had a two-year useful life for depreciation purposes. Thus, defendant concludes that the oral contract between plaintiff and defendant could not be performed in less than one year and is void because defendant did not sign a writing ratifying the agreement. We disagree.

Defendant's claim that the depreciation schedule was a two-year schedule is undisputed, however, items taken out of service during the course of the contract would have to be replaced with a new item that had a 24-month depreciation schedule, and this has no effect on the length of the contract. More importantly, the purchase order, i.e., the contract between defendant and DCX, on which plaintiff and defendant's agreement is based, states that it is a one-year contract from April 18, 2002, to April 18, 2003, and therefore, is not within the statute of frauds. MCL 566.132(1). Further, it is true that, Don Fergle, the purchaser for DCX, explained that the contract was later extended for a second year. This is demonstrated by various amendments to the purchase order, each of which state that it is effective for one year (although Amendment M was for 13 months). Even if the parties believed that DCX might so extend its agreement with defendant "[t]he rule is that if, by any possibility, [an agreement] is capable of being completed within a year, it is not within the statute, though the parties may have intended and thought it probable that it would extend over a longer period, and though it does so extend." *Rowe v Noren Pattern & Foundry Co*, 91 Mich App 254, 257; 283 NW2d 713 (1979). Here, it was possible that the parties would not extend the contract, and therefore, the contract between plaintiff and defendant could have been completed within one year and does not violate the statute of frauds.

Defendant next argues that it did not breach its contract with plaintiff. We disagree.

Whether a party breaches a contract is a factual issue, *Chelsea Investment Group*, slip op, p 6, which, as noted above, we review for clear error, *Chrisdom Properties*, 283 Mich App at 498. To the extent that determining breach involves interpreting the contract, the standard of review is de novo. *Chelsea Investment Group*, slip op, p 6.

When interpreting a contract,

> if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties . . . . If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [*Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (internal citations omitted).]

In addition, "a contract is to be construed as a whole . . . all its parts are to be harmonized so far as reasonably possible . . . every word in it is to be given effect, if possible; and . . . no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable." *Roberts v Titan Ins Co*, 282 Mich App 339, 358; 764 NW2d 304 (2009). "The rules of contract construction are the same for written and oral contracts." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 583; 473 NW2d 652 (1991). The "[t]erms of an oral agreement may be demonstrated by the course of dealing and performance between contracting parties." *Tucker v Allied Chucker Co*, 234 Mich App 550, 567; 595 NW2d 176 (1999).

Defendant argues that the trial court's findings of fact were clearly erroneous and it did not properly interpret the contract. First, according to defendant, Naso's testimony contradicts the court's conclusion that the billings that plaintiff presented were in keeping with the agreement. Moreover, the testimony the court relied on came from Gladwish and Jaques, neither of whom had working knowledge of the agreement or negotiations. Second, the record is unrefuted that DCX's transition to using Wackenhut, an outside company, to handle security, hampered the transaction. Third, defendant asserts that the trial court incorrectly concluded that Naso was motivated by a self-serving business interest. According to defendant, as a result of these erroneous factual conclusions, the trial court improperly found that plaintiff waived the condition precedent of the pay-when-paid clause by failing to submit all 20 of the final invoices to DCX. Defendant counters that plaintiff simply refused to help by providing invoices that were sufficient to allow the processing of payment. Finally, defendant argues that, under Michigan law, even if it was impossible for defendant to obtain payment from DCX, under the circumstances of this case, the pay-when-paid clause would still be applicable. Defendant concludes that, if defendant was liable because it failed to submit all the invoices, it could only be liable for the 12 invoices it failed to submit. We are not persuaded by defendant's arguments.

As discussed above, plaintiff presented several witnesses at trial who testified to the existence of a contract between plaintiff and defendant, wherein plaintiff supplied security uniforms and related apparel, and provided laundry service for these items for 20 DCX plants. Defendant, in turn, was responsible for submitting plaintiff's invoices to DCX. DCX would pay defendant, who, after taking what amounted to a three percent commission, would then pay plaintiff. Naso acknowledged that he took the information submitted by plaintiff and transferred it to an excel spreadsheet, which he then transmitted to defendant, often via e-mail. Thus, it is undisputed that defendant's duty under the contract was to submit plaintiff's invoices to DCX.

The trial court concluded that the contract was a pay-when-paid agreement, that is, defendant was not bound to pay plaintiff until defendant received payment from DCX, and further, that this contractual provision was a condition precedent. "A 'condition precedent' is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor." *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006). "Failure to satisfy a condition precedent prevents a cause of action for failure of performance." *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 583; 739 NW2d 696 (2007) (internal citations omitted). Moreover, "[c]ourts are not inclined to construe stipulations of a contract as conditions precedent unless compelled by the language in the contract." *Id*. at 584. "Accordingly, unless the contract language itself makes clear that the parties intended a term to be a condition precedent, this Court will not read such a requirement into the contract." *Real Estate One*, 272 Mich App at 179. In this case, however, both parties, agree that the contract contained a pay-when-paid provision, and further, that this provision is a condition precedent.

The dispute in this case, however, is whether, as held by the trial court, defendant prevented the condition precedent from occurring:

> [W]hen a contract contains a condition precedent, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event. Where a party prevents the occurrence of a condition, the party, in

> effect, waives the performance of the condition. Hence, the performance of a condition precedent is discharged or excused, and the conditional promise made an absolute one. [*Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131-132; 743 NW2d 585 (2007) (internal citations and punctuation omitted).]

In addition, "a party must prevent the condition from occurring by either taking some affirmative action, or by refusing to take action required under the contract, before a court will find a waiver of a condition precedent." *Id*. at 132.

In this case, the breach arose at the end of the contract, just short of two years after it began. After DCX outsourced security operations, and, apparently, security uniforms, to a company called Wackenhut, it no longer had a need for uniforms and service from plaintiff. According to Jaques, after DCX terminated the contract and returned all of the uniform items to plaintiff, plaintiff prepared the final invoices. Jaques explained that the final bill for each plant included a "sales invoice," which showed, as had all of the previous invoices, "the actual item number, which is a [DCX] item number, the description, number of units, the unit price, and then the extension of the total price." The document contained an invoice number (plaintiff's internal number), a customer identification number, which refers to the plant, and a customer purchase order number (between plaintiff and defendant). The final bill also included several off-rent forms, which included the depreciation charges for the items. Jaques explained that, pursuant to the agreement, the depreciation schedule applied if DCX failed to rent an item for the entire 24-month period. Since the contract did, in fact, end before the end of the two-year time frame, every single piece of clothing and accessory at all 20 plants was subject to depreciation, i.e., the off-rent charge.

There were also documents termed "statements" for each plant, which are "a summary of all outstanding invoices at that particular date." According to Jaques, the final invoices were mailed to defendant, but after some time, Naso reported that he did not have them. Thus, Todd Gladwish, plaintiff's president and CEO, and Jaques "actually hand delivered all of the invoices to . . . Mr. Naso," and according to Jaques, "we were then requested to provide it on a diskette because the paper copies took up an entire box . . . ." It took Jaques two days to individually scan each page in order to put it on a CD, and he did this two different times. Despite these efforts, however, plaintiff was never paid its outstanding balance.

Naso's explanation for why the final invoices were not paid is that the "dollar amounts" were too high, as were "their quantities." Furthermore, the people at the plants to whom he normally sent the excel spreadsheets "weren't the same people" after DCX outsourced its security operations to Wackenhut. According to Naso, "they basically pushed the information back. Not ours to deal with." Naso further stated that he needed help from plaintiff to figure out to whom to send the invoice.

Naso testified that, in attempting to get the final invoices paid for the 20 separate plant locations, rather than send them to the plants, as he had done over the course of the contract, he sent between five and eight of them to June Willis, an administrative assistant in the corporate security office. He explained:

> . . . . *I didn't send 20 because I couldn't come to the understanding and neither could [plaintiff] tell me why it was*. They just said, that's the way it is, but I

> couldn't myself figure out how to send somebody $100,000 and some worth of invoices when it was three months after the contract ended. So I took a group of them and I sent that group over to [Willis]. What she did with them, obviously, she told us yesterday she sent them out to the sites. The sites pushed back and would do nothing with them. [Emphasis added.]

Additionally, despite defendant's arguments on appeal, Naso clearly stated that he did not want to submit invoices that he could not understand because "the reputation of our company then comes into question," and he still had "the ultimate obligation not to be giving them bogus information or things that [he did not] feel [were] accurate or correct." Naso said he eventually sent all of the outstanding invoices to Willis in a box, on August 2, 2007 – more than a year after plaintiff filed its complaint.

Thus, Naso admitted that he did not submit all of the final invoices (and the eight that he did send went to Willis, not directly to the plants, as required) and essentially gave three reasons for his failure to comply with the contract: (1) the invoices were too high of a dollar amount and too complicated to understand, (2) the plant personnel to whom he usually sent the excel spreadsheets were no longer available, and (3) plaintiff did not provide proper support in the form of easy-to-understand information. Testimony was such, however, that the trial court did not clearly err in finding otherwise.

First, regarding Naso's claim that he did not want to submit invoices for high dollar amounts that could not be explained, it is true that Gladwish admitted that defendant would need some help understanding the final invoices. However, as noted above, Jaques indicated that he provided detailed information on more than one occasion. Moreover, Fergle, the DCX buyer, acknowledged that the purchase order, i.e., the contract, between defendant and DCX, included an explanation of the replacement costs for uniform items and it listed the depreciation schedule as well. The purchase order indicated that the garments were to be in service for a 24-month term, otherwise, the garments were subjected to the schedule of replacement costs. It is undisputed that the contract lasted less than 24 months. In addition, plaintiff had serviced a DCX plant in Canada for several years and used the same invoicing system. Thus, DCX was familiar with the way that plaintiff billed for its services, and understanding the final invoices should not have been an insurmountable challenge. Indeed, even according to Naso's testimony, there had never been problems with billing and regular statements often contained "off-rent" or depreciation charges for items that went out of service.

Moreover, despite Naso's contention that the transition to Wackenhut, an outside security provider, changed the status of the plant personnel to whom he had been sending invoices for approval, Fergle testified that, if the plant was still operating, regardless of whether security was being handled by an outside company, then there would be a DCX employee at the plant, such as the plant manager, who had the responsibility for the outside employees. Willis, furthermore, testified that security managers at the plant (to whom she forwarded some invoices) would have stayed employees of DCX, even though security personnel were transferred to Wackenhut. Thus, there is no explanation for why Naso sent invoices to Willis instead of plant personnel with the authority to issue the necessary releases for payment.

As for plaintiff's efforts to assist defendant, despite Naso's testimony that he could not understand the final billing, as noted above, plaintiff provided voluminous quantities of

information to defendant on more than one occasion. Further, Jaques identified an e-mail sent by Naso to Todd on October 25, 2004, a few months after the end of the contract, with the subject line "outstanding Chrysler invoices." In this e-mail, Naso said to Todd, "we need to be able to set down with them and show them what all the charges are for on a plant-by-plant basis." The response from Todd was that he and Jaques were available whenever Naso was. A year after the contract ended, on April 7, 2005, Naso sent an e-mail to Todd stating, "Todd, let's meet next Thursday in the morning. I've asked in the past for a breakdown of what is owed by each DCX location. I need it more detailed than what has been presented. Also, please provide me with any names at DCX that I can contact to set up a meeting if possible. We can maybe make the meeting next Thursday." Jaques testified that, shortly before Todd died in May 2005, Jaques met with Naso. When setting up the meeting, someone from defendant (Jaques was not sure who), told Jaques defendant did not have the invoices. "So, [Todd] and myself brought them down to insure that they would have them." At this meeting, Jaques did not recall Naso mentioning that he was concerned about being able to substantiate the invoices to DCX: "He did not review any of the invoices at the meeting, so I'm not sure how he could comment on not being able to hand them over . . . if we assume that they were not in possession of them originally." Thus, there is no evidence that plaintiff did not supply information when asked or did not make itself available for troubleshooting.

Finally, although defendant attempts to argue that the trial court erred in failing to determine whether "defendant acted reasonably in pursuing the condition precedent," defendant concedes that there is no such requirement under Michigan case law. Therefore, the trial court did not err in concluding that the condition precedent failed due to defendant's inaction and defendant was in breach of contract.

Defendant next argues that plaintiff improperly pleaded a claim for account stated. However, the trial court, did not specifically address the account stated claim, and furthermore, limited the language of its opinion to the breach of contract claim. Defendant admits that the trial court did not base its opinion on the account stated claim. Moreover, as we stated above, the trial court properly concluded that there was a breach of contract. Therefore, even if the account stated claim was invalid, there is no remedy this Court can provide and the issue is moot. *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004). "[T]his Court is not obliged to decide moot questions even when they are preserved." *Driver v Cardiovascular Clinical Assoc, PC*, 287 Mich App 339, 355; 788 NW2d 848 (2010) (internal citations omitted).

Defendant makes an additional argument about plaintiff's pleadings and its failure to join DCX as a party, but did not include it in the statement of questions presented. Therefore, defendant has waived this issue. *Charter Twp of Van Buren v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003). It is true that "this Court may consider an issue raised in a nonconforming brief if it is one of law and the record is factually sufficient," *id*., however defendant claims that DCX was a necessary party, hence,

> [b]ecause joinder is mandatory under MCR 2.205(A), rather than permissive, joinder is required for the benefit of the defendant and thereby places on the defendant the burden of objecting to misjoinder. Thus, the defendant must make a timely assertion of the position that separate suits violate the rule prohibiting the splitting of actions, modernly known as the joinder rule. If the defendant fails to make such a timely assertion, he waives his right to make such a claim; in effect,

> the defendant acquiesces in splitting causes of action by not raising timely objection. [*United Services Auto Ass'n v Nothelfer*, 195 Mich App 87, 89-90; 489 NW2d 150 (1992) (internal citations omitted).]

Accordingly, defendant has, again, waived this issue.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Peter D. O'Connell