STATE OF MICHIGAN

COURT OF APPEALS

HAWORTH, INC,

Plaintiff/Counter-Defendant/Appellee,

v

SHAPE CORP,

Defendant/Counter-Plaintiff/Appellant.

UNPUBLISHED
August 26, 2021

No. 354046
Ottawa Circuit Court
LC No. 19-005843-CB

Before: RONAYNE KRAUSE, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Defendant/counter-plaintiff Shape Corp (defendant), appeals by right the trial court's June 10, 2020 judgment directing defendant to pay plaintiff/counter-defendant Haworth, Inc. (plaintiff) $391,985,05 in rebate fees and $39,541.50 in attorney fees and expenses, for a total of $431,526.55. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant are both Michigan corporations. In 2014, the parties entered into a five-year supply agreement (the Supply Agreement or Agreement) under which defendant would produce, and plaintiff would purchase, steel tubing for use in producing plaintiff's "Compose Workspace" (Compose) furniture line. Under the Supply Agreement, defendant agreed to provide price reductions and annual rebates to plaintiff as an incentive to keep the steel tubing production job with defendant. Accordingly, the Supply Agreement contains a rebate schedule specifying defendant's obligation to pay rebates to plaintiff, including the size of rebates, for each year from 2014 to 2019, inclusive. The schedule also states in relevant part:

> This Schedule is based on Compose volumes from the 2013 calendar year. If annual volumes decrease by 20% or more from 2013 volumes, the corresponding rebate amount owed Haworth will be prorated accordingly for the impacted calendar year.

By 2015, defendant determined that it no longer wished to proceed under the agreed pricing and rebate structure, and plaintiff and defendant discussed transitioning the production to plaintiff.

In June 2016, plaintiff and defendant agreed to work together to effectuate the transition and wrap up production at defendant's facilities. According to defendant, through 2017 and 2018, it provided consulting and other services to plaintiff to facilitate the transition. Defendant was not additionally compensated for any consulting services provided to plaintiff; plaintiff states that defendant never requested compensation for consulting services and no agreement related to those services was ever made.

On March 24, 2018, plaintiff informed defendant that it should stop production of the steel tubing on April 13, 2018. Defendant agreed to do so, and also agreed to ensure that it had produced sufficient levels of stock for plaintiff to use during the transition and to retain the Compose tooling in its mills until June 1, 2018, in case plaintiff had issues with its production and needed to order additional supplies. The last purchase under the Supply Agreement was completed in May of 2018. In late May and early June 2018, defendant produced additional parts for plaintiff's purchase under increased price terms. In September 2018, plaintiff approached defendant about producing additional parts, but the parties were not able to agree on terms. In October 2018, plaintiff informed defendant that defendant's services would no longer be required on the Compose line.

In November 2018, plaintiff contacted defendant regarding payment of the rebate for 2018 associated with parts that were produced by defendant from January 1, 2018 until the time the contract was officially abandoned on May 13, 2018. Defendant informed plaintiff of its position that, because the Supply Agreement had been mutually terminated by both parties, defendant was not responsible for payment of the 2018 rebate. Plaintiff disagreed and argued that defendant's rebate obligations were still enforceable even after the termination of the contract because of Section 19.0(e) of the Supply Agreement, which states: "The expiration or termination of this Agreement shall not affect any of the provisions of this Agreement that by their nature are intended to continue after termination or expiration [of the Agreement]."

On January 31, 2019, plaintiff sent defendant an invoice for the 2018 rebate in the amount of $394,200.00. Plaintiff stated that the amount represented the prorated portion of the 2018 rebate that had accrued when plaintiff purchased product from defendant in early 2018 under the Supply Agreement. Defendant again informed plaintiff that since the Supply Agreement was abandoned, defendant was not obligated to pay the rebate.

Plaintiff filed suit on July 7, 2019, alleging one count of breach of contract. Specifically, plaintiff alleged that defendant breached the Supply Agreement by refusing to pay plaintiff the prorated 2018 rebate under the Supply Agreement. Plaintiff sought monetary damages in the amount of the invoice, plus an award of attorney fees and expenses under the Supply Agreement. Defendant answered the complaint, denying that it had breached the Agreement or that it was required to pay the 2018 rebate, and asserting counterclaims for unjust enrichment, promissory estoppel, and breach of contract based on plaintiff's alleged failure to compensate defendant for consultant services rendered during the transition.

Defendant filed a motion for summary disposition on December 23, 2019 under MCR 2.116(C)(10). The motion stated in part: "Shape's Counterclaim is only valid if this Court determines that the Supply Agreement was not abandoned or terminated. Therefore, if this Motion is granted, the Counterclaim should similarly be dismissed." Plaintiff responded to defendant's motion on January 13, 2020, arguing that defendant was contractually obligated, under the Supply Agreement, to pay the 2018 rebate, because it unambiguously provided a rebate structure by which

payments would be made to plaintiff dependent upon how much product plaintiff brought from defendant. Because plaintiff bought product from defendant during the 2018 time period, plaintiff argued, defendant was clearly obligated to pay a rebate. Plaintiff also argued that it did not abandon the Supply Agreement, but merely proceeded with a plan, known to both parties, to transition the Compose program to in-house production.

A hearing on defendant's motion was held on March 5, 2020. At the hearing, defendant argued that the parties had mutually abandoned the Supply Agreement, and that the rebate provision did not survive the Agreement's termination. Plaintiff argued that the Supply Agreement had not been mutually abandoned, and that in any event, defendant's obligation to pay the rebate on product ordered in 2018 remained. On March 23, 2020, the trial court issued a written opinion and order granting in part and denying in part defendant's motion for summary disposition. The court noted that "the parties had a clear intention to operate in relation to one another under the Supply Agreement, as amended by the Stocking Agreement Addendum,[1] while working toward an ultimate transfer of Compose production to plaintiff. Both parties operated under the Supply Agreement until that transition occurred." The court held that the parties mutually abandoned the Supply Agreement effective May 14, 2018. The court further held that plaintiff was entitled to receive a rebate for parts produced by defendant up unto the time the Supply Agreement was mutually abandoned, and that defendant had breached the Supply Agreement by failing to pay the rebate with respect to parts that were produced by defendant from January 1, 2018 to May 13, 2018.

The court also addressed attorney fees, holding that the Supply Agreement provided for defendant's indemnification of plaintiff for attorney fees and expenses arising from defendant's breach of its obligations under that Agreement. Accordingly, the trial court held that defendant was required to pay attorney fees and expenses to plaintiff.

The trial court also dismissed defendant's counterclaim, holding that, by defendant's own words in its motion, the counterclaim would be valid only if the court determined that the Supply Agreement was not mutually abandoned or terminated. Because it held that the Supply Agreement was abandoned, the court accordingly dismissed defendant's counterclaim.

Defendant moved for reconsideration on April 13, 2020, arguing that the mutual abandonment of a contract has the effect of rescinding that contract, rendering it void *ab initio* and unenforceable. The trial court denied defendant's motion, stating that "the court certainly cannot find that the parties intended to treat the Agreement as never having occurred."

Plaintiff moved for award of attorney fees and expenses on April 13, 2020. Defendant responded, arguing that it did not breach the Supply Agreement, because the invoice sent by plaintiff listed a different amount for the 2018 rebate than what was ultimately owed; however, defendant specifically stated it had no objection to the number of hours billed or the hourly rate paid by plaintiff to its attorneys. The trial court granted plaintiff's motion, noting that although

[1] The record reflects that, on July 1, 2016, plaintiff and defendant entered into a Stocking Agreement Addendum to address financial difficulties defendant faced in complying with the Supply Agreement.

plaintiff's "initial demand exceeded its actual award" by a relatively small amount, it was "not disputed that Haworth also sought to resolve this matter through pre-suit negotiations" rather than litigation. On June, 8, 2020, the trial court issued an opinion and order on plaintiff's motion for attorney fees and costs, awarding plaintiff "actual reasonable attorney fees and expenses, pursuant to Section 17.0(a) of the Supply Agreement, in the amount of $39,541.50."

This appeal followed. On appeal, neither party challenges the trial court's determination that the Supply Agreement no longer bound the parties after May 14, 2018; rather, they dispute whether defendant was obligated to pay a prorated rebate for 2018 under the Agreement (as well as the award of attorney fees and expenses, and the dismissal of defendant's counterclaim).

II. DEFENDANT'S OBLIGATION TO PAY A REBATE FOR 2018

Defendant argues that the trial court erred by determining that it was obligated to pay a rebate for the portion of the 2018 production year in which it was bound by the Supply Agreement. We disagree.

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). *Spiek v Dep't of Trans*, 456 Mich 331, 337; 572 NW2d 201 (1998). The moving party has the initial burden to support its claim by affidavits, depositions, admissions or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. In deciding such a motion, a trial court must consider the evidence in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). If the record evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id*. at 120.

We review de novo issues of contract interpretation and the legal effect of contractual provisions. *Bandit Indus, Inc v Hobbs Int'l, Inc* (After Remand), 463 Mich 504, 511; 620 NW2d 531 (2001).

When interpreting a contract, this Court must examine the contractual language to determine the intent of the parties. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). We must examine the language of the contract and accord the words their ordinary and plain meanings if such meanings are apparent. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). If the language is unambiguous, courts must interpret and enforce the contract as written. *Quality Prods*, 469 Mich at 375. "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id*.

"The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted." *Dault v Schulte*, 31 Mich App 698, 701; 187 NW2d 914, 915 (1971), quoting 17 Am Jur 2d Contracts § 484 (now found at 17A Am Jur 2d Contracts § 517). A contract may be abandoned when the parties "mutually abandon all further performance under it, and treat it as at an end, neither seeking to hold the other to any accountability under it." *Young v Rice*, 234 Mich 697, 700; 209 NW 43 (1926) (emphasis added). Mutual abandonment may result in mutual

rescission of the contract if there is "a mutual release of further obligations under the contract and a restoration of the status quo." *Gaval v Wojtowycz*, 13 Mich App 504, 510; 164 NW2d 724 (1968), quoting *Simpson v Murphy*, 229 Mich 449, 453; 201 NW 464 (1924). A rescinded contract is, in effect, considered to have never existed. See *Bazzi v Sentinel Ins Co*, 502 Mich 390, 408-409; 919 NW2d 20 (2018). Mutual rescission prevents a party from seeking the remedy of specific performance under the contract. *Higbie v Higbie*, 306 Mich 577, 599; 11 NW2d 248 (1943).

Generally, a vested contractual right exists when one party has performed under a contract that existed at the time, notwithstanding the contract's later modification or expiration. See, e.g., *In re Certified Question*, 447 Mich 765, 785; 527 NW2d 468 (1994) (holding that "the policyholders do have a vested contractual right to liability coverage for the period in question for which premiums have been paid"). When one party to the contract has performed its duties under the contract, it is generally vested with the right to seek monetary damages or other remedies as a result of the breach of that contract, i.e., the other party's failure to perform. See *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). Monetary damages recoverable from the breach of contract are generally "limited to the monetary value of the contract had the breaching party fully performed under it." *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 324-325; 565 NW2d 915 (1997).

Defendant argues that, because the trial court described the contract as "abandoned" by the parties, that the Supply Agreement was therefore necessarily rescinded, and that plaintiff cannot seek to hold defendant to its contractual obligation to pay the 2018 rebate. We disagree. Although the trial court held that the Supply Agreement was mutually abandoned as of May 14, 2018, the record contains no evidence, as the trial court stated on reconsideration, that the parties intended to treat the contract as though it had never existed. *Bazzi*, 502 Mich at 408-409. For example, plaintiff did not return the steel tubing it had purchased under the Supply Agreement for the previous four years, nor did defendant refund the payments made to it by plaintiff for that tubing. See Rest 3d of Restitution and Unjust Enrichment, § 37, comment a(3) (noting that rescission "ostensibly requires each party to return to the other whatever has been received by way of performance"). Rather, it is clear from the record that, while the parties intended "a mutual release of further obligations under the contract" they did not intend "a restoration of the status quo." *Gaval*, 13 Mich App at 510. The parties' and trial court's later use of the term "abandonment" to describe the agreement the parties reached in 2018 does not alter that fact. See Rest 3d of Restitution and Unjust Enrichment, § 54, comment a ("As a further requirement, the proponent of rescission must show that the unwinding of performance (as opposed to a remedy by money judgment) is both feasible and equitable on the facts of the case.").

There is no dispute that plaintiff fully performed its duties under the contract until May 14, 2018. Having performed, it was entitled to seek either defendant's performance or monetary damages for defendant's refusal to pay for that performance. *In re Certified Question*, 447 Mich at 785. Although abandonment may have prevented the parties from seeking to impose *further* obligations on one another under the Supply Agreement, see *Gaval*, 13 Mich App at 510; *Young*, 234 Mich at 700, nothing in the record indicates that the parties agreed to release each other from payment of any sums that were already due and owing under the Supply Agreement. The record is clear that plaintiff ordered composite tubing from defendant in 2018 and paid for it under the terms of the Supply Agreement. Having fully performed, it was entitled to receive a rebate under

the terms of that Agreement, notwithstanding the parties' later decision to abandon the Agreement going forward.[2]

Defendant also argues that the due date for payment of each years' rebate shows that the parties intended that the rebate not be paid unless the Supply Agreement was in effect for the entire year. We disagree. The plain language of the Agreement merely provides a deadline for payment of each year's rebate; nothing in that language can be reasonably interpreted as providing that if the Agreement ceases to be in effect before that deadline, defendant is relieved of its obligation. *Quality Prods*, 469 Mich at 375; *Wilkie*, 469 Mich at 47. Moreover, the Supply Agreement explicitly provides for proration of the rebate amount if plaintiff purchases less than the expected amount of tubing in a given year; therefore, to the extent defendant claims that the rebate is only intended to apply if plaintiff purchases a certain amount of tubing, or makes purchases for an entire calendar year, this argument is also meritless.

The trial court did not err by holding that defendant was obligated to pay the 2018 rebate, and that it breached the Supply Agreement by failing to do so.

III. ATTORNEY FEES AND EXPENSES

Defendant also argues that the trial court erred by awarding plaintiff attorney fees and expenses under the Supply Agreement. We disagree. This Court reviews for an abuse of discretion a trial court's award of attorney fees. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). We review de novo issues of contractual interpretation. *Bandit Indus, Inc* (*After Remand)*, 463 Mich at 511.

In this case, Section 17.0(a) of the Supply Agreement provides, in relevant part: "[Defendant], at its own expense, shall save harmless, defend and indemnify, and hold [plaintiff] . . . harmless from and against all liability, actual, reasonable costs and expenses (including attorney fees and expenses), arising from or relating to (i) [defendant's] breach of its obligations under this Agreement[.]" Plaintiff moved the trial court for an award of attorney fees and expenses under the Agreement, alleging that it had incurred those fees and expenses because it was forced to sue defendant to attain payment of the rebate. Plaintiff's complaint sought a remedy for defendant's breach of the Supply Agreement. As stated, we affirm the trial court's determination that defendant breached the Agreement. Therefore, by the plain language of Section 17.0(a), plaintiff is entitled to recover its attorney fees and expenses incurred in seeking a remedy for defendant's breach. *Quality Prods*, 469 Mich at 375.[3]

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[2] In light of this conclusion, we need not address the parties' arguments concerning the effect of Section 19.0(e).

[3] Defendant does not explicitly challenge the trial court's award of attorney fees on the ground that Section 17.0 did not survive the termination of the Supply Agreement. For clarity, however, we note that Section 17.0(b) provides that defendant is required to maintain general liability insurance and product liability insurance "which contains contract liability endorsements," with plaintiff as an additional insured, for "at least three years after the termination or expiration of this

Defendant's argument that it did not breach the Agreement because the judgment amount was slightly different than the amount of plaintiff's invoice also lacks merit. Because this argument was raised for the first time on appeal, this Court need not consider it. See *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). But in any event, defendant does not explain how a roughly 0.5% difference between the amount of the judgment and the amount of the invoice retroactively justified its refusal to pay *any* amount of the rebate based on its belief that it was not obligated to do so.

We conclude that the trial court did not abuse its discretion or commit an error of law in awarding plaintiff its attorney fees and expenses under the Supply Agreement.[4] *Smith*, 481 Mich at 526; *Bandit Indus, Inc* (*After Remand)*, 463 Mich at 511.

IV. DISMISSAL OF DEFENDANT'S COUNTERCLAIM

Defendant also argues that the trial court erred by dismissing its counterclaim. We disagree. This Court reviews de novo issues of contractual interpretation. *Bandit Indus, Inc* (*After Remand)*, 463 Mich at 511. Additionally, this Court reviews for an abuse of discretion a trial court's decision on a motion for reconsideration. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008).

Defendant's motion for summary disposition explicitly stated that its counterclaim was "only valid if this Court determines that the Supply Agreement was not abandoned or terminated. Therefore, if this Motion is granted, the Counterclaim should similarly be dismissed." Not only did the trial court determine that the Supply Agreement was abandoned, but defendant does not even challenge that holding on appeal. Further, defendant's motion was granted, albeit in part—the trial court's order states that defendant's "Motion for Summary Disposition is GRANTED in part in that the Supply Agreement was abandoned on May 14, 2018."

An error raised on appeal cannot be an error "to which the aggrieved appellant has contributed by planned or neglectful omission of action on his part." *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); see also *People v Witherspoon* (*After Remand*), 257 Mich App 329, 333; 670 NW2d 434 (2003) (stating that, generally, "an appellant may not benefit from an alleged error that the appellant contributed to by plan or negligence"). Although defendant argues that it did not contemplate the trial court holding that the Supply Agreement was abandoned *and* that it owed the rebate, the language of its motion is clear and unqualified. Defendant's contribution to any error in the trial court's dismissal precludes review of that error on appeal. *Smith*, 372 Mich at 337.

Agreement." The language of this provision indicates the parties' intent that Section 17.0 survive the termination or expiration of the Agreement. *Wilkie*, 469 Mich at 47.

[4] Defendant does not challenge the amount of attorney fees or expenses awarded on the grounds that they are not reasonable or do not represent plaintiff's actual fees and expenses incurred.

The trial court did not commit an error of law by dismissing defendant's counterclaim, nor did it abuse its discretion by denying defendant's motion for reconsideration. *Woods*, 277 Mich App at 629.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Jane M. Beckering
/s/ Mark T. Boonstra