[Cite as *NSK Industries, Inc. v. Bayloff Stamped Prods. Kinsman, Inc.*, 2010-Ohio-1171.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

NSK INDUSTRIES, INC. Appellee v. BAYLOFF STAMPED PRODUCTS KINSMAN, INC., FORMERLY KNOWN AS TARGET STAMPED PRODUCTS CORPORATION Appellant	C.A. No. 24777 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2008-02-1337

DECISION AND JOURNAL ENTRY

Dated: March 24, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Bayloff Stamped Products Kinsman, Inc. FKA Target Stamped Products ("Bayloff") appeals from the judgment of the Summit County Court of Common Pleas in favor of NSK Industries, Inc. ("NSK"). This Court affirms.

I

{¶2} In 2003, Bayloff and NSK each expressed an interest in contracting with one another whereby NSK would provide Bayloff with certain metal hinge parts from its overseas distributor and Bayloff would, in turn, supply the hinges to one of its manufacturers. The hinges at issue were comprised of several different parts, including a metal shoulder rivet, nylon washer, locking pin, locking spring, and solid center plated rivet. Although Bayloff and NSK's 2003 discussions did not result in the formation of an agreement, the companies negotiated once again in 2004 and reached an agreement. Bayloff and NSK disagree about the number of agreements

they entered into and the terms of those agreements, but as a result of their negotiations, NSK began providing Bayloff with the parts that it required. NSK would order the hinge parts from its overseas distributor and retain them until it received a "release" from Bayloff. The release would indicate the number of parts Bayloff needed NSK to deliver at a certain point in time. The companies' relationship later deteriorated when Bayloff's manufacturer stopped using Bayloff as its supplier, and Bayloff refused to take delivery of any further hinge parts from NSK. According to NSK, the companies contracted for a specific quantity of hinge parts and Bayloff was obligated to pay NSK for the entire quantity. According to Bayloff, the companies only ever agreed to Bayloff's annual estimated usages, never to specific quantities, and Bayloff only was obligated to pay NSK for the parts it requested per each release.

{¶3} On February 13, 2008, NSK filed suit for breach of contract against Bayloff. The parties filed joint stipulations on March 17, 2009, setting forth the exact type and number of hinge parts in dispute. Bayloff acknowledged that NSK incurred financial loss as a result of Bayloff's refusal to pay for the hinge parts, but denied that it was financially obligated to pay NSK for the parts. The parties also stipulated to NSK's damages in the event that judgment was entered in favor of NSK. On April 22, 2009, a jury trial commenced. The jury found in favor of NSK, and the court entered judgment against Bayloff in the amount of $109,347.23, plus interest.

{¶4} On April 27, 2009, Bayloff filed a motion for judgment notwithstanding the verdict ("JNOV"), or in the alternative, a new trial. Bayloff summarized its argument as follows: "[Bayloff] submits the evidence in this case does not match the verdict." The court denied Bayloff's motion on May 11, 2009.

{¶5} Bayloff now appeals from the court's judgment and raises three assignments of error for our review. For ease of analysis, we combine Bayloff's first two assignments of error.

II

Assignment of Error Number One

> "THE TRIAL COURT ERRED IN NOT GRANTING A DIRECTED VERDICT, A JUDGMENT NOTWITHSTANDING THE VERDICT OR ALTERNATIVELY A NEW TRIAL FOR BAYLOFF AS TO NSK'S CLAIM OF A CONTRACT BREACH DATED AUGUST 25, 2004."

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN NOT GRANTING A DIRECTED VERDICT, JUDGMENT NOTWITHSTANDING A VERDICT OR, ALTERNATIVELY, A NEW TRIAL FOR BAYLOFF AS TO NSK CLAIMS (sic) OF A CONTRACT BREACH DATED APRIL 27, 2005."

{¶6} In its first assignment of error, Bayloff argues that the trial court erred by not granting Bayloff's motions for directed verdict, JNOV, or a new trial as to the parties' purported August 25, 2004 contract. Specifically, Bayloff argues that there was insufficient evidence to show that the parties intended to form a contract for 4.5 million steel shoulder rivets on August 25, 2004. In its second assignment of error, Bayloff argues that the trial court erred by not granting Bayloff's motions for directed verdict, JNOV, or a new trial as to the parties' purported April 27, 2005 contract. Specifically, Bayloff argues that the evidence does not support the conclusion that the parties intended to form a contract for 633,000 pieces of part numbers 52472, 52474, and 60753 on April 27, 2005.[1]

[1] Although Bayloff's brief also references part number 50722 in its argument, the parties stipulated at trial that part number 50722 is not an issue in this matter because Bayloff released and paid for its entire order with regard to that part.

{¶7} This Court has held that:

> "An appellate court reviews a trial court's ruling on a motion for a directed verdict de novo, as it presents an appellate court with a question of law. A motion for a directed verdict assesses the sufficiency of the evidence, not the weight of the evidence or the credibility of the witnesses." (Internal citations omitted.) *Jarvis v. Stone*, 9th Dist. No. 23904, 2008-Ohio-3313, at ¶7.

After a court enters judgment on a jury's verdict, a party may file a JNOV to have the judgment set aside on grounds other than the weight of the evidence. See Civ.R. 50(B). As with an appeal from a court's ruling on a directed verdict, this Court reviews a trial court's grant or denial of a JNOV de novo. *Williams v. Spitzer Auto World Amherst, Inc.*, 9th Dist. No. 07CA009098, 2008-Ohio-1467, at ¶9, citing *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347. "JNOV is proper if upon viewing the evidence in a light most favorable to the non-moving party and presuming any doubt to favor the nonmoving party reasonable minds could come to but one conclusion, that being in favor of the moving party." *Williams* at ¶9, citing Civ.R. 50(B).

{¶8} R.C. 1302.04(A) provides, in relevant part, as follows:

> "[A] contract for the sale of goods for the price of five hundred dollars or more is not enforceable *** unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker."

The elements necessary to form a contract "'include an offer, acceptance, contractual capacity, consideration, *** a manifestation of mutual assent and legality of object and of consideration.'" *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16, quoting *Perlmuter Printing Co. v. Strome, Inc.* (N.D.Ohio 1976), 436 F.Supp. 409, 414. To constitute a valid contract, "both parties to a contract must assent to its terms; there must be a 'meeting of the minds' of the parties with respect to the essential terms of the contract, which terms are also definite and certain." *Franco v. Kemppel Homes, Inc.*, 9th Dist. No. 21769, 2004-Ohio-2663, ¶22. "[C]ourts may resort to extrinsic evidence of the parties' intent 'only where the language is unclear or

ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning.'" *Sarum Mgt., Inc. v. Alex N. Sill Co.*, 9th Dist. No. 23167, 2006-Ohio-5710, at ¶8, quoting *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, 132. See, also, R.C. 1302.05 (limiting the introduction of extrinsic evidence in the instance of a fully integrated document only if the evidence contradicts the terms of the agreement).

August 25, 2004 Contract

{¶9} Christopher Burke testified that he was an outside salesman for NSK at the time NSK and Bayloff began negotiations. Burke testified that he had a meeting in early 2004 with Bruce Betts and Randy Esser, representatives from Bayloff. According to Burke, Betts and Esser wanted a quote from NSK on steel shoulder rivets based on a projected use of 8.5 million rivets. Burke explained that NSK would be able to procure the rivets from an overseas distributor at a lower price, but that there would be a sixteen to twenty week lead time on delivery. He also explained that NSK's prices depended upon the quantity of items ordered such that the greater the number of items ordered, the lower the price of the items.

{¶10} Burke testified that, in February 2004, NSK received a purported purchase order from Bayloff for steel shoulder rivets. The order did not contain any quantity or price, however, so NSK sent a confirming purchase order. The confirming purchase order contained a quantity of 4.5 million rivets and a unit price of $47.25 per thousand rivets. It also contained the language "as released over one year from order date." Betts signed the purchase order on behalf of Bayloff and returned it on February 18, 2004. The signed purchase order confirmation contained an effective date of February 13, 2004. Thereafter, Bayloff began sending NSK releases and receiving the rivets it had ordered. Burke confirmed that Bayloff eventually received and paid for all 4.5 million rivets that stemmed from its initial order in February 2004.

{¶11} Burke testified that he spoke with Betts and Esser again at the end of August 2004 about Bayloff ordering additional rivets. Burke explained that because NSK's lead time on the rivets was sixteen to twenty weeks, he wanted to ensure that NSK had Bayloff's rivets in stock before the completion of their initial order for 4.5 million so that there would not be a gap in supply. Burke testified that, in discussing an order for additional rivets, Bayloff indicated that it needed to change the part number on the rivets. Until that point, the rivets had been coded with part number 60779. Burke testified that Bayloff wanted the part number for the rivets changed to 60991, but that the part itself was the same. Burke testified that, as a result of his conversation with Betts and Esser, NSK received a signed purchase order confirmation from Betts on September 13, 2004, indicating that Bayloff wished to purchase another 4.5 million rivets at the unit price of $47.25 per thousand rivets. The signed purchase order confirmation contained an effective date of August 25, 2004.

{¶12} Joel Hunger, an inside sales manager for NSK, testified that Bayloff released 1.5 million rivets from NSK within the first sixty days of its initial order in February 2004. Hunger testified that, because NSK's initial releases were sizeable and the lead time on the rivets was considerable, NSK approached Bayloff relatively soon after Bayloff's initial order to enter into another order and ensure NSK had a continuous supply ready for Bayloff. According to Hunger, he prepared a confirmation of commitment dated August 25, 2004 to send to Bayloff. The confirmation contained a quantity of 4.5 million rivets at a unit price of $47.25 per thousand rivets. It also contained the language "PART # 60991" and "Part # Change Only." Hunger testified that he included this language in the confirmation based on a conversation he had with "Barbara" from Bayloff. "Part # Change Only" was meant to indicate that, even though Bayloff wanted its next 4.5 million rivets to be labeled with part number 60991 instead of with part

number 60779, the rivets would not require any dimensional changes. Hunger confirmed that Betts signed the confirmation of commitment on Bayloff's behalf and returned it to NSK on September 13, 2004. Hunger testified that Bayloff released and paid for a total of 7,409,000 rivets during the course of the parties' relationship, the first 4.5 million of which were labeled with part number 60779 and the remainder of which were labeled with part number 60991.

{¶13} Bayloff argues there is insufficient evidence to show that it ordered an additional 4.5 million rivets from NSK after its February 2004 order. Viewing the evidence in a light most favorable to NSK, we cannot agree. Hunger sent Bayloff a purchase confirmation. The confirmation listed a quantity of 4.5 million rivets (part # 60991), listed a specific price for the rivets, contained a date of August 25, 2004, and contained a proposal number of "82504." Betts signed the confirmation and returned it to NSK. Bayloff seems to argue that the signed confirmation was not a new order, but rather a modification of its initial "no-stop" order that only changed the part number of the rivets. It argues that, "[i]f anything, this document is ambiguous at best." The confirmation, however, contained the date August 25, 2004 instead of referring back to the initial order date of February 13, 2004 and contained a different proposal number than the February 2004 order. It also contained a definite quantity and a definite price for that quantity. A reasonable juror could have concluded that NSK's purchase confirmation constituted an offer, and Bayloff's return of the signed confirmation constituted its acceptance of the offer.

{¶14} Even assuming the phrase "Part # Change Only" was ambiguous, the jury heard Burke and Hunger testify that Bayloff indicated its intent to order an additional 4.5 million rivets at an in-person meeting in August 2004. *Sarum Mgt., Inc.* at ¶8 (permitting the consideration of extrinsic evidence in the instance of an ambiguous contract). Burke also testified that when

Bayloff initially asked for a quote on rivets, it did so based on a projected use of 8.5 million rivets. Bayloff ultimately released and paid for approximately 7.4 million rivets. Based on the foregoing, a reasonable finder of fact could conclude that the parties intended to contract for another 4.5 million rivets beyond Bayloff's initial February 2004 order. Bayloff does not challenge any of the other necessary elements to form a contract, so we need not address them. See App.R. 16(A)(7). Instead, we conclude that, in viewing the evidence in a light most favorable to NSK, the trial court did not err in denying Bayloff's motions for directed verdict and JNOV.

April 27, 2005 Contract

{¶15} Hunger testified that he spoke with Esser in early April 2005 about the possibility of Bayloff ordering parts other than rivets from NSK. Hunger testified that Esser asked him for a price quotation on several different parts, including part numbers 52472, 52474, and 60753. Hunger faxed Esser a price quotation on the parts on April 14, 2005. Hunger quoted Bayloff a unit price of $13.25 per thousand parts on part number 52472 and a unit price of $48.00 per thousand parts on part number 60753. Hunger did not provide a quote for part number 52474 in the fax, but wrote "Checking Price" next to that part number. Hunger testified that Esser asked him to quote prices based on a usage quantity of 633,000 pieces for each part.

{¶16} According to Hunger, the parties further negotiated that day and Hunger sent Esser another fax containing price quotations. The second fax contained a unit price quotation of $42.00 per thousand parts for part number 52474. It also lowered the prices for the other two parts that Hunger quoted earlier in the day. The lower price for part number 52472 was $12.75 per thousand parts and $47.00 per thousand parts for part number 60753. Hunger testified that

NSK's prices were based specifically upon the 633,000 per part usage quantities in which Bayloff expressed an interest.

{¶17} Burke testified that he visited Bayloff in April 2005 and met with Randy Raidel, Betts' successor. At the meeting, Raidel handed Burke a purchase order, signed and dated for April 27, 2005. The purchase order included a request for part numbers 52472, 52474, and 60753. Each unit price on the purchase order matched the unit prices that Hunger quoted Bayloff in the second fax that he sent to Esser on April 14, 2005, but the order did not list the quantity amount for each part. Instead, Burke testified that Raidel handed him a separate piece of paper along with the purchase order, which listed the three part numbers and their usage quantities. Each part number had a usage quantity of 633,000. According to Burke, Raidel verbally confirmed the 633,000 usage quantity for each of the three part numbers. Burke testified that NSK never sent Bayloff a written confirmation of its April 27, 2005 order because, unlike Bayloff's August 2004 order for additional rivets, Bayloff gave NSK a quantity for all of its part numbers in the separate piece of paper that accompanied the April 2005 order sheet.

{¶18} Bayloff never sent NSK any releases for part numbers 52472 and 60753. As to part number 52474, Bayloff released 351,855 parts and left 281,145 parts remaining on the order. Bayloff argues that the parties never intended to contract for an exact quantity of 633,000 parts as to part numbers 52472, 52474, and 60753. According to Bayloff, it gave NSK a "blanket purchase order" for the parts, which meant that Bayloff was only obligated to compensate NSK for the parts Bayloff actually released. Under Bayloff's interpretation, NSK bore all the risk in the contract. NSK was obligated to provide Bayloff with any parts it released within a short amount of time even though each part had a substantial lead time. Accordingly, under Bayloff's

interpretation, NSK would have had to order Bayloff's projected usage and retain it based on the possibility that Bayloff might release all, some, or none of the parts at some future date.

{¶19} We cannot conclude that the trial court erred in denying Balyoff's motion for directed verdict and JNOV. A reasonable juror could have concluded that NSK's faxed price quotations constituted an invitation to make an offer, and Bayloff's purchase order, along with its attached sheet containing quantity amounts, amounted to an offer that NSK accepted. Bayloff does not point to any law that stands for the proposition that an offer is invalid if it is written on more than one piece of paper. See App.R. 16(A)(7). See, also, R.C. 1302.07(A) ("A contract for sale of goods may be made in any manner sufficient to show agreement[.]"). Bayloff essentially challenges the truthfulness of Burke's testimony, arguing that Bayloff never provided NSK with a quantity amount. In reviewing a sufficiency argument based on an appeal from a motion for directed verdict and JNOV, however, this Court must view the evidence in a light most favorable to NSK. Based on the evidence set forth by NSK, Bayloff was not entitled to a directed verdict or JNOV.

{¶20} Bayloff's captioned assignments of error also include claims that the trial court erred by not granting Bayloff's request, in the alternative, for a new trial. Neither Bayloff's motion in the trial court, nor Bayloff's brief on appeal, however, point to any of the specific grounds for a new trial or contain any law in support of an argument that the court should have granted Bayloff a new trial. As we have repeatedly held, "[i]f an argument exists that can support [an] assignment of error, it is not this [C]ourt's duty to root it out." *Cardone v. Cardone*, (May 6, 1998), 9th Dist. No. 18349, at *8. Bayloff's first and second assignments of error are overruled.

Assignment of Error Number Three

"IF IN FACT SUFFICIENT EVIDENCE WAS PRESENTED TO ALLOW THE COURT TO FIND THE EXISTENCE OF CONTRACTS BETWEEN THE PARTIES DATED AUGUST 25, 2004 AND APRIL 27, 2005 THESE CONTRACTS MUST BE CONSIDERED 'REQUIREMENTS CONTRACTS' AND NSK FAILED TO SHOW BAD FAITH ON THE PART OF BAYLOFF IN PERFORMING ON THE CONTRACTS."

{¶21} To the extent that Bayloff's third assignment of error can be construed as actually assigning error on some basis, Bayloff seems to argue that its contracts with NSK should have been considered requirements contracts. In the conclusion section of its brief, Bayloff refers to its third assignment of error as an argument that the jury's verdict is against the manifest weight of the evidence. We disagree.

{¶22} In reviewing a manifest weight challenge, this Court will affirm a trial court's judgment if it is "supported by some competent, credible evidence going to all the essential elements of the case[.]" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶26, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. In applying the foregoing standard, this Court recognizes its obligation to presume that the trial court's factual findings are correct and that while "[a] finding of an error in law is a legitimate ground for reversal, [] a difference of opinion on credibility of witnesses and evidence is not." *Calame v. Treece*, 9th Dist. No. 07CA0073, 2008-Ohio-4997, at ¶15, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81.

{¶23} Ohio's Commercial Code permits buyers and sellers to enter into requirements contracts in which the parties agree to measure the term of their agreement by either a seller's output or a buyer's requirements rather than by a specific quantity. See R.C. 1302.19. Bayloff once again argues that it never gave NSK specific quantities and that it only agreed to enter into blanket purchase orders. At trial, however, NSK's witnesses testified that its contracts with

Bayloff were for specific quantities of goods. NSK's exhibits corroborated its witnesses' testimony. The evidence presented showed orders from Bayloff for specific parts, in specific quantities, priced at specific dollar amounts. Further, NSK's witnesses testified that NSK only accepts orders for specific quantities because NSK's price quotations are dependent upon the volume of parts being ordered. As such, we must conclude that the record contains competent, credible evidence in support of the jury's verdict. Bayloff's third assignment of error lacks merit.

III

{¶24} Bayloff's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

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