IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LECTRO-TEK SERVICES, INC., A Washington Corporation,	)	**No. 28088-8-III**
Appellant,	)	
v.	)	
EXETER PACKERS, INC., A California Corporation,	)	**Division Three**
Respondent and Cross-Appellant,	)	
JAMES TARRANT and JANE DOE TARRANT, husband and wife, and the marital community composed thereof, and LTS AUTO SALES, INC. DBA LTS AUTOMATION, a Washington Corporation,	)	**UNPUBLISHED OPINION**
Defendants.	)	

Kulik, C.J. — Lectro-Tek Services, Inc. sued Exeter Packers, Inc., which does business as Sun Pacific Shippers,[1] for breaching contracts to purchase two computerized

[1] The parties referred to Exeter Packers, Inc. as Sun Pacific during trial.

citrus grading machines. Sun Pacific counterclaimed seeking a refund of all sums paid to Lectro-Tek, alleging Lectro-Tek made material misrepresentations upon which Sun Pacific relied. After a bench trial, the court ruled that Lectro-Tek was not entitled to damages under RCW 62A.2-709 (price of goods) or RCW 62A.2-708(2) (lost profits). It also denied Sun Pacific's counterclaims. Lectro-Tek appeals, contending the trial court should have awarded it the balance of the contract price or lost profits. Sun Pacific cross-appeals, challenging the trial court's rejection of its counterclaims. We affirm the trial court in all respects.

FACTS

Lectro-Tek is a Washington business that builds machines for the electronic grading and packing of fruits and vegetables. In January 1999, Ralph Hackett, a manager at Sun Pacific, a company that sorts and ships oranges in California, contacted James Tarrant, the chief executive officer of Lectro-Tek, about purchasing a machine that detects freeze damage in oranges. In late December 1998, a severe freeze damaged the California orange crop. Sun Pacific hoped that Lectro-Tek could develop a machine to salvage some of the crop. At that time, Lectro-Tek did not sell a machine that could perform this function.

On January 15, the parties met to discuss Sun Pacific's needs. Mr. Hackett told

Mr. Tarrant that the maximum amount of incoming bad fruit was 38 percent, and the machine would have to sort that amount to 15 percent before the fruit could be packed and shipped. Mr. Tarrant stated he would contact a software company to inquire whether these specifications could be met. Mr. Tarrant told Mr. Hackett that Lectro-Tek could not commit to any project without getting assurances that the technology could be developed.

While negotiating with Sun Pacific, Mr. Tarrant consulted Stuart Wyatt, a software engineer at AgriSys Corporation, a software development company, about developing x-ray technology to detect freeze damage in oranges. Mr. Tarrant advised Mr. Wyatt of Sun Pacific's time frame and the permitted tolerances of bad fruit. Mr. Wyatt believed the software could be developed to meet Sun Pacific's specifications and told Mr. Tarrant that AgriSys would prioritize the project. Mr. Tarrant relayed this information to Mr. Hackett. Mr. Tarrant did not enter into any written agreement with AgriSys.

On January 26, the parties entered into contracts for the purchase of two freeze damage detecting machines. The purchase price of each machine was $293,500. One machine was to be delivered to Woodlake, California, "on or about" March 1, 1999, and the second machine was to be delivered to Bakersfield, California, by March 21. Ex. 7; Clerk's Papers (CP) at 15, 17. The contracts did not provide a delivery date for the software. The contracts also included a $50,000 "[e]quipment expedite and research and

development offset" for software development. Ex. 7.

Lectro-Tek proceeded to build one of the machines in Wenatchee, Washington, and Mr. Wyatt worked on the software. On February 24 and 25, Mr. Hackett traveled to Wenatchee to observe the Woodlake machine's progress. Mr. Tarrant observed the machine was sorting, and he was "encouraged by . . . what it was doing, in the shop." I Report of Proceedings (RP) at 94. However, Mr. Hackett thought the results of the test run appeared "random" and doubted Lectro-Tek's ability to meet the deadlines. CP at 295, 296. Mr. Tarrant told Mr. Hackett that the software people were continuing to work on the software and that it would have to be perfected on site. Mr. Hackett did not voice any objections.

During this visit, Mr. Tarrant asked Mr. Hackett if he wished to discontinue the project or reject the contract. Mr. Hackett did not indicate that he wished to do so. In fact, Mr. Hackett stated that he would arrange shipping of the machine from Wenatchee to Woodlake. The parties did not discuss how long it would take to adjust the machine once it was shipped to California. Mr. Tarrant later testified, "[there was] no firm way that I could have told [Mr. Hackett] exactly how long it was going to take" and that Mr. Hackett never suggested a deadline for perfecting the software after delivery. I RP at 98.

On February 26, Mr. Hackett wrote to Mr. Tarrant, noting the assembled machine

was "operating mechanically" but that the software portion was "incomplete and not fit for the purpose of sorting oranges." CP at 422. He stated that he understood "that your software engineers are still working on the computer instructions necessary to separate freeze damage oranges." *Id.*

On March 3, Mr. Hackett sent a letter to Mr. Tarrant stating that Sun Pacific's decision to invest in Lectro-Tek was "predicated upon a specific time line . . . . It is in both of our interests to successfully complete the installation and operation of the new Lectro-Tek system. Please advise a revised delivery schedule." Ex. 28.

Mr. Tarrant immediately responded: "Your visit on the 25th of February was to determine if you thought it was worth continuing with the project. As you know [Lectro-Tek] is in possession of new software to run as soon as you get the power to the system at your site. . . . We must let the guys do their jobs. It still looks good from here." Ex. 27.

In another letter sent on March 3, Mr. Tarrant informed Mr. Hackett that all the equipment was ready to run except for the waterline, which was being installed. He stated that one of the software programs was ready for installation that day and wrote, "I will say that all energy has been, and will continue to be put into getting you running as soon as possible unless you direct us to do otherwise." Ex. 29. Mr. Hackett testified that he did not direct Mr. Tarrant to do otherwise.

The Woodlake machine was installed on March 5. Mr. Hackett wrote to Lectro-Tek, alleging the machine had "quite a way to go." CP at 431. He also stated that he expected the machine to "[e]liminate all 40%+ damaged fruit from the packable bin" and "[l]imit the over 20% damage fruit to 12% . . . of the packable bin." *Id*.

On March 5, Sun Pacific also stopped payment on a February installment check for $77,500. Mr. Hackett testified that he stopped payment because the machine could not limit the amount of good fruit being rejected to less than 10 percent and could not handle greater than 50 percent incoming bad fruit.

On March 8, Mr. Hackett notified Mr. Tarrant of the stop payment, claiming the machine was not commercially functional and suggested a meeting to discuss the issue of monetary advances. Mr. Hackett wrote: "Since we advanced the expediting fee and have yet to accept the equipment as seen in Wenatchee and as installed at Woodlake, we are compelled to stop payment on our check dated 2/25/99." Ex. 36; CP at 433. Mr. Tarrant replied that he could meet on March 10.

On March 9, Mr. Tarrant sent a letter to Mr. Hackett stating:

> As of twenty minutes ago, with an incoming product approaching 90% overall damage (much higher than your claimed 30% to 40% damage we were to deal with) the machine was picking at the rate of 20% in the good with a 3% false alarm rate.
>
> . . . .
>
> I am absolutely shocked that you would let us work 7 days a week to improve the machine when you obviously have made a decision to go

> another direction.
>
> . . . .
>
> I will of course have to stop work on the project and bring all my people home.

Ex. 38; CP at 439.

Mr. Tarrant observed the operation of the machine in Woodlake on March 10 and noted it was running "quite well." I RP at 135. A state fruit inspector observed that the machine was operating within state tolerances. However, Mr. Tarrant was unable to engage Mr. Hackett in discussions regarding payments or the state's inspection.

Lectro-Tek removed its employees from the Woodlake plant after March 12, 1999, and filed a lawsuit on October 29, 2002 for breach of contract by the buyer. Sun Pacific counterclaimed, alleging Lectro-Tek materially breached its obligations under the contract and made material misrepresentations upon which Sun Pacific relied.

The testimony at trial showed that when Sun Pacific stopped payment on its installment check on March 5, 1999, it knew the orange crop was much more damaged than originally anticipated. Robert Reniers, the chief financial officer of Sun Pacific and a partner in the business, testified that in late December 1998 a severe freeze damaged the California orange crops. He stated that Sun Pacific engaged in discussions with Lectro-Tek in early 1999 hoping Lectro-Tek could develop machinery to salvage the maximum amount of fruit after the freeze. Mr. Reniers conceded that it took about six to eight

weeks after the freeze, about mid-February, to determine the extent of the damage to the orange crops.

Mr. Reniers testified that the crop damage in 1998/1999 was extensive. Sun Pacific was able to ship only 1,852 cars[2] of fresh oranges out of 7,000. By comparison, the year before, Sun Pacific shipped 5,597 cars out of 6,600. The year after the freeze, Sun Pacific shipped 6,666 cars out of 7,500. Thus, in 1998/1999 Sun Pacific packed 26 percent of its fruit compared with 85 percent the year before.

Mr. Reniers further testified that at 50 to 60 percent damage it is unprofitable to process oranges. He stated that in 1999 Sun Pacific rejected one-half the orange crop and determined the remaining one-half could not be profitably sorted. Mr. Reniers testified that Sun Pacific had crop damage insurance and Sun Pacific was paid an unspecified amount of its claim on that policy.

Mr. Reniers conceded that due to the installment of the Woodlake machine on March 5, there was no record of Lectro-Tek's performance before the March 5 stop payment. He also admitted that it would have taken at least one or two days to fine tune the machine after installment on March 5 but that Sun Pacific cancelled the installment check before Lectro-Tek had a chance to get the machine running.

[2] Mr. Reniers testified that a car is a thousand cartons or a truckload.

Mr. Tarrant testified that on March 10 and 11, 80 percent of the incoming fruit was damaged. In reference to Sun Pacific's March 5 letter, Mr. Tarrant also testified that Sun Pacific had never previously communicated that it wanted the machine to eliminate all the 40-percent-plus damaged fruit from the packable bin or limit the over-20-percent bad fruit to 12 percent rather than the 15 percent provided for in the county standards. Mr. Reniers testified that Sun Pacific eventually sold the Woodlake machine for $100,000. Sun Pacific did not inform Mr. Tarrant of the sale.

Frank Martinez, a plant manager at Sun Pacific during 1999, identified the log book for entries made by county inspectors. He testified that the inspectors make entries only when the fruit does not meet state shipping standards. The log book for March 1999 had no indication that any inspector found fruit being processed at Sun Pacific did not meet those standards.

Ronald Juette, an electronic shop foreman for Lectro-Tek, helped install the Woodlake machine. He stated the accuracy of the machine was negatively related to the maximum amount of incoming damaged fruit and that it was difficult to get good results with the high percentage of bad fruit being run through the machine. He observed 65 to 75 percent bad fruit coming in. Despite this high percentage of bad fruit, Mr. Juette believed the machine worked. The court found him one of the more credible witnesses.

Cliff St. Martin, a general manager at a California fruit packing company, was familiar with the process of evaluating freeze damage in oranges using x-rays. He testified that when 75 to 80 percent of fruit is damaged it is not worth processing. He also indicated that when 60 to 70 percent of the incoming fruit is damaged it might not be worth processing, depending on the price of the fruit.

During cross-examination, Mr. Hackett conceded that he knew during his visit to Wenatchee in late February that the software was not completely developed. He also conceded that he consented to Mr. Tarrant's proposal to allow the development of the software to be perfected on site.

The trial court concluded that Sun Pacific breached the contract by stopping payment on March 5. However, it declined to award Lectro-Tek damages based on this breach, finding Lectro-Tek received $378,000 from Sun Pacific and incurred costs of $268,697.59. It concluded that Lectro-Tek was not entitled to the remaining unpaid contract price of $311,000. Lectro-Tek received $34,500 more than the price of one machine and the research and development fee. The court also concluded that Lectro-Tek did not provide evidence to support an amount certain for any profit lost.

The court denied Sun Pacific's counterclaims based on a finding that it breached the contract before Lectro-Tek could perform. The court concluded that Sun Pacific

breached its duties of cooperation and good faith when it stopped payment without notice to Lectro-Tek and unilaterally changed the performance requirements as the Woodlake machine came closer to satisfying the contractual specifications.

ANALYSIS

Damages

Lectro-Tek first contends the trial court erred by refusing to award Lectro-Tek the balance of the contract price upon Sun Pacific's breach under RCW 62A.2-709(1). Lectro-Tek points out that the contract price for the two machines plus the research and development fee was $637,000 but that Sun Pacific paid only $378,000.

Under the Uniform Commercial Code (UCC), a seller is entitled to recover the price as a remedy when the buyer fails to pay the price as it becomes due and the seller is unable to resell the goods at a reasonable price or the "circumstances reasonably indicate that such effort will be unavailing." RCW 62A.2-709(1)(b).

Here, the trial court concluded that Lectro-Tek was not entitled to the balance of the contract price because it received $378,000 and incurred costs of only $268,697.59, thus receiving $34,500 more than the price of one machine and the research and development fee. Lectro-Tek does not dispute these calculations but contends it should have been awarded the unpaid balance of the contract under RCW 62A.2-709(1)(b)

because the machines were specially manufactured for Sun Pacific and, therefore, could not be resold.

Sun Pacific responds that this court need not address the issue because Lectro-Tek failed to raise the issue at trial or reference the record pertaining to the lack of a resale market. In its reply brief, Lectro-Tek points to portions of the record in support of its claim that there was no resale market.

In its amended complaint, Lectro-Tek claimed it had been unable to resell the second machine at a reasonable price. However, the trial court did not make any findings regarding the alleged lack of a resale market or efforts to resell at a reasonable price. If no finding of fact is entered as to a material issue, it is deemed to have been found against the party having the burden of proof. *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn. App. 463, 475, 767 P.2d 961 (1989); *see also Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 887, 658 P.2d 1267 (1983) ("No finding as to a material fact constitutes a negative finding.").

In any event, the record undermines Lectro-Tek's argument. In its reply brief, Lectro-Tek points to the report of proceedings at pages 559 to 562 and 574 to support its argument that there was no resale market. However, these portions of the record simply indicate that Mr. Tarrant had some undefined contact with a South African apple

business, Shamrock Trading, and possibly National Fruit and Vegetable Technology. The record shows that Mr. Tarrant speculated the machines would be difficult to sell until another freeze arrived. However, there is no evidence in the record that Lectro-Tek attempted to sell the second machine after the freeze of 2007. Further, Lectro-Tek admitted that it did not attempt to advertise the machines in trade journals. The evidence is insufficient to establish that efforts by Lectro-Tek to resell the machine would have been unavailing under RCW 62A.2-709(1)(b).

Lost Profits

Alternatively, Lectro-Tek contends it is entitled to damages for lost profits under RCW 62A.2-708. It argues the trial court erred by finding that Lectro-Tek failed to adequately establish the amount of lost profits with the requisite certainty, pointing out that it expected a profit of $368,302.41 because the contract price for both machines was $637,000 and it incurred expenses of $268,697.59 in performing its obligations.

RCW 62A.2-708 provides:

> (1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (RCW 62A.2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price . . . and the unpaid contract price together with any incidental damages . . . .
>
> (2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the

buyer.

Lost profits as damages must be proven with reasonable certainty. *Carlson v. Leonardo Truck Lines, Inc.*, 13 Wn. App. 795, 800-02, 538 P.2d 130 (1975). "'[T]he testimony establishing the loss [of profits] must be clear and free from taint of speculation or conjecture.'" *Id.* at 800 (quoting *DeHoney v. Gjarde*, 134 Wash. 647, 667, 236 P. 290 (1925)). Additionally, a party claiming damages under RCW 62A.2-708(2) must first show that an award of damages under subsection (1) would be inadequate. *Kenco Homes, Inc. v. Williams*, 94 Wn. App. 219, 223-24, 972 P.2d 125 (1999). Generally, "the adequacy of damages under subsection (1) depends on whether the nonbreaching seller has a readily available market on which he or she can resell the goods that the breaching buyer should have taken." *Id.* at 224.

Lectro-Tek fails to assign error to the trial court's finding that the evidence did not support Mr. Tarrant's expectation to earn a $75,000 profit on the sale of each machine. We treat this finding as a verity on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). This finding supports the trial court's conclusion that "the evidence did not support an amount certain for any profit lost by Lectro-Tek" and, therefore, it was not entitled to recoup alleged lost profits under RCW 62A.2-708. CP at 104.

Here, Lectro-Tek ignores the evidentiary requirement of subsection (2). As

discussed above, it fails to establish the lack of a resale market for the machines. Without a showing that an award of damages under subsection (1) would be inadequate, Lectro-Tek's claim for profits under RCW 62A.2-708 fails.

The trial court did not err by refusing to award Lectro-Tek the balance of the contact price or lost profits.

CROSS-APPEAL

Sun Pacific cross-appeals the trial court's denial of its counterclaims. It first assigns error to the court's conclusion that an enforceable contract was formed, contending Lectro-Tek made misrepresentations that rendered the contract voidable, thereby entitling Sun Pacific to return of the net payments on the contract. Specifically, Sun Pacific contends Lectro-Tek misrepresented having the required assurances from AgriSys that the software could be timely developed. It also contends Lectro-Tek mischaracterized the $50,000 fee as an "expedite" fee and, in doing so, magnified the deception that the software could be timely completed.

To review the issues raised on cross-appeal, we conduct a two-part inquiry: (1) whether challenged findings of fact are supported by substantial evidence and (2) whether those findings of fact support the trial court's conclusions of law. *Landmark Dev., Inc v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

"A fraudulent misrepresentation or, under the right circumstances, even a material innocent misrepresentation can render a contract voidable." *Yakima County (W. Valley*) *Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 390, 858 P.2d 245 (1993); *see also* Restatement (Second) of Contracts § 164(1) (1981) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."). "A misrepresentation is 'an assertion that is not in accord with the facts.'" *Yakima County*, 122 Wn.2d at 390 (quoting Restatement, *supra*, § 159). The party seeking to have the contract voided bears the burden of proving any misrepresentation. *Id.* at 391.

We note that the trial court here made no finding relative to the alleged misrepresentations made by Lectro-Tek to Sun Pacific. As indicated above, the absence of such a finding constitutes a negative finding. *Lobdell*, 33 Wn. App. at 887. In any event, the record contradicts Sun Pacific's claims.

The record shows that during initial discussions with Sun Pacific, Mr. Tarrant informed Sun Pacific that computer software to detect freeze damage in oranges did not currently exist. Mr. Tarrant then consulted with Mr. Wyatt and informed him of Sun Pacific's permitted tolerances for bad fruit and time frame. Mr. Wyatt told Mr. Tarrant

the project was doable but that a $50,000 development fee would be required for AgriSys to prioritize the project. The January 26, 1999, contract provided that the $50,000 fee was an "[e]quipment expedite and research and development offset" for the software. Ex. 7. In view of this record, Mr. Tarrant made no misrepresentations about the software development or the nature of the $50,000 expedite and research fee.

Further, the record contradicts Sun Pacific's claim that Lectro-Tek should have disclosed the contents of the unsigned letter agreement dated January 26 from Bob Dollinger, the president of AgriSys. The letter stated that Lectro-Tek and AgriSys would work jointly toward the creation of a machine to detect freeze damage in citrus products and that the parties "shall utilize their best efforts to complete the project within 60 days of this agreement." Ex. 11.

Sun Pacific contends Lectro-Tek's failure to disclose the contents of this letter was a breach of its duty to act in good faith during contract negotiations. Sun Pacific is correct that the parties' general obligation to deal in good faith can give rise to a duty to disclose relevant information during contract negotiations. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). Here, however, the unsigned letter agreement was immaterial to the negotiations between Lectro-Tek and Sun Pacific. Mr. Tarrant did not agree with its terms and refused to sign it. The discussions regarding software

development were between Mr. Tarrant and Mr. Wyatt. Mr. Dollinger had no part of those discussions. Mr. Tarrant's understanding of whether the proper software could be developed was based on conversations with Mr. Wyatt, who assured him the project was doable. Exhibit 11 contained nothing of relevance to the business deal between Lectro-Tek and Sun Pacific. Accordingly, the trial court did not err by concluding that Lectro-Tek had no duty to disclose its contents.

Sun Pacific fails to present evidence demonstrating that Mr. Tarrant made any assertion not in accord with the facts.

Next, Sun Pacific assigns error to the trial court's conclusion that Sun Pacific cancelled the deal by stopping payment on an installment check on March 5. It argues that although it notified Lectro-Tek of the stop payment on March 8, there is no evidence it cancelled or terminated its involvement with the project, stating "the mere fact of a missed payment/a breach does not automatically result in a cancellation." Resp't's Br. at 44. Sun Pacific points out that both parties elected to continue the project after Lectro-Tek received notice of the stop payment on March 8.

Under the UCC, "'Cancellation' occurs when either party puts an end to the contract for breach by the other." RCW 62A.2-106(4). Here, the trial court concluded that "Sun Pacific did not allow a reasonable amount of time for refinement of the

software on site, when it cancelled the deal by stopping payment on March 5, 1999, before any actual documented production test runs had begun." CP at 104. The trial court also concluded that Sun Pacific breached its duties of cooperation and good faith when it continued to work with Lectro-Tek knowing Sun Pacific had already stopped payment on the installment check.

In view of the UCC's definition of cancellation, the trial court may have erred by characterizing Sun Pacific's stop payment as a cancellation; rather, the stop payment is more properly characterized as a breach of contract. Lectro-Tek did not breach the contract; therefore, there was no basis for Sun Pacific to "cancel" the contract. However, Sun Pacific's focus on the trial court's characterization of the stop payment order as a "cancellation" misses the essential point: Sun Pacific's stop payment constituted a material breach of the contract relieving Lectro-Tek of its duties under the contract. *See Jacks v. Blazer*, 39 Wn.2d 277, 285, 235 P.2d 187 (1951) (material breach discharges duty to perform); *Rosen v. Ascentry Technologies, Inc*, 143 Wn. App. 364, 369, 177 P.3d 765 (2008) ("An unpaid installment is a material breach.").

Sun Pacific ignores the statutory requirement of contractual fair dealing under RCW 62A.1-203.[3] The duty of good faith and fair dealing is implied in every contract.

[3] "Every contract or duty within this Title imposes an obligation of good faith in its performance or enforcement." RCW 62A.1-203.

Badgett, 116 Wn.2d at 569. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Id.*

Here, the trial court correctly concluded that Sun Pacific violated its implied duty to act in good faith when it stopped payment of an installment check on March 5 but did not inform Lectro-Tek of this cancellation until March 8. As discussed above, Mr. Hackett claimed he stopped payment because the machine could not handle greater than 50 percent incoming bad fruit. However, these standards were not written into the contract. At the time of the stop payment, Sun Pacific knew the orange crop was much more damaged than originally anticipated. The court found it was "reasonable to infer that it made more financial sense for Sun Pacific to breach their contracts with Lectro-Tek than to pay for machines that would no longer be profitable given the small amount of anticipated packout and the amount of insurance proceeds available to Sun Pacific." CP at 97-98. Despite knowing it had stopped payment on a check and that the machines were no longer profitable, Sun Pacific continued to work with Lectro-Tek.

Additionally, the court correctly concluded that Sun Pacific breached its duty to act in good faith when it unilaterally sought a change in the contract terms after the machine came closer to meeting the contract specifications. On March 5, Mr. Hackett advised Lectro-Tek that instead of a tolerance of 5 percent fruit having damage exceeding

40 percent he wanted to eliminate all 40 percent damaged fruit from the packing bins and rather than a tolerance of 15 percent of the fruit having damage exceeding 20 percent, he wanted to limit the over-20-percent fruit to 12 percent of the packable bin, even though county standards provided for no more than 15 percent. The trial court correctly concluded that Sun Pacific was not entitled to judgment on its counterclaims due to these breaches of its duty to act in good faith.

Sun Pacific's March 5 stop payment order constituted a breach of the contract as well as a breach of the duty to act in good faith.

Sun Pacific also contends that Lectro-Tek breached the contract by failing to provide adequate assurance of performance under RCW 62A.2-609. It contends that after Lectro-Tek received notice of the stop payment on March 8, "there was no doubt that Sun Pacific would be withholding contract payments until its concerns were adequately addressed and it had received adequate assurance of Lectro-Tek's performance." Resp't's Br. at 53. Sun Pacific contends that Exhibit 28 contains a clear and specific request for a date when the equipment would be operational and that Lectro-Tek failed to respond. It contends, "Having failed and refused, from at least March 8 onward, to provide adequate assurances, and thereafter abandoning the project, Lectro-Tek is deemed to have repudiated and breached the contracts, thereby entitling Sun Pacific to

judgment." Resp't's Br. at 58.

RCW 62A.2-609(1) provides that when reasonable grounds for insecurity arise with respect to the performance of either party, the other party may in writing demand adequate assurance of due performance. Under RCW 62A.2-609, the adequacy of a demand for assurances is a question of fact. *Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc.*, 85 Wn. App. 354, 364, 933 P.2d 417 (1997). A demand for assurances must generally be clear and unequivocal. *Id.* at 363-64. From the demand, the parties must understand the demanding party will withhold performance if assurances are not made. *Id*. at 364.

Here, the trial court concluded:

> Exhibit 28 did not threaten to stop payment on the check absent adequate assurances from Lectro-Tek. Sun Pacific's communications before it stopped payment were not clear and unequivocal to invoke the provisions of RCW 62A.2-609. Alternatively, Exhibit 29 provided Sun Pacific reasonable assurance in light of all the facts and circumstances.

CP at 103.

The record supports the trial court's conclusion. Mr. Hackett's March 3 letter to Lectro-Tek does not indicate that Sun Pacific would stop performance without assurances being provided. In fact, after stating his concerns about whether Lectro-Tek could timely deliver a working machine, Mr. Hackett simply stated, "Please advise a revised delivery

schedule for each of the contracts between our Companies for our immediate consideration." Ex. 28. This language does not constitute an unequivocal demand for assurance. Further, the conduct of the parties does not support Sun Pacific's contention that it issued a clear demand for assurances: Lectro-Tek continued working on the machine and Sun Pacific did not direct Lectro-Tek to stop doing so.

Even if we deem the March 3 letter an adequate demand for assurance under RCW 62A.2-609, Mr. Tarrant's responsive letter on March 3 provided the requisite assurance of performance, stating "all energy has been, and will continue to be put into getting you running as soon as possible unless you direct us to do otherwise. . . . Everyone has done a super-human job getting the system in and we are on track." Ex. 29. Sun Pacific's argument that Lectro-Tek failed to offer reasonable assurances fails.

The trial court did not err by concluding that Sun Pacific failed to make an unequivocal demand for assurance of performance and that Lectro-Tek provided the requisite assurance.

In view of this disposition of this case, we need not address Sun Pacific's claim that Mr. Tarrant is individually liable for any judgment against Lectro-Tek.

We affirm the trial court.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

_____
Sweeney, J.

_____
Brown, J.