COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1826-FT **Cir. Ct. No. 2014SC975**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

FORMAN AWNINGS AND CONSTRUCTION LLC,

PLAINTIFF-RESPONDENT,

V.

LO VENTURES, LLC, D/B/A REEFPOINT BREWHOUSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] This case is a dispute over allegedly shoddy awnings manufactured and installed by Forman Awnings and Construction LLC

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

for Reefpoint Brewhouse. We affirm the circuit court's conclusion that because Reefpoint accepted and used the awnings, it cannot rescind the contract but instead is limited to the remedy of reduction in the purchase price.

¶2 In 2013 Reefpoint contracted with Forman for fabrication and installation of an exterior awning system over a seating area at its bar and restaurant in Racine**.** Forman agreed to manufacture and install an awning system with "canvas … sewn so it can be removed yearly" at an estimated cost of $8161. As of June 2013, Reefpoint had paid $4000 of the purchase price as a down payment.

¶3 The awnings were completed on August 14, 2013, but about nine days later, Reefpoint expressed concerns about some aspects of the workmanship. There was testimony that Forman sent a building inspector to consider if there were any structural concerns with the installation and that Reefpoint "did not want" Forman to fix the alleged cosmetic defects and "would not allow" Forman onto the property to fix them, though Reefpoint denied barring Forman from the property. Reefpoint also presented testimony that "there wasn't really a whole lot to fix because [the awning] was pretty wrecked," but acknowledged that the awning system remained up and in use until it had to be removed in October for siding replacement.

¶4 Reefpoint had a third party remove the awning system, and there was conflicting testimony about whether cracked and broken welds observed after removal were due to shoddy workmanship or because of how the frame was removed. There was also testimony that Forman had built "custom awning structure[s]" similar to the one for Reefpoint on many occasions, for other

downtown Racine locations, with the same materials, fittings, style, and installation process, without any problems.

¶5 Reefpoint never paid the balance due on the contract, and Forman eventually sued for payment. Reefpoint counterclaimed for return of its deposit. After a trial, the court found that Reefpoint took delivery of the product and had the benefit of its bargain, with the awnings in place and in use for a period of time. The need to remove the entire awning system was "a factor outside of the control" of the parties. The court concluded that while Reefpoint was bound to the contract because it took the goods and used them, it was due some set off for the workmanship problems, reducing Forman's damages to $2000. Reefpoint appeals.

¶6 Contract disputes present questions of law and fact. Interpretation of a contract is a question of law reviewed de novo, but the underlying historical facts as found by the circuit court will not be disturbed on appeal unless clearly erroneous. ***Viking Packaging Techs., Inc. v. Vassallo Foods, Inc.***, 2011 WI App 133, ¶12, 337 Wis. 2d 125, 804 N.W.2d 507.

¶7 Although the parties do not discuss it, we conclude that this contract falls under the Uniform Commercial Code provisions for the sale of goods, WIS. STAT. ch. 402, because the predominant purpose of the contract was the sale of goods—the awning structure. When a contract covers a mix of goods and services, whether it falls within the scope of the sales code depends on the "predominant purpose" of the contract under the totality of the circumstances. ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶¶9-22, 283 Wis. 2d 606, 699 N.W.2d 189. Relevant circumstances include the contract language, the nature of the seller's business, the value of the materials, and the parties' primary objective for entering into the contract. ***Id.***, ¶21. Here, the contract describes the project as

"fabricat[ion] and install[ation]" of an awning with a particular frame and canvas structure. The price "includes all materials, labor, graphics, poles, permit and installation." The primary objective is the creation and installation of a custom awning to facilitate restaurant service outdoors. Overall the predominant purpose, the "thrust" of the contract, was for the sale of goods, namely, a custom awning. *See* ***Bonebrake v. Cox,*** 499 F.2d 951, 957-60 (8th Cir. 1974) (holding that the thrust of a contract for sale and installation of new bowling lanes was the sale of goods—the bowling lanes).

¶8 The rule is that when a buyer thinks the goods delivered do not meet contract requirements, the buyer can either repudiate the sale or accept the goods and seek some reduction in the purchase price. ***Fox v. Wilkinson***, 133 Wis. 337, 340, 113 N.W. 669 (1907). If the buyer keeps and uses the goods, rescission is no longer available as a remedy. ***Id.*** For instance, in ***Fox***, in a dispute over a contract for sale of a traction engine, the court found that the engine's low quality would have allowed the buyer to rescind the contract, but that the buyer's decision to use the engine for work, even after reporting defects to the seller, affirmed the sale and limited the buyer's remedies. ***Id.*** at 342.

¶9 The same is true under the provisions of the UCC. Acceptance of the goods occurs when the buyer's "reasonable opportunity to inspect the goods signifies … that the goods are conforming or that the buyer will take or retain them in spite of their nonconformity." WIS. STAT. § 402.606(1)(a). A buyer may revoke acceptance "within a reasonable time after the buyer discovers" defects that substantially impair the goods' value. WIS. STAT. § 402.608. However, revocation is no longer available after "substantial change in condition of the goods which is not caused by their own defects." ***Id.*** Still, even though the buyer cannot rescind or revoke the contract after accepting the goods, other remedies,

such as damages for the difference in value of the goods accepted and the goods promised, are still available. WIS. STAT. § 402.607(2) ("acceptance does not of itself impair any other remedy … for nonconformity"); WIS. STAT. § 402.714 (allowing damages for breach in regard to accepted goods).

¶10 There is no legal basis for reversal of the circuit court's decision. By finding that Reefpoint had the benefit of its bargain when it kept and used the awnings despite initial concerns about the workmanship, the court found that Reefpoint accepted the goods. The court also found that Reefpoint failed to give Forman a chance to make desired repairs before the entire awning structure was removed from the building. These findings were not clearly erroneous. So, the case is like ***Fox***: the buyer took acceptance of somewhat dissatisfactory goods and used them. Its remedy was properly limited to a reduction in the price to account for the defects. The court's finding that reducing Forman's damages to $2000 accounted for the defects was not clearly erroneous.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.