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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2518-09T2

101 BALLENTINE ROAD, L.L.C. and
SETH MARTIN,

Plaintiffs-Respondents,

v.

GPS PLUMBING, INC.,

Defendant/Third-Party
Plaintiff-Appellant,

v.

SETH MARTIN,

Third-Party Defendant.

Argued January 11, 2011 - Decided March 24, 2011

Before Judges Payne, Baxter and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1788-08.

Andrew R. Turner argued the cause for appellant (Turner Law Firm, L.L.C., attorneys; Mr. Turner, of counsel and on the brief).

Roberta L. Tarkan argued the cause for respondents.

PER CURIAM

Appellant General Plumbing Supply, Inc.[1] (GPS) appeals an order of judgment of November 9, 2009, for $29,313.93, including interest, entered after a bench trial.[2] The trial court found the supplies provided by GPS were non-conforming in that $4000 of the total order was the wrong brand of copper fitting, and decided that plaintiffs, 101 Ballentine Road, L.L.C. and the sole owner of the entity, Seth Martin (also the third party defendant), properly rejected the entire order and could return it in exchange for a complete refund. GPS argues that the trial court erred in finding that the brand of fitting, Viega, was a contract term, and also that the court incorrectly calculated damages. After reviewing the record in light of the contentions advanced on appeal, we affirm.

Martin is the owner, developer and general contractor for 101 Ballentine Road, L.L.C. Martin is developing a 20,000 square-foot, single-family home and carriage house on six acres of farmland at 101 Ballentine Road in Bernardsville, New Jersey. This matter involves plumbing parts for the home's radiant heating system, which requires heating tubing to be installed under the floor. Plaintiffs hired William Jannone & Sons

[1] Defendant appellant was incorrectly pled as GPS Plumbing, Inc.
[2] Plaintiffs did not file a cross-appeal so we have not considered their request in their brief to increase the award by $751.

(Jannone & Sons) to install the system. Jannone & Sons had designed and installed part of the radiant heating system for the home in 2005, using Viega Pro Press parts supplied by GPS. At that time, no competing company made this type of fitting. Viega invented the press fitting system, which is a copper-jointed system that does not require a torch or soldering, allowing press fittings to be installed in a time-saving and efficient manner.

Jannone made a handwritten list of plumbing parts, which he delivered to Martin's office manager, Anne Marie Gabriel. Gabriel sought bids, and defendant, through its representative, Thomas D. Stensgaard,[3] provided the best price. After numerous conversations with Gabriel, on October 29, 2007, Stensgaard confirmed by fax that all items could be delivered within five days of the deposit. On December 7, 2007, Martin wrote asking why the product had not been delivered since the fifty-percent deposit had been paid on November 29, 2007. In the same fax, Martin informed defendant that Jannone was going to be on vacation from December 14, 2007 until January, and needed to complete the heating system before he left. Martin also indicated that if delivery did not take place as promised, "we

[3] The trial court spells the name with two "a"'s, although the transcript reflects only one.

reserve the right to cancel the order and receive a full refund." Martin's project manager received the goods from GPS on December 20, 2007. The goods totaled over one hundred boxes of material and other items. The project manager marked the receipt received but not inspected.[4] The total value of the goods was $27,048.66, which was charged to Martin's American Express credit card.

When Jannone returned from vacation in January 2008, he noticed the delivered fittings were Nibco rather than Viega parts, and spoke with Stensgaard to cure the problem. They were unable to reach an accord, and Martin rejected all of the goods approximately six weeks after receiving them. Subsequently, Martin purchased the entire order from another plumbing supply company.

This dispute involves whether Martin specified Viega Pro Press fittings, or whether the Nibco press fittings provided by defendant fit within the specifications of the order. Gabriel testified that she did not know anything about plumbing, but told Stensgaard that he should supply the "exact items" on Jannone's handwritten eleven-page list with no variation. On six pages of the order Jannone put "PP #" (for Pro Press, the

[4] He signed "SLC" or "shipper load count," meaning the merchandise will be counted and inspected later.

Viega trademark name) and the unique Viega numbers from the Viega catalogue. He did not in any other way specify Viega products. Stensgaard claimed the "PP" was interpreted by him to mean "press product," and he had never heard of Viega's Pro Press system until it was mentioned in court. The trial court found that Stensgaard's testimony lacked credibility because it contradicted the testimony of Jannone and Martin, who stated that they had purchased Viega Pro Press products for this home from GPS in the past. Also, Stensgaard testified that in order to prepare the quote for plaintiffs, "he had to cross reference the Nibco products with the Viega numbers." Stensgaard also claimed that a fax was sent to Gabriel on November 5, 2007, confirming that Nibco brand fittings would be supplied. Gabriel denied receiving such a fax. The court found that the fax was not sent based on Gabriel's testimony and the absence of any indication on the document itself that it was actually sent by Stensgaard or received by Gabriel. All other faxed documents admitted into evidence were "clearly marked" with the date and time that they were sent.

"Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). We especially defer to the trial

court's credibility findings. Ramos v. M & F Fashions, 154 N.J. 583, 594-95 (1998); see also State v. Locurto, 157 N.J. 463, 470 (1999).

Jannone wanted Viega Pro Press fittings because he wanted to have the same fittings throughout the home, and wanted the warranty Viega provided. He was accustomed to installing the Viega product and knew he had the proper tool for installing that particular brand of fitting.

Martin sought damages of $52,525, including the cost of replacing the residence's hardwood floor due to the damage caused by the lack of heating that winter, additional costs of personnel time in dealing with the lateness of the supplies, the cost of the supplies from the new supplier, and the full amount charged to his credit card.

GPS argues that the trial court erred in finding that the contract required only Viega Pro Press products and thus finding that the Nibco product was non-conforming. According to GPS, because the words "no substitutions allowed" or "only Viega accepted" did not appear on Jannone's list of items, GPS was authorized to use Nibco's product. GPS also argues that by acknowledging delivery, plaintiffs accepted the goods pursuant to the Uniform Commercial Code (U.C.C.), and the subsequent rejection was actually a revocation of acceptance. Thus,

N.J.S.A. 12A:2-608, governing a buyer's right to revoke acceptance, rather than N.J.S.A. 12A:2-601, governing a buyer's rights prior to acceptance, controls.

N.J.S.A. 12A:2-606(1)[5] provides that acceptance of goods occurs when a buyer

> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
>
> (b) fails to make an effective rejection (subsection (1) of 12A:2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
>
> (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

We agree with the trial court's finding that plaintiffs never accepted the goods pursuant to N.J.S.A. 12A:2-606(1) because Jannone did not have an opportunity to inspect the goods until he returned from vacation, as GPS had been informed.

"Before acceptance, the buyer may reject goods for any nonconformity." Ramirez v. Autosport, 88 N.J. 277, 285 (1982) (citing N.J.S.A. 12A:2-601). N.J.S.A. 12A:2-106 defines

[5] The U.C.C. is adopted in New Jersey as N.J.S.A. 12A:1-101 to 12-26.

conforming goods as those that "are in accordance with the obligations under the contract." Ibid. N.J.S.A. 12A:2-601 allows a buyer to reject goods if the goods "or the tender of delivery fail[s] in any respect to conform to the contract." Ibid. Plaintiffs therefore need not show a defect of any particular size under the code for their rejection to have been proper pursuant to N.J.S.A. 12A:2-106 and N.J.S.A. 12A:2-601. The defective parts, however, did comprise a significant and essential part of plaintiffs' order. Because the delivery was late, GPS had no right to cure the defect. N.J.S.A. 12A:2-508. Nonetheless, Jannone made an unsuccessful attempt to resolve the dispute by allowing GPS to cure the defect. The court correctly found that plaintiffs rightfully rejected the goods and thus were authorized to cancel the contract. N.J.S.A. 12A:2-711.

The court found that the actual ascertainable damages were the charges to Martin's credit card of $26,274.33 for GPS products and the additional cost of $774.33 charged by the subsequent vendor to fill the order. The court directed GPS to pick up its defective order at its expense.

Affirmed.