STATE OF MICHIGAN

COURT OF APPEALS

CONSTRUCTION FASTENERS, INC.,

Plaintiff-Appellant,

v

DIGITAL EQUIPMENT COMPANY INC.,

Defendant-Appellee.

UNPUBLISHED
October 22, 1996

No. 185679
LC No. 93-19233-CK

Before: Young, P.J. and Taylor and R. C. Livo,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order summarily dismissing its complaint against defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff owned some computer hardware manufactured by defendant. After the expiration of the manufacturer's warranty period, defendant provided maintenance for the hardware on a per call basis. Following each post-warranty service call, defendant provided plaintiff with a "LARS report" which explained the services that had been provided and the charge. Defendant's standard terms and conditions were on these reports and stated that defendant was not liable for any damages for loss of data or use, and that any action against defendant had to be brought within eighteen months after the cause of action arose. In September of 1989, plaintiff and defendant entered into a maintenance agreement wherein defendant agreed to provide repair and maintenance for a fixed monthly fee. On September 21, 1989, plaintiff signed a field service agreement issued by defendant that stated that the terms and conditions attached to the agreement were the sole terms and conditions applicable (no terms or conditions were attached). Immediately above plaintiff's signature on this document was the representation that plaintiff had read the applicable terms and conditions and agreed to be bound by them. Plaintiff signed a letter of authorization dated May 29, 1990, giving defendant authority to invoice in accordance with its standard terms and conditions until August 30, 1991 (no terms or conditions were attached).

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* Circuit judge, sitting on the Court of Appeals by assignment.

In May, 1991, an employee of defendant serviced plaintiff's computer hardware. After confirming that plaintiff had a backup disk, defendant's employee attempted to fix the problem by reformatting the hard disk, which caused the erasure of all the data on the hard disk. Eventually a new hard disk had to be installed. When plaintiff attempted to restore the data via the backup tapes, it was discovered that the tapes essentially had nothing on them. Plaintiff lost most of its business information and spent considerable time reassembling the inventory information and reentering its data into the computer system.

Plaintiff filed a lawsuit against defendant in May, 1993. In answer to interrogatories, plaintiff identified the May 29, 1990, letter of authorization as the parties' contract. Defendant moved for summary disposition, arguing that the lawsuit was barred by the standard terms and conditions that had been incorporated into the letter of authorization, i.e., the lawsuit sought damages for loss of data and was filed more than eighteen months after the action arose. In a supplemental brief in opposition to defendant's motion, and without amending its interrogatory answers, plaintiff claimed that the parties' contract was an unsigned service agreement. The trial court pointed out that plaintiff could have requested the apparently missing pages containing the standard terms and conditions. The court said that the letter of authorization did refer to the terms and conditions and that plaintiff had an obligation to find out the terms if they were not provided. The court granted summary disposition, finding plaintiff was bound by the terms and conditions that had been incorporated by reference.

Plaintiff argues that summary disposition was improper because the parties' contract said the terms and conditions were attached when, in fact, they were not. Defendant argues that plaintiff was aware of, or should have been, of the standard conditions that were incorporated by reference into the letter of authorization.

Contracts must be construed as a whole, with effect given to writings incorporated by reference. *Whittlesey v Herbrand Co*, 217 Mich 625, 627-628; 187 NW 279 (1922). Where one contract refers to another, the intent of the parties is gathered from the two instruments taken together. *Id*. Where additional documents or terms are made part of a written contract by reference, the parties are bound by those additional terms even if they have never seen them. *Ginsberg v Myers*, 215 Mich 148, 150-151; 183 NW 749 (1921). Failure of a party to obtain an explanation of contractual terms is ordinary negligence which estops the party from avoiding the contract on the ground the party was ignorant of its provisions. *Scholz v Montgomery Ward & Co*, 437 Mich 83, 92; 468 NW2d 845 (1991). See also *Morgan v Goddard*, 239 Mich 174, 176; 214 NW 155 (1927)(plaintiff was bound to inform himself of the specifications involved in the contract rights and the obligations of the party with whom he was dealing).

The trial court properly granted summary disposition. The letter of authorization incorporated defendant's standard terms and conditions. Although the standard terms and conditions were not attached to the letter of authorization, plaintiff was put on notice that they were incorporated by reference. Under such circumstances plaintiff will not be heard to claim that those terms were not

applicable. The failure to attach the standard terms and conditions to the letter of authorization put plaintiff on notice of the omission. Further, plaintiff was familiar with the terms and conditions at issue from the "LARS reports."

Finally, we reject plaintiff's claim that an unsigned service agreement was the parties' contract because plaintiff acknowledged that the controlling contract was the letter of authorization.

Affirmed.

/s/ Robert P. Young
/s/ Clifford W. Taylor
/s/ Robert C. Livo