

STATE OF MICHIGAN
COURT OF APPEALS

PRECISION MASTER, INC., d/b/a MAPLE
MOLD TECHNOLOGIES,

UNPUBLISHED
July 12, 2007

Plaintiff/Counter-Defendant-
Appellant/Cross-Appellee,

v

MOLD MASTERS COMPANY,

No. 268501
Lapeer Circuit Court
LC No. 03-033520-CK

Defendant/Counter-Plaintiff-
Appellee/Cross-Appellant.

PRECISION MASTER, INC. d/b/a MAPLE
MOLD TECHNOLOGIES,

Plaintiff-Appellant/Cross-Appellee,

v

HUGO LEONARDI, JR.,

No. 268938
Lapeer Circuit Court
LC No. 04-034410-CZ

Defendant,

and

MOLD MASTERS COMPANY,

Defendant-Appellee/Cross-
Appellant.

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Plaintiff, Precision Master, Inc., appeals from entry of a judgment in favor of defendant, Mold Masters Company, in these consolidated breach of contract actions. We affirm.

I. Background and Procedural History

In 2002, defendant contracted with Collins & Aikman to manufacture molds for automobile parts, which were ultimately to be supplied to General Motors Corporation (GMC). Defendant subcontracted with plaintiff to manufacture pull ahead/production molds in accordance with its contract with Collins & Aikman. Plaintiff explained that the mold manufacturing process consisted of two phases. Phase I involved the building of the “pull ahead” mold, while Phase II comprised the “productionizing of the mold, building the other cavities and preparation of the mold for production use.” In total, defendant issued a total of nine purchase orders to plaintiff in accordance with the contract.

Payment terms for Phase I were “net 120 days from 1st shots.” Phase II provided that “[p]ayment terms for production tools are net 90th prox upon OEM PPAP submission.” “PPAP” is defined as an acronym for the “production part approval process” and is interpreted as meaning that payment would be due or forthcoming within 90 days after submission of the production parts for approval by GMC as the “OEM.” This case arises from the failure of plaintiff to pay 120 days from the first shots with respect to Phase I of the purchase orders. Delays in payment by defendant to plaintiff ranged from a minimum of three days overdue for three purchase orders to a maximum of 142 days overdue on two purchase orders, resulting in an average payment delay of 78 days for each Phase I purchase order. Although the payments were late, defendant paid all but one purchase order in full. For the purchase orders pertaining to Phase I, the total amount due was \$172,188. Of this amount, defendant paid plaintiff \$167,646, with a balance of \$4,542 remaining owed on one purchase order.

By September 2003, plaintiff had completed the Phase I manufacturing of the molds. However, citing the frequency of late payments, plaintiff forwarded correspondence to defendant indicating its willingness to “complete the balance of the contract,” but that it would require either initiation of payments “C.O.D.” for all future work or, in the alternative, the imposition of cancellation charges to retain the molds already in defendant’s possession. Plaintiff indicated that “time was of the essence” and that it would suspend any further work should defendant fail to respond within the required timeframe. In addition to requiring future payments be made C.O.D., plaintiff also required payment of all outstanding invoices, imposition of one percent monthly interest on all late payments and several additional terms.

Defendant responded, acknowledging plaintiff’s concern that the history of late payments would continue into Phase II of the mold production and offered to “post a letter of credit requiring that [plaintiff] is paid by a bank per the terms contained in each outstanding purchase order . . . for the remaining work if [defendant] does not make payment in accordance with the purchase orders.” Defendant indicated the importance of a timely response by plaintiff in order to maintain the mold production schedule. Plaintiff rejected defendant’s offer to secure a letter of credit as not providing “adequate security.” In addition, plaintiff asserted that defendant was currently in breach of the contract and owed \$37,324, irrespective of “PPAP approval.”

Plaintiff initiated a complaint for breach of contract. Defendant counterclaimed and asserted that plaintiff had waived any claim for breach of contract based on the acceptance of late payments. In filing its motion for partial summary disposition, defendant contended that plaintiff waived its right to cancel the purchase orders by routinely accepting the late payments and that defendant’s offer to secure a letter of credit was sufficient to provide plaintiff with adequate assurances. Defendant argued that plaintiff’s demands improperly sought to substantially modify terms of the contract. In its motion for summary disposition, plaintiff contended defendant first

breached the contract by failing to make timely payments. Defendant argued that the unpaid balance of \$4,542 could not comprise a breach because it did not substantially impair the value of the whole contract, as required by statute, to legitimately cancel contractual performance.

At the hearing on the motion for summary disposition, the trial court acknowledged that payments by defendant were routinely late, but that plaintiff accepted the late payments “without repudiating the contract.” In addition, the trial court stated that plaintiff had the right, with regard to the single purchase order retaining an unpaid balance, to cancel the contract if the alleged breach “substantially impaired the value of the contract.” The trial court proceeded to grant defendant’s motion for summary disposition, ruling, in relevant part:

[T]he nonpayment of [\$4,542] did not impair the whole contract and, thus, did not allow Maple [Mold] to cancel the entire purchase because the alleged \$4,542 constituted only 5.47 percent of the entire value of the contract. Furthermore, Mold Masters offered a letter of credit to further assure Maple Mold of the future payments to be paid.

The trial court denied plaintiff’s motion for reconsideration.

After plaintiff refused to perform Phase II of the contract, defendant sought to purchase substitute goods in mitigation of its losses. Plaintiff incurred additional costs of \$44,976 on five of the Phase II purchases orders to secure cover through procurement of substitute goods. In addition, defendant realized a savings of \$33,388 in the production of three of the Phase II molds, but argued that any savings realized should not be offset and that it was entitled to payment from plaintiff in the amount of \$44,976. At the conclusion of a bench trial, the court found that the total cost of productionizing the Phase II molds was \$44,976 more than the contract between plaintiff and defendant, less the \$33,388 in savings realized by defendant to have the substitute goods produced by an alternative contractor. Following subtraction of the realized savings, the trial court also subtracted \$4,542, the outstanding amount owed by defendant to plaintiff in accordance with Phase I of the contract, resulting in a judgment in favor of defendant of \$7,046, plus \$726 interest.

II. Standard of Review

This Court reviews a trial court’s decision on a motion for summary disposition *de novo*. *First Pub Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). “Contract interpretation and statutory interpretation involve issues of law that are subject to *de novo* review by this Court. We reverse a trial court’s findings of fact only if they are clearly erroneous.” *Sands Appliance Serv, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000) (citations omitted).

III. Analysis

Plaintiff contends the trial court erred in determining it breached the contract by failing to continue to perform despite the ongoing receipt of late payments by defendant. Plaintiff further contends the trial court erred because it did not consider defendant’s failure to perform or initiate the second phase of the contractual agreement between the parties regarding preparation of the molds for production.

The parties do not dispute that the purchase orders at issue in this matter constituted an installment contract, in accordance with MCL 440.2612(1), which defines an “installment contract” as “one which requires or authorizes the delivery of goods in separate lots to be separately accepted.” Pursuant to MCL 440.2612(3):

Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

Comment six to the statute, while not dispositive, provides insight and guidance with regard to interpretation of this statutory provision. Specifically, the comment provides, in relevant part:

Whether the non-conformity in any given installment justifies cancellation as to the future depends, not on whether such non-conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract. If only the seller’s security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance but has not an immediate right to cancel the entire contract. If [sic] is clear under this Article, however, that defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect “waived.”

In addition, comment seven to the statute provides that “[u]nder the requirement of seasonable notification of cancellation under subsection (3) . . . a seller may withhold a delivery pending payment for prior ones, at the same time delaying his decision as to cancellation.”

Although plaintiff contends it complained repeatedly regarding the receipt of late payments by defendant, there is no indication of actual notice of intent by plaintiff to cancel the contract and discontinue further performance until the Phase I production molds were fully completed. Importantly, for contract cancellation in accordance with MCL 440.2612(3), a party must demonstrate that the non-conformity “substantially impairs the value of the whole contract.” As noted by the trial court, the outstanding amount due to plaintiff on Phase I constituted a very minor percentage of the value of the contract and, thus, was insufficient to justify cancellation of the specific purchase order, let alone the entire contract.

More importantly, the statute clearly indicates that plaintiff’s acceptance of the “nonconforming installment[s]” served to reinstate the contract, based on plaintiff’s failure to notify defendant of its intent to cancel the contract. Although plaintiff contends it strongly objected to the ongoing late payments tendered by defendant, mere objection to the untimely payments is not commensurate with outright repudiation or notification of cancellation. In addition, the language contained in MCL 440.2612(3) indicates that plaintiff’s demand for assurances with regard to timely receipt of future payments also served to reinstate the contract and did not justify outright cancellation and revocation of performance.

Plaintiff's contention that it was entitled to receive payment and cancel any further performance under the contract due to the failure of defendant to initiate Phase II production is not sustainable. The purchase orders are quite clear, with regard to the second phase of production that payment is due within 90 days after "OEM PPAP submission." Because there is no assertion that the "production part approval process" had occurred with GMC, the condition precedent for initiation of payment under this portion of the purchase orders had not occurred and defendant could not be in breach of this portion of the contract.

Plaintiff next argues that the trial court erred in determining that defendant's offer of a letter of credit provided sufficient assurance to address the concern of the timeliness of future payments. MCL 440.2609 provides, in relevant part:

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

In this instance, defendant offered to provide a letter of credit to assure payment in conformance with the purchase order timeframes. In contrast, plaintiff demanded alteration of the actual contractual terms by requiring payments C.O.D., the initiation of interest on late payments, and other requirements. The demands by plaintiff did not constitute merely "adequate assurances" of performance, but in actuality comprised a unilateral attempt to alter and favorably enhance the contractual provisions. Defendant's offer to secure a letter of credit with a third-party bank to assure payment in accordance with the purchase orders provided satisfactory assurance of "due performance." Further, MCL 440.2609(1) does not permit full repudiation of a contract, but rather merely the suspension of performance. Plaintiff's mere anticipation or belief that defendant could not procure a letter of credit did not provide a legitimate basis for its repudiation of the contract. Finally, the adequacy of the assurance provided by defendant is not determinable solely by plaintiff's preferences, but rather in accordance with "commercial standards." As such, a letter of credit from a bank, requiring its payment of defendant's obligations under the specified contractual timeframes, was correctly deemed to be sufficient assurance by the trial court.

On cross-appeal, defendant takes issue with the trial court's calculation and award of damages. Defendant contends the trial court should only have considered additional costs incurred by defendant in procuring substitute goods without offset for any savings realized. Contrary to defendant's assertion, the issue is determined by the clear language of MCL 440.2712(2). "Because the plain language of the statute is the best indicator of the Legislature's intent, we enforce the statute as written." *US Fidelity & Guarantee Co v Michigan Catastrophic Claims Ass'n*, 274 Mich App 184, 201; 731 NW2d 481 (2007).

MCL 440.2712(1) permits a buyer to procure substitute goods or “‘cover’ by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.” Specifically:

The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (section 2715), but less expenses saved in consequence of the seller’s breach. [MCL 440.2712(2) (footnote omitted).]

In procuring substitute goods to meet Phase II production requirements, defendant incurred additional charges on five of the purchase orders. One of the purchase orders was for precisely the same cost by the new subcontractor as would have been incurred for production of the goods by plaintiff. Three of the purchase orders for substitute goods resulted in a savings to defendant from the price that would have been owed to plaintiff for production of these same items. It is disingenuous of defendant to suggest that the monies saved on three of the purchase orders securing the substitute goods are not included as “expenses saved in consequence of the seller’s breach,” in accordance with the language of MCL 440.2712(2). “The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed.” *Roberts v Farmers Ins Exch*, ___ Mich App ___; ___ NW2d ___ (Docket No. 270406, issued March 27, 2007), slip op, p 7. Therefore, the purpose is to allow the nonbreaching party to realize the benefit of his bargain, but not to obtain a windfall. Based on the clear and unambiguous language of the statute, the trial court’s calculation of damages was both permissible and entirely reasonable.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens