

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS E. WOODS, Receiver for KURDZIEL
INDUSTRIES, INC., a/k/a T J HOLDING OF
MICHIGAN, INC.,

UNPUBLISHED
June 14, 2011

Plaintiff/Counter-Defendant-
Appellee,

v

No. 295289
Muskegon Circuit Court
LC No. 08-045878-CK

JLG INDUSTRIES, INC.,

Defendant/Counter-Plaintiff-
Appellant,

and

EAGLE QUEST INTERNATIONAL, LTD.,

Defendant.

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

In this contract case, defendant JLG Industries, Inc.,¹ appeals by right the trial court's orders denying its motions for summary disposition, directed verdict, and judgment notwithstanding the verdict (JNOV). We affirm.

Plaintiff was a manufacturer of gray iron counterweights. Defendant manufactured industrial equipment that required these counterweights. In 1999, plaintiff and defendant entered into a requirements contract (Supply Agreement) whereby plaintiff was to provide defendant with "100% of its gray iron counterweight requirements per Exhibit A" through September 2002. Exhibit A set forth the prices for specific part numbers that corresponded to specific weights. Also in 1999, defendant bought a company called Gradall. In December 2000, the parties

¹ Reference to defendant in this opinion refers to JLG only.

executed a contract extension (2000 Extension) that expired December 31, 2004, and specifically referenced Gradall and its part numbers. In 2003, defendant acquired a company called Omniquip, which produced the Lull and Skytrack product lines. Another amendment (2004 Extension) was executed between the parties in June 2004, effective January 1, 2005, to December 31, 2007, that specifically referenced these product lines but did not list part numbers for them in the pricing addendum. In 2006, defendant began also utilizing another supplier, defendant Eagle Quest International, Ltd (EQI), in addition to plaintiff and continued to do so throughout the remainder of the parties' contract. Plaintiff subsequently filed suit for breach of contract. Defendant filed counterclaims for breach of contract and fraud.

I. SUMMARY DISPOSITION

We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When reviewing a motion under MCR 2.116(C)(10), we consider all the evidence submitted by the parties in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id.* We also review de novo a trial court's interpretation of a contract. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010). "A contract must be interpreted according to its plain and ordinary meaning." *Id.* Its provisions must be read as a whole in order to determine the parties' intent and enforce clear terms as written. *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 358; 764 NW2d 304 (2009). Contract language is ambiguous if it is susceptible to two reasonable interpretations. *Alpha Capital Mgt*, 287 Mich App at 611-612. Ambiguities in construction are for the trier of fact to determine and thus, summary disposition is inappropriate. *Id.*

The parties both argue that the contractual language is unambiguous, but have differing interpretations as to its scope.² Defendant's position is that the Supply Agreement and 2000 Extension are exclusive as to the part numbers listed in it, but the 2004 Extension is not.³ Plaintiff asserts that the contracts are exclusive without limitation. The parties essentially rely on the same key provisions to support their differing interpretations. We find both constructions

² The parties briefly address plaintiff's allegation, which was not contained in its complaint but was presented to the trial court and jury, that defendant breached their contract in 2003 when it purchased weights from other suppliers. The jury's verdict against defendant on plaintiff's breach of contract claim was based only on its dual sourcing with EQI, which began in 2006. Because defendant suffered no prejudice as a result of the jury being allowed to consider plaintiff's allegation of breach by defendant in 2003, any error was harmless. MCR 2.613(C). Therefore, the parties' arguments regarding defendant's 2003 purchases are immaterial, and we do not consider them.

³ Although plaintiff's complaint implicates only the 2004 Extension, the parties agree that the amendments should be read in light of the preceding agreement(s).

reasonable. “When the terms of a contract are contested, the actual terms of the contract are to be determined by the jury.” *Linsell v Applied Handling, Inc*, 266 Mich App 1, 12; 697 NW2d 913 (2005), citing *Guilmet v Campbell*, 385 Mich 57, 69; 188 NW2d 601 (1971). “This is true even when the evidence of the terms is uncontested.” *Guilmet*, 385 Mich at 69. Therefore, we conclude that the trial court did not err in finding that the question of the contract’s scope was for the jury.⁴ Accordingly, the trial court did not err in denying defendant’s summary disposition motion on this basis.

Next, defendant argues that it was entitled to summary disposition on plaintiff’s breach of contract claim based on plaintiff’s prior substantial breach. “[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach” *Able Demolition, Inc v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007) (internal quotation and citation omitted). “However, the rule only applies if the initial breach was substantial,” which occurs when the other party does not obtain “the benefit which he or she reasonably expected to receive.” *Id.* (second internal quotation and citation omitted). As stated in *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964), a substantial breach

can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party. [Citations omitted.]

Defendant argues that plaintiff breached the contract first based on various aspects of a surcharge it imposed and chronic quality issues with the weights, supporting its arguments with deposition testimony and emails. In each argument, defendant seeks that the evidence and inferences drawn therefrom be viewed in its favor. However, a court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists, and summary disposition may not be granted. *White v Taylor Distrib Co*, 275 Mich App 615, 625; 739 NW2d 132 (2007). Further, while plaintiff sufficiently responds with its own evidence to show that a genuine issue of material fact exists, it too requires that we determine credibility in plaintiff’s favor. Consequently, we find that the trial court did not err in denying defendant’s summary disposition motion on its affirmative defense.

Lastly, defendant argues that it was entitled to summary disposition on its counterclaims of breach of contract and fraud, both of which it supports with deposition testimony and emails. Again, this evidence, and plaintiff’s responsive evidence, requires that we make impermissible credibility determinations in order to believe the truth of the declarants’ statements. *White*, 275

⁴ The extrinsic evidence defendant presents to support its interpretation does not persuade us to decide differently.

Mich App at 625. Therefore, we find that the trial court did not err in denying defendant's summary disposition motion on its counterclaims.

II. DIRECTED VERDICT

We review de novo a trial court's decision on a motion for a directed verdict. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). "We review all the evidence presented up to the time of the motion in the light most favorable to the nonmoving party to determine whether a question of fact existed. 'If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury.'" *Id.* (citations omitted).

Defendant argues that it was entitled to a directed verdict because plaintiff could not prove its breach of contract claim. It first asserts that the evidence indisputably proved that the contract was not exclusive. Thus, it could not have been in breach when it utilized other suppliers in 2003. However, because the jury did not find defendant breached the contract on this basis, any error was harmless. MCR 2.613(A).

Next, defendant asserts that it could not have breached the contract when it dual sourced with EQI because the 2004 Extension provided that items could be added or deleted as business conditions dictated. It contended that the quality problems with plaintiff's weights and spike in surcharges were business conditions that justified its deletion of part numbers from the contract. Plaintiff's former CEO/President Kenneth Zach testified at length regarding plaintiff's quality problems and rectification efforts. He also testified to the acceptance rates of plaintiff's product, which were over 99 percent during the period defendant dual sourced to EQI, and stated that zero defects was nearly impossible to sustain in the industry. Further, the contract provided a remedy for defects, and Zach testified to defendant's utilization of it.

Additionally, there was evidence that plaintiff included an average amount of number one busheling and ductile auto cast in its monthly surcharge due to the fact that its facility used the same equipment to manufacture a different weight that required these materials. Witnesses also testified that these materials were never completely removed from the bill of material. In considering a motion for directed verdict, it is for the jury to weigh the evidence and decide the credibility of the witnesses. See *King v Reed*, 278 Mich App 504, 522; 751 NW2d 525 (2008).

Moreover, there was no testimony at the time of defendant's directed verdict motion regarding what type of business conditions the parties contemplated would justify deletion of part numbers from the contract. The term "business conditions" could reasonably be construed as being limited to circumstances outside the contract. Pricing and quality were covered in the contract. Based on the evidence presented, we believe that reasonable minds could differ as to whether plaintiff's quality problems and surcharging justified defendant's deletion of part numbers from the contract and subsequent dual sourcing to EQI. Therefore, we conclude that the trial court did not err when it denied defendant's motion for directed verdict.

III. JURY INSTRUCTIONS

We review for an abuse of discretion a trial court's determination whether supplemental instructions are applicable and accurate.⁵ *Silberstein*, 278 Mich App at 451. An abuse of discretion occurs when the court's decision falls outside the range of principled and reasonable outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). However, an instructional error will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008).

Defendant asserts that had the jury been instructed on rescission, it would have found that plaintiff's fraud rescinded the contract. Thus, it would not have found that defendant breached the contract. "In general, rescission abrogates a contract completely. All former contract rights are annulled; it is as if no contract had been made." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 640; 534 NW2d 217 (1995) (citations omitted). A person who has been defrauded by a contract must act promptly, and the defrauded person must do nothing in affirmance of the contract after ascertaining the facts. *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 628; 692 NW2d 388 (2004).

Defendant's proposed rescission instruction only instructed the jury to determine whether defendant acted promptly in bringing its fraud claim—"JLG may be entitled to rescission of the contract [if it promptly brought suit after learning of plaintiff's fraud] Rescission is a remedy that the court may grant" The instruction did not advise the jury to determine whether defendant was entitled to rescission. Rather; the instruction directed the jury to determine the factual issues, reserving to the trial court the ultimate decision regarding the remedy. Therefore, it does not follow that had the instruction been given, the jury would have found that plaintiff's fraud rescinded the contract. The instruction did not ask the jury to make that decision. Accordingly, the trial court did not abuse its discretion in denying defendant's request to give the rescission instruction.

IV. JNOV

We review de novo a trial court's decision on a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). We view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party. *Id.* If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009).

Defendant first argues that it was entitled to JNOV on plaintiff's breach of contract claim because plaintiff's fraud rescinded the contract. Thus, it could not have subsequently breached the contract. In effect, it asked the trial court to determine that it was entitled to rescission. The

⁵ Because the parties conceded during the JNOV hearing that the trial court denied defendant's instructional request, we considered this issue preserved.

trial court has discretion to grant this equitable remedy. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982). A “trial court will not grant rescission unless the party requesting it is blameless.” *Stanton v Dachille*, 186 Mich App 247, 260; 463 NW2d 479 (1990) (defendants’ request for rescission properly denied because one defendant breached the contract). Defendant’s only reason for requesting rescission was to avoid liability on its own breach. Thus, it would be inequitable to rescind the contract. Further, defendant had a sufficient alternative at law in the form of monetary damages. Accordingly, we conclude that the trial court did not err in denying defendant’s JNOV motion on this basis.

Alternatively, defendant argues that it was entitled to JNOV because plaintiff’s fraud amounted to a prior substantial breach. Even if the actions that were the basis for plaintiff’s fraud constituted a breach of contract, we believe that reasonable minds could differ as to whether the breach was substantial. The surcharge provision could reasonably be viewed as separate from and ancillary to the contract price and thus, a non-material term. The weights’ prices were set by the contract and were the basis of the parties’ consideration, the essential operative element. The surcharge provision, however, was a separate contract term. The surcharge costs could fluctuate and conceivably be zero. Further, there was no evidence that the amount defendant paid in improper surcharges for raw materials not actually used affected plaintiff’s cost competitiveness. The jury could reasonably have determined that plaintiff’s fraud did not equate to a complete failure of consideration and, that therefore, there was no substantial breach. *McCarty*, 372 Mich at 574. Accordingly, we conclude that defendant was not entitled to JNOV on plaintiff’s breach of contract claim on the basis of prior substantial breach.

Affirmed.

/s/ Douglas B. Shapiro

/s/ Peter D. O’Connell

/s/ Donald S. Owens