

FILED

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CLERK SUPREME COURT 112

IN THE COURT OF APPEALS OF IOWA

Filed August 25, 1981

MACY BROTHERS, INC.,)

Plaintiff-Appellant,)

v.)

POWESHIEK COUNTY NATIONAL BANK,)

Defendant-Appellee.)

1-125
2-65570

Appeal from Poweshiek District Court.

Dick R. Schlegel, Judge.

Plaintiff appeals trial court's adverse judgment on his action for payment of materials ordered by defendant's agent and for interest. **AFFIRMED.**

Roger Williams and J. N. Diehl, of Diehl, Clayton, Cleverley & Knopf, Newton, Ia., for plaintiff-appellant.

Robert Huster, of Mote, Wilson & Welp, Marshalltown, Ia., and Manly Law Office, Grinnell, Ia., for defendant-appellee

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff appeals trial court's adverse judgment on his action for payment of materials ordered by defendant's agent, and for interest. We affirm.

Mueller Construction, Inc., general contractor for defendant Poweshiek County National Bank, has defended this action because of the contractual relationship between it and plaintiff, and will be referred to as defendant.

Defendant negotiated a written purchase order contract with plaintiff which set out the amount, specifications, and price of ready-mix concrete needed for the bank building. Plaintiff alleges that in January of 1975, he received a phone call from defendant's agent, Jack Murray, ordering an 8.2 sack concrete mix which was different than that specified in the purchase order. Two months later Plaintiff delivered the concrete to the work site.

When plaintiff sent defendant the bill reflecting the increased cost of the 8.2 sack concrete, defendant refigured the bill and sent plaintiff a check for the amount that had been agreed to. Plaintiff returned the check, and later defendant filed a mechanic's lien against the property, and then brought an action to foreclose on the lien.

The trial court initially dismissed plaintiff's action and released and discharged the mechanic's lien, but on a later motion the trial court entered judgment for the plaintiff only for the amount that had been agreed to in the contract, and ordered interest on that amount from June 6, 1980. Plaintiff appeals the judgment. Our review of this equity matter is de novo. Iowa R. App. P. 4.

I. Authority of Defendant's Agent.

Plaintiff contends that defendant's agent had both actual and apparent authority to order the 8.2 sack concrete. Actual authority includes both express and implied authority. Newberry v. Barth, Inc., 252 N.W.2d 711, 714 (Iowa 1977).

Express authority is power specifically mentioned by the principal in setting out the extent of the agent's duties. Newberry, 252 N.W.2d at 714. The record shows that defendant did not give his agent express authority to order concrete. Defendant testified that he never delegated the power to change concrete mix specifications to anyone. Defendant also testified that in his manual describing work procedures for the job supervisor, specific mention is made that major material items are ordered by the office on a purchase order form and that even changes in quantities are generally made

by issuing a revised purchase order. Therefore, no express authority existed.

Implied authority is incidental authority which is necessary, usual and proper to effectuate the authority expressly conferred on an agent. Newberry, 252 N.W.2d at 714. Since Murray had no express authority to change mix specifications, by definition he could not have had the implied power to do so. We conclude that Murray had no actual authority, either express or implied, to order concrete.

Plaintiff also asserts that Murray had the apparent authority to change the order. "Apparent authority, or ostensible authority to do such acts or to make such contracts, is that which, although not actually granted, has been knowingly permitted by the principal or which he holds the agent out as possessing." Mayrath Co. v. Helgeson, 258 Iowa 543, 548, 139 N.W.2d 303, 306 (1966).

We must examine defendant's actions to determine whether he held his agent out as possessing the authority to make changes. The defendant negotiated the terms of the contract with plaintiff, and his agent was not involved in the process. The one item that Murray ordered which was not on the purchase order form, but which was approved by defendant, was an air compressor, and defendant had discussed that purchase with plaintiff beforehand. Defendant did not hold Murray out as having the authority to make changes in the contract, nor did he permit Murray to act with apparent authority. Therefore, Murray did not have apparent authority. Defendant was the customer, not Murray, and plaintiff should not have changed the order without his customer's knowledge and approval. Our ruling does not place an unreasonable burden on plaintiff or on business people in his position. The business person is required only to know with whom he is dealing, and with which of his customers' employees he may deal. A brief conversation concerning who his customer has authorized to purchase materials and to change the purchase order is simply good business practice, not an unreasonable burden.

II. Tender

When defendant sent plaintiff a check for \$1,528.95 on March 31, 1975, plaintiff refused the check because he had billed defendant \$1,904.11 for the 8.2 sack concrete used on the bank project. Defendant had typed "per corrected statement" on the voucher, and had sent the \$1,528.95 check because it had been the amount agreed to in the purchase order. Plaintiff refused the check because he thought it was offered conditionally as full satisfaction of the debt rather than on account, and he thought his

acceptance of the check would mean his acquiescence to the lesser amount. It is the general and often-stated rule that a lawful, bona fide tender stops the accrual of further interest. Swanson v. Baldwin, 250 Iowa 342, 345, 93 N.W.2d 740, 742 (1958). Whether defendant's sending the check to plaintiff constituted a lawful tender, and thus stopped the accrual of interest, depends on the effect of the words "per corrected statement" typed on the voucher.

"It is the universal rule that a tender upon condition for which there is no foundation in the contractual relation between the parties is ineffective * * * .

* * * But where the condition is one which the debtor has the right to insist on, a tender made subject to that condition is valid." Swanson v. Baldwin, 250 Iowa at 345, 93 N.W.2d at 742, quoting 52 Am. Jur. Tender § 24 (1944).

Plaintiff is correct in saying that the words typed on the voucher imply a condition, but since there was a written contract between the parties setting out the type, price, and quantity of concrete needed, since defendant had not authorized his agent to change the terms of the purchase order, and since defendant gave plaintiff no indication his agent had the power to order a different concrete, defendant was correct in conditioning payment on the negotiated terms. Defendant properly tendered the check and there is no accrual of interest.

AFFIRMED.