

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 26 1984

CLERK SUPREME COURT

MARVIN R. MENTZER and DIANA L. MENTZER,

Plaintiffs-Appellants,

vs.

TOWNSEND ENGINEERING COMPANY,

Defendant-Appellee.

Filed December 26, 1984

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4-406
83-1124

Appeal from the Iowa District Court for Polk County - John N. Hughes,
Senior Judge.

Plaintiffs appeal from judgment for defendant in an action for breach of contract arising out of a sale of nonconforming goods, asserting: (1) that the evidence was insufficient to support the trial court's finding that plaintiffs had neither reasonably notified defendant of intent to cure the nonconformity nor made an attempt to make a conforming delivery; and (2) that defendant improperly rejected conforming tender. REVERSED AND REMANDED.

Thomas C. Farr of Peddicord & Sutphin, P.C., Des Moines, for plaintiffs-appellants.

Robert G. Bridges of Bridges & Frampton, Des Moines, for defendant-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

PER CURIAM

Plaintiffs, Marvin and Diana Mentzer, filed an action for breach of contract arising out of a sale of an air compressor and air drier. Defendant, Townsend Engineering, the buyer of the equipment, filed an answer and counterclaimed for consequential damages. Following a trial to the court, judgment was entered for the defendant on the plaintiffs' claim and the defendant's counterclaim was dismissed.

Plaintiffs are assignees of the claim of the original seller, Iowa Air Power. Iowa Air contracted with the defendant to sell and install an air compressor and air dryer for \$9650. The contract, completed in May 1980, provided for delivery within "1-2 weeks"; however, the parties agreed that installation would be done over the July 4th holiday weekend when the plant was shut down. The seller tested the equipment to some extent when it was received from a supplier and when it was installed during the July 4th weekend. It was only when the equipment was operated under normal working conditions that it proved defective. When the plant returned to full operation on Monday, July 7th, the employees began to notice moisture in the air lines of the new system. Mentzer, the seller's representative, was contacted on Wednesday, July 9th, and he came out to inspect the equipment. By Friday, he concluded that the drier was defective. The defendant was still able to operate with the defective drier, but the production capacity was reduced. On Monday, July 14th, Mentzer ordered a new drier and notified the defendant.

Defendant asked the Seller to temporarily reconnect the old equipment, but Mentzer refused because the reconnection required electrical rewiring work which his employees were not qualified to perform.

On Wednesday, July 16th, Mentzer advised defendant that the new drier was to be delivered and would be installed the following Saturday or Monday, so that the unit would be operational late in the day on Monday, July 21. At that point the

defendant cancelled the contract and told Mentzer: "you better get down and get your equipment out of here."

The defendant then hired another person to reconnect the old equipment, and on July 29 it ordered a compressor and drier from another corporation.

On July 22, the seller wrote to the defendant, stating it would not accept cancellation of the defendant's original order and expected payment. On August 11, the defendant replied in writing, repeating its cancellation of the contract because the goods were non-conforming. Also on August 11, the defendant attempted to return the equipment to the seller but the seller refused to accept it. The equipment has since remained at the defendant's place of business.

The specific findings of the trial court challenged by plaintiffs on appeal were that the seller had neither reasonably notified defendant of intent to cure nor made an attempt to make conforming delivery and that defendant's rejection was proper. Defendant did not cross-appeal from the dismissal of its counterclaim but requests on appeal that it be allowed to offset the amount of its claimed damages against the value of the equipment remaining in its possession after the seller refused to accept return. Plaintiffs' objection to the request for modification asserts that such a request for relief is improper when no cross-appeal was taken.

This is an action at law, and the findings of the trial court are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

The seller's right to cure when the goods delivered are defective is governed by Iowa Code § 554.2508, which states:

1. Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

2. Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

Iowa Code § 554.2508 (1983).

This statute allows the seller the opportunity to cure an improper delivery if he notifies the buyer within a reasonable time. We find the trial court's conclusion that the seller "did not reasonably notify the defendant of any intention to cure the nonconformity and in fact made no attempt to make a conforming delivery" to be unsupported by the record.

In this case, the seller had reasonable grounds to believe that the drier would be acceptable. It tested the unit when it first was delivered and once it was installed at the defendant's plant. It was only under normal working conditions that the problem became apparent. The seller learned that the equipment was defective the week of July 7 and ordered a new drier which could have been installed by Monday, July 21. During this time the defendant's business was still operational, albeit at a reduced production level. Instead of allowing the seller time to cure the defect, the defendant cancelled the contract and sought the unit from a second seller, which was not ordered until July 29.

We find that the seller seasonably notified the defendant and that it could have provided conforming goods within a reasonable time. The trial court order dismissing the plaintiffs' claim was in error. We remand for a determination of the damages caused to the seller under Iowa Code § 554.2708. Because we conclude that the defendant acted wrongfully in not allowing the seller the opportunity to cure the defective drier, we find that the dismissal of the defendant's counterclaim to be proper.

The findings of the trial court are reversed and the case is remanded for a determination of damages.

REVERSED AND REMANDED.