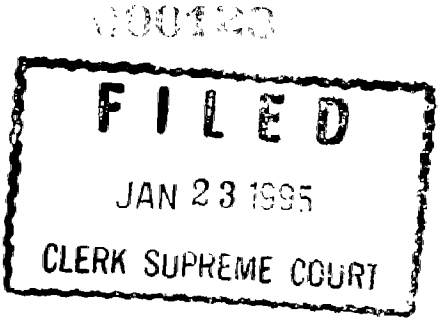
IN THE COURT OF APPEALS OF IOWA

No. 4-463 / 94-0280



C-THRU CONTAINER CORPORATION,
An Illinois Corporation,

Plaintiff-Appellant,

vs.

MIDLAND MANUFACTURING COMPANY,
An Iowa Corporation,

Defendant-Appellee.

Appeal from the Iowa District Court for Jasper County, Michael J. Streit, Judge.

The plaintiff appeals from an adverse ruling of the district court, in a breach of contract action, granting summary judgment in favor of the defendant. **REVERSED AND REMANDED.**

Terry R. Rickers of Matthias, Campbell, Tyler, Nuzum, Greta & Rickers, Newton, for appellant.

Herbert S. Selby of Selby, Updegraff & Smith, Newton, for appellee.

Heard by Donielson, C.J., Cady, J., and Keefe, S.J.*

*Senior judge from the 1st judicial district serving on this court by order of the Iowa Supreme Court.

KEEFE, S.J.

The plaintiff, C-Thru Container, was formed for the purpose of providing blow-molded plastic containers designed to hold juices and other liquid substances. The Nedlog Company is a commercial fruit juice manufacturer and distributor. C-Thru was founded primarily to ensure that Nedlog would have an adequate supply of suitable bottles designed to contain Nedlog's products.

Midland Manufacturing makes a variety of blow-molded bottles and containers. Midland, however, has primarily manufactured high density polyethylene (HDP) bottles, while C-Thru provided polyvinyl chloride (PVC), a higher grade material.

On March 23, 1989, C-Thru and Midland entered into a contract involving the sale to Midland of PVC blow-molding equipment. The purchase price was $26,000. Pursuant to the contract, the method of payment for the equipment was specified in the contract as being a two cent per piece credit against the purchase price of bottles ordered by C-Thru, plus an additional two cent per piece payment made directly to Oswalt Weiss, who was a minority shareholder in C-Thru. The contract also stated that C-Thru expected to order between 500,000 and 900,000 PVC gallons in 1989, at a price of $545.77 per thousand containers.

Midland picked up the equipment and moved it to Monroe, Iowa. In July 1989, Midland sent a notice to C-Thru that it was ready to begin production. C-Thru, however, failed

to order any bottles from Midland, instead buying (HDP) bottles from other suppliers at a far lower cost. Ultimately, On January 13, 1992, Midland gave notification to C-Thru that it was rescinding the 1989 contract based on C-Thru's failure to order any bottles. C-Thru did not respond to this notice. On September 1, 1992, Midland sent C-Thru notice that it was claiming a $23,562.13 artisan's lien for the expenses of moving, rebuilding and repairing the machinery. Midland attempted to contact C-Thru several times regarding the dispute, but received no answer. On September 30, 1992, the artisan's lien was foreclosed and the machinery sold.

On October 21, 1992, C-Thru notified Midland that it had failed to comply with the terms of the contract and that the full purchase price of $26,600 plus interest was due and payable within thirty days. On April 3, 1993, C-Thru filed a petition alleging that Midland had breached the contract by being incapable of producing the bottles as agreed to in the contract. On November 1, 1993, eight days before trial, Midland filed a motion for summary judgment, and C-Thru resisted on the grounds that the summary judgment motion was untimely and insupportable on the merits. On November 8, 1993, the district court indicated that it would grant the motion, and on January 13, 1994, a formal ruling was filed granting the motion for summary judgment. C-Thru has appealed.

C-Thru argues the motion for summary judgment was untimely based on Iowa Rule of Civil Procedure 237(c), which provides that any motion for summary judgment must be filed at least forty-five days before trial. C-Thru additionally contends the summary judgment was inappropriate on the merits since there was a serious dispute at to whether Midland was capable of producing the bottles as agreed to in the contract. C-Thru also maintains that because Midland never made any payment on the machinery, it has zero interest in that property.

The court will first consider the merits of the trial court's grant of the summary judgment motion filed by Midland. Because of the decision on the merits, the court will not address the issue as to whether the summary judgment motion was filed in a timely manner under Iowa Rule of Civil Procedure 237(c) when read in conjunction with rule 83(a).

The granting of a summary judgment will be upheld when no material fact is at issue and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). However, in reviewing the grant we require the moving party to show no genuine issue of material fact exists and it is entitled to the judgment as a matter of law. Shaw v. Soo Line R.R. Co., 463 N.W.2d 51, 53 (Iowa 1990). To determine if the movant has met this burden, we review the record in the light most favorable to the party opposing the summary judgment. Hoffnagle v. McDonald's

Corp., No. 93-1009 (Iowa Oct. 19, 1994); Downs v. A & H Construction, Ltd., 481 N.W.2d 520, 552 (Iowa 1992).

Paragraph III(A) of the contract involved provided that:

> Midland agrees to make commercially acceptable bottles for C-Thru as per sample bottles provided by C-Thru, for prices outlined in this agreement.

While the contract was going on, no bottles of any kind were ever produced and bought. The record shows during this period thirteen phone calls from C-Thru to Midland. C-Thru claims these calls were made to attempt to settle the issues between the parties. Midland claims there was correspondence with C-Thru which terminated the agreement for failing to order bottles. Employees of both parties stated in deposition that the standard for such bottle purchases within the blow-molding business is for the supplier to demonstrate the ability to produce commercially acceptable bottles before mass quantities were manufactured.

The issue relied on by the trial court was whether usage of trade evidence creates a sufficient fact issue as to the rights and obligations of the parties and the contract so as to defeat the summary judgment. Iowa Code section 554.2202 (1993) states that usage of the trade evidence may not be used to contradict a writing intended by the parties as a final expression of their agreement, but may be used to explain or supplement. In addition,

Iowa Code section 554.2202(h) provides if a writing was "intended also as a complete and exclusive statement of the terms of the agreement" the writing may not be explained or supplemented by evidence of consistent additional terms. Here the agreement contains a clause that it is the complete and exclusive agreement of the parties.

In argument C-Thru cites the federal case of Ralph's Distributing Co. v. AMF, Inc., 667 F.2d 670 (8th Cir. 1981). AMF granted Ralph's a franchise agreement of Ski-Daddler snow mobiles in a designated territory. Id. at 671. Ralph's was a wholesale dealer who bought from AMF for resale to dealers. Id. The agreement did not state that Ralph's had an exclusive franchise. Id. Because the Ski-Daddler did not sell, AMF terminated their production and sold their inventory to Harley-Davidson dealers in Ralph's territory. Id. Ralph's sued claiming AMF had violated his exclusive franchise to sell in his territory. Id.

Ralph's raised an argument which is the same as we have in this case. He alleged that evidence of course of performance or usage of trade would demonstrate the intent of the parties to be an exclusive franchise. Id. The district granted a summary judgment to AMF. Id. at 672. The Eight Circuit court reversed stating that the agreement designated Ralph's in a particular sales area. Id. at 674. The agreement was silent as to whether or not this was exclusive. Id. Evidence of course of performance or

usage of trade did not contradict any explicit contractual term. Id. It could be used to explain and supplement the meaning of the territorial description. Id. The Eighth Circuit cited Iowa Code sections 554.1205, .2202 and .2208 in deciding this case. Id.

The same logic should apply here. As stated before witnesses for both sides testified that is was customary in this industry to produce test bottles before producing large quantities to be sure they were "commercially acceptable."

Taking this evidence in the light most favorable to C-Thru, we conclude the evidence of usage of trade creates a genuine issue of fact.

We determine any other issues the parties may have raised are either covered by this opinion or without merit.

For these reasons, the trial court's granting of a summary judgment against C-Thru is reversed and remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.