IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 6-232 / 95-530

EGI SYSTEMS, INC. d/b/a D.A. EDGERTON & ASSOCIATES,
Plaintiff-Appellant,

vs.

IOWA BEARING COMPANY, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

D.A. Edgerton & Associates appeals the district court ruling rejecting its claims for breach of contract and conversion regarding the proposed sale of goods from Iowa Bearing Company **AFFIRMED**

August B Landis, Whitfield & Eddy, P L.C.,Des Moines, for appellant.

David K. Basler, Belin Harris Lamson McCormick, P.C., Des Moines, for appellee.

Considered by Huitink, P.J. and Habhab and Streit, JJ. Sackett, C.J., takes no part.

HUITINK, J.,

Plaintiff EGI Systems, Inc.("EGI"), d/n/a D.A. Edgerton & Associates, Inc., appeals the order of the district court that denied EGI's claims for breach of contract and conversion and found in favor of the Defendant, Iowa Bearing Company, Inc. ("IBC"), on its counterclaim for breach of contract.

This case concerns the sale of goods between merchants. EGI Systems Inc., the buyer, is a developer and manufacturer of a machine known as the "britte dotte engraver" which mechanically engraves signs with braille characters. The seller, Iowa Bearing Company, or IBC, is a local distributor of shafts and bearings that are used in manufacturing the engravers.

On or about July 21, 1993, EGI submitted a purchase order to IBC for $4487.60 worth of custom-cut shaft assemblies to be delivered by August 10, 1993, and $3777.40 worth of bearings to be placed in IBC's inventory and delivered to EGI on an as-needed basis. EGI included a check for $2113.10 with its purchase order. The terms of the purchase order required a 50% deposit on the shafts with the net due in 30 days, and designated the balance due on the bearings in 30 days.

Approximately two weeks prior to the placement of the order, Paul Weinstock, a representative of IBC, contacted Dave Edgerton, the sole stockholder and president of EGI, regarding the purchase of the materials needed to make the engravers. During that conversation, Weinstock informed Edgerton that IBC would need credit references

from EGI before accepting the payment terms sought by Edgerton. In conversations subsequent to receiving the purchase order, Weinstock reminded Edgerton that the payment terms of the purchase order would not be accepted until EGI was able to supply IBC with additional credit information. Otherwise payment would be C.O.D.

IBC sent an acknowledgment of the purchase order, on July 28, 1993, that required payment C O.D. The acknowledgment also noted that the shafting order was non-cancelable and non-returnable. The balance of the order was subject to approval by IBC's credit department. IBC contacted Edgerton's accountant who was unable to provide it with any credit information on the company. Weinstock learned from Edgerton that he had a poor personal credit history. Based on Edgerton's promises to supply the requested credit information, IBC proceeded to order the parts and then cashed EGI's check for $2113.10 on August 6, 1993.

Weinstock informed Edgerton that some of the parts ordered would not be available by August 10, 1993, the date that EGI requested for delivery in its purchase order. Edgerton asked that he be kept apprised of the situation. By the end of August, IBC had several complete sets of the parts but Edgerton refused to accept partial delivery When all the parts were received by IBC, Edgerton refused to pick up the parts.

In January of 1994, EGI filed suit alleging breach of contract and conversion of the check for $2113.10. IBC filed a counterclaim seeking damages based on theories

of breach of contract and promissory estoppel. A bench trial was held in October 1994. The district court found in favor of IBC in January of 1995, and awarded $2504.39 in damages on its counterclaim. EGI filed a Motion to Enlarge and Amend Judgment which was denied in February of 1995. EGI appeals from both orders of the district court.

EGI assigns error to the following: the district court's findings concerning the formation of the contract between the parties, the finding that EGI breached the contract with IBC by failing to provide credit information, the finding that IBC complied with the terms of the contract, and the rejection of EGI's conversion claim.

I. Formation of the Contract.

EGI first argues that the district court erred in failing to properly address the issue of offer and acceptance concerning the formation of the contract between EGI and IBC. The district court found that by the conduct of both parties an agreement was made that EGI would provide sufficient credit information or the delivery of the goods would be C O.D.

The case was tried to the court at law so our review is for correction of errors. Iowa R.App.P. 4. The findings of fact in jury-waived cases have the effect of a special verdict. Iowa R.App.P. 4. They are binding on appeal if supported by substantial evidence Iowa R.App. 14(f)(1). We are not bound by the trial court's application of

legal principles or conclusions of law. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 862 (Iowa 1991); Iowa R.App.P. 14(f)(14).

The question concerning the formation of the contract can be summarized as follows: are the C.O.D. payment terms, in the absence of approved credit, part of the contract, and if so, did EGI breach the contract by failing to either provide the requested credit references or to pay for the goods in full upon delivery? We look to Iowa's version of Article 2 of the Uniform Commercial Code, specifically section 554.2207 (1995), in answering this question:[1]

> 1. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
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> 2. The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
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> a. the offer expressly limits acceptance to the terms of the offer;
> b they materially alter it; or
> c. notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
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> 3 Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties did not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the

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[1] *See* Iowa Code sections 554.2102 ("this Article applies to transactions in goods ."), and .2105(1) (" '*Goods*' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . .

> writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this chapter.

EGI argues that its purchase order was an offer to enter into a contract for the sale of shafts and bearings in exchange for a 50% deposit on the shafts with the balance to be paid on both items in thirty days. Both the C.O.D. payment terms and the demand for credit references, it contends, were terms to be construed as proposals by IBC for addition to the contract. See Iowa Code § 554.2207(2). However, EGI contends that under section 554.2207(2)(a), the following paragraph set forth in the purchase order, expressly limited acceptance to the terms of the offer:[2]

> Seller and D.A. EDGERTON & ASSOCIATES agree to be bound by all terms and conditions contained herein, all of which are a part of this instrument and should be carefully read. Any provision in Seller's invoices, billing statements, acknowledgment forms or other documents which are inconsistent with the provisions of this Contract and Purchase Order, whether or not signed by a D.A. EDGERTON & ASSOCIATES representative, shall be of no force and effect.

Thus, under 554.2207(2)(a) and (2)(c), the C.O.D. and credit terms in IBC's acceptance are automatically rejected.

We find the restrictive language in EGI's purchase order may be read in either one of two ways: (1) that EGI agreed to contract only if IBC's acceptance contained all of EGI's terms and EGI thereby objects to any additional terms; or (2) EGI's offer can

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[2] We agree with EGI's assertion that the contract was "between merchants" under section 554.2104(1) ("Merchant" means a person who deals in goods of the kind . . .), and 2104(3) (" 'Between merchants' means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants."). Therefore, 554 2207(2) governs the contract between the two parties.

be accepted only by a document that contains neither additional nor different terms. *See Power Eng'g & Mfg, Ltd. v. Krug Int'l,* 501 N.W 2d 490, 494 (Iowa 1993); *see* White & Summers, *Uniform Commercial Code,* § 1-3, at 43 (3d ed. 1988);

Under the first reading, IBC's order acknowledgment operates as an acceptance of EGI's purchase order under section 554.2207(1) and the C.O D. and credit terms are proposed additional terms. *Power Engineering,* 501 N.W.2d at 494. However, the proposed terms are excluded under section 554.2207(2)(a) and (c).[3]

Under the second reading of the purchase order, no contract existed under section 554.2207(1) after the exchange of forms because the C.O.D and credit terms are different terms. *Id.*; White & Summers, § 1-3, at 44. However, contract formation can occur, as the trial court noted, under section 554.2207(3). *Power Engineering,* 501 N.W 2d at 494, *White & Summers,* § 1-3, at 45. We are in agreement with the trial court's finding that the parties' conduct was sufficient to establish a contract under section 554.2207(3), but that the writings of the parties are inconsistent concerning the payment and credit terms. Section 554.2207(3) only applies:

> when the writings of the parties do not otherwise establish a contract yet their conduct evidences a contract. Additionally, it presumes that there have been "writings of the parties" in which they failed to reach an agreement. . . . contract formation under subsection (3) gives neither party the relevant terms in his document, but fills out the contract with the standardized provisions of Article Two.

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[3] The restrictive clause in EGI's purchase order operates as the required notification of objection to the C.O.D. and credit terms under section 554.2207(2)(c). *Power Engineering,* 501 N.W.2d at 494; White & Summers, § 1-3, at 43.

White & Summers, § 1-3, at 45. We construe the restrictive clause in EGI's offer according to the second reading and find that no contract existed following the exchange of the forms since no 554.2207(1) acceptance ever occurred. *Id.* at 44.

Following the language of section 554.2207(3), we hold that the contract between EGI and IBC consists of the terms on which the writings of the parties agree and also supplementary terms provided by other provisions of Article 2.

It is undisputed that the parties and their respective forms are not in agreement as to the payment terms under the contract. Therefore, under 554.2207(3), we look to other provisions of Article 2 to supply the necessary terms. Section 554.2310 provides the following guidelines with respect to payment terms:

> Unless otherwise agreed
> a. payment is due at the time and place at which the buyer is to receive the goods eventhough the place of shipment is the place of delivery; . . .

Accordingly, we hold that payment for the shafts and the bearings was due at the time and place of delivery. There is substantial evidence in the record to support the trial court's finding that EGI refused to accept the order and pay for the goods C.O.D. when they arrived. Therefore, the finding of breach by EGI was proper. Because we find that EGI's refusal to accept and pay for the order in full was in breach of the contract, we need not reach the question of whether EGI breached the contract by failing to provide credit information to IBC.

II. Failure to Deliver in a Single Lot.

EGI next contends that the district court erred in finding that IBC complied with its obligations under the contract Specifically, EGI argues that the evidence established that IBC breached the contract by failing to tender timely delivery of the goods in a single lot as called for by the purchase order. We disagree.

The purchase order designated an August 10, 1993 delivery date but not all of the parts were received by IBC until early October. The record indicates that IBC informed Edgerton of the delay prior to the delivery date. When informed of the delay, Edgerton simply requested that he be kept apprised of the situation. Later, partial shipments were offered but were refused by Edgerton.

The trial court found that IBC complied with its obligations under the contract by keeping EGI informed as to the delivery date of the goods. The court also added that IBC was thereafter justified in suspending performance when EGI did not offer credit information. The trial court has not cited any statutory or case authority supporting this conclusion. However, we will affirm on appeal where any proper basis appears for a trial court's ruling, even though it is not one upon which the court based its holding. *Rouse v. Union Township*, 530 N.W.2d 714, 717 (Iowa 1995). We are bound to affirm the ruling on any ground appearing in the record whether argued or not by the parties. *In Interest of T.N.M.*, 542 N.W.2d 574, 575 (Iowa App. 1995)

Accordingly, we uphold the trial court's findings on this issue, although we do so by applying the principles of waiver.

We conclude that when Edgerton failed to object to the late delivery, he essentially waived his right to delivery by August 10, 1993. A party may waive a condition precedent to his own performance of a contractual duty, when such condition precedent exists for his sole benefit and protection, and compel performance by the other party who has no interest in the performance or nonperformance of the condition. *Matter of Estate of Clark,* 447 N.W.2d 549, 550 (Iowa App. 1989), *quoting Rodgers v. Baughman,*342 N.W.2d 80, 806 (Iowa 1983). A party to a contract who is entitled to the performance of a condition precedent, may waive it either expressly or by conduct indicating waiver. *Mosebach v. Blythe,* 282 N.W.2d 755, 760 (Iowa 1979). The August 10, 1993 delivery date was a condition precedent to EGI's duty to pay for the goods C.O.D. The record does not indicate that IBC had any interest in delivering the goods by August 10 and therefore, EGI was entitled to waive it. Edgerton's request to be kept apprised of the delivery situation when informed of the delay by IBC, impliedly waived the original delivery date designated by the purchase order. *See Employee Benefits Plus, Inc., v. Des Moines Gen. Hosp.,* 535 N.W 2d 149, 156 (Iowa App. 1995); *see also Forman v. Benson,* 112 Ill.App.3d 1070, 68 Ill.Dec. 634, 446 N.E.2d 535, 540 (1983) (words or conduct of party inconsistent with their intention to rely on the requirements of the contract may constitute waiver.) Therefore, we affirm on this issue.

III. Conversion

Finally, EGI contends that the district court erred in finding that EGI failed to establish a claim for conversion. A conversion occurs when a person or entity exercises wrongful control or dominion over the property of another in denial of or inconsistent with the other's possessory right to the property. *Larson v. Great West Casualty Co.*, 482 N.W.2d 170, 173 (Iowa App. 1992) (citations omitted). No conversion may be found where the exercise of control was not wrongful, as, for example, where the property was rightfully in the possession of the defendant. *Id.* We agree with the trial court's finding that IBC did not exercise wrongful control over EGI's deposit check. The parties contracted for the sale of shafts and bearings. IBC ordered the goods and cashed the deposit check based on the contract between the parties. Furthermore, by promising to provide IBC with credit references, EGI led IBC to believe that it had the authority to order the materials and to cash the deposit check. No conversion can be found where the plaintiff's conduct reasonably led the defendant to believe the defendant had authority for the actions taken with regard to the property. *Id; Restatement (Second) of Torts*, § 892 and Comment c (1979). We also agree with the finding that IBC was justified in retaining EGI's deposit check to cover the costs of the ordered materials. Accordingly, we affirm on this issue as well.

AFFIRMED.