[Cite as *Norco Equip. Co. v. Simtrex, Inc.*, 2009-Ohio-5562.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92479

NORCO EQUIPMENT COMPANY

PLAINTIFF-APPELLEE

vs.

SIMTREX, INC.

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-518421

BEFORE: McMonagle, J., Gallagher, P.J., and Celebrezze, J.

RELEASED: October 22, 2009

JOURNALIZED:

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Plaintiff-appellee, Norco Equipment Company, located in Ohio, distributes industrial air compressors manufactured by CompAir. Defendant-appellant, Simtrex, Inc., located in Pennsylvania, exports equipment to companies in the Middle East.

{¶ 2} In 2006, Norco filed suit against Simtrex, claiming breach of contract and unjust enrichment related to Norco's sale of an air compressor and other equipment to Simtrex, for which Simtrex had not paid. Simtrex answered and asserted counterclaims for breach of contract, breach of Uniform Commercial Code ("UCC") warranties, and fraud. Simtrex also asserted a third-party complaint for fraud, conversion, and theft (this count was subsequently dismissed) against Norco's president, Eric Niedermeyer. The essence of Simtrex's claims was that Norco, through Niedermeyer, had represented that the air compressor it sold to Simtrex was new, when, in fact, it was used.

{¶ 3} At the close of all the evidence at trial, the trial judge granted Norco and Niedermeyer's motion for a directed verdict. The court entered judgment in favor of Norco in the amount of $162,355, the contract price for the air compressor and equipment, and dismissed Simtrex's claims against Norco and Niedermeyer. The trial court subsequently granted Norco's motion for prejudgment interest for the period September 3, 2003 to August 29, 2008

in the amount of $55,514.52. Simtrex appeals from the trial court's judgments granting Norco's motions. For the reasons that follow, we reverse and remand for a new trial.

Trial Testimony

{¶ 4} Norco called three witnesses at trial: Niedermeyer, William Steele, vice-president of sales and marketing at CompAir USA, and Shaji P. Simon, Simtrex's owner (on cross-examination).

{¶ 5} Niedermeyer testified that Simon called him in late June or early July of 2003 and inquired about procuring an oil-free, diesel-powered, portable air compressor capable of producing 425 cubic meters of air per minute. Niedermeyer contacted CompAir USA in Sidney, Ohio, and was told that CompAir USA's engineers had built such a "prototype" compressor in 2001 for testing purposes to determine if the compressor could be manufactured in volume. The Model No. C425OFC compressor, with Serial No. 3607X11, had been extensively tested by CompAir USA's engineers and had 400 engineering test hours on it.

{¶ 6} Niedermeyer testified that he told Simon about the 400 test hours on the compressor and that the machine had never been rented or used other than for the test hours. Niedermeyer denied any knowledge of Defendant's Exhibit G, a document produced by Norco during discovery that purportedly

demonstrated that the machine had been loaned to another company on March 15, 2002.

{¶ 7} Niedermeyer testified that he inspected the compressor at the CompAir USA facility in June 2003, and there was nothing about the machine that "caused him concern." He admitted that he saw rust on the exhaust manifold, but asserted that the rust was the normal result of moisture condensing on the cast iron as the machine cooled down. Niedermeyer admitted that he did not tell Simon about the rust and did not tell him that the compressor had been built in 2001. Niedermeyer testified that pictures of the compressor taken in June or July 2003 indicated there were no dents, rust, or other imperfections on it.

{¶ 8} At Simon's request, Niedermeyer provided Simon with a specification sheet regarding a "C425OFC Oil-Free Diesel Air Compressor." Niedermeyer admitted that the specification sheet did not reference the prototype compressor he intended to sell to Simtrex. After some negotiation about price, Niedermeyer quoted Simon $162,355 for the air compressor and accompanying filter, dryer, dessicants (salt tablets), and two air hoses. Simon then issued a purchase order for "1 COMPAIR #C425OFC, DIESEL, OILFREE COMPRESSOR SKID MOUNTED, WITH DRYER, FILTER & DESSICANTS TO SUPPLY INSTRUMENT AIR WITH ALL ACCESSORIES WITH 2 EA AIR HOSES 2" X 10M, 150#RF[.]"

{¶ 9} Simon testified that his purchase order was for a new C425OFC air compressor and that he ordered the compressor by description based on the specification sheet sent to him by Niedermeyer. Simon's purchase order did not reference the serial number of the prototype air compressor, nor did it specify that the air compressor was to be new. Niedermeyer confirmed Simon's purchase order with an invoice to Simtrex. Norco's invoice similarly did not specify that the air compressor was new, and did not reference the serial number of the prototype air compressor or indicate that the compressor had 400 engineering hours on it.

{¶ 10} Niedermeyer testified that he knew prior to shipment that Simon was buying the compressor for resale to Mahatta Trading Company, a Kuwaiti importer that supplies equipment to engineering and construction companies in the Middle East. He denied knowing that Mahatta intended to sell the compressor to Kellogg Brown & Root ("KBR").[1] Simon told Niedermeyer that he would arrange for shipping the compressor and accompanying equipment from CompAir USA's facility in Sidney, Ohio to Kuwait; Niedermeyer then sent Simon drawings of the C425OFC air compressor, along with pictures

[1]Norco's complaint contradicts Niedermeyer's testimony. Paragraph nine of the complaint states: "In the course of the discussions regarding the equipment, Simtrex, through Simon, told Plaintiff's representative, Eric Niedermeyer, in Ohio, that its customer was the Mahatta Trading Company W.L.L. ("Mahatta") in Safat, Kuwait. Simplex [sic] further informed the Plaintiff that Mahatta intended to sell the equipment to KBR Engineering and Construction Services ("KBR"), an American company and a subsidiary of Halliburton Company."

showing how the compressor was bolted to the skid. Niedermeyer also signed a letter of credit that indicated that Norco would be paid upon payment to Simtrex by Mahatta.

{¶ 11} Niedermeyer testified that Simon called him after the compressor arrived in Kuwait and told him that KBR wanted documentation and assurances from CompAir USA that the compressor had a full warranty and was not a used machine. Gavin Monn, CompAir USA's president, then faxed a letter to representatives of Mahatta in which he informed them that the machine had been built by CompAir USA's engineering department, any running time on the machine was due solely to engineering tests, and the compressor had never previously been rented or sold.

{¶ 12} According to Niedermeyer, Simon also told him that the machine had been damaged in transit and would not start. Niedermeyer stated that Steven Ryder, a representative from CompAir UK, subsequently went to Kuwait to "see if he could smooth things out." Niedermeyer stated that he thought KBR eventually got the machine running, but Simon subsequently called and told him that KBR had rejected the compressor because it was used, rusted, and dented, and the Murphy controller on the compressor was "hanging down."

{¶ 13} William Steele, vice-president of sales and marketing at CompAir USA, testified that the machine at issue was built as a prototype machine at

CompAir USA's Sidney, Ohio facility. He explained that after prototype machines are built, CompAir USA's engineers put the machines outside and "run them continually." Steele stated that keeping the machines outside can cause rust, so CompAir USA sands and repaints the machines before shipping. Steele admitted that the prototype C425OFC air compressor at issue had been tested outside "to its extremes of pressure and temperature."

{¶ 14} Steele testified that after Niedermeyer, a close personal friend, contacted him about procuring a machine for Simtrex, Niedermeyer visited CompAir USA's facility and saw the prototype C425OFC air compressor. Steele said the machine was in good condition when he looked at it with Niedermeyer, although he saw some rust on it, so he told Niedermeyer that CompAir USA would clean the machine and "paint it over" before they sold it. Steele stated that he took pictures of the machine at Niedermeyer's request.

{¶ 15} Steele testified that CompAir USA sells only new equipment, and he did not consider the prototype air compressor to be used. Steele denied that the compressor had ever been rented or loaned to anyone prior to its sale to Simtrex. He stated that he could not identify Defendant's Exhibit G, although he agreed that CompAir USA's engineers would have kept records relating to any loan of the machine.

{¶ 16} Simon testified that he called several distributors who did not have the compressor in stock before he eventually called Norco, where he dealt

with Niedermeyer. Simon testified further that he had never dealt with Norco prior to this transaction and had never purchased an air compressor before.

{¶ 17} Simon testified that he told Niedermeyer that he was going to export the machine to Kuwait for eventual use by KBR. He stated further that he "never" buys used equipment and that Niedermeyer told him the air compressor was "new equipment" that would meet his specifications. Simon stated that Niedermeyer did not tell him, before Simtrex issued its purchase order to Norco, that the compressor had 400 engineering hours on it, had been built in 2001, and had been loaned to another customer in 2002. According to Simon, Niedermeyer only told him about the 400 engineering test hours on the compressor when he called Niedermeyer after the machine had reached Kuwait and told him the various complaints about its condition. Simon stated that Niedermeyer then told him the machine was considered new, despite the 400 test hours. Simon denied telling Niedermeyer that the compressor had been damaged in transit.

{¶ 18} Simon testified that he subsequently emailed Niedermeyer a report of an inspection of the compressor done jointly with either Mahatta or KBR representatives and a CompAir representative after the compressor reached Kuwait. The report noted 11 alleged deficiencies with the compressor, including 1) a bent panel door and broken control panel door lock;

2) a visible dent on the right side cover; 3) used parts throughout; 4) engine, wires, bolts, and metallic parts painted yellow "as if dipped in a paint can"; 5) damage to the engine exhaust cover; 6) rusted engine exhaust and other manifolds; 7) support at structural angles indicating refurbishment of machine; 8) rusted U-bolts not of matching size; 9) visible oil and smoke marks showing "the unit has been well used"; 10) damaged outer insulation; and 11) insulation on cover panels not cut to proper size. The report concluded, "in short, this unit is clearly an [sic] used one."

{¶ 19} Simon testified that Niedermeyer did not respond to this email. On September 28, 2003, Simon sent a letter advising CompAir USA's president that KBR had rejected the compressor. Simon testified that after KBR and Mahatta rejected the compressor, Simtrex had to reimburse Mahatta for the cost of shipping the compressor to Kuwait and storing it until it was sold by Mahatta shortly prior to trial.

{¶ 20} At the close of the evidence, the trial judge granted Norco and Niedermeyer's motion for directed verdict. Simtrex raises four errors for our review.

Law and Argument

I. Directed Verdict

{¶ 21} Simtrex first argues that the trial court committed reversible error in granting Norco and Niedermeyer's motion for directed verdict.

{¶ 22} A motion for directed verdict tests whether the evidence is sufficient to present an issue to the jury. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68. The trial court may direct a verdict when reasonable minds can come to only one conclusion. Civ.R. 50(A)(4). In ruling on such motions, the court must construe the evidence in the light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences from the evidence. *Posin v. ABC Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271; *Mastellone v. Lightning Rod Mutual Ins. Co.*, 175 Ohio App.3d 23, 2008-Ohio-311, ¶43. When there is substantial, competent evidence upon which reasonable minds may reach different conclusions, the court must deny the motion. *Ramage v. Cent. Ohio Emergency Serv. Inc.* (1992), 64 Ohio St.3d 97, 109. We review the trial court's ruling on a motion for directed verdict de novo. *Lotfi-Fard v. First Fed. of Lakewood*, 8th Dist. No. 87207, 2006-Ohio-3727, ¶37.

A. Breach of Contract Claims

{¶ 23} "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, ¶28.

{¶ 24} A meeting of the minds as to the essential terms of the contract is a requirement for enforcing the contract. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369. A meeting of the minds occurs when both parties "mutually assent to the substance of the exchange." *Miller v. Lindsay-Green, Inc.*, 10th Dist. No. 04AP-848, 2005-Ohio-5803, ¶63.

{¶ 25} The trial judge granted Norco and Niedermeyer's motion for a directed verdict because, he opined, "no question whether it was new or used, secondhand or whatever, apparently ever came up. I mean there seems to be no question about that." He stated further that "when there's only one [compressor] available, it doesn't make a difference whether it was new or used" and that, in any event, "[he did not] know how this jury is going to be able to determine whether in the minds of the parties a new compressor was the subject of their transaction." None of these reasons was an appropriate basis upon which to grant a directed verdict.

{¶ 26} In particular, it is abundantly clear that the testimony adduced at trial squarely presented a disputed factual issue regarding what the parties contracted for, obviously an essential element of the contract. Niedermeyer testified that the contract was formed when Simon faxed the purchase order and that the intended item to be purchased was the prototype compressor that had 400 test hours on it. He claimed that he told Simon about the test hours.

Simon, on the other hand, testified that he issued a purchase order for a new air compressor and that he based his order on the specification sheet regarding a C425OFC compressor sent to him by Niedermeyer. Simon denied Niedermeyer's claim that the 400 test hours had been disclosed to him and his assertion that a machine with 400 test hours on it is considered new. Considering this testimony, it is obvious that the subject of whether the compressor was new or used "came up" during negotiations, and reasonable minds could have found that the contract was for a new compressor of a given model, or for a specific compressor with 400 hours of use on it, depending upon whom the jury found credible.

{¶ 27} Furthermore, in considering a motion for a directed verdict, the trial court considers neither the weight of the evidence nor the credibility of the witnesses; its sole concern is whether the nonmoving party adduced evidence of substantial probative value in support of his or her claims. *Jarupan v. Hanna*, 10th Dist. No. 1069, 2007-Ohio-5081, ¶8. Here, the trial judge's observation that it "made no difference" whether the compressor was new or used because there was only one available was both wrong (it apparently matters greatly to both Norco and Simtrex) and a factual determination that should have been left to the jury.

{¶ 28} And finally, the jury could have determined what the parties contracted for by evaluating the credibility of the witnesses and any other evidence produced at trial, the way all juries determine disputed issues.

{¶ 29} Because reasonable minds could have reached different conclusions regarding what the parties contracted for, the trial court erred in granting Norco's motion for directed verdict on its breach of contract and unjust enrichment claims against Simtrex, and on Simtrex's breach of contract claim against Norco.

{¶ 30} We are not persuaded by Norco's disingenuous argument that the equipment at issue was described by Simtrex in its purchase order, which did not specify that the equipment was to be new or that it could not have engineering test hours on it, and, therefore, the parole evidence rule bars Simtrex from proving any terms other than those contained in the purchase order.

{¶ 31} The parol evidence rule, R.C. 1305.02 (applying to sales of goods), states that "terms * * * that otherwise are set forth in a writing intended by the parties as a final expression of the agreement with respect to the terms that are included in their agreement may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented by * * * (A) course of dealing, usage of trade, or course of performance; (B) evidence of consistent additional terms, unless the

court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."

{¶ 32} The parol evidence rule is designed to protect the integrity of written agreements and thereby encourage parties to put all contractual terms in writing. *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 27. The rule does not apply, however, absent an initial finding that the written agreement contains final terms or is the complete agreement of the parties. Id.; *Seleman v. Ganley, Inc.* (Mar. 22, 2001), 8th Dist. No. 78599, citing *Camargo Cadillac Co. v. Garfield Enterprises, Inc.* (1982), 3 Ohio App.3d 435, 439.

{¶ 33} Despite Norco's argument to the contrary, the trial court never made a finding that the purchase order represented the parties' complete agreement (and did not conduct the analysis set forth in *Carmargo Cadillac Co.*, supra, which requires an evidentiary hearing outside the presence of the jury before any parol evidence is admitted in which the court considers the facts and circumstances surrounding the making of the contract to determine if the contract is the parties' final agreement and, hence, whether parol evidence is admissible). Accordingly, as the purchase order was silent regarding whether the compressor was to be new or could have test hours on it, a consistent additional term, the trial court correctly heard evidence of the parol agreement to explain or supplement the incomplete written terms.

Seleman, supra; *Assoc. of Fire Fighters, Loc. 93 v. Cleveland* (Feb. 7, 2002), 8th Dist. No. 78970.

{¶ 34} Furthermore, it is well settled that a court may hear parol evidence when, through fraud or mistake, the contract does not express the actual agreement or intention of the parties. *Bartholomy v. Maeda* (Aug. 6, 1992), 7th Dist. No. 91 C.A. 171, citing *Neininger v. State* (1893), 50 Ohio St. 394, 400. Here, the parol evidence regarding what Niedermeyer told Simon prior to Simtrex's purchase order related directly to Simtrex's fraud claim.

{¶ 35} Lastly, we note that Norco did not object to any parol evidence at trial and, in fact, itself introduced extrinsic evidence to explain the intent of the parties to the contract. Specifically, Niedermeyer testified that he told Simon prior to Simtrex's issuance of its purchase order that the air compressor had 400 test hours on it. Accordingly, Norco cannot now complain about parol evidence offered by Simtrex to explain the intent of the parties.

{¶ 36} We are also unpersuaded by Norco's argument that a directed verdict was proper because there was no evidence that Simtrex ever rejected the goods or properly revoked its acceptance of the compressor. R.C. 1302.60 and 1302.66 provide for the rejection of nonconforming goods and the revocation of the buyer's acceptance of the goods. Under these provisions, if the compressor was non-conforming, and Simtrex properly rejected it or revoked its acceptance, it is entitled to its damages. But, if the compressor

was conforming, then Simtrex's rejection was wrongful and Norco is entitled to its damages. Simon testified that the compressor was inspected immediately upon arrival in Kuwait (notably, with a CompAir representative) and that rejection followed immediately after that inspection. Niedermeyer admitted that Simtrex rejected the compressor because it had test hours on it. In directing the verdict, the trial court opined that the reasons given for the rejection were not reasonable. But whether Simtrex's rejection was a proper and timely rejection or revocation of acceptance of the goods was a factual question for the jury, not the court.

B. UCC Warranties

{¶ 37} The trial court likewise erred in granting Norco's motion for directed verdict regarding Simtrex's claims for breach of UCC warranties.

{¶ 38} Under R.C. 1302.26, "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." In light of Simon's testimony, reasonable minds could conclude that Niedermeyer told Simon the air compressor was new and never told him about the 400 test hours on the machine. Reasonable minds could further conclude that Norco breached this express warranty by selling Simtrex a compressor with 400 test hours on it. On the other hand, reasonable minds could conclude that Niedermeyer told Simon about the 400

test hours and, further, that an air compressor with 400 test hours on it is still considered to be a new machine. In light of the disputed testimony, the trial court erred in directing a verdict on this claim.

{¶ 39} Simtrex also claimed that Norco breached implied warranties of merchantability and fitness for a particular purpose. R.C. 1302.27 provides that a warranty of merchantability is implied in every contract for the sale of goods. To be merchantable, the goods must, among other things, "pass without objection in the trade under the contract description." Although Norco argues there was no evidence that the air compressor was not of a quality generally accepted in the trade, Simon testified that an air compressor with 400 test hours on it was unacceptable to him as a merchant and would not pass without objection by other merchants in the trade. Norco argues that Simon was incompetent to make this assessment due to his limited knowledge of air compressors, but such a determination was for the jury. In light of Simon's testimony, the trial court erred in granting a directed verdict on this claim.

{¶ 40} The trial court also erred in granting a directed verdict on Simtrex's claim of implied warranty of fitness for a particular purpose. Under R.C. 1302.28, "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is * * * an implied warranty that the goods shall be fit for such

purpose." Simon testified that he told Niedermeyer that he was going to export the machine to Kuwait for eventual use by KBR. He testified further that he only buys new equipment for his customers and the air compressor with 400 test hours on it was unacceptable to Mahatta and KBR. Niedermeyer testified (despite Norco's complaint) that he knew nothing about KBR prior to the sale and further, that an air compressor with 400 test hours on it is considered new. As reasonable minds could reach different conclusions as to whether Norco breached the implied warranty of fitness for a particular purpose, the trial court erred in granting a directed verdict on this claim.

C. Fraud

{¶ 41} The elements of fraud are: 1) a representation, 2) which is material to the transaction at hand, 3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, 4) with the intent of misleading one into relying upon it, 5) justifiable reliance upon the representation, and 6) a resulting injury proximately caused by the reliance. *Williams v. U.S. Bank Shaker Square*, 8th Dist. No. 89760, 2008-Ohio-1414, ¶14, citing *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 1998-Ohio-294.

{¶ 42} If the jury believed Simon, Simtrex established a factual question regarding these elements at trial. Simon testified that Niedermeyer told him

the air compressor was new, even though it had 400 engineering test hours on it, and sent him a specification sheet that appeared to be for a new C425OFC air compressor. Clearly these representations were material to the transaction. If an air compressor with test hours on it is not considered new equipment by others in the trade, as Simon testified, then Niedermeyer made the representation with knowledge of its falsity. According to Simon, Niedermeyer knew he would rely on the representations, as the negotiations were conducted by telephone and facsimile, and Simon did not travel to Ohio to view the machine. Finally, Simon testified that Simtrex relied on the representations that the machine was new, to its detriment, as KBR and Mahatta subsequently rejected the compressor. If, on the other hand, the jury believed Niedermeyer's testimony that he told Simon about the 400 test hours, Simtrex's fraud claim would fail. As reasonable minds could reach different conclusions, the trial court erred in granting a directed verdict on this claim.

D. Conversion

{¶ 43} Simtrex also asserted a conversion claim against Niedermeyer. On appeal, Simtrex does not challenge the trial court's granting of directed verdict on this claim; hence, we do not consider whether the trial court's judgment on this claim was in error.

{¶ 44} Appellant's first assignment of error is sustained in part. The matter is reversed and remanded for a new trial on Norco's breach of contract and unjust enrichment claims against Simtrex, Simtrex's breach of contract, breach of UCC warranties, and fraud counterclaims against Norco, and its third-party fraud claim against Niedermeyer.

{¶ 45} In light of our resolution of Simtrex's first assignment of error, Simtrex's second, third, and fourth assignments are moot and we need not consider them. See App.R. 12(A)(1)(c).

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR