COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2014AP736 **Cir. Ct. No. 2012CV607**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

ERIK T. JOHNSON,

PLAINTIFF,

WILSON MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

TEX-MACH, INC. AND FIRST MERCURY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

BONDED FIBERS MIDWEST, INC., EMPLOYERS INSURANCE COMPANY OF WAUSAU, LIBERTY MUTUAL INSURANCE COMPANY AND LIBERTY MUTUAL FIRE INSURANCE COMPANY,

DEFENDANTS,

PRODUCTS UNLIMITED, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: PHILLIP A. KOSS, Judge. *Reversed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 GUNDRUM, J. Products Unlimited, Inc. (PUI) appeals the circuit court's grant of Tex-Mach, Inc.'s[1] motion for judgment on its cross-claim for indemnity against PUI. For the following reasons, we reverse.

Background

¶2 Erik Johnson filed suit against Tex-Mach, Bonded Fibers Midwest, Inc., and PUI following an injury he sustained in using textile equipment, a fine opener, in the course of his employment with Bonded. The fine opener had been purchased from Tex-Mach by way of an invoice which included the following language at the bottom:

> Buyer shall indemnify and hold Seller harmless against any and all claims arising from the direct or indirect operation or use of these goods; including cost of defense, settlement and reasonable attorney's fees. Title to these goods shall remain with Seller until payment is received in full…. Payment of this invoice shall constitute acceptance of all terms and conditions set forth hereon.

¶3 PUI, located in Omaha, Nebraska, and Bonded, located in Delavan, Wisconsin, have a close relationship in that members of the Beier family are owners of each company and Jeff Beier is president of Bonded and vice president

[1] We use "Tex-Mach" to refer both individually to Tex-Mach and collectively to it and its insurer First Mercury Insurance Company.

of PUI. Over the years, Gary Pospisal, an employee of PUI, would travel to Tex-Mach to view textile equipment for potential purchase, and would purchase equipment from and through Tex-Mach for both PUI and Bonded. Tex-Mach and PUI agree that even though Pospisal was an employee of PUI, he had authority to purchase equipment for and on behalf of both PUI and Bonded.

¶4 In November 2006, Pospisal visited Tex-Mach to look at equipment for potential purchase. Following that visit, on December 1, 2006, a purchase order was initiated on PUI stationery for the purchase of two fine openers from Tex-Mach for $3500 each, with a total of $7000. "Ronnie:[2] please bill to Bonded Fibers Midwest Inc." was typed in the middle of the purchase order and the name "Gary Pospisal" was typed on the signature line at the bottom. The January 22, 2007 invoice from Tex-Mach which underlies this action identifies one fine opener being "SOLD TO" "Bonded Fibers Midwest, Inc." for $3500 and shipped to Omaha, Nebraska. At his deposition, Pospisal testified that he purchased the fine opener for use at Bonded as "an alternate feed system to [be added to Bonded's] existing line." The fine opener was initially sent to PUI, where it was refurbished under Pospisal's direction to be made ready for use at Bonded. Bonded paid "costs" for the materials and labor used by PUI to refurbish the fine opener.

¶5 After acquiring the fine opener, Pospisal also purchased a chute feed from Germany through Tex-Mach to be used with the fine opener at Bonded. Once the fine opener was refurbished and the chute feed acquired, the fine opener

[2] The reference to "Ronnie" was to Ronald Cantrell, vice president of Tex-Mach, with whom Gary Pospisal had a long-standing business relationship.

was sent to Bonded where Pospisal and two other PUI employees installed it, along with the chute feed, in March 2008. In October 2010, Johnson was injured while working with the fine opener at Bonded. He filed suit against Tex-Mach, PUI, and Bonded, and Tex-Mach cross-claimed against PUI and Bonded for indemnity under the contract for the fine opener. PUI cross-claimed against Tex-Mach.

¶6 Tex-Mach filed a motion for declaratory judgment "seeking a ruling that Bonded Fibers and [PUI] should indemnify it." At a hearing on the motion, both Tex-Mach and PUI agreed there were no genuine issues of material fact and the indemnification question was ripe for determination by the circuit court.[3] The circuit court concluded that "as pointed out by [Tex-Mach's counsel], based on Mr. Pospisal's testimony and other evidence presented, that frankly [Pospisal's] working for both. Clearly, Bonded Fibers. And that's the ultimate—They paid for it. It went there ultimately." The court stated it understood PUI's argument that PUI is not a party to the contract, but stated:

> [The fine opener] went to their plant. They did all of the [refurbishing] work. They installed the guards. They got paid [by Bonded for the refurbishing]. And I don't think they made a—They paid for costs apparently, but they still did. They are sister companies to each other; if not, PUI is a parent of Bonded Fibers; and therefore, as Mr. Pospisal himself stated, he was there on behalf of both.

[3] Bonded sought a jury trial. It appears from the record that Tex-Mach and Bonded both subsequently settled with Johnson and, related to that settlement, a stipulation and order was signed and entered which dismissed, on the merits and with prejudice, "all other parties' claims, counterclaims and cross-claims among and between the parties … with the exception of Tex-Mach's cross-claims against [PUI]." Thus, the final judgment is only against PUI and Bonded is not a party to this appeal.

The court held that PUI and Bonded "both are entwined such that it is a matter of law they are both responsible." The court entered judgment for Tex-Mach and against PUI[4] in the amount of $191,709.13. PUI appeals.[5]

Discussion

¶7 Although the circuit court ruled in favor of Tex-Mach, Tex-Mach does not propound as support on appeal the circuit court's conclusion that both Bonded and PUI were parties to the contract because they were "entwined." Rather, having apparently settled with Bonded[6] following the court's ruling holding both Bonded and PUI "responsible" for the indemnity provision, Tex-Mach asserts on appeal that PUI is the original "buyer" of the fine opener from Tex-Mach. We disagree and conclude that the contract itself unambiguously demonstrates that Bonded, not PUI, purchased the fine opener, and thus, Bonded, not PUI, is bound by the indemnity clause.

¶8 Tex-Mach correctly notes our standard of review. "The grant or denial of a declaratory judgment is addressed to the circuit court's discretion. However, when the exercise of such discretion turns upon a question of law, we review the question independently of the circuit court's determination." ***Olson v. Farrar***, 2012 WI 3, ¶24, 338 Wis. 2d 215, 809 N.W.2d 1 (citation omitted). The interpretation of a contract presents a question of law we review de novo. ***Osborn***

[4] *See supra* note 3 (explaining why the judgment is against PUI only).

[5] PUI also challenges on appeal the circuit court's ruling related to amounts PUI is obligated to pay Tex-Mach under the indemnification provision of the contract. Because we conclude that PUI is not a party to the contract and therefore owes Tex-Mach no duty of indemnification, we need not address this issue.

[6] *See supra* note 3.

v. Dennison, 2009 WI 72, ¶33, 318 Wis. 2d 716, 768 N.W.2d 20. Absent ambiguity, in determining which parties intended to be bound by the terms of a contract, our review is informed by the language within the contract itself. *See* ***St. Regis Apartment Corp. v. Sweitzer***, 32 Wis. 2d 426, 433-34, 145 N.W.2d 711 (1966).

¶9 PUI refers to only the invoice from Tex-Mach as constituting the contract between the parties. Without clearly stating so, Tex-Mach appears to suggest the invoice and the purchase order together constitute the contract.[7] Neither party develops any arguments on the point. Regardless, we need not decide the apparent disagreement[8] because even if we considered the purchase order as part of the contract, there remains no ambiguity.[9]

¶10 The December 1, 2006 purchase order, on PUI stationery with "Gary Pospisal" typed on the signature line, requests two fine openers for a total purchase price of $7000. In the middle of the order it reads "Ronnie: please bill to Bonded Fibers Midwest Inc." The January 22, 2007 invoice from Tex-Mach, which includes the indemnification language underlying this action, indicates that

[7] Tex-Mach asserts that PUI "made possible a contract with Tex-Mach by submission of the Purchase Order #GP1632 which 'usually is the first document having the legal attributes of an offer.'" (Quoting ***Rich Prods. Corp. v. Kemutec, Inc.***, 66 F. Supp. 2d 937, 956 (E.D. Wis. 1999)).

[8] See ***Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.***, 58 Wis. 2d 193, 208, 210, 206 N.W.2d 414 (1973), for a discussion of Uniform Commercial Code § 2-207 (adopted in Wisconsin as WIS. STAT. § 402.207), indicating that where invoice is issued after purchase order, and contains additional material terms, the invoice is essentially a counteroffer and the acceptance is the parties' subsequent performance.

[9] Tex-Mach makes brief reference to multiple provisions of the Uniform Commercial Code, however, it fails to develop arguments as to how those provisions apply. *See* ***ABKA Ltd. P'ship v. Board of Review***, 231 Wis. 2d 328, 349 n.9, 603 N.W.2d 217 (1999) (we do not address undeveloped arguments).

payment should be made from the invoice and describes one fine opener for a total amount of $3500. It conspicuously states that the fine opener was being "SOLD TO" "Bonded Fibers Midwest, Inc." While this language alone makes clear the contract is between Tex-Mach and Bonded, we also note that the contract states: "Title to [the fine opener] shall remain with [Tex-Mach] until payment is received in full" and "Payment of this invoice shall constitute acceptance of all terms and conditions set forth hereon." Tex-Mach acknowledges that Pospisal was authorized to act on behalf of Bonded[10] and it is undisputed that Bonded paid the invoice, and thus accepted the terms and conditions of the contract.

¶11 Tex-Mach downplays the key "SOLD TO" "Bonded Fibers Midwest, Inc." language of the contract, asserting PUI actually bought the fine opener for its own purposes and then made a "second sale" of the opener to Bonded.[11] Quoting deposition testimony, Tex-Mach asserts that Pospisal was the "only person on the buy side of this transaction." No one disputes that. Although we need not delve into the extrinsic evidence due to the clarity of the contract itself, our thorough review of the record nonetheless has uncovered no evidence of

[10] In its response brief, Tex-Mach states, "Products Unlimited's Undisputed Facts establish that Mr. Pospisal was authorized to act by both Bonded Fibers and Products Unlimited, and that is how the circuit court ruled." In its brief in support of its motion for declaratory judgment, Tex-Mach asserted: "It turns out that Mr. Pospisal, acting for both Bonded Fibers and Products Unlimited, knew very well what he was agreeing to, read the terms and conditions, and understood the indemnity provision" and "Mr. Pospisal took numerous trips to Tex-Mach's South Carolina site to pick out equipment on behalf of Products Unlimited and Bonded Fibers. He was the Products Unlimited and Bonded Fibers representative noted on the numerous invoices that were … identical to the Invoice at issue in this matter."

[11] Tex-Mach makes no attempt to explain how a "second sale" of the fine opener might have been made. The best we can divine is that Tex-Mach may be referring to Bonded paying PUI "costs" for PUI's refurbishment of the fine opener. If this is what Tex-Mach is suggesting effectuated a "second sale," we do not see how payment of costs for the parts and labor involved with the refurbishment could fairly be considered a sale of the fine opener itself from PUI to Bonded.

a "second sale"—a sale of the fine opener from PUI to Bonded—and strongly suggests Pospisal was in fact acting as an agent of Bonded when he purchased the fine opener for Bonded's use and on Bonded's behalf.

¶12 Based on the unambiguous terms of the contract, Bonded, not PUI, is the purchaser of the fine opener sold by Tex-Mach and thus, Bonded, not PUI, is bound by the indemnity clause.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

¶13 NEUBAUER, P.J. (*concurring*). I disagree that the contract documents alone unambiguously exclude PUI as a purchaser of the fine opener. The purchase order came on PUI stationery, but noted that Bonded Fibers was to be billed. The subsequent invoice references that purchase order and provides that the fine opener was to be shipped to PUI, but also states that the fine opener was sold to Bonded Fibers. The invoice also provides that the payment of the invoice "shall constitute acceptance of all terms and conditions set forth herein," including the indemnity at issue. These documents do not conclusively show who purchased the fine opener. Indeed, the majority's extensive discussion of the extrinsic facts underscores that the documents alone do not rule out PUI as a purchaser of the fine opener.

¶14 The extrinsic facts do establish that Bonded Fibers paid for the fine opener and ended up with it. There are no facts to show that PUI paid anything to Tex-Mach and therefore no facts to show any payment accepting the terms and conditions of the invoice. To the contrary, Gary Pospisal, the only individual on the "buy" side, testified that he told Tex-Mach to bill Bonded Fibers and that Bonded Fibers bought the fine opener from Tex-Mach. While PUI refurbished the equipment, it was paid at cost for labor and materials by Bonded Fibers. Neither PUI's internal accounting notation nor Tex-Mach's subjective understanding as to who was buying the equipment establishes an offer and acceptance, i.e., a meeting of the minds, between Tex-Mach and PUI. While Pospisal was employed by PUI as an engineer and had ownership interests and held positions in the related entities, nothing about that shows that PUI bought the fine opener from Tex-Mach.

The absence of any facts showing an offer and acceptance between PUI and Tex-Mach for the purchase of the fine opener entitles PUI to judgment as a matter of law. *See* WIS. STAT. § 802.08(6) ("If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.").