COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1334 **Cir. Ct. No. 2011CV149**

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

MANITOWOC CRANES, INC.,

PLAINTIFF-APPELLANT,

V.

MACHINE TOOL TECHNOLOGIES, INC., D/B/A MAC-TECH,

DEFENDANT-INTERVENOR,

VECTOR AUTOMATION TECHNOLOGIES, INC.,

DEFENDANT,

MAZAK OPTONICS CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Manitowoc County: GARY L. BENDIX, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mazak Optonics Corporation prevailed at summary judgment in a breach-of-contract and promissory-estoppel case Manitowoc Cranes, Inc. filed against Mazak, Machine Tool Technologies, Inc. d/b/a Mac-Tech, and Vector Automation Technologies, Inc. Mac-Tech cross-claimed against Mazak and Vector; Mazak cross-claimed against Mac-Tech. Manitowoc entered into a settlement and ***Pierringer*** release with Vector.[1] After the circuit court ruled in favor of Mazak at summary judgment, Mac-Tech and Mazak agreed to dismiss their cross-claims against each other. Manitowoc contends the summary judgment ruling was wrong and appeals from the order dismissing the cross-claims. We conclude the circuit court properly granted Mazak's motion for summary judgment against Manitowoc and thus properly dismissed the cross-claims. We affirm the order.

¶2 Manitowoc designs, manufactures, and sells cranes for construction-related applications. In 2008, it began looking to purchase a machine system to laser-cut steel tubing for its lattice-boom crawler cranes. Mazak manufactures and sells laser-cutting equipment. Mac-Tech is a distributor of Mazak's products.

¶3 Mazak, with Mac-Tech, pitched its laser tube-cutting system to Manitowoc. Rejected as too costly, Mazak eventually proposed one component of the system Manitowoc needed, the Spacegear U44 laser tube-cutting machine. The Spacegear would have to be combined with an automatic material handler called an "indexer." Vector designs, manufactures, and implements material-

[1] *See* ***Pierringer v. Hoger***, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

handling systems. Manitowoc agreed to purchase the Spacegear and associated software and programming from Mazak, the indexer from Vector, and a dust collector from Mac-Tech to create an integrated system.

¶4 Mazak, Vector, and Mac-Tech (the vendors) began building the system. In December 2008, Manitowoc issued separate purchase orders (the "December POs") to each and made down payments to Mazak and Vector.

¶5 On January 21, 2009, an internal Manitowoc email addressed "Laser Purchase Issues" that "need to be resolved." It stated in part: "Senior management wants the package renegotiated to one purchase order to allow the company to hold one vendor accountable for the entire system." Two days later, Manitowoc representatives met with the vendors' representatives and conveyed to them that Manitowoc wanted a single source of supply and accountability and "to cancel the existing separate POs and issue a single PO encompassing the entire package." The parties agreed that Mac-Tech would serve as prime contractor for the project with Mazak and Vector serving as Mac-Tech's subcontractors.

¶6 On February 20, Mac-Tech sent Manitowoc an email of "high importance" directing Manitowoc to "cancel the original purchase orders" and "process a new purchase order to Mac-Tech as described." An attached letter from Brad Peterson, Mac-Tech's vice president of sales, set forth for Manitowoc's review and approval a summary of the parties' agreement, stated that Mac-Tech would serve as Prime Contractor, outlined the "scope of supply," listing the components each vendor would supply, price, and terms of payment, and told Manitowoc to direct questions or concerns to Mac-Tech. It also stated:

> **TERMS OF SALE:**
>
> **Please Note:** All existing purchase orders, for this project, will be cancelled and one purchase order will be issued to Mac-Tech as the Prime Contractor…. All monies and communication regarding this transaction will flow through Mac-Tech ….

Manitowoc confirmed the arrangement.

¶7 On February 27, Manitowoc issued a PO (the "February PO") to Mac-Tech "for the supply of the laser tube[-]cutting system, including all related components." Mac-Tech's formal acknowledgment of the February PO noted that "all existing purchase orders for this project will be closed and one PO will be issued to Mac-Tech as the prime contractor."

¶8 The February PO specified that the system was to be installed and operational by May 29, 2009. "Mating" Vector's indexer with Mazak's Spacegear proved difficult, however. Test run, or "run-off," dates repeatedly got pushed back. Disagreements arose over the criteria by which a run-off would be deemed successful.

¶9 The first run-off did not occur until January 2010. It was a failure. A second run-off in March 2010 also was unsuccessful. The failures appeared to be related to the Spacegear software, but Mazak was unable to identify or correct the problem. Whatever the cause, by May 2010 the vendors acknowledged that the issues with the system remained unresolved. Manitowoc never put the system, for which it paid over $425,000, into commercial use.

¶10 Manitowoc filed suit against Mac-Tech for breach of contract. A year later, it filed an amended complaint adding Mazak and Vector. The amended complaint alleged breach of contract against all three defendants and promissory

estoppel and breach of contract as a third-party beneficiary against Mazak and Vector. Mazak moved for summary judgment on grounds that it and Manitowoc were not in privity. The circuit court granted Mazak's motion. This appeal, taken from the ensuing agreed order between Mazak and Mac-Tech, followed.

¶11 Whether the circuit court properly granted a motion for summary judgment is a question of law an appellate court reviews de novo. ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶5, 283 Wis. 2d 606, 699 N.W.2d 189. We use the same methodology as the circuit court. ***M&I First Nat'l Bank v. Episcopal Homes Mgmt.***, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995). *See* WIS. STAT. § 802.08(2) (2013-14). We will not repeat the well-known methodology here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* § 802.08(2). "We view the summary judgment materials in the light most favorable to the nonmoving party." ***Rainbow Country Rentals and Retail, Inc. v. Ameritech Publ'g, Inc.***, 2005 WI 153, ¶13, 286 Wis. 2d 170, 706 N.W.2d 95 (citation omitted). Interpreting a contract also presents a question of law subject to de novo review. ***Linden***, 283 Wis. 2d 606, ¶5.

¶12 Manitowoc first argues that the circuit court failed to apply proper summary judgment methodology. It contends the court took Mazak's submitted facts as true "simply because Manitowoc did not follow the same numbering format as Mazak." Nothing in the record supports this assertion.

¶13 The transcript reveals a robust discussion between the court and counsel, plainly demonstrating the court's thorough grasp of the case. The court's statement that it was "not [its] job to look for that needle in a haystack" was

nothing more than a request that counsel direct it, where necessary, to a particular document in the voluminous filings. Neither at the hearing nor anywhere in the nineteen-page written decision did the court demand a particular numbering format. It simply concluded that Manitowoc's recited facts did not place into dispute the facts Mazak relied on to support its case for summary judgment. The court properly applied summary judgment procedure.

¶14 Manitowoc next contends the court erroneously granted summary judgment to Mazak on the breach-of-contract claim. We disagree.

¶15 The first step in evaluating a breach-of-contract claim is to determine whether a valid contract exists. ***Riegleman v. Krieg***, 2004 WI App 85, ¶20, 271 Wis. 2d 798, 679 N.W.2d 857. The complaint in a breach-of-contract action must set forth the substance of the agreement or have attached a copy of the agreement. ***Schell v. Knickelbein***, 77 Wis. 2d 344, 349, 252 N.W.2d 921 (1977).

¶16 Manitowoc did not do so. Rather, at the summary judgment hearing, Manitowoc identified as the basis for the contract between it and Mazak the "Letter of Technical Understanding" Mazak created shortly after the December PO regarding modification Manitowoc requested to the standard Spacegear model; a May 2009 email from Mac-Tech's Peterson about testing the system; and a September 2009 email from Peterson regarding a conference call with Mac-Tech, Mazak, and Vector to discuss "open issues" about system installation, in which Peterson noted, among other things, that "Mazak will need to confirm programming issues" related to a clamping device.

¶17 Here, Manitowoc adds that the court ignored evidence of a contract between Mazak and Manitowoc. It points to the December PO issued to Mazak, Mazak's written acknowledgement of it, the sizable down payment it made to

Mazak pursuant to the December PO, and Mazak's early performance of its obligations under the December PO.

¶18 The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." ***Baxter v. Wisconsin DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (alteration in original; citation omitted). Manitowoc's recitation of the facts ignores the contractual changes the February PO wrought. Manitowoc also ignores that even it viewed the contract as being with Mac-Tech. In December 2009 emails to Mazak regarding the run-off issues, Manitowoc told Mazak that "[t]he PO is with Mac-Tech and the agreement was made with Mac-Tech," and "Again, the contract is with Mac-Tech and this was done with Mac-Tech."

¶19 In addition, contrary to the allegations in the amended complaint, Mazak could not have breached a contract to supply a functional laser tube-cutting *system*. Even under the December PO, Mazak's obligation was to provide the Spacegear, one *component* of the system. Neither the documents cited at the hearing nor the additional facts presented here establish a contract between Manitowoc and Mazak for an entire *system*.

¶20 The undisputed facts show that it was Manitowoc that set in motion the contractual environment of which it now complains. Manitowoc demanded that one vendor be held accountable for the entire system, and it was by Manitowoc's own doing that the February PO superseded the December PO. Once Mac-Tech donned the mantle of prime contractor and Manitowoc canceled the December POs, Manitowoc's contract was with Mac-Tech.

¶21 Manitowoc next contends that questions of fact preclude summary judgment on the issue of whether a novation occurred. Mazak responds that the legal theory of novation is inapplicable because the February PO canceled the December POs. Manitowoc suggests that Mazak is bound to a novation theory because Mazak raised it as an affirmative defense. We disagree with Manitowoc.

¶22 First, a party need not pursue every affirmative defense it initially raises. *Cf.* ***Hertlein v. Huchthausen***, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986) (purpose of pleading is to give fair notice of potential claim).

¶23 Second, novation does not apply here. A novation is "an agreement between the obligor [Mazak], obligee [Manitowoc] and a third party [Mac-Tech] by which the third party agrees to be substituted for the obligor and the obligee assents thereto, the obligor is released from liability and the third person takes the place of the obligor." ***Siva Truck Leasing, Inc. v. Kurman Distribs.***, 166 Wis. 2d 58, 67, 479 N.W.2d 542 (1991) (citation omitted). The February PO was not, as Manitowoc contends, "just a 'paperwork shuffle' that did not alter any of the parties' obligations." Rather, it canceled Mazak's contractual duties to Manitowoc and established a new contract with Mac-Tech. Contrary to Manitowoc's assertions, the court did not conclude that Mazak met its contractual obligations to Manitowoc. It concluded that no contractual relationship existed.

¶24 Manitowoc next asserts that, if it had no contract with Mazak, the circuit court erred in granting summary judgment against it on its promissory estoppel claim because it acted in reliance on Mazak's performance promises.

¶25 A claim for promissory estoppel arises only when there is no contract. ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶53, 262 Wis. 2d 127, 663 N.W.2d 715. It applies when there is a "promise which the promisor

should reasonably expect to induce action or forbearance of a definite and substantial character … and which does induce such action … if injustice can be avoided only by enforcement of the promise." ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 694, 133 N.W.2d 267 (1965) (citation omitted).

¶26 The circuit court found that if Mazak made promises outside of the negotiated POs, any action induced was on Mac-Tech's part as general contractor. It concluded that enforcement was not necessary to avoid injustice, as all parties were sophisticated business entities, Manitowoc has a contractual remedy against Mac-Tech, and, looking to principles underlying the economic loss doctrine, granting Mazak's motion for summary judgment on the promissory estoppel claim protects freedom of contract and encourages purchasers to assume, allocate, and insure against the risk of nonperformance. *See* ***Van Lare v. Vogt, Inc.***, 2004 WI 110, ¶17, 274 Wis. 2d 631, 683 N.W.2d 46. We agree it is not unjust to enforce the contract in the way Manitowoc sought to set it up.

¶27 The last issue is whether the court erred in ruling that, as a matter of law, Manitowoc could not be a third-party beneficiary of the contract between Mac-Tech and Mazak. "The person claiming to be a third[-]party beneficiary must show that the contract was entered into by the parties to the contract directly and primarily for the benefit of the third party." ***Schilling by Foy v. Employers Mut. Cas. Co.***, 212 Wis. 2d 878, 886-87, 569 N.W.2d 776 (Ct. App. 1997).

¶28 The circuit court ruled that the Mac-Tech/Mazak contract obliged Mazak to provide a laser machine, not a system, to Mac-Tech, not Manitowoc.

> Even a cursory reading of the contract between [Mac-Tech and Mazak] demonstrates that Mazak was not obligated to provide the entire system consisting of the laser, the printer, the tube feeder and the dust collector. Indeed, in the Amended Complaint in paragraphs 11-15, plaintiff, itself,

> specifically alleges that Mazak was to provide the laser component for this system and that the other components were to be supplied by Mac-Tech and Vector.

¶29 Under the Mac-Tech/Mazak contract, Mazak supplied a laser cutter and software component to Mac-Tech. Manitowoc is incidental to that contract. An indirect benefit incidental to a contract is not sufficient to show that the parties entered into the contract "directly and primarily" for the benefit of a third party. ***Schilling***, 212 Wis. 2d at 886-87.

¶30 Finally, Mac-Tech would not have a breach-of-contract cause of action under its contract with Mazak for Mazak's failure to provide a total system. Manitowoc cannot assert third-party beneficiary status to recover or enforce a contract claim Mac-Tech does not have. *See* ***Watkins v. Watkins***, 210 Wis. 606, 612, 245 N.W. 695 (1933) ("[W]hen a right has been created by contract, the third party claiming the benefit of the contract takes the right subject to all the terms and conditions of the contract creating the right.").

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).