COURT OF APPEALS
DECISION
DATED AND RELEASED

May 15, 1996

No. 95-0768

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

ALLISON SYSTEMS, INC.,

Plaintiff-Appellant,

v.

PENSAR CORPORATION,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Allison Systems, Inc. appeals from a summary judgment in favor of Pensar Corporation. We affirm.

Allison manufactures, designs and develops products for the electronics security industry. In the course of designing an electronic access control system, the ControlPro System, Allison contacted Pensar for assistance in developing and manufacturing the hardware and software subsystems. During the spring and summer of 1993, representatives of Allison and Pensar

met numerous times and exchanged documents relating to the ControlPro System. On August 3, 1993, Gary Larsen, Allison's vice president and engineer, requested quotations from Pensar for three products (the door controller, I/O point controller and battery backup unit), and hardware and software non-recurring engineering charges and unit pricing on the components for the three products. Allison also provided specifications. On December 14, 1993, Pensar submitted a quotation per Allison's August 3 preliminary specifications. The quotation noted that "[s]pecifications are subject to change upon mutual agreement between Allison Systems, Inc. and Pensar." Allison accepted the quotation in a purchase order dated December 14.

On or about January 24, 1994, Allison submitted to Pensar an additional fifty pages of specifications for the ControlPro System. The parties never agreed on the January 1994 specifications, and in August 1994, Allison filed a breach of contract action. The trial court granted Pensar summary judgment because there was no meeting of the minds with regard to the January 1994 specifications and therefore there was no agreement to produce the ControlPro components.

On appeal, we apply the same methodology used by the trial court and decide de novo whether summary judgment is appropriate. ***Coopman v. State Farm Fire & Casualty Co.***, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). We review the parties' submissions on summary judgment to determine whether there are any material facts in dispute which would entitle the opposing party to a trial. *See* ***Benjamin v. Dohm***, 189 Wis.2d 352, 358, 525 N.W.2d 371, 373 (Ct. App. 1994).

The parties do not dispute that they entered into a contract in December 1993. We agree with the trial court that the parties' submissions on summary judgment reveal that the crux of the dispute is whether they had an agreement subsequent to Allison's submission of the January 1994 modified specifications. Our review of the parties' submissions reveals that there are no material facts in dispute on the question of whether the parties agreed to the January 1994 modifications.

"A contract is based on a mutual meeting of the minds as to terms, manifested by mutual assent." ***Goossen v. Estate of Standaert***, 189 Wis.2d 237,

246, 525 N.W.2d 314, 318 (Ct. App. 1994). Where the parties fail to agree on the essential terms and conditions of a contract, there has been no meeting of the minds and no intention to contract. ***Novelly Oil Co. v. Mathy Constr.***, 147 Wis.2d 613, 617, 433 N.W.2d 628, 630 (Ct. App. 1988).

Pensar argues that its December 1993 agreement did not require it to develop software; Allison disagrees. We need not resolve the dispute regarding the meaning of the references to software in the December 1993 contract because we conclude that there are no material facts in dispute on the question of whether the parties subsequently agreed to the January 1994 modifications submitted by Allison. The parties' December 1993 contract contemplates mutual agreement with regard to changes in specifications. Allison's Larsen testified at his deposition that the August 3 specifications did not contain software specifications, that the January 24 specifications were in addition to the August 3 specifications, that the January 1994 modifications were significant and that the parties did not agree to them. That the December 1993 agreement contemplated that specifications would be subject to change and that the August 3 specifications were "preliminary" does not detract from the requirement that subsequent changes had to be mutually agreed upon.

Allison's brief points to several areas in which it contends that there were material issues of fact which should have precluded summary judgment. Allison argues that the December 1993 contract contemplated that Pensar would provide reasonable support with regard to hardware and software modifications. However, the full term indicates that such support would be "subsequent to the acceptance of prototype units." Here, it is undisputed that no prototypes were ever produced. Therefore, this clause in the contract had yet to take effect.

Allison contends that Pensar's counterclaim seeking payment for work it performed under the December 1993 agreement in the areas of non-recurring engineering charges and software development was an admission that the parties had a contract and precluded what Allison characterizes as Pensar's subsequent contention that no contract existed. Allison's argument is flawed. Pensar's counterclaim does not allege that the parties did not have a contract. Rather, Pensar sought to obtain payment for work performed under the December 1993 agreement even as it denied the existence of any subsequent

agreement relating to the January 1994 specifications. We see no inconsistency in Pensar's claims and arguments.

In its reply brief, Allison argues that Pensar had a duty of good faith to perform under the December 1993 contract, including making a reasonable effort to negotiate regarding Allison's January 1994 proposed modifications. Because this argument is raised for the first time in the reply brief, we do not consider it. ***Swartwout v. Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (Ct. App. 1981).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.