RENDERED: JULY 25, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001922-MR

GALVAMET AMERICA CORPORATION — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 09-CI-03166

THE NORRENBROCK COMPANY, INC.; AND B.L. SPILLE CONSTRUCTION, INC. — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Appellant Galvamet America Corporation appeals from the October 16, 2012 order of the Kenton Circuit Court that Galvamet indemnify Appellee, The Norrenbrock Corporation, for damages caused by defective wall paneling Galvamet manufactured and sold to Norrenbrock, who then sold the

siding to Spille Construction, Inc., for use in two construction projects. We affirm in part, reverse in part, and remand for additional proceedings

I. Facts and Procedure

Galvamet is a manufacturer of wall panels for use in construction projects. In 2007, Norrenbrock purchased wall panels from Galvamet and then resold them to Spille, a contractor. Spille installed the wall panels on two buildings, the Locomotive Shop and Hump Tower. Prior to entering into the contract, Norrenbrock provided Spille with Galvamet's specification book which contained Galvamet's Limited Warranty. The booklet also instructs a warranty recipient to contact Galvamet to request the Limited Warranty after installation of Galvamet's products. The Limited Warranty provides in part that "[t]he panels fabricated by Galvamet are, on delivery to the Customer, free from defects in material and workmanship . . . for a period of two (2) years from the date of shipment to the Customer."

Galvamet confirmed the transactions by sending two Order Acknowledgements, one in January 2007 and one in May 2007, containing the contractual terms regarding the purchase and delivery of the wall panels, as well as "Sales Terms." Sales Term 19 provides:

> NO claim for damages for goods that do not conform to specification will be allowed unless Galvamet is given immediate notice after delivery of goods to the first destination to which they are shipped and allowed an opportunity to inspect them. Goods for which damages are claimed shall not be returned, repaired, or discarded without Galvamet's written consent. Buyer's exclusive

> remedy against Galvamet and Galvamet's sole obligation for any and all claims shall be limited to Galvamet's replacing goods that do not conform to the specifications or (at Galvamet's option) refunding the purchase price. In no event shall Galvamet have any liability for incidental or consequential damages.

Norrenbrock signed both Order Acknowledgements.

The parties do not dispute that after the panels were installed, about 36.6 % of the panels began to show blisters and required replacement. Spille informed Norrenbrock of the defects and Norrenbrock then informed Galvamet. When Norrenbrock and Galvamet failed to correct the defects, Spille brought suit against Norrenbrock for breach of implied warranties of merchantability and fitness for a particular purpose, seeking damages for the cost to repair the defective panels at the Locomotive Shop. Norrenbrock then filed a third-party complaint against Galvamet, seeking indemnification for any damages awarded to Spille.

Spille later amended its complaint against Norrenbrock to include damages for the defective panels at the Hump Tower. However, Norrenbrock did not amend its third-party complaint against Galvamet to include the Hump Tower claims prior to the final judgment. The circuit court granted partial summary judgment to Spille on the issue of Norrenbrock's liability for breach of the implied warranties of merchantability and fitness for a particular purpose; and granted summary judgment to Norrenbrock on the issue of Galvamet's indemnification liability to Norrenbrock. Following a bench trial on the issue of damages, the circuit court entered a final judgment awarding Spille $299,812.00 for the Locomotive Shop

and $134,025.00 for the Hump Tower. The circuit court also ordered Galvamet to indemnify Norrenbrock for the total amount of $433,837.00.

Both Norrenbrock and Galvamet appealed; however, Spille later settled all its claims against Norrenbrock. After the settlement, Spille's complaint against Norrenbrock was dismissed with prejudice.

II. Standard of Review

The circuit court's findings of fact shall not be set aside unless they are clearly erroneous. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). Findings of fact are clearly erroneous when they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Conclusions of law, including contractual interpretation, are reviewed *de novo*. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99,105 (Ky. 2003).

III. Analysis

On appeal, Galvamet asserts (1) that its indemnity obligation to Norrenbrock was contractually limited by the parties' agreement, contained in the "Order Acknowledgement," to a refund of the purchase price for the wall panels with aesthetic issues; (2) that it does not owe any indemnity for a claim based on the sample limited warranty document; (3) that it does not owe any indemnity for the portion of damages related to the Hump Tower Project; and (4) that its indemnity obligations to Norrenbrock cannot be greater than the amount for which Norrenbrock settled Spille's claims. We address each of Galvamet's arguments in turn.

A. ***Limitation of Galvamet's Indemnity Obligation Based on the Parties' Agreement Contained in the "Order Acknowledgements."***

Galvamet argues that Sales Term 19 contains a valid limitation of remedies clause, limiting Norrenbrock's available remedy to the cost of replacement, or the refund of the purchase price of the defective panels. We disagree. Because the contract at issue is for the sale of goods, this transaction is governed by the Uniform Commercial Code, as adopted in KRS[1] Chapter 355.

1. *The "Order Acknowledgements" Constitute a Written Expression of the Agreement Between the Parties which Satisfies the Statute of Frauds.*

Galvamet argues that the circuit court erred by categorizing the Order Acknowledgements as an invoice rather than an expression of the agreement between the parties. We agree. Despite Norrenbrock's arguments to the contrary, deciding whether the invoice constituted an expression of Norrenbrock's agreement with Galvamet is an issue of contract interpretation, which is examined as a matter of law.

The contract between the parties is for a sale of goods greater than $500. Therefore, to be enforceable, the contract must be evidenced by a writing which satisfies the Statute of Frauds. KRS 355.2-201. To satisfy the Statute of Frauds, a writing must: (1) evidence the existence of a contract for sale between the parties, (2) state the quantity of the goods, and (3) be signed by the party against whom enforcement is sought. KRS 355.2-201(1).

[1] Kentucky Revised Statutes.

The Order Acknowledgement forms satisfy these requirements. The circuit court found that the Order Acknowledgements contain the contractual terms of the purchase and shipment of the wall panels, which is sufficient to evidence a contract for sale between the parties. The Order Acknowledgements stated the quantity of panels to be purchased and were signed by Norrenbrock. The Order Acknowledgements therefore meet the formal requirements of KRS 355.2-201 and constitute a written expression of the parties' agreement.

2. *Interpreting Sales Term 19's Limitation of Remedies Clause.*

Galvamet argues that the limitation of remedies clause contained in "Sales Term" 19 effectively disclaims liability for incidental or consequential damages and limits Galvamet's indemnity obligation to a refund of the purchase price for the nonconforming panels. Whether the Order Acknowledgement contains a valid limitation of remedies clause under KRS 355.2-719 is a matter of contract interpretation, which, as noted, is decided as a matter of law, not as a finding of fact. *See First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000) ("The construction and interpretation of a contract . . . are questions of law to be decided by the court").

Galvamet argues that Sales Term 19 constitutes an unambiguous limitation of remedies clause, which establishes an exclusive remedy for any and all claims against Galvamet. Norrenbrock argues to the contrary that because Norrenbrock reads Sales Term 19 differently than Galvamet reads it, the term is ambiguous. Therefore, so goes Norrenbrock's argument, Sales Term 19 should be construed

against the drafter, Galvamet. Norrenbrock contends that, if construed against Galvamet, Sales Term 19 limits remedies only for nonconforming goods, not for defective goods, and therefore does not apply to Norrenbrock's claim.

Norrenbrock's argument mischaracterizes the standard for ambiguity in a contract. The standard for ambiguity is an objective one: reasonableness. "An ambiguous contract is one capable of more than one different *reasonable* interpretation." *Frear*, 103 S.W.3d at 105-06 (emphasis added). Whether a contract is ambiguous does not hinge on whether one party believes that the contract means something different than the other party. To apply a subjective standard, as Norrenbrock suggests, would lead to the nonsensical result that any litigant in any contract dispute could establish ambiguity simply by announcing a contrary reading of the contract, no matter how unreasonable. Where an ambiguity in a term exists, a court will gather the intent of the parties from the contract as a whole, considering the subject matter of the contract, the situation of the parties, and the conditions under which the contract was written. *Id.* at 106.

On the basis of this objective standard, we find that Sales Term 19 is ambiguous. Upon a careful reading of Sales Term 19, the construction of the paragraph permits at least two reasonable interpretations. One interpretation is that the exclusive remedy for *any claim* will be the replacement or refund of the purchase price for nonconforming goods. The other is that the exclusive remedy for *goods that do not conform* will be a replacement or a refund of the purchase price. Because the language in Sales Term 19 is capable of more than one

reasonable interpretation, the term is ambiguous and we therefore interpret the contract in favor of Norrenbrock as the non-drafting party. *B. Perini & Sons v. Southern Ry. Co.*, 239 S.W.2d 964, 966 (Ky. App. 1951). As explained below, interpreting the contract in favor of Norrenbrock, we find that Sales Term 19 established an exclusive remedy only for nonconforming goods.

Galvamet argues that evidence regarding the Limited Warranty is not permitted under the parol evidence rule. We disagree and conclude that we may consider the language contained in the Limited Warranty in interpreting the agreement. KRS 355.2-202 prohibits contradiction of the express terms set forth in a writing intended by the parties to be the final expression of their agreement by evidence of any prior agreement or contemporaneous oral agreements. KRS 355.2-202. However, such agreements may be explained or supplemented by course of performance, course of dealing, or usage of trade. *Id*.

Regardless whether the Order Acknowledgements constituted a final expression of the terms of Galvamet's agreement with Norrenbrock, the terms may be explained or supplemented by evidence of course of performance, course of dealing, or usage of trade. KRS 355.2-202(1). Further, course of performance is a strong indicator of the parties' intent to include the warranty as part of their agreement. *See Potts v. Draper*, 864 S.W.2d 896, 899 (Ky. 1993) ("Course of actual performance by the parties must be considered the best indication of what they intended the writing to mean.")

The circuit court found, as a factual matter, that the giving of a Limited Warranty was a course of conduct between Norrenbrock and Galvamet and that it was the industry standard for panel manufacturers to provide paint and product defect warranties to customers. Because the Limited Warranty constituted course of dealings between the parties, the Limited Warranty can supplement or explain the terms contained in the Order Acknowledgements as long as the Limited Warranty does not directly conflict with those terms.

We find that the Limited Warranty does not directly conflict with the terms of the Order Acknowledgement, and therefore we are not prohibited by the parol evidence rule from considering the Limited Warranty to resolve the ambiguity in Sales Term 19 of the Order Acknowledgments. Both the Order Acknowledgements and the Limited Warranty contain a clause setting out the buyer's exclusive remedy. However, the limitation of remedies provision in the Limited Warranty specifically addresses defective goods.

The Limited Warranty states that the goods will be "free from defects in material and workmanship." This specificity of language implies that Sales Term 19 was meant to apply to a certain type of goods, nonconforming goods, as opposed to goods with "defects in material and workmanship" which might reveal themselves after delivery and acceptance. *Compare* Black's Law Dictionary, *Nonconforming Goods* (9th ed. 2009) ("Goods that fail to meet contractual specifications, allowing the buyer to reject tender of the goods or to revoke their acceptance."), *with* Black's Law Dictionary, *Defective* (9th ed. 2009) ("Containing

an imperfection or shortcoming in a part essential to the product's safe operation.") Additionally, Sales Term 19 provides that "NO claim for damages for goods that do not conform to specification will be allowed unless Galvamet is given *immediate notice after delivery* of goods" (emphasis added). The focus on delivery as the pertinent point in time for notifying Galvamet further evidences the parties' intent that Sales Term 19 would apply only to nonconforming goods, and only through delivery and acceptance of the goods.

Based on the implications of the language above, we agree with the circuit court's interpretation of Sales Term 19 as addressing remedies for nonconforming goods. The Limited Warranty contains a *separate* exclusive remedy clause, indicating that the parties intended a different exclusive remedy after the Limited Warranty took effect, *i.e.*, after the installation of the panels.[2] Sales Term 19 was intended to establish an exclusive remedy for nonconforming goods with a remedy to be exercised, if at all, between delivery and acceptance of the wall panels. Once the panels were installed, the parties intended the Limited Warranty to take over as the governing document. We therefore hold that the limitation of remedies clause in Sales Term 19 remained in effect only through delivery and acceptance of the wall panels, and therefore does not limit Galvamet's indemnity obligation for the defective panels, which were conforming at the time of delivery and acceptance – *i.e.*, the panels had not yet blistered at the time of acceptance.

[2] The Specification Booklet provides, in relevant part: "A warranty will be extended on request depending on the geographical location and the use of the building. Contact your Galvamet Technical Representative for a warranty and special considerations *once the product has been installed.*" (Emphasis added).

Furthermore, because the exclusion of consequential damages applied only under Sales Term 19 for nonconforming goods, this remedy limitation does not apply to Galvamet's indemnity obligation.

Having resolved the ambiguity issue in Sales Term 19, we need not reach Norrenbrock's argument that Sales Term 19 fails in its essential purpose.

B. ***Indemnity Obligation Based on the Sample Limited Warranty.***

Galvamet argues that because it did not issue or sign the Limited Express Warranty, it owes no indemnity based on that warranty. The existence of the express warranty is only relevant to the interpretation of Sales Term 19, not to the issue of either party's liability. The circuit court granted summary judgment for Spille, against Norrenbrock, for liability based on breach of the implied warranties of merchantability and fitness for a particular purpose, and for Norrenbrock, against Galvamet, on those same grounds, simply noting that there was a factual dispute about whether the agreement between Galvamet and Norrenbrock limited the parties' available remedies. Because liability was found to exist on the grounds of implied warranties rather than the Limited Warranty, whether the Limited Warranty would have provided a different remedy is irrelevant to this appeal.

C. ***Indemnity Obligation for Damages Related to the Hump Tower Project.***

Galvamet next argues that because Norrenbrock did not amend its third-party complaint prior to the final judgment to include the claims related to the Hump Tower Project, Galvamet is not required to indemnify Norrenbrock for those damages.

By operation of the civil rules, the trial court and this court treat the Hump Tower claims as though they had been raised in the pleadings. CR[3] 15.02 (when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated as if they had been raised in the pleadings). Additionally, CR 15.02 provides that "failure to amend does not affect the result of the trial of these issues." *Id.*

Here, Spille amended its complaint to include claims for the Hump Tower Project and *both* parties put on evidence at trial regarding damages for the Hump Tower Project. Because both parties presented evidence, the parties impliedly consented to trying the Hump Tower claims. Therefore, those claims are treated as if they had been raised in the pleadings and we hold that the trial judge did not err by awarding Norrenbrock indemnity for the Hump Tower claims.

D. ***Galvamet's Indemnity Obligations are Limited by Norrenbrock's Settlement with Spille.***

After the circuit court's final judgment, Norrenbrock and Spille settled all claims between them. While Norrenbrock was ordered to pay Spille $433,837.00, there is no information in the record regarding the amount that the settlement agreement required Norrenbrock to pay to Spille. Galvamet argues that its indemnity obligation to Norrenbrock should be limited to any amount actually paid by Norrenbrock to Spille. Norrenbrock contends that because the circuit court ordered Norrenbrock to pay $433,837.00 to Spille, Galvamet should be required to

[3] Kentucky Rules of Civil Procedure.

indemnify it for that amount, regardless of how much less Norrenbrock settles the claims against it for.

We find Galvamet's argument persuasive. "A claim for indemnity is one where the Plaintiff is essentially trying to get money back that he already paid." *Liberty Mutual Ins. Co. v. Louisville & Nashville R.R. Co.*, 455 S.W.2d 537, 541-42 (Ky. 1970). Like any indemnee, Norrenbrock's "right to be indemnified is limited, of course, to the extent of its liability." *Id.* To award Norrenbrock indemnification in excess of its obligations under Norrenbrock's settlement agreement with Spille would result in a windfall to Norrenbrock and would be inconsistent with the restitutionary theory of indemnification. *See, e.g., Degener v. Hall Contr. Corp.*, 27 S.W.3d 775, 781-82 (Ky. 2000) ("A claim for indemnity is not a claim in which the claimant seeks damages for his/her own personal injuries, but is one in which the claimant seeks restitution for damages he/she was required to pay for injuries sustained by another.") We therefore hold that Galvamet's indemnity obligation to Norrenbrock is limited by the total amount of payments to Spille under the settlement agreement between them.

III. Conclusion

For the foregoing reasons, we reverse the circuit court's judgment as to the indemnity obligation based on the final judgment against Norrenbrock in favor of Spille, and remand the case to the circuit court for further proceedings not inconsistent with this opinion. In every other regard, we affirm.

VANMETER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN PART, AND DISSENTS IN PART.

TAYLOR, JUDGE, CONCURRING IN PART, AND DISSENTING IN PART: I concur with the majority opinion in the reversal of the judgment on the indemnity obligation and dissent as to the remainder of the opinion.

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