IN THE COURT OF APPEALS OF IOWA

No. 0-684 / 10-0254
Filed October 6, 2010

BRIAN LIPHARDT,
Plaintiff-Appellee,

vs.

AMERICAN FENCE COMPANY OF IOWA, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Paul L. Macek, Judge.

American Fence Company of Iowa appeals the district court's ruling in this breach of contract action. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Gregory G.T. Ervanian of Graham, Ervanian & Cacciatore, L.L.P., Des Moines, for appellant.

David M. Pillers of Pillers and Richmond, Dewitt, for appellee.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Brian Liphardt, doing business as American Fence and Pool (Liphardt), filed this action for breach of contract and unjust enrichment arising from Liphardt's purchase of fencing, materials, and supplies from American Fence Company of Iowa, Inc. (American). American answered and counterclaimed for breach of contract.

Following a bench trial, the district court found a contract existed between the parties. The court found Liphardt purchased fencing materials from American, for which he paid $81,471.73 two months before actually receiving those materials. There was to be no charge for freight. Before receiving the materials first ordered, Liphardt placed a second and third order, both of which he understood would be included in the delivery of the first order and thus there would be no freight charge. The materials were delivered in separate shipments, however, and American billed Liphardt for shipping.

The court found American breached the contract "by not providing merchantable goods" and that Liphardt remained in possession of nonconforming materials, which should be returned, having a value of $20,491.60. When added to a credit in the amount of $10,659.92 for goods previously returned, Liphardt was entitled to a total credit of $31,151.52. The court further found Liphardt owed American $4741.43 for the second and third orders, but not for shipping of those orders.

The district court ordered judgment in favor of Liphardt in the sum of $26,137.97[1] with interest at the rate of five percent per annum. The court also ordered Liphardt to allow American, at its own expense, to pick up the nonconforming goods.

American appeals, complaining the district court erred in applying the Uniform Commercial Code as an improper "legal theory," which was neither pleaded by Liphardt, nor to which American had consented at trial.

Our review of this law action is for errors at law. *See* Iowa R. App. P. 6.907. We are bound by the trial court's findings of fact if supported by substantial evidence. *Flanagan v. Consol. Nutrition, L.C.*, 627 N.W.2d 573, 577 (Iowa Ct. App. 2001). However, we are not bound by the trial court's application of legal principle or its conclusions of law. *Id.*

American relies upon the cases of *Gibson Elevator, Inc. v. Molynuex*, 668 N.W.2d 565 (Iowa 2003) (finding defendant waived an affirmative defense, which had not been specially pleaded as required by Iowa Rule of Civil Procedure 1.419),[2] and *Gosha v. Waller*, 288 N.W.2d 329, 331-32 (Iowa 1980) (finding the

[1] This appears to be a scrivener's error. The correct amount should be $26,410.09.

[2] We note that the supreme court in *Gibson Elevator* stated, "*citation to Code sections is not required if the gist of the claim can be determined*." *Gibson Elevator*, 668 N.W.2d at 567 (emphasis added). There the district court had dismissed a grain elevator's suit to collect on a delinquent account. *Id.* at 566. On appeal, the elevator contended the defendant had not asserted violations of Iowa Code sections 212.2 (requiring duplicate delivery tickets) and 215.16 (making it unlawful for corporation to use a scale for weighing commodities of weight greater than the factory rated scale capacity) or their application to section 189.30 (providing for severe consequences for violation of agriculture-related statutes) in the defendant's answer, and thus it was error for the district court to bar recovery based upon those statutory provisions. *See id.* at 566-67. The supreme court found the district court did err in "void[ing] an entire account simply because sales that were made in violation of a statute are a part of the account." *Id.* at 568. However, the supreme court found that even though the defendant had not cited

district court erred in entering judgment upon a theory of breach of implied warranty where the plaintiff had alleged only violation of express warranties, but remanding to allow the plaintiffs to move to amend to conform to the proof). American's problem, however, lies in its characterization of the Uniform Commercial Code as a legal theory, when it is the applicable law.

This case involves the sale of goods, and thus, is governed by the Iowa Uniform Commercial Code (UCC). *See* Iowa Code § 554.2102 (2009) ("Unless the context otherwise requires, this Article [Uniform Commercial Code—Sales] applies to transactions in goods; . . ."); *Flanagan*, 627 N.W.2d at 577 ("The UCC undoubtedly applies in this case. Article 2 of the UCC applies to 'transactions in goods.'"); *cf. Speight v. Walters Dev. Co., Ltd.*, 744 N.W.2d 108, 116 (Iowa 2008) (noting that where claim is *not* based on sale of goods the UCC does not apply). American could no more refuse to "consent" to the applicability of the UCC than it could any other area of Iowa law.[3]

American does not otherwise dispute the trial court's findings of fact or conclusions of law. We reverse for entry of an amended judgment in the correct amount of $26,410.09, but otherwise affirm the district court. *See* Iowa Ct. R. 21.29(1)(a), (e). Costs are assessed to American.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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sections 189.30 or 215.16, defendant had raised the "voidness issue" in its amended answer by claiming the elevator referenced entries of "weights in excess of which weights for which Plaintiff's scale has been licensed." *Id.* at 567. Liphardt was not required to cite Code sections where the "gist" of his claim could be determined from the petition.

[3] Moreover, American's pretrial filing indicates its awareness that the provisions of Article II of the UCC govern this dispute. In its Pretrial Conference Submissions, American contends in part, "Plaintiff has failed to comply with the provisions of Article II, the Uniform Commercial Code" and "Plaintiff is obligated to prove . . . compliance with . . . Article II of the Uniform Commercial Code."