

IN THE COURT OF APPEALS OF IOWA

No. 0-736 / 09-1920
Filed December 8, 2010

TOTAL SOURCE MOLDERS, INC.,
Plaintiff-Appellee,

vs.

**GREAT AMERICAN BOTTLE
WORKS, INC.,**
Defendant-Appellant.

Appeal from the Iowa District Court for Grundy County, Bradley J. Harris,
Judge.

Great American Bottle Works appeals the district court's finding that it had
a contract with Total Source Molders, Inc. **AFFIRMED.**

Robert W. Thompson of Thompson Law Office, Reinbeck, for appellant.

Paul C. Peglow and Bethany J. Currie of Johnson, Sudenga, Latham,
Peglow & O'Hare, P.L.C., Marshalltown, for appellee.

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

POTTERFIELD, J.**I. Background Facts and Proceedings**

Total Source Molders, Inc. (TSM) manufactures plastic products for wholesale suppliers. On July 1, 2006, TSM purchased the business assets of GM Manufacturing (GM) and took over its contracts. As part of this transaction, TSM inherited from GM its business relationship with Great American Bottle Works, Inc. (GABW). GM had produced plastic products for GABW, including water bottle caps. As part of the transaction, TSM purchased from GM the inventory of products it had on hand for GABW. GM advised TSM to keep inventory on hand for certain products used by GABW.

TSM continued to manufacture products for GABW. TSM used molds owned by and specifically made for GABW to make these products. Though GABW now claims that it did not require TSM to maintain inventory of its products, during their business relationship, GABW and TSM communicated frequently about the level of inventory available on certain products. GABW expressed great dissatisfaction when TSM did not have inventory of a product GABW needed.

One of the main products TSM manufactured for GABW was a 53 millimeter cap. In early 2007, GABW purchased a mold for a new product, a 63 millimeter cap. In July 2007, GABW submitted a purchase order to TSM for a quantity of 63 millimeter caps. TSM filled the order and also produced a quantity of these caps to be kept as inventory. GABW never picked up or paid for any of the 63 millimeter caps, those in inventory or those specifically ordered by GABW.

In early 2008, the business relationship between TSM and GABW deteriorated. On February 19, 2008, GABW submitted a purchase order to TSM for caps in four different colors and one other item manufactured by TSM for GABW. GABW received an acknowledgment of the order on February 25, 2008, showing an estimated shipping date of March 20, 2008. GABW emailed TSM expressing dissatisfaction with the month-long delay in receiving orders. TSM promised to begin manufacturing the items that it had the material for, but notified GABW “the rest is about 1 1/2 weeks out.” On March 24, 2008, GABW notified TSM by email to cancel the balance of the purchase order because it could not wait any longer for the product. However, GABW informed TSM it would “pick up any caps that [TSM] made based on” the February 2008 purchase order. GABW retrieved its molds from TSM, but did not pick up or pay for any of the goods manufactured by TSM.

On April 9, 2008, TSM filed a petition at law in which it alleged that it had manufactured products for GABW pursuant to a contractual agreement. TSM asserted that GABW refused to pay for the products, which TSM had made specifically for GABW and which were not suitable for sale to others in the ordinary course of TSM’s business. TSM also claimed that GABW required TSM to keep a certain amount of inventory on hand, for which GABW should have paid TSM upon termination of the business relationship. GABW denied the existence of a contract requiring TSM to maintain inventory levels of any product.

After trial, the district court determined that a contract existed for the manufacture of push tops and 53 and 63 millimeter caps and for the maintenance of certain inventory levels of these products by TSM for GABW. The district court

further found these products were not suitable for sale to others in the ordinary course of TSM's business. The court found that a valid contract existed under Iowa Code section 554.2201(3)(a) (2007). Accordingly, the court entered judgment in favor of TSM for the value of these items TSM had in inventory.¹ GABW appeals, arguing the district court erred in finding a contract existed.

II. Standard of Review

Our review of actions at law is for correction of errors at law. Iowa R. App. P. 6.907. The district court's findings of fact are binding if supported by substantial evidence. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 179 (Iowa 2010).

III. Merits

The district court found that a valid contract existed under Iowa Code section 554.2201(3)(a), which provides:

3. A contract which does not satisfy the [statute of frauds] but which is valid in other respects is enforceable

a. if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicated that the goods are for the buyer, has made either a substantial beginning of the manufacture or commitments for their procurement.

We agree with the district court's findings.

First, the goods were specially manufactured by TSM for GABW. TSM used GABW's custom molds and colors. The items were manufactured in response to GABW's July 2007 and February 2008 purchase orders or to satisfy

¹ The district court found that the evidence was insufficient to establish that TSM was required to maintain inventory on any other items. This is not at issue on appeal.

the inventory requirements. GABW argues that it never asked TSM to keep inventory on hand. The district court disagreed, finding, “The court determines that a contract did exist between the parties requiring [TSM] to maintain the inventory set forth” Substantial evidence supports this finding. Three employees at TSM testified that GABW required TSM to keep levels of inventory available for certain products. Further, correspondence between GABW and TSM establishes that the two businesses communicated frequently about the inventory levels. The record establishes that TSM specially manufactured the goods in inventory for GABW.

Second, the goods are not suitable for sale to others in TSM’s ordinary course of business. Because the goods were made using GABW’s custom molds and colors, the product was exclusive to GABW and could not be sold to other customers in the ordinary course of business. The only items that were not custom-made were the push tops. However, TSM did not have any other clients who bought push tops; therefore, these were not suitable for sale to others in TSM’s ordinary course of business. Jeff Thys, one of the founders of TSM, testified that if GABW did not use the products, TSM would throw them away because it had no use for the product. While GABW’s contention that there is a market for these goods may be true, the issue here is whether the goods are suitable for sale in the ordinary course of the *seller’s* business. The record shows that they are not.

Finally, before notice of repudiation, TSM took substantial steps toward the manufacture of the goods ordered in February 2008. GABW argues that TSM should have understood that the business relationship was over before it

made the products at issue. However, on May 24, 2008, when GABW emailed TSM its intent to retrieve its molds, GABW stated it would pick up any caps TSM had made based on the February 2008 purchase order. Thus, TSM was acting without notice of repudiation of the purchase order. Further, the record establishes that by this date TSM had substantially begun to manufacture the goods specified in the February 2008 purchase order as well as the goods necessary to meet the established inventory levels. We find there is no merit to GABW's claim that the goods were never produced.

We agree with the district court's finding that a valid contract existed between TSM and GABW pursuant to section 554.2201(3)(a) for the manufacture of goods ordered by GABW in July 2007 and February 2008 as well as for the maintenance of established inventory levels. Therefore, TSM is entitled to payment for the goods it manufactured, and GABW is entitled to possession of the goods.

AFFIRMED.

Tabor, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I concur with the majority's decision that GABW is responsible to pay for the goods it ordered in July of 2007 and February of 2008. I disagree that GABW is responsible to pay for the goods held in inventory.