

IN THE COURT OF APPEALS OF IOWA

No. 9-109 / 08-0962
Filed May 6, 2009

**ABC METALS & RECYCLING
COMPANY, INC.,**
Plaintiff-Appellant/Cross-Appellee,

vs.

HIGHLAND COMPUTER FORMS, INC.,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Gregory A. Hulse,
Judge.

The plaintiff appeals and the defendant cross-appeals from the district
court's order in a breach of contract case. **AFFIRMED IN PART, REVERSED IN
PART, AND REMANDED.**

Wendy Boka and R. Ronald Dogge of Hopkins & Huebner, P.C., Des
Moines, for appellant.

Jerrold Wanek of Garten & Wanek, Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

This contract dispute involves a five-year “Waste Paper Agreement” that ABC Metals and Recycling Co. (ABC), a recycler, and Highland Computer Forms, Inc. (Highland), a company that produces forms, entered into in 2001. In broad brush, the agreement required Highland to sell all its used, recyclable paper to ABC at a defined, per-ton price.

Each party maintains that the other breached the agreement. Following a bench trial, the district court found Highland had breached the agreement by selling recyclable paper to other entities and ABC had breached the agreement by paying Highland a unit price that was too low for the paper it did receive. The district court rejected an additional claim by Highland that ABC had breached the agreement by regularly declaring and paying for a lower tonnage of recyclable paper than the actual weight delivered to it by Highland.

ABC appeals and Highland cross-appeals. We affirm the district court’s rulings, except with respect to the pricing issue, where we reverse and remand in favor of ABC.

I. FACTS AND PROCEDURAL HISTORY.

Highland is in the computer forms business and, by the nature of that business, produces waste paper and other recyclable waste. ABC historically purchased waste paper from Highland for recycling purposes.

In June 2001, Highland was moving to a new facility with reduced production space. Accordingly, ABC’s representative, Mark McCoy, approached Highland’s Robert Nost about installing a new system for recycling paper. Highland employees had previously separated and baled recyclable paper, then

stored it in multiple Gaylord containers, before transferring it to ABC. The new system, however, was going to utilize an on-site compactor. Recyclable paper could be automatically blown into the compactor, or could be easily tipped into that compactor from dock carts. The advantages of that system were that it would save Highland both space and labor.

On June 28, 2001, the parties entered into a one-page, five-year "Waste Paper Agreement," the contract at issue in this case. The agreement provided that ABC would rent Highland the compactor and certain other equipment for \$250 a month, that Highland would sell all recyclable paper to ABC for the next five years, and that ABC would pay Highland for the recyclable paper "according to the price found on the Fibre Market News web site for the Chicago area for 'colored ledger,' plus \$10.00 per ton."

For five years, the parties operated under the contract. However, after the contract expired by its own terms in mid-2006, ABC sued Highland for damages, whereupon Highland counterclaimed against ABC. The parties' disputes center on three separate issues.

First, during the term of the "Waste Paper Agreement," and despite the contract provision that Highland would "sell all recyclable paper to ABC," Highland sold some of its waste paper to other companies for a higher price than ABC was paying. Highland argued that waste paper that could not be put into the compactor (and would have needed to be stored on Highland's premises) was not subject to the contract and could be sold to other companies. However, the district court found that after Nost of Highland complained in mid-2003 about not being able to put all the waste paper into the compactor, ABC's McCoy

immediately agreed that all the paper in question, such as “butt rolls” (i.e., partial rolls of paper), could be deposited into the compactor. Even so, Highland continued to sell some waste paper to other companies. The district court found that these subsequent sales breached the parties’ contract and awarded ABC damages for them.

Second, shortly after the contract was signed, Fibre Market News discontinued its own website. However, the same Fibre Market News data continued to be published on a Recycling Today website and were used by ABC to calculate the price it paid Highland. Highland contended that following the cessation of the Fibre Market News website, ABC should not have relied on the Recycling Today website, but instead should have paid a “reasonable” price as determined by local market conditions. That reasonable price—in Highland’s view—would have been the same price that ABC’s competitors paid Highland.

The district court agreed with Highland on the pricing issue. Thus, it awarded Highland \$23,702.27 in damages on its counterclaim for underpayment. This figure represented the difference between the pricing ABC actually paid Highland for waste paper after Fibre Market News discontinued its own website and the pricing that ABC’s competitors paid (the hypothetical “reasonable price”), multiplied by the number of tons of Highland waste paper purchased by ABC.

Additionally, in light of its finding for Highland on the pricing issue, the district court awarded ABC only \$43,699.46 in damages on its affirmative claim against Highland, instead of the \$58,698.60 requested by ABC. The higher damages number would have reflected the difference between ABC’s resale price to paper mills and the Recycling Today pricing (plus ten dollars a ton, as

per the contract). The district court, however, concluded ABC was only entitled to the difference between its resale price and the “reasonable” price, multiplied by the quantities of paper that Highland sold to other companies in breach of the parties’ contract.

The third issue related to ABC’s manner of determining and reporting the weight of recyclable paper it received from Highland during the course of the contract. Highland claimed the weight as reported by ABC was generally much lower than the weight of waste paper it actually delivered to ABC; thus, ABC was shortchanging Highland. ABC, however, argued this difference was actually due to Highland’s inclusion of trash, garbage, and other materials that could not be sold as recyclable paper. The district court found Highland had not proved its case on the “weight” claim and ruled for ABC on this point.

Accordingly, in a carefully reasoned opinion, the district court found ABC was entitled to recover \$43,699.46 from Highland for breaching the exclusivity provision of the “Waste Paper Agreement” by failing to deliver certain recyclable paper to ABC, and Highland was entitled to recover \$23,702.27 from ABC for breaching the pricing provision of the same agreement by underpaying Highland. After offsetting the awards, the district court entered judgment for ABC in the net amount of \$19,997.19.

Both parties appeal. ABC argues that the district court erred in holding it to a “reasonable” price rather than the Fibre Market News price as found on the Recycling Today website (plus ten dollars). Thus, ABC contends that its damages verdict should have been \$58,698.60, and that Highland should not have recovered on its counterclaim. On the other hand, Highland argues that the

district court should have found ABC materially breached the contract by under-reporting the weight of the recyclable paper delivered to it, and this breach relieved Highland of any duty to perform. Therefore, according to Highland, ABC should have recovered nothing rather than \$43,699.46 on its claim.

II. STANDARD OF REVIEW.

This case was tried at law; thus, our review is for correction of errors at law. Iowa R. App. P. 6.4. The district court's factual findings are binding upon us if supported by substantial evidence. Iowa R. App. P. 6.14(6)(a).

III. LEGAL ANALYSIS.

Both parties and the district court assumed that Article 2 of the Uniform Commercial Code ("UCC") applies to this litigation, because it primarily involves the sale of goods, i.e., recyclable paper. We shall do the same.

With regard to the pricing issue, the district court concluded that once the Fibre Market News website closed down, the price that ABC was to pay Highland for paper should have been determined by the "open price term" provisions of the UCC. See Iowa Code § 554.2305 (2007). According to those provisions, a "reasonable price" should be used when "the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded." *Id.* § 554.2305(1)(c). We agree that if the "standard" in this case were no longer available, it might be appropriate to resort to a "reasonable price." However, we believe the district court's finding that the relevant standard was no longer available is not supported by substantial evidence. *Cf. Oglebay Norton Co. v. Armco, Inc.*, 556 N.E.2d 515, 518-20 (Ohio

1990) (upholding trial court's decision to impose a reasonable price after the primary and secondary pricing mechanisms failed).

Even though the Fibre Market News website closed down shortly after the contract was signed, the same Fibre Market News market data became available on a different website – Recycling Today. The data were even listed there under the heading, “Fibre Market News.” The “Fibre Market News” table on Recycling Today contained exactly the same geographic and pricing categories as before. These included “sorted colored ledger,” the same “colored ledger” category that had been in existence when the prices were published on an actual Fibre Market News website. In effect, the relevant portion of the Fibre Market News website was simply absorbed into another website.

As McCoy testified without rebuttal, “It is still the Fibre Market News directory, or index. It's just located now in the Recycling Today web site.” ABC used that pricing throughout the contract period.

Furthermore, the record shows that Nost became aware early on that the Fibre Market News website closed down and contacted McCoy about that. McCoy directed him to another website (i.e., Recycling Today), Nost thereafter checked the pricing himself using that website, and was “satisfied with the pricing.” This course of performance is persuasive, and also supports the proposition that Highland waived any potential complaints to the pricing. See Iowa Code §§ 554.1303(1), (4), and (6).

Under these circumstances, we believe the district court erred in utilizing a “reasonable” price rather than the “Fibre Market News” price plus ten dollars per ton.¹

Regarding the weighing dispute, the district court found there was insufficient evidence to conclude that ABC had breached the “Waste Paper Agreement” by under-reporting the weight of recyclable paper it received. The district court further noted that “there was nothing in the contract which requires any particular form of documentation of weight” Upon our review of the record, we agree. Highland’s arguments were circumstantial, and the district court was entitled to reject them. On appeal, Highland no longer challenges the district court’s refusal to award damages *on its counterclaim* for ABC’s alleged under-reporting of weight, but argues that this under-reporting was a material breach that bars ABC from recovering *on its affirmative claim against Highland*. However, regardless of how the arguments are framed, we believe the district court’s resolution of the under-reporting issue was supported by substantial evidence.

IV. CONCLUSION.

Because of our differences with the district court on the pricing issue, we have determined that ABC should have judgment on its claim against Highland in the amount of \$58,698.60 and that Highland is not entitled to recover on its counterclaim. Accordingly, we affirm entry of judgment in favor of ABC but

¹ As Official Comment 6 to UCC § 2-305 puts it, “Throughout the entire section, the purpose is to give effect to the agreement which has been made.” We believe the agreement was to use Fibre Market News pricing, whether found on the Fibre Market News website or, later, moved to another website.

reverse and remand so that the district court may increase the amount of the judgment to \$58,698.60, plus interest at the legal rate.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.