STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0436

Comp Machining, Inc.,
Respondent,

vs.

Holb-Gunther, LLC, d/b/a Sea-Legs,
Appellant.

Filed November 19, 2012
Affirmed in part and reversed in part
Hudson, Judge

Blue Earth County District Court
File No. 07-CV-09-3725

Ryan B. Magnus, Jennifer L. Thon, Jones and Magnus, Attorneys at Law, Mankato, Minnesota (for respondent)

Ryan R. Dreyer, Eric G. Nasstrom, Brian M. Sund, Morrison Sund PLLC, Minnetonka, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Harten, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art VI, § 10.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

In this appeal from a judgment for respondent on its breach-of-contract action for failure to pay for delivered goods, appellant argues that: (1) respondent's claims are barred by the statute of limitations because respondent failed to commence its action within four years of the alleged breach; (2) the district court clearly erred in finding that appellant had not proven the allegation in its counterclaim that a contract existed for respondent to manufacture one thousand cylinders for appellant; and (3) the district court erred in awarding prejudgment interest based on terms contained in invoices mailed four years after contract formation. Because we conclude that both parties' claims are barred by the statute of limitations, we affirm in part and reverse in part.

FACTS

Appellant Holb-Gunther, LLC, d/b/a Sea-Legs (Sea-Legs), manufactures a portable, hydraulic pontoon lift that attaches to the underside of a pontoon and pushes the pontoon out of the water, eliminating the need for a dockside lift. Respondent Comp Machining, Inc. had provided hydraulic cylinders and cylinder component parts for the Sea-Legs product since 1999, though appellant did not purchase the Sea-Legs product until 2003.

Comp Machining sued Sea-Legs for breach of contract for failure to pay for goods ordered and delivered in 2004. Sea-Legs counterclaimed for breach of contract for damages suffered as a result of Comp Machining's failure to perform under a separate 2004 oral contract with Sea-Legs to produce 1,000 hydraulic cylinders.

In 2004, Sea-Legs submitted eight purchase orders to buy cylinders and component parts from Comp Machining. The district court found that these were "open price" contracts under which the parties contracted without agreeing upon the price of the goods; instead, the price was to be fixed by Comp Machining after delivery of the purchased goods. The eight purchase orders were submitted by Sea-Legs between February 6, 2004, and April 23, 2004. Delivery was completed on seven of the eight contracts between March 3, 2004, and May 26, 2004. Delivery was completed on the eighth contract on November 22, 2004. The district court found that Comp Machining's typical delivery time of six to eight weeks after the orders were placed was standard within the industry and commercially reasonable.

Due to various family and health-related issues suffered by key personnel at Comp Machining, Comp Machining did not fix the price of these goods until it submitted eight invoices to Sea-Legs on May 15, 2008. Comp Machining set the total price for these goods at $73,713.34. The invoices stated that the "[l]ate [f]ee is 1 1/2% per month unless prior arrangements are made."

Sea-Legs contends that in 2004 it entered into a separate oral contract with Comp Machining to purchase 1,000 hydraulic cylinders. Sea-Legs claims it suffered lost sales and buy-to-cover damages from having to purchase the cylinders at a higher price when Comp Machining failed to produce the cylinders. Comp Machining denies having entered into this agreement.

On December 19, 2008, Comp Machining mailed a summons and complaint to Sea-Legs. The record contains no evidence that an acknowledgment-of-service form was

mailed to Sea-Legs or that such a form was returned by Sea-Legs. On November 17, 2009, Comp Machining filed this summons and complaint with the district court. Though an affidavit of service by mail was attached to the complaint, no acknowledgement-of-service form signed by Sea-Legs was filed. On January 21, 2010, Sea-Legs filed its answer and counterclaim as well as its informational statement indicating that "[a]ll parties have been served with process." The answer did not assert arguments related to ineffective service, lack of personal jurisdiction, or the statute of limitations. On September 7, 2011, Sea-Legs filed an amended answer asserting a statute-of-limitations defense.

The district court held a bench trial on September 14, 2011. The district court found that Sea-Legs breached the eight contracts by failing to pay the amount due listed on the invoices and awarded Comp Machining the principal sum of $73,713.34. The district court held that the late-fee provision on the invoices became part of the contract under Minn. Stat. § 336.2-207 (2010), given that it did not materially alter the contract and Sea-Legs failed to object to the provision in a timely manner. Comp Machining was also awarded $19,228 in interest, equal to the total accrued interest minus the interest previously written off for tax purposes. The district court rejected Sea-Legs' counterclaim, concluding that no contract was formed for the 1,000 cylinders. Finally, the district court held that the four-year statute of limitations had not expired because the parties' course of dealing established that the parties had formed an open price contract, under which the price of goods was not fixed, and therefore payment owed, until Comp Machining sent invoices to Sea-Legs. Thus, it concluded that Comp Machining's cause

of action did not accrue until May 2008, making its claims timely. The district court denied appellant's motion for amended findings of fact and renewed motion for judgment as a matter of law.

This appeal follows.

D E C I S I O N

In an appeal from a bench trial, the district court's factual findings are given great deference and are not set aside unless clearly erroneous. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). However, no deference is given to the district court on purely legal issues. *Id.* "When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard." *Id.* (quotation omitted).

Both parties agree that, because these contracts are for the sale of goods, they are governed by Article II of the Uniform Commercial Code (UCC), Minn. Stat. §§ 336.2-101 to .2-725 (2010). *See* Minn. Stat. §§ 336.2-105(1) (defining "goods"). Under the UCC, "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." Minn. Stat. § 336.2-725(1). The cause of action accrues "when the breach occurs." *Id.* (2).

Accrual of the Cause of Action

Both parties also agree that Sea-Legs' breach of its contract with Comp Machining occurred when Sea-Legs failed to make payment on the 2004 contracts. They disagree,

however, over when that payment was due. "Unless otherwise agreed payment is due at the time and place at which the buyer is to receive the goods." Minn. Stat. § 336.2-310(a). The district court found that this default provision did not apply because the parties had entered into open-price contracts, as defined by Minn. Stat. § 336.2-305, under which the price of goods was to be fixed by Comp Machining after delivery of the goods, by sending an invoice to Sea-Legs. The district court found that "[t]he course of dealing between the parties establishes that the parties contemplated payment at the time of invoicing." The district court concluded that Sea-Legs was not obligated to pay under the 2004 contracts until it received the invoices from Comp Machining in May 2008. The district court therefore held that Comp Machining's cause of action for breach of contract did not accrue until May 2008.

The parties do not contest the district court's finding that, because the contracts did not state a price, and, given the circumstances surrounding their formation, the contracts were "open price" contracts, as defined by Minn. Stat. § 336.2-305. That statute provides, in part:

> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> > (a) nothing is said as to price; or
> >
> > (b) the price is left to be agreed by the parties and they fail to agree; or
> >
> > (c) 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.

> (2) A price to be fixed by the seller or by the buyer means a price for the fixer to fix in good faith.

Id.

We agree with the district court's finding that the parties established open-price contracts under which Comp Machining was to fix the price of goods at some time after delivery. But the district court erred in reasoning that Comp Machining could therefore fix the price of the goods and submit initial invoices nearly four years after they were delivered.

The district court relied on *Frank Novak & Sons, Inc. v. Sommer & Maca Indus., Inc.*, to support its conclusion that Sea-Legs did not owe payment until the invoices were sent—four years after delivery. 538 N.E.2d 700 (Ill. App. Ct. 1989), *appeal denied*, 545 N.E.2d 109 (Ill. Oct. 5, 1989). In *Frank Novak & Sons*, the parties had a 24-year business relationship establishing that defendant did not owe payment until invoices were sent, which was often years after the invoiced goods were delivered. *Id.* at 701–02. In 1977, plaintiff invoiced defendant for the past eight years of work and brought suit in 1978 when defendant refused to pay. *Id.* at 702. The court held that, because the parties' written communications and course of dealing reflected a mutual agreement that payment was not due until an invoice was submitted, the cause of action did not accrue, and the four-year statute of limitations begin to run, until defendant refused to make payment on the 1977 invoices. *Id.* at 705–06.

The district court's reliance on *Frank Novak & Sons* is misplaced because here there was no such agreement or course of dealing. While the parties formed open-price

contracts under which Comp Machining was to fix the price of goods after they were delivered by submitting an invoice to Sea-Legs, it is clear from the record that they had no agreement affording Comp Machining an unlimited amount of time either to fix the price of goods or to submit invoices.

Although the parties had not agreed on how long Comp Machining would have to fix the price, under Minn. Stat. § 336.2-309(1), "[t]he time for shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time." Given the district court's finding that six to eight weeks was a commercially reasonable time frame for delivery of goods under the contracts, we conclude that, under Minn. Stat. § 336.2-309(1), Comp Machining was required to fix the price of the goods by submitting an invoice to Sea-Legs within eight weeks after delivery.

Therefore, under Minn. Stat. § 336.2-305(1), when Comp Machining failed to fix the price of goods within eight weeks of delivery, the price became fixed as a "reasonable price at the time for delivery." At this point, because Comp Machining had fully performed under the contract and the contract price had been fixed, Sea-Legs was in breach of the contract, and the cause of action accrued. "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." Minn. Stat. § 336.2-301. While there may have been some uncertainty regarding what a "reasonable price at the time for delivery" was, "the running of the statute [of limitations] does not depend on the ability to ascertain the exact amount of damages." *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999).

The cause of action for each contract therefore accrued eight weeks after delivery was completed—between May 2004 and July 2004 for seven of the contracts, and January 2005 for the eighth.

Commencement of the Action

Having established when Comp Machining's cause of action accrued, we next address whether Comp Machining's action was commenced within four years of when the cause of action accrued. Comp Machining argues that, because the last delivery occurred on November 22, 2004—with the cause of action therefore accruing eight weeks later in January 2005—it commenced the action within the four-year statute-of-limitations period by mailing the summons and complaint to Sea-Legs on December 19, 2008. But even setting aside the fact that delivery had been completed on seven of the eight contracts by the end of May 2004, mailing the complaint did not by itself commence the civil action.

A civil action is commenced against a defendant "when the summons is served upon that defendant, or at the date of acknowledgment of service if service is made by mail." Minn. R. Civ. P. 3.01(a), (b). To accomplish service by mail, two copies of a notice of acknowledgment must be mailed with the summons and complaint. Minn. R. Civ. P. 4.05. Service is ineffectual if the sender does not receive the acknowledgment within 20 days. Minn. R. Civ. P. 4.05 (requiring receipt of acknowledgment of service within time defendant is required to serve an answer); Minn. R. Civ. P. 12.01 (requiring defendant to serve an answer within 20 days after service of summons); *Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 611 (Minn. App. 2000) (holding that service by mail is

ineffectual if signed acknowledgment of service is not received by sender within 20 days), *review denied* (Minn. Jan. 26, 2001). Neither plaintiff's substantial compliance with the rules for service of process nor a defendant's actual knowledge of the lawsuit is sufficient to effectuate service. *Turek*, 618 N.W.2d at 612; *Coons v. St. Paul Cos.*, 486 N.W.2d 771, 775 (Minn. App. 1992), *review denied* (Minn. July 16, 1992).

While Comp Machining mailed the summons and complaint by first-class mail to Sea-Legs on December 19, 2008, the record contains no evidence that an acknowledgment of service was returned by Sea-Legs. "The action is commenced by mail when the defendant acknowledges service. If no acknowledgment is signed and returned, the action is not commenced until service is effective by some other authorized means." Minn. R. Civ. P. 3.01 1985 advisory comm. note. Because Comp Machining did not effectively serve Sea-Legs by mail, the action was not commenced on December 19, 2008.

Where service of process is not effectuated but the defendant waives that defect, the action is commenced for statute-of-limitations purposes on the date upon which the action constituting waiver takes place. *MW Ag, Inc. v. New Hampshire Ins. Co.*, 107 F.3d 644, 647–48 (8th Cir. 1997). Sea-Legs filed its answer and counterclaim with the district court on January 21, 2010. The answer did not raise a defense of lack of personal jurisdiction or insufficient service of process, and the informational statement asserted that both parties had been served with process. This constituted a waiver of insufficient service of process. *See* Minn. R. Civ. P. 12.08 (stating that defense of insufficiency of service of process is waived if not made by motion or included in responsive pleading).

The action therefore commenced for statute-of-limitations purposes on January 21, 2010, more than five years after the cause of action accrued. *MW Ag, Inc.*, 107 F.3d at 647–48. Comp Machining's breach-of-contract claim was therefore barred under the four-year statute of limitations. Minn. Stat. § 336.2-725.

Comp Machining argues that, because Sea-Legs never argued that service was ineffective and did not raise the issue of when the cause of action commenced until its closing arguments, Comp Machining has had no opportunity to establish that it commenced the action prior to January 21, 2010. We disagree. If Sea-Legs did in fact return an acknowledgment of service within 20 days after the complaint was mailed, the acknowledgment should have been filed with the complaint. *See* Minn. R. Civ. P. 4.06 (stating requirements for proof of service); Minn. R. Gen. Pract. 7 (proof of service shall be attached to all documents filed with district court when service occurs before filing); 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 4:25 (5th ed. 2009) (service of summons by mail is proven by acknowledgment or admission of party served). Furthermore, Comp Machining had notice before trial in Sea-Legs' amended answer that Sea-Legs would raise a statute-of-limitations defense. "Because the defendant is accordingly given the power to let the statute of limitations run before acknowledging receipt, or even simply to not acknowledge receipt, service by mail should be avoided at any time near the end of the period of limitations." 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 3:3 (5th ed. 2009).

Because the statute of limitations bars the claims of both parties, we do not consider the remaining issues presented on appeal, and we affirm that portion of the district court's order denying appellant's counterclaim.

Affirmed in part, reversed in part.