IN THE SUPREME COURT OF THE STATE OF NEVADA

NEWMONT GOLD COMPANY, A DELAWARE CORPORATION,
Appellant,
vs.
DRESSER INDUSTRIES, INC., ROOTS DIVISION, A DELAWARE CORPORATION,
Respondent.

No. 39102

FILED

FEB 18 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting summary judgment to respondent Dresser Industries, Inc., Roots Division (Roots), in a case involving a contract dispute with appellant Newmont Gold Company (Newmont). We reverse the district court's order granting Roots' motion for summary judgment and remand this matter to the district court for further proceedings.

FACTS

Newmont conducts gold mining operations near Carlin, Nevada. One of Newmont's processing facilities is Mill 6, where sulfides and carbons are removed from ore containing gold. A sulfur dioxide (SO_2) blower assembly assists with the cleaning and removal of the SO_2 gases produced at Mill 6. The SO_2 blower assembly is a centrifugal compressor, which includes a motor driven rotor connected to an impeller fan blade that rotates in a counterclockwise or clockwise direction at over 6,500 r.p.m. The SO_2 blower includes an inlet guide vane assembly (IGVA), which is used to control the volume and the direction of gas flow into the impeller (fan).

Roots manufactures centrifugal compressors. In 1994, Roots designed and manufactured the SO_2 blower assembly used at Mill 6. The

SO_2 blower assembly manufactured for Mill 6 rotated in a counterclockwise direction. Roots also sent Newmont information about its General Terms of Sale, GTS-5001, which contained provisions limiting Roots' liability. Newmont received the GTS-5001 by fax on January 24, 1994. Newmont added the following heading to the GTS-5001: "MANUFACTURER'S STANDARD WARRANTY AND LIMITATION OF LIABILITY INFORMATION," and then incorporated the GTS-5001 into a reference book for the SO_2 blower assembly. The GTS-5001 was the first item in Newmont's index for that reference book. The GTS-5001 language limited damages for breach of warranty of contract, specifically excluding consequential damages.

On October 4, 1996, Newmont requested a price quotation from Roots for a replacement IGVA, and Roots provided Newmont with a one-page fax indicating that one "COMPLETE GUIDE VANE ASSY WITH OUT POSITIONED" would cost $53,661 and delivery would be in twenty to twenty-two weeks. The fax also stated: "THIS OFFER IS EXPRESSLY SUBJECT TO AND CONDITIONAL UPON BUYER'S ACCEPTANCE OF ROOTS' TERMS AND CONDITIONS OF SALE (GTS-5001)." The fax did not include a copy of the GTS-5001. Roots' parts manager testified in his deposition that a copy of the GTS-5001 should have been added to the fax, and he was not sure if Newmont received a copy of the terms and conditions. Roots' parts manager also testified that, because Newmont had established itself as a customer with Roots, he probably did not discuss with Newmont the terms and conditions of the contract.

On December 17, 1996, Roots faxed to Newmont a list of parts that would be included in the IGVA and specifically referenced the October 4, 1996 quotation. Roots' parts manager testified at his deposition that he does not remember if he spoke with anyone at Newmont before

faxing the list of parts. On the December 17, 1996 fax was a handwritten notation, which included "PO # 631023."

After receiving the December 17, 1996 fax, Newmont mailed a copy of a purchase order for one IGVA to Roots. The purchase order stated: "BY ACCEPTING THIS ORDER YOU AGREE TO ALL OF THE TERMS AND CONDITIONS HEREOF INCLUDING THOSE PRINTED ON THE BACK OF THIS SHEET." Newmont's terms and conditions permitted consequential damages. Roots' parts manager testified that Newmont might also have faxed him a copy of the purchase order. Roots' parts manager answered "[i]n or around" when asked at his deposition whether he received the purchase order from Newmont around December 17, 1996. Roots did not receive the mailed purchase order until December 31, 1996.

Roots' internal policies and procedures prohibited accepting or beginning production on an order whose terms and conditions conflicted with the GTS-5001 terms and conditions. If Roots received a purchase order or other document containing terms and conditions different from the GTS-5001, Roots' personnel were required to contact the purchaser and ensure that the contract would be governed by the GTS-5001. Until the conflict between the buyer's and Roots' general terms and conditions were resolved, the order was not to be processed. Roots failed to follow this procedure on the December IGVA order.

On December 18, 1996, Roots began production on the contract for the new IGVA. On December 19, 1996, Roots mailed Newmont an order acknowledgment referencing Newmont's purchase order number, which is the same number that was handwritten on the December 17, 1996 fax. Roots also mailed a second order acknowledgment to Newmont on January 20, 1997.

In June 1997, Roots delivered the replacement IGVA to Newmont. Later that month, Newmont installed the replacement part. Several employees at Newmont testified at their depositions that they expected the replacement IGVA to be an exact duplicate of the old IGVA. However, the replacement IGVA did not fit properly. Newmont claims that it was not unusual to have some difficulties installing a replacement IGVA because anytime a replacement IGVA is installed the linkage rods must be removed. Removing the linkage rods required that another component, the Beck actuator, be adjusted. Newmont also found that the actuator arm on the IGVA was in a different position than the original. As a result, Newmont's mechanical technicians had to recalibrate the Beck actuator in order to calibrate the IGVA in this new position. This process required shortening and repositioning the connecting rod that links the actuator and the IGVA.

Once the replacement IGVA was installed, Newmont discovered "that the control room monitors showed the actuator arm to be in the 'open' position, when it was, in fact, in the 'closed' position." Because the replacement IGVA was not working correctly, Newmont modified the IGVA to make it fit and changed the controls in an attempt to correct the reversed operation. Newmont personnel also testified that they never suspected that the problems they experienced were caused by the IGVA being set to rotate clockwise as opposed to counter clockwise.

On July 3, 1997, about sixty hours after the replacement IGVA was installed, high vibration of the SO_2 blower assembly caused a shutdown. That same day, Newmont called Roots' service department and requested technical assistance to service and repair the SO_2 blower assembly. Kenneth Schilling, a Roots service technician, was at Newmont

that same day. Schilling stated that when he arrived at Mill 6, the IGVA had been removed and he did not see it.[1]

The SO_2 blower assembly was repaired and restarted on July 15, 1997 and failed again within twenty-three hours. After the second failure, Newmont discovered a severe crack in one of the IGVA's blades. Newmont claims it did not discover the cause of the breakdowns until July 23, 1997 when Newmont personnel discovered that the replacement IGVA unit was running in a clockwise direction rather than a counterclockwise direction as required. Once Newmont discovered the cause of the breakdown, it immediately notified Roots, and Roots repaired the IGVA.

During July 1997, Newmont claims that Roots' personnel, including Schilling, were on site at Newmont and that no one noticed the defect in the replacement IGVA. Schilling stated that it was not until the second failure that Newmont finally told him that it experienced control problems with the replacement IGVA during June 1997.

On July 14, 1998, Newmont brought seven causes of action against Roots in district court, including: breach of contract, breach of express warranty-contract, breach of express warranty-UCC, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of a consulting contract, and professional negligence. Roots filed a motion for summary judgment based on NRS 104.2607(3)(a), which requires the buyer to notify the seller of a breach of contract within a reasonable time. Roots also alleged in a separate motion

[1]Schilling stated in an affidavit that Newmont never told him that the IGVA had been replaced until "sometime after the unit was started up on July 15." Schilling also stated that Newmont did not mention that it had had problems installing the IGVA until sometime after July 15.

that its price quotation on October 4, 1996, was an offer and that its terms and conditions governed the contract.

The district court granted Roots' motions for summary judgment. In doing so, the district court concluded that when Newmont installed the replacement IGVA, it became immediately apparent that the linkage arm did not fit properly. The district court also noted that when the SO_2 blower assembly was operating, the fan on the IGVA was open when it should have been closed, and that to fix this problem, Newmont reversed the leads on the actuator control unit. Therefore, the district court held that because Newmont was on notice that the replacement IGVA was dissimilar from the original, Newmont had a duty to notify Roots of the nonconforming IGVA under NRS 104.2606 and NRS 104.2607.

The district court also determined that Roots' price quotation on October 4, 1996, was an offer for the purchase of a replacement IGVA and that Roots' terms and conditions governed the contract. The court noted that Roots' offer was expressly conditioned on its terms and conditions of warranty and liability. In addition, the court noted that Newmont gave Roots an oral purchase order number over the telephone, which Roots relied on when it sent an acknowledged receipt of Newmont's purchase order and began production on the IGVA before it received Newmont's written purchase order on December 31, 1996.

Newmont filed a timely notice of appeal.

DISCUSSION

Newmont argues on appeal that the district court erred in granting Roots' motions for summary judgment because questions of fact exist regarding whether Newmont failed to provide timely notice under NRS 104.2607 and whether Roots' terms and conditions apply.

Summary judgment is appropriate if there are no genuine issues "as to any material fact" and "the moving party is entitled to a judgment as a matter of law."[2] "A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party."[3] In determining whether summary judgment is proper, the non-moving party is entitled to have the evidence and all reasonable inferences in its favor accepted as true.[4]

Because the agreement in this case involved the sale of goods, the contract is governed by the provisions of the Uniform Commercial Code (UCC), which has been adopted in Chapter 104 of the Nevada Revised Statutes.

Notice under NRS 104.2607

Newmont asserts that whether Newmont notified Roots within a reasonable time after Newmont discovered that the replacement IGVA was a nonconforming good is a question of fact to be resolved by the trier of fact. We agree.

NRS 104.2607(3)(a)[5] provides: "The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." NRS

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[2]NRCP 56(c).

[3]Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

[4]State, Dep't Transp. v. Central Telephone, 107 Nev. 898, 901, 822 P.2d 1108, 1109 (1991).

[5]NRS 104.2607(3)(a) has been adopted from the Uniform Commercial Code § 2-607(3)(a).

104.1204(2) provides that "[w]hat is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action."

This court has not addressed the requirements under NRS 104.2607(3)(a). The "reasonable time" required NRS 104.2607(3)(a) is related to when the buyer "knew or should have known of the defects in the goods."[6] Whether the buyer should have known of the defect depends on whether the defect was "so obvious as to be apparent in the normal exercise of the perceptory senses."[7] Whether notice was reasonable is usually a question of fact for the jury.[8] We conclude that whether the difficulties Newmont experienced in installing the replacement IGVA made its nonconforming nature, specifically that it rotated in the wrong direction, readily apparent is a question of fact. Newmont argues that the obvious problems were of the type that would usually be corrected on-site by the buyer and would not be grounds for rejecting the IGVA as a nonconforming good. Roots claims that the problems demonstrated a significant problem with the IGVA and reasonable persons would have known to notify Roots that the IGVA did not conform to the contract. Since reasonableness is a question of fact to be resolved by the trier of fact, the district court erred in granting summary judgment on this issue.

Terms and conditions

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[6]Or. Lumber Co. v. Dwyer Overseas Timber, Etc., 571 P.2d 884, 887 (Or. 1977).

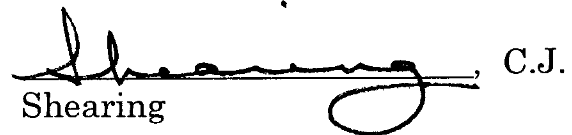
[7]Slemmons v. Ciba-Geigy Corp., 385 N.E.2d 298, 304 (Ohio Ct. App. 1978).

[8]Los Angeles Nut House v. Holiday Hardware Corp., 825 F.2d 1351, 1354 (9th Cir. 1987).

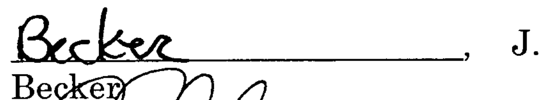
Newmont also contends that questions of fact remain regarding whether Roots' October 4, 1996, price quote was an offer that incorporated Roots' terms and conditions. We agree.

NRS 104.2206(1)(a) provides that "[a]n offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." We have noted that "[i]ntent to make an offer or an acceptance is a question of fact."[9] The fact that Newmont had incorporated the GTS-5001 in a reference book is not enough to conclude, as a matter of law, that Roots' October 4, 1996, price quote was an offer that bound Newmont to the terms and conditions in the GTS-5001. Therefore, we conclude that the district court erred in granting Roots judgment as a matter of law.

Accordingly, we reverse the judgment of the district court and remand for further proceedings.



__________________________, C.J.
Shearing



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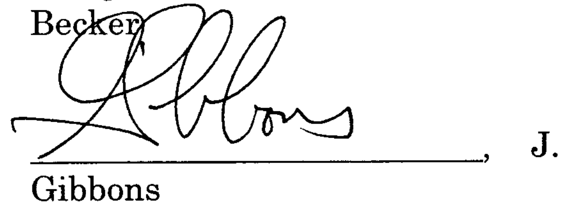
Becker



__________________________, J.
Gibbons

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[9]James Hardie Gypsum, Inc. v. Inquipco, 112 Nev. 1397, 1401, 929 P.2d 903, 906 (1996) overruled on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 955 n.6, 35 P.3d 964, 969 n.6 (2001).

cc: Hon. Andrew J. Puccinelli, District Judge
Beckley Singleton, Chtd./Las Vegas
Matthews & Wines
Yates & Leal
Easterly Armstrong & Lambert
Lemons Grundy & Eisenberg
Quarles & Brady LLP
Elko County Clerk