THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge
Shannon M. Phillips, Master-in-Equity

Case No. 2021-CP-42-01163
Appellate Case No. 2022-000348

Custom Performance Engineering, Inc., ... Respondent-Appellant

v.

AM Industrial Group, LLC, ... Appellant-Respondent.

FINAL BRIEF OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 3

ARGUMENT 4

THE TRIAL COURT IMPROPERLY HELD THAT CUSTOM PERFORMANCE WAS NOT ENTITLED TO DAMAGES TO COVER ITS LOSS 4

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Apex Mining Co. v. Chicago Copper & Chemical Co., 340 F.2d 985 (8th Cir. 1965) 5
Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006) 4
Catawba Indian Tribe of S.C. v. South Carolina, 372 S.C. 519, 642 S.E.2d 751 (2007) 4
Dakota Gasification Co. v. Didion, No. 1:10-CV-015, 2011 WL 2848524 (D.N.D. July 15, 2011) 5
Dickson v. Delhi Seed Co., 26 Ark. App. 83, 760 S.W.2d 382 (Ct. App. Ark 1988) 6
Hughes Comm'ns Galaxy, Inc. v. United States, 271 F.3d 1060 (Fed. Cir. 2001) 4
Huntington Beach Union High Sch. Dist. v. Cont'l Info. Syss. Corp., 621 F.2d 353 (9th Cir. 1980)..... 5
In re Lifeguard Indus, Inc., 42 B.R. 734 (S.D. Ohio 1983) 7
Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC, 747 F. Supp. 2d 568 (W.D.N.C. 2010)..... 4,6-7
Mueller v. McGill, 870 S.W.2d 673 (Ct. App. Tex. 1994)..... 5
Thorstenson v. Mobridge Iron Works Co., 87 S.D. 358, 208 N.W.2d 715 (S.D. 1973) 6
Universal Builders Corp. v. United Methodist Convalescent Homes of Conn., Inc., 7 Conn. App. 318, 508 A.2d 819 (App. Ct. Conn. 1986)..... 5

Statutes

S.C. Code Ann. § 36-2-102..... 4
S.C. Code Ann. § 36-2-105..... 4
S.C. Code Ann. § 36-2-712..... 4,7
Ohio Rev. Code Ann. § 1302.86..... 7

Other Authorities

S.C. Code Ann. § 36-2-712, cmt. ns.1-2..... 4-5,7
Ohio Rev. Code Ann. § 1302.86 cmt. n.2..... 6

STATEMENT OF THE ISSUE ON APPEAL

1. DID THE TRIAL COURT IMPROPERLY HOLD THAT CUSTOM PERFORMANCE WAS NOT ENTITLED TO THE DIFFERENCE IN PRICE BETWEEN THE AMI MACHINE AND THE REPLACEMENT MACHINE?

STATEMENT OF THE CASE

Custom Performance Engineering, Inc., ("Custom Performance"), a Spartanburg, South Carolina engineering firm that deals in mass manufacturing of metal products, conducted a nationwide search for a machine that could bend eighteen-gauge stainless steel tubes with three-inch walls. (See R. p. 95, lines 15 – 18; R. p. 106, line 25 – p. 107, line 3; R. p. 110, line 23 – p.111, line 1; R. p. 111, lines 19 – 20; R. p. 11.) After a diligent search and comparison with other available machines, Custom Performance purchased a like-new VB76 high torque Eaton Leonard machine from Appellant-Respondent AM Industrial Group, LLC ("AMI") in August 2020. (See R. p. 95, lines 15 – 23; R. p. 106, line 25 – p. 107, line 3; R. p. 110, lines 23 – 24; R. pp. 141 – 50; R. p. 12.) Custom Performance paid $132,000.00 for the AMI Machine and expended additional costs to tool and install the machine. (See R. p. 96, lines 12 – 13; R. p. 96, line 18 – p. 98, line 7; R. p. 130; R. pp. 141 – 49.)

The AMI Machine failed to function properly. (R. p. 98, lines 8 – 9.) AMI sent a representative to inspect the AMI Machine, but this representative was unable to make the machine bend three-inch tooling and material. (R. p. 13.) Over a period of several months, AMI attempted to make the AMI Machine operational but failed to do so. (R. p. 13.) A third-party inspector also viewed the AMI Machine and concluded that it was refurbished incorrectly. (R. p. 13; R. p. 109, line 19 – p. 110, line 1.) Custom Performance asked the third-party inspector's company about repairing the AMI Machine, but the company could not do so. (See R. p. 109, line 21 – p. 110, line

5.) After AMI repeatedly failed to repair the AMI Machine, in January 2021, Custom Performance rejected the AMI Machine. (R. p. 14.)

Custom Performance immediately undertook efforts to find a replacement machine that could "bend thin wall stainless steel" with "18 gauge 3 inch" capacity. (R. p. 111, lines 19 – 20; R. p. 112, lines 16 – 17 (testifying that this capacity was the "bottom premise" of purchasing a replacement).) Among other efforts, Custom Performance spoke with the third-party inspector's company, which also sold machines, inquiring as to the availability of another bender machine. (R. p. 110, lines 1 – 4.) It also reviewed the findings of its earlier search for a workable bender machine. (See R. p. 110, line 20 – p. 111, line 1.) Custom Performance ultimately concluded that the best replacement option was a refurbished YLM CNC-90 MSRSM-6A CNC Bending Machine (the "Replacement Machine"), which it purchased and tooled for $255,087.00. (R. p. 98, lines 10 – 12, 20 – p. 99, line 1; R. p. 116, lines 11 – 20; R. pp. 131 – 40.)

The Replacement Machine included a ninety-millimeter diameter capacity which, contrary to arguments by AMI, did not equate to an ability to bend more than three inches. (R. p. 111, lines 17 – 25 ("Just because it has a 90 millimeter doesn't mean it's going to bend over 3-inch stainless steel. And [the vendor of the Replacement Machine] will tell you that. . . .").) The Replacement Machine also had a three-stack capacity, whereas the AMI Machine had a single stack capacity. (R. p. 112, lines 4 – 10.) However, Custom Performance only utilized the single-stack capacity on the Replacement Machine. (R. p. 112, line 12.)

Despite its efforts to timely cover the AMI Machine, Custom Performance lost significant profits because of the months-long failure of the AMI Machine to function. These losses total approximately $257,680.00. (R. p. 125, lines 21 – 23; see also R. p. 109, lines 14 – 16.)

On April 13, 2021, Custom Performance filed a summons and complaint alleging that AMI was liable for breach of contract, breach of express warranty, and breach of implied warranty of merchantability. (R. pp. 10 – 21.) Despite being served the summons and complaint, AMI failed to file an answer or other appropriate response, and on August 18, 2021, default was entered against it. (R. pp. 26 – 27; R. pp. 28 – 29; R. pp. 8 – 9.)

On September 8, 2021, AMI finally appeared, filing a motion to set aside entry of default. (R. pp. 31 – 40.) Custom Performance filed a response in opposition, and a hearing was held on September 28, 2021. (R. pp. 41 – 70; see R. pp. 5 – 7.) That same day, the Honorable J. Derham Cole issued an order denying AMI's motion to set aside entry of default. (R. pp. 5 – 7.)

On December 20, 2021, a damages hearing took place before the Honorable Shannon Phillips, Master-in-Equity for Spartanburg County. (R. p. 93.) On February 21, 2022, the court issued an order awarding the full $132,000.00 cost of the Machine, $8,694.00 to install and tool the Machine, and $257,680.00 in lost profits. (R. p. 126, lines 7 – 19; R. p. 3.) The court refused to award Custom Performance its costs in purchasing the Replacement Machine. (R. p. 126, lines 7 – 19; R. p. 3.)

On March 21, 2022, AMI filed and served a notice of appeal, appealing both the September 28, 2021 order denying its motion to set aside entry of default and the February 21, 2022 order awarding damages to Custom Performance. (R. pp. 73 – 74.) On March 25, 2022, Custom Performance filed and served its notice of cross-appeal, solely appealing the February 21, 2022 order failing to award its cost to cover. (R. pp. 77 – 78.)

STANDARD OF REVIEW

The lower court applied an improper statutory standard in determining whether to award the difference in the value of the AMI Machine and the Replacement Machine. A court's

interpretation and application of a statute are questions of law reviewed *de novo*. See Catawba Indian Tribe of S.C. v. South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Moreover, although a finding that cover is unreasonable is a finding of fact, a lower court's findings of fact must be reversed if it is clear that the court was influenced by an error of law. Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC, 747 F. Supp. 2d 568, 579 (W.D.N.C. 2010) (quoting Hughes Comm'ns Galaxy, Inc. v. United States, 271 F.3d 1060, 1066 (Fed. Cir. 2001)); Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121,127, 631 S.E.2d 252, 255-56 (2006) (citations omitted).

ARGUMENT

THE TRIAL COURT IMPROPERLY HELD THAT CUSTOM PERFORMANCE WAS NOT ENTITLED TO DAMAGES TO COVER ITS LOSS

The South Carolina Uniform Commerical Code ("UCC") governs the contract between AMI and Custom Performance because it concerns a machine that was movable at the time of its identification to the contract. See S.C. Code Ann. §§ 36-2-102, -105(1). Pursuant to the UCC, Custom Performance is entitled to recover the difference between the cost of the AMI Machine and the cost of the Replacement Machine:

> (1) After a breach within the preceding section (§ 36-2-711) the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
>
> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§ 36-2-715), but less expenses saved in consequence of the seller's breach.

S.C. Code Ann. § 36-2-712(1), (2). The purpose of allowing a buyer to cover is to provide the buyer with "a remedy aimed at enabling him to obtain the goods he needs . . . ." See S.C. Code Ann. § 36-2-712 cmt. n.1. Cover goods need "**not [be] identical** with those involved but [should be] commercially usable as reasonable substitutes under the circumstances of the particular case."

S.C. Code Ann. § 36-2-712 cmt. n.2 (emphasis added). It is "immaterial" that "the method of cover used was not the cheapest." Id. Rather, "[t]he test of proper cover is whether at the time and place the buyer acted in **good faith and in a reasonable manner**." Id. (emphasis added). The buyer's cover is presumed to be proper, and the seller has the burden to show that the cover was unreasonable or made in bad faith. Dakota Gasification Co. v. Didion, No. 1:10-CV-015, 2011 WL 2848524, at *6 (D.N.D. July 15, 2011); Apex Mining Co. v. Chicago Copper & Chemical Co., 340 F.2d 985, 987 (8th Cir. 1965).

Here, the lower court applied an improper standard to determine whether the Replacement Machine constituted proper cover. As stated in its order,

> The court declines to award, however, the difference in the cost of the [AMI] Machine and the cost of the Replacement Machine. During cross-examination, Custom Performance's witness testified that the Replacement Machine is not identical to the [AMI] Machine and contains more features not available on the [AMI] Machine. Because of this, the court declines to award the cost of "cover" or the tooling and installation costs for the Replacement Machine.

(R. p. 3.) The basis for the court's refusal to award cover is erroneous. The fact that a substitute good is different from or even better than the contracted-for good does not prevent a buyer from receiving cover costs. Rather, courts consider whether the substitute was commercially usable as a reasonable substitute under the circumstances. See, e.g., Huntington Beach Union High Sch. Dist. v. Cont'l Info. Syss. Corp., 621 F.2d 353, 357 (9th Cir. 1980) (holding that buyer was entitled to cover damages even though its cover was not the most reasonable purchase because it was still "reasonable" and made in good faith); Universal Builders Corp. v. United Methodist Convalescent Homes of Conn., Inc., 7 Conn. App. 318, 324, 508 A.2d 819, 823 (App. Ct. Conn. 1986) (holding that substitution of different trusses was acceptable where no evidence existed "from which the court could conclude that . . . cover was made in bad faith or with unreasonable delay."); see also Mueller v. McGill, 870 S.W.2d 673 (Ct. App. Tex. 1994) (reversing directed verdict for defendant

where plaintiff purchased replacement car that was newer and more expensive, locating same model car was difficult, and replacement car was very similar to contract car); Dickson v. Delhi Seed Co., 26 Ark. App. 83, 760 S.W.2d 382 (Ct. App. Ark. 1988) (holding that evidence of cost of oats replacing contracted-for unprocessed oats was proper as evidence of cover even though replacement oats were processed rather than unprocessed and another supplier offered unprocessed oats); Thorstenson v. Mobridge Iron Works Co., 87 S.D. 358, 208 N.W.2d 715 (S.D. 1973) (reversing directed verdict for defendant where defendant argued that plaintiff's purchase of replacement tractor and loader was not proper cover because replacement tractor was "entirely different" from the contracted-for tractor).

For example, in Irwin Industrial Tool Co. v. Worthington Cylinders Wisconsin, LLC, 747 F. Supp. 2d 568 (W.D.N.C. 2010), the buyer, Irwin Industrial Tool Co. d/b/a BernzOmatic ("BernzOmatic"), filed suit against Worthington Cylinders Wisconsin, LLC ("Worthington"), a supplier that breached its contract for the supply of fuel cylinders. Id. at 573. BernzOmatic required "tall, skinny cylinders," and when Worthington refused to supply these cylinders at the contract price, BernzOmatic would have been forced to purchase substitute cylinders from Worthington at the higher market price. Id. at 579. Considering this price increase, BernzOmatic searched for a new supplier and determined that a "Fat Boy" cylinder from another supplier would be the "best available substitute." Id. Worthington argued that this cylinder did not constitute proper "cover" because it was a different cylinder: it had a high price, a different shape, and a larger size. See id.

The court disagreed. The United States District Court for the Western District of North Carolina, relying on identical language from the Official Comment to the Ohio UCC, observed that cover goods "need not be identical but rather must be 'commercially usable as reasonable substitutes under the circumstances.' " Id. (quoting Ohio Rev. Code Ann. § 1302.86 cmt. n.2.) The

court found that BernzOmatic presented substantial evidence that the replacement "Fat Boy" cylinders were commercially usuable as reasonable substitutes under the circumstances, and therefore, BernzOmatic was entitled to an award of cover damages. Id.

Likewise, in In re Lifeguard Industries, Inc., 42 B.R. 734 (S.D. Ohio 1983), a dispute arose between Lifeguard Industries, Inc. ("Lifeguard"), which manufactured and sold aluminum siding, and Suburban Construction Co. ("Suburban"), which bought aluminum siding from Lifeguard. Id. at 735. Suburban placed two orders with Lifeguard for aluminum siding, one of which was coated with tedlar. Id. at 736. Both sets of siding were defective. Id. To avoid delays in construction, Suburban ordered replacements for both sets of siding from another company that was purportedly the only other manufacturer of siding with tedlar coating. Id. Lifeguard presented evidence that Suburban ordered a higher quality material for the replacement siding and "raised questions" as to the product lines that the replacement manufacturer actually offered at the time of the replacement order. Id. at 738. Nevertheless, the court found these arguments "unwarranted" in light of the straightforward rule that cover is proper if "at the time and place[,] the buyer acted in good faith and in a reasonable manner." Id. (quoting Ohio Rev. Code Ann. § 1302.86). Accordingly, "[i]n the absence of any allegations of bad faith," the court held that Suburban's cover costs were commercially reasonable. Id.

Here, Custom Performance's purchase of the Replacement Machine satisfied the straightforward cover requirements set forth in § 36-2-712. S.C. Code Ann. § 36-2-712(1); S.C. Code Ann. § 36-2-712 cmt. n.2. Most of AMI's complaints centered on the fact that the Replacement Machine was not "identical" to the AMI Machine. First, AMI complained that the Replacement Machine advertised a ninety-millimeter diameter capacity rather than a three-inch dimater capacity; nevertheless, Custom Performance presented evidence that "[j]ust because it has

a 90 millimeter doesn't mean it's going to bend over 3-inch stainless steel. And [the vendor of the Replacement Machine] will tell you that. . . ." (R. p. 111, lines 21 – 22.) Moreover, although AMI points to the Replacement Machine's three-stack capacity as opposed to the AMI Machine's one-stack capacity, Custom Performance only operated with the single-stack mode. (R, p. 112, lines 12 – 18.) As Custom Performance explained, the Replacement Machine satisfied the "bottom premise" in finding a replacement: it provided a timely substitute that could "bend thin wall stainless steel" with "18 gauge 3 inch" capacity. (R. p. 111, lines 19 – 20; R. p. 112, lines 16 – 17.)

Finally, the circumstances support the reasonableness of purchasing the Replacement Machine. Before purchasing the AMI Machine, Custom Performance spent significant time searching the market for a machine that could bend three-inch pipe of eighteen-gauge stainless steel. (See R. p. 95, lines 19 – 25; R. p. 106, line 25 – p. 107, line 3; R. p. 110, line 23 – p. 111, line 1.) After selecting and purchasing the AMI Machine, months lapsed in which the AMI Machine failed to function, despite attempted repairs, until Custom Performance rejected the AMI Machine. (R. pp. 12 – 14.) By the time Custom Performance purchased the Replacement Machine—over one year after purchasing the AMI Machine—Custom Performance had searched the market for a workable machine and had even contacted a third party regarding repairing the AMI Machine. (R. p. 109, line 19 – p. 110, line 5; R. p. 110, line 20 – p. 111, line 1; R. pp. 130 – 40.) The result of these search efforts combined with the pressure of continuing to lose contracts led Custom Performance to purchase the most commercially reasonable substitute: the Replacement Machine. Accordingly, Custom Performance is entitled to the difference in value between the Replacement Machine and the AMI Machine.

CONCLUSION

For the reasons stated above, Custom Performance Engineering, Inc. respectfully requests that this Court reverse the Master-in-Equity's ruling that it is not entitled to the difference in price between the AMI Machine and the Replacement Machine.

October 4, 2022

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent-Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

The undersigned certifies that a copy of the Final Brief of Respondent-Appellant was served upon counsel of record in the above-entitled action by electronic mail on October 4, 2022, as follows:

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