CASE NO.: 2016-001158

THE STATE OF SOUTH CAROLINA
IN COURT OF APPEALS

Wendell Cooper, Appellant

v.

East Coast Granite and Tile Inc., Respondent.

ON APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

FINAL BRIEF OF APPELLANT

DATE: March 26, 2018

Wendell Cooper, Pro Se
117 Palm Springs Way
Simpsonville, South Carolina 29681

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STATEMENT OF ISSUES ON APPEAL

DID THE TRIAL COURT ERR AS A MATTER OF LAW BY NOT ALLOWING THE APPELLANT THE RIGHT TO REJECT THE DELIVERY OF GOODS THAT DID NOT CONFORM TO THE CONTRACT UNDER S.C. UNIFORM COMMERCIAL CODE 36-2-711 (S.C. UCC)?

DID THE TRIAL COURT ERR AS A MATTER OF LAW IN RULING THAT APPELLANT WAS NOT ENTITLED TO BE RESTORED TO HIS PRE-CONTRACT POSITION WHEN THE MAGISTRATE COURT RULED IN PLAINTIFF FAVOR UNDER S.C. UNIFORM COMMERCIAL CODE 36-2-106 (4)

DID THE TRIAL COURT ERR AS A MATTER OF LAW IN RULING THAT WHEN APPELLANT REJECTED THE DELIVERY OF GOODS FOR NON-CONFORMITY, WHICH

THE BURDEN WAS ON THE SELLER TO PROVE THAT THE NONCONFORMITY WAS CORRECTED ACCORDING TO S.C. UNIFORM COMMERCIAL CODE 36-2-512 (1)(2). SEE CASE LAW MIRON V. YONKERS RACEWAY, INC., 400 F.2d 112, 119 (2 Cir.1968)?

DID THE TRIAL COURT ERR AS A MATTER OF LAW IN RULING THAT ABSENCE OF A SPECIFIC TIME PROVISION IN THE CONTRACT IS GOVERNED BY REASONABLE TIME TO CURE THE MATTER BEFORE NOTICE OF TERMINATION OF THE CONTRACT IN ACCORDANCE WITH S.C. UNIFORM COMMERCIAL CODE 36-2-309(2)?

DID THE TRIAL COURT ERR AS A MATTER OF LAW IN RULING THAT THERE WAS A BINDING CONTRACT BETWEEN THE APPELLANT AND EAST COAST GRANITE AND TILE WHEN THE CONTRACT WAS REJECTED FOR NON-CONFORMITY? SEE S.C. UNIFORM COMMERCIAL CODE 36- 2-606?

DID THE TRIAL COURT ERR AS A MATTER OF LAW IN RULING THAT APPELLANT WAS NOT ENTITLED TO RECOUP ALL MONIES PAID IN ADVANCE IN ACCORDANCE WITH S.C. UNIFORM CODE 36-2-711? SEE (PECKHAM V. LARSEN CHEVROLET-BUICK-OLDSMOBILE, INC., 99 IDAHO 675,677,587 P. 2D 816 818 (1978) (RECOVER OF PRICE PAID)?

DID THE TRIAL COURT ERR AS A MATTER OF LAW IN RULING THAT IN NOT RECOGNIZING THAT THE RECORD DID NOT CONTAIN ANY WRITTEN NOTICE BY THE SELLER TO CURE THE NON-CONFORMITY IDENTIFIED BY THE APPELLANT IN ACCORDANCE WITH S.C. 36-2-501 (1)?

DID JUDGE FORD ERROR IN WRITING A SECOND DATE NOVEMBER 17, 2015 WHICH CONTRACTED THE LANGUAGE OF HIS FIRST ORDER FOLLOWING THE APPLELANT'S FILLING HIS APPLEAL OF THE FIRST ORDER?

STATEMENT OF THE CASE

Pro Se Appellant Wendell Cooper respectfully submit this brief as motion to restore Appellant to his pre-contractual positon. The brief urges this Court to reverse the discussion below, and thus supports the position of Appellant Wendell Cooper.

On November 31, 2014, appellant contracted with East Coast Granite to install granite and vessels in the master bathroom, guest bathroom, and hall bathroom. The installation of the above granite was delayed due to contractor's issues to keep scheduled appointments. Nevertheless, when appellant met with Geoff Polin at the warehouse, he brought with him a

sample of the flooring to match it with the granite. This was done in the sun light, inside in the show room and sample of granite was taken to appellant residence to make sure that the paint, granite, and flooring matched and it is the appellant testimony that he clearly can distinguish the difference between the color of the granite that he chose and the color of the granite that was delivered based on the above steps that was taken to make sure that the colors matched.

On May 6, 2015, appellant contacted Geoff Polin by email to inform him that he was ready for the granted to be installed. In this email appellant informed Mr. Polin that the cabinet company he recommended never got back with him. In addition, appellant asked Mr. Polin if his company would match C&A Home Improvement (C & A) estimate price for the granite

On or about May 11, 2015, the granite was scheduled for installation. The installers never showed for the appointment.

On or about May 12, 2015, the granite was again scheduled to be installed. The installers never showed for the appointment.

On or about May 13, 2015, the granite was again scheduled to be installed. The installers never showed for the appointment.

On or about May 14, 2015, the granite was again scheduled to be installed. The installers did show up for this appointment, but with the incorrect color of granite. At this time, appellant had a conversation with the installers and they concluded that the granite was the incorrect color. The installers then removed the granite at the instruction of their supervisor.

On or about May 18, 2015, appellant met with the store manager to discuss the issues with the color of the granite. At this time, the manager insisted that the color was correct, and appellant disagreed.

On June 23, 2015, appellant contracted with Blue Corral Stoneworks to finish the job that was not completed by East Coast Granite and Tile.

On June 23, 2015, appellant filed a claim in small claims court to be reimbursed for expenses paid in advance in the amount of $2273.66, due to goods being rejected because of non-conformity.

On September 29, 2015, this case was heard before Judge Dean Ford in Magistrate Court. Judge Ford ruled in favor of appellant and instructed the Defendant to pay $80.00 court cost and deliver the rejected granite to appellant.

On November 29, 2015, appellant filed an appeal in the Court of Common Pleas.

On April 28, 2016, Judge Letitia Verdin dismissed the appeal in favor of the appellee absent a written order.

Nature of The Action and Relief Sought

This action against East Cost Granite and Tile for sale on approval and return of goods, which appellant allege that appellee failed to deliver the correct color and pattern of granite. As a result, appellant was forced to incur additional expenses by having another company to finish the work. The trial Court ruled in favor of the appellant by granting him court cost and the delivery of the non-delivered granite. The Court of Common Pleas of Appeal entered a judgment affirming the lower court decision not restore appellant to his pre-contract position. In the case the Court failed explain the legislative reasons for its ruling. Appellant seeks the reversal of the judgement and to restore him to his pre-contract position.

Nature of The Judgment

The nature of the judgement agreed with the lower court's ruling. However, absent from the record is the Court's reasons of law for its decision. Thus, Appellant can only have speculated why the Court ruled against him, which creates an undue burden to defend his rights.

Basis of Appellant Jurisdiction

Appellant jurisdiction is based on Title 14-Court of Appeals section 14-8-260.

Effective Date for The Appellant Purpose

The judgement to affirm the Magistrate's Court decision was signed April 28, 2016. The notice of Appeal was served and filed on May 27, 2016.

SUMMARY OF THE ARGUMENT

There is no evidence in record that would refute the testimony of both the appellant and his witness who personally heard the installer's state that the granite was not the same color as outlined in the picture. The installer made a call to the office and according to the installer he was informed to remove the granite.

The appellee failed to produce any directed testimony from any of the installers that would contradict the above testimony statement. Appellee never denied that the installer said the granite was the wrong color. On the contrary, they provided testimony that the installers were not authorized to make the above statement. Nevertheless, they identified themselves as working for the appellee which authorize them to legally represent the company.

The contract is non-binding until buyer accepts the goods and the installation of said goods. As such, the buyer rightfully rejected the goods when they did not conform to the contract. Thus, allowing plaintiff to cancel his contract and seek reimbursement. Since this case

involves the rejection of goods it is not necessary for the appellant to address whether the seller has the right cure substantial defects that justify revocation of acceptance. *(See Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 378 (App. Div. 1978) (right to cure after acceptance limited to trivial defects). Ramirez v. Autosport 88 N.J. 277 (1982), 440 A.2d 1345 and S.C. UCC 36-2-711.* Upon rejection of goods, the burden is on the seller to prove that the non- conformity was corrected. *Miron v. Yonkers Raceway, Inc., 400 F.2d 112, 119 (2d Cir. 1968) and S.C. UCC 36-2-512.* In this case the appellee failed to prove that the statements made by the installers that the color of the granite was not correct because, no testimony by any of the installers was present in trail.

Upon rejection of goods, the buyer is entitled to a full reimbursement of monies paid. S.C. UCC 36-2-711. (Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc., 99 Idaho 675,677,587 P. 2D 816 818 (1978) 2-711 (Recover of price paid.) The time for the seller to deliver the granite had exhausted and the buyer rightfully cancelled the contract.

In the color section of the contract the seller lists the color of the granite as "Gallo Ornamental" that is type of stone which comes in various colors. Pat's indoor and outdoor materials @ *http: patscolor.com/materials/granite/giallo-ornamental/* list some of the different colors of available granite.

The Court or appellee have not invoked a statue, case law or standard of conduct that would deny appellant rights of a full reimbursement in the Court's ruling in favor of the appellant.

The contract includes the approval of sold of goods and the installation of said goods. However, there is no instruction by the seller instructing the buyer what steps are to be taking if there is no agreement to finalize the contract.

ARGUMENT

I. THE CONTACT IS NONE BINDING BECAUSE THE BUYER REJECTED THEDELIVERY OF THE GOODS, THUS PROVIDING THE BUYER WITH THE RIGHT TO CANCEL THE CONTRACT.

A. The S.C. UCC Laws allows the buyer to reject the contract and receive reimbursement in several insistences.

1. S.C. UCC 36-2-606 (1) sates in part, "Accept of good occurs when the buyer after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them despite their non-conformity.

The seller has made part of his contract the following condition *(Page 1 of the contract item 18)* "All balances due are to be paid on arrival of the installation team. Homeowner or contactor will sign off that they are completely satisfied prior to the installation team leaving the job site." In this case appellant rejected the delivery of goods as the result of the granite being the wrong color.

2. S.C. UCC 36-2-711(1)(b) "Where the seller fails to make delivery of repudiates or the buyer rightfully rejects or justifiably revokes acceptance the with respect to any goods involved...the buyer may cancel or and whether or not he has done so may in addition recovering so much of the price as paid has been. (b) Recover damages for non-delivery as provide in this chapter (Section 36- 2-713).

3. S.C. UCC 36-2-106 "Cancellation occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of termination except that the canceling party also retains remedy for the breach of the whole contract or any unperformed balance.

Appellant requested the reimbursement of payment that had been paid under rejected contract as the result of appellant hire another company to complete the job. Accordingly, Judge Ford was required by law to request the seller to reimburse appellant the cost of the contract. As stated in appellant's complaint, he should have been reimbursed for the installation cost because the seller never installed the granite.

II. THE SELLER WAS PROVIDE WITH AMPLE TO CURE BUYERS REASONS FOR NOT ACCEPTANCE NON-CONFORMITY OF GOODS, WHICH THE BURDEN REMAIN WITH THE SELLER TO PROVE THE NON-CONFORMITY WAS CORRECTED.

On or about May 14, 2015, the installer installed the granite and removed the granite because the granite was the wrong color. Moreover, appellant did not sign any paperwork accepting the delivery of the granite. On or about May 18, 2015 appellant met with the manger concerning the color of the granite unfortunately an agreement to resolve this matter was not obtainable. Nor did the Seller provide appellant with any written suggestion that would indicate that they were willing cure the problem. Thus, appellant filed a complaint in Small Claims Court on June 23, 2015. The seller had reasonable time to deliver the granite after appellant request for the goods to deliver, where a contract provides for successful performance but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may terminated at any time by either party. *(See S.C. UCC 36-2 309).* The time following appellant's rejection of the delivery of the granite coupled with the silence by the seller to address the matter at hand. Appellant was forced to file a complaint in Small Claim Court canceling his contract with the appellee. Thereby asking the Court to enter a judgment for appellant in the about of the contract on record. (*See Ramirez v. Auto 88 N.J. 277 (1982) 440 A.2d 1345*

In this case the issues are very similar to the case at bar. The respondent rejected the van delivery following the inspection of the van with a salesman he advised the respondent's not to accept the van because it was not ready for delivery. Even though the two parties tried to work things out they could not come to an agreement, therefore the respondents never took possession of the van. The court ruled that the respondent's had a right to cancel the contact for any nonconformity and be restored to their pre-contract positon. Nonetheless, the seller may still effect a cure and preclude unfair rejection and cancellation by the buyer. The trail court

determined respondent had rejected the van within a reasonable time. Appellant has the burden of proving that it had corrected the defects and court found that Appellant did effect a cure. Thus, the respondent was entitled to cancel the contract.

A. APPELLANT PROVIDED TESTIIMONY FORM A WITHNESS THAT WAS PRESENT DURING THE ATTEMPTD INSTALATION OF THE GRANITE AND HEARD THE INSTALLER STATE THAT THE GRANTIE WAS THE INCORRECT COLOR.

The Appellee did not present any documentary or testimony that installers were not qualified to make the above statement. The installers would have to some authority to make decisions because the appellees' contract requires them have the homeowner to sign-off that there is no damage to granite and they are completely satisfied before they leave the residence. When the installers came to appellant's residence they identified themselves as employees of East Coast Granite. Clearly, they were representing East Coast Granite and Tile when they made that statement. Judge Ford failed to explain the judicial reason for his ruling, so it is unclear if the above testimony was taken into consideration.

B. THE SALE RPRSENTIATIVE GEOOF POLIN MIS-LEAD THE COURT BY STATING THAT APPELLANT CONTRACTED WITH ANOTHER COMPANY TO PURCHASE THE GRANITE AT CHEAPER PRICE

Appellant never contracted with another company (C & A) to install granite. However, Appellant did obtain an estimate from C & A to purchase granite. The estimate was obtained because appellant was purchasing cabinets and C & A offered a discount on the granite if both were purchased from the company. I shared this information with Mr. Polin and ask him if he would match the price. Mr. Polin called appellant to inform him that his company does match other companies' prices. There is a difference between an estimate and a contract. A contact means that the buyer has agreed to make a purchase based on the estimate. This was not situation in this case, consequently Mr. Polin mis-spoke when he testified that appellant entered in a

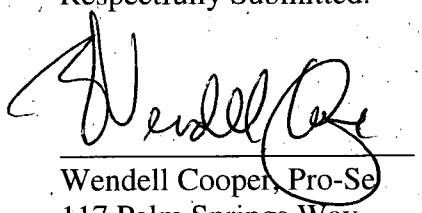
contact to purchase the granite a much lower price before East Coast Granite and Tile Inc. fabricated his granite. Furthermore, appellant had already paid for East Coast Granite and Tile to install granite as outlined in the contract on November 31, 2014. (Transcript Page 9, 3-10). Moreover, the company that wrote the estimate that Mr. Polin is referring to did not install the granite. The contract to purchase the granite from Blue Carol Stoneworks was done on June 23, 2015, after East Coast Granite and Tile refused to cure the problem.

Lastly, based on the stated reasons above Judge Ford's second order should be stricken from the record.

CONLUSION

Accordingly, the court of common pleas judgement against Cooper's should be denied for the foregoing reasons.

Respectfully Submitted.



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