THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001061

James Stephen Nivens and Carolyn Nivens. ..... Appellant

v.

JB & E Heating & Cooling, Inc. ..... Respondent

FINAL BRIEF OF RESPONDENT

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October 23, 2020

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STATEMENT OF ISSUES

I. WAS THE PREDOMINANT PURPOSE OF THE CONTRACT A SALE OF GOODS AS CONTEMPLATED BYSOUTH CAROLINA CODE §36-2-725.

FACTS

On or about October 4, 2010, Appellant contracted with the Respondent for the installation of a geothermal HVAC unit at 105 Mountain View Street, Clover, SC. Pursuant to the contract the Respondent installed the unit. In March 2011 an email was sent by the Respondent that addressed the allegation by the Appellant that the unit was not working properly (R. p. 61). The last time that the unit was worked on by the Respondent was 2012 (R. p. 49). On or about March 28, 2012, a complaint was filed with the South Carolina Department of Labor and Licensing Regulation before the Residential Builders Commission alleging that the Respondent had improperly installed of the unit. On February 13, 2013, Panther Heating and Cooling, Inc. prepared an inspection report for Appellant, identifying alleged defects in the installation of the HVAC system (R. p. 40 on July 23, 2014). The Hearing Officer of the Commission issued a recommendation that the Complaint be dismissed (R. p. 41-48). The Hearing Officer's recommendation was adopted as a final Order, was issued January 27, 2015 (R. p. 50). The Appellant commenced this action on August 10, 2017 by the filing of a Summons and Complaint. The Respondent timely answered and thereafter filed a Motion for Summary Judgement. The Motion for Summary Judgement was heard by the Court on February 7, 2019. On March 18, 2019 the Court issued it Order granting the Respondent's Motion for Summary Judgement.

ARGUMENTS

I. THE PREDOMINANT PURPOSE OF THE CONTRACT WAS NOT A SALE OF GOODS AS CONTEMPLATED BY SOUTH CAROLINA CODE §36-2-725.

In order for a contract to fall under the six year statute of limitations of South Carolina Code §36-2-725 the contract must be for goods rather than services. If a contract provides for both good and services the Court use the "Predominant Purpose" test to determine if the UCC applies. *Ranger Construction Co. v. Dixie Floor Co., 433 F. Supp. 442 (D.S.C. 1977).* If the predominant purpose of the contract is the rendition of services with goods incidentally involved the UCC is not applicable. In determining the predominant purpose of the contract, the Court should consider the language of the contract the structure of compensation and ratio of materials supplied to labor expended. *Fournier Furniture, Inc., v. Waltz-Holst Blow Pipe Co., 980 F. Supp. 187, 189 (W.D. Va. 1997).* The Court found that the total value of the contract was $15,280.00. The Court further found that only $6,100.00, including sales tax, was for the material, which is less than 40% of the total value of the contract. The Appellant agreed with this calculation (R. p.113, lines 2-7). There were no allegations that the equipment was defective. The complaint was concerned the services provided by the Respondent including an allegation that the Respondent did not choose the correct equipment. The Respondent did not design, fabricate or manufacture the Climate Master Unit. The Respondent acquired the unit its necessary materials to the removal and installation service contract.

The Respondent cites the case *Coakley & Williams, Inc., v. Shatterproof Glass Corp., 706 F.2d 456, 460 (4th Cir. 1983).* In *Coakley* the Court looked at the language of the contract, the nature of the supplier's business and the intrinsic worth of the materials provided as the

factors in determining predominant nature of the contract. In the present case the contract itself is unclear as to whether it is predominantly for the sale of goods or for services. In looking at the second factor, the nature of the suppliers business, the Respondent is not a manufacturer or a store selling a product. It is a heating and cooling company that installs products. In looking at the intrinsic materials provided the undisputed fact is that over 60% of the contract was for installation. These factors clearly weigh in the Respondent's favor.

The statute of limitations runs from the date the injury is discoverable by the exercise of reasonable diligence. *Republic Contract Corporation v. SCDHPT, 332 S.C. 197, 503 SE2d 761 (SC App. 1998).* The appellant had the inspection report of Panther Heating and Cooling, Inc. on February 13, 2013. The report identified problems in the system, so Appellant had notice of the problems by that date. This action was not filed until August 10, 2017, and therefore was not filed within the three year statute of limitations.

CONCLUSION

For the reason stated, the Court should affirm the judgment of the Circuit Court.

Respectfully Submitted,

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