RAD CONCEPTS, INC. v. WILKS PRECISION INSTRUMENT CO.

DAVIS, Judge.

RAD Concepts, Inc. (RAD) appeals from the judgment rendered by the Circuit Court for Montgomery County (Woodward, J., presiding), at a bench trial, in favor of appellee Wilks Precision Instrument Company, Inc. (WPIC) ... for RAD’s breach of contract ....

FACTUAL BACKGROUND

This appeal arises from claims of breach of contract between former business associates involved in the manufacturing and selling of radiology equipment. According to Thomas B. Wilks, President of WPIC, he met with Glenn Strawder of RAD in February of 1998 “to give [him] some budgetary quotes so he knew what he was looking at for costing on tooling and piece parts costs” for the manufacture of a patented x-ray cassette holder. Appellant sought this information to determine how much capital would be required to launch this new venture. WPIC was impressed with the cassette holder and, accordingly, informed appellant that no “up front” money would be required with creative financing. With this specialized financing, RAD was able to have the tooling for two steel molds for its project amortized into the unit price. RAD explained that, although it had approximately $30,000 to pay to WPIC at the initiation of the contract, WPIC instructed appellant to use that money for advertising instead.

The parties did not draft a formal agreement until two years later. WPIC submitted a proposed contract to appellant to which the latter responded by proposing an amendment that provided for RAD to improve the sample and the finished product. WPIC agreed to the amendment and the final contract read as follows:

Contract #1

Date: 02/22/00
To: Rad Concepts
Fax #: 301-483-9433
From: Tom
Total # of Pages: 2

Dear Glen [sic],

This company is pleased to submit the following quotation for your review:

One (1) Single Cavity Production Mold to Produce Tray and one (1) Single Cavity Production Mold to Produce I-Beam (including engineering drawings) $62,948.00

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Parts Molded in the Above Molds from Black ABS (including 2 ea. Holes drilled and tapped in the tray, and 2 ea. Thumb Screws per Set) ........................ $10.63/Set

Note: One Set = One Tray and One I-Beam

Tooling amortization on 5,000 Sets ................................................................. $12.59
Total Parts Costs for Initial Order of 5,000 Sets ......................................... $23.22 each

Special Packaging will be quoted upon request.

Delivery: Samples in Twelve (12) to Fourteen (14) weeks, after receipt of Order and Approval of Drawing(s) by Rad Concepts, Inc/Glenn Strawder.

F.O.B.: Our Plant

Terms: Tooling cost(s) to be amortized over initial order of 5,000 sets (as discussed above) purchased within one (1) calendar year of tooling completion and approval of Samples/Finish Sets. Net 30 Days for production, upon approval of Credit. Shipping will be UPS (ppd & add). Ownership of Tooling will transfer upon timely payment of parts invoices totaling at least 5,000 sets.

Please note: Future orders will carry a Mold Set-up Charge of $350.00 per Mold per run. Minimum quantities may be required due to vendor requirements on the Thumbscrews.

Lastly, we request that Rad Concepts, Inc/Glenn Strawder purchase all injection molded products covered under U.S. Patent #6,017,149 from WPIC for a period of at least five (5) years from approval of Sample/Finish Set.

We hope this quotation meets with your approval and you favor us with your order....

.... Pursuant to the contract, WPIC produced steel molds for the tray and I-Beam bar in accordance with the drawings approved by Mr. Strawder. Although the drawings specified 7/16” brass screws, the sample screw provided to WPIC by Mr. Strawder was “off size” and smaller than a standard 7/16” screw. Mr. Wilks suggested, and Mr. Strawder agreed, to use a smaller 3/8” screw because it was less expensive. However, Mr. Strawder wanted to see how the smaller screw worked before committing RAD to the purchase of 10,000 screws for the 5,000 cassette holders. Accordingly, by letter dated May 5, 2000, Mr. Wilks offered to provide 500 smaller “thumb screws” for RAD at a cost of $2.75 each. On May 16, 2000, Ms. Mott [Vice President of RAD] noted her agreement on Mr. Wilks’ May 5 letter.

On June 19, 2000, WPIC completed production of the first 47 cassette holders or units and notified RAD that the units were ready for delivery. On the same day, Mr. Strawder and Ms. Mott went to the WPIC plant, picked up the units and paid the full amount due, as set forth in Invoice No. 14327, for the 47 holders and the remaining 406 screws (94 screws were used in the 47 units).

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However, a letter dated June 19, 2000, was delivered to WPIC reducing RAD’s initial order of 5,000 units to 703 units and 1,000 screws. According to Mr. Strawder, WPIC responded with the following: if RAD raised the order back to 5,000 units, (1) RAD would not have to pick up the entire 5,000 units at one time; (2) RAD would be invoiced only for the amount it picked up; and (3) RAD would not have to pay for the “first couple of batches of” cassette holders until RAD sold and collected money from its customers. On July 17, 2000, Ms. Mott cancelled the order for 703 units and reinstated the initial order for 5,000 units by sending WPIC the following letter: “Please void our order dated June 19, 2000. We now request an order of 5,000 holders and 10,000 screws.”

The first 47 units were rejected by RAD because of scratch marks on the surface of the trays. Mr. Wilks then suggested texturing the surfaces of the trays to reduce the scratch marks and offered to replace, without charge, the 47 holders with textured trays. On July 28, 2000, after RAD agreed to pay $2,300.00 for texturing the 5,000 units and $400.00 for freight, WPIC faxed a letter confirming such charges and the continued use of the smaller screws WPIC had employed in the first 47 holders. Ms. Mott replied to WPIC with a hand-written note agreeing to amortizing the new charges but objecting to the smaller screws and requesting the larger screws specified in the drawings. Ms. Kelvie [Office Manager for WPIC] then calculated the new amortization charge by crediting the amortization amount paid by RAD on the 47 units (Invoice No. 14327) and adding the texturing and freight costs. The result was an increase in the amortization charge for the 5,000 holders from $12.59 to $13.00 per unit. Mr. Wilks also agreed to use the larger screws in the 5,000 holders. On August 1, 2000, WPIC sent the 800-pound steel mold to an outside vendor for engraving texture on the surfaces of the tray mold.

In order to use up the previously ordered 500 smaller screws, Mr. Strawder verbally placed an order with WPIC for 195 units in early August. On August 23, 2000, after receiving the textured mold, WPIC began running the order of 195 units and the replacement of the 47 original holders. On August 25, 2000, RAD picked up the 242 units from the WPIC plant without inspection and without making any payment and immediately began to fill the orders received from its customers. On August 31, 2000, WPIC sent RAD Invoice No. 14415 for the 195 units, which invoice reflected the new amortization charge of $13.00 per unit. Mr. Strawder requested time to pay this invoice and Mr. Wilks agreed to payment by January 1, 2001, but if not paid by that date, WPIC would impose interest at the rate of 1.5% per month accruing from the original due date of September 30, 2000. On December 4, 2000, Ms. Mott submitted a payment of $1,000.00 toward Invoice No. 14415 with a hand-written note saying: “Tell Tom that this is a partial payment on Invoice No. 14415. Thank you for your patience. We hope to pay the rest as soon as possible.” RAD made no further payments on Invoice No. 14415. By the end of December 2000, RAD had sold 39 units at $249.00 per unit, for a total revenue of $9,711.

Meanwhile, on August 23, 2000, WPIC began to manufacture the 5,000 holders. A sample holder from the final run of 5,000 units was sent on September 11, 2000 to RAD for its approval. On September 14, 2000, Ms. Mott telephoned Ms. Kelvie and acknowledged the receipt of the sample. According to Ms. Kelvie, Ms. Mott said, “It looked wonderful. Go with it.” Ms. Kelvie also [stated] that she discussed with Ms. Mott a new amortization amount for the tooling costs based upon the balance of such costs after payment on the previous invoices, plus the texturing, spread over the 5,000 units ordered by RAD. Ms. Kelvie memorialized Ms. Mott’s
approval of the September 11 sample by writing “Parts approved 9/15 [sic]/00” on RAD’s July 17 order for 5,000 holders. Ms. Kelvie also noted the new amortization cost by writing on the same document the following:

* New 65,000.00
Amort <2,535.00> Inv. #14415
62,465.00

Conversely, Ms. Mott [explained] that she did not recall ever making such statement but remembered having told Ms. Kelvie that Mr. Strawder would evaluate the sample and get back to WPIC. Mr. Strawder also [stated] that he never approved the September 11 sample.

After the Mott-Kelvie telephone conversation, WPIC completed the final order of 5,000 units on September 19, 2000. WPIC did not notify RAD of the completion of the 5,000 units, and RAD never picked up any of these units.

In a letter dated December 12, 2000, Mr. Strawder wrote to Mr. Wilks the following:

Hi Tom,

How is everything? Hope life is good! Do you need any help spending your money? (Smile)

Tell you why I’m writing. Please find enclosed one of the 200-plus holders of RAD Concepts, Inc. from our first shipment from you. Please look at the top surface of the bar. Can you tell us why there are all of those scratches? Lori [Mott] checked most of the boxes of holders we received from you and all of them are like this. Do you know what happened? Are these marks permanent? Or can it be corrected? Do you think these are major marks? How did it get past your people[?] Do you think that the others you have made up are damaged like this too?

Tom when we talked about the plate like portion of the holder being fabricated so that it would look better than originally shown us, the bar did not have these major marks on the top surface. I do not want to get any of your employees in trouble but someone is always doing something that I do not believe is normal in your industry. We are receiving units that have mistakes too often.

You know Tom how important it is for us to make a good first impression. You know this is a brand new product and we need to make a good start. HELP US!!!!!

Sincerely,

Glenn

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After several unsuccessful attempts to contact RAD in order to respond to the above letter, Mr. Wilks referred the matter to WPIC’s attorney, Damon Bernstein. Mr. Bernstein wrote a letter to RAD dated January 25, 2001, notifying it of the completion of 5,000 units and requesting assurances of performance. In that letter, Mr. Bernstein wrote the following:

...Under the agreements between the parties, WPIC has produced the items requested and it stands ready to deliver the balance of the order. Apparently, after you recognized the extent of your delinquency in making payment, a letter was sent questioning the quality of the final product. To the extent that the units have a blemish, this can readily be corrected. However, WPIC has every reason to question RAD’s ability and intentions with regard to payment. Therefore, you must provide actual payment or assurances acceptable to WPIC that the amounts due will be paid within a time certain which is acceptable to WPIC, before any further product or corrective action will be furnished ...

Before he could respond to Mr. Bernstein’s letter, Mr. Strawder received a telephone call from Mr. Wilks on February 5, 2001. During the conversation, which became acrimonious, Mr. Wilks said, “If we cannot sort things out, maybe our lawyers can.” In turn, Mr. Strawder said that he was never going to buy the “trashes” WPIC produced. On the same day, Mr. Strawder wrote a letter to Mr. Bernstein stating that he could not understand why Mr. Bernstein was claiming that RAD owed WPIC for the 5,000 units when Mr. Wilks mentioned a past due amount of only $1,500.00. Mr. Strawder then offered to make installment payments of at least $150.00 per month until the debt was satisfied.

On February 10, 2001, RAD received Invoice No. 1144 from WPIC for $118,150.00, which covered the manufacturing costs and tooling amortization for 5,000 units. Mr. Strawder wrote Mr. Bernstein a second letter dated February 20, 2001 complaining that half of the 242 units had I-Beam bars with scratch marks, which prevented the sale of these units to RAD’s customers. He demanded that the scratched I-Beam bars be replaced with new ones. Mr. Strawder also demanded that WPIC give an explanation concerning the scratch marks on the I-Beam bars because he could not believe Mr. Wilks’ claim that those marks were normal and part of the molding process. Regarding future payments to WPIC, Mr. Strawder stated that RAD needed to spend all of its money on marketing, advertising, shipping, and billing the product to its customers. Nevertheless, RAD would continue to make installment payments of $150.00 per month as promised in Mr. Strawder’s February 5 letter.

In the year 2000, RAD sold 14 cassette holders during the month of August, 16 in September, 6 in October, 2 in November, and 1 in December. Thereafter, RAD sold 37 more units until January 3, 2002. Out of a total of 76 holders sold, RAD received only 3 back from its customers.

WPIC filed its Complaint on December 4, 2001, requesting judgment against [RAD] for the outstanding balance due and owing of $121,757.85 and interest in the amount of $8,446.33. [RAD] filed an Amended Counterclaim against [WPIC] on January 3, 2002, in which it set forth a prayer for damages of over $16,000,000 for [WPIC]’s alleged breach of contract.
After settlement discussions failed, the parties stipulated to proceeding by way of a bifurcated trial to determine separately the issues of liability and damages. The circuit court … conducted a two-day bench trial on the issue of liability on June 30, 2003 and July 1, 2003, after which the parties submitted proposed findings of fact and conclusions of law. The court heard closing arguments on November 13, 2003 and held the matter sub curia.

On January 12, 2005, the court issued its Memorandum Opinion, in which it announced that judgment would be entered in favor of WPIC on its claim and against RAD on its counterclaim ….

* * *

LEGAL ANALYSIS

Appellant challenges the court’s application of [UCC] § 2-609 and its reliance on § 2-610 cmt. 3 in finding that RAD statutorily repudiated the contract by failing to provide adequate assurance of due performance. RAD also assigns error to the court’s finding that, in addition to the repudiation by statute, Strawder repudiated the contract with WPIC in his telephone conversation with Wilks on February 5, 2001. Because WPIC committed “major breaches” in August 2000, October 2000, on January 25, 2001 and February 1, 2001, which “rendered Contract #1 impossible of performance long before February 5, 2001,” RAD argues that judgment should be entered against WPIC for breach of contract and that RAD be “given the opportunity to prove its damages.”

* * *

RAD argues … that the court erred in finding that it repudiated Contract #1 for the 5,000 units during a telephone conversation between Strawder and Wilks on February 5, 2001. RAD claims that, assuming that Strawder’s statement that he would not purchase the “trashes” WPIC created did amount to a repudiation of the contract, he retracted the statement, pursuant to [UCC] § 2-611, on the same day by way of a letter to WPIC’s attorney, which stated in part:

I also can’t figure out why Tom has gotten [the WPIC attorney] involved so fast. And I don’t know why you are saying that we owe “Wilks” payment for 5,000 holders right now. The amount of money past due that Tom mentioned on the phone today was $1,500.00. I told Tom that I thought we had agreed over the phone months ago to pay the late interest charges on this overdue amount. We have never received a statement about making payment on these interest charges from Tom and have spoken with him on more then [sic] one occasion about it again. I still don’t understand why Tom has gotten you involved for such a small debt instead of a collection company better yet why didn’t he just send us the bill, call us or write us a letter.

I am making arrangement for payment of the $1,500.00. [RAD] can make a minimum payment of $150.00 (one hundred & fifty dollars) per month until this debt is exhausted. We will make a larger payment as soon as sales improve. Starting date for the first payment is March 1, 2001.

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It is Rad Concepts, Inc. desire to continue doing business with Wilks. We cannot afford to stop filling orders now. We cannot close shop now. Tom [Wilks] knows this I’m sure. It would not be fair to a new product to not be able to continue at this point. (Emphasis added).

The trial judge in this case had the opportunity to sit as the trier of fact and observe the witnesses’ demeanor. We hold that the trial judge committed no error, and did not abuse his discretion in finding repudiation on the part of RAD....

It is undisputed that Strawder stated his unwillingness to continue with Contract #1. The record evidence is sufficient to demonstrate repudiation, given the trier of fact’s duty to weigh the evidence. We next consider whether that unequivocal repudiation was retracted.... RAD could retract Strawder’s statement refusing to purchase the 5,000 units to which it was contractually bound, so long as WPIC did not materially change its position or consider RAD’s refusal to perform final. Despite appellant’s effort to retract its statement and maintain business relations with WPIC, it is clear that WPIC, as the aggrieved party, materially changed its position after that telephone conversation. WPIC submitted its invoice for payment for the balance due on Contract #1, received by RAD five days after the telephone conversation on February 5, 2001. Section 2-611(2) also requires that the purported retraction must include adequate assurances. Strawder’s letter does not comply with § 2-611. He offered a payment plan for the contract for the 242 additional units, but stated nothing with respect to Contract #1. Assuming, arguendo, that he was alluding to Contract #1, WPIC had the option to deem RAD’s offer to pay $150 per month for the overall debt of all units as an inadequate assurance. Viewing the evidence in the light most favorable to WPIC, we hold that the court did not err in finding that RAD repudiated Contract #1.

Appellant asserts … that the circuit court erred in relying upon §§ 2-609 & 2-610 and the respective Comments to these sections. Specifically, RAD claims that the demand letter from WPIC’s counsel was not written in compliance with § 2-609, and that the “creative financing” to which the parties agreed did not make the balance due....

Because application of the provisions of the Uniform Commercial Code is often fact-based, a trial court has discretion as to how to interpret and apply the laws of the Commercial Code. The Court of Appeals reiterated the manner in which appellate courts should analyze commercial laws, with guidance from the Official Comments:

... [I]n interpreting the Code, [we use] the same principles of statutory construction that we would apply in determining the meaning of any other legislative enactment. These well settled principles require ascertainment of the legislative intent, and if, as is the case here, construction becomes necessary because the terminology chosen is not clear, then we must consider not only the significance of the literal language used, but the effect of our proposed reading in light of the legislative purpose sought to be accomplished. Unlike most state statutory enactments, the U.C.C. is accompanied by a useful aid for determining the purpose of its provisions – the official comments of the Code’s draftsmen. While these comments are not controlling authority and may not be used to vary
the plain language of the statute, they are an excellent place to begin a search for
the legislature’s intent when it adopted the Code.

UCC official comments).

The court, in its application of the pertinent legal principles to the facts of this case, did
not err in its findings or abuse its discretion. RAD notes that the court correctly found that the
“parties entered [into] two separate contracts – one for 195 cassette holder units [in August of
2000] and the other for 5,000 units [in February of 2000].” RAD, nevertheless, argues,
unconvincingly, that its failure to pay under the August contract cannot and should not be viewed
in conjunction with its ability to perform, i.e., pay for the 5,000 requested units under the
February contract, Contract #1.

The circuit court delineates the reasons why it found RAD liable on the August contract
for 195 units, thereby imposing the responsibility of performance for payment upon RAD. The
court explained that it found RAD accepted these units by “acting in a manner inconsistent with
seller’s ownership,” in accordance with § 2-606(1)(c), when RAD took possession of the units on
August 25, 2000, without payment, and began to sell and ship the units to customers on August
28, 2000. The court also found that RAD failed to effectively reject the units despite having a
reasonable opportunity to inspect. See § 2-606(1)(b). Additionally, Strawder complained in
correspondence to WPIC about scratches in December of 2000, after units had been sold, but
failed to present any evidence of an effective rejection.

Significantly, the court also found that RAD did not prove by a preponderance of the
evidence that there was a defect in any of the units that substantially impaired the value of the x-
ray cassette holders, which would have allowed RAD to revoke its acceptance. See § 2-608(1)
(stating “[t]he buyer may revoke his acceptance of a ... commercial unit whose nonconformity
substantially impairs its value to him if he has accepted it”). The court noted that, because only
three units out of seventy-six were returned to RAD, and not due to an alleged defect, the units
clearly did not contain a defect that substantially impaired their value. With respect to RAD’s
failure to pay under this contract, the parties agreed that RAD would pay by January 1, 2001, or
have interest applied to the unpaid balance. In the meantime, RAD was to submit $150 per
month until the debt was satisfied, a requirement with which RAD did not comply, except for a
payment of $1,000 in December of 2000. We hold that these findings are all based upon
reasonable inferences that the trial judge, as trier of fact, was able to make in evaluating the
evidence.

Comment Three [to] § 2-609, on adequate assurance of performance, provides in
pertinent part: “[A] buyer who falls behind in “his account” with the seller even though the items
involved have to do with separate and legally distinct contracts, impairs the seller’s expectation
of due performance....” § 2-609 cmt. 3.

The record clearly discloses that the court made the rational inference and came to the
proper legal conclusion that WPIC had reasonable grounds for insecurity … that RAD would not
perform under the February 2000 contract and submit proper and timely payment for the 5,000 units, and was therefore justified in demanding assurances. The evidence revealed, when viewed in a light most favorable to WPIC, that “[w]hile RAD sold 39 units as of January 1, 2001, which sales generated revenue of $9,711.00, RAD paid only $1,000 toward the invoice [14415 requesting for the 195 units $4,607.85].” RAD contends that, because WPIC’s lawyer did not refer to or mention Contract #1 in the demand letter, § 2-609 did not apply. There is, however, the letter referring to the completed units, as well as the attorney’s request that RAD “provide actual payment or assurances acceptable to WPIC that the amounts due will be paid within a time certain which is acceptable to WPIC.” There is no doubt that a reasonable trier of fact would conclude that WPIC was demanding adequate assurances pursuant to § 2-609. Moreover, RAD, after repudiation, did nothing to effectively retract repudiation except offer payment for the August 2000 contract and rely upon the “creative financing” agreed to at the inception of the contract. RAD, however, wrote a letter to complain about scratches on the August 2000 holders, and referred to “the other units,” demonstrating its awareness of WPIC’s work on the 5,000 other units to be completed.

WPIC presented additional justification for its demand of adequate assurances of performance from RAD. Lei Fong Koo, testifying on behalf of WPIC, explained that, in his prior business dealings with RAD, his company, Metro Tool and Manufacturing Corporation, prepared molds for x-ray trays, drawings and a tray sample for RAD. Koo noted that his company created and modified the molds as requested by RAD and “sent out parts to the hospitals” pursuant to his company’s contract with RAD. When asked whether he was ever paid for his work, he responded that he was not paid. Koo’s testimony, coupled with RAD’s actions under Contract #2, demonstrates WPIC’s substantial justification in demanding assurances.

Because we hold that the court properly applied § 2-609 to the facts in this case, it follows that it did not err or abuse its discretion in applying § 2-610. Section 2-609(4) specifically states that “[a]fter receipt of a justified demand failure to provide within a reasonable time ... assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.” Once RAD failed to effectively retract its repudiation or provide assurances adequate to WPIC, its repudiation remained, requiring the court to invoke § 2-610, which sets forth the steps an aggrieved party may take in the event of an anticipatory repudiation. Further, the court accurately applied the substantial value test, articulated in Comment Three of § 2-610, and found that a “material inconvenience or injustice” would result if WPIC was “forced to wait and receive an ultimate tender minus the part or aspect repudiated.” § 2-610 cmt. 3. Consequently, we reject RAD’s claims that the court erred in its application of §§ 2-609 and 2-610 to reach its conclusions.

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For the reasons stated herein, we shall affirm the decision of the lower court.

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