

NOTICE

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2015 IL App (4th) 140201-U

NO. 4-14-0201

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 27, 2015

Carla Bender

4th District Appellate

Court, IL

ABB, INC.,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Macon County
TATE & LYLE INGREDIENTS AMERICAS, INC.,)	No. 10L51
Defendant-Appellee.)	
)	Honorable
)	Thomas E. Little,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.

Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court found the trial court did not err in granting summary judgment in favor of defendant.

¶ 2 In June 2010, plaintiff, ABB, Inc. (ABB), filed an amended complaint against defendant, Tate & Lyle Ingredients Americas, Inc. (Tate & Lyle), for breach of contract. In September 2013, Tate & Lyle filed a motion for summary judgment, which the trial court granted in February 2014.

¶ 3 On appeal, ABB argues the trial court erred in granting summary judgment in favor of Tate & Lyle. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Parties

¶ 6 ABB is a manufacturer of electrical transmission and distribution equipment, with

its principal place of business in Raleigh, North Carolina. According to Tate & Lyle, it is a global provider of distinctive, high-quality ingredients and solutions to food, beverage, and other industries and has its principal place of business in Decatur, Illinois.

¶ 7 B. The Transformer Contract

¶ 8 In 2005 or 2006, Tate & Lyle decided to expand its plant located in Loudon, Tennessee. The company hired an engineering firm to develop the specifications for the necessary electrical equipment, including a transformer. Based on the specifications, Tate & Lyle sought bids from three transformer manufacturers, including ABB.

¶ 9 In March 2008, ABB quoted a price of \$711,344 for one substation transformer, to be constructed at its facility in South Boston, Virginia. Given the amount of time to construct the transformer, ABB indicated shipment of the finished transformer would be in late November or early December 2008. The parties engaged in correspondence regarding the terms and conditions. On March 20, 2008, Carl Sechrest, vice president of global purchasing for Tate & Lyle, sent an e-mail to ABB's sales representative that the terms had been changed to reflect "the use of the agreed global terms and riders."

¶ 10 On March 21, 2008, Tate & Lyle submitted a purchase order and attached the agreed terms and conditions. The delivery date was set for December 19, 2008. The purchase order contained Tate & Lyle's standard "purchase conditions," which include sections on remedies and termination. The portion of the remedies section relevant to this appeal is set forth as follows:

"6. REMEDIES

6.1. Without prejudice to any other right or remedy which
the Purchaser may have, if any Goods are not supplied in

accordance with, or the Seller fails to comply with any of the terms of this Contract, the Purchaser shall be entitled to avail itself of any one or more of the following remedies at its discretion, whether or not any part of the Goods have been accepted by the Purchaser:

(a) to rescind the Order;

(b) to reject the Goods (in whole or in part)

and return them to the Seller at the risk and cost of the Seller on the basis that a full refund for the Goods so returned shall be paid forthwith by the Seller;

(c) at the Purchaser's option to give the Seller the opportunity at the Seller's expense either to remedy any defect in the Goods or to supply replacement Goods and carry out any other necessary work to ensure that the terms of the Contract are fulfilled;

(d) to refuse to accept any further deliveries of the Goods;

(e) to carry out at the Seller's expense any work necessary to make the Goods comply with the Contract ***."

The relevant termination section is set forth as follows:

"20. TERMINATION

20.1. The Purchaser shall have the right at any time and for any reason to terminate the Contract in whole or in part by giving the Seller written notice whereupon all work for the Contract shall be discontinued and the Purchaser shall pay to the Seller fair and reasonable compensation for work-in-progress at the time of termination but such compensation shall not include loss of anticipated profits or any consequential loss.

20.2. The Purchaser shall have the right at any time by giving notice in writing to the Seller to terminate the Contract forthwith if:

(a) the Seller commits a material breach of any of the terms and conditions of the contract which is not remedied in 14 days after notification thereof ***."

A separate rider to 20.2 replaced "The Purchaser" with "Each Party" and "Seller" with "other Party."

¶ 11 On July 24, 2008, Hazel Epperson, ABB's project-administration coordinator, submitted drawings and details to Tate & Lyle, requesting comments and approval to be given by August 8, 2008, in order for ABB to maintain its manufacturing schedule. Tate & Lyle approved ABB's drawings, and ABB released the job for manufacturing on August 5, 2008.

¶ 12 On November 18, 2008, Epperson notified Tate & Lyle that electrical testing of the transformer would begin on December 1, 2008, and would likely last five to seven days. She expected the shipment date of the transformer to be December 15, 2008.

¶ 13 On November 20, 2008, Bill Holman, ABB's sales representative, e-mailed Epperson and forwarded a request by Tate & Lyle that the delivery of the transformer be delayed until the week of January 5, 2009, because Tate & Lyle was "running behind on the site prep." ABB apparently complied with this request.

¶ 14 In early December 2008, ABB tested the transformer and it failed the sound-level test required by American National Standards Institute standards. In a deposition, ABB's engineer, Amit Mukerji, testified the transformer measured at 77.97 decibels, when it was guaranteed at 74 decibels. Epperson acknowledged the sound level failed to meet the requirements of the National Electrical Manufacturers Association as well as the contract. In February 2009, Epperson notified Tate & Lyle of the failure and asked for a waiver on the sound level. Tate & Lyle responded by stating it would insist the transformer meet all specifications outlined in the contract.

¶ 15 ABB attempted to fix the transformer. Mukerji stated it was determined the sound problem could be solved by adding steel to the core of the transformer. To do so, the unit had to be taken apart by cutting the cover, draining the oil, and removing the coils and the top yoke. Thereafter, the core steel had to be laid down flat and narrowed widths of steel had to be dismantled. Epperson stated cutting the cover of a transformer is a "serious matter." Mukerji stated the fix ended up damaging a porcelain bushing.

¶ 16 On March 19, 2009, ABB notified Tate & Lyle that the transformer had passed the sound test. However, on the same date, the transformer failed the "high voltage applied" portion of the testing. On March 24, 2009, Epperson notified Tate & Lyle about the failure, stating, in part, as follows:

"I have the unpleasant task of reporting a failure on the

applied portion of the test process. As discussed last week, the transformer passed the sound test with a comfortable margin, however, in the last portion of the test, the applied test failed. We have placed the unit in vapor phase to remove the oil from the assembly and expect to have the evaluation of the failure not later than Friday, March 27, 2009."

¶ 17 On April 13, 2009, Sechrest sent a letter to Epperson, indicating Tate & Lyle's decision to rescind the purchase order for the transformer based on "the failure of ABB to comply with its terms on multiple occasions." The letter stated, in part, as follows:

"As you know, ABB has not been able to demonstrate that the Power Transformer will meet the contractual specifications despite multiple attempts to do so. After these multiple failures, Tate & Lyle has grave concerns about the quality of the Power Transformer and ABB's ability to provide a Power Transformer which conforms in all respects with the Purchase Order and the included specifications and is fit for the purpose intended by Tate & Lyle. Because the Power Transformer has not been supplied in accordance with the Purchase Order, Tate & Lyle is rescinding the Purchase Order.

Any and all costs associated with the rescission of Purchase Order *** shall be borne by [ABB]."

In his deposition, Sechrest stated the rescission was based on the failed noise and voltage tests, as well as ABB's failure to deliver the transformer by December 2008.

¶ 18 Despite the rescission notice, ABB went about correcting the problems with the transformer. On April 27, 2009, Epperson sent a letter to Sechrest, which stated, in part, as follows:

"In accordance with the terms and conditions for the above referenced Purchase Order, ABB is pleased to inform you that we have corrected the issues identified in your letter of April 13, 2009 within the cure period allowed in the Purchase Order, and we will be shipping the transformer to Tate & Lyle."

That same day, Sechrest sent an e-mail to Epperson, noting Tate & Lyle had rescinded the purchase order and advising ABB "that no attempt be made to deliver."

¶ 19 C. Court Proceedings

¶ 20 In June 2010, ABB filed an amended complaint against Tate & Lyle. ABB set forth a claim of breach of contract, alleging it performed all aspects of the obligation imposed by the purchase order and Tate & Lyle refused, without justification, to accept the transformer and pay the purchase price. ABB alleged Tate & Lyle's "purported 'rescission' and refusal to accept delivery of the Unit therefore constitutes a breach of the Order." ABB sought damages in excess of \$750,000. ABB also set forth a claim of specific performance, asking the trial court to enter an order directing Tate & Lyle to accept delivery of the transformer, pay the full purchase amount plus storage costs of \$1,000 per week since May 1, 2009, prejudgment interest, and other damages.

¶ 21 In July 2010, Tate & Lyle filed an answer to the amended complaint. In September 2013, Tate & Lyle filed a motion for summary judgment, arguing the contract between it and ABB should be enforced as Tate & Lyle's rescission of the contract was proper.

¶ 22 In November 2013, ABB filed a memorandum of law in opposition to the motion for summary judgment. ABB claimed Tate & Lyle was seeking to avoid paying for the transformer after it cancelled a planned plant expansion due to the economic downturn of 2008 and 2009. ABB alleged Tate & Lyle's claim of rescission was "simply a ruse" to cover the actual reason for not purchasing the transformer, *i.e.*, it no longer needed it.

¶ 23 In February 2014, the trial court entered its written order and allowed Tate & Lyle's motion for summary judgment. The court stated, in part, as follows:

"Section 6.1 of the Purchase Conditions plainly provides for the remedy of rescission, at the discretion of the Purchaser, when goods are not supplied in accordance with the terms of the Contract. In this case the undisputed facts clearly demonstrate that [ABB] failed to comply with contractual requirements in that a) its[] transformer initially failed the sound test, b) its[] transformer later failed the voltage test, and c) it failed to ship the transformer to [Tate & Lyle] in a timely manner.

In support of its[] claim and in opposition to the Motion, [ABB] refers the court to Section 20 of the Purchase Conditions. More specifically, [ABB] claims that Section 20 provided [ABB] with a right to cure any defects in the transformer within 14 days after receipt of [Tate & Lyle's] letter of April 13, 2009. Essentially [ABB] contends that Sections 6.1 and 20 are inconsistent and when considering the contract language as a whole, Section 6.1 cannot be read to nullify Section 20 under the circumstances of this case.

Here the court finds that there is no inconsistency or ambiguity in the contractual agreement. Sections 6.1 and 20 provide each party with certain rights and remedies that apply to circumstances that may or may not arise during the contractual relationship. [ABB] and [Tate & Lyle] negotiated the terms of the contract. Although [ABB] suggests that the contractual language was drafted by [Tate & Lyle] and should be construed against [Tate & Lyle], the court finds no evidence to suggest that this contractual arrangement was anything more than an arms-length negotiation between two substantial and sophisticated corporations."

The court found no genuine issue of material fact exists and entered judgment in favor of Tate & Lyle. This appeal followed.

¶ 24

II. ANALYSIS

¶ 25 ABB argues the trial court erred in granting summary judgment in favor of Tate & Lyle. We disagree.

¶ 26

A. Standard of Review

¶ 27 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' "

Ioerger v. Halverson Construction Co., 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008)

(quoting 735 ILCS 5/2-1005(c) (West 2000)). We construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opposing

party. *Illinois State Bar Ass'n Mutual Insurance Co. v. Mondo*, 392 Ill. App. 3d 1032, 1036, 911 N.E.2d 1144, 1148 (2009). On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007).

¶ 28 B. Contract Interpretation

¶ 29 In construing a contract, a court's primary objective is to give effect to the intent of the parties. *Zabaneh Franchises, LLC v. Walker*, 2012 IL App (4th) 110215, ¶ 17, 972 N.E.2d 344.

"A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent. [Citations.] Moreover, because words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others." *Gallagher v. Lenart*, 226 Ill. 2d 208, 233, 874 N.E.2d 43, 58 (2007).

¶ 30 When parties dispute the meaning of a contract provision, "the threshold issue is whether the contract is ambiguous." *Fleet Business Credit, LLC v. Enterasys Networks, Inc.*, 352 Ill. App. 3d 456, 469, 816 N.E.2d 619, 629 (2004). If the language of the contractual provision is unambiguous, it is to be given its plain and ordinary meaning. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556, 866 N.E.2d 149, 153 (2007). "A contract is not rendered ambiguous merely because the parties disagree on its meaning." *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153, 821 N.E.2d 206, 214 (2004). A court's determination as to whether a contract is ambiguous is a question of law. *Peck v. Froehlich*, 367

Ill. App. 3d 225, 228, 853 N.E.2d 927, 931 (2006).

¶ 31 C. Rescission of the Contract

¶ 32 ABB argues summary judgment was inappropriate, claiming the purchase order was ambiguous as to ABB's ability to cure defects in section 20.2 and Tate & Lyle's right of rescission in section 6.1. Section 6.1 of the purchase conditions provides, in part, as follows:

"6.1. Without prejudice to any other right or remedy which the Purchaser may have, if any Goods are not supplied in accordance with, or the Seller fails to comply with any of the terms of this Contract, the Purchaser shall be entitled to avail itself of any one or more of the following remedies at its discretion, whether or not any part of the Goods have been accepted by the Purchaser:

(a) to rescind the Order[.]"

Section 20.2 of the purchase conditions provides, in part, as follows:

"20.2. The Purchaser shall have the right at any time by giving notice in writing to the Seller to terminate the Contract forthwith if:

(a) the Seller commits a material breach of any of the terms and conditions of the contract which is not remedied in 14 days after notification thereof ***."

A separate rider to 20.2 replaced "The Purchaser" with "Each Party" and "Seller" with "other Party."

¶ 33 Here, the quoted sections are not ambiguous. Both are straightforward and clear.

Sections 6.1 and 20.2 provide the respective parties with certain rights and remedies if and when certain circumstances arise during the contractual relationship. Moreover, termination of the contract and rescission are two separate and distinct matters requiring different scenarios for invocation. Thus, invoking the rescission clause of section 6.1 does not nullify the termination clause in section 20.2. Tate & Lyle had the power under the contract to terminate the purchase order if there was a material breach, subject to ABB's right to cure within 14 days. Tate & Lyle also had the power to rescind the order if ABB failed to comply with any of the terms of the contract. Tate & Lyle clearly chose the latter.

¶ 34 ABB likes to refer to section 20.2 as the "curable defects" provision. However, it is labeled the "termination" provision, which sets forth the rights of the parties in the event Tate & Lyle or ABB sought to terminate the contract. Section 20.2 gives ABB the right to cure, but only after Tate & Lyle gives written notice of its intent to terminate the contract. Section 20.2 does not refer to the right to cure defects if Tate & Lyle sought to rescind the contract. Moreover, the "remedies" provision of section 6.1 does not include language allowing ABB the right to cure.

¶ 35 Despite ABB's claims to the contrary, its reading of the two provisions necessarily writes the rescission remedy of section 6.1 out of the contract. Sections 6.1 and 20.2 are separate rights available to the designated parties, each with different triggers. ABB also claims Tate & Lyle could only rescind the contract under section 6.1 if the breach "had gone to the core of the contract." However, that phrase does not appear in section 6.1. Instead, that provision allows Tate & Lyle to rescind the order if any of the goods are not supplied in accordance with, or ABB fails to comply with, any of the terms of the contract. It does not restrict Tate & Lyle's right to rescind based on a breach of "the core of the contract."

¶ 36

D. Tate & Lyle's Right of Rescission

¶ 37

ABB contends "[r]escission is an extraordinary and drastic equitable remedy reserved for when a breach vitiates the core purpose of the agreement, and where money damages will not provide adequate compensation." In support, ABB cites cases addressing rescission as a court-fashioned remedy. See *CC Disposal, Inc. v. Veolia ES Valley View Landfill, Inc.*, 406 Ill. App. 3d 783, 952 N.E.2d 14 (2010); *Finke v. Woodard*, 122 Ill. App. 3d 911, 462 N.E.2d 13 (1984).

¶ 38

Here, however, the parties agreed upon rescission as a remedy, and ABB has not cited any cases that would limit the ability of courts to enforce such a contractual provision. Our supreme court has recognized "[t]he law and the public policy of Illinois permit and require that competent parties be free to contract with one another." *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 549, 687 N.E.2d 968, 972 (1997). Thus, "courts should not interfere with the right of two parties to contract with one another if they freely and knowingly enter into the agreement." *Garrison v. Combined Fitness Centre, Ltd.*, 201 Ill. App. 3d 581, 584, 559 N.E.2d 187, 190 (1990). Moreover, " 'courts may not rewrite language or add provisions to make the agreement more equitable.' [Citations.]" *Berryman Transfer & Storage Co. v. New Prime, Inc.*, 345 Ill. App. 3d 859, 863, 802 N.E.2d 1285, 1288 (2004).

¶ 39

In the case *sub judice*, the evidence indicates two well-established corporations engaged in arm's-length negotiations and agreed to an unambiguous contract. ABB and Tate & Lyle were free to enter into a contract with the rescission remedy, which Tate & Lyle could exercise if ABB failed to comply with any of the terms of the contract. ABB failed to comply with those requirements, as evidenced by the failed sound test, the failed voltage test, and the failure to ship the transformer in a timely manner. Thus, Tate & Lyle was well within its rights

under the contract to exercise the remedy of rescission. As no genuine issue of material fact exists in this case, the trial court did not err in granting summary judgment in favor of Tate & Lyle.

¶ 40

III. CONCLUSION

¶ 41

For the reasons stated, we affirm the trial court's judgment.

¶ 42

Affirmed.