COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2073

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DONALD JENSEN,

PLAINTIFF-RESPONDENT,

v.

A COMPLETE SPA & POOL SUPPLY CENTRE, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] A Complete Spa and Pool Supply Centre, Inc., appeals from a small claims judgment awarding Donald Jensen the return of his $500 deposit towards the purchase of a spa. A Complete Spa argues that it is

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

entitled to damages of $500 for Jensen's breach of the contract of sale for the spa. The store also argues that it is entitled to recover in quantum meruit for the reasonable value of removing the spa Jensen had chosen from its showroom and making it unavailable for sale to other customers. We disagree and affirm.

I. Background

¶2 On November 14, 1998, Jensen gave A Complete Spa a $500 deposit towards the purchase of a spa. The only written evidence of the transaction is a sales invoice that includes Jensen's name, a description of the spa, a statement that Jensen paid the $500 deposit by check, and the remaining balance of $3,213.60. On November 24, 1998, Jensen informed A Complete Spa that he could no longer afford the spa. About one week later, Jensen called A Complete Spa and spoke with Greg Griswold, an employee of the store. Griswold explained that the store policy was not to give cash refunds and that Jensen could instead have a $500 credit with the store. Jensen filed a complaint in small claims court, demanding the return of the $500. A Complete Spa entered a counterclaim for the $500.

¶3 At trial, Griswold testified that when Jensen put down the deposit, A Complete Spa moved his spa from the showroom into storage so that it would not get damaged and so other customers would not think it was still for sale. Griswold explained that moving the spa into storage involved a lot of work because the spas are large and in order to move one spa into storage, the other spas in the showroom have to be moved out of the way. Griswold argued that A Complete Spa should be able to keep the $500 because "[t]he deposit was to cover our cost to take the spa out of the store. I am not looking to make our whole profit because we ultimately were able to resell the spa." Griswold did not say whether, when A Complete Spa resold the spa, it received more or less than the $3,713.60 price to

which Jensen had agreed. The trial court entered a judgment in Jensen's favor for the $500 plus costs, explaining that without having informed Jensen that his deposit was non-refundable, A Complete Spa had no basis on which to keep the money. A Complete Spa appeals.

II. Analysis

¶4 A Complete Spa argues that the trial court erred by concluding that it was not entitled to keep the $500 as damages. The store contends that it had a valid contract to sell Jensen a spa and that Jensen breached the contract when he decided he could no longer afford the spa. A Complete Spa argues that it is entitled to the $500 to compensate it for the expense and effort of removing the spa from the showroom and storing it, and holding the spa off the market during the store's busy season.

A. Statute of Frauds

¶5 Under the Uniform Commercial Code's (UCC) "Statute of Frauds," WIS. STAT. § 402.201, contracts for the sale of goods for the price of $500 or more must be in writing. Section 402.201(1) provides:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by the party's authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing.

Thus, under § 402.201(1), the written document: must indicate that the parties entered into a contract for sale; must be signed; and is enforceable only for the

quantity of goods indicated in the document. Whether Jensen's agreement with A Complete Spa was a valid contract under § 402.201(1) is a question of law that we review de novo. *See* ***First Bank v. H.K.A. Enterprises, Inc.***, 183 Wis. 2d 418, 423, 515 N.W.2d 343 (Ct. App. 1994).

¶6 We conclude that Jensen's agreement to purchase the spa from A Complete Spa was an enforceable contract under WIS. STAT. § 402.201(1). In ***First Bank***, we noted that "it is essential, in order to satisfy the statute of frauds, that the 'signed memoranda', standing alone, acknowledge the existence of a 'contractual status.'" ***First Bank***, 183 Wis. 2d at 424 (quoting ***Oakley v. Little***, 272 S.E.2d 370, 373 (N.C. Ct. App. 1980)). In this case, the sales invoice and the check Jensen presented for the deposit were sufficient writings to demonstrate the contractual status between the parties. The sales invoice provided a description of the spa that Jensen agreed to purchase, and listed the purchase price and quantity. Jensen did not sign the invoice, but we conclude that the check he presented to A Complete Spa for the deposit sufficiently authenticated the agreement and identified Jensen as a party to the contract. Unlike in ***First Bank***, 183 Wis. 2d at 420-22, 426, where an appraisal document produced for an unrelated purpose was insufficient to demonstrate a binding agreement between the parties for the sale of a houseboat, in this case, the invoice and the deposit check clearly indicate Jensen's agreement to purchase the spa from A Complete Spa for $3,713.60.

B. Damages

¶7 Under WIS. STAT. §§ 402.610(2) and 402.703(4),[2] when Jensen repudiated the contract by informing A Complete Spa that he could no longer afford the spa, the store was entitled to resell the spa and recover damages as provided in WIS. STAT. § 402.706. Section 402.706(1) provides:

> Under the conditions stated in s. 402.703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under s. 402.710, but less expenses saved in consequence of the buyer's breach.

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[2] WISCONSIN STAT. § 402.610 provides, in part:

> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:
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> ….
>
> (2) Resort to any remedy for breach (ss. 402.703 or 402.711), even though the aggrieved party has notified the repudiating party that the aggrieved party would await the latter's performance and has urged retraction.

WISCONSIN STAT. § 402.703 provides, in part:

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (s. 402.612), then also with respect to the whole undelivered balance, the aggrieved seller may:
>
> ….
>
> (4) Resell and recover damages as provided in s. 402.706.

The determination of the proper measure of damages for Jensen's breach is a question of law that we review de novo. *See* ***Schorsch v. Blader***, 209 Wis. 2d 401, 405, 563 N.W.2d 538 (Ct. App. 1997).

¶8 We conclude that A Complete Spa has failed to demonstrate that it is entitled to any damages for Jensen's breach. "Damages for breach of contract are recoverable only to the extent that the evidence permits the loss to be established to a reasonable degree of certainty." ***Thorp Sales Corp. v. Gyuro Grading Co.***, 107 Wis. 2d 141, 152, 319 N.W.2d 879 (Ct. App. 1982), *aff'd*, 111 Wis. 2d 431, 331 N.W.2d 342 (1983). The evidence presented at trial does not demonstrate that Jensen's breach caused A Complete Spa to suffer a reasonably certain loss.

¶9 Under WIS. STAT. § 402.706(1), A Complete Spa was entitled to resell the spa and recover the difference between the resale price and the price Jensen agreed to pay. However, though Griswold stated that the store resold the spa, he presented no evidence of the resale price at trial. Without such evidence, there is no basis to establish that there was any difference between the resale price and the price Jensen had agreed to pay.

¶10 Under WIS. STAT. § 402.706(1), A Complete Spa is also entitled to recover any incidental damages, as defined in WIS. STAT. § 402.710, caused by Jensen's breach. Section 402.710 provides that "[i]ncidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." Although Griswold described the work involved in moving the spa Jensen had chosen from the showroom into storage, A Complete Spa presented no evidence that it incurred any "commercially

reasonable charges, expenses or commissions" as a result. We do not know the number of hours spent moving spas, nor the reasonable hourly rate for that work. A Complete Spa stored the spa on its premises and has not demonstrated that it incurred any delivery or storage charges as a result of Jensen's breach.

¶11 A party injured by a breach of contract "is not entitled to be placed in a better position because of the breach than he [or she] would have been had the contract been performed." ***Dehnart v. Waukesha Brewing Co.***, 21 Wis. 2d 583, 595-96, 124 N.W.2d 664 (1963). In this case, A Complete Spa was able to resell the spa after Jensen breached. Without demonstrating that it resold the spa for less than the price to which Jensen had agreed or that Jensen's breach resulted in quantifiable incidental damages, A Complete Spa is not entitled to keep Jensen's $500 deposit in addition to the amount it received in reselling the spa.[3]

C. Quantum Meruit

¶12 Finally, A Complete Spa argues that it is entitled to recover in quantum meruit on the basis of a contract implied in law for the reasonable value of the service of removing the spa from the showroom and making it unavailable for sale to other customers. However, "[w]here a valid express contract is proven no recovery can be had on an implied contract." ***Schultz v. Andrus***, 178 Wis. 358, 361, 190 N.W. 83 (1922). We have already concluded that A Complete Spa had a valid express contract with Jensen.

By the Court.—Judgment affirmed.

[3] We also note that A Complete Spa is not entitled to liquidated damages, as it argued at trial. Although WIS. STAT. § 402.718(1) provides that "[d]amages for breach by either party may be liquidated in the agreement" in a reasonable amount, Jensen's agreement with A Complete Spa did not provide for any liquidated damages.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.