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DISTRICT II

November 21, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1214

Manitowoc Cranes, Inc. v. Machine Tool Technologies, Inc.
(L.C. #2011CV149)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Machine Tool Technologies, Inc., d/b/a Mac-Tech, appeals from a judgment denying its request for attorney's fees against Manitowoc Cranes, Inc. Manitowoc cross-appeals from the

circuit court's decision denying it summary judgment on its claims against Mac-Tech. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2015-16).¹ We affirm the circuit court.

Mac-Tech's Appeal

As the prevailing party in the underlying litigation, Mac-Tech sought attorney's fees against Manitowoc. The circuit court denied that request.

We decided a prior appeal involving the parties. *Manitowoc Cranes, Inc. v. Machine Tool Technologies, Inc., d/b/a Mac-Tech*, No. 2015AP1334, unpublished slip op. (WI App Mar. 30, 2016) (hereafter *Manitowoc I*). As relevant to the pending appeal, we held in *Manitowoc I* that Manitowoc and Mac-Tech had a contract for a laser tube-cutting system and, pursuant to that contract, Mac-Tech acted as the prime contractor in relation to the system components to be supplied by it and other vendors. *Id.*, ¶20.

In May 2016, the case returned to the circuit court. In an order dated February 22, 2017, the circuit court dismissed Manitowoc's claims against Mac-Tech for failure to prosecute. Thereafter, Mac-Tech sought attorney's fees as the prevailing party, which the circuit court denied. Mac-Tech appeals.

Preliminarily, we hold that the circuit court erred when it denied Mac-Tech's request for attorney's fees on the basis that Mac-Tech and Manitowoc did not have a contract. As discussed above, *Manitowoc I* held otherwise. Nevertheless, the circuit court reached the right result.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The dispositive issue is whether Mac-Tech is the beneficiary of a fee-shifting provision such that it should be awarded attorney’s fees after prevailing on claims brought against it by Manitowoc.² Unless an agreement between the parties shifts liability for attorney’s fees and costs, each party bears its own fees and costs. *See Nationstar Mortg., Inc. v. Stafsholt*, 2018 WI 21, ¶27, 380 Wis. 2d 284, 908 N.W.2d 784.

Mac-Tech does not argue that its contract with Manitowoc contains a fee-shifting provision. Rather, Mac-Tech argues that the fee-shifting provision is found in documents comprising Mazak Optonics Corporation’s contract; Mazak was a supplier to Mac-Tech. This argument is flawed. First, Mazak did not have a direct contractual relationship with Manitowoc. *Manitowoc I*, unpublished slip op. ¶¶19-29. Second, as previously determined, the prime contract was between Manitowoc and Mac-Tech (the seller). As discussed below, Manitowoc’s terms and conditions excluded terms found in the seller’s forms, invoices, or other documents.

As explained in *Manitowoc I*, Manitowoc’s February 27, 2009 purchase order created its contractual relationship with Mac-Tech as the prime contractor on the laser tube-cutting system. *Manitowoc I*, unpublished slip op. ¶¶6-7, 20. The February 2009 purchase order, which Mac-Tech acknowledged, stated that the seller (Mac-Tech) agreed to “accept your order, subject to the conditions you specify on original order. Manitowoc standard terms and conditions apply.” The

² While we have considered all of the arguments in the briefs, we only discuss those arguments that are necessary to our decision. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (we are not bound by the manner in which the parties have structured or framed the issues). Arguments not mentioned are deemed rejected. *Id.*

document then directed the reader to the terms and conditions on Manitowoc's website.

Paragraph two of Manitowoc's terms and conditions provides in relevant part:

These Terms, including all documents specified by Manitowoc as being a part of these Terms, all addenda and any purchase orders issued to Seller by Manitowoc ("PO") constitutes the agreement between Manitowoc and Seller and supercedes all other agreements and understandings regarding the subject matter hereof. These Terms shall be deemed to be incorporated within any PO issued to Seller by Manitowoc. These Terms are expressly subject to, and Seller's acceptance expressly conditioned upon, Seller's assent to each and all of the terms hereof, and Manitowoc hereby objects to any different or additional terms not specifically agreed to in writing by Manitowoc. *The terms of Seller's forms, invoices or documents shall not be a part of the terms hereof.* Reference to Seller's bids, proposals or acknowledgments of any PO shall not affect the terms hereof and the terms of such items are expressly excluded herefrom. Manitowoc's receipt and acceptance of goods and services furnished under and pursuant to these Terms and any PO shall not be construed to be conduct inconsistent with the terms of this section.

(Emphasis added.)

Manitowoc's terms and conditions applied, and they neither permitted fee-shifting nor permitted Mac-Tech to rely upon Mazak's documents for fee-shifting. The circuit court did not err in denying Mac-Tech's request for attorney's fees from Manitowoc.

Manitowoc's Cross-Appeal

In January 2015, the circuit court denied Manitowoc's motion seeking partial summary judgment in its favor on the question of whether Mac-Tech breached its contract to provide a laser tube-cutting system. After our decision in *Manitowoc I*, the case returned to the circuit court in May 2016. In an order dated February 22, 2017, the circuit court dismissed Manitowoc's claims against Mac-Tech for failure to prosecute.

On cross-appeal, Manitowoc argues that the circuit court erroneously denied its summary judgment motion. We affirm because Manitowoc's challenge to the circuit court's summary judgment ruling is not adequately briefed. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Manitowoc does not challenge the circuit court's February 2017 dismissal of its claims against Mac-Tech for failure to prosecute.³ Additionally, Manitowoc does not cite any authority for the proposition that a party whose claims have been dismissed for failure to prosecute may have review of a summary judgment decision that predates such a basis for dismissal.

Because the same party did not prevail on the appeal and cross-appeal, we deny WIS. STAT. RULE 809.25 costs to both parties. RULE 809.25(1)(a).

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

³ Because the issue is not raised, we need not address whether a challenge to the February 22, 2017 dismissal order would be timely in this appeal.