HIGH COURT OF AMERICAN SAMOA
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IN THE HIGH COURT OF AMERICAN SAMOA

APPELLATE DIVISION

O.O. ENTERPRISES, INC., Appellant,	)	AP No. 01-09
v.	)	OPINION AND ORDER
AJIT IMPEX, Appellee.	)	

Before KRUSE, Chief Justice, WARD, Associate Justice, PATEA,* Acting Associate Justice, LOGOAI, Chief Associate Judge, and FA'ASUA, Associate Judge.

Counsel: For Appellant, Fiti A. Sunia
For Appellee, Marshall L. Ashley

BACKGROUND

Appellant O.O. Enterprises, Inc. ("O.O. Inc.") is an American Samoa corporation doing business in American Samoa. In October 2005, O.O. Inc. ordered via e-mail preserved plums from Appellee Ajit Impex ("Ajit"), a Hong Kong-based exporter with whom O.O. Inc. had been doing business for approximately 10 years. Ajit's December 9, 2005, Invoice No. 62221 to O.O. Inc. reflected the supply and shipment of, among other items, 394 cartons of sweet prunes--rather than preserved plums. Although it had ordered both sweet prunes and preserved plums before and understood the difference in the products, O.O. Inc. did not question the appearance of "sweet prunes" on the invoice. In

* The Honorable Elvis R. Pila Patea, Judge, District Court of American Samoa, serving by designation of the Secretary of the Interior.

January 2006, the sweet prunes arrived in American Samoa.

In March 2006, Izzudin Talib ("Izzudin") visited American Samoa on Ajit's behalf. During Izzudin's visit, he met with Nam Suk Ko ("Ko"), O.O. Inc.'s owner. There is nothing in the record, beyond Ko's testimony, indicating contact between O.O. Inc. and Ajit between January 2006, when O.O. Inc. received its order, and Izzudin's trip in March 2006. During the March meeting, Ajit agreed to lower the price for the sweet prunes to $2.15 per package. The price adjustment, which was signed by both parties, also provided that "payment in full must settle by end Dec. 2006." O.O. Inc. did not pay for the prunes. In May 2007, Ajit sued O.O. Inc.

The Trial Division held a two-day trial on the merits, during which it heard testimony and admitted other evidence. In its October 10, 2008, Order finding for Ajit, the Trial Division cited *Steffany v. Scanlan*, 3 A.S.R. 465, 464 (Trial Div. 1961) for the principle that a party who accepts the benefits accruing under a contract removes any defects in the contract by implied ratification. The Trial Division also relied, in part, on provisions of the Uniform Commercial Code ("U.C.C.") in its analysis. The Trial Division found that O.O. Inc. ratified its contract with Ajit because O.O. Inc. did not reject the goods Ajit sent. The Trial Division further concluded that O.O. Inc. was barred from any recovery because there was no evidence that O.O. Inc. gave timely notice that the goods it received were nonconforming. The Trial Division then awarded Ajit judgment in

the amount of $111,546.80.

DISCUSSION

I. Standard of Review

The Appellate Division reviews questions of law *de novo*, *Roman Catholic Diocese of Pago Pago v. Avegalio*, 20 A.S.R. 2d 70 (App. Div. Mar. 11, 1992), and findings of fact below for clear error, A.S.C.A. § 43.0801(b). A finding of fact is erroneous when "the entire record produce[s] the definite and firm conviction that the court below committed a mistake, according particular weight to the trial judge's assessment of conflicting and ambiguous facts." *TCW Special Credits v. K/V Kassandra Z*, 7 A.S.R.3d 3, 7 (App. Div. 2003) (internal quotations omitted).

II. Analysis

On appeal, O.O. Inc. maintains that the Trial Division erred by focusing on O.O. Inc.'s actions, rather than focusing on damages caused by Ajit when it sent nonconforming goods. Although we agree with the outcome of the case, we find that the Trial Division's reliance on *Steffany* and the U.C.C. is misplaced. *Steffany*, and precedent cited therein, deal with ratification when the execution or content of a contract is defective, rather than with the delivery of nonconforming goods. *Steffany* is thus not on point. Further, the Trial Division's citation to the U.C.C. is unnecessary because American Samoa statutes and the common law can be cited to the same end. *Kim v. Chang*, AP No. 15-08, Opinion and Order (App. Div. Aug. 18, 2009).

In *Kim v Chang*, this Court was also faced with an appeal

from a judgment of the Trial Division concerning the delivery of nonconforming goods. There, the Appellate Division first noted that whereas the *Fono* had not adopted the U.C.C., it had enacted A.S.C.A. § 1.0201 which adopted "the common law of England as is suitable to conditions in American Samoa." The Court went on to note that § 1.0201 has been interpreted, in *Tung v. Ah Sam,* 4 A.S.R. 764, 768 (Trial Div. 1971), to reference "that body of jurisprudence as applied and modified by the courts of the United States at the time the statute was adopted and as since construed." In addition, the Appellate Division further observed that American Samoa had its own, albeit abbreviated, commercial code.[1] The Court then addressed and decided the *Kim* appeal relying "exclusively" on pertinent provisions of American Samoa statutory law and applicable common law principles. *Id.* Opinion and Order at 5.

We likewise do so here, and with the above principles in mind, we now consider whether O.O. Inc. accepted the sweet prunes sent by Ajit. Under A.S.C.A. § 27.1532(3), a contract for the sale of goods is enforceable with respect to goods that have been "received and accepted." Because statute law does not offer further guidance with respect to acceptance, breach of contract, or damages, resort may be had to common law principles. *See Kim,* AP No. 15-08, Opinion and Order at 5.

"A fundamental variance between promised performance and performance made is breach of contract." *C.B.T. Lumber, Inc. v.*

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[1] *See* A.S.C.A. §§ 27.1501 *et seq.*

Pacific Reliant Industries, Inc., 20 A.S.R.2d 26, 28 (Trial Div. 1991). Goods are conforming if the goods are what was promised under the contract. *See id.* The parties do not dispute the existence of a contract, or contest the modification of the contract whereby Ajit reduced the price for the sweet prunes. Ajit sent sweet prunes, nonconforming goods, and was in breach.

However, it is well established that if a seller sends nonconforming goods, the buyer must either accept all or part of the goods, or reject them. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 69, 350. An acceptance of goods occurs when the buyer does any act inconsistent with the seller's ownership. *Kim*, AP No. 15-08, Opinion and Order at 5 (citing RESTATEMENT (SECOND) OF CONTRACTS § 69(2) ("An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable.")). *See also Rusk Mfg. Co. v. John D. Mershon Lumber Co.*, 266 Mich. 99, 103 (Mich. 1934) ("The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after a lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.")

To recover damages related to nonconforming goods, the buyer must have provided the seller sufficient notice that something was awry with the product. *See* RESTATEMENT (SECOND) OF CONTRACTS §

350. Thus, in determining whether O.O. Inc. is entitled to damages, the issue is not only whether Ajit provided nonconforming goods, but also whether O.O. Inc.: (1) rejected the nonconforming goods; (2) accepted the nonconforming goods as they were; or (3) accepted the nonconforming goods and gave sufficient notice that the goods were nonconforming.

Rightful rejection must be specific, and must be made within a reasonable time. *See Id.* A buyer who accepts nonconforming goods must pay the contract rate for those goods. *Kim*, AP No. 15-08, Opinion and Order at 7). A buyer who accepts nonconforming goods, but notifies the buyer in a timely manner that there is a problem with the goods, is not prohibited from seeking certain damages, such as consequential damages. *See* RESTATEMENT (SECOND) OF CONTRACTS § 350. If the buyer, however, does not notify the seller of the problem, the buyer cannot later seek damages in connection with nonconforming goods. *See id.*

O.O. Inc. contends that it rejected the sweet prunes as nonconforming, but there is nothing in the record to support that contention. Rather, the record indicates there was no rejection: there is no evidence of Ko's claimed communication with Ajit; there is a valid contract modification that is silent as to nonconforming goods or rejection; and O.O. Inc. acted inconsistently with Ajit's ownership by undertaking to sell the prunes. At trial, Ko testified that he informed Ajit immediately that it sent the wrong product, but he could not remember the means of communication he used. Ko thought he called Izzudin.

There are, however, no corroborating memoranda on the record in the way of telephone records, emails, letters or faxes - no evidence of communication near the date of delivery, or otherwise, before the March 2006 meeting. The trial court weighed the evidence--or lack of evidence--accordingly.

The March 2006, contract modification in which O.O. Inc. agreed to pay $2.15 per package for the prunes mentioned neither rejection nor nonconforming goods. In connection with the modification, Izzudin testified that during the March 2006 meeting, Ko paid for goods received in January of that year, except for the prunes because they were not selling well. Izzudin stated that Ko said he ordered too many cartons of sweet prunes, and needed more time to pay for that item. Izzudin agreed to extend the payment terms, as well as to lower the price for the prunes. A May 19, 2007, email from Ko informed Ajit that the prunes were selling slowly even at the reduced price, but, again, made no mention of nonconformity or rejection. Lastly, O.O. Inc. undertook to sell the sweet prunes, which is an act inconsistent with Ajit's ownership. The trial court's finding that O.O. Inc. accepted the sweet prunes is substantially supported.

A buyer is not precluded from seeking certain damages if it gave the seller adequate notice that nonconforming goods were received. *See* RESTATEMENT (SECOND) OF CONTRACTS § 350. Beyond Ko's testimony, there is nothing in the record to support a finding that O.O. Inc. notified Ajit of any nonconforming goods. Because

O.O. Inc. did not provide notice to Ajit, O.O. Inc. was barred from any recovery available to a buyer who accepts nonconforming goods.

O.O. Inc. also argues that a buyer has the option to revoke its acceptance of nonconforming goods. This is true only in limited circumstances not present in this case, such as when the seller promised the buyer that the defective goods would be fixed, but fails in its promise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 246.

Considering the record as a whole, and according appropriate weight to the trial court's assessment of conflicting facts, there is substantial evidence to support the Trial Division's findings of fact. Further, despite its citations to *Steffany* and the U.C.C., the Trial Division's conclusions are supported by statute and common law.

ORDER

For the reasons stated above, we AFFIRM.

It is so ordered.

Dated: 5/11/11

F. MICHAEL KRUSE
Chief Justice

JOHN L. WARD II
Associate Justice

ELVIS R. PILA PATEA
Acting Associate Justice

LOGOAI SIAKI P.
Chief Associate Judge

FA'ASUA P. POMELE
Associate Judge