EXHIBIT B

LEXSEE 1995 OHIO APP. LEXIS 3974

INTERNATIONAL EXTRUSIONS, INC., Plaintiff-Appellee vs. PM SECURITY ROLLING SHUTTERS, INC., ET AL., Defendants-Appellants

NO. 68325

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

1995 Ohio App. LEXIS 3974

September 14, 1995, DATE OF ANNOUNCEMENT OF DECISION

PRIOR HISTORY:

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court. Case No. 246428.

DISPOSITION:

JUDGMENT: AFFIRMED.

COUNSEL:

For plaintiff-appellee: Brian J. Green, Harry W. Greenfield, Cleveland, Ohio. Michael Hazelwood, Cleveland, Ohio.

For defendants-appellants: Thomas R. Pahys, Lakewood, Ohio.

JUDGES: JOSEPH J. NAHRA, JUDGE. SPELLACY, P.J., and SWEENEY, JAMES D., J., CONCUR.

OPINION BY: JOSEPH J. NAHRA

OPINION:

JOURNAL ENTRY and OPINION

NAHRA, J.:

Appellants, PM Security Rolling Shutters, Inc. and Greg Pappas, are appealing the trial court's verdict after a bench trial, in favor of appellee, International Extrusions, Inc. Appellants contend the verdict was against the manifest weight of the evidence and was contrary to law. For the following reasons, we affirm.

Appellee, International Extrusions, Inc. produced and sold aluminum extrusions on account to appellant PM Security. Appellee sued PM Security and Greg Pappas, president of PM Security, for non-payment on the account in the amount of $ 22,778.26. Appellants claimed they were not liable for certain invoices and were entitled to [*2] various credits. Appellant Greg Pappas claimed he was not personally liable on the account.

The trial court found appellants were not liable for a $ 3,048.90 invoice for goods not delivered by appellee. Appellants were liable for the full amount of the rest of the invoices, in the amount of $ 19,729.36. The trial court also found that Greg Pappas was personally liable on the account.

I.

Appellants' first through fourth assignments of error are interrelated and will be discussed together. They state:

> I. THE JUDGMENT IS NOT SUSTAINED BY THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> II. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED BY THE TRIAL COURT ARE CONTRARY TO THE EVIDENCE ADDUCED AT TRIAL.
>
> III. THE TRIAL COURT'S DENIAL OF APPELLANTS' MOTION FOR NEW TRIAL REPRESENTS AN ABUSE OF DISCRETION.

Appellants assert four separate issues under these assignments of error, each pertaining to different transactions between appellee and appellants. Appellants' first issue states:

> THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANTS ARE LIABLE TO APPELLEE FOR THE AMOUNT OF $ 6,377.00 UNDER INVOICE NUMBER 282800DI, AS THERE WAS NEVER A MEETING OF THE MINDS OF THE [*3] PARTIES AND, THEREFORE, THERE EXISTED NO BINDING, ENFORCEABLE CONTRACT BETWEEN THE PARTIES WITH RESPECT TO THIS INVOICE.

Appellants contend they are not liable to pay an invoice for $ 6,377.00 for one inch tubing. Appellee manufactured this tubing for another customer, who rejected the tubing. William Fouts, a manufacturer's representative for appellee, testified he told Greg Pappas he would sell the tubing to PM Security for a discounted price of one dollar per pound. According to Fouts, Pappas accepted the tubing at this price.

Pappas testified he told Fouts he would accept the tubing "for the right price." Fouts replied, "It will be right." The right price for Pappas was the scrap price of twenty-five to thirty cents per pound. Any higher price would be uneconomical to appellants, because they could obtain two inch tubing at seventy-two cents per pound, and would not have to fit together two one-inch pieces. When Pappas received an invoice for one dollar per pound, he called Ross Hazelton, one of appellee's salesmen. Pappas told Hazelton to pick up the tubing, but appellee never picked up the tubing.

Hazelton testified he had no conversations with Pappas about the tubing. [*4] Fouts testified Pappas had no complaints about the tubing or price of the tubing. Fouts also stated when he went to PM Security's plant, he observed that part of the tubing had been used. Fouts did not know a price of one dollar per pound was uneconomical for appellants' use.

In its findings of fact and conclusions of law, the trial court found the parties agreed to the price of one dollar per pound for the tubing, and there was a meeting of the minds. See *Episcopal Retirement Homes, Inc. v. Ohio Department of Industrial Relations (1991), 61 Ohio St.3d 366, 575 N.E.2d 134.* The court also found appellants accepted the tubing, did not reject or revoke acceptance, and were therefore liable on the invoice. See *R.C. 1302.61, 1302.64, 1302.65, 1302.66.* These findings were based on some competent, credible evidence, namely the testimony of Fouts and Hazelton. Judgments supported by some competent, credible evidence cannot be reversed as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, Seasons Coal Co., Inc. v. City of Cleveland (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273.*

Appellants assert Fouts' [*5] testimony was not credible, because it is impossible to believe Pappas would have accepted the uneconomical price of one dollar per pound. It is not impossible to believe Pappas made an uneconomical decision, perhaps by mistake. Appellants also argue Fouts' testimony was vague and uncertain, and Pappas' testimony was more credible. Fouts was positive that he specifically conveyed the price to Pappas. The trial judge was in the best position to determine which witnesses were more credible, and this court cannot substitute its judgment as to the credibility of witnesses. *Seasons Coal, supra, State v. Awan (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 277.* The trial court's decision that appellants were liable on this invoice was not against the manifest weight of evidence and was not contrary to law.

Appellants' second issue states:

> THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANTS ARE LIABLE TO APPELLEE FOR THE AMOUNT OF $ 4,750.00 UNDER INVOICE NUMBER 233510DI AS APPELLEE, BY FAILING TO DELIVER TO APPELLANTS ACCEPTABLE SAMPLES WHICH COULD HAVE BEEN APPROVED BY APPELLANTS FOR USE, FAILED TO PERFORM ITS CONTRACT.

The invoice in question was for service charges to produce [*6] the third and fourth dies ordered by PM Security. PM Security submitted samples of finished product so appellee could make the dies. Ross Hazelton testified that the wall thickness had to be increased over the thickness of the samples. Hazelton stated Pappas was aware of the increased wall thickness. The print drawings sent to Pappas reflected the change in size. Pappas signed off on the prints. Pappas had previously informed appellee he was unequipped and unable to verify print drawings.

The dies were manufactured in accordance with the print drawings. Sample parts were made from the dies. Hazelton said appellants received samples from both dies, but Pappas testified he only received samples from one of the dies. Pappas informed appellee the samples

were too thick and were unacceptable. New dies would have to be made to produce acceptable parts.

Appellants assert appellee breached the contract because the samples were not acceptable. Appellants argue they did not accept the samples, and therefore did not accept the dies.

The parties originally agreed that the dies would conform to the samples submitted by appellants. There was evidence the parties subsequently modified this agreement, [*7] and agreed to increase the thickness. Hazelton testified Pappas was aware of the design change. Pappas approved of the change by signing the prints. Pappas cannot claim he did not agree to the print drawings because he did not understand them. A person entering into a contract has the duty to make reasonable efforts to learn its contents. *Campco v. Distributors, Inc. (1987), 42 Ohio App. 3d 200, 203, 537 N.E.2d 661.* Appellee produced dies which conformed to the prints, and thus fulfilled its agreed to contractual duties.

Appellants could not rightfully reject the dies, because the dies conformed to the contract. See *R.C. 1302.60.* Appellants were liable for the die charges, although they could reject the samples and be free from obligations to order units produced with the dies.

There were no implied warranties that the dies would meet appellants' particular purpose. The seller had no knowledge or reason to know the part dimensions required by appellants. See *R.C. 1302.28.* Appellants agreed to deviate from the sample, but did not indicate what deviations were acceptable.

Competent, credible evidence shows appellee did not breach the contract and appellee was entitled to payment [*8] for the dies.

The trial court's findings of fact were incorrect in regards to this issue. There was no evidence supporting the trial court's findings that the dies conformed to the samples submitted by appellants and appellants accepted the samples produced by the dies. This error is harmless, however. *Civ.R. 61.* As discussed above, the parties agreed the dies would deviate from the samples, and appellee fulfilled its contractual duty.

Appellants' third issue states:

> THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANTS ARE LIABLE TO APPELLEE FOR THE FULL AMOUNT OF INVOICE NUMBERS 220870DI; 220890DI; AND, 229580DI, AS PRODUCT DELIVERED BY APPELLEE TO APPELLANTS UNDER SAID INVOICES WERE DEFECTIVE AND APPELLANTS WERE ENTITLED TO A 50% CREDIT.

Appellants claim they were entitled to credits for materials produced with the first and second dies. Pappas testified that items under invoice numbers 220870DI and 220890DI had defective paint. The items were returned to appellee for repainting and shipped back to PM Security. The items were still unsatisfactory. Appellee sold appellants spray paint for $ 90 to fix the problems. Some of the materials from these invoices were crushed [*9] and unfit for use.

Pappas further testified that Fouts said there was going to be a credit for these items, but Fouts did not state an amount. PM Security paid the full price for these invoices and did not return any material. Fouts testified that he did not discuss credits and no credits were issued.

Slats sold under invoice number 232540DI had unacceptable color variations. According to Pappas, Fouts promised a credit of greater than fifty percent. Fouts testified he did not discuss any credits, and Pappas agreed to use the slats "as is." When Fouts visited PM Security's plant, he did not observe any of the material in question. Pappas told Fouts the materials had been used.

There was some competent, credible evidence supporting the trial court's determination that appellants accepted these goods, and did not reject or revoke acceptance. See *R.C. 1302.64, 1302.61, 1302.66.* Appellants were obligated to pay the contract rate for the goods they accepted. *R.C. 1302.65.* The trial court chose to believe appellee's witnesses' testimony that no credits were offered. As stated above, the credibility of witnesses is primarily for the trier of fact. *State v. Awan, Seasons Coal, supra.* [*10]

Appellant's fourth issue states:

> THE TRIAL COURT ERRED IN NOT CREDITING APPELLANTS WITH THE SUM OF $ 3,120.00 FOR DIES FOR WHICH APPELLANTS HAD PAID APPELLEE IN FULL.

Appellants claim they are entitled to credits for the first and second dies, which appellants paid for and are in the possession of appellee. George Gazepis, appellee's vice president of finance, testified that demand was made by appellants to deliver the dies to appellants. Appellee stated it would turn over the dies when appellants paid the past due invoices.

Appellee had a molder's lien on the dies and could retain possession of the dies until appellants paid for the work performed with these dies. *R.C. 1333.31. R.C. 1333.31*, unlike *R.C. 1333.30*, does not require the die be

located in the state of Ohio. The molder must send a final notice to the customer only if the molder wishes to enforce the lien through an execution sale of the dies. *R.C. 1333.31(B)*, (C). The lien is perfected upon possession and notice is not required to perfect the lien. See *In re Flue Gas Resources (Bankr. Ct. N.D. Ohio 1987), 77 B.R. 628.* Appellee had a lien on the dies and could retain possession, even though appellee did [*11] not send a final notice. Appellants were not entitled to credits for the dies.

The trial court's conclusion that appellants were not entitled to any credits, and were liable to pay $ 19,729.36 on the account was supported by competent, credible evidence and was not contrary to law. The trial court did not err in denying appellants' motion for a new trial.

Accordingly, appellants' first through fourth assignments of error are overruled.

II.

Appellants' fifth assignment of error states:

> THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF APPELLEE AGAINST THE INDIVIDUAL APPELLANT, GREG PAPPAS.

Pappas testified that he signed a document entitled "Credit Application and Personal Guarantee" in order to obtain credit from appellee. The document states:

> I, the undersigned as officer, director, shareholder or partner, in my PERSONAL capacity agree to guarantee the credit extended to the above * * * corporation.

The document refers to monies due the Noecker Group. "Noecker Group" is printed at the top of the form, and the companies included in the group, including appellee, are listed on the form. Noecker Group is a registered name in the state of Michigan [*12] for a group of corporations, including appellee.

The guarantee clearly states that the signator guarantees the debt in his personal capacity. The language is not ambiguous and cannot be construed to mean that Pappas was merely signing on behalf of the corporation. Cf. *Yearling Properties, Inc. v. Tedder (1988), 53 Ohio App.3d 52, 557 N.E.2d 1231.* It is also clear that appellee was a party to the guarantee agreement. Appellee was a corporation under the Noecker Group and appellee's name was listed on the guarantee. Pappas admitted the purpose of signing the guarantee was to obtain credit from appellee. The trial court did not err in holding Pappas personally liable on the account.

Accordingly, this assignment of error is overruled.

The decision of the trial court is affirmed.

It is ordered that appellee recover of appellants its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*

SPELLACY, [*13] P.J., and

SWEENEY, JAMES D., J., CONCUR.

JOSEPH J. NAHRA

JUDGE

N.B. This entry is made pursuant to the third sentence of *Rule 22(D), Ohio Rules of Appellate Procedure.* This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.