HORIZON WELL SERV., LLC V. PEMCO OF NM, LLC

HORIZON WELL SERVICE, L.L.C.,
Plaintiff-Appellant,
v.
PEMCO OF NEW MEXICO, L.L.C.,
Defendant-Appellee.

No. 33,754

COURT OF APPEALS OF NEW MEXICO

December 30, 2015

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY, William G. Shoobridge, District Judge

COUNSEL

Eric D. Dixon, Portales, NM, for Appellant

Hinkle, Shanor LLP, Richard E. Olson, Maryl M. McNally, Roswell, NM, for Appellee

JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: MICHAEL E. VIGIL, Chief Judge, RODERICK T. KENNEDY, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} Horizon Well Service, LLC (Horizon) appeals from the district court's order dismissing its claims against PEMCO of New Mexico, LLC (PEMCO) for breach of contract, breach of warranty, and unfair trade practices. Horizon argues that the district court erred in determining that the parties' claims were settled by an accord and

satisfaction. Agreeing, we reverse and remand for proceedings consistent with this Opinion.

BACKGROUND

{2} PEMCO agreed to fabricate a specialized piece of well servicing equipment called a swabbing unit for Horizon. Horizon purchased an International Truck chassis and agreed to pay PEMCO $161,060.46 to construct the swabbing unit.

{3} PEMCO completed the unit and Horizon took possession of it on March 24, 2011. In early April 2011 Horizon returned the unit to PEMCO because the unit was vibrating. PEMCO worked on the unit's driveline and replaced the transfer case. In July 2011 Horizon was having difficulty with the unit's transmission and took it to American Equipment, a heavy equipment and truck repair shop. American Equipment consulted with Watson Truck and Supply (Watson) and together they determined that the truck's transmission needed to be replaced. The transmission was replaced and the drivelines were re-machined. The unit was still experiencing a vibration.

{4} At the end of August 2011 Horizon took the unit back to PEMCO to address the vibration. PEMCO discovered that the bolts and brackets securing the transfer case were bent and damaged. PEMCO replaced the bolts and brackets and lowered the transfer case. Then, in early September 2011 the unit was not shifting gears properly. Horizon took the unit to Watson. It was determined that the transmission issues were caused by an improper output speed and vibration, which were likely the result of the unit's transfer case being installed at an improper angle. Dan Wharf (Wharf), Watson's operations manager advised Horizon that if the issue was not addressed the new transmission would fail.

{5} Horizon took the unit to PEMCO again in mid-September 2011. The unit's transmission would not go into gear. Wharf went to PEMCO to look at the unit. He determined that the transmission had failed and needed to be replaced. After inspecting the transmission, Wharf confirmed that the transmission failure was caused by driveline vibration which likely resulted from the transfer case being installed at too great an angle. PEMCO agreed to pay Watson for replacing the transmission. PEMCO also re-positioned the transfer case.

{6} In November 2011 Horizon filed suit against PEMCO for breach of contract, breach of warranty, and unfair trade practices. PEMCO countersued for debt and money due, alleging that Horizon still owed PEMCO $13,214.86 for the fabrication of the unit, and seeking reimbursement for the cost of replacing the second transmission. After a bench trial, the district court dismissed the parties' claims finding that the claims had been settled by a full accord and satisfaction. The district court also determined that PEMCO had not engaged in unfair trade practices. This appeal followed.

DISCUSSION

{7} On appeal, Horizon challenges the district court's findings and conclusions concerning accord and satisfaction and unfair trade practices. And though the district court did not reach the merits of Horizon's warranty claims, it made findings related to the scope of the warranties, which Horizon also challenges. Although we reverse the district court's judgment on other grounds, we do address the district court's findings relevant to the warranty issue raised by Horizon as they are likely to recur on remand. *See Atherton v. Gopin*, 2015-NMCA-003, ¶ 39, 340 P.3d 630 (recognizing that where "the parties have argued issues that are sure to recur on remand, . . . it would be useful to address them in aid of the work to be done on remand yet to be done by the district court"), *cert. granted*, 2014-NMCERT-012, 344 P.3d 988.

Standard of Review

{8} Because Horizon challenges the evidence supporting the district court's factual findings and conclusions of law "we apply a substantial evidence standard of review." *Deutsche Bank Nat'l Trust Co. v. Beneficial N.M. Inc.*, 2014-NMCA-090, ¶ 7, 335 P.3d 217 (internal quotation marks and citation omitted), *cert. granted sub nom. Deutsche Bank v. Johnston*, 2014-NMCERT-008, 334 P.3d 425. Under this standard, we defer to the district court's factual findings, resolving all disputed facts and indulging all reasonable inferences in favor of the district court's findings. *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 18, 320 P.3d 1. "[W]e will not disturb the [district] court's factual findings unless the findings are not supported by substantial evidence." *Strata Prod. Co. v. Mercury Expl. Co.*, 1996-NMSC-016, ¶ 12, 121 N.M. 622, 916 P.2d 822. "Substantial evidence means relevant evidence that a reasonable mind could accept as adequate to support a conclusion."*Romero*, 2014-NMSC-007, ¶ 18 (internal quotation marks and citation omitted). The district court's legal conclusions are reviewed de novo. *Strata Prod. Co.*, 1996-NMSC-016, ¶ 12.

{9} We note that "findings of fact and conclusions of law are often indistinguishable, and a reviewing court is not bound by a designation as a finding." *Miller v. Bank of Am., N.A.*, 2015-NMSC-022, ¶ 27, 352 P.3d 1162 (alterations, internal quotation marks, and citation omitted). We are "not bound by a district court's determination when it is unclear whether that decision is a finding of fact or a conclusion of law." *Id.*

Accord and Satisfaction

{10} Accord and satisfaction is an affirmative defense. *Transamerica Ins. Co. v. Sydow*, 1988-NMSC-029, ¶ 4, 107 N.M. 104, 753 P.2d 350. Horizon argues that the district court erred in dismissing its claims, finding that Horizon and PEMCO settled their claims through an accord and satisfaction. "An accord and satisfaction is a method of discharging a contractual obligation by substituting for such contract an agreement for the satisfaction thereof and performing the substituted agreement." *Nat'l Old Line Ins. Co. v. Brown*, 1988-NMSC-071, ¶ 10, 107 N.M. 482, 760 P.2d 775. This requires that an offer of something of value be made in full satisfaction of a demand or claim. *Miller v. Prince St. Elevator Co.*, 1937-NMSC-027, ¶ 19, 41 N.M. 330, 68 P.2d 663. The offer must be accompanied by declarations specifying or conduct indicating that if the offer is

accepted “it is to be in full satisfaction.” *Smith Constr. Co. v. Knights of Columbus*, 1974-NMSC-016, ¶ 8, 86 N.M. 50, 519 P.2d 286 (internal quotation marks and citation omitted). The declarations or conduct must be “of such character that the [offeree] is bound so to understand such offer.” *Id.* (internal quotation marks and citation omitted).

{11} An accord constitutes a new contract between the parties. *Clark Leasing Corp. v. White Sands Forest Prods., Inc.*, 1975-NMSC-022, ¶ 4, 87 N.M. 451, 535 P.2d 1077. And, as with the enforcement of any contract, “the party seeking enforcement generally must show that the contract is factually supported by an offer, an acceptance, consideration, and mutual assent.” *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 42, 304 P.3d 409 (internal quotation marks and citation omitted); *accord Smith*, 1974-NMSC-016, ¶ 8 (“When considering the existence of an accord and satisfaction, we should examine the following elements: [(1) d]id the debtor make an offer in full satisfaction of the debt; [(2) w]as there an unliquidated or disputed claim which formed the basis of this offer; [(3) w]as this offer accompanied by acts and declarations which amounted to a condition; [(4) w]ere those acts and declarations such that the offeree was bound to understand them; and [(5) w]as the offer accepted in full satisfaction of the debt.”).

{12} In this case, the district court concluded that Horizon had accepted an offer made by PEMCO to settle Horizon’s warranty dispute in return for PEMCO’s forgiveness of the amounts owed by Horizon on the swabbing unit. The court further concluded that the parties’ actions “indicated an agreement to settle all claims by offsetting amounts owed effecting a full accord and satisfaction of all claimed damages.” Horizon argues that the evidence does not support these conclusions. We agree.

{13} Brett Abernathy, owner of Horizon, testified that the last time the unit was at PEMCO for repairs, he spoke with Gary Buie, President of PEMCO, regarding the balance due for the fabrication of the unit. According to Abernathy, Buie told him not to worry about paying the final payment of approximately $13,000. Abernathy received an invoice for the final payment, but because of the conversation with Buie, the invoice was not paid. It was Abernathy’s understanding that Buie told him not to worry about paying the invoice because of all the problems Horizon experienced with the unit.

{14} Buie, on the other hand, testified that he did *not* tell Abernathy not to worry about paying the remaining balance due for the manufacture of the unit. In fact, Buie testified that, as of the date of the trial, the final payment on the initial invoice was still outstanding. Cynthia Buie, Vice-President and office manager of PEMCO confirmed that the outstanding balance on that initial invoice was $13,214.46.

{15} Even under the deferential substantial evidence standard, the evidence presented at trial does not support the district court’s conclusion that the parties intended to offset the amount owed on the unit for the amount of Horizon’s warranty claims. Abernathy’s testimony reflects that Horizon unilaterally understood that PEMCO offered to forgive the remainder of Horizon’s debt for the swabbing unit, which is consistent with Abernathy’s testimony and the Buies’ testimony that Horizon did not pay

the remainder of the invoice. However, there is no evidence that Horizon understood that the forgiveness of the debt was conditioned upon the forfeiture of its warranty claims.

{16} We also note that in its answer to Horizon's complaint for breach of contract and breach of warranty, PEMCO did not affirmatively raise the defense of accord and satisfaction. Instead PEMCO filed a counterclaim for debt and money due, alleging that "[d]espite due demand, Horizon has not, to date, paid the amount remaining on the . . . unit." We recognize that a party's failure to affirmatively plead accord and satisfaction does not preclude that party from raising the defense later in the proceedings, as PEMCO did here. *See All. Health of Santa Teresa, Inc. v. Nat'l Presto Indus., Inc.*, 2007-NMCA-157, ¶ 12, 143 N.M. 133, 173 P.3d 55. However, the fact that PEMCO did not initially raise the defense and filed a counterclaim for the balance due on the original invoice, coupled with the evidence presented at trial, including (1) Buie's testimony that there was no offer by PEMCO to forgive Horizon's debt, (2) Abernathy's testimony that PEMCO continued its attempts to collect the balance of the original invoice, and (3) Cynthia Buie's testimony that the balance on original invoice was still outstanding, indicates that there was no mutual understanding or mutual assent between the parties concerning the forgiveness of debt or settlement of claims.

{17} Hence, the district court's conclusion that the parties' claims were settled by a full accord and satisfaction is inconsistent with the requirements for accord and satisfaction as set forth in *Smith* and with New Mexico precedent regarding enforcement of contracts. *See Strausberg*, 2013-NMSC-032, ¶ 42; *Smith*, 1974-NMSC-016, ¶ 8. For the reasons stated, we conclude that PEMCO's argument of accord and satisfaction is without merit.

Breach of Warranty

{18} Because the district court concluded that the parties' had settled their claims, it did not reach the merits of Horizon's warranty claims. Nonetheless, the district court made findings relevant to the warranty issues. Horizon now challenges those findings on appeal. We address the challenged findings pertaining to the warranty issues to the extent they are likely to recur on remand.

{19} It is undisputed that PEMCO gave a general warranty of one year on the swabbing unit, including materials and workmanship. At trial, Abernathy testified that the unit was in the shop for repairs a total of twenty-two days between its delivery in March 2011 and September 2011. He estimated lost profits flowing from the downtime at approximately $2,100 per day.

{20} Buie testified that the express warranty on the unit did not provide for downtime. According to Buie, he personally had not heard of anyone in the industry providing compensation for downtime under a warranty. When asked about the industry custom with regard to compensating for downtime, Wharf testified that Watson does not warranty downtime and that, in the industry, it is unusual to pay for downtime while

equipment is in the shop for warranty work. Mike Reynolds, of American Equipment testified that paying for downtime "depends on how important the customer is," and Abernathy testified that Horizon had, on occasion, compensated customers for lost production during downtime.

{21} Based on this evidence, the district court found that the custom in the industry, regarding warranties, is that they do not include coverage for downtime or business interruption. Horizon argues that the evidence is insufficient to establish an industry custom of excluding lost profits or downtime from warranties. Horizon also claims that, as a matter of law, industry custom is irrelevant to the scope of an express warranty.

{22} "[A] practice, in order to be considered 'custom,' must be sufficiently common so as to justify the expectation that it will be followed[.]" UJI 13-826 NMRA comm. comment. "The existence and scope of the trade custom must be proved as facts[.]" *Id.* Here, the conflicting testimony before the district court does not establish what is sufficiently common for the industry, such that there is an industry's expectation and it is followed. In fact, quite the opposite was established—there is no industry custom. We conclude that there is insufficient evidence to support the district court's finding as to the industry custom.

{23} As to Horizon's argument that industry custom is irrelevant to the scope of a general, express warranty, we agree. Consequential damages resulting from the breach of an express warranty may include lost profits. *See* NMSA 1978, § 55-2-715(2)(a) (1961) ("Consequential damages resulting from the seller's breach include . . . any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise[.]"); *Newcum v. Lawson*, 1984-NMCA-057, ¶ 38, 101 N.M. 448, 684 P.2d 534 ("In an action for breach of contract the one who fails to perform the agreement is justly responsible for all of the damages flowing naturally from the breach. The general rule of foreseeability is applicable in measuring damages for breach of contract." (citation omitted)). Industry custom may operate to modify or exclude the implied warranty of merchantability. *See* NMSA 1978, § 55-2-316(3)(c) (1961) (stating that "an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade"). However, we have found no authority for the proposition that industry custom can operate to limit or exclude consequential damages for breach of an express warranty, where no such limitation or exclusion is included in a warranty itself.

Unfair Trade Practices

{24} Horizon also challenges the district court's conclusion that PEMCO did not engage in unfair trade practices. Under the Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2009), the plaintiff must show that: (1) the defendant "made an oral or written statement, visual description or other representation that was either false or misleading"; (2) the false or misleading representation was "knowingly made in connection with the sale . . . of goods or services"; (3) "the conduct

complained of . . . occurred in the regular course of the [defendant's business]"; and (4) "the representation [was] of the type that may, tends to or does, deceive or mislead any person." *Ashlock v. Sunwest Bank of Roswell, N.A.*, 1988-NMSC-026, ¶ 4, 107 N.M. 100, 753 P.2d 346 (alterations, internal quotation marks, and citation omitted), *overruled on other grounds by Gonzales v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, 899 P.2d 576.

{25} Horizon claims that Buie, as PEMCO's agent, engaged in unfair trade practices by falsely representing himself as an expert in building swabbing units and then failing to deliver the quality of goods provided for in the contract. *See* § 57-12-2(D). Evidence relevant to this claim was presented at trial, however, the district court made no findings concerning that evidence. Without making relevant findings, the district court concluded that PEMCO did not engage in any deceptive or unfair trade practices.

{26} As a result, we reverse the district court's ruling on Horizon's unfair practices claim for lack of findings. *See Miller*, 2015-NMSC-022, ¶ 30 ("It is the trial court's duty to make findings of the essential or determining facts, on which its conclusions in the case were reached, specific enough to enable this [C]ourt to review its decision on the same grounds as those on which it stands." (alterations, internal quotation marks, and citation omitted)); *Green v. Gen. Accident Ins. Co. of Am.*, 1987-NMSC-111, ¶ 21, 106 N.M. 523, 746 P.2d 152 ("When findings wholly fail to resolve in any meaningful way the basic issues of fact in dispute, they become clearly insufficient to permit the reviewing court to decide the case at all." (alteration, internal quotation marks, and citation omitted)).

CONCLUSION

{27} For the forgoing reasons, we reverse the district court's judgment, and remand for proceedings consistent with this Opinion.

{28} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

RODERICK T. KENNEDY, Judge