

1 STATE OF MINNESOTA
2 IN THE SUPREME COURT

3
4 CASE NO. A06-2227
5
6

7 Gaylord's, Inc.,

8 Appellant,

Date of Filing of Appellate
9 Decision: 4 December 2007

10 vs.

Trial Court

11 Case No. CT-05-007744

12 Valspar Refinish, Inc.,

13 Respondent.
14

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17 **REPLY BRIEF OF APPELLANT, GAYLORD'S, INC.**
18
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1 the record?

2

3 Valspar introduced no evidence and did not even *claim* that
4 it didn't have actual notice that its products were defective,
5 and it doesn't explain *why*, if it didn't have actual notice and
6 if it didn't have any obligation to provide products free of
7 defects, *its representatives tried for a year to correct the defects in the products that it*
8 *supplied to Gaylord's*. Valspar's conduct reveals the absurdity of its
9 arguments. Its actions speak louder than its words.
10
11

12

13 Legal Argument and Authority

14

- 15 1. Genuine Issues of Material Fact Exist as to
16 Whether Gaylord's Revoked Acceptance of the
17 Products, Whether Written Notice of the
18 Defects was Required, and Whether Valspar has
19 Waived its Right to Written Notice.

20

21 Gaylord's has explained why Valspar may not rely on the
22 Supply Agreement (Agreement) or the General Warranty when it had
23 actual notice of its defective products and tried to correct the
24 defects for at least one year (Opening Brief, pp. 4-8; 12-20)
25 [App: 295-300;302-309;319-322]. Minnesota law provides that
26 written notice pursuant to a contract is not required when a
27 party has actual notice (Opening Brief, pp. 14-17).
28

1 Valspar's argument that summary judgment was proper on
2 Gaylord's breach of contract claim because Gaylord's did not
3 timely revoke acceptance of the defective products pursuant to
4 the Agreement is wrong [RB, page 15], because Valspar is *equitably*
5 *estopped* from invoking the limitations period in the Agreement
6 because it repeatedly promised to fix the defects and tried, for
7 over a year, without success, to fix the defects [Opening Brief,
8 pages 17-20]. Hydra-Mac, Inc. vs. Onan Corp. 450 NW2d 913 at 919
9 (1990). Equitable estoppel is ordinarily a *question of fact* to
10 be decided by the jury. Northern Petrol Chemical vs. U.S. Fire
11 Ins. Co. 277 NW2d 408, 410 (1979).
12
13

14
15 National Bankcard Services, Inc. vs. Family Express
16 Corporation, 2006 WL 2480479 (D. Minn. August 29, 2006)
17 [App:368], cited by Valspar in support of its argument that
18 actual notice will not override a contract's requirement of
19 written notice, actually *supports* Gaylord's position that written
20 notice is not required when actual notice exists [RB, page 20].
21
22

23 In National Bankcard Services (NBS), the plaintiff sold a
24 data processing service to the defendant to provide exclusive
25 authorization and capture services for the defendant's retail
26 sales at its gas stations and convenience stores. There were
27 delays in implementing the system, which were caused by the
28

1 defendant, but most of them were resolved. After about a year on
2 a 36-month service contract, the defendant switched vendors
3 solely based on price [App:368 at 370].
4

5
6 NBS sued for breach of contract and the defendant counter-
7 claimed arguing that providing non-breaching services was a
8 condition precedent to its own performance.
9

10 The appellate court did not say that providing conforming
11 products was never a condition precedent to a defendant's
12 performance. Moreover, the Court did not hold that NBS's
13 services had failed to conform. Although acknowledging that the
14 system had technical failures, there was no language in the
15 contract requiring NBS to provide a system free of bugs with no
16 chance to remedy them. In fact, *unlike Valspar*, NBS was able to
17 correct most of the defects. *Id.* at pages 370. There was no
18 discussion in NBS about whether the defendant gave NBS actual
19 notice of the defects in lieu of its failure to provide written
20 notice.
21
22

23
24 The appellate court said that "*Courts should not construe*
25 *contract provisions to be conditions precedent 'unless required*
26 *to do so by plain, unambiguous language or by necessary*
27 *implication.'*" [App: 370]. [Emphasis added].
28

1 In contrast to the facts in NBS, Gaylord's did not switch
2 suppliers based on price. It switched suppliers because
3 Valspar's products were so bad that they almost drove Gaylord's
4 out of business [App: 311-315]. Also, unlike Valspar, NBS
5 corrected the defects [App: 295-328]. *There was no discussion in NBS about*
6 *whether the plaintiff had actual notice of any defects.* In fact, the defendant
7 claimed that giving notice of the alleged breach "would have been
8 futile." [App:368 at 370]. Therefore, the appellate court did
9 not conclude as a matter of law that actual notice was
10 insufficient, as Valspar contends (RB, p. 21).
11
12

13
14 Here, there is a triable issue of material fact about
15 whether providing paint products that were useful is necessarily
16 implied as a condition precedent to Valspar's right to demand
17 written notice, especially when it had actual notice and had been
18 given a year to fix those defects.
19

20
21 Valspar expressly warranted that its products would conform
22 to its "published specifications" [App:40]. At a minimum, this
23 must mean that Valspar warranted its products would not be
24 worthless, or even *harmful*, to Gaylord's [as they were], or else
25 that warranty is meaningless and the Agreement is *illusory* [See
26 Opening Brief, pages 25-28].
27
28

1 Gaylord's expert provided unrefuted evidence that Valspar's
2 products contained contaminants and had serious quality control
3 problems, thereby raising a triable issue of material fact as to
4 whether Valspar's products met its own product specifications
5 [App: 324-328]. That, alone, should have precluded summary
6 judgment.
7

8
9 Valspar's inability to fix the problems frustrated the
10 purpose of the contract. As stated in NBS, frustration of
11 purpose is demonstrated when (a) the party's principal purpose in
12 making the contract is frustrated without that party's fault; (b)
13 by the occurrence of an event, the non-occurrence of which was a
14 basic assumption on which the contract was made [App: 368 at 371-
15 372].
16

17
18 The primary purpose of the Agreement in this case was for
19 Valspar to provide colors that matched, paint that applied
20 smoothly and evenly, and that properly and timely cured [App:
21 297-300, 311-317]. Otherwise, there would be no reason for
22 Gaylord's to buy Valspar's products because those products would
23 be useless, and even harmful, to it.
24

25
26 Based on Valspar's assurances to Gaylord's about its
27 resources and expertise, Gaylord's reasonably believed that
28

1 Valspar would provide products that were not defective. Valspar
2 didn't. Consequently, whether the contract was frustrated is
3 another triable issue of material fact and summary judgment
4 should not have been granted.
5

6
7 **2. Whether Valspar's Products Were Defective or**
8 **Failed to Conform to its Published**
9 **Specification is Material and the Summary**
10 **Judgment Motion Should Not Have Been Heard**
11 **Until Discovery was Completed.**

12 Valspar claims that the defects in its products were
13 irrelevant because Gaylord's failed to satisfy conditions
14 precedent to bringing an action based upon the defects or
15 nonconformities by failing to provide written notice (RB, p. 24).
16

17 As discussed in the Opening Brief, Valspar had actual notice
18 and is equitably estopped from asserting any limitations period
19 because of its repeated assurances over a year and its
20 unsuccessful efforts during that year to try to fix the defects
21 (Opening Brief, p. 17).
22

23
24 Valspar's argument that it did not have to provide products
25 free of defects is an admission that the Agreement and General
26 Warranty are *illusory*.
27
28

1 At the time Valspar's motion for summary judgment was heard,
2 Valspar had obtained a protective order, which allowed it to
3 refuse to disclose its "*published specifications*", among other
4 things [App: 223-224; 239]. In addition, discovery concerning
5 Valspar's notice of its defective products, whether it received
6 adequate cure time, and efforts made to remedy the defects was
7 unanswered [App: 224]. Only the deposition of Bill Lunney had
8 been taken. No one from Valspar had been deposed [App: 226].
9
10 Discovery on other issues material to the motion for summary
11 judgment was still outstanding at the time the stay was granted
12 [App: 223-225]. Consequently, Valspar's summary judgment motion
13 should not have been heard by the court until after discovery was
14 completed. Chavous vs. District of Columbia Financial Resp. &
15 Mgmt. Assistance Auth., 201 FRD 1 (DDC 2001) [staying discovery
16 is inappropriate where discovery is necessary to gather facts to
17 defend against a dispositive motion]. Id. at 3.
18
19
20

21 Valspar's argument that its product specifications were
22 provided to Gaylord's on product data sheets and on paint cans is
23 made in bad faith because *there is no reference to the record on*
24 *appeal showing that either claim in its brief is supported by*
25 *evidence introduced in the trial court.*
26

27 Valspar has also misrepresented Bill Lunney's deposition
28 testimony by failing to disclose that the reason he did not

1 testify that he knew nothing about the product specifications was
2 *because Valspar's attorney didn't ask him if he had that knowledge.* Consequently,
3 whether the "published specifications" were provided and of what
4 those specifications consist are further issues of material fact
5 which preclude the entry of summary judgment.
6

7
8 Valspar also fails to explain what it would have done
9 differently if Mr. Lunney, who is not a scientist, had been able
10 to understand the [unidentified] specifications and if he had
11 reported the product's nonconformance therewith in writing to
12 Valspar.
13

14
15 The obvious answer is nothing, because Valspar sent its own
16 representatives to Gaylord's plant for over a year to see the
17 problems for themselves and they still could not fix them [App:
18 308-309; 314-315; 320-322]. Did Valspar expect Mr. Lunney to
19 tell Valspar how to make paint and clear coat products?
20 Valspar's argument that Gaylord's knew what the specifications
21 were and could have reported Valspar's products' nonconformity
22 with those specifications is unsupported by the record and is
23 made in bad faith. It is evidence of Valspar's desperation to
24 try to justify the unjustifiable.
25

26
27 Why didn't Valspar support its arguments with references to
28 the record on appeal as required by Minnesota law?

1 3. Summary Judgment on Gaylord's Tort Claims,
2 Including Fraud, Should Have Been Denied.

3
4 Valspar claims that Gaylord's tort claims are governed
5 solely by the UCC, citing Hapka vs. Pacquin Farms, 458 NW2d 683
6 (Minn. 1990) [RB, page 40]. Gaylord's has refuted that argument
7 and respectfully refers the Court to pages 33 through 41 of its
8 Opening Brief.
9

10
11 With regard to Gaylord's fifth cause of action for fraud in
12 the inducement, Valspar argues that Gaylord's is barred by the
13 Minnesota Uniform Commercial Code (UCC) from bringing a tort
14 claim for fraudulent inducement [RB, page 40]. Valspar is wrong.
15

16 Pursuant to Minn. Stat. § 336.1-103(b):
17

18
19 *"Unless displaced by the particular provisions of*
20 *the Uniform Commercial Code, the principles of law and*
21 *equity, including...the law relative to capacity to*
22 *contract...fraud, misrepresentation...and other*
23 *validating or invalidating cause supplement its*
24 *provisions."*
25

26
27 ///
28

1 ETM Graphics, Inc. vs. H.B. Fuller Co. (WL 61394), Minn. Ct.

2 App. March 25 (1992) [RB, page 40], does not support Valspar's
3 argument that all tort claims are barred by the UCC. In ETM
4 Graphics, there were no factual issues in dispute and only
5 property damage was claimed. Here, there are factual issues in
6 dispute and Gaylord's damages include damage to its reputation,
7 lost income, and damages to the equipment used to make the truck
8 bed lids.

10
11 Minn. Forest Products, Inc. vs. Ligna Machinery, Inc., 17

12 F.Supp.2d 892 (Dist. of Minn. 1998), provides a comprehensive
13 discussion of circumstances under which fraud claims in
14 commercial settings similar to this case are permitted [Opening
15 Brief, pages 38-41].

17
18 Valspar also contends that the economic loss doctrine
19 pursuant to Minn. Stat. § 604.10 does not apply [RB, page 40].
20 Once again, Valspar is wrong.

22
23 The economic loss doctrine was partially codified in Minn.
24 Stat. § 604.10, which sets forth the conditions under which
25 damages may be recovered in both tort and contract:

26
27 ///
28

1 “(a) Economic loss that arises from a sale of
2 goods that is due to damage tangible property other
3 than the goods sold may be recovered in tort as well as
4 in contract, but economic loss that arises from a sale
5 of goods between parties who are each merchants in
6 goods of the kind is not recoverable in tort.”

7 Under Minn. Stat. § 336.2-104(1), a merchant is a person who
8 deals in the type of goods sold or if he had specialized
9 knowledge about the goods sold.
10

11 In determining whether the plaintiff was a merchant, the
12 Minnesota Forest court noted that “not all large, sophisticated
13 purchasers are necessarily merchants in goods of the kind they
14 buy”. Minn. Forest at 905. The court also stated that the issue
15 of whether a party is a merchant is a question of fact for the
16 jury. Id.
17
18

19 Gaylord’s cannot be considered a merchant under the UCC
20 because it sells truck bed lids, not paint and, therefore, does
21 not deal in goods of the kind involved in the transaction with
22 Valspar. Moreover, even though it uses paint products, its
23 knowledge is limited to the application of automotive refinishes,
24 not to the chemical formulation and manufacture of them [App:
25 225; 290-291].
26
27
28

1 Accordingly, Gaylord's is not a merchant pursuant to
2 Minnesota law and its economic losses, including lost profits, is
3 recoverable under Minn. Stat. § 604.10(a).
4

5
6 Conclusion
7

8 Again, Valspar's argument is: *Although we're not much good*
9 *at making automotive paint products, we're really clever, we have*
10 *really clever lawyers, and we have a really clever contract, so*
11 *we don't have to sell Gaylord's products that actually work.*
12

13
14 Gaylord's wants, and is entitled to, the opportunity to
15 present its claims to a jury of Valspar's peers, at which time
16 Valspar can tell the citizens of Minnesota about its cleverness
17 and can see how a jury of its peers reacts. Gaylord's asks this
18 court to give it the opportunity that it deserves for a jury to
19 determine how clever Valspar really is.
20

21 Dated: 16 April 2008

22 Respectfully submitted,
23

24
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29
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08-3623replybrief/sm