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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-648**

Industrial Lumber & Plywood, Inc.,
Respondent,

vs.

Cherry Tree Cabinets, Inc.,
Appellant,
Nova Wood Lamination, Inc.,
Respondent.

**Filed January 19, 2010
Affirmed
Stauber, Judge**

Hennepin County District Court
File No. 27CV08470

Jeffrey C. Thompson, Jamie L. Anderson, Howse & Thompson, PA., Plymouth,
Minnesota (for respondent Industrial Lumber)

James M. Ventura, Wayzata, Minnesota (for appellant Cherry Tree)

Glenn P. Bruder, Mitchell, Bruder & Johnson, Edina, Minnesota (for respondent Nova
Wood)

Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and
Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STAUBER, Judge

This is an appeal from summary judgment in favor of respondent seller, who sued for breach-of-contract based on materials delivered to but not paid for by appellant. Appellant argues that the district court erred in granting summary judgment in favor of respondent because it failed to consider appellant's affirmative defenses. We affirm.

FACTS

Respondent Industrial Lumber & Plywood Inc. is a wholesale supplier of wood products. In 1995, respondent entered into a credit agreement with appellant Cherry Tree Cabinets, Inc. Under the terms of the agreement, appellant agreed to pay finance charges of 1.5% per month for invoices not paid within 30 days and to pay collection and court costs.

In late December 2004, or early January 2005, respondent delivered an order of wood products to appellant. Appellant paid the invoice, and used the product to manufacture furniture and cabinetry. Appellant subsequently discovered that the product was defective and notified respondent. Appellant claimed that respondent "repeatedly promised to do whatever it takes to make it right." Appellant then sent respondent an invoice detailing the loss incurred from using the defective goods. Respondent failed to pay appellant's invoice but had earlier supplied conforming replacement products.

In the meantime, the parties continued their business relationship, with appellant ordering and respondent supplying wood products. However, because respondent did not

pay appellant's invoice for its losses in using the earlier defective wood products, appellant offset its alleged losses from subsequent invoices from respondent.

In January 2008, respondent brought suit against appellant for breach of contract and unjust enrichment. Respondent claimed that in 2005, it supplied appellant with various wood products that had been specifically ordered from time to time by appellant, but that appellant has refused to pay the balances owed on these orders. Appellant answered by way of affirmative defense, alleging that respondent had delivered defective wood products to appellant, that appellant did not discover the defect until it had "expended significant time, effort, and other resources to manufacture the wood products into furniture and cabinetry." Appellant claimed that "[t]his resulted in actual losses to [appellant] of more than \$30,000" and that these "consequential damages were offset against invoices from [respondent]."

In July 2008, respondent moved for summary judgment. The district court subsequently issued its order concluding that the undisputed evidence demonstrates that appellant "received the product and did not pay the invoices." Although the court acknowledged appellant's position that it was offsetting its loss from respondent's subsequent invoices, the district court found that appellant's "'claim' was never pled." Thus, the court granted summary judgment in favor of respondents because the "only claim in this case is the claim of [respondent] against [appellant]." This appeal followed.

D E C I S I O N

"On appeal from summary judgment, we review de novo whether a genuine issue of material fact exists, and whether the district court erred in its application of the law."

Peterka v. Dennis, 764 N.W.2d 829, 832 (Minn. 2009) (quotation omitted). “[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “[S]ummary judgment should be affirmed if it can be sustained on any ground.” *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

To establish a claim for breach of contract, the plaintiff must prove that “(1) a contract was formed; (2) the plaintiff performed any conditions precedent; and (3) the defendant breached the contract.” *Commercial Assocs. Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. App. 2006). When a party has breached a contract, the Uniform Commercial Code provides that “[t]he buyer on notifying the seller of an intention to do so may deduct all or any part of the damages resulting from any breach of contract from any part of the price still due under the *same contract*.” Minn. Stat. § 336.2-717 (2008) (emphasis added).

Here, appellant concedes that the parties had a valid contractual relationship and that it received a product from respondent. But appellant argues that respondent failed to adequately perform under the contract because it delivered a defective product to appellant, and then failed to make appellant whole. As a result, appellant offset its claimed damages by applying the damages to subsequent purchases of respondent’s product. Appellant argues that under the UCC, its decision to offset its damages is a valid defense to respondent’s breach-of-contract claim.

Appellant's argument is without merit because in order for section 336.2–717 to apply, there must be *one* contract. Here, the contract that appellant claims respondent breached is an entirely different contract from the contracts that respondent claims appellant breached. In other words, each order and resulting invoice between respondent and appellant constitutes a separate contract. Thus, appellant's affirmative defenses are not applicable because the defenses apply to a different contract than the contracts on which respondent's claim is based. Indeed, appellant conceded at oral argument that if there were multiple contracts, a counterclaim should have been filed in order for appellant to recover. But appellant failed to file a counterclaim, and fails to demonstrate that all of the transactions between appellant and respondent were made pursuant to one contract. As the district court found, the only claim before it was respondent's claim for breach of contract for appellant's failure to pay the later 2005 invoices. Appellant does not dispute that (1) respondent supplied certain products to appellant in 2005; (2) these products were not defective; and (3) appellant failed to pay for these products. Accordingly, there are no genuine issues of material fact, and the district court did not err in granting summary judgment in favor of respondent.

Affirmed.