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**IN THE
COURT OF APPEALS OF INDIANA**

KNITCRAFT CORPORATION,)
)
 Appellant-Plaintiff,)
)
 vs.) No. 49A04-1007-CC-397
)
 RALEIGH LIMITED, INC.,)
)
 Appellee-Defendant.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather A. Welch, Judge
Cause No. 49D12-0512-CC-49814

February 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

A garment manufacturer sued one of its retail buyers for breach of contract after the buyer cancelled its order for made-to-order clothing. After the cancellation, the garment manufacturer did not attempt to sell the clothing to another buyer but instead kept the garments until it eventually donated them to charity. The manufacturer sued the retail buyer for the full original contract price of the garments. The trial court determined that although the retail buyer breached the contract of sale, the manufacturer failed to mitigate its damages, and therefore the manufacturer was not entitled to damages for the breach in the amount of the full contract price of the garments. Because the contract price was the only evidence of damages presented by the manufacturer, the trial court found the evidence insufficient to support a damage award. The manufacturer appeals, asserting clear error in several of the trial court's findings and conclusions thereon. Finding no clear error, we affirm the trial court's judgment in favor of the buyer.

Facts and Procedural History

Knitcraft Corporation is a Minnesota corporation that manufactures made-to-order garments. Raleigh Limited, Inc., is an Indiana corporation that operates a retail men's apparel store. Knitcraft and Raleigh have been doing business together for over thirty years. In February of 2005, Knitcraft independent sales representative Richard Hencier met with Raleigh president Mark Koplow to discuss whether Raleigh wished to order garments. On February 24, 2005, Raleigh placed an order for sweaters in the amount of \$3892 and a separate order for slacks in the amount of \$1785. The combined total for both orders was

\$5677. The made-to-order items were to be manufactured by Knitcraft and shipped to Raleigh between August 30, 2005, and October 15, 2005. Knitcraft sent Raleigh an acknowledgment of the orders which provided that “NO ORDER MAY BE CANCELLED AND IS SUBJECT TO A CANCELLATION CHARGE.” Appellant’s App. at 25 and 27. On May 16, 2005, more than three months prior to the first scheduled shipping date, but after Knitcraft had started manufacturing the garments, Raleigh cancelled its orders.

Following the cancellation, Knitcraft did not deliver the garments to Raleigh and Raleigh did not pay for the garments. Knitcraft made no attempt to sell the garments to another buyer. Instead, Knitcraft kept the garments until it ultimately donated them to charity in December of 2007.

Knitcraft filed its complaint for damages for breach of contract against Raleigh on December 28, 2005. A bench trial was held on December 14, 2009. On March 4, 2010, the trial court issued an order in which it sua sponte entered findings of fact and conclusions thereon. The trial court’s order concludes in pertinent part as follows:

23. The Court hereby finds that Knitcraft failed to mitigate its damages as they did not make any efforts to find another buyer for the goods at a reasonable price. Furthermore, the Court does not find that the evidence presented reasonably indicates that such effort of finding another buyer would be unavailing.
24. The Court hereby finds that Knitcraft has failed to provide sufficient evidence of its damages because the law requires a claimant must prove its damages with reasonable specificity. (citations omitted)
25. Therefore, the Court hereby finds that a contract existed between Knitcraft and Raleigh and that Raleigh breached the contract. However, the Court finds that Knitcraft has failed to present sufficient evidence to permit the Court to determine the appropriate damages.

Id. at 19-20.

Thereafter, on March 23, 2010, Knitcraft filed a motion to correct error arguing that the affirmative defense of mitigation of damages was not properly raised and further that Raleigh had failed to provide evidence of a specific amount of damages that could have been mitigated. Following a hearing, the trial court entered its order denying Knitcraft's motion to correct error. Specifically, the trial court concluded that the affirmative defense of failure to mitigate damages was tried by express consent of the parties. The court further concluded that while Raleigh had the burden to prove that Knitcraft failed to mitigate, Raleigh did not have the burden to prove a specific amount of damages that could have been mitigated. The trial court reiterated that the burden to provide evidence of damages to a reasonable certainty remained with Knitcraft and that Knitcraft failed to meet that burden. This appeal ensued.

Discussion and Decision

Where, as here, the trial court enters findings of fact and conclusions thereon sua sponte, we review the trial court's findings and conclusions to determine whether the evidence supports the findings and whether the findings support the judgment. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). We will set aside the trial court's findings and judgment only if they are clearly erroneous. *Id.* Findings are clearly erroneous when the record contains no facts to support them either directly or by inference, and a judgment is clearly erroneous if it is unsupported by the findings of fact and conclusions thereon. *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). That is to say, a judgment is clearly erroneous

when a review of the record leaves us with a firm conviction that a mistake was made. *Id.* We neither reweigh the evidence nor assess witness credibility, and consider only the evidence most favorable to the judgment. *Id.* When a trial court enters findings sua sponte, the specific findings control only as to the issues they cover, while a general judgment standard applies to any issue upon which the court has not found. *Brinkmann v. Brinkmann*, 772 N.E.2d 441, 444 (Ind. Ct. App. 2002). A general judgment will be affirmed if it can be sustained on any legal theory supported by the evidence. *Leever v. Leever*, 919 N.E.2d 118, 122 (Ind. Ct. App. 2009).

Knitcraft asserts error in the trial court's findings and conclusion that Knitcraft presented insufficient evidence to support a damage award. Knitcraft further asserts that the trial court clearly erred when it failed to award the full contract price as damages pursuant to Indiana Code Section 26-1-2-709. We will address each argument in turn.

I. Insufficient Evidence of Damages

The trial court found that a contract existed between the parties for the purchase of garments and that, in cancelling its purchase order, Raleigh breached that contract. However, the trial court went on to find that Knitcraft failed to mitigate its damages. Because the only evidence of damages presented by Knitcraft was the contract price, the trial court concluded that Knitcraft failed to present sufficient evidence to support a damage award. Knitcraft claims that the trial court's findings in this regard are unsupported by the evidence and that its ultimate conclusion is therefore clearly erroneous. We disagree.

The essential elements of any breach of contract claim are the existence of a contract, the defendant's breach thereof, and damages. *Holloway v. Bob Evans Farms, Inc.*, 695 N.E.2d 991, 995 (Ind. Ct. App. 1998). The measure of damages for breach of contract is the loss actually suffered by the breach. *Sheppard v. Stanich*, 749 N.E.2d 609, 611 (Ind. Ct. App. 2001). Indeed, the plaintiff must show that its damages flowed directly and naturally from the breach. *Sammons Commc 'ns of Indiana, Inc. v. Larco Cable Constr.*, 691 N.E.2d 496, 498 (Ind. Ct. App. 1998), *trans. denied*. Damages may not be awarded based upon guess or speculation but must be ascertainable with reasonable certainty. *Id.* The burden of proof with respect to damages rests with the plaintiff. *Indiana Bureau of Motor Vehicles v. Ash, Inc.*, 895 N.E.2d 359, 368 (Ind. Ct. App. 2008).

The only evidence of damages presented by Knitcraft was the actual contract price of \$5677. However, as noted by the trial court, the non-breaching party has a duty to mitigate damages. *Four Seasons Mfg., Inc. v. 1001 Coliseum, LLC*, 870 N.E.2d 494, 507 (Ind. Ct. App. 2007). The burden is on the breaching party to prove that the non-breaching party has not used reasonable diligence to mitigate its damages. *Id.*

We first address Knitcraft's argument that Raleigh failed to raise the affirmative defense of mitigation of damages in a responsive pleading and thus has waived the issue. Failure to mitigate damages is an affirmative defense that may reduce the amount of damages a plaintiff is entitled to recover after liability has been found. *Willis v. Westerfield*, 839 N.E.2d 1179, 1187 (Ind. 2006). A party's failure to raise an affirmative defense in a responsive pleading generally results in waiver; however, an issue not raised in the pleadings

but tried by express or implied consent of the parties will be treated as if it were raised by the pleadings. *Van Bibber Home Sales v. Marlow*, 778 N.E.2d 852, 859 (Ind. Ct. App. 2002), *trans. denied* (2003). Specifically, Indiana Trial Rule 15(B) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The amendment of pleadings to conform to the evidence presented at trial is a matter within the trial court's discretion, and we will not reverse that decision barring an abuse of discretion. *Countrymark Coop., Inc. v. Hammes*, 892 N.E.2d 683, 692 (Ind. Ct. App. 2008), *trans. denied*.

In its order on Knitcraft's motion to correct error, the trial court found that the issue of mitigation of damages, although not raised in the pleadings, was tried by express consent of the parties since "the affirmative defense of mitigation of damages was raised by [Knitcraft] during the direct examination of [Knitcraft vice president] Mary Bergin and pursued by Raleigh on cross examination." Appellant's App. at 9. Knitcraft not only raised the mitigation issue on direct examination, but it also failed to object when Raleigh pursued questioning on the issue. Accordingly, the trial court concluded that the parties expressly

consented to trial on the issue and granted Raleigh's motion for leave to file the affirmative defense to conform to the evidence. Appellant's App. at 11. We find no abuse of discretion.

In the alternative, Knitcraft maintains that the trial court's finding that Knitcraft failed to mitigate its damages is clearly erroneous. Bergin testified on direct examination that Knitcraft made absolutely no effort to sell any of the garments to another buyer and, after holding the garments in a warehouse for several years, Knitcraft donated the garments to charity. On cross-examination, Raleigh questioned Bergin about Knitcraft's failure to try to sell the garments, and Bergin maintained that Knitcraft never attempted to sell the garments because such attempts would have been unsuccessful. Similarly, Knitcraft independent salesman Hencier admitted that he made no effort to sell the garments to other customers or retail stores and further admitted that he did not attempt to place the garments in one of the eleven employee/investor-owned stores known as "St.Croix" that sell Knitcraft garments. Hencier stated that he made no attempts to sell the garments because he believed that none of those stores would have purchased the garments.

Based upon the evidence, the trial court found that Knitcraft indeed failed to mitigate its damages and specifically found that Knitcraft's excuses for not attempting to sell the garments were unpersuasive and unreasonable. On appeal, Knitcraft essentially asks that we reweigh the evidence and reassess witness credibility, tasks we are not at liberty to perform. The record contains facts to support, both directly and by inference, the trial court's findings and conclusions regarding Knitcraft's failure to mitigate. We cannot say that the trial court's

conclusion that Knitcraft did not use reasonable diligence to mitigate its damages was clearly erroneous.

As noted above, Raleigh had the burden to demonstrate that Knitcraft did not use reasonable diligence to mitigate damages, and Knitcraft had the burden to prove its actual losses with reasonable certainty. In sum, based upon the evidence presented, Raleigh met its burden but Knitcraft did not. Knitcraft came forth with only the contract price as a measure of damages, and Raleigh came forth with evidence to show that Knitcraft failed to mitigate those damages. Based upon its failure to mitigate, the trial court determined that Knitcraft is not entitled to the full contract price, and thus Knitcraft has not provided sufficient evidence to permit the trial court to determine appropriate damages. A damage award must be supported by probative evidence and cannot be based upon speculation, conjecture, or surmise. *Crider & Crider, Inc. v. Downen*, 873 N.E.2d 1115, 1118 (Ind. Ct. App. 2007). The trial court did not clearly err when it concluded that Knitcraft failed to present sufficient evidence to support a specific damage award.

II. Indiana Code Section 26-1-2-709

Knitcraft also contends that the trial court erred by failing to award the full contract price as damages pursuant to Indiana Code Section 26-1-2-709.¹ That section provides:

(1) When the buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental damages under IC 26-1-2-710, the price:

¹ The Uniform Commercial Code, codified at Indiana Code Sections 26-1-2-101 through 26-1-2-725, constitutes a comprehensive system for determining the rights and duties of buyers and sellers with respect to contracts for the sale of goods. *Reed v. Central Soya Co.*, 621 N.E.2d 1069, 1075 n.5 (Ind. 1993), *modified on reh'g*, 644 N.E.2d 84 (1994).

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price, he must hold for the buyer any goods which have been identified to the contract and are still in his control, except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

An action on the price is a remedy for a seller based upon an ineffective rejection of goods by a buyer and may also provide a remedy to a seller when goods are lost, damaged, or non-resalable. *See Brandeis Mach. & Supply Co. v. Capitol Crane Rental, Inc.*, 765 N.E.2d 173, 177 n.2 (Ind. Ct. App. 2002).

For recovery under subsection (1)(b) of the statute, Knitcraft had the burden to show that it was “unable after reasonable effort to resell [the goods] at a reasonable price” or that “the circumstances reasonably indicate that such effort [would be] unavailing.” Ind. Code § 26-1-2-709(1)(b). Knitcraft concedes that it made no effort to resell the garments but maintains that the evidence does not support the trial court’s conclusion that the circumstances did not reasonably indicate that any effort at resale would have been unavailing.

The only evidence presented by Knitcraft that any effort at resale would have been unavailing was testimony that the garments at issue were for the fall 2005 season and that the

selling season for those garments would generally have been from January 5, 2005 through March 15, 2005. Hencier testified that the reason he made no attempt to resell the garments was because he presumed that after March 15, 2005, retailers already would have purchased all garments necessary for the fall 2005 season and already would have spent their entire budgets. When asked why Knitcraft did not attempt to sell the garments to “discount” stores such as T.J. Maxx or Marshalls, both Hencier and Bergin stated that Knitcraft did not wish to hurt its reputation by allowing its garments to be sold at such stores. Tr. at 19-20, 69. Again, the trial court was not persuaded by Knitcraft’s presumptions and excuses. Instead, the trial court assessed the evidence and witness credibility and specifically concluded that it did not “find that the evidence presented reasonably indicates that such effort of finding another buyer would [have been] unavailing.” Appellant’s App. at 19. In light of the limited evidence presented by Knitcraft on this issue, we cannot say that the trial court’s finding is clearly erroneous.

Moreover, we note that a seller who brings an action on the price “must hold for the buyer any goods which . . . are still in his control, except that if resale becomes possible he may resell them at any time prior to collection of the judgment.” Indiana Code § 26-1-2-709(2). The net proceeds of any resale must be credited to the buyer, and payment of the judgment entitles the buyer to any goods not resold. *Id.* Here, Knitcraft neither held onto the goods for Raleigh nor resold the goods. Rather, Knitcraft donated the garments to a local charity. Knitcraft cannot now seek to recover the price of the goods pursuant to Indiana Code Section 26-1-2-709, as Knitcraft has no proceeds to give to Raleigh and no goods to

deliver to Raleigh in the event of a judgment in Knitcraft's favor. Accordingly, an action on the price pursuant to Indiana Code Section 26-1-2-709 must fail. The trial court's findings and judgment are not clearly erroneous.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.