

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10608  
Summary Calendar

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BECK STEEL, INC.,

Plaintiff-Counter Defendant-  
Appellee,

versus

AMERICAN STAIR CORP., INC.,

Defendant-Counter Claimant-  
Appellant.

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Appeal from the United States District Court for the  
Northern District of Texas  
(5:93-CV-109-C)

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( July 18, 1995 )

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:\*

The central issue in this appeal concerns whether a Texas contract between two parties is a contract for goods or for services. Defendant/Counter-Plaintiff/Appellant American Stair Corporation, Inc. ("American Stair") appeals a judgment in favor of

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Plaintiff/Counter-Defendant/Appellee Beck Steel, Inc. ("Beck Steel") in a contract action. We reverse.

#### FACTS AND PROCEDURAL HISTORY

This diversity case based on Texas law arises from a contract dispute between Beck Steel, a steel fabricator and Texas corporation, and American Stair, a manufacturer and supplier of steel stairs and an Illinois corporation. In mid-November 1992, American Stair approached Beck Steel for assistance in providing steel railings for three phases of a project in which American Stair was constructing and installing stairs for the new Philadelphia Convention Center. The parties agreed to a contract setting forth the prices and Beck Stair's obligations to construct steel railings for phases II, III, and IV of the project in accordance with shop drawings and a sample previously provided. The contract also specified that Beck Steel would deliver the finished products to Philadelphia on three separate dates.

Beck Steel did not perform its obligations for phase III, forcing American Stair to complete the railings. In the railings that Beck Steel provided for phases II and IV, many defects were allegedly present, requiring American Stair to pay another company to correct the problems. American Stair paid the initial \$35,588 invoice submitted by Beck Steel. American Stair, however, did not pay the remaining \$84,355 that Beck Steel claimed was owed.

Beck Steel sued American Stair in federal court, alleging three causes of action:

- (1) a contract action under Texas law seeking recovery of the unpaid balance on the contract, which Beck Steel claimed had been fully performed;

- (2) a negligent misrepresentation action under Texas law based on American Stair's alleged negligent breach of the contract in failing to timely provide Beck Steel with a sample of the railing; and
- (3) a declaratory judgment action under 28 U.S.C. § 2201 seeking a declaration that Beck Steel was not obligated to pay backcharges for nonconforming and missing goods.

Beck Steel also sought to recover attorney's fees and later amended its complaint to allege negligence involving an alleged failure to disclose during preliminary negotiations the necessity of meeting deadlines and strictly complying with product samples.

American Stair denied that Beck Steel had fully performed under the contract and later counterclaimed against Beck Steel, alleging three causes of action:

- (1) a contract action under the Texas Uniform Commercial Code ("UCC") seeking contract damages, costs of cover, incidental damages, and consequential damages based on Beck Steel's breach of the contract;
- (2) an action for breach of express and implied warranties under the Texas UCC; and
- (3) a declaratory judgment action under 28 U.S.C. § 2201 seeking a declaration that Beck Steel had breached the contract and was obligated to pay backcharges for nonconforming and missing goods.

American Stair also sought recovery of attorney's fees.

The case was tried before a jury. The jury found that Beck Steel had failed to perform its obligations under the contract. The jury awarded damages to American Stair of \$13,500. But the jury also awarded contractual damages of \$84,355 to Beck Steel for American Stair's failure to perform its obligations for phases II and IV of the contract. The jury also found that American Stair's negligence had proximately caused \$46,574.94 worth of damages. Finally, the jury awarded attorney's fees for both parties. In its

judgment, the trial court awarded Beck Steel \$130,929.94, plus attorney's fees and interest. The trial court awarded American Stair \$13,500, plus attorney's fees and interest. American Stair appeals from the judgment in favor of Beck Steel. Beck Steel has chosen not to appeal the judgment in favor of American Stair.

#### I

##### The Contract: Goods or Services?

The Texas UCC "applies to transactions in goods." Texas Bus. & Commerce Code Ann. § 2.102 (Vernon 1968). "Goods" are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract." Id. § 2.105(a). The UCC's perfect tender rule allows the buyer to reject all of the goods "if the goods or the tender of delivery fail in any respect to conform to the contract." Id. § 2.601.

American Stair argues that its contract for stair railings with Beck Steel is a contract for goods covered by the UCC, and not a contract for services. If so, because the jury found Beck Steel to have breached the contract, it cannot claim damages under the UCC's perfect tender rule, as "the doctrine of substantial performance is not applicable under Section 2.601." Texas Imports v. Allday, 649 S.W.2d 730, 737 (Tex.App.--Tyler 1983, writ refused n.r.e.). The question to be initially determined is whether or not the contract was a contract for goods or for services.

In hybrid transactions that involve the sale of both services and materials, Texas courts have held that "the question becomes whether the dominant factor or 'essence' of the transaction is the sale of the materials or the services." G-W-L, Inc. v. Robichaux,

643 S.W.2d 392, 394 (Tex. 1982) (holding that a building contract is not covered by the UCC), *overruled on other grounds by Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987); *see also Montgomery Ward & Co., Inc. v. Dalton*, 665 S.W.2d 507, 511 (Tex.App.--El Paso 1983) (holding that a contract for roof installment is not covered by the UCC); *Freeman v. Shannon Construction, Inc.*, 560 S.W.2d 732, 737 (Tex.Civ.App.--Amarillo 1977, writ refused n.r.e.) (holding that a contract for cement work on a project is not covered by the UCC). A common thread of the Texas cases finding a service contract is that the service provider arrives onsite to provide the service on a fixed, as opposed to movable, entity. *Dalton*, 665 S.W.2d at 511 (roof installment); *Freeman*, 560 S.W.2d at 737 (cement work). Here, Beck Steel has not arrived onsite to install the railings, but has manufactured and delivered the railings, very movable objects.

Beck Steel responds by arguing that American Stair supplied virtually all of the materials for the railings. We have found no Texas case that emphasized this factor. *Cf. Robichaux*, 643 S.W.2d at 392, 394 (holding that a building contract was for services in a case where the builder provided the materials). Moreover, in all contracts, all the materials are ultimately supplied by the buyer, whether in the form of directly providing the material or in higher contract prices to cover the costs of the material. Beck Steel also relies on its labor costs in constructing the railings and argues that over 80% of Beck Steel's bid on the contract constituted labor services. However, the percentage of the contract price allocated by the seller to services derived from its

labor costs as opposed to materials cannot be determinative, as there are many manufactured goods for which labor costs, as opposed to materials, constitute a disproportionate amount.

In this instance, Beck Steel was to construct steel railings with certain characteristics at its own site and to deliver such moveable railings for American Steel's use at another site. We find that the contract was for a sale of goods covered by the UCC. Because there was no perfect tender, Beck Steel cannot recover on its contract claim. And because Beck Steel's contract claim fails, Beck Steel's attorney's fees claim likewise fails because Section 38.001 of the Texas Civil Practice and Remedies Code only allows attorney's fees if a valid contract claim is present, Hartford Casualty Ins. Co. v. Budget Rent-a-Car Systems, Inc., 796 S.W.2d 763, 770-71 (Tex.App.--Dallas 1990, writ denied).

## II

### Contract or Tort?

The jury also awarded Beck Steel damages for a negligence claim arising out of the parties' negotiation of, and performance under, the contract. Beck Steel alleged that American Stair was negligent in:

- (1) failing to timely deliver materials and the sample as provided in the contract;
- (2) failing to disclose that Beck Steel must strictly comply with the time and delivery constraints in the contract;
- (3) failing to disclose that Beck Steel must strictly comply with the sample mentioned in the contract; and
- (4) failing to disclose that it had been difficult for American Stair to obtain approval of the sample from the project architect.

"In determining whether the plaintiff may recover on a tort theory, it is also instructive to examine the nature of the plaintiff's loss. When the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract." Southwestern Bell Telephone Co. v. DeLanney, 809 S.W.2d 493, 494 (Tex. 1991). The DeLanney court also provided the following standard: "If the defendant's conduct . . . would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort." Id. Here, it is clear there would be no liability for Beck Steel's allegations if no contract existed. For example, if there had been no contract, American Stair would have no duty to Beck Steel to timely deliver materials and the sample. Beck Steel also argues that Texas law allows recovery for negligent misrepresentation. However, the trial court did not instruct the jury on the elements of negligent misrepresentation and the appellee does not plead a misrepresentation nor does it point to any misrepresentation made by the appellant. Since Beck Steel's claim sounds only in contract, it may not recover damages in tort and no recovery for negligence will be allowed.

#### CONCLUSION

For the foregoing reasons, the award of damages and attorney's fees to Beck Steel is reversed.