IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

CARNES COMPANY, INC.,

OPINION AND ORDER

Plaintiff,

02-C-0208-C

v.

STONE CREEK MECHANICAL, INC.,

Defendant.

- -

Successful business contracts are like Tolstoy's happy families: they produce little in the way of drama. It is the failed contracts that engender emotion and lead to law suits such as this one, which is particularly interesting because of the efforts defendant's president took to change the story to suit his goals. I conclude that these efforts were in vain, that the picture is not the one that defendant tried to paint after the fact and that defendant breached the modified contract when it failed to pay plaintiff for the products plaintiff had shipped to it. Plaintiff neither repudiated the contract nor breached it, but performed its part of the bargain and stood ready, willing and able to produce the energy recovery units defendant had ordered, subject only to adequate assurance of payment from defendant.

From the record and from the evidence adduced at trial, I find the following facts.

FACTS

Plaintiff Carnes Company, Inc. is incorporated in Wisconsin and has its principal place of business within the state. It manufactures heating, ventilating and air conditioning units. Gregory Cichon is its general manager. Defendant Stone Creek Mechanical, Inc. is a Pennsylvania corporation doing business as a mechanical contractor, with its principal place of business in Doylestown, Pennsylvania. Its president is Richard Worth.

In May 2000, defendant was awarded a contract for the heating, ventilating and air conditioning of three schools in the Marple Newtown School District in Pennsylvania. Initially, a company known as Chase and Associates was to furnish energy recovery units made by Venmar, but Chase lost the right to sell the line and asked plaintiff to bid on the units in place of Venmar. After six months of negotiations and requests for specifications primarily with Chase and primarily through plaintiff's manufacturer's representative, Jay J. Surkin Company, plaintiff accepted defendant's purchase order for 50 units by letter dated June 27, 2001. Plaintiff wrote that it would provide the energy recovery units and would assign the balance of the purchase order to Chase. This included the purchasing of cooling and heating coils, variable frequency drives and curbs. On July 16, 2001, Richard Worth returned the June 27, 2001 letter to plaintiff with his signed acknowledgment.

(Unbeknownst to plaintiff, defendant had used correction fluid to delete certain provisions of the acknowledgment, contrary to the ordinary business practice of crossing out any sections not agreed to. Defendant did not call plaintiff's attention to the deleted provisions at the time he returned the acknowledgment and the employee who received and filed the acknowledgment never noticed it.) The purchase order was for $640,000 of energy recovery units, of which plaintiff's portion was $527,000.

Whenever plaintiff accepts a purchase order, it produces an acknowledgment and sends it to the customer. Thereafter, whenever there are any changes in the order, including shipment dates, plaintiff generates a new acknowledgment and mails it to the customer. The back of every invoice and acknowledgment carries plaintiff's terms and conditions, which include the requirements that payment is due within 30 days from the date of the invoice, that a late payment charge of 1 1/2% a month may be added to any invoiced amounts unpaid when due, that the buyer is to reimburse plaintiff for any costs of collection, including reasonable attorney fees, and that plaintiff may defer delivery or cancel the contract if the buyer defaults in any payment due. Defendant knew about these terms and conditions before it sent the purchase order to plaintiff because plaintiff had provided the same information to defendant in April 2001, along with the warranty verification defendant had demanded.

From March through June 2001, plaintiff worked to obtain a technical description

of the energy recovery units that was complete enough for building purposes. During this same time, Chase supplied the school district's engineer with information about plaintiff's units and obtained the engineer's approval to substitute them for the Venmar units on which Chase had bid. As part of the negotiations, the parties agreed that defendant would supply the controls for the units from Invensys, a controls manufacturer, and plaintiff would mount and wire them on the factory floor.

During the same March to June period, plaintiff was making changes in the design of the energy recovery units. Up until late June 2001, Chase was coordinating the manufacture and purchase of the energy recovery units in conjunction with defendant. Plaintiff's questions or requests for information went to its representative and from it to Chase and back the same way. After June 27, 2001, plaintiff started talking directly with Worth.

Plaintiff planned the building of the energy recovery units so that after a six to eight week preparation time, it could build a certain number of units each week, completing all 50 of the units within 25 weeks after it had set up its production line. When it talked with its representative, Barry Surkin, in January 2001, plaintiff knew that defendant wanted delivery of the units in June or July 2001, but as time passed and the school district's specifications were still unclear, the parties realized that these delivery dates would be unworkable. In March, Chase provided plaintiff, through Surkin, Worth's preferred

sequence for the manufacture and shipment of the units, each of which was to be custom built.

Sequencing is crucial to plaintiff. It must coordinate ordering and delivery of component parts, schedule the preparation of the final engineering drawings for each custom unit and arrange shipping schedules. When it has to change sequencing, it often has to run overtime to produce the special parts necessary to build a unit and, at the same time, negotiate with its suppliers for expedited delivery of necessary component parts.

On June 20, 2001, more than a month before defendant sent plaintiff its signed copy of plaintiff's acceptance of the purchase order, plaintiff faxed Chase the final production sequence. According to the schedule, plaintiff would be building the first four units starting July 31, and its next units starting the week of August 17. In the same communication, plaintiff advised defendant that it would need its first delivery of variable frequency drives, cooling and heating coils and controls no later than June 29 in order to keep to this schedule. On June 28, 2001, Worth called to ask plaintiff to expedite the production of ten units in addition to the initial nine units plaintiff had scheduled for delivery by August 24, 2001. Plaintiff agreed to accommodate defendant, although doing so meant moving back production for other customers, moving part of its production to a sister plant in Chicago, along with engineers, designers and manufacturing experts, and arranging with its North Carolina facility to send a surplus press breaking machine to Chicago. Worth assured

Cichon that he was willing to pay an expedited charge for this work.

Because Chase & Associates was not performing properly, Worth took over the ordering of the curbs, coils and variable frequency fans. In fact, Worth had ordered all the curbs for the units even before plaintiff had accepted the purchase order. At no time before November 6, 2001, did defendant ever tell plaintiff that plaintiff was responsible for ordering the items that had been assigned to Chase or advise plaintiff of any costs defendant was absorbing that it believed should have been paid by Chase (or by plaintiff as assignor of the contract).

When the Invensys controls did not arrive in time for plaintiff to manufacture and ship the 19 units by August 24, the parties agreed that plaintiff would ship the units without controls and, in lieu of paying an expediting charge, defendant would install the controls itself on the 19 units plus two to three others. Chase was to provide Temtrol coils for the units, but Temtrol would not accept a purchase order from Chase, so Worth agreed to send a purchase order directly to Temtrol. Worth understood that plaintiff could not complete any units until the coils had been delivered because the coils give rigidity to the entire structure. As of late June and July, he was working to expedite their delivery. In a telephone call to the manager of plaintiff's energy recovery unit product line on July 10, 2001, Worth expressed his appreciation to plaintiff for its performance and promised that he would have half the Temtrol coils at the plant by mid-July and the rest by the end of July. Despite this

assurance, as of July 25, 2001, plaintiff had not received any coils. Cichon wrote Worth to advise him that if he did not receive the coils by July 27, he would halt production on defendant's units and expedite other customers' orders to fill his production schedule. The first coils were delivered on Saturday, August 4, 2001; plaintiff opened its Chicago facility that day in order to receive the coils.

Plaintiff began shipping units on August 21 and sent an invoice for those units the next day. According to the invoice, the terms of payment were net 30 days. Around September 13, Worth called plaintiff to say that there would be no payment until he had received "as built" submittals. He did not explain the basis for this condition. The purchase order called for submittals to be provided within 30 days of the receipt of the purchase order but it made no reference to "as built" submittals, which reflect the energy recovery unit as it is actually built. See McGraw Hill Dictionary of Engineering (2d ed. 2003) ("As-built drawing" is "a drawing as amended after completion of an industrial facility in order to provide an accurate record of the details of the entire installation in their final form.") The purchase order's only condition on payment was the provision of operation and maintenance data, written warranty information and insurance information.

Worth told plaintiff to send the submittals to Richard Chase, not to him. Plaintiff sent the submittals to Chase, Surkin and Worth that day by overnight mail. The UPS tracking information shows that Worth received the package on the morning of September

14. On September 18, 2001, Worth called Deborah Versnik, plaintiff's accounts payable supervisor, to say that he needed various submittals for the architect before he could pay plaintiff. Versnik could not understand why Worth was telling her this because plaintiff had sent the submittals to him five days earlier and in any event, they were not her responsibility.

Through the end of September, plaintiff's general manager, Gregory Cichon, spoke with Worth about the remaining units on a number of occasions. At no time did Worth express any dissatisfaction to plaintiff about the quality of the units it was producing or the timeliness of the shipments.

In September 2001, Chase started submitting bills to defendant that exceeded the $113,000 it was due under the purchase order.

On October 2, 2001, when plaintiff had not received any payment from defendant on any of the invoices, Cichon informed Worth that it would stop production if it did not receive payment. Worth told Cichon that he would send two checks on October 5 and checks for the next two invoices the following week and so on until all payments were current. Defendant sent plaintiff checks totaling approximately $64,695 for the first two invoices, dated August 21 and 27, but sent no payments for the third and fourth invoices. On October 18, six days after defendant was to have made the payments for the third and fourth invoices, plaintiff put defendant "on hold" for future shipments and advised it of the

hold by fax. On October 19, Worth called plaintiff and talked with the head of the credit department, threatening to cancel his order and saying he had lived up to the agreement as he understood it. He said he had given plaintiff two checks just to be nice but that he had no deal with Cichon to pay another two invoices. He called again on October 22, to say that he was meeting with Barry Surkin and wanted to resolve all the billing and cost issues before paying anything.

Shortly after these calls from Worth to the credit department, Cichon called the school district, explaining that plaintiff had shipped and supplied products for which it was not getting paid, that it had put defendant on shipping hold and would soon be putting it on production hold. The next day, Worth called Cichon and told him he was going to pay plaintiff. He told Cichon he had no problems with plaintiff but was very unhappy with Chase. Worth said he would continue to pay plaintiff and would pay according to plaintiff's terms in 30 days on all future invoices. Cichon memorialized this conversation in a letter to Worth dated October 25, 2001.

Also on October 25, Worth wrote to plaintiff, agreeing both to issue payment for two invoices in exchange for plaintiff's expedition of energy recovery unit #2 and to accept additional expediting costs of $1,367.00 to insure shipment of the unit on or before November 5, 2001. Plt.'s Tr. Exh. #15. Worth added that plaintiff's submittals would be approved on October 29, and the approval would release for payment any invoices over 30

days old. He confirmed that payment for those invoices would be made on or before November 17, 2001, and that all future invoices would be paid net 30 days as agreed. He made no mention in the letter of any demands for offsets for the cost of installing controls or variable frequency drives, about charging plaintiff for purchase of the curbs, about any delays in shipment of prior units or about any demands for offsets for expenses defendant had incurred as a result of Chase's failure to perform its part of the bargain. At the end of the letter, Worth advised plaintiff that he would be traveling out of the country from October 26 to November 11.

Plaintiff received the payment for the two invoices, as promised. It removed the shipping hold and expedited production on the unit on which it was working and shipped the four units immediately thereafter.

Shortly after plaintiff shipped the four units, and during the time Worth had said he would be traveling outside the country, Worth sent a six-page letter to plaintiff's parent company, Venturedyne, stating that defendant would send no further payments to plaintiff or to Chase "as a result of the actions as noted above." Plt.'s Tr. Exh. #17. Attached to the letter were numerous documents, some of which neither Cichon nor any other employee of plaintiff had ever seen before. The questionable documents included the following:

1. Signed copy of plaintiff's acceptance of purchase order (Plt.'s Tr. Exh. #17, Att. 1(b)).

This copy includes a "third page" that was purportedly part of the signed copy of plaintiff's acceptance of purchase order, stating that plaintiff would be responsible for all state sales taxes. Plaintiff's copy of the signed acceptance shows fax numbers across the top of the acceptance in its file, which has only two pages and has the original numbers and one paragraph deleted.

2. July 9, 2001 fax transmittal (Plt.'s Tr. Exh. #3)

This is a purported two-page communication dated July 9, 2001, addressed to the attention of Greg Cichon, with a first page marked "Fax Transmittal" at the top and "Page 1 of 1" at the bottom. In the first page of this "fax," Worth advises plaintiff that defendant would be deducting the cost of field mounting the Invensys controls from the purchase order. The second page of this supposed two-page communication is a "Fax Cover Sheet" from Invensys Building Systems addressed to defendant, quoting field control installation costs. Worth had sent plaintiff a copy of the second page sometime during the summer, seeking information from plaintiff he might be able to use for negotiating a lower price with Invensys.

3. July 10, 2001 letter (Plt.'s Tr. Exh. # 4)

This is a letter from defendant, signed by Worth, advising plaintiff that plaintiff is to provide the variable frequency drives and wiring, that defendant does not intend to limit its rights to recover costs related to delay in delivery by accepting delivery of the first 22 energy recovery units without controls and adding that the terms and conditions noted in the purchase order "supersede any other written or implied language. Including but not limited to Terms, Conditions and Warranty as noted on Carns [sic] Company Acknowledgment." Worth ends the letter with the statement that "[m]anufacturing and production of these units shall represent acceptance of these terms and conditions." The letter is not signed. It shows that a copy was sent to defendant's attorney.

4. July 23, 2001 letter (Plt.'s Tr. Exh. #7)

This is a letter dated July 23, in which Worth says that defendant will deduct the costs for field mounting of the controls from the purchase order, that

> defendant takes exception to plaintiff's terms and conditions in the acknowledgments and that coil fan variable frequency drives are to be factory mounted and "in strict accordance with the terms and conditions" of the purchase order.

5. July 26, 2001 letter (Plt.'s Tr. Exh. #9)

> This is a letter dated July 26 that purports to be a response to Cichon's fax of July 25. In it, Worth repeats his statement that plaintiff is responsible for all costs of field mounting controls, that defendant will not "accept any supposed expediting costs," that defendant did not order the coils for the units and that any delivery problem is the responsibility of plaintiff and its "supplier," Chase & Associates.

Cichon never received the fax transmittal described in paragraph 2. He cannot explain how Worth would have known how to spell his name because he had not spoken to Worth before July 9.

When Cichon talked with Worth on July 10, Worth said nothing about any of the matters discussed in the letter dated the same day, see ¶ 3 above, which was supposedly sent to plaintiff both by fax and certified mail. Cichon never received the letter and never saw it until Venturedyne sent him a copy of Worth's November 6 transmittal. Instead, on July 10, Worth and Cichon discussed trading the costs of field mounting the controls for plaintiff's expediting charges. One of plaintiff's employees signed for a certified mail envelope on July 17 that contained copies of acknowledgments defendant had sent plaintiff previously but no copy of the July 10 letter.

Plaintiff received a letter from Worth dated July 23, but it was not the one described

above in paragraph 4. In the letter actually sent to plaintiff, Worth said he had received the shipping acknowledgments dated July 17, noted his concern about the slippage in production and asked plaintiff to do "everything within your power" to expedite production. He added that he would provide plaintiff with "any assistance as required to maintain the required shipping dates."

In a July 25 response to the July 23 letter that he did receive, Cichon stated that there was no slippage in the schedule, reminded Worth of the critical importance of the coils and of Worth's promise to have them on site by mid-July and emphasized the need to have them no later than July 27 if production was not to be halted. On August 2, Cichon wrote again to Worth, repeating the need for prompt delivery of the coils.

Had plaintiff received a copy of the letter to Venturedyne before it shipped the four units, it would not have released them to defendant. Had it received any of the letters that defendant fabricated (Plt.'s Tr. Exhs. ## 17, att. 1(b), 3, 4, 7, and 9), it would not have built any units for defendant.

In a conversation with Cichon in October, Worth told him that he and his attorney had made modifications to the June 27 assignment letter and had removed the amounts of the assignments and the final paragraph. During a meeting Barry Surkin had with Worth, Worth hung up from a conversation with a vendor on the Marple Newton project, looked at Surkin and boasted, "I say one thing and do another." On October 22, Worth told Surkin

that because he had deleted the numbers on the assignment letter, leaving only the total of $640,000, he could cancel the contract with plaintiff and he had two quotes to finish the order. He said also that he wanted to sue Chase but that his attorney had told him he could not because he had no contract with Chase. During the same conversation, Worth expressed his concern to Surkin that the costs for the items assigned to Chase were reaching $325,000, considerably more than the $113,000 plaintiff had assigned to Chase when it accepted the purchase order.

Defendant never made any payments to plaintiff after sending the first two checks identified in its letter of October 25, 2001, although plaintiff reiterated its readiness to complete the contract in letters dated November 21, 2001, December 6, 2001, December 20, 2001 and January 3, 2002. Defendant made several proposals for payment but none of them provided for full payment for past due invoices or would have provided security for future shipments. For example, on December 21, 2001, defendant offered to provide a C.O.D. certified bank check in the amount of $30,879.445 for every three units of the remaining 19 units that plaintiff would provide. Defendant said nothing about payment for past due invoices. Plaintiff did not accept the offer. In another proposal, defendant maintained that it was entitled to offsets for all components it had ordered plus the cost of producing 19 additional units. The parties continued to negotiate unsuccessfully through the winter until plaintiff cancelled the contract on March 7, 2002.

Plaintiff received $99,928.65 for units it shipped to defendant. Defendant owes plaintiff $231,930.17, plus interest at the rate of 1 1/2% a month, for shipped units for which defendant never paid. Plaintiff incurred unrecoverable costs for units it did not ship in the amount of $169,992.19, including the price of special parts, plus the materials, labor and overhead required to build the units incorporating the special parts. Because these units and their components are custom orders, plaintiff is unable to resell them.

Plaintiff calculated the costs it incurred for the last 19 units that were never shipped. As special parts are ordered and delivered, plaintiff assigns them an order number. Plaintiff does the same with material, labor and "burden" (all fringe benefits, all costs of machines, repairs, etc. for that department plus a percentage of labor dollars for the particular department that contributes to the final product). Then plaintiff estimates the costs of activities, such as assembly, and materials, such as paint, which do not have assigned part numbers. At the end, plaintiff adds a figure for overhead, using the standard overhead numbers for the year without any profit. (The details of the calculations are spelled out in plaintiff's damage exhibits.)

Plaintiff reused any parts that could be reused. Its claim for damages covers only items that could not be reused because of their unique nature. The motors cannot be reused because their warranties expired within one year.

OPINION

Despite defendant's amateurish efforts to redraw the picture of the parties' relationship, the outline is clear. Plaintiff performed; defendant reneged. Until defendant received the 31 units it needed to complete the first phase of the school district work, it continued to assure plaintiff that all was well and that payments would be forthcoming. Once it had achieved that result, it changed its tune, insisting it had been dissatisfied with plaintiff's performance from the time the parties reached their agreement on June 27, 2001, and produced fabricated documents to make it appear that it had been expressing this dissatisfaction to plaintiff all along.

The evidence of fabrication is irrefutable. First, not only are the documents questionable on their face because of discrepancies in the fax headings and page numbers, but they contradict statements Worth was making to plaintiff orally and in writing at the same time he was supposedly sending the phony documents. Second, no reasonable manufacturer would have made the efforts plaintiff did to produce the energy recovery units out of sequence had it received the letters defendant says it sent telling plaintiff that it was rescinding its promise to trade the costs of installing the controls for an expediting charge.

Third, there is the oddity of plaintiff's receipt of a certified mail envelope containing nothing but copies of acknowledgments that defendant had sent plaintiff previously. Were it not for the fact that it was necessary to the case Worth was trying to build that plaintiff

receive some kind of certified mail on or around the day his July 10 certified mail letter should have been received, it is conceivable that this mailing might have been a mistake. No such finding is possible, give the importance of the receipt of a certified mail envelope. Finally, there is Worth's obvious lack of credibility: his failure to make the payments he promised; his own admission that he deleted the numbers and one paragraph of plaintiff's acceptance of defendant's purchase order; his boast that he says one thing and does another; his statement to plaintiff in the October 25 letter that he would be out of the country until after the day on which plaintiff had agreed to ship the last four units that would enable him to complete the first phase of the school district project; his sending the letter to Venturedyne *after* he knew the units were shipped; the fact that he had been preparing the letter to Venturedyne while assuring plaintiff that defendant would make all payments if plaintiff would complete the four units; and his failure to adduce any credible evidence that it has either paid the costs it attributes to Chase & Associates or is liable for those costs. Worth gave false testimony on the stand about a number of matters, such as defendant's not receiving information from Chase that plaintiff was providing Chase, when in fact Chase had been sending him the information, Tr. Trans. 3-13-14; Chase's responsibility to coordinate the delivery of the Invensys controls, when the purchase order said nothing about Chase's or plaintiff's responsibility for seeing that the controls were shipped, id. at 20; and the amount of money defendant had paid for items it contends are Chase's responsibility, id. at

39-42, and Plt.'s Tr. Exh. #102.

As a preliminary point, I note that the parties disagree about the effect of the terms and conditions of payment that plaintiff included in the April 2001 warranty verification it sent defendant and reiterated on the back of every acknowledgment it sent to defendant, setting forth the terms of payment (30 days net, etc.). Defendant denies that it was bound by these terms, first, because plaintiff did not make them part of its acceptance of the purchase order and second, because it disavowed the terms specifically and in writing. Neither of the grounds has substance. As to the first, defendant knew the terms and conditions before it entered into the contract with plaintiff and cannot claim surprise about them. Even if defendant had not known of them in advance, it would have become bound by them under the terms of Wis. Stat. § 402.207 (§ 2-207 of the Uniform Commercial Code), which provides that additional terms such as the ones plaintiff included on its invoices and acknowledgments become part of the agreement unless the offer expressly limits acceptance to the terms of the offer, which is not the case here, or the buyer notifies the seller of its objection to the terms within a reasonable time of receiving them, which defendant failed to do, or if the added terms materially alter the terms of the offer, which these do not do. It is common for commercial contracts to include terms such as interest on overdue payments and collection costs. U.C.C. § 2-297, cmt. 5 (listing examples of clauses that involve no element of unreasonable surprise, such as provision for interest on overdue

invoices or for standard credit terms that are within range of trade practice). See also Advance Concrete Forms, Inc. v. McCann Construction Specialties Co., 916 F.2d 412, 415 (7th Cir. 1990) (addition of credit terms are not material alterations of contract for sale of goods); Mid-State Contracting, Inc. v. Superior Floor Co., 2002 WI App 257, ¶¶ 8-12.

Defendant's second ground for finding the credit terms non-binding is that it disavowed the terms and conditions specifically and in writing. This argument fails because defendant never sent the letters in which it supposedly expressed its disavowal. In fact, if there were any question about defendant's knowledge of the terms and their binding effect, it would be resolved by looking at the two letters it says it sent. The very fact that Worth felt the need to fabricate them speaks volumes about his understanding of the effect of those terms.

At trial, the parties devoted considerable time to the difficulties they had in obtaining parts and initiating the manufacture of the energy recovery units and their attendant negotiations. Most of this is irrelevant because the case turns on defendant's October 25, 2001 letter, which modified the parties' original agreement. In the letter, Worth assured plaintiff that it would bring *all* its payments current and pay additional expediting charges, if plaintiff would ship energy recovery unit #2 on or before November 5, 2001. Worth said nothing in the letter about any of the matters he identified later in his November 6 letter to Venturedyne, such as plaintiff's financial responsibility for Chase's failures and omissions,

plaintiff's responsibility for paying the cost of installing controls or variable frequency drives or the supposed delays in shipment of prior units. He did not say that defendant would deduct any amounts from the promised payments to reimburse itself for any alleged problems in production or procurement. Plaintiff accepted the agreement proposed in the October 25 letter by completing production of the energy recovery units and shipping them on or before November 5.

Defendant denies that the October 25 letter effected a modification of the contract. In its view, the letter did nothing more than address the outstanding invoices and require future payments to be made within 30 days of shipping. Defendant ignores the fact that under the original agreement, which included the terms and conditions of the acknowledgments, defendant was to pay all invoices within 30 days. Defendant did not send the letter until more than 30 days after the invoices had been sent. Thus, when it promised it would issue checks for the third and fourth invoices the next day (October 26) and make full payment of all other outstanding invoices within another few weeks, it was seeking a modification of the terms of the agreement under which the parties had been operating up to that point. Defendant was free to try to work out a new contract. There is no prohibition on the modification of contracts, see, e.g., Estreen v. Bluhm, 79 Wis. 2d 142, 152, 255 N.W.2d 473 (1977) (enforcing terms of parties' compromise agreement that modified their existing land contracts), although the manner in which they do so may be limited by the

terms of the original contract. See, e.g., Cloud Corp. v. Hasbro, Inc., 314 F.3d 289 (7th Cir. 2002) (discussing requirements for valid modification of purchase orders in light of parties' agreement that such orders could not be modified without buyer's written consent).

As modified, the contract required plaintiff to ship the final units that defendant needed to complete the first phase of its contract with the school district and defendant to send two checks immediately, pay all outstanding invoices promptly and pay future invoices within 30 days of their issuance. Defendant sent the first two checks, as promised, but made no further payments. At that point, it was in breach of the terms of the modified contract.

When plaintiff refused to make any further shipments pending payment of all arrearages and advance payment for any additional shipments, it was exercising a commercially proper response to defendant's failure to pay the price it had incurred for the units. Wis. Stat. § 402.709 (when buyer fails to pay price as it becomes due, seller may recover price of goods accepted and goods identified to contract if they cannot be resold at reasonable price with reasonable effort). Defendant was well in arrears with its payments when plaintiff stopped shipping. Defendant's failure to pay what it owed under the contract made it liable for the price of the goods shipped previously plus "the goods identified to the contract," id., because the unique nature of the goods was such that plaintiff could not resell them.

Defendant denies that it waived any rights in its October 25 letter but argues that if

it did, it retracted the waiver subsequently when it learned, allegedly for the first time, that plaintiff was denying any responsibility for Chase's failure to perform its part of the agreement. Wis. Stat. § 402.209(5). Defendant cannot make this assertion with a straight face. It knew before it entered into the original contract with plaintiff that plaintiff was not going to provide the items it had assigned to Chase. Were it otherwise, defendant would not have been ordering the curbs for the energy recovery units even before it had secured plaintiff's acceptance of the purchase order when it was Chase's job to order them; it would have simply reminded plaintiff that it was responsible for the entire job (as I found it was, see Carnes Company v. Stone Creek Mechanical, Inc., 02-C-0208-C (Dec. 13, 2002)) and that it would have to provide its own curbs if Chase was not doing so. Defendant would not have agreed to guarantee Chase's payment to Temtrol in order to obtain coils but would have demanded that plaintiff provide the guarantee. At the least, defendant would have kept plaintiff apprised of the costs defendant was incurring. Finally, defendant would have discussed the matter with Cichon on October 24, the day before Worth wrote the letter promising to make all overdue payments with no reference to plaintiff's supposed obligation to cover all of Chase's costs and responsibilities.

Moreover, § 402.209(5) allows parties to retract only those waivers that affect an "executory portion of the contract"; the newly modified contract passed the executory phase as soon as plaintiff resumed work on the #2 units. Even if this were not the case, defendant's

claim of retraction ignores the resulting injustice to plaintiff if defendant were allowed to retract its waiver after plaintiff had relied upon it by shipping the final units. Retraction is not an option when the other party has relied upon the waiver to its detriment. Id.

Defendant argues that it is irrelevant whether the October 25 letter modified the contract because it is plaintiff that breached the contract and relieved defendant of any obligation to complete its payments. According to defendant, the October 25 letter made it clear that submittals meeting the project engineer's approval were a condition precedent to the November 17 payment and plaintiff failed to provide them. This is a mischaracterization of the letter, which states that

> [defendant] will receive on 10/29/01 final approval of the submittal information for the Energy Recovery Units as submitted by the Carns [sic] Company and Chase and Associates. The approval of this information will release for payment any invoices as issued by the Carns Company which are over 30 days old. Payment for the [sic] these invoices will be made on or before November 17th 2001.

Worth did not say that payment would be released only *if* the submittals were approved. He did not express any doubt about their approval. He said the approvals would be forthcoming on October 29 and that as soon as they were received, defendant would pay all past due invoices. Defendant has no support for an argument that the original purchase order made "as built" submittals a condition of the contract. The purchase order contains no such requirement. It requires plaintiff to provide warranty information and instruction booklets, all of which plaintiff had supplied well before October 25.

Defendant rests its entire case on what it asserts was plaintiff's anticipatory repudiation of the contract, its term for plaintiff's refusal to take responsibility for the costs defendant incurred when Chase failed to perform. Defendant argues that when plaintiff insisted on full payment for the products it had supplied without deducting from the payment any and all cost overruns that defendant had incurred, it was announcing its intention to breach the contract and freeing defendant to look elsewhere for energy recovery units. Defendant says it learned of plaintiff's position for the first time in a conversation between Worth and Cichon that took place a few days after Worth sent the October 25 letter.

The facts show that defendant knew long before the end of October that plaintiff was not assuming any responsibility for the items it had assigned to Chase. Therefore, defendant waived the issue when it wrote the October 25 letter in an effort to persuade plaintiff to produce the last four units defendant needed to complete the first phase of the remodeling project. Defendant argues that it notified plaintiff on several occasions that it would be deducting such costs from the amount due plaintiff under the purchase order, but I have found that it did not send these purported notifications until November 6, long after the dates it claimed to have done so.

Because I have found that the October 25 letter was a modification of the parties' original agreement, my conclusion in the December 13, 2002 order that plaintiff had agreed to limit defendant's total liability under the purchase order to $640,000 is no longer critical

or even relevant to the disposition of this case. Regardless what plaintiff agreed to in accepting the purchase order, defendant changed the nature of the agreement when it assumed the responsibility for ordering component parts assigned originally to Chase and guaranteed payment for parts Chase had ordered rather than notifying plaintiff that it should be the party exercising the responsibility. Its actions operated as a waiver of defendant's right to offsets in the contract price for Chase's failure to provide component parts and service. Even if they did not, defendant has adduced no credible evidence of any costs it incurred for component parts and certainly no evidence that it incurred costs in excess of the $113,000 it was obligated to pay to Chase for the parts and service Chase was to provide. Defendant suggests, for example, that it owes about $90,000 to Temtrol for coils, yet the evidence shows that it views its obligation as no more than $48,000.

Even if I assume that defendant never wrote the October 25 letter, defendant would still be liable for all of the costs that plaintiff incurred in carrying out its obligations under the purchase order and it would have no right to any offsets for "covering," that is, buying goods in substitution for goods plaintiff was required to provide. Defendant has asserted that it had no reason to believe that plaintiff was repudiating the contract until November 2001. Although I have found that to be a disingenuous assertion at best, I consider it an admission by defendant that plaintiff did not repudiate the contract before November. Thus, until November, defendant did not have even an arguable right to cover. Wis. Stat. § 402.610

allows an aggrieved party to resort to any remedy for breach provided in Wis. Stat. § 402.711, *when* the other party repudiates a contract with respect to future performance and its failure to perform will result in a substantial impairment of the value of the contract. Defendant cannot argue that when it was ordering curbs, guaranteeing payment for the coils and buying variable frequency drives, it had a right to do so because plaintiff had repudiated the contract. Plaintiff had not even accepted the purchase order when defendant ordered the curbs.

Still another ground for liability exists under the Uniform Commercial Code's provisions for installment contracts (albeit limited to the unpaid invoices for the shipped units, plus interest), although it does not need extensive discussion in view of my prior conclusions. The parties' agreement authorized the delivery of goods in separate shipments. Wis. Stat. § 402.612 . Once plaintiff shipped the units and defendant accepted them, defendant was liable for payment. Wis. Stat. § 402.507(1) (tender of goods entitles seller to payment according to contract). Defendant would have been relieved of this liability had it rejected the units within a reasonable time after they were delivered, Wis. Stat. § 402.602, but it accepted all of the units and therefore became bound to pay for them.

Despite defendant's attempts to shift the blame for its nonperformance onto plaintiff, defendant has no meritorious defense to plaintiff's claim, a fact that should have been clear to defendant two years ago. It is time for defendant to provide plaintiff with the benefit of

its bargain. Plaintiff is entitled to an award of the damages it incurred as a result of defendant's failure to pay for the units plaintiff shipped in the amount of $231,930.17, plus interest at the rate of 1 1/2% a month, and in the amount of $169,992.19 for the costs of units that plaintiff built but was unable to ship because of defendant's refusal to bring its payments current and provide plaintiff adequate security for the unshipped units. In addition, plaintiff is entitled to an award of the costs and fees of collecting the amounts defendant failed to pay for which it was liable.

Defendant argues that plaintiff has not supplied sufficient proof to support its claim for the costs of its unshipped units, such as time sheets for the work done or invoices that would show that the unused material costs were for materials purchased for use on defendant's order. This argument has little force. The evidence shows clearly how plaintiff calculated its costs, using the order numbers to trace the major costs incurred for the production of each of the unshipped units.

ORDER

IT IS ORDERED that defendant Stone Creek Mechanical, Inc. is liable to plaintiff Carnes Company, Inc. for damages in the amount of $231,930.17, plus interest at the rate of 1 1/2% a month, for units shipped for which defendant did not pay, for $169,992.19, for units built that could not be resold, and reimbursement of the attorney fees and costs it has

incurred to collect defendant's unpaid obligation. Plaintiff may have until August 1, 2003, in which to file and serve its itemization of interest due plus attorney fees and costs incurred. Defendant may have until August 15, 2003, in which to file and serve any objections it has to plaintiff's submissions.

Entered this 18th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge