

VERMONT SUPERIOR COURT  
Caledonia Unit  
1126 Main Street Suite 1  
St. Johnsbury VT 05819  
802-748-6600  
www.vermontjudiciary.org



CIVIL DIVISION  
Case No. 174-12-20 Casc

Peter Blose v. Calendar Brook Cabinetry et al

## FINDINGS, CONCLUSIONS, AND JUDGMENT

This is a small claims court action concerning the conformance of plywood products that were ordered, cut, and sold to Plaintiff Peter Blose by Defendant Calendar Brook Cabinetry. The Court held a merits hearing in this case on May 24, 2022 in front of Judge William Cobb. As explained in the Court's June 21, 2022 Entry Order, this hearing had to be re-scheduled due to the fact that Judge Cobb was suspended from the bench prior to drafting a decision in this matter. This second merits hearing occurred on August 26, 2022 in front of the undersigned. At that hearing both parties were present, self-represented, and allowed to re-present their evidence and testimony.

### Factual Findings

Based on the evidence and testimony, the Court makes the following findings:

Plaintiff is a woodworker whose primary product is what he characterizes as a high-end game table. The table, itself, is a six-sided cube made out of six-interlocking plywood panels that are stained and painted on each side with a different gameboard. The table comes with games pieces for each of the gameboard faces, and the pieces are stored inside the cube, which is accessed by a small door in the middle of one of the panels. The only paint on the tables are small doors (which can have different designs) and the lines and fill of each game board. The rest of the table is stained, as the customer may order, either a reddish-brown "maple" color or a darker brown "chestnut" color. Both colors allow the grain of the plywood veneer to appear visible around and underneath the gameboards and give the table the appearance and sense of wood furniture, which as Plaintiff testified is the intent and appeal of his design. Plaintiff sells his game tables directly to the consumers either through the internet or at craft and artisan shows. Plaintiff's tables retail for \$750.

Beginning in 2012 and for several years prior to the present dispute, Plaintiff had used Defendant as a plywood supplier. Plaintiff, in his plywood orders, sought void-free plywood. Upon Defendant's recommendation, Plaintiff had purchased birch plywood products, particularly a product known as Baltic birch plywood. By way of explanation, plywood is a composite, engineered wood-product. It is comprised of layers of wood veneer--thinly sliced pieces of wood—that are then glued together at various angles with resins to make a board approximately one-inch thick. Sheets of plywood can be made cheaply with a rough quality, but they can also be expensive and made for finished carpentry. They are generally sold in various sizes of width and length. In this case, the sheets of plywood came in either five by five feet configurations or four by eight feet configurations. The various intermediate layers of plywood can come from a variety of sources—apple, poplar, and other less expensive woods—but it is the top or veneer layer that is the most important for the plywood's appearance. It is the top layer that defines the value of the plywood product—apart from any overall manufacturing quality and consistency. In a Baltic birch plywood product, the underlying layers are not birch, but the top layer is, and woodworkers and purchasers value the appearance of this top layer for its grain, appearance, and quality.

Plaintiff credibly testified that he valued the Baltic birch plywood based on its subtle woodgrain, the way it absorbed stain, and the overall appearance that “popped” on his game tables. The evidence as to whether he communicated this value to Defendant is not well-established. In Plaintiff's prior written purchase orders, he had indicated that he wanted “birch cabinet Grade 03 or better plywood with poplar core ‘Purebond by Columbia’—with no filler on finish side, no scratched, dents, machine oil or dirt.” Pltf. Ex. 10. Defendant testified that he did not know what Plaintiff did with the plywood products that Plaintiff ordered from his woodshop.<sup>1</sup> While Plaintiff testified that he had ordered Baltic birch plywood for his September 2020 order, a fact that Defendant did not dispute, it is not evident that he made clear why it had to be Baltic birch and why another high-end plywood would not suffice as a substitute. In fact, Defendant credibly testified that he did not understand the birch veneer to be the critical part of the order. Instead, Defendant understood Plaintiff's primary needs to be for a high-quality plywood that did not have gaps in its layers or filler on its veneer face.

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<sup>1</sup> The Court finds this testimony to be true in the sense that Defendant was unfamiliar with Plaintiff's finished product. Given that Defendant also provided the service of cutting the sheets into the appropriately sized panels, sanding, and carving the grooves on the back side of each panel for interlocking assembly, the Court finds that Defendant had some general sense of what Plaintiff was doing with the wood products that Defendant was selling and preparing. This finding does not change the outcome of the present case, but it reflects the nature of the parties' relationship as buyer and seller with some history of prior dealings, but lacking an intimate familiarity with each other's processes.

Due to supply issues, Defendant was unable to secure the Baltic birch plywood product in September of 2020. Instead, Defendant offered Plaintiff a maple plywood product that was, in Defendant's opinion, equivalent in quality and general appearance. Defendant provided Plaintiff with 96 panels of this maple plywood. There is no dispute that the product was clearly labeled as a maple veneer product. There is also no dispute that the quality of the plywood itself was equivalent in terms of its manufacture and lack of voids between the layers. Both the maple and Baltic birch plywood products were high-end veneer plywood, and either product could have been used in a piece of finished carpentry, whether furniture, cabinet, or panel, without painting over the veneer. Both the maple and Baltic birch samples provided to the Court have tight and subtle grains, and to the untrained eye each would be difficult to distinguish from the other. The maple substitute plywood panels were delivered to Plaintiff in September of 2020, and Plaintiff paid Defendant for the panels in a timely manner.

To Plaintiff, though, the final product was anything but indistinguishable. Plaintiff testified that the maple plywood did not seem to pop or set-off the game board lines in the same manner as the Baltic birch. He credibly testified that the maple plywood tables did not hold the stain or shine in the same way as the Baltic birch. Plaintiff approached Defendant shortly after the delivery and notified him of the difference. Defendant recommended Plaintiff to use a wood conditioner.

Plaintiff states that despite his best efforts to polish and condition the maple panels, the finished product never "popped" like the Baltic birch product, and the 15 tables resulting from the maple plywood were all sold at a discount of \$100 or more. As a result, Plaintiff now seeks \$1,500 in damages, which represents the losses he incurred as a result of accepting the maple product in lieu of the Baltic birch product. Defendant contends that he should not be responsible for the lower price as the maple plywood was of an equal quality and was a reasonable cover for the unobtainable Baltic birch product.

### Legal Analysis

The sale of goods in Vermont, like most states, is covered by Article 2 of the Uniform Commercial Code (UCC), which Vermont has long adopted and applied to commercial disputes. 9A V.S.A. § 2-102 (noting that "this article applies to transactions in goods"); see also J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 1,2 (2d ed. 1980) (noting that all but one of the fifty States had, by 1979, adopted the UCC). The purpose of the UCC is to create a series of rights, responsibilities, and reasonable allocations of risk between the parties to support the sale and commercial transactions of goods. 9A V.S.A. § 1-103; see also J. WHITE & R.

SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 14–18. The general policy of Article 2 of the UCC is to preserve commercial deals wherever possible. 9A V.S.A. § 605, cmt. 2.

The first relevant provision of the UCC to the present case is 9A V.S.A. § 2-601, which states that if the goods or tender of delivery fail in any respect to conform to the parties' contract a buyer may either reject the whole, accept the whole, or accept any "commercial units" within the delivery and reject the rest. As the comments to this section indicates, "A buyer accepting a non-conforming tender is not penalized by the loss of any remedy otherwise open to him." 9A V.S.A. § 2-601, cmt. 1; see also *Rutland Music Service, Inc. v. Ford Motor Co.*, 138 Vt. 562, 564 (1980) ("This rule provides a buyer with a right of rejection whenever the tender of delivery or the goods so delivered are not perfectly in conformity with the contract . . ."). The right to reject, however, has two significant limitations. First, the revocation must be made in a timely manner. *Id.* Second, the revocation must be premised on a substantial impairment of the value and not merely because the tender of goods was "less than perfect." *Id.*

In the present case, there is no written contract or even a communication in evidence as to what the parties' expectations were. The prior writing that Plaintiff submitted, indicates that he sought birch veneer plywood, but it emphasizes the manufactured quality of the wood (no voids, no filler) rather than the specific species of the veneer. As the facts show, Plaintiff's expectation that only birch and only a particular type of birch would suffice was not communicated in writing or through an effective oral exchange with defendant. Cf. 9A V.S.A. § 2-201 (requiring any contract for goods over \$500 to be in writing for its terms to be enforceable). Nevertheless, it is undisputed that Plaintiff requested "Baltic birch" plywood in his September 2020 order, and that he received maple plywood instead. As comment 3 to 9A V.S.A. § 2-608 indicates, Defendant's knowledge or lack thereof about Plaintiff's particular purpose or the impairment of value created by substituting maple for birch plywood is not important. "[T]he question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances." 9A V.S.A. § 2-608 cmt. 2. As the evidence indicates, the difference in veneers was enough to give rise to a substantial impairment in the value of the final wood product in that Plaintiff was not able to sell the game tables made out of maple for the same prices as his prior birch plywood products. Collectively, these facts are enough for this Court to conclude that the delivery of the maple plywood sheets was non-conforming to the parties' initial agreement for Defendants to supply pre-cut, sanded, and grooved Baltic birch plywood panels.

It is undisputed that Plaintiff became aware of this difference during the delivery of the panels or shortly thereafter. The evidence shows that Plaintiff complained in a timely manner to Defendant about this issue. As such, Plaintiff has the three options under 9A V.S.A. § 601. He could have accepted the panels, rejected the panels, or accepted a certain number of them. Plaintiff elected to accept the panels. As Plaintiff testified, he accepted these panels, in part, on Defendant's refusal to take them back and upon Defendant's recommendations that wood conditioner would cure the difference in appearance. For the purposes of the UCC analysis, the Court concludes that the evidence is sufficient to have put Defendant on notice of the material issue with the nonconforming goods and the breach of terms that maple for birch represented. 9A V.S.A. § 607(3). This means that even though Plaintiff accepted and did not at any time revoke acceptance of the panels, he remains eligible to seek remedies from Defendant for this breach.

This brings the Court to 9A V.S.A. § 2-714, which involves Buyer's damages for breach regarding accepted goods. This section provides a buyer who accepts non-conforming goods with the right to seek damages related to the non-conformity of the product "as determined in any manner, which is reasonable," and it allows for any incidental and consequential damages that are allowed under section 2-715. 9A V.S.A. § 2-714 (1) & (3). In this case, Plaintiff elected to retain the panels and incorporated them into game cubes that he then sold, albeit at the reduced price of \$650 per table. His damages, as filed and as supported by the evidence, are limited to a claim of consequential damages. This, in fact, appears to be the only reasonable source of damages. The quality and cost of the maple plywood that Plaintiff received appear to be equivalent to the price paid, and its structural fitness for use in the construction in a gaming table is equivalent to the Baltic birch product. The sole distinction is a subtle aesthetic difference in appearance, Plaintiff's "popping factor." As such, the Court concludes that Plaintiff received equivalent quality plywood and that the price paid for the product was fair based on the quality of the product received.

Under section 2-715, a buyer may receive consequential damages resulting from a seller's breach "for any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." 9A V.S.A. § 2-715(2)(a). Here the evidence supports a denial of Plaintiff's claim for consequential damages. Defendant did not know the details about Plaintiff's use of the plywood panels and the credible evidence is that Defendant did not know at the time of the transaction that Plaintiff required the very specific birch veneer. The prior transactions focused almost entirely on the manufactured quality of the plywood and not the specific wood veneer. Defendant understood this to

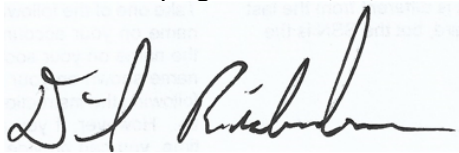
be the key requirement and provided the maple substitute under the mistaken, but good faith belief, that the quality of the maple plywood would equal or exceed the birch plywood. While the provision of maple instead of birch might have given Plaintiff the right to refuse the panels or seek cover by purchasing birch from another supplier (as Plaintiff has done for his subsequent sourcing), there is no evidence to support the conclusion that Defendant knew or had reason to know at the time of the sale that the failure to supply a Baltic birch plywood would cause \$1,500 in consequential damages. *Curtis Funeral Home v. Smith Lumber Co.*, 114 Vt. 150, 154–55 (1945) (noting that consequential damages can only arise when “special circumstances are known to the defaulting party to the contract”). In this case, Defendant simply did not know how important or special the Baltic birch veneer was to Plaintiff, and as a direct result, Defendant cannot be held liable as a matter of law for the consequential damages that followed from this breach.

Finally, the Court would note that in coming to this conclusion, the Court does not reach the issue of whether Plaintiff’s consequential damages were reasonable or not. See *Hall v. Miller*, 143 Vt. 135, 145–46 (1983). Since the Court does not reach this issue, it expressly makes no findings or conclusions regarding the reasonableness of Plaintiff’s measurement of consequential damages.

### **ORDER**

Based on the foregoing, the Court renders a verdict in this matter in favor of Defendant and denies Plaintiff’s claim for damages.

Electronically signed on 11/23/2022 3:12 PM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink, appearing to read "D. Richardson", is written over a light blue rectangular background. The signature is fluid and cursive.

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Daniel Richardson  
Superior Court Judge