

STATE OF MICHIGAN
COURT OF APPEALS

ACEMCO, INC, d/b/a ACEMCO
AUTOMOTIVE,

UNPUBLISHED
October 27, 2005

Plaintiff-Appellee/Cross-Appellant,

v

No. 256638
Muskegon Circuit Court
LC No. 02-041900-CK

OLYMPIC STEEL LAFAYETTE, INC,

Defendant-Appellant/Cross-
Appellee.

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant, Olympic Steel Lafayette, Inc. (Olympic), appeals as of right from a judgment in favor of plaintiff, Acemco, Inc. (Acemco) in this contract action. On appeal, Olympic argues that because the Supply Agreement between the parties violates the statute of frauds, is too indefinite, and lacks consideration, it is unenforceable and therefore the trial court erred when it granted Acemco's motion for summary disposition and denied Olympic's motion for summary disposition. On cross-appeal, Acemco argues that the trial court erred when it did not allow it to recover attorneys fees and costs under the Supply Agreement, the trial court erred when it granted Olympic's motion for summary disposition specifically finding that Acemco was not entitled to the agreement's pricing from November 2001 through December 2001, and finally that if this Court finds that the jury verdict in the matter must be reversed, that the trial court erred when it found the Supply Agreement was not a requirements contract.

Because the Supply Agreement lacks a quantity term and violates the statute of frauds, is too indefinite to be enforced, and mutual consideration is absent, the Supply Agreement is wholly unenforceable both for the term of the agreement and retroactively. Further, the trial court properly found that the Supply Agreement was not a requirements contract and properly dismissed Acemco's claim for attorney fees and costs of litigation. We affirm in part, reverse in part, and remand.

Acemco is an automotive supplier that manufactures metal stampings for use in various cars and light trucks. Olympic is a steel service center that provides improved steel coils for use in manufacturing to various customers in the automotive industry including plaintiff. On December 6, 2001, Acemco and Olympic executed a written agreement. The written document

is entitled “Supply Agreement”¹ and includes two exhibits, A and B. The parties agreed to the following obligation:

Purchase of Products. During the term of this Agreement, the Seller agrees to sell to the Buyer such quantities of the Products as the Buyer may specify in its purchase orders, which the buyer may deliver at its discretion.

According to the document, exhibit A set forth the specifications of the steel products distributed and sold by Olympic. Exhibit A is a spreadsheet listing twenty-four items, several columns of product specifications, and one column entitled “Price delv’d.” Centered on two lines on the top of the document are the words “Acemco Blanket 2001” and it is dated November 13, 2001. Elsewhere on the document are the words “2002 Pricing.”

The only time the Supply Agreement references exhibit B is in a term concerning “pricing.” The term states as follows:

Pricing. The pricing of the Products during the term of this Agreement shall be as provided in Exhibit B attached hereto.

Attached to the Supply Agreement representing exhibit B is a purchase order printed on an Acemco order form. The purchase order lists Olympic as the “VENDOR” and Acemco as the “SHIP TO.” The “quantity” column on the purchase order is listed as “1.000 EA.” There are two product prices appearing on the purchase order and are listed as “HRPO Steel: \$14.95” and “HSLA Steel: \$15.85.” Exhibit B does not incorporate or include the word “blanket” or the phrase “blanket order”. In fact, other than in the specifications exhibit, the word “blanket” or phrase “blanket order” is conspicuously absent.

Following execution of the contract, Acemco began purchasing steel from Olympic pursuant to the prices in the Supply Agreement. Within a few months after the execution of the Supply Agreement, the institution of steel tariffs caused the market price levels on raw steel to increase dramatically. Despite instituting a corporate goal to move to a leaner raw steel inventory carrying system in 2001, reducing the year 2000 inventory level of three to four weeks to five to ten days, and after the increase in steel prices, Acemco established a plan to drastically increase its in-house inventory levels in order to build a “safety stock of raw material.” Acemco’s increasing inventory on-hand goals resulted in Acemco rapidly increasing its steel orders from Olympic through spring and summer 2002.

After receiving Acemco’s orders, Olympic warned Acemco that it would not be able to continue to supply it with the increasing quantities of steel, and also requested that Acemco pay a

¹ The first paragraph of the Supply Agreement errantly lists Acemco as the “Seller” and Olympic as the “Buyer.” The trial court found that this error was nothing more than a “typographical error” and had no other effect on the Supply Agreement because there was no other conduct or admission suggesting a reversal of roles. The parties do not raise this issue on appeal and we do not address it.

price premium on the prices set forth in the Supply Agreement on its orders as a result of prevailing market prices. Acemco responded that it would not pay an increased price and repeatedly requested assurances from Olympic that it would be able to fulfill the amounts of steel ordered in its purchase orders or Acemco would be forced to obtain “cover.” Olympic attempted to procure the steel necessary to fulfill Acemco’s orders and continued to make steel deliveries under the Supply Agreement throughout spring and summer 2002 but was late with some deliveries and missed others. Ultimately, because Olympic did not provide the requested assurances, Acemco declared Olympic in breach of the Supply Agreement in September 2002. Acemco informed Olympic that it would no longer accept any deliveries from Olympic. Acemco admitted that one of the reasons it told Olympic not to deliver further steel was because Acemco “had insufficient floor space for the deliveries scheduled both from Olympic and from [its] alternate suppliers.” Acemco admitted that at that point its plants were “virtually filled up with steel.”

Acemco filed a complaint against Olympic alleging breach of the Supply Agreement and requested the court to award Acemco cover damages. Olympic answered and filed a counterclaim seeking damages against Acemco alleging that the Supply Agreement was not enforceable, and alternatively, to the extent it was enforceable, that it was Acemco who was in breach of the Supply Agreement. After discovery, the parties filed cross-motions for summary disposition, and the trial court found the Supply Agreement enforceable. As such, the trial court granted partial summary disposition in favor of Acemco on its breach of contract claim against Olympic for failure to timely deliver steel orders and failure to provide assurances, and found that Acemco was entitled to cancel the Supply Agreement and seek cover.

At the same time, and on Olympic’s motion for summary disposition regarding unenforceability, the trial court found that the Summary Agreement was neither indefinite in its terms nor lacking consideration. In favor of Olympic, the trial court granted partial summary disposition holding that nothing in the record supported Acemco’s assertions that the Supply Agreement was a “requirements contract.”

Thereafter, the matter proceeded to a jury trial where the core issue for the jury was to determine the actual quantity of “Acemco’s 2002 forecasted volume.” The court instructed the jury that the Supply Agreement was an enforceable contract; the contract was broken as of August 28, 2002; and that the quantity term was “Acemco’s 2002 forecasted volume, give or take 15%.” The jury returned a verdict awarding Acemco \$772,135 in “cover” damages for breach of contract and Olympic \$821,382 in damages for breach of contract on its remaining counterclaims. The trial court entered an order of judgment reflecting the jury verdict ordering Acemco to pay Olympic a total judgment of \$121,777. The court did not award costs to either party. Olympic timely appealed the final order assigning legal errors at the summary disposition phase of the action. Acemco answered and cross-appealed.²

² Neither party has appealed any aspect of the jury trial.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Under MCR 2.116(C)(8), the legal basis of the complaint is tested by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All factual allegations are taken as true, and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party. *Id.* The motion should be denied unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify recovery. *Id.*

A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A court must consider the entire record in the light most favorable to the nonmoving party. *Id.* The trial court may grant summary disposition under MCR 2.116(C)(10) if it determines there is no genuine issue of material fact and judgment is warranted as a matter of law. *Id.* A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record presents an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

On direct appeal, Olympic first argues that the trial court erred when it denied its motion for summary disposition because the Supply Agreement is unenforceable since it lacks a quantity term and violates the statute of frauds. Acemco counters asserting that because the Supply Agreement does contain a quantity term and because Olympic admitted the parties entered into the Supply Agreement, the statute of frauds does not preclude enforcement of the contract.

The contract between the parties was one for the sale of goods and so it falls under the Uniform Commercial Code. Thus, the issues in this case are governed by the UCC as adopted in Michigan. MCL 440.1101 *et seq.* Under MCL 440.2106(1), a "contract for sale" includes both a present or future sale of goods. The UCC statute of frauds provision applies to the sale of goods and the Supply Agreement in this case concerned the sale of goods, i.e., steel. Therefore, MCL 440.2201(1) applies to this case. The statute requires that the quantity term of a contract for the sale of goods be in writing before the contract is enforceable. *Lorenz Supply Co v American Standard, Inc*, 419 Mich 610, 614; 358 NW2d 845 (1984). Specifically, MCL 440.2201(1) requires: (1) a "writing sufficient to indicate that a contract for sale has been made between the parties" and (2) that the writing be "signed by the party against whom enforcement is sought." MCL 440.2201(1). While other terms of the contract may be proven by parol evidence, the quantity may not. *Lorenz Supply Co, supra* at 614; *In re Frost Estate*, 130 Mich App 556, 559; 344 NW2d 331 (1983). This Court in *In re Frost Estate, supra*, articulated the rule as follows:

"When quantity is not precisely stated, parol evidence is admissible to show what the parties intended as the exact quantity,"

* * *

but where the writing relied upon to form the contract of sale is totally silent as to quantity, parol evidence cannot be used to supply the missing quantity term. [*Id.* quoting *Alaska Independent Fisherman's Marketing Ass'n v New England Fish Co*, 15 Wash App 154, 159-160; 548 P 2d 348 (1976), quoting *Hankins v American Pacific Sales Corp*, 7 Wash App 316; 499 P 2d 214 (1972).]

The Supply Agreement separate from its exhibits contains twenty-nine enumerated terms set out separately, none of which is entitled “quantity.” Quantity is referred to in only one place in the Supply Agreement, in paragraph 1, where it states:

1. Purchase of Products. During the term of this Agreement, the Seller agrees to sell to the Buyer such quantities of the Products as the Buyer may specify in its purchase orders, which the buyer may deliver at its discretion.

Reasonable minds could not construe the above language as containing a quantity term because the language specifies no quantity whatsoever. The language instead grants complete discretion to the buyer to deliver purchase orders containing any amount or no amount at its discretion without any other limiting feature. The grant of complete discretion results in a countless number of possible quantities from zero to infinity. “Any” quantity is in fact no quantity at all.

Acemco argues that Exhibit A includes the term “blanket” on the attachment and that the use of that word in conjunction with the description of products on the attachment is sufficient to satisfy the quantity term requirement. Exhibit A is referred to in the Supply Agreement only in the preamble section of the document, and it states as follows:

The Seller is engaged in the distribution and sale of certain steel products, the specifications for which are set forth in Exhibit A attached hereto (the “Products”).

In *Great Northern Packaging Inc v General Tire and Rubber Co*, 154 Mich App 777, 787; 399 NW2d 408 (1986) this Court found that the term “blanket order” expresses a quantity, albeit an imprecise one allowing for the introduction of parol evidence to determine the quantity. In that case, the words “Blanket Order” appeared on an actual purchase order. The purchase order was a change order that had altered the initial quantity represented on the purchase order from the words “fifty units” to the words “Blanket Order.” *Id.* at 780. Here, the word is simply “blanket” and not “blanket order,” the word appears on the top of a specifications sheet and not on a purchase order actually representing a quantity. Reasonable minds could not differ that the word “blanket” itself, its placement on the header of a specifications sheet, or the use of the word “blanket” in conjunction with the description of products does not implicate the concept of quantity, let alone provide a quantity sufficient to satisfy the statute of frauds.

Acemco also argues that Exhibit B is clearly a blanket purchase order and uses terminology based on blanket order principles and thus the language in the Supply Agreement itself satisfies the statute of frauds because of the use of the phrase “in its purchase orders” in paragraph one of the agreement. Exhibit B is referenced only once and that is in paragraph three regarding “pricing” in the Supply Agreement. The term states as follows:

3. Pricing. The pricing of the Products during the term of this Agreement shall be as provided in Exhibit B attached hereto.

As Exhibit A was used to illustrate product specifications, Exhibit B was clearly used to set the price of the steel. Although printed on a purchase order form, this document was not an order. Exhibit B was only referred to in paragraph three of the contract, the pricing paragraph, and the quantity of 1.000 EA shows that one unit of HRPO Steel was priced at \$14.95, and one unit of

HSLA Steel was priced at \$15.85. Unlike *Great Northern Packaging Inc, supra*, this purchase order was not an actual order because it was not used to make an order. Instead, the document merely set out a pricing schedule and never referenced contract quantity. Reasonable minds could not differ regarding whether Exhibit B was a purchase order or pricing schedule. Exhibit B alone or read in concert with the rest of the Supply Agreement does not provide a quantity term.

For all of these reasons, reasonable minds could not construe the language in the Supply Agreement as containing a quantity term. The trial court erred when it found that the Supply Agreement contained “an imprecise or erroneous quantity provision.” The trial court erred when it allowed the introduction of any parol evidence to “supply the missing quantity term.” *In re Frost Estate, supra* at 559.

Acemco next argues that even if the Supply Agreement does not contain a quantity, Olympic’s admissions satisfy the statute of frauds exception. The trial court found that Olympic cannot rely on the statute of frauds defense because Olympic admitted that the Supply Agreement was an enforceable contract in its pleadings, and because the “uncontroverted documentary record further establishes that corporate officers of Olympic admitted in their depositions that the quantity of steel which they were obligated to sell to Acemco under the contract was the Acemco 2002 forecasted volume, give or take fifteen percent.”

Our legislature has provided a judicial admission exception to the requirement that a contract for the sale of goods be in writing. MCL 440.2201(3)(b).³ It provides in pertinent part:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500.00 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

³ MCL 440.2201 was rewritten and amended by PA 2002, No. 15 effective February 21, 2002. The amended version of the statute increases the amount in subsection (1) to \$1,000.00 or more, but does not otherwise materially change the statute. For purposes of this case, since the statute was amended after the Summary Agreement was executed on December 6, 2001, we reference the previous version of the statute.

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted [MCL 440.2201(3)(b).]

Acemco asserts that in Olympic's pleadings, Olympic repeatedly refers to the Supply Agreement, and in its counterclaim relies on the Supply Agreement in support of its own breach of contract claims against Acemco and that these references constitute admissions for purposes of MCL 440.2201(3)(b). Acemco also points to deposition testimony of Olympic's former sales manager, Todd Watts, its chief financial officer, Richard Marabito, and inside sales manager, Sandra Innes, indicating that the parties had a contract for purposes of MCL 440.2201(3)(b).

First, our review of Olympic's pleadings reveals that Olympic does reference the Supply Agreement. However, the references are for purposes of challenging the sufficiency of the agreement. Acknowledging the existence of a writing encompassing an agreement between the parties does not constitute an admission that the Supply Agreement is a valid and enforceable contract containing all required terms. Also, Olympic did plead the affirmative defenses of the statute of frauds and lack of mutuality from its first pleadings illustrating that Olympic did not concede the Supply Agreement was a valid and enforceable contract despite referencing the agreement in its pleadings.

Acemco also points to deposition testimony of Olympic's former sales manager, Todd Watts, asserting that his testimony not only constitutes an admission of contract for purposes of MCL 440.2201(3)(b), but also a "quantity of goods admitted" pursuant to MCL 440.2201(3)(b). However, the deposition established that Watts was no longer associated with Olympic in any capacity on the date of his deposition, April 16, 2003. In fact, Watts testified that he left Olympic's employ on his own volition on September 3, 2002. Because Watts was no longer employed by Olympic, any statements he made during the deposition cannot qualify as admissions under the judicial admission exception to the requirement that a contract for the sale of goods be in writing. MCL 440.2201(3)(b).⁴

Next, Acemco points to deposition testimony of Olympic's chief financial officer, Richard Marabito. A review of Marabito's deposition testimony reveals that he was employed as an officer of Olympic on the date of the deposition. Moreover, it is clear that Marabito testified that the parties had a contract. This admission does fulfill the first prong of MCL 440.2201(3)(b), that a contract for sale was made by the parties. But it does not fulfill the second prong of MCL 440.2201(3)(b) -- enforceability. MCL 440.2201(3)(b) states that even if a contract is admitted, "the contract is not enforceable under this provision beyond the quantity of goods admitted." Acemco does not highlight in its brief on appeal, and we have not found in Marabito's deposition, any "quantity of good admitted" or even a reference to quantity under the Supply Agreement. Therefore, Marabito's deposition testimony, although an admission that the

⁴ See also MRE 801(d)(2)(D) for further support.

parties made a contract for the sale of goods, does not make the contract enforceable because he has not provided an admitted quantity to fulfill the second prong of MCL 440.2201(3)(b).

Finally, Acemco relies on the deposition testimony of Sandra Innes, Olympic's inside sales manager, stating that her testimony also satisfies the admission exception to the statute of frauds, MCL 440.2201(3)(b). In its brief on appeal, Acemco states specifically, "Innes testified that Olympic was obligated to provide *a customer like Acemco* with up to 15% more steel than its annualized forecast and also acknowledged that Olympic and Acemco did have a business account relationship." [Emphasis added.] Acemco never asserts that Innes admitted there was an enforceable contract between the parties, and further, never asserts that Innes was aware of a quantity term present in the agreement between Acemco and Olympic. Our reading of Innes' testimony reveals that she never testified specifically about the Supply Agreement and further never provided a quantity term for the Supply Agreement at issue. Innes' testimony was much more generalized and concerned a methodology used to arrive at quotes from her experience in the industry, and was not an admission that the parties made a contract for the sale of goods and does not make the contract enforceable pursuant to the exception found in MCL 440.2201(3)(b) since she has not provided an admitted quantity.

Because there is no discernable quantity included in the four corners of the Summary Agreement, and because Acemco offered no admissible testimony providing both an admission of a contract for the sale of goods and an admitted quantity, the trial court erred when it denied Olympic's motion for summary disposition. Since Olympic has established that the Supply Agreement is not enforceable for lack of a quantity term and that the trial court erred when it denied Olympic's motion for summary disposition, we decline to reach Olympic's alternate arguments supporting reversal.

On cross-appeal, Acemco argues the trial court erred when it granted Olympic summary disposition on Acemco's claims for attorney fees and costs. We review a trial court's decision concerning attorney fees and costs for an abuse of discretion. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002); *Schoensee v Bennett*, 228 Mich App 305, 314; 577 NW2d 915 (1998). A trial court's decision constitutes an abuse of discretion when the result is "so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Id.* at 314-315.

In general, a contractual provision requiring the breaching party to pay the other side's attorney fees is judicially enforceable. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). But recovery is limited to reasonable attorney fees. *Id.* at 195-196; *In re Howarth Estate*, 108 Mich App 8, 12; 310 NW2d 255 (1981). However, because the Supply Agreement is not enforceable since the quantity term is missing, Acemco cannot attempt to enforce the indemnity section of the Supply Agreement regarding claims for attorney fees and costs. Likewise, Acemco's attempts to enforce an unenforceable agreement retroactively from November 1, 2001 through December 5, 2001 must also fail.

Finally, Acemco argues on cross-appeal that if this Court reverses the jury verdict and finds that MCL 440.2201 applies, and that the Supply Agreement is not a fixed quantity agreement, then the Supply Agreement is still enforceable as a requirements contract, contrary to the trial court's finding otherwise. Our Supreme Court has stated that in order for a requirements contract to be enforceable under MCL 440.2201(1), specific language describing the

“requirements or output term of a contract” must be included in the written agreement. *Lorenz Supply Co, supra* at 615. The trial court found, and we agree, that there is nothing in the Supply Agreement suggesting a requirements contract. Further, a requirements contract has been described as an agreement “in which the seller promises to supply all the specific goods or services which the buyer may need during a certain period at an agreed price in exchange for the promise of the buyer to obtain his required goods or services exclusively from the seller.” *Propane Industrial, Inc v General Motors Corp*, 429 F Supp 214, 218 (WD Mo, 1977). Again, the trial court found, and we agree, that nothing in the written agreement binds Acemco to purchase its steel exclusively from Olympic. This is further support for the conclusion that the Supply Agreement is not a requirements contract.

Affirmed in part, reversed in part, and remanded. We remand to the trial court for entry of summary disposition in favor of Olympic. And we direct the trial court to vacate the post-trial judgment and enter judgment in accordance with the jury verdict in favor of Olympic on its counterclaims. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio