STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

CHALLENGE MFG. COMPANY, LLC,

Plaintiff,

vs.

METOKOTE CORPORATION,

Defendant.
_____/

Case No. 19-10312-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER RESOLVING CROSS-MOTIONS
FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Canadian-born character actor and playwright John McLiam coined the phrase "icing on the cake" in his play, "*The Sin of Pat Muldoon*," but McLiam never explained whether the icing on the cake constitutes a good or a service provided by a baker. This case obligates the Court to solve that lingering mystery. In 2018, Plaintiff Challenge Mfg. Company, LLC ("Challenge") and Defendant MetoKote Corporation ("MetoKote") modified their supply chain contract by agreeing to a revised purchase order that not only increased the pricing structure for MetoKote's e-coating of automotive parts, but also stated: "Metokote agrees that it will not request any further price increase for the life of the part[.]" In September 2019, MetoKote demanded another price increase. At first, Challenge balked, but eventually it sent an e-mail promising to modify the price under protest and then it issued a second revised purchase order increasing the price "to $1.95 – effective 12/1/19." The framework for deciding whether the second revised purchase order binds the parties depends upon whether the e-coating furnished by MetoKote constitutes a good or a service. The Court concludes that e-coating is a good, which turns out to be the icing on the cake for Challenge in this contest.

I. Factual Background

Both sides have moved for summary disposition under MCR 2.116(C)(10), which allows the parties to contest the factual sufficiency of Plaintiff Challenge's claims. See El-Khalil v Oakwood Healthcare, Inc, 504 Mich 152, 160 (2019). In evaluating the competing motions, the Court should review "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." Maiden v Rozwood, 461 Mich 109, 120 (1999). Thus, the Court shall limn the facts by referring to the entire record developed by the parties.

Plaintiff Challenge and Defendant MetoKote began their commercial relationship under the terms of a blanket purchase order issued in November of 2014. In 2017, MetoKote asked for a price increase, and Challenge acceded by issuing a new blanket purchase order bearing the revision date of January 4, 2018. See Complaint, Exhibit 1. That price increase was accompanied by a notation in the revised purchase order that "Metokote agrees that it will not request any further price increase for the life of the part, and will continue to support the Customer's full production demands for the life of the program." Id. The revised purchase order included a second page with the instruction to "See Standard Terms for Purchases of Goods or Services" and a website address, id., but those terms drafted by Challenge were not attached or sent to MetoKote.

In 2019, Defendant MetoKote sought another price increase and threatened to terminate its contractual relationship with Plaintiff Challenge if Challenge did not agree to the price increase that MetoKote demanded. The parties exchanged e-mails on the subject, and Challenge ultimately issued a second revised purchase order that included the notation: "Price adjusted on 11/25/19 to $1.95 – effective 12/1/19." See MetoKote's Motion and Brief for Summary Disposition, Exhibit 15. That version of the purchase order also came with a page directing MetoKote to "See Standard Terms for

Purchases of Goods or Services" and a website address, but not the terms themselves. See id. On November 19, 2019, in the midst of negotiations over a second price increase, Challenge filed this case requesting declaratory relief and claiming breach of contract against MetoKote. At the outset of the action, Challenge moved for summary disposition, but the Court refused to award relief until the parties finished discovery. Now, with discovery in the rearview mirror, the parties have returned with another round of motions for summary disposition under MCR 2.116(C)(10).

II. Legal Analysis

In its complaint, Plaintiff Challenge has presented two claims. First, Challenge has requested a declaratory judgment that Defendant MetoKote is bound to provide parts at the contract price under a requirements contract "for the life of the program." See Complaint, ¶¶ 29-35. Second, Challenge has accused MetoKote of breach of contract for demanding an increase in the price prescribed under the revised purchase order dated January 4, 2018. See Complaint, ¶¶ 37-40. Each party asserts that it is entitled to summary disposition under MCR 2.116(C)(10). "When considering such a motion, a trial court must consider all evidence submitted by the parties" and may award relief "when there is no genuine issue of material fact." El-Khalil, 504 Mich at 160. "'A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.'" Id.

A. Applicability of the Uniform Commercial Code.

The parties have raised a threshold issue that the Court must resolve before deciding whether either side should receive summary disposition. Specifically, the parties disagree about whether the motions should be resolved under common-law contract principles or the provisions of the Michigan version of the Uniform Commercial Code ("UCC"), MCL 440.1101, *et seq*. By its terms, the UCC

only "applies to transactions in goods[.]" See MCL 440.2102; see also Bev Smith, Inc v Atwell, 301 Mich App 670, 682 (2013). In contrast, the "sale of services [is] actionable under general principles of common law." Home Ins Co v Detroit Fire Extinguisher Co, Inc, 212 Mich App 522, 526 (1995). Some transactions involve a combination of goods and services. "When determining whether the UCC applies to a contract for the sale of goods and services, Michigan courts apply the predominant factor test." Id. at 527. Under that test, if "the purchaser's ultimate goal is to acquire a product, the contract should be considered a transaction in goods, even through service is incidentally required." Neibarger v Universal Cooperatives, Inc, 439 Mich 512, 536 (1992). "Conversely, if the purchaser's ultimate goal is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service." Id. "Whether the Uniform Commercial Code . . . applies in a particular case is a question of law," see Bev Smith, 301 Mich App at 681, so the Court must apply the predominant-factor test to determine whether to resolve this case under the UCC or, instead, under common-law principles.

By all accounts, Plaintiff Challenge furnishes automotive assemblies to General Motors. To satisfy the requirements of General Motors, Challenge enlisted Defendant MetoKote to coat one part – called a plenun – that Challenge incorporates into its assemblies.[1] See Complaint, ¶ 11. Under the parties' contract, Challenge ships the part to MetoKote, which applies an e-coating to the part. After MetoKote has applied the e-coating, it returns the part to Challenge, which incorporates the part into an automotive assembly. MetoKote describes what it does as a service, whereas Challenge contends that MetoKote provides a good in the form of the e-coating. MetoKote relies upon an out-of-state decision, Insul-Mark Midwest, Inc v Modern Materials, Inc, 612 NE2d 550 (Ind Sup Ct 1993), which

[1] In their briefs, both parties have explained the e-coating process in excruciating detail.

supports MetoKote's contention that the application of a coating constitutes a service, not a good. But Challenge counters with an unpublished decision from the Michigan Court of Appeals holding that the application of proprietary coatings to automotive parts involved "sales of tangible personal property[,]" rather than "performance of services," because "it was the actual coatings, provided by [the supplier], that added value to its customers' automotive parts." PFG Enterprises v Department of Treasury, No 305948, slip op at 3-4 (Mich App Dec 27, 2012) (unpublished decision). That same reasoning applies with equal force in the instant case, where MetoKote's "application services were incidental to the sales of its" e-coating. Id. at 4. Accordingly, the Court shall employ the reasoning of our own Court of Appeals and rule that MetoKote provides a good – not a service – to Challenge, so the transactions between those two parties are governed by the Michigan version of the UCC.[2]

B. The Governing Blanket Purchase Order.

Plaintiff Challenge and Defendant MetoKote initially operated under a blanket purchase order that Challenge issued in 2014, but the two parties agreed upon a price increase, which was reflected in a revised purchase order effective January 4, 2018. See Complaint, Exhibit 1. That new purchase order seemed to settle the matter of pricing for once and for all by stating: "Metokote agrees that it will not request any further price increase for the life of the part[.]" Id. But in 2019, MetoKote made another demand for a price increase. Challenge rejected MetoKote's demand, and an exchange of e-mails ensued. See Challenge's Brief Supporting Its Motion for Summary Disposition, Exhibits 17-

[2] The Court acknowledges that the Supreme Court of Indiana rendered its decision in a case that involved the UCC, whereas our Court of Appeals provided its reasoning in a tax dispute, but the Court nonetheless finds the analysis of our Court of Appeals compelling enough to apply to disputes involving the UCC. Moreover, participants in supply chain transactions in the automotive industry have come to rely upon the detail, precision, and certainty afforded by the UCC, which was adopted in Michigan and other states to ensure uniform rules of engagement.

19 (e-mails from September 27, 2019, through November 25, 2019). The discussion began with a demand by MetoKote for a price increase on September 27, 2019, see id., Exhibit 17, and it ended when Challenge issued a second revised purchase order on November 25, 2019, that included a price increase "effective 12/1/19[.]" See id., Exhibit 20. Along the way, Challenge repeatedly reminded MetoKote of its contractual promise not to request any additional price increases, MetoKote made threats of disruptions in service to Challenge and even threatened to withdraw from the contractual relationship, and on November 25, 2019, Challenge sent an e-mail to MetoKote stating: "Challenge will be updating its pricing to you this morning under protest [and] will be sending the updated PO shortly." See id., Exhibits 17-19. Then, as promised, Challenge sent MetoKote the second revised purchase order on November 25, 2019, including a price increase effective December 1, 2019. See id., Exhibits 19-20.

The final stages of the negotiations took place after Plaintiff Challenge had filed this action against Defendant MetoKote on November 19, 2019, so the validity of the second revised purchase order was immediately thrown into this litigation. In competing motions for summary disposition, Challenge argues that the price increase in the second revised purchase order is inoperative because Challenge issued that purchase order under protest. In contrast, MetoKote contends that the second revised purchase order is binding on both sides because nothing in the document itself suggests that it was issued under protest, rather than as a result of a bilateral agreement on a price increase. The UCC provides that a contracting "party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not prejudice the rights reserved by that performance, promise, or assent." See MCL 440.1308(1). To proceed under a reservation of rights, "[w]ords such as 'without prejudice,' 'under protest,' or the

like are sufficient." See MCL 440.1308(1). Challenge maintains that it reserved its right to contest the price increase by stating in an e-mail sent just before it issued the second revised purchase order that it would "be updating its pricing to you [*i.e.*, MetoKote] this morning under protest[.]" See Challenge's Brief Supporting Its Motion for Summary Disposition, Exhibit 19.

Surprisingly, Defendant MetoKote concedes on page two of its brief in response to Plaintiff Challenge's motion for summary disposition that "MetoKote is not claiming that Challenge's protest fails because it appears in an e-mail." MetoKote further asserts that "Challenge's protest claim fails because under the controlling common law the protest was omitted from a fully integrated contract, and parol evidence – such as a separate e-mail – is inadmissible to alter the contract's unambiguous terms." The Court, however, has already concluded that this dispute is governed by the UCC, rather than the common law of contracts. As a result, Challenge may attempt to invoke MCL 440.1308 in an effort to contest MetoKote's reliance on the second revised purchase order issued November 25, 2019. Defendant MetoKote characterizes MCL 440.1308(1) as inapplicable to this dispute because its language is limited to situations "where a party 'performs or promises performance or assents to performance' under an *existing contract*." See Brief in Support of MetoKote's Motion for Summary Disposition at 15 (emphasis in original). But the statute does not include the limitation to "existing" contracts that MetoKote claims. Instead, MCL 440.1308(1) applies to every contractual relationship through sweeping language that states:

> A party that with explicit reservation of rights performs or promises performance or assents to performance in any manner demanded or offered by the other party does not prejudice the rights reserved by that performance, promise, or assent.

See MCL 440.1308(1). Challenge assented to performance in a manner demanded by MetoKote by paying an increased price with explicit reservation of rights in an e-mail that immediately preceded

issuance of the second revised purchase order on November 25, 2019, thereby engaging in a textbook example of performance under protest contemplated by MCL 440.1308(1).

But Plaintiff Challenge's issuance of the second revised purchase order under protest ensures that Challenge will obtain summary disposition under MCR 2.116(C)(10) only if Challenge presents an argument that renders the second revised purchase order inoperative, thereby leaving the revised purchase order issued in 2018 in effect.[3] See Complaint, Exhibit 1. And this is where events on the ground have overtaken the allegations in the complaint Challenge filed six days before it issued the second revised purchase order. To its credit, Defendant MetoKote has tried to anticipate the theories that Challenge may pursue in its effort to invalidate the second revised purchase order,[4] but the Court prefers to permit Challenge to speak for itself.

Plaintiff Challenge's response to Defendant Metokote's summary disposition motion offers two theories. First, Challenge cites an unpublished ruling from the United States District Court for the Western District of Michigan, Chainworks, Inc v Webco Industries, Inc, 2006 WL 461251 (WD Mich Feb 24, 2006), for the legal proposition that price increases reflected in a purchase order issued under protest are inoperative. Second, a response brief from Challenge argues that the price increase in the second revised purchase order is neither binding upon Challenge nor enforceable by MetoKote because of the preexisting-duty rule, which provides that "doing what one is legally bound to do is not consideration for a new promise." Yerkovich v AAA, 461 Mich 732, 740-741 (2000). That rule

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[3] As Defendant MetoKote has succinctly put it: "Even assuming the UCC applies, Plaintiff's protest under § 1308(1) only preserved an objection. To challenge the 2019 Purchase Order Plaintiff must establish legal grounds to do so." See Brief in Support of MetoKote's Motion for Summary Disposition at 16.

[4] Specifically, Defendant MetoKote has explained in detail why neither unconscionability nor economic distress nor lack of consideration will invalidate the second revised purchase order.

"bars the modification of an existing contractual relationship when the purported consideration for the modification consists of the performance or promise to perform that which one party was already required to do under the terms of the existing agreement." Id. at 741. Thus, the preexisting-duty rule seems to carry the day for Challenge because MetoKote extracted the second revised purchase order by threatening to cut off Challenge's supply, insisting on a new purchase order, and offering nothing beyond continued supply of e-coating in exchange. But that theory appears nowhere in Challenge's complaint, and MetoKote has barely had a chance to contest that theory in a reply brief. Therefore, the Court shall abstain from awarding summary disposition under MCR 2.116(C)(10) to Challenge, deny MetoKote's motion for summary disposition, allow Challenge three weeks' leave to amend its complaint, and ultimately address both remaining arguments advanced by Challenge either in another round of motions for summary disposition or at a bench trial.[5]

III. Conclusion

For the reasons set forth in this opinion, the Court shall deny Defendant MetoKote's motion for summary disposition under MCR 2.116(C)(10), grant summary disposition to Plaintiff Challenge under MCR 2.116(C)(10) as to the applicability of the UCC to this action, abstain from granting any further relief to Challenge, and afford Challenge three weeks' leave to amend its complaint.

IT IS SO ORDERED.

Dated: March 24, 2021

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

[5] The Court intends to conduct a status conference to determine the best path forward.