STATE OF MICHIGAN

IN THE SUPREME COURT

MSSC, INC.,
Plaintiff-Appellee,

v

AIRBOSS FLEXIBLE PRODUCTS CO.,
Defendant-Appellant.
_____/

Supreme Court No. 163523

Court of Appeals No. 354533

Oakland County Circuit Court
No. 2020-179620-CB

Hon. James M. Alexander

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APPELLANT'S ADDENDUM OF UNPUBLISHED AND OUT-OF-STATE CASES

2020 WL 1169405
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

BORGWARNER PDS (ANDERSON), L.L.C., Plaintiff,
v.
INDUSTRIAL MOLDING CORPORATION, Defendant.

Case No. 20-10607
|
Signed 03/11/2020

Attorneys and Law Firms

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ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER and NOTICE OF HEARING ON MOTION FOR PRELIMINARY INJUNCTION FOR SPECIFIC PERFORMANCE

DENISE PAGE HOOD, United States District Judge

I. INTRODUCTION

***1** This matter is before the Court on Plaintiff BorgWarner PDS (Anderson), L.L.C.'s ("BorgWarner") Motion for Temporary Restraining Order and Preliminary Injunction ("Motion for TRO"). ECF No. 2. BorgWarner seeks an order "enjoining [Defendant Industrial Molding Corporation ("IMC")] to continue to perform its contractual obligations to supply BorgWarner 100% of its requirements of the 43 Part Numbers at issue (the "Parts") until further order of this Court." *Id.* at Pg 88. On March 6, 2020, BorgWarner filed a Verified Complaint against IMC alleging: Specific Performance (Count I); Declaratory Judgment (Count II); Breach of Contract/Anticipatory Repudiation (Count III); and Promissory Estoppel (Count IV).

II. BACKGROUND

BorgWarner is a Delaware limited liability company with its principal place of business located in Noblesville, Indiana, and none of its members or parent companies is a citizen of Tennessee or Texas. IMC is a Tennessee corporation with its principal place of business located in Lubbock, Texas. The Court has diversity subject matter jurisdiction pursuant to 28 U.S.C. § 1332 based on complete diversity of the parties and the amount in controversy exceeds $75,000, exclusive of costs, interest, and attorney fees. The Court appears to have personal jurisdiction over IMC based on the contracts at issue in this case, as IMC negotiated them with BorgWarner (a company whose headquarters are in Michigan) and because the contracts provide that "the forum and venue for any legal action or proceeding concerning this Purchase Order will lie in the appropriate federal or state courts in the State of Michigan and [IMC] specifically waives any and all objections to such jurisdiction and venue. ECF No. 1, Ex. 1 at § 27. For the same reasons, venue also is proper in this Court.

According to the Complaint and the Motion for TRO, IMC, as "Seller," has been supplying the Parts to BorgWarner, as "Buyer," and shipping them to BorgWarner's facility in San Luis Potosi, Mexico, since approximately January 2017. ECF No. 1, ¶ 7. BorgWarner incorporates the Parts into various automotive assemblies, including solenoid, alternator, and starter assemblies (the "Products") that BorgWarner supplies to its customer, General Motors. *Id.* at ¶ 8. BorgWarner represents that the Parts and Products are unique to GM and cannot be used anywhere else. IMC supplies the Parts pursuant to BorgWarner blanket purchase orders (the "Purchase Orders"). *Id.* at ¶ 9 (*see* ECF No. 1, Ex. 2 for representative samples of the Purchase Orders). Each Purchase Order contains "Terms and Conditions." *See* ECF No. 1, Ex. 1 (collectively, the Purchase Order and its Terms and Conditions constitute a "Contract").

Each Purchase Order obligates IMC to provide all or a specified percentage of the units that BorgWarner requires for the Part, which BorgWarner initiates by issuing "Releases" on a regular basis indicating both its current, and projected future, volume requirements. *Id.* at ¶ 10. IMC is then required to satisfy the Purchase Order, and IMC currently provides 100% of BorgWarner's requirements for all of the Parts. *Id.* Each of the Purchase Orders recites that it "is governed by and subject to

BorgWarner Purchase Order Terms and Conditions." *Id.* at ¶ 11. Those Terms and Conditions provide that, "subject to Buyer's termination rights, this Purchase Order is a requirements contract under which Buyer will purchase and Seller will sell all ... or ... a specified percentage ... of the goods or services specified for the length of the applicable manufacturer's program production life (including extensions and model refreshes) as determined by the original equipment manufacturer or, if applicable, by Buyer's Customer." *Id.* (citing ECF No. 1, Ex. 1 at § 1).

***2** The Terms and Conditions provide that "Deliveries must be made both in quantities and at times specified on the face of this Purchase Order or in Buyer's schedules and time is of the essence. Buyer's delivery schedules are an integral part of the Purchase Order, are governed by these terms and conditions and are not independent contracts." *Id.* at ¶ 12 (citing ECF No. 1, Ex. 1 at § 4) (emphasis added). In the event that the Purchase Order terminates for any reason, the Terms and Conditions dictate that IMC must "cooperate in the transition of supply. Seller will continue production and delivery of all goods and services as ordered by Buyer, at the prices and in compliance with the terms of the Purchase Order, without premium or other condition, during the entire period reasonably needed by Buyer to complete the transition to the alternate supplier(s)." *Id.* at ¶ 13 (citing ECF No. 1, Ex 1 at § 12) (emphasis added). The Terms and Conditions further state that "[t]his Purchase Order must not be filled at prices higher than those specified on the Purchase Order, unless otherwise agreed to in writing by the Buyer." *Id.* (citing ECF No. 1, Ex. 1 § 2).

BorgWarner alleges that, as early as January 3, 2020, IMC began to regularly breach the Contract by failing to deliver an adequate number of Parts to BorgWarner, in violation of its obligation to deliver the Parts "both in quantities and at times specified on the face of this Purchase Order or in Buyer's schedules and time is of the essence." *Id.* at ¶ 14 (citing ECF No. 1, Ex 1 § 4). BorgWarner claims to have made IMC aware of these breaches on many occasions, but IMC has ignored these warnings. *Id.* at ¶ 15.

On February 27, 2020, IMC delivered a letter by email to BorgWarner's parent company in Michigan that IMC had received information "indicat[ing] to us that [BorgWarner] may have been, or at least intends to be, sourcing from us less than 100% of [its] needs for the [Parts.]" *Id.* at ¶¶ 16-18 (citing ECF No. 1, Ex 3). IMC objected to this, and insisted that the Contract entitles IMC to be BorgWarner's sole supplier of the Parts for the life of the program and demanded "assurances" that BorgWarner would continue sourcing 100% of its requirements for the Parts from IMC for the life of the program. *Id.* at ¶¶ 18-19. Specifically, the letter demanded "a notarized affidavit from an executive officer of [BorgWarner]," along with several other indications of assurance, rather than "[a] simple statement from someone to that effect." *Id.* at ¶ 19 (citing ECF No. 1, Ex 3).

BorgWarner insists that IMC lacked the legal right to demand such assurances because the Contract does not entitle IMC to a guarantee that it will be BorgWarner's sole source of the Parts for the life of the program. *Id.* at ¶¶ 20-21 (citing ECF No. 1, Ex. 1 §§ 1 and 10, which provide that each Purchase Order is "subject to Buyer's termination rights," such that BorgWarner can "terminate all or any part of this Purchase Order at any time and for any reason by giving written notice to Seller."). For that reason, BorgWarner believes it has no obligation to guarantee IMC that BorgWarner will source 100% of the Parts from IMC for the life of the program. BorgWarner represents that it has not exercised its termination rights. *Id.* at ¶ 21.

IMC's letter asserted that BorgWarner's commitment to source 100% of its Parts from IMC is "critical to the pricing, capital commitments, raw material ordering and prompt supply." *Id.* at ¶ 22 (citing ECF No. 1, Ex 3). BorgWarner alleges that this claim fails to state a reasonable apprehension that a decision to resource the Parts would deprive IMC of BorgWarner's due performance of the Contract or otherwise injure IMC in any legally cognizable way because the Terms and Conditions make adequate provision for any obsolescence that IMC may incur as a result:

> Where articles or materials are to be specifically manufactured for Buyer hereunder and where Seller is not in default, an equitable adjustment shall be made to cover Seller's actual cost, excluding profit, for work-in-process and raw materials as of the date of termination, to the extent such costs are reasonable in amount and are properly allocable or apportionable under generally accepted accounting principles to the terminated portion of this Purchase Order.

***3** *Id.* at ¶ 23 (citing ECF No. 1, Ex 1 § 10). BorgWarner alleges that those terms constitute the "entire agreement" between the parties as to this subject matter, such that any additional "assurances" or accommodations demanded by IMC's letter are necessarily unreasonable. *Id.* at ¶ 24 (citing ECF No. 1, Ex 1 § 27).

IMC's February 27, 2020 letter further stated that "[f]ailure to completely comply will be confirmation of our concerns and entitle us to all remedies provide[d] by the [C]ontract and the Uniform Commercial Code." *Id.* at ¶ (citing ECF No. 1, Ex 3). BorgWarner alleges that such action is inconsistent with IMC's contractual obligations and an anticipatory breach of the Contract. *Id.* at ¶ *Id.* at ¶ 25. IMC indicated that:

> In the interim, ... all purchase orders referred to are suspended immediately, (i) no release not in the system at the beginning of this week and not at this moment accepted by us will be honored until further notice and (ii) our raw material purchasing activity will be modified so as to limit or prevent as much as possible any obsolescence that might be experienced due to this threat.

Id. at ¶ 26 (citing ECF No. 1, Ex 3). BorgWarner contends that this refusal to honor its Releases is both a direct and anticipatory breach of the Contract, as IMC "may not terminate this Purchase Order before expiration." *Id.* at ¶ 27 (citing ECF No. 1, Ex 1 §§ 4 and 10). In any event, under the Contract, IMC is obligated to cooperate with BorgWarner to "continue production and delivery of all goods and services as ordered by Buyer," without raising prices. *Id.* at ¶ 28 (citing ECF No. 1, Ex. 1, § 12).

On March 3, 2020, BorgWarner emailed IMC, advising that BorgWarner planned to respond to IMC's letter on or before March 6, 2020 (the Court has not been made aware whether such a response was sent to IMC), and reminding IMC that in the interim, "it is important that full shipments of [P]arts continue consistent with the current [P]urchase [O]rders." (emphasis in original). *Id.* at ¶ 32. The same day, IMC responded in an email, noting the lack of "adequate assurance" from BorgWarner and stating, "That does not mean we [IMC] intend to stop shipping. In fact, we intend to ship what is necessary to avoid a shutdown at your customer to the extent that depends on our product." *Id.* at ¶¶ 29-30 (citing ECF No. 1, Ex 4). For the purported reason of "protecting" itself, IMC stated,

> Until we can get a firm and believable build plan for each part, continued shipping must be via limited, agreed on spot P.O.s. It may be that a C.O.D. regimen is required until those plans can be agreed. However, nonpayment of any outstanding invoice will require additional measures on our part. ... We will not be ordering more raw material until we have the agreed plan in place. We have cancelled raw material orders that could be cancelled without penalty. Failure to address the matter further will force us to shut lines down that we view to be in immediate risk of overproduction."

Id. at ¶ 31 (citing ECF No. 1, Ex 4).

On March 4, 2020, IMC sent another email purporting to make other changes to the Contract:

> [IMC is] trying to maintain a normal production and shipping schedule. However, the longer you insist on no transparency the less likely you are to have a comfortable outcome.... If our raw material availability becomes an issue due to your lack of commitment, then we will have trouble supplying even the parts that were routinely on that schedule.

***4** *Id.* at ¶ 33 (citing ECF No. 1, Ex 5). IMC also stated that it was "**aware of a large surge of those parts put in the planning schedule las[t] week and cannot commit to satisfying those. Therefore, they have been rejected.... In the meantime, while we intend to continue our production and quality monitoring as**

usual, parts shipped are shipped WITHOUT WARRANTY OF ANY SORT EXPRESS OR IMPLIED." *Id.* (emphasis added). BorgWarner alleges that IMC does not have the legal or contractual right to make such unilateral alterations to the Contract and that any cancellation of raw material orders and related measures threaten to reduce the already-deficient volume of Parts IMC ships to BorgWarner to the point that BorgWarner may face shortages of the Products it ships to its customers. *Id.* at ¶¶ 34-35.

BorgWarner alleges that, based on IMC's communications noted above, "it will begin to run out of the Parts it needs to supply GM in as little as 1.5 weeks." *Id.* at ¶ 37. On March 5, 2020, BorgWarner representatives sought assurances from IMC about deliveries of BorgWarner's five most critical Parts, and IMC confirmed only three of them. On that basis, BorgWarner expects to run out of one of these parts within one week (on or about March 13, 2020), and to run out of the other within two weeks. *Id.* at ¶ 38.

On March 9, 2020, in conjunction with the Motion for TRO, BorgWarner submitted a proposed order granting the Motion for Temporary Restraining Order. Roughly 90 minutes later, IMC filed "Objections to the Proposed Order" submitted by BorgWarner, and a proposed order. The proposed order submitted by IMC is substantially the same as the proposed order submitted by BorgWarner in that recognizes that injunctive relief is appropriate, even allowing that IMC generally must continue supplying the Parts to BorgWarner. The proposed orders differ in exactly what "supplying the Parts to BorgWarner" means:

> (1) BorgWarner proposes that the Court require that "IMC must continue to meet all of BorgWarner's requirements of all Parts at issue in BorgWarner's Complaint, as stated in the [R]eleases issued by BorgWarner pursuant to the terms of BorgWarner's Purchase Orders. For the avoidance of doubt, this obligation includes the recent increase in volumes that IMC has referred to as a "surge."
>
> (2) IMC proposes that hte Court require that "IMC must use its best efforts to continue to supply, and BorgWarner must pay, for the 4[3] Parts at issue in BorgWarner's Complaint in quantities consistent with historical release schedules."

The Court notes that: (a) in the Motion for TRO, BorgWarner asks the Court to issue an order "requiring IMC to ship the Parts in accordance with the parties' supply agreement," ECF No. 2, PgID 88; and (b) in the brief in support of the Motion for TRO, BorgWarner asks the Court to issue an order "requiring IMC to timely supply BorgWarner with the quantities of the Parts at the times Ordered in the Releases until further order of this Court." ECF No. 2, PgID 111. BorgWarner filed a reply the same afternoon.

III. ANALYSIS

In this case, IMC has received notice of BorgWarner's Motion for a Temporary Restraining Order and, to an extent, agrees with the relief requested. Based on that notice, the Court considers the following four factors in determining whether to issue a temporary restraining order:

> (1) whether the movant has shown a strong or substantial likelihood or probability of success on the merits;
>
> (2) whether the movant has shown that he or she would suffer irreparable harm if the preliminary relief is not issued;
>
> ***5** (3) whether the issuance of a preliminary injunction will not cause substantial harm to third parties; and
>
> (4) whether the public interest would be served by the issuance of a preliminary injunction.

Sandison v. Michigan High School Athletic Association, Inc., 64 F.3d 1026, 1030 (6th Cir. 1995); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir. 1982); *Mason County Med. Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977). The standard for injunctive relief is not a rigid and comprehensive test. The four factors are to be balanced, not prerequisites that must be satisfied, as "these factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." *In re Eagle-Picher Indus., Inc.* 963 F.2d 855, 859 (6th Cir. 1992).

A. Likelihood of Success on the Merits

The Contracts require IMC to supply BorgWarner with its requirements of the Parts at fixed prices. *See, e.g.* ECF No. 1, Ex. 3 ("These purchase orders are 100% requirements orders for the life of the part ordered."); ECF No. 1, Ex. 1 at § 1 ("subject to Buyer's termination rights, this Purchase Order is a requirements contract under which Buyer will purchase and Seller will sell all ...

or ... a specified percentage ... of the goods or services specified for the length of the applicable manufacturer's program production life (including extensions and model refreshes) as determined by the original equipment manufacturer or, if applicable, by Buyer's Customer."); ECF No. 1, Ex. 1 at § 2 ("This Purchase Order must not be filled at prices higher than those specified on the Purchase Order, unless otherwise agreed to in writing by the Buyer.").

The Court notes that, even if IMC desires to and has the right to terminate one or more of the Purchase Orders, the Terms and Conditions dictate that IMC must "cooperate in the transition of supply[, such that] Seller will continue production and delivery of all goods and services as ordered by Buyer, at the prices and in compliance with the terms of the Purchase Order, without premium or other condition, during the entire period reasonably needed by Buyer to complete the transition to the alternate supplier(s)." ECF No. 1, Ex 1 at § 12 (emphasis added).

The Sixth Circuit has recognized the propriety of granting injunctive relief that consists of ordering a defendant supplier to continue to supply goods when the defendant is the sole supplier of parts to the plaintiff. *See, e.g.*, *TRW Inc. v. Indus. Sys. Assoc. Inc.*, 47 F. App'x 400, 401 (6th Cir. 2002). *See also* MICHIGAN CONTRACT LAW § 14.16 (1998) ("Specific performance is particularly appropriate in the modern automotive industry where manufacturers commonly enter into requirements contracts.").

As the Contracts appear to require IMC to continue to perform its contractual obligations to supply BorgWarner 100% of BorgWarner's requirements of the Parts, the Court finds that BorgWarner is likely to prevail on the merits of its claim seeking specific performance.

B. Irreparable Harm

Regarding the irreparable injury requirement, it is well settled that a plaintiff's harm is not irreparable if it is fully compensable by money damages. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). However, an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate. *Id.* at 511-512. "The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute." *Basicomputer*, 973 F.2d at 512. *See also Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001) ("loss of established goodwill may irreparably harm a company."); *Thermatool Corp. v. Borzym*, 575 N.W.2d 334, 338 (Mich. Ct. App. 1998) ("non-compensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty.").

***6** The Terms and Conditions provide that "Deliveries must be made both in quantities and at times specified on the face of this Purchase Order or in Buyer's schedules and time is of the essence. Buyer's delivery schedules are an integral part of the Purchase Order, are governed by these terms and conditions and are not independent contracts." *Id.* at ¶ 12 (citing ECF No. 1, Ex. 1 at § 4) (emphasis added). BorgWarner has represented that IMC currently provides 100% of BorgWarner's requirements for all of the Parts, ECF No. 1 at ¶ 10, which Parts are then supplied to, and only to, BorgWarner's customer, General Motors. *Id.* at ¶ 8.

BorgWarner notes that, as is standard practice in the automotive industry, it orders the Parts and delivers the Products on a just-in-time basis. *Id.* at ¶ 39. BorgWarner claims that, if BorgWarner's supply of Products to General Motors is interrupted because IMC ceases supply of the Parts, General Motors will have to turn their production lines off, causing "potentially devastating and irreparable consequences." *Id.* at ¶ 40. For purpose of seeking a restraining order, BorgWarner argues that General Motors would not only look to BorgWarner for compensation, but that such an interruption would "inflict lasting damage on BorgWarner's reputation with OEM customers."

Without continued supply of the Parts, BorgWarner's production lines will grind to a halt as soon as March 13, 2020. ECF No. 1, at ¶ 38. Although that may cause a financial impact of millions of dollars in shutdown damages, more important for purposes of the Motion for TRO are: (a) the incalculable losses from being shut out of future supply work with its OEM customers; (b) losing various employees due to a lack of work, and (c) severe damage to BorgWarner's reputation as a reliable, on-time supplier, likely leading to lost goodwill and future business opportunities with other OEMs. All of these possible consequences constitute irreparable harm. *See, e.g.*, *Almetals Inc. v. Wickeder Westfalenstah L. GmbH.*, No. 08-10109, 2008 WL 4791377, at *9 (E.D. Mich. Oct 29, 2008) (granting permanent injunction against automotive supplier where there was no alternative source of supply for the components and plaintiff would lose goodwill and business relationships with customers). The substantial danger and likelihood that BorgWarner will suffer immediate and irreparable harm absent injunctive

relief supports the entry of a temporary restraining order.

C. Balance of Harms

As noted above, BorgWarner is likely to sufferable irreparable harm if the Motion for Temporary Restraining Order is not granted. To the extent that IMC suffers any harm by having to continue to perform its duties under the Contracts, IMC can recover damages. This factor favors BorgWarner.

D. Public Interest

This factor favors BorgWarner, as the public has an interest in having valid contracts enforced and there is no evidence at this time that the Contracts are invalid. *See, e.g.*, *Zimmer, Inc. v. Albring*, No. 08-12484, 2008 WL 2604969, at *9 (E.D. Mich. Jun, 27, 2008); *Superior Consulting Co. v. Walling*, 851 F. Supp. 839, 848 (E.D. Mich. 1994).

E. Conclusion

Because BorgWarner has shown a likelihood of success on the merits and that it will suffer irreparable harm if IMC fails to deliver the Parts in accordance with the Contracts, the Court grants BorgWarner's Motion for a Temporary Restraining Order. IMC must continue to perform under the Contracts and supply the Parts to BorgWarner. Specifically, the Court will enter a temporary restraining order that requires IMC to timely supply, without interruption, BorgWarner with the quantities of the Parts at the times ordered in the Releases, and requires BorgWarner to timely pay IMC for such quantities of the Parts in accordance with the terms of the Contracts, until further Order of the Court. The Court notes that BorgWarner did not argue or request any language regarding "surges" in its Motion for TRO or brief in support of the Motion for TRO and, therefore, declines to include that language in this Order.

***7** The Court will set a hearing date on BorgWarner's Motion for Preliminary Injunction given that a temporary restraining order expires by its terms within fourteen (14) days, unless IMC consents to a longer time period. Fed. R. Civ. P. 65(b)(2). No security pursuant to Rule 65(c) need be posted by BorgWarner since it is not requesting any performance by IMC other than what is set forth in the Contracts.

IV. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that BorgWarner's Motion for Temporary Restraining Order (filed March 6, 2020) is GRANTED. No security is required to be posted.

IT IS FURTHER ORDERED that pursuant to Fed. R. Civ. P. 65(a), IMC must timely supply, without interruption, BorgWarner with the quantities of the Parts at the times ordered in the Releases, and BorgWarner must timely pay IMC for such quantities of the Parts in accordance with the terms of the Contracts, until further Order of the Court.

IT IS FURTHER ORDERED that BorgWarner serve IMC a copy of the Verified Complaint, BorgWarner's Motion for Preliminary Injunction and this Order, by **Thursday, March 12, 2020**. IMC's response to the Motion for Preliminary Injunction for Specific Performance must be filed with the Clerk's Office by **5:00 p.m. on Monday, March 16, 2020**, and BorgWarner's reply (if any) must be filed by **5:00 p.m. on Tuesday, March 17, 2020**.

IT IS FURTHER ORDERED that a **hearing on BorgWarner's Motion for Preliminary Injunction for Specific Performance is scheduled for Wednesday, March 18, 2020, at 2:30 p.m.** Proofs will be taken at that time if required by the parties, and the parties so notify the Court.

All Citations

Not Reported in Fed. Supp., 2020 WL 1169405

End of Document

2021 WL 4975067
United States District Court, E.D. Michigan, Southern Division.

COOPER-STANDARD AUTOMOTIVE INC., Plaintiff,
v.
DAIKIN AMERICA, INC., Defendants.

Case No. 21-cv-12437
|
Signed 10/26/2021

Synopsis
Background: Buyer brought diversity action against seller of resins that buyer incorporated into various automotive parts, asserting claims for breach of contract/anticipatory repudiation and promissory estoppel and seeking specific performance declaratory judgment. P filed motion for temporary restraining order.

Holdings: The District Court, Nancy G. Edmunds, J., held that:

[1] buyer's terms and conditions in purchase order, which expressly limited acceptance of its offer to its own terms and conditions, governed supply contract with seller;

[2] buyer demonstrated likelihood of success on merits of claims for breach of contract/anticipatory repudiation against seller;

[3] buyer demonstrated irreparable harm absent temporary restraining order; and

[4] public interest would be served by issuing temporary restraining order.

Motion granted.

Procedural Posture(s): Motion for Temporary Restraining Order (TRO).

West Headnotes (10)

[1] Injunction Grounds in general; multiple factors

212Injunction
212IIITemporary Restraining Orders in General
212III(B)Factors Considered in General
212k1132Grounds in general; multiple factors

Court considers four factors in determining whether to issue temporary restraining order (TRO): (1) whether movant has strong likelihood of success on merits, (2) whether movant would suffer irreparable injury absent stay, (3) whether granting stay would cause substantial harm to others, and (4) whether public interest would be served by granting stay. Fed. R. Civ. P. 65(b).

[2] Sales Acceptance of offer to buy

343Sales
343IIINature and Formation of Contract
343k718Offer and Acceptance
343k721Offer to Buy
343k721(3)Acceptance of offer to buy

Under Article 2 of the Uniform Commercial Code (UCC), as adopted in Michigan, contract for seller to supply buyer with resins that buyer incorporated into various automotive parts was formed when seller accepted buyer's offer by issuing acknowledgement to buyer and shipping the products to buyer along with an invoice. Mich. Comp. Laws Ann. § 440.2207(1).

[3] Contracts Offer and acceptance in general
Contracts Necessity in general

95Contracts
95IRequisites and Validity
95I(B)Parties, Proposals, and Acceptance
95k16Offer and acceptance in general
95Contracts
95IRequisites and Validity
95I(D)Consideration
95k47Necessity in general

At its most basic level, a contract is formed when there is an offer, acceptance, and consideration.

[4] **Sales** Offer to buy

343Sales
343IIINature and Formation of Contract
343k718Offer and Acceptance
343k725Variance from Offer; Additional Terms in Acceptance or Confirmation
343k725(3)Offer to buy

Under Article 2 of the Uniform Commercial Code (UCC), as adopted in Michigan, buyer's terms and conditions in purchase order, which expressly limited acceptance of its offer to its own terms and conditions, governed supply contract with seller of resins that buyer incorporated into various automotive parts, even though seller's order acknowledgement purported to reject different terms or conditions proposed by buyer, because seller did not expressly make its acceptance conditional on buyer's assent to seller's terms. Mich. Comp. Laws Ann. § 440.2207(2)(a).

[5] **Injunction** Sales and marketing in general

212Injunction
212IVParticular Subjects of Relief
212IV(L)Trade or Business
212k1366Sales and marketing in general

Buyer demonstrated likelihood of success on merits of claims for breach of contract/anticipatory repudiation against seller of resins, which buyer incorporated into various automotive parts, based on seller's unilaterally raising prices of the products and threatening to withhold the products, weighing in favor of temporary restraining order. Fed. R. Civ. P. 65(b).

[6] **Injunction** Irreparable injury

212Injunction
212IIPreliminary, Temporary, and Interlocutory Injunctions in General
212II(B)Factors Considered in General
212k1101Injury, Hardship, Harm, or Effect
212k1106Irreparable injury

Showing of probable irreparable harm is the single most important prerequisite to granting injunctive relief. Fed. R. Civ. P. 65.

[7] **Injunction** Irreparable injury
Injunction Recovery of damages

212Injunction
212IInjunctions in General; Permanent Injunctions in General
212I(B)Factors Considered in General
212k1041Injury, Hardship, Harm, or Effect
212k1046Irreparable injury
212Injunction
212IInjunctions in General; Permanent Injunctions in General
212I(B)Factors Considered in General
212k1050Availability and Adequacy of Other Remedies
212k1054Recovery of damages

Party's harm is "irreparable," as required for injunctive relief, when it cannot be adequately compensated by money damages. Fed. R. Civ. P. 65.

[8] **Injunction** Clear, likely, threatened, anticipated, or intended injury
Injunction Irreparable injury

212Injunction
212IInjunctions in General; Permanent Injunctions in General
212I(B)Factors Considered in General
212k1041Injury, Hardship, Harm, or Effect

212k1044Clear, likely, threatened, anticipated, or intended injury
212Injunction
212IInjunctions in General; Permanent Injunctions in General
212I(B)Factors Considered in General
212k1041Injury, Hardship, Harm, or Effect
212k1046Irreparable injury

For an injury to constitute irreparable harm, as required for injunctive relief, it must be certain, great, and actual. Fed. R. Civ. P. 65.

[9] Injunction Sales and marketing in general

212Injunction
212IVParticular Subjects of Relief
212IV(L)Trade or Business
212k1366Sales and marketing in general

Buyer demonstrated irreparable harm absent temporary restraining order in breach of contract action against seller of resins that buyer incorporated into various automotive parts, which would enjoin seller from withholding products or raising its prices, even if buyer may ordinarily have responsibility to "cover" in order to lessen its damages pursuant to Article 2 of the Uniform Commercial Code (UCC), as adopted in Michigan; the "just-in-time" nature of the automotive supply chain provided potential for large-scale disruption if just one of the down-line companies was unable to fulfill its obligations under contract, and due to the unique nature of seller's products and the testing and certification requirements of buyer's customers, it would not be possible to secure alternate products from a different supplier. Fed. R. Civ. P. 65(b); Mich. Comp. Laws Ann. § 440.2715(2).

[10] Injunction Sales and marketing in general

212Injunction
212IVParticular Subjects of Relief
212IV(L)Trade or Business
212k1366Sales and marketing in general

Public interest would be served by issuing temporary restraining order in buyer's breach of contract action against seller of resins that buyer incorporated into various automotive parts, which would enjoin seller from withholding products or raising its prices; public interest would best be served by requiring parties to a contract to abide by their agreement, and public interest weighed in favor of the efficient administration of the automotive industry. Fed. R. Civ. P. 65(b).

Attorneys and Law Firms

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OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Nancy G. Edmunds, United States District Judge

***1** This is an automotive supply chain dispute over which the Court has diversity jurisdiction. On October 15, 2021 Plaintiff Cooper-Standard Automotive, Inc. ("Cooper-Standard") filed its four-count complaint against Defendant Daikin America, Inc. ("Daikin") for specific performance (Count I), declaratory judgment (Count II), breach of contract/anticipatory repudiation (Count III), and promissory estoppel (Count IV). Contemporaneous with the filing of its complaint, Cooper-Standard brought the present Motion For Temporary Restraining Order And Preliminary Injunction. (ECF No. 3.) Daikin opposes Cooper-Standard's motion and filed a brief in opposition. (ECF No. 5.) The Court held a hearing on October 22, 2021 wherein both parties participated in oral argument. For the reasons that follow, the Court GRANTS IN PART AND DENIES IN PART Cooper-Standard's motion.

I. Background

Cooper-Standard and Daikin are parties to a supply relationship whereby Daikin supplies Cooper-Standard with 100% of Cooper-Standard's requirements of four unique products, known as resins.[1] (ECF No. 3, PageID.86.) Cooper-Standard incorporates the resins it receives from Daikin into various automotive parts that it then supplies to its automotive OEMs and automotive tier supply customers including Ford, GM, Volvo, and BMW. (*Id.* at PageID.83.) The Cooper-Standard parts are uniquely designed and then approved by its customers under the strict requirements of the production parts approval process. (*Id.* at PageID.86.) The resins from Daikin have undergone testing and validation for use in the Cooper-Standard parts, a process that takes many months. (*Id.* at PageID.86-87.)

[1] The unique resins are individually identified as Product 185, Product 186, Product 189, and Product 196.

Daikin and Cooper-Standard first began conducting business pursuant to a one-year contract that expired in 2013. (ECF No. 5, PageID.112.) Thereafter, Daikin states it continued to sell resins to Cooper-Standard "on a purchase order basis from 2013 to the present." (*Id.*) Cooper-Standard contends that the parties were most recently doing business pursuant to a certain scheduling agreement, dated October 23, 2018, that operates as a requirements contract (the "Scheduling Agreement"). (ECF No. 3, PageID.87; *see also* ECF No. 1-3, PageID.46.) Pursuant to the Scheduling Agreement, Cooper-Standard would issue "releases" on a regular weekly basis indicating both its current and projected volume requirements which Daikin is then required to supply. (ECF No. 3, PageID.87.)

The Scheduling Agreement provides:

> This scheduling agreement constitutes Buyer's purchase order and is subject to the Cooper Standard Automotive Inc. Purchase Order General Terms and Conditions as amended from time to time ("Terms") which are incorporated in full by this reference.... Acceptance of this purchase order is limited to the Terms, and Buyer objects to and rejects any additional or different terms. Subject to Buyer's termination rights, unless a quantity is specified this purchase order is a requirements contract under which Buyer will purchase and Seller will sell Buyer's requirements for Buyer's Plant identified above of the Products specified.

***2** (ECF No. 1-3, PageID.47.)

Cooper-Standard's terms and conditions state that the Scheduling Agreement constitutes Cooper-Standard's entire offer notwithstanding any prior dealings between the parties and reiterates that the offer is limited to Cooper-Standard's terms:

> § 1.2. *This Purchase Order is an offer by Buyer to purchase the Products from Seller limited to the Terms and those terms reflected on the face of Buyer's Purchase Order.* The Purchase Order is effective, and a binding contract is formed, when Seller accepts Buyer's offer.... Seller will be deemed to have accepted the Purchase Order in its entirety without modification or addition, *notwithstanding any prior dealings or usage of trade*, upon the earliest of: (i) Seller commending work or performance with respect to any part of the Purchase Order; (ii) Seller delivering written acceptance of the Purchase Order to Buyer; (iii) shipment of Products or performance of services; or (iv) any conduct by Seller that fairly recognizes the existence of a contract for Buyer's purchase and Seller's sale of the Products. *The Purchase Order is limited to and conditional upon Seller's acceptance of the terms of the Purchase Order.* Any additional or different terms or conditions proposed by Seller ... are deemed material and unacceptable to, and

> are rejected by, Buyer.

(§ 1.2, ECF No. 1-2, PageID.26) (emphasis added).

The terms and conditions also expressly provide that the contract formed between the parties is to be a requirements contract that will exist for the duration of "the applicable manufacturer's program production life ... as determined by Buyer's customer." (§ 2.1, ECF No. 1-2, PageID.26); that "Seller acknowledges that Buyer is purchasing Products for use in a tiered supply chain ... [therefore] Seller agrees that it will not withhold or threaten to withhold the supply of Products at any time" (§ 2.4, ECF No. 1-2, PageID.27); that "[r]eleases are incorporated into, and are an integral part of, the Purchase Order and are not independent contracts" (§ 3.1, ECF No. 1-2, PageID.27); and that "Seller acknowledges that Buyer's pricing to Buyer's Customers for goods that incorporate the Products is based on pricing received from Seller for the Products ... [accordingly,] prices are firm fixed prices for the duration of the Purchase Order and are not subject to increase for any reason ..." (§ 6.1, ECF No. 1-2, PageID.28).

Upon receipt of the Scheduling Agreement, Daikin states it issued an "Order Acknowledgment," invoiced Cooper-Standard and shipped the ordered materials. (ECF No. 5, PageID.113.) The Order Acknowledgment contains the following language:

> Note that all products described herein or which are shipped by [Daikin] (DAI) hereafter are subject to the DAI general terms and conditions of sale. Any additional or different terms and/or conditions proposed by buyer are not binding on DAI and are hereby rejected, except if and to the extent specifically consented to in writing by an authorized DAI officer. This document acknowledges DAI's receipt of buyer's purchase order. All pricing, quantities, and fulfillment timing are subject to approval by DAI's sales representative.

***3** (ECF No. 5-2, PageID.133.)

The parties conducted business without issue until recently. On August 31, 2021, Daikin's Key Account Executive emailed a letter to Cooper-Standard's Commodity Manager to inform her of Daikin's intention to increase prices for certain products effective October 1, 2021. (ECF No. 1-5, PageID.54; ECF No. 1-4, PageID.49.) The letter also announced it was changing many of the contractual terms between the parties. (*Id.*) Cooper-Standard responded stating that it rejects the price increase based upon the language contained in the Scheduling Agreement and Cooper-Standard's terms and conditions. (ECF No. 1-5, PageID.52-53.) Thereafter, Daikin informed Cooper-Standard that the account would remain on hold and no products would be shipped until Daikin received notification that Cooper-Standard accepted Daikin's increased pricing proposal.[2] (ECF No. 1-10, PageID.71.)

[2] Daikin simultaneously threatened to stop shipping products due to a dispute between the parties regarding a $15,971.25 invoice that remained unpaid. Cooper-Standard alleges the invoice is for defective material and that Cooper-Standard properly notified Daikin that the material was defective pursuant to the parties' dispute process. (ECF No. 1-6, PageID.57.)

In its present motion, Cooper-Standard seeks to enjoin Daikin from withholding the products or raising its prices. According to Cooper-Standard, it maintains enough products to supply its needs for six weeks or less after which its lines will shut down causing it to breach its own contracts with its customers and causing loss of good will, employee jobs, and other damages. (ECF No. 3, PageID.94, 101.) Due to the unique design of the products and the requirement that any new products undergo rigid testing requirements and approval by the OEMs, Cooper-Standard states that it is unable to identify a new supplier on short notice and would require at least 12 months to transition to an alternate supplier.

II. Legal Standard

[1]Rule 65 of the Federal Rules of Civil Procedure authorizes the issuance of a temporary restraining order ("TRO"). The Sixth Circuit has explained that the purpose of a TRO under Rule 65 is to preserve the status quo until the Court has had an opportunity to determine whether a preliminary injunction should issue. *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993). The Court considers four factors in determining whether

to issue a TRO: "(1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury absent a stay, (3) whether granting the stay would cause substantial harm to others, and (4) whether the public interest would be served by granting the stay." *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008).

III. Analysis

A. Likelihood of Success on the Merits

Cooper-Standard states that it is likely to succeed on the merits of its claim because Daikin has anticipatorily repudiated the valid, binding and enforceable requirements contract between the parties by threatening to withhold shipment of the products. By contrast, Daikin argues that "the contractual documents governing the supply of resins, as well as the parties' conduct, establish that the parties always agreed that [Daikin] had the right to adjust its prices and to allocate its inventory among various customers." (ECF No. 5, PageID.119-120.) The Court must therefore consider whether the parties had a contract and if they did, what the terms of that contract included.

***4** Michigan law applies to this dispute. (*See* § 31.2, ECF No. 1-2, PageID.41.) Michigan's version of Article 2 of the Uniform Commercial Code ("MUCC"), Mich. Comp. Laws §§ 440.2101-.2725, "governs the relationship between parties involved in contracts for the sale of goods." *Grosse Pointe Law Firm, PC v. Jaguar Land Rover N. Am., LLC*, 317 Mich. App. 395, 400, 894 N.W.2d 700 (2016) (citing Mich. Comp. Laws § 440.2102). The so-called "battle of the forms" provision of the MUCC provides:

> Sec. 2207. (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

Mich. Comp. Laws § 440.2207. Under this section, there appears to be a valid, binding, and enforceable contract between the parties.

[2] [3]At its most basic level, a contract is formed when there is an offer, acceptance, and consideration. In this case, Cooper-Standard issued its offer to Daikin as the October 23, 2018 Scheduling Agreement which incorporated Cooper-Standard's terms and conditions. (See ECF No. 1-3, PageID.47) ("Acceptance of this purchase order is limited to the Terms, and Buyer object to and rejects any additional or different terms."). Daikin accepted this offer and a contract was formed when Daikin issued its Order Acknowledgment, "a definite and seasonable expression of acceptance," *see* Mich. Comp. Laws § 440.2207(1), and shipped the products to Cooper-Standard along with an invoice.

[4]As for the terms of the parties' contract, an analysis of Mich. Comp. Laws. § 440.2207 shows that Cooper-Standard's terms and conditions govern. While Daikin's Order Acknowledgment purported to "reject" different terms or conditions proposed by Cooper-Standard, it did not expressly make its acceptance conditional on Cooper-Standard's assent to Daikin's terms. (*See Order Acknowledgment*, ECF No. 5-3, PageID.137) (stating that its products and shipments "are subject to the [Daikin] general terms and conditions of sale" and that "[a]ny additional or different terms and/or conditions proposed by buyer are not binding on [Daikin] and are hereby rejected ..."). Daikin's willingness to do business even by terms other than its own is evident by its immediate shipment of the products without regard to whether Cooper-Standard expressed its assent to Daikin's terms.

Because both Cooper-Standard and Daikin are merchants within the meaning of of Mich. Comp. Laws 440.2104(1),[3] ordinarily Daikin's additional terms would have become part of the contract. *See* Mich. Comp. Laws

440.2207(2) (providing that "[b]etween merchants such terms become part of the contract" unless one of three exemptions applies.) But in this case, Cooper-Standard expressly limited acceptance of its offer to its own terms and conditions. (*See* ECF No. 1-3, PageID.47) ("Acceptance of this purchase order is limited to the Terms, and Buyer object to and rejects any additional or different terms."). Thus, Mich. Comp. Laws 440.2207(2)(a) applies and Daikin's terms did not become part of the contract.

[3] Mich. Comp. Laws § 440.2104 provides that a "merchant" is one "that deals in goods of the kind ..."

***5** [5]Under Cooper-Standard's terms and conditions, made part of the contract through the language in the Scheduling Agreement, Daikin agreed "that it will not withhold or threaten to withhold the supply of Products at any time" (§ 2.4, ECF No. 1-2, PageID.27), and that prices of the products "are firm fixed prices for the duration of the Purchase Order and are not subject to increase for any reason ..." (§ 6.1, ECF No. 1-2, PageID.28). Accordingly, Daikin's actions in unilaterally raising the prices of the products and threatening to withhold the products constitute breaches of the contract or anticipatory repudiation. Cooper-Standard has therefore shown a likelihood of success on the merits.

This factor weighs in favor of Cooper-Standard.

B. Irreparable Harm

[6] [7] [8]"A showing of 'probable irreparable harm is the single most important prerequisite' " to granting injunctive relief. *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 801 (E.D. Mich. 2001) (quoting *Reuters Ltd. v. United Press Int'l., Inc.*, 903 F.2d 904, 907 (2d Cir. 1990)). A party's harm is "irreparable" when it cannot be adequately compensated by money damages. *Eberspaecher N. Am., Inc. v. Van-Rob, Inc.*, 544 F. Supp. 2d 592, 603 (E.D. Mich. 2008). For an injury to constitute irreparable harm, it must also "be certain, great, and actual." *Lucero*, 160 F. Supp. 2d at 801 (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[9]In this case, Cooper-Standard states that its lines will inevitably shut down without Daikin's products causing catastrophic effects on the supply chain of automotive parts, the loss of customer goodwill, employee job termination, and other damages for which there would be incalculable losses. (ECF No. 3, PageID.101.) Daikin responds by arguing that Cooper-Standard can "cover" and secure its continued supply of resins by agreeing to pay the increased prices Daikin announced in its August 31 letter and pricing schedule. (ECF No. 5, PageID.117.) Relying on this Court's opinion in *Eberspaecher*, Daikin states that Cooper-Standard controls its own fate and can choose to pay the increased prices or suffer the damages it describes. *See Eberspaecher*, 544 F. Supp. 2d at 603.

But the Court in *Eberspaecher* did not require the buyer to pay increased prices newly instituted by the seller, as Daikin would have Cooper-Standard do here. *Id.* Rather, in that case, this Court decided the motion in favor of the seller after the buyer unilaterally decided to pay $46.13 per automotive part, as opposed to the $49.50 contract price, accumulating a debt of more than $460,000. *Id.* at 594-95. In other words, the Court found it necessary to preserve the status quo.

The Court therefore agrees with Cooper-Standard and finds that this factor weighs in favor of granting its motion. The "just-in-time" nature of the automotive supply chain provides potential for large-scale disruption if just one of the down-line companies is unable to fulfill its obligations under contract. *See Eberspaecher N. Am., Inc. v. Nelson Glob. Prod., Inc.*, No. 12-11045, 2012 WL 1247174, at *6 (E.D. Mich. Apr. 13, 2012) ("the potentially catastrophic effects of a disruption in the supply chain of automotive parts is well established in the case law of this court.") Moreover, while a buyer may have the responsibility to "cover" in order to lessen its damages, *see* Mich. Comp. Laws § 440.2715(2), this typically refers to a buyer's ability to procure similar goods from a different distributor. In this case, due to the unique nature of Daikin's products and the testing and certification requirements of Cooper-Standard's customers, it would not be possible to secure alternate products from a different supplier. *See TRW Inc. v. Indus. Sys. Assoc. Inc.*, 47 F. App'x 400, 401 (6th Cir. 2002) (affirming preliminary injunction by district court based upon a finding of irreparable harm where automaker could not readily obtain air bags from another source and that plaintiff's goodwill and business reputation would be harmed absent injunctive relief.)

C. Whether an Injunction Would Cause Substantial Harm to Others and Whether the Public Interest Would be Served by Issuing the Injunction

***6** Cooper Standard asks the Court to maintain the status quo so as to keep all the affected businesses in the supply

chain operating. Without injunctive relief, Cooper-Standard points out that disastrous consequences will be felt by its customers and its customers' customers up the supply chain.

[10]The Court agrees and finds that the remaining factors weigh in favor of a temporary restraining order. The public interest is best served by requiring parties to a contract to abide by their agreement. *Superior Consulting Co. v. Walling*, 851 F. Supp. 839, 848 (E.D. Mich. 1994). The public interest also weighs in favor of the efficient administration of the automotive industry. *Key Safety Sys., Inc. v. Invista, S.A.R.L., L.L.C.*, No. 08-CV-10558, 2008 WL 4279358, at *13 (E.D. Mich. Sept. 16, 2008) (holding that public interest factor weighed in favor of injunctive relief where compelling seller to supply automotive part would avoid consequential plant shutdown or layoffs and would avoid economic harm to the state, region, and nation); *see also Almetals Inc. v. Wickeder Westfalenstahl, GmbH*, No. 08-10109, 2008 WL 4791377, at *10 (E.D. Mich. Oct. 29, 2008) ("Denying the injunction places at risk the operations at Almetals, and, correspondingly, numerous customer assembly plants. This would be disastrous, irreparably damaging Almetals' business and reputation, and causing further detriment to the economy. Additionally, the public interest is served by requiring Wickeder to abide by its contractual agreement.")

IV. Conclusion

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. (ECF No. 3.) With respect to Plaintiff's motion for temporary restraining order, the motion is **GRANTED** and the Court hereby issues a temporary restraining order which will remain in effect from the date and time this order is issued through the latest date and time allowable under Federal Rule 65. With respect to Plaintiff's motion for preliminary injunction, Plaintiff's motion is **DENIED**. The parties may stipulate to convert this order to one for preliminary injunction. Absent such stipulation, the Court will set the matter for hearing and issue a briefing schedule. Pursuant to Federal Rule of Civil Procedure 65(c), the Court orders Plaintiff to post a bond in the amount of $15,971.25 plus $13,000 per month each month until this Order expires or is vacated.

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2021 WL 4975067, 106 UCC Rep.Serv.2d 218

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2019 WL 423523
United States District Court, E.D. Michigan, Southern Division.

DAYCO PRODUCTS, LLC, Plaintiff,
v.
THISTLE MOLDED GROUP, LLC, d/b/a Moxness, Defendant.

Case No. 18-10862
|
Signed 02/04/2019

Attorneys and Law Firms

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OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Sean F. Cox, U. S. District Judge

***1** A Tier-1 automotive supplier sued a Tier-2 automotive supplier, alleging that it violated a requirements contract by demanding a higher price and supplying defective parts. The Tier-1 supplier now moves for partial summary judgment on the issue of liability for the price increase. For the reasons below, the Court will grant the motion for partial summary judgment.

BACKGROUND

Plaintiff Dayco Products, LLC, a Tier-1 automotive supplier, manufactures valved aspirator tube assemblies, which it then sells to Ford Motor Company for use in F-150 pickup trucks. Compl. ¶ 11. To make these assemblies, Dayco requires parts from Tier-2 automotive suppliers, including Defendant Thistle Molded Group LLC d/b/a Moxness. Moxness supplied Dayco with two parts: a check valve disc and a gate spring.

Around March 5, 2016, Dayco sent revised drawings of the parts to Moxness. Snyder Aff. ¶ 6 (ECF No. 15, PageID 89). Dayco designated these drawings as revision level F. *Id.* On March 8, 2016, Moxness returned an acknowledgment form for both parts, indicating that the "revision [was] accepted as is." *See* 28-0749-F Acknowledgment, Ex. 8 of Pl.'s Mot. Partial Summ. J. (ECF No. 15, PageID 126); 28-0752-F Acknowledgment, Ex. 9, (ECF No. 15, PageID 128).

On March 15, 2016, Dayco issued a purchase order to Moxness for the check valve discs and gate springs. PO 428079, Ex. 2 of Pl.'s Mot. Partial Summ. J., (ECF No. 15, PageID 93). The order was titled "requirements contract" and stated "[r]equirement [sic] contract issued for the purchased part referenced above. Dayco will furnish releases against this purchase order." *Id.* The quoted unit price for the check valve disc was $0.2187 and the quoted unit price for the gate spring was $0.3012. *Id.* The requested quantity for both was listed as "PER RLS." *Id.*

The purchase order outlined the terms of the offered requirements contract and expressly rejected any prior terms that the parties may have discussed:

> This Requirements Contract is limited to its terms stated herin [sic], and the Terms and Conditions of Purchase available at www.daycosupplier.com. Any additional or different terms proposed by Seller are rejected, and are not binding on Buyer unless expressly agreed to by Buyer in writing. Subject to Buyers [sic] termination rights, this contract is binding on the parties for the length of the applicable OEM vehicle program production life (including model refreshes as determined by the OEM).

(ECF No. 15, PageID 94).

As incorporated into the order, the Terms and Conditions on Dayco's website further elaborated on the contract. In

Section B.1, the Terms reiterated that this purchase order was for Dayco's requirements and outlined how Dayco would communicate its needs to Moxness:

> If the quantify of Items to be purchased is not specified on the Order, then the quantity is for Purchaser's requirements and the Purchaser will, by a written or electronic authorization (a "release") communicate to the Seller, from time to time, the quantity of Items to be purchased and the due dates for delivery of such items.

***2** (ECF No. 15, PageID 104)

In Section B.2, the Terms prohibited any price changes:

> The prices specified on the Order are fixed and shall include all charges and expenses related to the sale of the Items to Purchaser and no additional charges shall be added to the amount due from Purchaser in connection with the sale of the Items including, but not limited to, surcharges, shipping, packaging, taxes and duties.

Id.

The Terms provided four ways for Moxness to accept the requirements contract. Moxness could (1) fail to object to the provided terms within two business days of receipt of the order; (2) commence work on the parts; (3) ship the parts; or (4) sign and return the terms. (ECF No. 15, PageID 106).

The Terms also stated that they, along with the order, would constitute the entirety of the agreement between Dayco and Moxness. (ECF No. 15, PageID 115).

On March 31, 2016, Moxness delivered an invoice for 2,548 check valve discs to Dayco. Moxness Invoice SII/59317, Ex. 6 of Pl.'s Mot. (ECF No. 15, PageID 122). On April 4, 2016, Moxness delivered a second invoice for 103 gate springs. Moxness Invoice SII/59322, Ex. 7 of Pl.'s Mot. (ECF No. 15, PageID 124). Moxness delivered parts to Dayco under the purchase order in March, April, May, June, and July of 2016. Snyder Aff. ¶ 5. (ECF No. 15, PageID 89).

On April 21, 2016, Dayco issued a new part drawing for the gate spring. Ex. G of Def.'s Res. (ECF No. 22, PageID 265-266). Dayco designated these drawings as revision level G. *Id.* "But, Moxness never responded to that revision, and so the parties never implemented it." Snyder Aff. ¶ 7. (ECF No. 15, PageID 89).

On July 15, 2016, Moxness informed Dayco that it could no longer manufacture the check valve disc or gate spring at the agreed-upon price. Ex. C of Def.'s Res. (ECF No. 21, PageID 227). Moxness stated that the gate spring had a higher-than-anticipated manufacturing cost because of the "substantial cycle time and the unexpected scrap rate of the part." *Id.* Similarly, the check valve disc was more expensive because of a "cycle time" increase. *Id.* In other words, the parts took longer than expected to make and wasted too much raw material. Moxness's new quote priced the check valve disc at $0.5728/unit (more than 2.5 times greater than the purchase order's price) and the gate spring at $3.7028/unit (more than 12 times greater than the purchase order's price). Ex. 11 of Pl.'s Mot. (ECF No 15, PageIDs 135 and 137).

On August 5, 2016, Dayco issued a new purchase order, which agreed to a higher price for the parts. Ex. 12 of Pl.'s Mot. (ECF No. 15, PageID 141). Dayco would purchase the check valve discs for $0.5728/unit and the gate springs for $1.3064/unit. This increase is more than 2.5 times the prior price of the discs and more than 4 times the prior price of the springs. Dayco paid these higher prices, under protest, to ensure that it could meet its obligations to Ford. *Id.* ("Modified pricing will be paid under protest as an effort to mitigate damages. Dayco reserves its rights to purse all claims that Dayco may have arising under or related to this modification.").

***3** Eventually, Dayco stopped dealing with Moxness, and began purchasing discs and springs from a different Tier-2 supplier. This new supplier charged higher prices than those contracted-for in the first purchase order between Dayco and Moxness. Snyder Aff. ¶ 9.

On March 14, 2018, Dayco filed a two-count complaint. (ECF No. 1). The first count alleged that Moxness breached the contract by increasing the price. (ECF No. 1, PageID 8). The second count alleged that Moxness breached the contract by delivering defective parts throughout the life of the contract. (ECF No. 1, PageID

9).

On September 21, 2018, Dayco moved for partial summary judgment on the issue of Moxness's liability for the price increase. Dayco argues that it had a valid, fixed-price requirements contract with Moxness, and that Moxness breached this contract by demanding a price increase. In response, Moxness argues that there was no valid requirements contracts, that its invoices constituted counter-offers, and that Dayco has failed to establish that Moxness actually breached the contract.

ANALYSIS

Summary judgment will be granted where there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue of material fact exists where "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elect. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The mere existence of a scintilla of evidence in support of the [non-moving party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252. The Court "must view the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the non-moving party." *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526 (6th Cir. 2002).

The parties agree that Michigan law governs in this case. Accordingly, the Michigan Supreme Court is the controlling authority. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). If the Michigan Supreme Court has not decided an issue, then the Court "must ascertain the state law from all relevant data." *Orchard Grp., Inc., v. Konica Med. Corp.*, 135 F.3d 421, 427 (6th Cir. 1998) (citations omitted). "Relevant data includes state appellate court decision, supreme court dicta, restatements of law, law review commentaries, and majority rule among other states." *Id.*

I. The Existence of a Requirements Contract

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v. Chrysler Corp.*, 445 Mich. 109, 127 n.28, 517 N.W.2d 19 (1994). "The language of the parties' contract is the best way to determine what the parties intended." *Klapp v. United Ins. Group Agency, Inc.*, 468 Mich. 459, 476, 663 N.W.2d 447 (2003). Dayco has the burden of proving that a contract exists, the terms of the contract, and that Moxness's action constituted a breach. *See Johnson Controls, Inc., v. TRW Vehicle Safety Systems, Inc.*, 491 F.Supp.2d 707, 720 (E.D. Mich. 2007).

Dayco argues that the parties entered into a requirements contract, which is a contract where "a buyer promises to buy, and a seller to supply, all the goods or services that a buyer needs during a specified period." Black's Law Dictionary (10th ed. 2014). Dayco contends that the first purchase order constituted an offer, which Moxness accepted by commencing work on and shipping the parts without objection. In response, Moxness argues that the purchase order did not create a contract—requirements or otherwise—between the parties because it lacked a specific quantity term and exclusivity.

***4** Based on the plain language of the purchase order, and the Terms incorporated therein, Dayco has the better of this argument. The purchase order identified itself as a "requirements contract" three times. It also expressly incorporated Dayco's terms, which outlined how Moxness could accept the offer. One way was "commencement of work" on the parts. (ECF No. 15, PageID 106). Another way was to ship the parts. *Id.* Moxness did both. Thus, by its actions, Moxness accepted the offer of a requirements contract according to the offer's clear terms.

Moxness mounts two challenges to Dayco's characterization of the purchase order as a requirements contract. First, it argues that the purchase order lacked a sufficient quantity term. Second, it argues that the contract fails for lack of exclusivity. Neither of these arguments has merit.

a. Quantity Term

Moxness argues that the contract is unenforceable because it does not have a quantity term. Requirements contracts, however, will often lack a specific quantity term because just-in-time buyers do not know how much product they need until they need it. Michigan's Uniform Commercial Code provides for this problem. In M.C.L.A. § 440.2306(1), the U.C.C. states that "[a] term which measures the quantity by ... the requirements of the buyer means such actual ... requirements as may occur in good faith, except no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior ...

requirements may be tendered or demanded." The comment to that section goes on to state that a requirements contract "is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party." *Id.* at cmt. 2.

Here, the purchase order repeatedly identified itself as a requirements contract and stated that Dayco would communicate its periodic orders by release. This arrangement is a common in the automotive industry. *See, e.g.*, *JD Norman Industries v. Metaldyne, LLC*, 2016 WL 1637561 at *7 (E.D. Mich. 2016) (noting that the nature of "just in time" automotive supply chains is "well established" in this district) (internal citations omitted). Further, Dayco's Terms stated that "[i]f the quantity of Items to be purchased is not specified on the Order, then the quantity is for [Dayco's] requirements and [Dayco] will, by a written or electronic authorization (a "release"), communicate to [Moxness], from time to time, the quantity of items to be purchased and due dates for delivery of such items." (ECF No. 15, PageID 104). Because the plain language of the purchase order shows that the parties entered into a requirements contract, the contracted-for quantity was Dayco's actual, good-faith requirements, except those that were unreasonably disproportionate. *See* M.C.L.A. § 440.2306(1). This quantity is sufficiently precise to enforce the contract. *See Lorenz Supply Company v. American Standard, Inc.*, 419 Mich. 610, 615 (1984) ("A requirements or output term of a contract, although general in language, nonetheless is, if stated in the writing, specific as to quantity, and in compliance with [the statute of frauds]"); *See also Johnson Controls, Inc.*, 491 F.Supp.2d at 714-717 (finding that a purchase order that listed the quantity as "AS REL" had a sufficiently precise quantity because it "gives some indication that [the plaintiff] intended to purchase and [the defendant] intended to sell some quantity of parts.").

Moxness attempts to sidestep this conclusion by arguing that this contract's quantity term was dictated by Dayco's releases, not its requirements. To support this argument, Moxness points to *Advanced Plastics Corp. v. White Consol. Indus., Inc.*, 47 F.3d 1167 (Table), 1995 WL 19379 (6th Cir. 1995). In that case, however, the parties redefined the contract's quantity term by stating "Seller agrees to furnish Buyer's requirements for the goods or services covered by this Purchase Order to the *extent of and in accordance with* ... Buyer's written instructions." *Id.* at *2. (emphasis added). No such language appears in the contract between Dayco and Moxness.[1]

[1] Moxness also argues that its relationship with Dayco "strongly resembles" the blanket purchase order in *Sundram Fasteners Ltd. v. Flexitech, Inc.*, 2009 WL 3763772 (E.D. Mich. 2009). However, the findings of fact in *Sundram* are of no value here because, in that case, the parties stipulated that the purchase order was not a requirements contract.

***5** Thus, the Court concludes that this contract does not fail for lack of a sufficient quantity term.

b. Exclusivity

Next, Moxness argues that the requirements contract is unenforceable because it does not require Dayco to purchase all of their check valve discs and gate springs from Moxness. This lack of exclusivity, Moxness argues, would be fatal to Dayco's claim in most jurisdictions. (ECF No. 21, PageID 235) (citing federal appellate, federal district, and state appellate court opinions applying the law of California, Georgia, Idaho, Illinois, Indiana, Kansas, Maine, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, and the United States Court of Federal Claims). However, both parties agree that the Michigan Supreme Court has not addressed whether exclusivity is required for a requirements contract to be valid under Michigan law.

As evidenced by Moxness's cited cases, the view that requirements contracts must be exclusive appears to be well-established in most jurisdictions. *See also* 1 White, Summers, and Hillman, Uniform Commercial Code § 420 (6th ed.) ("a 'requirements contract,' in order to be valid, must (1) obligate the buyer to buy goods, (2) obligate the buy to buy the goods *exclusively* from the seller, and (3) obligate the buyer to buy all goods of a particular kind form the seller.") (emphasis added). However, the Michigan Court of Appeals and courts in this district have found that requirements contracts do not need to be exclusive. *See General Motors Corp. v. Paramount Metal Products, Co.*, 90 F.Supp.2d 861, 873 (E.D. Mich. 2000); *Plastech Engineered Products v. Grand Haven Plastics, Inc.*, No. 252532, 2005 WL 736519 at *7 (Mich. Ct. App. 2005) (unpublished per curiam) (relying on *General Motors Corp.*, 90 F.Supp.2d at 873). To determine whether non-exclusive requirements contracts are permissible in Michigan, this Court would need to predict whether the Michigan Supreme Court would agree with the majority out-of-state view or with what appears to be a minority view expressed by some courts in Michigan

However, for the purposes of this motion, the Court need not answer this question because the contract between Dayco and Moxness was exclusive. Dayco's terms stated that "the quantity is for [Dayco's] requirements." As explained above, this term means that Dayco committed to purchase all of its actual, good-faith requirements from Moxness. If Dayco required a check valve disc or a gate spring, it was contractually obligated to purchase it from Moxness. Thus, Moxness's argument that the contract fails for lack of exclusivity is meritless because it contradicts the clear terms of the contract.

II. Moxness's Invoices

Moxness argues that its invoices constituted counter-offers, and that any contract between the parties incorporated its own terms and conditions. Under Moxness's terms, it has the power to increase prices if its costs increase, as determined by Moxness in good faith. Moxness's Terms and Conditions of Sale, Ex. 14 to Pl. Mot. (ECF No. 15, PageID 144). In Moxness's view, it received Dayco's purchase order, and counter-offered to sell a specific quantity of parts on a specific date by shipping the parts and issuing the invoice.

***6** Once again, however, this argument contradicts the purchase order's clear terms, which stated that Moxness could accept the offer of a requirements contract by commencing work or shipping the parts. Thus, by the time that Dayco received Moxness's invoice, Moxness had already accepted the requirements contract.

Moxness's argument also implicates a provision of Michigan's Uniform Commercial Code that is known as the "battle of the forms." Under M.C.L.A § 440.2207(1) "[a] definite and seasonable expression of acceptance or a written confirmation ... operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." M.C.L.A § 440.2207(2) continues, "[t]he additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

Here, Moxness's invoices and shipments—in response to Dayco's purchase order—constituted a definite and seasonable expression of acceptance. Moxness's invoices included different and additional terms, most notably the ability of Moxness to unilaterally raise prices in good faith. These terms were not incorporated into the contract, however, because all three statutory exceptions apply. First, Dayco's purchase order was "limited to acceptance of the express terms contained on the Order and [the] Global Terms." (ECF No. 15, PageID 106). Second, Moxness attempted to change the contract from a fixed-price requirements contract to a fixed-quantity contract with a potentially fluid price. These changes are undoubtedly material. Third, Dayco had preemptively objected to any additional or different terms. *Id.* Thus, Moxness clearly accepted Dayco's offer of a requirements contract without incorporating any of its own terms.

III. Moxness's Breach

Finally, Moxness argues that Dayco has failed to demonstrate that Moxness breached the parties' contract because Moxness's contractual obligations only triggered upon Dayco issuing a release, which Dayco never did after Moxness communicated its unwillingness to deliver at the contract price. However, the U.C.C. states that, "[w]here the seller ... repudiates ... then with respect to any goods involved ... the buyer may cancel and ... (a) 'cover' and have damages ... as to all the goods affected ..." M.C.L.A. § 440.2711(1). Repudiation "centers upon an overt communication of intention ... which ... demonstrates a clear determination not to continue." M.C.LA § 440.2610 cmt. 1.

Here, Moxness clearly repudiated by informing Dayco that they were unwilling to deliver at the contract price. Under those circumstances Dayco is not obligated to jeopardize its production schedule by issuing a release that Moxness already stated it would not fill. Instead, Dayco may pay under protest or find replacement parts and then sue for any money it paid above the contract price—which is exactly what it did here. Thus, the Court concludes that Moxness breached the contract by unequivocally stating that it was unwilling to deliver at the contract price.

CONCLUSION AND ORDER

***7** For the reasons above, the Court GRANTS Dayco's motion for partial summary judgment as to the issue of liability on its price-increase claim.

IT IS SO ORDERED.

Not Reported in Fed. Supp., 2019 WL 423523, 97 UCC Rep.Serv.2d 1111

All Citations

End of Document

996 F.2d 1219
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA7 Rule 53 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Seventh Circuit.

Walter T. HOUSTON, Plaintiff–Appellee,
v.
MILLER CENTRIFUGAL CASTING COMPANY, Incorporated, Defendant–Appellant.

No. 92–2279.
|
Argued Jan. 20, 1993.
|
Decided May 20, 1993.

Appeal from the United States District Court for the Eastern District of Wisconsin, No. 90 C 634; Robert W. Warren, Judge.

Synopsis
E.D.Wis.

AFFIRMED.

Procedural Posture(s): On Appeal.
Before CUMMINGS, and ROVNER, Circuit Judges, and SHADUR, Senior District Judge.*

ORDER

***1** In November 1991 Walter T. Houston filed this diversity action against Miller Centrifugal Casting Company ("Miller") alleging that he is owed commissions for sales negotiated and consummated while he was an employee but for which goods were not shipped until after his employment ceased. Houston was hired by Miller as a sales representative on January 25, 1985. The original contract provided that he would receive a 5 percent commission on the products he sold for defendant. Miller is in the foundry business and manufactures "centrifugally cast castings." Houston was to act as sales representative for Miller in eight Midwestern states. Though the initial contract was only for a period of one year, Houston continued to work for Miller and the question raised here is: under what terms? Defendant allegedly fired Houston and ended its contractual relationship with him on May 15, 1989, although Miller claims that Houston quit.[1] Letters exchanged at the time suggest the departure was amicable but necessary because Houston began to do work for a company in competition with Miller. In any event, things turned bitter when plaintiff sought an accounting for commissions on shipments made under a contract he allegedly secured from the Cone Drive Division of Ex–Cel–O Corporation ("Cone Drive") in January 1989 for the period January 1, 1989, to December 31, 1991. Plaintiff asked for $106,214.89 in post-termination commissions (app. at A–57), and a jury agreed that he deserved the money.

On appeal defendant contends that (1) documentary evidence did not show a purchase order received prior to plaintiff's termination, (2) the trial court erred by submitting to the jury instructions and a special verdict permitting it to find for the plaintiff on an implied contract theory, and (3) there was no credible evidence under the express contract placed into evidence that would support the jury's damage award. We disagree and therefore affirm.

Miller already had a relationship with Cone Drive when Houston became its sales representative for Michigan where Cone Drive is located; Miller did $700,000 in annual business with the firm by 1984. Thus the basic agreement between Miller and Houston, under which Houston would be reimbursed 5 percent for commissions, was altered slightly for sales to Cone Drive: he was to receive 1 percent in commission on the first $700,000 and 5 percent for business beyond that. By the time plaintiff left defendant's employ, Cone Drive was doing $1.4 million in yearly sales with Miller. Houston negotiated Miller's first blanket order with Cone Drive in 1986. As they use the term "blanket order," the parties are apparently referring to a "requirements contract." A customer who signs a requirements contract agrees to purchase from the seller—and the seller agrees to provide—all of the buyer's needs for a particular product, in this case gear blanks. Black's Law Dictionary 1172 (5th ed. 1979). Thus the parties have a binding contract even though the exact quantity of items sold fluctuates according to the buyer's needs. Houston renegotiated the requirements contract between Cone Drive and Miller in 1989; the record shows he made ten phone calls to Cone

Drive and seventeen phone calls to Miller in January 1989 to secure the contract's continuation. Miller now contends that it had no contract with Cone Drive because of the absence of the quantity term—and of course Houston cannot be compensated for negotiating a contract that doesn't exist. But requirements contracts are well recognized in contract law and indeed are expressly permitted by Wisconsin law, Wis.Stat. § 402.306. The best evidence that Cone Drive and Miller in fact did have a valid and binding contract is that Miller continued to supply Cone Drive's needs. In any event, the jury found that there was a contract between the two firms and this type of dispute where the contract is ambiguous is for the trier of facts to determine. *RTE Corp. v. Maryland Casualty Co.*, 247 N.E.2d 171, 175 (Wisc.1976).

***2** Defendant also asserts that plaintiff is not entitled to commissions on goods shipped to Cone Drive after plaintiff's employment ended. The parties' original employment contract ended after 1985, but they continued the relationship until May 25, 1989. Defendant criticizes the jury instructions for suggesting that an implied contract might have been formed; he argues that the jury should have been forced to choose between the parties' differing versions of express oral contracts. The implied contract theory works against Miller because certain terms of the implied contract would be supplied by customs in the industry, which in this case favor Houston receiving his commissions. Since there was enough of a question about just what kind of contract existed between the parties and what the terms were of that contract, the instructions given were not an abuse of the trial court's discretion. The instructions were not overly broad, confusing or prejudicial. *Lenard v. Argento*, 699 F.2d 874, 893–894 (7th Cir.1983), certiorari denied, 464 U.S. 815.

Finally, defendant argues that there was no evidence to support the jury's award of $106,214.89 to plaintiff. However, plaintiff testified that he used the shipping logs of defendant and checked them against the items covered in the blanket order he had negotiated with Cone Drive. Moreover, defendant's president testified that if his company had not terminated its relationship with plaintiff in May 1989, Houston would have continued to receive commissions of 1 percent on the first $700,000 of shipments and 5 percent on shipments of over $700,000 to Cone Drive. Because plaintiff had secured the new blanket order from Cone Drive in January of 1989, months before his termination, he was entitled to receive commissions from June 1989 through December 1991, as claimed.[2] Therefore plaintiff was justified in seeking commissions commencing in June 1989, the month after his termination, through December 1991, the remaining period of the blanket order.

Judgment affirmed.

* The Honorable Milton I. Shadur, Senior District Judge for the Northern District of Illinois, is sitting by designation.

1 According to plaintiff's Exhibit 31, the actual termination date was May 25, 1989 (App. A–56).

2 He was apparently paid his appropriate commissions through May 1989.

All Citations

996 F.2d 1219 (Table), 1993 WL 170965

KeyCite Yellow Flag - Negative Treatment
Distinguished by Waste Stream Environmental, Inc. v. Lynn Water and Sewer Com'n, Mass.Super., January 3, 2003

290 Mass. 207
Supreme Judicial Court of Massachusetts, Suffolk.

ROYAL PAPER BOX CO.
v.
E. R. APT SHOE CO.

March 27, 1935.

Synopsis
Exceptions from Superior Court, Suffolk County; Weed, Judge.

Action of contract by the Royal Paper Box Company against E. R. Apt Shoe Company. Finding for defendant, and plaintiff brings exceptions.

Exceptions overruled.

West Headnotes (6)

[1] Sales Offer, acceptance, and consideration

343Sales
343XIActions
343XI(E)Weight and Sufficiency of Evidence
343k2724Nature and Formation of Contract
343k2726Offer, acceptance, and consideration
(Formerly 343k52(5.1), 343k52(5))

In action by paper box manufacturer against shoe company for breach of contract to purchase shoe boxes, evidence held to justify finding that only contract between parties was by shoe company's written order and its acceptance by box manufacturer's letter.

[2] Sales Verdict and findings

343Sales
343XIActions
343XI(A)In General
343k2434Trial or Hearing
343k2436Verdict and findings
(Formerly 343k389)

In action by paper box manufacturer against shoe company for breach of contract to purchase shoe boxes, finding that salesman was told he was getting order for 8,000 cases anyway, and there might be a few more, held not inconsistent with finding that only contract between parties was by shoe company's written order and its acceptance by box manufacturer's letter.

[3] Sales Offer, acceptance, and consideration

343Sales
343XIActions
343XI(E)Weight and Sufficiency of Evidence
343k2724Nature and Formation of Contract
343k2726Offer, acceptance, and consideration
(Formerly 343k52(5.1), 343k52(5))

Shoe company's purchase order for shoe boxes, and acknowledgment indicating its final acceptance by paper box manufacturer, held adequate and sufficiently definite to evidence complete and enforceable contract on terms set forth in purchase order.

[4] Sales Extrinsic Circumstances; Construction by Parties

343Sales
343VTerms of Contract; Rights and Obligations of Parties
343V(A)In General
343k902General Rules of Construction
343k906Extrinsic Circumstances; Construction by Parties
343k906(1)In general
(Formerly 343k60)

In action by paper box manufacturer against

shoe company for breach of contract to purchase shoe boxes, purchase order is to be construed with reference to circumstances under which it was given and accepted.

[5] **Sales** Output Contracts, Requirements Contracts, and Exclusive Dealings

343Sales
343VTerms of Contract; Rights and Obligations of Parties
343V(C)Delivery and Acceptance of Goods
343V(C)3Quantity of Goods
343k1005Output Contracts, Requirements Contracts, and Exclusive Dealings
343k1006In general
(Formerly 343k71(4))

In purchase order for shoe boxes, words "requirements for balance of year" held dominant words not controlled or extended by words "approximate estimate" and figures following, particularly in view of words "blanket order" in column headed "Quantity."

1 Cases that cite this headnote

[6] **Sales** Buyer's obligations, performance, and breach

343Sales
343VTerms of Contract; Rights and Obligations of Parties
343V(C)Delivery and Acceptance of Goods
343V(C)3Quantity of Goods
343k1005Output Contracts, Requirements Contracts, and Exclusive Dealings
343k1007Buyer's obligations, performance, and breach
(Formerly 343k71(4))

Where shoe company contracted to buy shoe boxes fulfilling its "requirements for balance of year" and business conditions resulted in reducing its requirements far below approximate estimates given in order, box manufacturer cannot recover its loss from buyer.

7 Cases that cite this headnote

Attorneys and Law Firms

***208 **96** L. R. Eyges, of Boston, for plaintiff.

L. M. Friedman and F. L. Kozol, both of Boston, for defendant.

Opinion

QUA, Justice.

The plaintiff claims damages for the alleged breach by the defendant of a contract to buy from the plaintiff eight thousand cartons of paper shoe boxes.

****97** On July 29, 1929, an interview took place at the defendant's place of business between one Green, the plaintiff's general manager, and E. R. Apt and Arthur Apt representing the defendant. At that interview and as a result of the negotiations which then took place Arthur Apt made out and handed to Green the following 'purchase order':

E. R. Apt Shoe Company — Purchase order

Manchester, New Hampshire

Date, July 29-29 — A No 7827

To Royal Paper Box Co	This number must appear on your invoice,	
5 Appleton St. Boston	package and correspondence	
Please enter our order as follows.		
to be called in		
Ship via as needed	Department Packing Terms 7%	10 days.

Quantity	Description	Price
	Requirements for Balance of year to Jan. 1-1930	
Blanket	Approximate estimate	
Order	4000 #8 Shu-stiles label	1 25
	4000 Apt Special label	1 35
	Wrapped boxes as original sample	

Conditions

1. Acknowledge order and state when you will ship. By _____

2. Deliver no goods without a confirmed order.

3. We reserve right to cancel, refuse or return Merchandise not Confirmed by

delivered as specified. Arthur Apt

***209** There was conflicting evidence as to what the talk was both before and at the time of the delivery of the purchase order to Green, the plaintiff's evidence tending to show that he was assured that notwithstanding the wording of the purchase order, he was getting a contract for approximately eight thousand cases in any event, and the defendant's evidence tending to show that nothing was said to that effect, but that it was explained to Green that the defendant never gave an outright order, and that Green said he 'merely wanted the order to insure the fact he would get the business by the end of the year whatever it amounted to on that particular box,' and that Green took the order and walked out. The next day the plaintiff wrote the defendant as follows: 'We wish to acknowledge with thanks your orders No. 7827 and No. 7828. We will be able to make delivery on No. 8 Shu-Stile and Apt Specials after August 1st.'

[1] [2] [3] Upon the case thus presented the judge was justified in finding that 'the only contract made between the parties is by the defendant's written order of July 29, 1929, and its acceptance by the plaintiff's letter of July 30.' His further finding that Green 'was told that he was getting an order for 8000 cases anyway and there might be a few more than 8000 cases' is not inconsistent with the finding first quoted. There was evidence that this was an estimate of the number likely to be needed based upon the defendant's past experience and orders for shoes then on hand. The purchase order of July 29 and the acknowledgment of July 30 indicating its final acceptance by the plaintiff are adequate and sufficiently definite to evidence a complete and enforceable contract on the terms set forth in the purchase order. Cabot v. Winsor, 1 Allen, 546, 549; Remick v. Sandford, 118 Mass. 102. See, also, Thomas v. Barnes, 156 Mass. 581, 583, 31 N. E. 683.

[4] [5] [6] The purchase order is to be construed by the court with reference to the circumstances under which it was given and accepted. Smith v. Faulkner, 12 Gray, 251, 255. We think the dominant words are 'Requirements for Balance of year to Jan 1 1930' and that those words are not controlled ***210** or extended by the words 'Approximate estimate' and the figures which follow. The word 'estimate,' in the connection in which it is here used, even though qualified by 'approximate' cannot fairly be enlarged to denote a warranty. The words 'Blanket Order' in the column headed 'Quantity' lend further support to ****98** this construction. Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622; National Pub. Co. v. International Paper Co. (C. C. A.) 269 F. 903; Cragin Products Co. v. Fitch (C. C. A.) 6 F.(2d) 557; Marx v. American Malting Co. (C. C. A.) 169 F. 582; Mathieson Alkali Works v. Virginia Banner Coal Corp., 147 Va. 125, 136 S. E. 673; Tancred, Arrol & Co. v. The Steel Co. of Scotland, Ltd., 15 A. C. 125. See Burgess Sulphite Fibre Co. v. Broomfield, 180 Mass. 283, 62 N. E. 367. If business conditions after July 29, 1929, resulted in reducing the defendant's requirements for the balance of the year far below the approximate estimate that is the misfortune of the plaintiff and any loss to it is a consequence of the kind of agreement into which it entered. Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622.

The defendant accepted only one thousand two hundred and six cartons of boxes but there was no evidence that it failed to take and to pay for as many of the boxes of the type contracted for as it required for the balance of the

year to January 1, 1930. The finding for the defendant was therefore proper.

Exceptions overruled.

All Citations

290 Mass. 207, 195 N.E. 96