[Cite as *Allied Erecting & Dismantling Co., Inc. v. Ohio Edison Co.*, 2015-Ohio-2328.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ALLIED ERECTING & DISMANTLING CO., INC.	)	CASE NO. 13 MA 40
PLAINTIFF-APPELLEE	)	
VS.	)	OPINION
OHIO EDISON CO.	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 06 CV 3604

JUDGMENT: Reversed. Judgment for Appellant.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: June 10, 2015

[Cite as *Allied Erecting & Dismantling Co., Inc. v. Ohio Edison Co.*, 2015-Ohio-2328.]
WAITE, J.

{¶1} Appellant Ohio Edison Company appeals a March 6, 2013 Mahoning County Court of Common Pleas jury verdict. The jury found that the parties had entered into an oral contract where Appellant agreed to design and construct an electrical substation for Appellee Allied Erecting & Dismantling Co., Inc. The jury awarded Appellee $400,000 in damages and the trial court granted prejudgment interest. The parties were previously before us regarding a separate but related contractual issue regarding the sale of transformers, *Allied Erecting & Dismantling Co. v. Ohio Edison Co.,* 7th Dist. No. 10-MA-25, 2011-Ohio-2627 ("*Allied I*").

{¶2} Appellant raises several issues on appeal. It argues that our ruling in *Allied I* barred Appellee from introducing evidence of the transformer contract as proof that a substation contract existed. As the alleged substation agreement primarily involved goods and not services, Appellant also avers that the statute of frauds completely bars the alleged verbal contract. Even so, Appellant contends that its representative lacked the authority to enter into a binding contract and the trial court erred in instructing the jury on every plausible theory of agency.

{¶3} Assuming that we find a verbal contract existed, Appellant argues that the jury reached its damage award based on improper speculation. Appellant also urges us to find that the trial court erroneously disregarded the magistrate's decision in this matter, which recommended denial of Appellee's request for prejudgment interest. Finally, Appellant asserts that Appellee failed to preserve the issue it attempts now to raise on cross-appeal.

{¶4} Appellee responds by arguing that *Allied I* did not bar introduction of the transformer contract as evidence that the parties entered into a substation contract. Further, Appellee asserts that the substation contract sought services rather than goods, so that the Uniform Commercial Code ("UCC") does not apply. Appellee posits that the trial court properly instructed the jury on the theory of agency and that the jury correctly determined Appellant's agent had authority to enter into the contract. Moreover, Appellee urges that the damage award was not speculative and that the trial court properly awarded prejudgment interest.

{¶5} On cross-appeal, Appellee contends that the trial court did err in precluding evidence of the costs related to the purchase and storage of the transformers resulting from Appellant's breach.

{¶6} For the reasons provided, Appellant's second assignment of error has merit and is sustained. Consequently, the remaining assignments of error and Appellee's unpreserved issue on cross-appeal are moot.

Factual and Procedural History

{¶7} On April 21, 2006, representatives for Appellant and Appellee met to discuss two separate contracts: one for the purchase of electrical transformers and one for the design and construction of an electrical substation. At this meeting, Appellee was represented by its president, John Ramun, along with Ed Klien and Jim Fuese. Appellant was represented by Lisa Nentwick, senior account manager, and John Podnar. On May 1, 2006, Nentwick sent Ramun a proposed written contract for the design and procurement of the transformers; this contract was ultimately signed

and completed. In August of 2006 the parties met to discuss the design and construction of the electrical substation. During this meeting, a dispute arose between the parties as to whether the construction mark-up would be twenty-seven percent or fifteen percent. As the parties were unable to resolve their dispute, discussions regarding the substation ended.

{¶8} Shortly thereafter, Appellee filed a complaint asserting that the parties had reached an oral agreement during their April 21, 2006 meeting and Appellant had breached that contract by failing to design and construct the substation. Appellant filed a counterclaim asserting that Appellee had failed to pay under the separate transformer contract. This conflict resulted in an appeal that was partially resolved in *Allied I*. In *Allied I,* this Court held that Appellee was required to remit payment under the transformer contract. We remanded the case for a determination as to whether a verbal contract existed for the substation.

{¶9} On remand, Appellee argued that the parties had entered into an oral contract during the April 21, 2006 meeting. Pursuant to this alleged agreement, Appellant was to design and construct an electrical substation for Appellee. After Appellant failed to perform, Appellee argued that it was forced to perform much of the design and construction and ultimately required to hire a consultant, as Appellee had no experience in substation design or construction. The substation project took approximately six years to complete, although Appellee admits that it contributed in part to the delay. Accordingly, Appellee raised a host of theories on which to base purported damages.

{¶10} The matter proceeded to jury trial. The jury found that the parties had entered into an oral agreement and that Appellant breached that contract by failing to design and construct the substation. The jury awarded Appellee $400,000; however, Appellee sought an additional award of prejudgment interest, which was initially denied by the magistrate. Appellee objected to the magistrate's decision and the trial court disagreed with the magistrate on this issue and granted Appellee prejudgment interest. Appellant has filed a timely appeal. The trial court granted Appellant's motion for a stay on the judgment. As our determination as to Appellant's second assignment of error resolves this appeal in its entirety, this assignment will be addressed first.

Second Assignment of Error

> WHERE, AS A MATTER OF LAW, THE ALLEGED *ORAL* CONTRACT IS PRIMARILY FOR THE SALE OF GOODS, IN VIOLATION OF THE STATUTE OF FRAUDS, DOES THE TRIAL COURT ERR IN SUBMITTING THE CLAIMED CONTRACT CLAIM TO THE JURY?

{¶11} Appellant contends that although the parties were engaged in discussing a contract that appears to seek both goods and services, ultimately Appellee's goal was to obtain a substation: a good. In addition, Appellant notes that Appellee does not dispute the fact that the value of the substation is well over five hundred dollars. As the so-called contract involves a good, is worth more than five hundred dollars and is unsigned, Appellant argues that the statute of frauds operates to bar the so-called verbal contract. Further, Appellant argues that because there are

no disputed facts as to the predominant purpose of the contract, the trial court erred in submitting the question of whether the contract was for goods or services to the jury.

{¶12} In response, Appellee contends that its predominant purpose in entering into this verbal contract was to obtain Appellant's design services. Appellee argues that it specifically desired Appellant's expertise in substation design. Appellee asserts that the evidence admitted at trial unquestionably showed that the predominant purpose of the contract was design and construction services. As the contract was predominantly seeking services, Appellee concludes that the UCC and the statute of frauds do not apply, thus the parties could enter into a valid verbal agreement.

{¶13} It is the general rule in Ohio that when a contract involves both goods and services, "the test for the inclusion in or the exclusion from sales provisions is whether the predominant factor and purpose of the contract is the rendition of service, with goods incidentally involved, or whether the contract is for the sale of goods, with labor incidentally involved." *Allied Indus. Serv. Corp. v. Kasle Iron & Metals, Inc.,* 62 Ohio App.2d 144, 147, 405 N.E.2d 307 (6th Dist.1977). Usually, the "predominate purpose" of the contract where the facts are not clear is a question for the jury. *RPC Elec., Inc. v. Wintronics, Inc.,* 8th Dist. No. 97511, 2012-Ohio-1202, ¶16. However, as almost all contracts involving commercial goods include some aspect of services, the fact that the manufacturer uses their effort and expertise in producing the good does not necessarily mean that the buyer is purchasing a

service. *Action Group, Inc. v. NanoStatics Corp.,* 10th Dist. No. 13AP-72, 2013-Ohio-5542, ¶45. A court must consider whether the purchaser's ultimate goal is to obtain a product or a service. *Id.*

{¶14} The distinction is important, because a contract for the purchase of goods is subject to the strictures of the UCC. The relevant portion of the UCC, the statute of frauds, has been codified in R.C. 1302.04(A):

> Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

{¶15} While the Ohio Supreme Court has yet to answer the question of whether a contract that appears to seek as its goal a combination of goods and services involves a question of law or fact, at least five Ohio districts have said that such a combination presents a question of fact. See *Mueller v. All-Temp Refrig, Inc.,* 3rd Dist. No. 15-13-05, 2014-Ohio-2718; *Arlington Elec. Constr. v. Schindler Elevator Corp.,* 6th Dist. No. L-91-102, 1992 WL 43112 (March 6, 1992); *Renaissance Technologies, Inc. v. Speaker Components, Inc.,* 9th Dist. No. 21183, 2003-Ohio-98; *RPC Elec., Inc.*, *supra*; *Action Group, Inc.*, *supra*.

{¶16} However, Ohio courts have held that an exception to this principle exists when there are no disputed facts as to the predominant purpose of the

contract. *Valleaire Golf Club, Inc. v. Conrad,* 9th Dist. No. 03CA-0006-M, 2003-Ohio-6575, ¶7. When the predominant purpose of the contract is undisputed, the matter becomes a question of law. *Id.* See also *RPC Elec., Inc.*, *supra*.

{¶17} Appellee urges us to accept that its primary goal was to obtain Appellant's expertise in design and construction of an electrical substation. But our review of this record reveals that Appellee's ultimate and, in fact, only goal was to obtain a good. Appellee sought a substation. The fact that some design and manufacturing were required to obtain this good was incidental to providing Appellee with its predominant purpose: securing a working electrical substation. Hence, it appears that the "predominant purpose" exception to the rule applies and the matter was a question of law for the trial court to decide, alone.

{¶18} Although there are no cases in Ohio directly on point dealing with procurement of substations, there is an analogous case that provides us with some instruction on the issue.

{¶19} The Tenth District applied this "predominant purpose" exception in *Action Group, Inc., supra.* Action Group was to manufacture a plastic "head" and its component parts for NanoStatics, a nanofiber company that creates nanofiber materials for commercial use. Action Group specialized in product development, manufacturing and fulfillment. The trial court determined that this contract for the design of a head and its components actually sought a good. *Id.* at ¶24. On appeal, the Tenth District noted that no evidence was presented to explain the purpose of a "monolithic plastic head" and its components, which were the subject of the contract.

Id. at ¶52. However, based on the language of the contract and the testimony of the parties, the Court agreed that the contract's predominant purpose was for a sale of goods. *Id.* at ¶44. The Court explained that although Action Group performed a substantial amount of services in order to develop this head and its components, the "mere fact that a manufacturer utilizes its effort and expertise in producing a good does not mean that the buyer is purchasing those services instead of the good itself." *Id.* at ¶45. Certainly, Action Group was forced to design and manufacture this part for NanoStatics. A sizable portion of the parties' written agreement specifically addressed how Action Group would be paid for the design and manufacturing of the plastic head. Ultimately, however, the Court concluded that since NanoStatics' actual goal was to acquire goods, the plastic head and its components, the UCC applied. *Id.* at ¶44. NanoStatics had no direct use for the design and manufacturing apart from securing their desired goods.

{¶20} We note here that Appellant is not in the business of selling its design services. Appellant is an electrical power provider. Appellee contends that as Appellant had expertise in designing substations, it sought that expertise, primarily. However, it is readily apparent that Appellee needed this so-called expertise not because it desired only the design, but because it needed only the substation. The design and construction were incidental to its real need. As in *Action Group, Inc.,* although the design and construction services necessary to obtain a substation may be substantial, Appellee's goal in this alleged contract was to obtain a substation, which is a good. Consequently, and based on the evidence of record, the

predominant purpose of this contract was undisputedly for the sale of a good. Thus, the UCC applies.

{¶21} Under the UCC, a contract for the sale of a good must be in writing and signed by the party to be charged if the value of the good is worth $500 or more. Here, the parties agree that the substation's cost is well in excess of $500. The parties also agree that the contract is neither in writing nor is it signed. Thus, as the contract sought a good in excess of $500 and is not in writing nor signed, the statute of frauds renders any agreement unenforceable. As Appellee cannot enforce the contract, Appellant is not liable. Accordingly, Appellant's second assignment of error has merit. The trial court erred in sending the matter to the jury and should have ruled, as a matter of law, that Appellee does not have a valid, enforceable agreement. As such, Appellant is not liable in damages to Appellee.

First, Third, Fourth, and Fifth Assignments of Error

AFTER THIS COURT OF APPEALS DETERMINED THAT THE PURCHASE OF TRANSFORMERS AND THE EXISTENCE OF A SUBSTATION CONTRACT WERE SEPARATE, INDEPENDENT AND NOT CONTINGENT, DID THE TRIAL COURT ERR IN ALLOWING THE TRANSFORMER CONTRACT TO BE USED TO PROVE THE ALLEGED ORAL SUBSTATION CONTRACT?

WHERE THE "PROOF" OF CONTRACT DAMAGES IS WHOLLY SPECULATIVE, DOES THE TRIAL COURT ERR IN SUBMITTING A BREACH OF CONTRACT CLAIM TO THE JURY?

WHERE BOTH THE PRINCIPAL AND PURPORTED SELLING AGENT AGREE THAT AN ALLEGED ORAL AGREEMENT EXCEEDS THE AUTHORITY OF THE AGENT, THE PRINCIPAL AND PURPORTED BUYER HAVE NO CONTACT OR COMMUNICATION, AND THE PURPORTED PRINCIPAL DOES NOT ACT INCONSISTENTLY SO AS TO SUPPORT THE CLAIMED AUTHORITY, DOES THE TRIAL COURT ERR IN SUBMITTING A CASE TO THE JURY UPON MULTIPLE THEORIES OF AGENCY?

WHERE MONEY WAS NOT "DUE AND PAYABLE" ON THE ALLEGED ORAL CONTRACT AND, WHERE THE VERDICT MADE PLAINTIFF WHOLE, DID THE TRIAL COURT ERR IN REVERSING THE MAGISTRATE'S DECISION AND AWARDING PREJUDGMENT INTEREST, PURSUANT TO R.C. §1343.03(A)?

Cross Appeal

APPELLEE’S CROSS-ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE OF DAMAGES RELATING TO ADDITIONAL COSTS PAID TO OHIO EDISON FOR THE TRANSFORMERS WHERE THE COURT OF APPEALS' OPINION IN ALLIED I DOES NOT IN ANY MANNER RESTRICT OR IMPAIR THE SUBSTATION CONTRACT OR THE DAMAGES THAT MAY BE CLAIMED FOR BREACH THEREOF.

{¶22} Appellant contends that because our opinion in *Allied I* held that the transformer contract and substation contract were not dependent, contingent, or part of an overreaching agreement, the trial court erred in allowing Appellee to use the transformer contract as evidence in order to prove the existence of the substation contract.

{¶23} Appellant next argues that Appellee could not prove it was damaged. In fact, Appellant asserts that as Appellee received a better price to build the substation through a second company, it suffered no damages.

{¶24} Next, Appellant contends that the evidence presented at trial showed that its agent lacked the authority to enter a binding contract. Thus, Appellant argues that the trial court erred in instructing the jury on every plausible theory of agency law. For the same reason, Appellant asserts that the trial court erred in denying its motion for a directed verdict.

{¶25} Finally, Appellant argues that the trial court erred in awarding prejudgment interest. Appellant argues that prejudgment interest is only awarded to a party when the opposing party has retained money due and owing under the contract. In this case, Appellant explains that Appellee sought damages for breach of a contract, not for money due and owing under a contract. Thus, prejudgment interest is inapplicable.

{¶26} In its cross-appeal, Appellee argues that the trial court erred in preventing it from offering evidence to the jury of damages related to the purchase

and lengthy storage of the transformers. Appellee asserts that the trial court's ruling was inconsistent with our opinion in *Allied I.*

{¶27} We note that Appellee has not properly raised its cross-appeal issue. Regardless, as the alleged oral contract between the parties violated the statute of frauds and is unenforceable, the remaining assignments of error and the cross-appeal are moot.

Conclusion

{¶28} As the undisputed evidence of record reflects that Appellant's predominant purpose in the contract was to obtain a good, the UCC applies to bar oral contract. There was no contract between the parties on which to base damages. As the contract is void, the remaining issues before us are moot. The judgment of the trial court is reversed. Judgment is entered for Appellant.

Donofrio, P.J., concurs.

Robb, J., concurs.