[Cite as *H & M Landscaping Co., Inc. v. Abraxus Salt, L.L.C.*, 2010-Ohio-4138.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94268

H & M LANDSCAPING CO., INC.

PLAINTIFF-APPELLANT

vs.

ABRAXUS SALT, L.L.C.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-688445

BEFORE: Celebrezze, J., Boyle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: September 2, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, H & M Landscaping Co., Inc. ("H&M"), appeals from the trial court's grant of summary judgment in favor of appellee, Abraxus Salt, L.L.C. ("Abraxus"). H&M argues that Abraxus breached a contract for the supply of road salt for the 2007-2008 winter season. After a thorough review of the record and the apposite law, we affirm the decision of the trial court.

{¶ 2} On September 25, 2007, Abraxus contacted H&M to discuss its salt needs for the upcoming winter season. The parties arrived at an oral agreement, and H&M sent Abraxus a check for $100,000 to prepurchase road

salt. On October 10, 2007, Abraxus sent H&M a packet of documents including a price quotation that required acceptance within 15 days. This quotation, signed by the vice president of Abraxus, detailed the prices previously negotiated by the parties, including a discount for salt purchased in advance. The "early season price," as the quotation called it, was $38 per ton. The regular price specified in the document was $44 per ton if purchased after October 5, 2007. H&M signed the document and returned it to Abraxus along with a check for $50,000 to further secure salt at the reduced price.

{¶ 3} During that winter season, H&M was provided with salt it had prepurchased at the agreed-upon price. By February 13, 2008, H&M had used all of its prepaid salt and was invoiced for two new salt orders at $44 per ton. On February 18, 2008, H&M purchased additional salt, but at a price of $55 per ton. On this date, Abraxus advised H&M that its regular salt supplier, Cargill, was experiencing a shortage at its salt mine in Cleveland. As a result, Abraxus had to purchase salt from other locations at an increased price and increased transportation costs. Abraxus informed H&M that it must pay all outstanding invoices immediately, and any future salt purchases would cost $110 per ton.

{¶ 4} H&M declined to purchase any further salt and sued Abraxus for breach of contract and fraud on March 26, 2009. Abraxus submitted a motion to dismiss, which the trial court converted to a motion for summary judgment.

After both parties had submitted briefs, the trial court granted summary judgment in favor of Abraxus. H&M timely filed a notice of appeal raising one assignment of error.

Law and Analysis

{¶ 5} Appellant argues in its sole assignment of error that the trial court erred in granting Abraxus's motion for summary judgment.

{¶ 6} "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 7} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio

St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim*." (Emphasis sic.) Id. at 296. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 8} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153.

The Existence of a Contract

{¶ 9} H&M alleges that the price quotation sent by Abraxus constituted an offer, which H&M accepted, creating a binding contract between the parties. A contract for the sale of salt is a contract for the sale of goods. As such, the parties' claims are governed by Ohio's version of the Uniform Commercial Code ("UCC"), codified in R.C. 1301 et seq. Generally, a price quotation is not an offer, but rather an "'invitation for an offer[.]'" *Dyno Const. Co. v. McWane, Inc.* (C.A. 6 1999), 198 F.3d 567, 572, quoting *White Consol. Indus., Inc. v. McGill Mfg. Co. Inc.* (1999), 165 F.3d 1185, 1190. However, a document labeled a quotation may constitute an offer if the

quotation is sufficiently definite to require only the offeree's assent to create a binding contract. Id. The determination is to be made based "upon the intention of the person communicating the quotation as demonstrated by all of the surrounding facts and circumstances." Id.

{¶ 10} Whether a price quotation can constitute an offer must be judged on the writing as well as the objective evidence surrounding its creation. In *Bergquist Co. v. Sunroc Corp.* (E.D.Pa. 1991), 777 F.Supp. 1236, 1249, the district court found that the following created an issue of fact that should be resolved by the jury: "(i) the price quotation was developed by the defendant after the parties had engaged in substantial negotiations; (ii) the quotation included a description of the product, a list of various quantities at various prices, terms of payment, and delivery terms; (iii) the quotation contained the statement '[t]his quotation is offered for your acceptance within 30 days'; and (iv) the price which the purchaser paid was the price listed in the price quotation rather than the price listed in the purchaser's subsequent purchase order." *Dyno Constr.* at 573.

{¶ 11} In the present case, the parties had engaged in significant negotiations, as evidenced by H&M's $100,000 check submitted to Abraxus before H&M received the quotation. Abraxus also referred to the quotation as a "salt pricing contract" in a cover letter accompanying the document. H&M was charged the early season rate that was specified. The document

contained a signature block titled "Accepted," which an H&M representative signed and returned within the period specified in the document. These factors appear similar to the quotation in *Bergquist*. Also, in *SST Bearing Corp. v. MTD Consumers Group Inc.*, Hamilton App. No. C-040267, 2004-Ohio-6435, cited by H&M, the First District found that a price quotation served as an offer. This case applied the factors set forth in *Bergquist*; however, the quotations in these cases set forth specific quantities.

{¶ 12} In the present case the document in question contains price, delivery terms, terms of payment, and product descriptions. Quantity is missing from the document. Quantity is generally the only term that is required for contract formation. Official Comment One to R.C. 1302.04. "[T]herefore, if a contract lacks a quantity term, it * * * runs afoul of the Statute of Frauds and is not enforceable."[1] *Orchard Group, Inc. v. Konica Med. Corp.* (C.A. 6 1998), 135 F.3d 421, 428. Abraxus argues the document precludes a finding that it constitutes an offer because it specified that it was not an order and stated that neither party assumed any obligation as to usage, i.e., no quantity was stated or could be assumed. H&M asserts that the transaction between the parties was a requirements agreement whereby Abraxus would supply H&M with all its needed salt for the 2007-2008 season.

[1]R.C. 1302.04, Ohio's codified statute of frauds, requires a written agreement if a contract for the sale of goods is for an amount greater than $500.

{¶ 13} A requirements contract is "[a] contract in which a buyer promises to buy and a seller to supply all the goods or services that a buyer needs during a specified period. * * * A requirements contract assures the buyer of a source for the period of the contract." Black's Law Dictionary (8 Ed. 2004). See, also, R.C. 1302.19(A).

{¶ 14} The only arguable reference evidencing an intent to form a requirements contract in Abraxus's quotation is the beginning line which states, "ABRAXUS SALT, LLC is pleased to submit the following quote for your Deicing Salt needs for the 2007/2008 season[.]" This is not a sufficiently definite expression of an intent on the part of Abraxus to engage in a full requirements contract, as H&M claims.

{¶ 15} Under Ohio law prior to the adoption of the UCC, a requirements contract "must [have] some fixed conditions or circumstances from which the quantities involved in the contract can at least be approximated." *U.S. Printing & Lithographing Co. v. Crites* (1921), 15 Ohio App. 63, 1 Ohio Law Abs. 395, at p. 2. In those pre-UCC cases that have upheld requirements contracts as valid, "the quantities needed may be ascertained with some degree of certainty, and the intention of the parties, it is presumed, was to contract with reference to such quantity." *Fuchs v. United Motor Stage Co.* (1939), 135 Ohio St. 509, 514, 21 N.E.2d 669. The UCC did not substantially change the common law in Ohio. *Orchard Group* at 428, fn. 2.

{¶ 16} The language from the document in the present case is not definite enough to determine any amount. The duration of the contract, although not required to be stated with specificity, is hazy, referencing only the "2007/2008 season."

{¶ 17} In *Orchard Group*, the Sixth Circuit found that "'[Konica] is pleased to offer these terms in return for a film commitment of 36 mos.'" was not a seasonable expression of an intention to enter into a requirements contract, finding "[t]here is nothing in the language itself on its [face] which even remotely suggests exclusivity." *Orchard Group* at 429. Similarly, the document sent by Abraxus contains no language as to exclusivity. H&M remained free to purchase salt from other suppliers. This is an important element to a requirements contract because such contracts rely on the good faith of the parties for enforcement.

{¶ 18} Additional language in the document sent by Abraxus stated, "[e]ither party in regard to usage allocated above assumes no obligation." This language would preclude a finding that the parties intended to enter into a requirements contract or that the document contemplated an exclusive relationship. H&M attempts to submit parole evidence in an affidavit to the trial court, but "parole evidence is only admissible when the contract language is itself ambiguous as to its terms. See, e.g., *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 794 (4th Cir.1989)." *Orchard Group* at 429.

"To permit parole evidence would be to effectively permit post-litigation revision of a contract which is not the least unclear." Id. at 429-430.

{¶ 19} While *Orchard Group* deals with a new business where no prior estimation of requirements could be used to determine whether the parties were operating in good faith, the same logic applies here. H&M does not allege that the two parties had a prior relationship that would allow evidence of past dealings to fill in a quantity term.[2]

{¶ 20} H&M argues that Abraxus accepted the agreement through its actions in supplying H&M with salt at the agreed-upon price. Abraxus did supply H&M with salt that was prepaid at the agreed-upon rate. However, Abraxus also charged H&M $11 per ton more than the quoted rate on at least one occasion after H&M exhausted its prepurchased amount. This course of performance information does not help H&M overcome the lack of a quantity term in the agreement. H&M sent payment for $150,000 in salt, which Abraxus accepted and delivered. The statute of frauds precludes H&M from arguing that additional amounts were also included in the agreement because they are not evident in the document that H&M asserts is a contract, and

[2]"A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." R.C. 1301.11(A). This evidence "give[s] particular meaning to and supplement[s] or qualif[ies] terms of an agreement." R.C. 1301.11(C). Such evidence is admissible despite the statute of frauds.

Abraxus's actions do not demonstrate acceptance of a duty to supply additional quantities of salt. R.C. 1302.04(C)(3) allows a party to enforce a contract that does not satisfy the statute of frauds "with respect to goods for which payment has been made and accepted * * *." Therefore, H&M could enforce an agreement for the amount of salt that it had paid for, but no more.

Fraud

{¶ 21} H&M argues Abraxus committed fraud by representing to H&M that it would supply all its needed salt for the 2007-2008 season at the price set forth in the quotation.

{¶ 22} "The elements of fraud in the inducement are '(1) a representation of fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with utter disregard and recklessness, as to whether it is true or false, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation, (6) and a resulting injury proximately caused by the reliance.'" *Mtge. Electronic Registration Sys., Inc. v. Mosley*, Cuyahoga App. No. 93170, 2010-Ohio-2886, ¶34, quoting *Natl. City Bank v. Slink & Taylor, LLC*, Portage App. No. 2002-P-0045, 2003-Ohio-6693, ¶23.

{¶ 23} H&M alleges the parties reached an understanding that Abraxus would supply H&M with 7,900 tons of salt for the 2007-2008 season at an agreed-upon price. According to H&M president, Mark Mazzurco, H&M was

required to purchase between 80 and 120 percent of that estimated amount. H&M was then sent a document Abraxus referred to as the "[s]alt pricing contract." H&M relied on the promise of a supply of salt at a consistent price and chose Abraxus as its supplier, sending Abraxus $150,000. According to Mr. Mazzurco's deposition testimony and affidavit, there was a promise on the part of Abraxus, which H&M justifiably relied upon, and which resulted in injury when Abraxus failed to follow through by increasing the price of salt 150 percent. However, H&M has not shown that Abraxus knew the promise to supply H&M with salt for the 2007-2008 season at certain prices was false at the time it was made. Abraxus supplied H&M with all of its prepurchased salt at the agreed-upon price and only increased prices after a salt shortage required Abraxus to purchase salt at increased wholesale prices and delivery expense. Abraxus provided the purchase information from its suppliers documenting the increases. Therefore, H&M's fraud charge must fail as a matter of law.

{¶ 24} Since H&M's fraud claim fails, so too does its claim for punitive damages. Generally, punitive damages are not available in a breach of contract action. *Ketcham v. Miller* (1922), 104 Ohio St. 372, 136 N.E. 145, paragraph two of the syllabus. "[P]unitive damages are recoverable for a tort committed in connection with, but independently of, a breach of contract, the allowance of the punitive damages being for the tort, and not for the breach of

the contract." *Host v. Ursem* (July 15, 1993), Cuyahoga App. No. 63109, at p. 3.

Conclusion

{¶ 25} The document in question is not a contract, but rather a price quotation inviting an offer from H&M. H&M submitted payment for $150,000 worth of salt and received that amount. H&M has failed to demonstrate fraud on the part of Abraxus. The quotation is not sufficiently definite to constitute a contract between the parties. The trial court did not err in granting summary judgment in favor of Abraxus.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR