

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INTERNATIONAL POULTRY PROCESSORS, : CIVIL ACTION
INC. :
 :
v. :
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WAMPLER FOODS, INC. : No. 98-4612

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 :
v. :
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INTERNATIONAL POULTRY PROCESSORS, : No. 98-4612
INC. and ERNEST MILOU : (Originally 99-300)

M E M O R A N D U M

Ludwig, J.

April 29, 1999

Defendant/cross-action plaintiff Wampler Foods, Inc. moves for summary judgment on International Poultry's breach of contract and misrepresentation claims and on Wampler's cross-action.¹ Fed. R. Civ. P. 56.² Jurisdiction is diversity. 28 U.S.C. § 1332.

This action involves the sale of turkeys. According to International Poultry Processors, Inc.'s complaint, Wampler Foods, Inc. orally agreed in January 1998 to be its primary turkey supplier. Wampler disputes the existence of the contract and

¹Summary judgment has been entered in favor of cross-action defendant Ernest Milou. Order, April 8, 1999.

²"Summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999) (quoting Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1230 (3d Cir. 1993)).

claims \$246,864.73 for shipments made in June, 1998, the last month in which it supplied turkeys to plaintiff. In ruling on this motion, the facts must be viewed through the summary judgment prism of nonmovant International Poultry - i.e., from its standpoint. Fed R. Civ. P. 56.

International Poultry, a Pennsylvania corporation, had its principal place of business in Philadelphia. It bought "canner toms" - slaughtered, plucked, whole male turkeys - from wholesalers, cut them up, and resold them. Milou dep. at 12.

Wampler, located in Rockingham County, Virginia, "is in the business of breeding, growing, slaughtering, and then selling poultry, primarily chickens and turkeys." Myran aff. ¶ 11. It sells whole turkeys on the wholesale market and also processes turkey into retail products, such as turkey hot dogs and turkey parts. Id.

In 1992, Wampler began selling canner toms to International Poultry. Myran aff. ¶ 5; Milou dep. at 6. The price was set by reference to the "Urner Barry Price Current," which is a commercial trade publication used in the industry. Myran aff. ¶ 8-10; Milou dep. at 37-39. Typically, canner toms are sold by the load, which weighs between 36,000 and 40,000 pounds, or by the half load. Milou dep. at 45; Myran aff. ¶ 7.

From January 1995 to June 1996, the parties entered into a series of six-month contracts, consisting of oral agreements confirmed by letter from Wampler's sales manager, and International Poultry's purchase order numbers. Myran aff. ¶¶ 17-24, 55.

In August, 1997 International Poultry stopped purchasing from Wampler. Milou aff. ¶ 7; Wampler's answer at 7. Some months later, in an effort to regain its business, Wampler proposed becoming International Poultry's primary supplier of turkey product.³ Milou aff. ¶ 11; Milou dep. at 33. Wampler would supply one load of turkeys per business day until December 31, 1998 at the Urner Barry rate. Milou aff. ¶ 11; Milou dep. at 32-33, 40-41. On January 5, 1998, after expressing concern about the potential effect of an interruption in Wampler's supply, International Poultry orally accepted the proposal. Milou aff. ¶ 12, 14; Milou dep. at 33. It also submitted purchase order numbers for January 1998.⁴ Myran aff. ¶ 26-27; Wampler's ex. P.

In return, Wampler sent International Poultry an annual credit application, which was completed and returned. Milou aff. ¶ 15, 16; Wampler's ex. L, LL; Curry aff. ¶¶ 2-4. By letter dated February 5, 1998, Wampler advised International Poultry that it

³Wampler disputes having made such a proposal or that the parties entered into a one-year contract.

⁴International Poultry's president testified that he does not recall having submitted purchase order numbers on any occasion. Milou dep. at 80-89. However, lack of memory does not contradict Wampler's evidence that it received purchase order numbers. See Dickey v. Baptist Memorial Hosp.-N. MS, 146 F.3d 262, 266 n.1 (5th Cir. 1998) ("The mere fact that Dr. Washington does not remember the alleged phone conversation, however, is not enough, by itself, to create a genuine issue of material fact."); Groff v. Continental Ins. Co., 741 F. Supp. 541, 548 (E.D. Pa. 1990) ("This lack of memory or knowledge alone is insufficient to create a genuine issue of material fact Therefore, the evidence presented by [defendant] on this issue remains uncontradicted.").

qualified for a \$100,000 credit line, net 10 days. Milou aff. ¶ 18; Wampler's ex. MM.

In January and each month thereafter through May, 1998, International Poultry placed orders for the following month and transmitted corresponding purchase order numbers. Myran aff. ¶¶ 30-32, 38-42, 45-50; Wampler's ex. Q-S, W-Z, and DD-JJ. Before Wampler accepted each order, it confirmed the canner toms' availability. Myran aff. ¶¶ 30, 38, 41, 43, 45, 48, 50; Wampler's ex. AA, GG.

On June 10, 1998 Wampler informed International Poultry that for economic reasons it would not offer turkey product for sale beyond June 29, 1998. Milou aff. ¶ 21; Milou dep. at 90-91; Myran aff. ¶ 52. After an unsuccessful search for alternative suppliers, International Poultry went out of business. Milou aff. ¶ 23. Wampler claims nonpayment of \$246,864.73 for canner toms shipped between June 11, 1998 and June 29, 1998. Milou dep. at 60-65; Myran aff. ¶ 56; Wampler's ex. I. International Poultry does not dispute receipt or price – but asserts an offset for shrinkage. Milou dep. at 60-65.

On August 25, 1998 Wampler filed an action in the United States District Court for the Western District of Virginia to recover payment for the June 1998 deliveries. C.A. No. 98-59(H) (W.D. Va.). Two days later International Poultry filed the present action. Following transfer from the District of Virginia, the two actions were consolidated.

Wampler's motion for summary judgment involves substantive issues governed by state law. According to Wampler, there was no oral contract; enforcement of such a contract would be barred by the statute of frauds; and there is no evidence of fraudulent intent on Wampler's part or of unfair dealing.

As to matters of state law - in this instance Pennsylvania - it is necessary to "predict what the Pennsylvania Supreme Court would do if presented with this case. . . . In the absence of guidance from the state's highest court, we are to consider decisions of the state's intermediate appellate courts for assistance in predicting how the state's highest court would rule." 2-J Corp. v. Tice, 126 F.3d 539, 541 (3d Cir. 1997) (citations omitted).⁵

Existence of Oral Contract

A credibility dispute as to the existence of an oral contract cannot be resolved at this stage. Wampler urges that the deposition testimony of International Poultry's president is not worthy of belief. "However, at the summary judgment stage, a court may not weigh the evidence or make credibility determinations; these tasks are left to the fact-finder." Boyle v. County of Allegheny Pa., 139 F.3d 386, 393 (3d Cir. 1998). Because there is a genuine issue of material fact whether the parties entered into

⁵At a Rule 16 conference on April 6, 1999 counsel agreed that no choice of law analysis is necessary, inasmuch as the substantive law in this case is the same in both Pennsylvania and Virginia.

an oral one-year contract, summary judgment must be denied as to this issue.

Waiver of Affirmative Defense

International Poultry also resists the motion on the ground that Wampler waived the affirmative defense of the statute of frauds by not pleading it in its answer. In diversity cases, what qualifies as an affirmative defense is determined by state law. See Charpentier v. Godsil, 937 F.2d 859, 863 (3d Cir. 1991). Here, under both Pennsylvania and Virginia law, the statute of frauds is considered to be such a defense. See Bocchicchio v. General Public Utilities Corp., 456 Pa. Super. 23, 29, 689 A.2d 305, 309 (1997); Kwon v. Lee, 31 Va. Cir. 411 (Cir. Ct. Fairfax County 1993). On the other hand, pleading requirements and waivability, being procedural in nature, are matters of federal law. See Herremans v. Carrera Designs, Inc., 157 F.3d 1118, 1122-23 (7th Cir. 1998).

While Fed. R. Civ. P. 8(c) requires affirmative defenses to be pleaded in the answer, "failure to raise an affirmative defense in a responsive pleading, however, does not always result in waiver." Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1373 (3d Cir. 1993). An affirmative defense is not waived if raised "at a pragmatically sufficient time and [the plaintiff] was not prejudiced in its ability to respond." Charpentier v. Godsil, 937 F.2d 859, 864 (3d Cir. 1991) (quoting Lucas v. United States, 807 F.2d 414, 418 (5th Cir. 1986)). "For example, a party may raise an unpled affirmative defense in an appropriate motion." Kleinknecht,

989 F.2d at 1373. A motion for summary judgment, "while not the most appropriate way to raise a previously unpled defense," may nonetheless be appropriate if plaintiff is not prejudiced.⁶ Kleinknecht, 989 F.2d at 1374.

International Poultry has not attempted to show and cannot fairly aver any prejudice resulting from Wampler's assertion of the statute of frauds defense in this motion. The reason is that the defense was apparent on the face of International Poultry's complaint, which states that the parties "entered into an oral agreement." Am. compl. ¶ 9. Better practice is to plead the defense or to raise it by threshold motion. Otherwise, both the Court and plaintiff may be led to believe that defendant is willing to forego the defense and not rely on it, conceivably occasioning undue expense and delay. Here, however, while not conforming with Rule 8(c), defendant gave timely notice that it would file an early

⁶In numerous decisions in this District, an affirmative defense raised in a motion for summary judgment has been held not to have been waived. See, e.g., Zhang v. Southeastern Fin. Group, Inc., 980 F. Supp. 787, 795-96 (E.D. Pa. 1997); Kenepp v. American Edwards Labs., 859 F. Supp. 809, 816 (E.D. Pa. 1994); Shirsat v. Mutual Pharm. Co., Civ. A. No. 93-3202, 1996 WL 606297, at *3-4 (E.D. Pa. Oct. 22, 1996); S.N.A., Inc. v. Hartzell Propeller, Inc., Civ. A. No. 95-1397, 1996 WL 283646, at *4 (E.D. Pa. May 29, 1996); Blizzard v. Motorola, Inc., Civ. A. No. 94-0207, 1995 WL 216938, at *2 (E.D. Pa. Apr. 12, 1995); Surgical Laser Techs., Inc. v. Heraeus Lasersonics, Inc., Civ. A. No. 90-7965, 1995 WL 20444, at *2-6 (E.D. Pa. Jan. 12, 1995); Mines v. City of Phila., Civ. A. No. 93-3052, 1994 WL 386362, at *1-2 (E.D. Pa. July 22, 1994); see also Turiano v. Schnarrs, 904 F. Supp. 400, 405-06 (M.D. Pa. 1995) (same). But see Rhoads v. Stein, Civ. A. No. 93-4699, 1995 WL 339023, at *2-3 (E.D. Pa. June 1, 1995) (motion to amend answer to include affirmative defense was not raised at a "pragmatically sufficient time" because amendment would require reopening discovery and "would substantially delay the disposition" of the case).

summary judgment motion. Moreover, plaintiff was afforded ample opportunity to meet the motion. Accordingly, the defense of the statute of frauds will not be deemed waived.

Statute of Frauds

An oral contract for the sale of goods in excess of \$500 cannot be enforced unless there are writings sufficient to satisfy the statute of frauds. Section 2-201 of the Uniform Commercial Code, adopted by Pennsylvania and Virginia,⁷ sets forth the statute as follows:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

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

.....

⁷13 Pa. Cons. Stat. Ann. § 2201 (West 1999); Va. Code Ann. § 8.2-201 (Michie 1998).

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

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted.

As explained in the first comment to section 2-201, although the "required writing need not contain all the material terms of the contract, . . . it must evidence a contract for the sale of goods; second, it must be 'signed,' a word, which includes any authentication which identifies the party to be charged; and third, it must specify a quantity." Also, it has been held that "when considering the writing requirement, the Court may consider more than one writing if they bear either an express reference one to another or internal evidence of their interrelation." International Prods. & Techs., Inc. v. Iomega Corp., 10 U.C.C. Rep. Serv. 2d (CBC) 694 (E.D. Pa. 1989) (citations and quotation omitted), aff'd, 908 F.2d 962 (3d Cir. 1990)).

According to International Poultry, several writings satisfy the statute of frauds:⁸

⁸International Poultry also contends that (1) it is customary in the turkey industry for producers to enter into one-year oral contracts with turkey processors; (2) because of lower wholesale prices for turkey product, Wampler reduced turkey production and shifted some commodity turkey sales to "in-house" valued-added turkey production; and (3) its credit limit with Wampler is consistent with a one-year contract. However, these assertions appear to have no bearing on the statute of frauds issues.

- Handwritten notes showing that the parties on December 24, 1997 discussed "Canners for 1998."⁹ International Poultry's resp. br. at 21.
- Two letters from Wampler's assistant credit manager, regarding International Poultry's annual credit review.
- A letter from Wampler denying International Poultry's request to extend payment terms.

Those writings are evidence that the parties had an ongoing business relationship and that Wampler extended International Poultry credit. However, none of them, individually or together, specify a quantity of goods or denote other terms of a sale. See Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 677 (3d Cir. 1991) ("Courts have generally found that a quantity term must be stated for compliance with the Code, and commentators have agreed.").¹⁰ The review of an annual credit line may be consistent with business dealings but is lacking in requisite particulars. Similarly, general statements such as "we look forward to many years of serving you," do not refer to a specific contract or quantity and, consequently, will not satisfy the statute of frauds.

As International Poultry contends, writings between merchants may confirm a contract under U.C.C. § 2-201(2). "Between merchants, failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing under

⁹Although the notes are difficult to decipher, there does not appear to be a reference to "Canners for 1998." Wampler's ex. M, third entry.

¹⁰International Poultry does not assert – and it does not appear to be the fact – that the alleged oral agreement was a requirements, output, or indivisible contract.

subsection (2) and is sufficient against both parties under subsection (1). The only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds” U.C.C. § 2-201 cmt. 3; see also United McGill Corp. v. Gerngross Corp., 689 F.2d 52, 54 (3d Cir. 1982) (“When, between merchants, a writing in confirmation of the oral contract and sufficient to bind the sender is received, the recipient may not raise the statute of frauds as a defense unless he sends written notice of objection within ten days of receipt of the writing.”). Wampler’s letters, which were referable to credit terms, do not confirm a contract. Furthermore, section 2-201(2) may be used only to eliminate the recipient’s statute of frauds defense – i.e., for International Poultry – not the sender’s – Wampler.

International Poultry’s position that Wampler concedes the existence of the contract is limited by the pro tanto scope of the admission. Wampler’s brief states, at page three, that “in 1998, the parties had a month-to-month contract only.” If that statement is considered to be a judicial admission, the oral contract would still not be enforceable beyond June 1998. The U.C.C. states that “the contract is not enforceable . . . beyond the quantity of goods admitted.” U.C.C. § 2-201(3)(b).

Because the writings in this case do not establish two elements required by the statute of frauds – an agreement and a

quantity – Count II of International Poultry’s amended complaint must be dismissed.¹¹

Fraud and Deceit¹²

Under Pennsylvania law, intentional misrepresentation has five elements: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) resulting damage to the recipient. See Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Invs., 951 F.2d 1399, 1409 (3d Cir. 1991). “[P]romises to do future acts do not constitute a valid fraud claim.” Id. (quoting Wood v. R.R. Donnelley & Sons Co., 888 F.2d 313, 318 (3d Cir. 1989)); see also Sokoloff v. Strick, 404 Pa. 343, 348, 172 A.2d 302, 304 (1961) (“We have recently held more than once that a mere breach of good faith, or a broken promise to do or refrain from doing something in the future . . . is not . . . fraud.”).

¹¹To the extent that International Poultry asserts a theory of promissory estoppel, that contention must also be rejected. In this Circuit, it has been predicted that the Pennsylvania Supreme Court would bar a promissory estoppel claim that did not comply with the requirements of the statute of frauds. See Atlantic Paper Box Co. v. Whitman’s Chocolates, 844 F. Supp. 1038, 1043 n.7 (E.D. Pa. 1994); International Prods. & Techs., Inc. v. Iomega Corp., 10 U.C.C. Rep. Serv. 2d (CBC) 694 (E.D. Pa. 1989) (“If estoppel claims were not barred by the application of the statute of frauds, every promise satisfying section 90 of the Restatement, but which was otherwise invalid under the statute of frauds, would be actionable under an estoppel claim. Such a reading would strip the statute of its purpose.”), aff’d, 908 F.2d 962 (3d Cir. 1990).

¹²International Poultry’s brief does not discuss this issue. Accordingly, the argument may be considered to have been abandoned. In any event, it appears to be without merit.

However, "a statement of present intention which is false when uttered may constitute a fraudulent misrepresentation of fact." Mellon Bank, 951 F.2d at 1409 (quoting Brentwater Homes, Inc. v. Weibley, 471 Pa. 17, 23, 369 A.2d 1172, 1175 (1977)).

Viewed most favorably to International Poultry, the evidence does not show that Wampler's intent was to defraud its customer. Furthermore, if International Poultry relied on its perception of Wampler's representations, its doing so was unjustified. Given the history of their business contacts, International Poultry should have recognized that what occurred as to 1998 purchases bore scant resemblance to the parties' prior practice. International Poultry is unable to say it provided purchase order numbers for the entire period, and Wampler did not confirm the agreement in writing, as had occurred with their previous contracts. Accordingly, there appears to be no basis in law or fact for count I of International Poultry's amended complaint, and it must also be dismissed.

Edmund V. Ludwig, J.

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O R D E R

AND NOW, this 29th day of April, 1999, the motion of defendant/cross-action plaintiff Wampler Foods, Inc. for summary judgment is granted. The following rulings are entered:

1. Plaintiff International Poultry Processors, Inc.'s amended complaint is dismissed with prejudice.

2. Judgment is entered in favor of Wampler Foods, Inc. and against International Poultry Processors, Inc. in an amount to be assessed at a later date.¹³

3. By May 14, 1999 International Poultry will submit a statement of the amount of its claim for shrinkage and a proffer of its evidence on this issue.

¹³At a Rule 16 conference on April 6, 1999 counsel agreed that if Wampler's motion were granted, judgment could be entered against International Poultry.

4. Before May 19, 1999 counsel shall conduct serious settlement discussions to resolve the remaining disputes, including the offset for shrinkage and Wampler's request for attorney fees.

5. The next Rule 16 conference is rescheduled from May 18, 1999 and shall be held by telephone on May 19, 1999 at 9:30 a.m.

A memorandum accompanies this order.

Edmund V. Ludwig, J.