

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

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

WAMPLER FOODS, INC. : CIVIL ACTION
 :
v. :
 :
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.

June 2, 1999

International Poultry Processors, Inc. moves "to alter or amend judgment or, alternatively, for relief from judgment or order." Fed. R. Civ. P. 59(e),¹ 60(b).²

International Poultry contends that the order entered April 29, 1999 granting summary judgment was erroneous because (1) the breach of contract claim is not barred by the statute of frauds having been waived by industry custom; (2) the performance exception to the statute of frauds applies because the contract was

¹A motion for reconsideration under Fed. R. Civ. P. 59(e) must rely on one of three grounds: (1) an intervening change in law; (2) the availability of new evidence, not previously available; or (3) the need to correct clear error of law or prevent manifest injustice. See North River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995).

²A party may be relieved from judgment under Fed. R. Civ. P. 60(b) for "mistake, inadvertence, surprise, or excusable neglect" or "any other reason justifying relief from the operation of the judgment."

indivisible; (3) the writings sufficiently established a quantity; and (4) the fraud claim has a legal basis. For the following reasons, these contentions are rejected:³

(1) Waiver by industry custom: Official Comment Four to U.C.C. § 1-205 states that "mandatory rules of law such as the Statute of Frauds . . . cannot be abrogated by agreement, or by a usage of trade."⁴ However, as between the parties themselves, the Pennsylvania Superior Court has held that the statute of frauds may be waived by a course of dealing. See H.B. Alexander & Son, Inc. v. Miracle Recreation Equip. Co., 314 Pa. Super. 1, 6, 460 A.2d 343, 345 (1983). In H.B. Alexander, a subcontractor gave a contractor an oral bid for seat materials for a football stadium. The decision noted that their previous dealings were consistent with the industry custom of bidding by telephone. It held that "the parties had entered into a binding oral contract and that through its conduct and by its course of dealing, the [subcontractor] waived the provisions of the Statute of Frauds." 314 Pa. Super. at 6; 460 A.2d at 345.

Here, it is undisputed that each time, in 1995 and 1996, when the parties previously entered into long-term contracts, Wampler sent a detailed letter outlining the contract's terms.

³The purpose of the statute of frauds is to prevent perjury and fraud and to prevent parties from escaping their legal obligations. See Stelwagon Mfg. Co. v. Tarmac Roofing Sys., 63 F.3d 1267, 1276 (3d Cir. 1995).

⁴This provision has been codified by Pennsylvania and Virginia. See 13 Pa. Cons. Stat. Ann. § 1205 cmt. 4 (1998); Va. Code Ann. § 8.1-205 cmt. 4 (1998).

Mem. of 4-29-99, at 3, 15. Those letters satisfied statute of frauds requirements. Wampler, therefore, can not be said to have waived the statute based on the parties' previous dealings.

International Poultry argues that the statute of frauds may also be waived by industry custom. For support, it relies on Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 862 F. Supp. 1361 (E.D. Pa. 1994) (citing H.B. Alexander, 314 Pa. Super. at 6; 460 A.2d at 345), aff'd in part and rev'd in part on other grounds, 63 F.3d 1267 (3d Cir. 1995). Stelwagon, a roofing materials wholesaler, entered into an oral distributorship agreement with an asphalt company, Tarmac. About a year later, Stelwagon became aware of sales to its competitors in violation of the agreement. It sued for breach of contract and price discrimination, claiming federal antitrust violations. Following a jury verdict for plaintiff on both claims, defendant moved for judgment as a matter of law or, alternatively, for a new trial or remittitur. As to the breach of contract claim, the decision stated that under H.B. Alexander "custom and usage of trade can indicate that there has been a waiver of the statute of frauds' protection. That there was no prior course of dealing between Stelwagon and Tarmac is irrelevant, since there was evidence in the record to support a conclusion that Tarmac waived the statute of frauds in line with the established industry course of dealing." Stelwagon, 862 F. Supp. at 1366 (citations omitted). The performance exception to the statute of frauds was also found to apply because "Tarmac's conduct indicated the existence of an agreement." Id.

The Court of Appeals affirmed with regard to the breach of contract claim. It agreed that Tarmac's part performance of the distributorship agreement removed the contract from the statute of frauds. See Stelwagon, 63 F.3d at 1276-77. Waiver by usage of trade was not discussed. See id. at 1277 n.21 ("Because of our decision on the issue of part performance, we need not address the parties' arguments with respect to usage of trade.").

Stelwagon aside, Pennsylvania has not held that usage of trade can amount to a waiver. H.B. Alexander referred to industry custom merely so as to describe, as customary, the parties' prior course of dealing. Permitting a waiver of the statute based on "usage of trade" would contradict Comment Four of U.C.C. § 1-205. Stelwagon, to the extent that it may be interpreted to so hold, will not be followed.⁵

(2) Waiver by performance: Unlike the sale of a business entity, a daily shipment of goods – here, turkeys – is readily segmented; consequently, the performance exception only binds Wampler pro tanto. See Stelwagon, 63 F.3d at 1276-77 (divisible contract can be segmented by time or shipments).

(3) Quantity term: This argument was rejected in the original memorandum of April 29, 1999.

⁵Even if Stelwagon were followed, the statute of frauds would not have been waived. As U.C.C. § 1-205 sets forth, "course of dealing controls usage of trade." Wampler did not waive the statute of frauds in its prior long-term arrangements with International Poultry. This course of dealing, therefore, would control purported industry custom.

(4) Fraud: International Poultry maintains that Wampler's decision to reduce turkey production is evidence of its intent to defraud International Poultry. This single piece of evidence – which is unrelated to any representation alleged to have been made to International Poultry – is insufficient to create a material dispute of fact. "Furthermore, if International Poultry relied on its perception of Wampler's representations, its doing so was unjustified." Mem. of 4-29-99, at 15.

Accordingly, the motion for reconsideration and relief from judgment will be denied.

Edmund V. Ludwig, J.

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O R D E R

AND NOW, this 2nd day of June, 1999 International Poultry Processors, Inc.'s "motion to alter or amend judgment or, alternatively, for relief from judgment or order" is denied. Fed. R. Civ. P. 59(e), 60(b).

A memorandum accompanies this order.

Edmund V. Ludwig, J.

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AND NOW, this 2nd day of June, 1999 judgment is entered in favor of Wampler Foods, Inc. and against International Poultry Processors, Inc. in the amount of \$240,476.42¹ plus interest since July 1, 1998, and \$5,000 in attorneys' fees.

Edmund V. Ludwig, J.

¹The parties agreed that (1) there should be a \$6,388.31 offset to Wampler's claim due to shrinkage and (2) Wampler is entitled to reasonable attorneys' fees of \$5,000. These agreements are without prejudice to the parties' positions on liability.