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

ELLIOT & FRANTZ, INC. Plaintiff,	:	CIVIL ACTION
v.	:	
INGERSOLL-RAND COMPANY, Defendant.	:	NO. 03-4746

MEMORANDUM

Fullam, Sr. J. April 5, 2005

On April 1, 2005, after oral argument, I granted defendant's motion for summary judgment. This memorandum sets forth the reasons for that order.

Plaintiff Elliot & Frantz, Inc. was a distributor of Ingersoll-Rand products. The relationship between the parties is governed by a set of written agreements entered into in 1994. The defendant terminated the relationship, leading to this lawsuit in which plaintiff alleges breach of contract, and breach of the obligation of good faith and fair dealing. Defendant moved for summary judgment on the remaining claims. For the reasons that follow, summary judgment has been granted.

(1) Breach of Contract

It is undisputed that the written contract permitted termination by either party, with or without cause. Plaintiff attempts to overcome this provision by arguing that defendant waived the issue by not referencing the "without cause" provision in the termination letter. I can find no authority for the

proposition that a party must reference the termination without cause provision of a contract in the termination letter to avoid waiver of that contractual right. The contract did not require any particular form of termination letter.

Plaintiff also asserts that after execution of the contract, defendant's management employee orally represented to plaintiff that defendant would terminate only for cause, and that the plaintiff had "nothing to worry about" so long as the plaintiff "did a good job." Plaintiff argues that the parties' conduct thereafter in continuing to carry out the contract is evidence that the contract was amended. I disagree.

Like any other contractual modification, an oral modification requires consideration. Oscar v. Simeonidis, 352 N.J. Super. 476, 484 (2002). In this case, the alleged oral modification was conditioned upon continued performance under the existing contract, which does not constitute fresh consideration. Although plaintiff argues that it refrained from exploring opportunities to deal with other vendors as a result of defendant's promise, such forbearance is not sufficient to provide consideration, since dealing with competing vendors would have been a breach of the contract.

Finally, plaintiff argues that New Jersey public policy prohibits termination of dealer agreements without cause. Shell Oil Company v. Marinello, 63 NJ 402 (1973) (holding that where

there is disproportionate bargaining power courts will be hesitant to enforce a termination without cause provision). I find that public policy to be inapplicable here. First, Marinello involved a gas station franchise agreement covered by the New Jersey Franchise Practices Act, a circumstance not applicable here. Second, and more important, the parties in this case are of substantially equal bargaining power. In its response to the motion for summary judgment, plaintiff describes itself as "an experienced distributor of construction equipment." Even defendant praised plaintiff's business acumen in a publication celebrating plaintiff's 40 years in business, stating "you can count on E&F for great service and equipment. . ." Given plaintiff's sophisticated and respected position in the industry, I find as a matter of law that New Jersey's public policy of preventing economic duress is not implicated in this case.

(2) Bad Faith

An obligation to perform in good faith is implicit in every contract, including those with express and unambiguous provisions allowing either party to terminate without cause. Sons of Thunder v. Borden, 690 A.2d 575 (N.J. 1997). Even where termination of the contract is valid, a party can still be held liable for bad faith where a termination decision is withheld from another party. Bak-A-Lum Corp. v. Alcoa Bldg. Products

Group, 351 A.2d 349 (N.J. 1976). Defendant asserts that plaintiff has not, and cannot, put forth any evidence of bad faith in this case. Plaintiff alleges that a reduction in sales support and advertising assistance from defendant, as well as defendant's decision to open a company store in plaintiff's sales territory, provide sufficient evidence of bad faith to bring the question to a jury.

The contract addressed the issue of support:

> Ingersoll-Rand shall provide sales assistance, engineering and application advice, reasonable quantities of advertising materials, campaigns and instructions in sales and service.

Distributor Selling Agreement, ¶ 2 (B). The parties do not dispute that up until March of 2002, the level of support provided under the contract was more than sufficient. However, plaintiff contends that after the promotion of Mr. Cleeland, the defendant's district manager, the level of support dropped dramatically.

The parties do not dispute that, even after Mr. Cleeland was promoted, defendant continued to provide sales support to plaintiff. While the individuals assigned to provide such support were not able to do so with the same level of expertise as Mr. Cleeland, defendant did not withdraw its contractually obligated support. The contract calls for reasonable support to be provided, and a reasonable jury could not conclude that defendant failed to meet that standard. In addition, unlike the

situation in Bak-A-Lum, defendant in this case provided reasonable notice of the decision to terminate the contract, and did not mislead plaintiff into making additional expenditures on the assumption termination would not occur. Plaintiff simply cannot prevail in this action.

/s/ John P. Fullam
John P. Fullam, Sr. J.