

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**CONTINENTAL STRUCTURAL PLASTICS, INC,
Plaintiff,**

v.

**Case No. 15-147164-CK
Hon. James M. Alexander**

**GLOBAL FINISHING SOLUTIONS, LLC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff’s motions for summary disposition. In its motions, Plaintiff seeks (1) a summary ruling as to its declaratory judgment claim, and (2) dismissal of each claim contained in Defendant’s Counterclaim (except the breach of contract claim).

Plaintiff supplies components to the automotive and other industries, and Defendant manufactures paint booths and other painting-related systems. This case involves a dispute over an agreement where Defendant would supply a paint system for Plaintiff’s Carry, Ohio plant.

Generally speaking, a short time after ordering a paint-supply system from Defendant, Plaintiff cancelled the agreement and went with another supplier. Defendant claims that it incurred certain costs in fulfilling the agreement and demanded that Plaintiff reimburse for the same. But the parties dispute how much Plaintiff should reimburse.

As a result, Plaintiff filed the present lawsuit on a single declaratory relief claim – seeking a ruling that Defendant: (1) is owed nothing on the terminated contract, or (2) may only

seek limited damages incurred between its acceptance of the formal purchase order on July 23, 2014 and the date that Plaintiff terminated the contract on August 7, 2014.

In response, Defendant filed a First Amended Counterclaim alleging claims of: (1) breach of contract, (2) fraud or misrepresentation, (3) promissory estoppel, (4) unconscionable termination, and (5) illusory promise.

Plaintiff now moves for partial summary disposition, seeking: (1) a ruling on its declaratory judgment claim, and (2) dismissal of the bulk of Defendant's First Amended Counterclaim. To this end, Plaintiff moves for summary under MCR 2.116(C)(8) or (C)(10).

A motion under (C)(8) tests the legal sufficiency of the complaint, and a motion under (C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

On May 31, 2014, Defendant submitted a proposal to supply the system (including scope of work, purchase price, and terms and conditions) to Plaintiff. On June 4, 2014, Plaintiff responded by returning a Letter of Intent, which provided (in relevant part):

We are pleased to inform you that it is the Intent of Continental Structural Plastics to source the Process Equipment for the Carey Ohio Facility Paint Line to your company for the sum of \$5,597,350.

...

Please commence work on this project. CSP will be responsible for any and all costs which are incurred from this date forward, if for any reason a Purchase Order were not to be created.

The same day, June 4, 2014, Defendant claims that it began work on the project – in reliance on the Letter of Intent.

On June 16, 2014, Defendant received an initial purchase order dated June 13, 2014 for the project. Ultimately, this purchase order was not accepted because the parties did not agree on

all terms and conditions. Defendant claims that the parties finally reached a verbal agreement on the terms and conditions during a July 7, 2014 teleconference.

But on June 23, 2014 (between the June 16 initial purchase order and the July 7 teleconference), Defendant claims that an executive of one of its competitors (Giffin) called to speak with a Defendant employee. The Giffin executive, Jeff Stoffel, advised that it had a purchase order with Plaintiff on the same project and wondered if Defendant was also working on it.

The same day, Defendant then contacted Plaintiff's representative on the project, Tim Slagle, who informed Defendant that Giffin did not have a purchase order and Defendant was the sole supplier on the project. Defendant claims that Slagle also asked Defendant to help Plaintiff out and move forward with the project.

As stated, the parties held a teleconference on July 7, 2014, which led to an agreement on the project's terms and conditions. During this teleconference, Defendant claims that its Systems Integration Group Vice President, Ken Schaer, asked Plaintiff's Executive Director of Purchasing, Charles Gelfand, about Giffin.

Schaer claims that Defendant was told that Giffin had a purchase order for the project, and Defendant did not want to get involved in a lawsuit between Plaintiff and Giffin. Schaer claims that Gelfand assured Defendant that it need not be concerned and, "in effect, that [Defendant] was [Plaintiff's] sole supplier on the Project."

On July 23, 2014, Plaintiff issued a second purchase order with revised terms and conditions. It is undisputed that Defendant ultimately accepted this purchase order – although Plaintiff (alternatively) claims that Defendant accepted it "after July 23" or "on or after July 23," and Defendant identifies this agreement as the "July 23/24 contract."

On July 24, Defendant claims that Stoffel (the Giffin executive) called Schaer and told him that Plaintiff had issued a purchase order to Giffin for the project. Stoffel wanted to know if Defendant was also working on the project, and Schaer claims that he responded affirmatively.

Later the same day, Defendant claims that Schaer again separately called Gelfand and Slagle to discuss Stoffel's claims. Schaer claims that "he received assurances from both Gelfand and Slagle that [Defendant] was the sole supplier to [Plaintiff] on the Project, and that [Defendant] needed to continue to work diligently to help [Plaintiff] meet [its] deadline." Schaer also claims that, again, Slagle advised him that Giffin did not have a purchase order for the project.

Defendant claims that, despite all these assurances, on August 7, 2014, Plaintiff cancelled the contract and informed Defendant that Giffin was awarded the project on a turnkey basis. Defendant then demanded that Plaintiff pay damages that Plaintiff claims Defendant is not entitled to. This lawsuit resulted.

1. Declaratory Judgment / Breach of Contract

Plaintiff first seeks a ruling as to its declaratory judgment claim that would also affect the scope of Defendant's breach of contract counterclaim. Specifically, Plaintiff seeks a ruling that, "if anything," Defendant can only recover "the documented cost . . . of work in process and raw material allocable to the terminated work" – an amount that Plaintiff claims totals \$208,136 or less – and only for the time period between July 23, 2014 and August 7, 2014.

Defendant, on the other hand, seeks damages exceeding this scope and timeframe based on Plaintiff's June 4, Letter of Intent, through Plaintiff's termination of the agreement.

Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

As stated, in response to Defendant’s proposal, Plaintiff sent a letter dated June 4, 2014, directing Defendant to begin working on the project. This letter provided that: “CSP will be responsible for any and all costs which are incurred from this date forward, if for any reason a Purchase Order were not to be created.”

Plaintiff argues that Defendant cannot base its breach of contract or quasi contract claims on this provision because a Purchase Order **was created**. And the above provision only applies “if for any reason a Purchase Order **were not to be created**.” As a result, the above provision does not apply, and Defendant’s damages (if any) would be limited to those incurred under said Purchase Order (dated July 23, 2014) – the only agreement in place.

This is an issue because Plaintiff wishes to limit any recoverable damages to the period between the July 23 Purchase Order and the August 7 termination. Defendant, on the other hand, seeks damages dating back to the June 4 Letter of Intent. And there is a substantial difference between these two calculations.

Plaintiff further cites the Terms & Conditions accompanying the July 23 Purchase Order, at paragraph 1, which provides that said Purchase Order “constitute[s] the entire and final

agreement of the parties and cancels and supersedes any prior or contemporaneous negotiation or agreements, unless otherwise noted.”

The Terms & Conditions further provide, at paragraph 21, that Plaintiff may terminate “at any time without cause,” and in such event, Defendant “will stop work . . . and terminate all orders and subcontracts **that relate to the terminated order.**” Further,

[Plaintiff] will pay [Defendant] for finished work accepted by [Plaintiff] as well as for the documented cost to [Defendant] of work in process and raw material **allocable to the terminated work which is not in excess of any prior [Plaintiff] authorization.** Payment made under this Clause 21 will constitute [Plaintiff’s] only liability for termination hereunder with title and right of possession to all delivered goods and services vesting in [Plaintiff] immediately upon [Plaintiff] tender of such payment.

Plaintiff does not dispute that Defendant incurred damages in reliance of the June 4 Letter of Intent. But Plaintiff interprets the above provisions as providing that the July 23 Purchase Order limits Defendant’s damages to those incurred **after** acceptance said Purchase Order (not before) and specifically cancelled and superseded the Letter of Intent’s promise to be responsible for any and all costs incurred from June 4 forward. The Court wholly disagrees.

In order to accept Plaintiff’s curious argument, the Court would have to conclude that the work performed **at Plaintiff’s direction and in furtherance of the project** (the paint line for the Carey, Ohio plant) did not somehow “relate to the terminated order” and was not “allocable to the terminated work which is not in excess of any prior [Plaintiff] authorization.”

When read in whole and interpreted in a plain and ordinary meaning, Plaintiff agreed to pay for any “finished work accepted by [it] as well as for the documented cost to [Defendant] of work in process and raw material” that relate to the work that Defendant performed in furtherance of the project. As long as the work was related to the Carey, Ohio paint line and not in excess of any prior Plaintiff authorization, Plaintiff is responsible for reimbursement.

And the determination of the amount of damages depends on resolution of numerous questions of fact. For the above reasons, the Court DENIES Plaintiff's motion for summary disposition with respect to its declaratory relief claim.

2. Fraud/Misrepresentation

Plaintiff next argues that Defendant's fraud counterclaims fail as a matter of law because the parties' agreement contained a plain merger and integration clause.

In order to prevail on a fraud claim, a plaintiff must establish:

1. The defendant made a material representation.
2. The representation was false.
3. When the defendant made the representation, it knew that it was false, or the defendant made the representation recklessly, without any knowledge of its truth, and as a positive assertion.
4. The defendant made the representation with the intention that it should be acted on by the plaintiff.
5. The plaintiff acted in reliance on the representation.
6. The plaintiff suffered injury due to his reliance on the representation.

Hord v Environmental Research Inst, 463 Mich 399, 404; 617 NW2d 543 (2000).

In support of its motion, Plaintiff argues that Defendant cannot establish fraud because of the clause contained in paragraph 1 of the July 23 Purchase Order's Terms & Conditions. As stated, this clause provides that said Purchase Order "constitute[s] the entire and final agreement of the parties and cancels and supersedes any prior or contemporaneous negotiation or agreements, unless otherwise noted."

In support, Plaintiff cites *UAW-GM Human Resource Ctr v KSL Rec Corp*, 228 Mich App 486; 579 NW2d 411 (1998). The *UAW-GM* Court reasoned:

[I]n the context of an integration clause, which releases all antecedent claims, only certain types of fraud would vitiate the contract.

...

while parol evidence is generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have

no effect on the validity of the contract. **Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself**, i.e., fraud relating to the merger clause **or fraud that invalidates the entire contract including the merger clause**. *UAW-GM, supra* at 503, citing 3 Corbin, Contracts, § 578.

Defendant alleges just this type of fraud. The alleged merger clause accompanied the July 23 Purchase Order. But before that date, Defendant was told that its competitor, Giffin, was tasked with completing the same project. Defendant asked Plaintiff about Giffin's involvement on the project on June 23 and July 7. Defendant claims that both conversations resulted in Plaintiff assuring Defendant that it was the sole supplier and Giffin was not on the project.

Another similar conversation occurred on July 24, and Defendant received the same assurances from Plaintiff. This date is important because, as stated, Plaintiff claims that Defendant accepted the July 23 Purchase Order (alternatively) "after July 23" or "on or after July 23," and Defendant identifies this agreement as the "July 23/24 contract."

In other words, a reasonable trier-of-fact could conclude that Plaintiff's July 24 reassurances preceded Defendant's acceptance of the Purchase Order. But, in any event, it is undisputed that Plaintiff's alleged June 23 and July 7 assurances precede Defendant's alleged acceptance of said Purchase Order.

Defendant claims that said representations were false when made, that Plaintiff knew them to be false, that Plaintiff intended that Defendant rely on said representations, and that it did rely on them to its detriment "by continuing to incur costs and foregoing other work to work on the Project."

This is precisely the type of fraud that may invalidate the contract or merger clause under *UAW-GM*. Because Defendant has alleged actionable fraud in the inducement, Plaintiff's motion for dismissal of Defendant's fraud/misrepresentation claims is DENIED.

3. Promissory Estoppel

Plaintiff next seeks dismissal of Defendant's promissory estoppel counterclaim based on the existence of an undisputed written agreement.

Indeed, it is well settled that, "A contract will be implied **only where no express contract exists**. There cannot be an express and implied contract covering the same subject matter at the same time." *Campbell v Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972), citing *Superior Ambulance Service v Lincoln Park*, 19 Mich App 655; 173 NW2d 236 (1969).

Plaintiff argues that the parties have an express contract that governs their interaction. But, as stated, Defendant has pled a claim of fraud in the inducement that may prove to invalidate said contract. In such event, the Court finds that Defendant may plead promissory estoppel as an alternative theory of recovery or to cover actionable promises not subject to any remaining, valid express agreement.

As a result, Plaintiff's motion for summary with respect to this claim is DENIED.

4. Unconscionable Termination / Illusory Promise

Finally, Plaintiff seeks dismissal of Defendant's unconscionable termination and illusory promise Counterclaims because the same do not state any viable cause of action.

In response, Defendant admits that these claims "operate together as an argument in the alternative." But Defendant fails to cite any authority that said claims are recognized as viable causes of action in Michigan.

Plaintiff, on the other hand, cites *Clark v Daimler Chrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005), which examined unconscionability as a **defense** to a breach of contract claim (and not a cause of action).

Further, “[a]n ‘illusory contract’ is defined as ‘[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation. The insubstantial promise renders the agreement unenforceable.’” *Ile v Foremost Ins Co*, 293 Mich App 309, 315; 809 NW2d 617 (2011). Defendant’s Amended Counterclaim does not allege an illusory contract. Even accepting Defendant’s allegations as wholly true, the agreement imposes obligations on both parties.

For the above reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Defendant’s Counterclaims for unconscionable termination (Count VII) and illusory promise (Count VIII) are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” As a result, Plaintiff’s motion for summary disposition of said claims is GRANTED under (C)(8), and the same are DISMISSED.

5. Summary

To summarize, Plaintiff’s motion for summary of Defendant’s Counts VII and VIII is GRANTED under (C)(8), and said claims are DISMISSED.

In all other respects, Plaintiff’s motions are DENIED.

IT IS SO ORDERED.

November 4, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge