

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JVIS-USA, LLC, a Michigan limited liability company and JVIS MANUFACTURING, LLC, a Michigan limited liability company, d/b/a, JVIS USA MANUFACTURING, LLC,

Plaintiffs,

vs.

Case No. 2013-2742-CB

NARTRON CORPORATION, n/k/a GEN X MICROSYSTEMS and a/k/a OLDNAR CORPORATION, a Michigan corporation and UUSI, LLC, d/b/a NARTRON, a Michigan limited liability company,

Defendants,

and

UUSI, LLC, d/b/a NARTON, a Michigan limited liability company,

Defendant/Counter and Third-Party Plaintiff

vs.

JVIS-USA, LLC, a Michigan limited liability company and JVIS MANUFACTURING, LLC, a Michigan limited liability company, d/b/a, JVIS USA MANUFACTURING, LLC

Counter-Defendants,

and

FUTABA CORPORATION OF AMERICA, a foreign corporation, THOMAS J. GRONSKI, RANDY GRIFFIN, and GINA TERRY,

Third-Party Defendants.

JARRELL A. SCAUGH
MACOMB COUNTY CLERK
MI. CLERKS, MICHIGAN

2016 JUL -8 PM 5:37

FILED

OPINION AND ORDER

Plaintiffs JVIS-USA, LLC and JVIS Manufacturing, LLC (collectively, "Plaintiffs") have filed a motion for partial summary disposition of Count III of Defendant UUSI, LLC d/b/a Nartron's ("Defendant") counter/third-party complaint. Defendant has filed a response and requests that the motion be denied. In addition, both sides have filed reply briefs in support of their positions.

I. Factual and Procedural History

Plaintiffs are tier I suppliers of automotive parts for Chrysler. Defendant is a Tier II supplier of circuit boards and other electronic components used in the interiors that Plaintiffs supply to Chrysler. This matter originally arose out of Plaintiffs' claims against Defendants for breach of contract. Specifically, Plaintiffs allege that Defendants failed/refused to supply circuit boards to it at the quantities, pricing and timing contained in the parties' agreement.

Defendant has subsequently filed a counter/third-party complaint ("Counter-Complaint"). The Counter-Complaint is based on Defendant's allegations that Plaintiff has failed to pay it for the work it had completed and has improperly provided the parts, and intellectual property underlying those parts, to Futaba Corporation of America ("Futaba") to reverse engineer so that it could continue to produce the parts without contracting with Defendant.

On April 22, 2015, Plaintiffs filed a joint motion for summary disposition as to Defendant's conversion (Count II) and unjust enrichment/quantum meruit (Count VII) claims. On May 18, 2015, Third Party Defendants Randy Griffin and Gina Terry filed

their concurrence with the motion. On July 27, 2015, Defendant filed its response to the motion. On July 31, 2015, Plaintiffs filed their reply brief in support of their motion.

On May 22, 2015, Defendant filed their motion for summary disposition as to their misappropriation of trade secrets (Count I) and declaratory relief (Count VIII) claims. Futaba, Mr. Gronski, and Plaintiffs each filed responses to the motion and requested that the motion be denied. On July 31, 2015, Defendant filed reply briefs as to each of the responses.

On February 29, 2016, the Court entered its Opinion and Order (a) denying Plaintiff's joint motion for summary disposition of Counts II and VII of the Counter-Complaint, (b) denying Defendant's motion for partial summary disposition of Counts I and VIII of the Counter-Complaint and (c) granting Plaintiffs', Futaba's and Mr. Gronski's request for summary disposition as to Counts I and VIII of the Counter-Complaint.

On February 1, 2016, Plaintiffs filed their instant motion for summary disposition of Count III of the Counter-Complaint. On February 16, 2016, Defendant filed its response. In addition, the sides have subsequently each filed reply briefs in support of their positions. On March 28, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a

motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

The title of Plaintiffs' motion states that it seeks summary disposition of Count III of the Counter-Complaint. Count III is entitled "Breach of Contract/Promissory Estoppel". However, in actuality Plaintiffs' motion seeks summary disposition of the portion of Defendant's claim in which it seeks to recover lost profits. Specifically, Plaintiffs contend that Defendant's lost profits claim is barred by the express terms of the parties' contract.

A.

As a preliminary matter, the parties dispute whether Article 2 of the Uniform Commercial Code (UCC) or the common law applies in this case. Article 2 of the UCC governs relationships between parties involving in the "transactions of goods". *Home Ins Co v Detroit Fire Extinguisher Co, Inc.*, 212 Mich App 522, 527; 538 NW2d 424 (1995). Contracts for service are governed by the common law. *Id.* Michigan courts apply the predominant factor test to determine whether a contract primarily involves the sale of goods, actionable under the UCC, or the sale of services, actionable under common law. *Id.* "If the purchaser's ultimate goal is to acquire a product, the contract

should be considered a transaction in goods, even though service is incidentally required. Conversely, if the purchaser's ultimate goal is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service." *Farm Bureau Mutual v. Combustion Research Corp.*, 255 Mich App 715, 723; 662 NW2d 439 (2003), quoting *Neibarger v. Universal Cooperatives Inc.*, 439 Mich 512, 536–537; 486 NW2d 612 (1992).

In this case, neither party has applied the predominant factor test to this facts of this case. Rather, Plaintiffs arguments are based on the assumption that the UCC applies, while Defendant's brief makes arguments under both bodies of law without addressing what law it asserts applies in this matter. Consequently, the Court is unable to determine what law applies to the contract formation and interpretation questions as it applies to the fact in this matter, which on its own is grounds for denying Plaintiffs' motion for summary disposition. Moreover, for the reasons discussed below, Plaintiffs' motion must be denied as several questions of fact exists even if it were to be determined that the UCC applies in this case.

B.

The UCC expressly allows a seller to recover lost profits if the difference between the market value of the goods at issue and unpaid contract price is insufficient to compensate the seller. See MCL 440.2708(2). Nevertheless, Plaintiffs aver that the UCC also permits the parties to contractually agree to different damages that those specifically provided by the UCC pursuant to MCL 440.2719. In response, Defendant contends that section 2719 only allows the parties to limit a buyer's remedies, not seller's remedies.

Plaintiffs rely on MCL 440.2719, which governs the contractual modification or limitation of remedies which provides:

Sec. 2719. (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages

- (a) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this articles, as by limiting the buyer's remedies to return of the goods and replacement of the price or to repair and replacement of nonconforming goods or parts; and
 - (b) resort to a remedy as provided is optional unless the remedy is specifically agreed to be exclusive, in which case it is the sole remedy.
- (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.
- (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

"The primary goal of statutory construction is to give effect to the intent of the Legislature." *People v. McLaughlin*, 258 Mich App 635, 672; 672 NW2d 860 (2003). To do so, a court must begin by examining the language of the statute, and if the statute's language is clear and unambiguous, the court must enforce the statute as written. *People v. Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003). The only reference to either buyers or sellers in section 2719 is in subsection (1). Even if the Court were to find that subsection (1) was intended to apply only to buyer's remedies, which it is not, such a finding is immaterial to this case.

Lost profits are a type of consequential damages. *Sullivan Industries, Inc. v Double Seal Glass Co, Inc.*, 192 Mich App 333, 347; 480 NW2d 623 (1991).

Accordingly, subsection (3) of section 2719 is the relevant portion of the statute. Subsection (3) provides that consequential damages may be limited or excluded unless doing so is unconscionable. In this case, there has been no argument that excluding Defendant's from seeking lost profits is unconscionable. Moreover subsection (3) clearly and unambiguously provides that consequential damages may be excluded - without any language which could even arguably limit the provision to situations in which a buyer's rights rather than the seller's rights, are implicated. Consequently, the Court is satisfied that section 2719 allows for parties to contractually agree to exclude a seller from recovering consequential damages such as lost profits. Accordingly, the issue becomes whether the parties' contract so limits Defendant's ability to recover lost profits.

C.

In this case, the parties' relationship was carried out by operation of Defendant issuing quotes for work requested by Plaintiffs and Plaintiffs then issuing purchase orders in which they ordered certain items. In their motion, Plaintiffs allege that their terms and conditions were provided to Defendant at the beginning of the parties' relationship and that Defendant agreed that Plaintiffs' terms would govern the parties' relationship. Further, Defendants aver that revision 3 of purchase order 301714 ("PO 301714(3)") constitutes the parties' contract with respect to the production of the PCB boards in question, and that purchase orders 3218 and 3397 constitute the contract with regards to the design, engineering and development of the PCBs.

In support of Plaintiffs' position that they provided their terms and conditions to Defendant at the beginning of the parties relationship and that Defendant agreed to be

bound by those terms, Plaintiffs rely on the affidavit of David Maronek. (See Plaintiffs' Exhibit A.) Mr. Maronek was employed by Defendant as its Vice President of Sales from February 2010 through September 2013. (*Id.* at ¶3.) Mr. Maronek testified in his affidavit that beginning in February 2010 he began meeting, on Defendant's behalf, with Plaintiffs to negotiate the engineering, design, development and manufacture of the PCBs. (*Id.* at 4.) Further, Mr. Maronek stated that he was Defendant's primary representative responsible for the negotiations, that in May/June 2011 he was provided with a copy of JUSA's terms and conditions, and that Plaintiffs' terms and conditions and purchase orders constituted the parties' agreement. (*Id.* at ¶¶5, 6 and 8.) In addition, Plaintiffs rely on the testimony of James Smith, Defendant's corporate representative on the issue of damages, in which he testified that in his opinion purchase orders are contracts. (See Plaintiffs' Exhibit 6, at 28.)

In response, Defendant argues it did not receive Plaintiffs' terms and conditions at the beginning of the parties' relationship and did not agree that those terms and conditions were to govern the relationship. In support of its position, Defendant relies on Mr. Maronek's deposition testimony, which was taken after he executed the affidavit upon which Plaintiffs rely. In particular, Defendant relies on Mr. Maronek's testimony that he only handled the negotiations until November 2012, that when he was replaced there was no substantive agreement in place, and that he was not the lead negotiator when PO 301714(3) was issued. (See Exhibit A to Defendant's supplement, at 167-170; 178-179.) Further, Defendant relies on Mr. Maronek's testimony that he did not recall receiving the terms and conditions attached as Exhibit 2 to Plaintiffs' motion. In addition, with respect to Mr. James' testimony, Defendant avers that the testimony as

merely Mr. James' opinion and does not amount to an admission of any kind.

Based on the above-referenced evidence, the Court is convinced that a genuine issue of material facts exists with respect to whether Defendant agreed to be bound by Plaintiffs' terms and conditions at the beginning of the parties' relationship. While Mr. Maronek testified that he received a copy of Plaintiffs' terms and conditions and that the terms and conditions, in conjunction with Plaintiffs' purchase orders, form the parties' contract, Mr. Maronek also testified that there was not a substantive agreement in place when he was replaced as Defendant's lead negotiator and that he did not recognize the terms and conditions Plaintiffs now rely upon. Further, although Mr. James testified that purchase orders in his opinion are contracts, his testimony was generic in nature and did not address the parties' negotiations or contract(s) specifically. The Court is not persuaded that Mr. Maronek's conflicting testimony nor Mr. James' generic opinion constitutes grounds for making a dispositive finding on the issue of whether Defendant agreed that Plaintiffs' terms and conditions would govern the parties' relationship; rather, the Court is convinced that there is a genuine issue of material fact on this issue that must be resolved by the trier of fact at trial.

D.

The next issue raised by the parties is whether PO 301714(3) constitutes the parties' contract with regards to the production of the PCBs. On this issue Defendant avers that PO 301714(3) is not the contract with respect to the production of the PCBs. Specifically, Defendant avers that PO 301714(3) was rejected by Nartron and replaced by other purchase orders and quotes. Indeed, PO 301714 was revised at least 8 times, as is evidence by the existence of PO 301714, revisions 6, 7 and 8, which are attached

as Defendant's Exhibits J, K and L. Plaintiff JUSA's Vice President of Purchasing Arthur Hariskos testified that when there are multiple revisions to a purchase order each revision replaces the previous version. (See Defendant's Exhibit F, at 76.) Moreover, Mr. Maronek testified in conjunction with this issue that Defendant rejected PO 301714(3) and that he and Richard Burks were instructed to negotiate different terms with Plaintiffs. (See Exhibit A to Defendant's supplement, at 178-179; 202-203.)

Based upon the existence of at least 8 revisions to PO 301714, Mr. Hariskos testimony that revisions replace previous versions, and Mr. Maronek's testimony that Defendant rejected PO 301714(3), the Court is convinced that a question of fact exists as to whether PO 301714(3) constitutes the contract between the parties with respect to the production aspect of the parties' relationship. Moreover, if one of the subsequent versions of PO 301714 constitutes the contract, a question exists as to what terms and conditions were incorporated into that contract.

With respect to the design, engineering and development aspects of the parties' relationship, Plaintiffs aver that POs 3218 and 3397 constitute the contract governing those aspects. While Plaintiffs attach POs 3218 and 3397 (See Plaintiffs' Exhibit 3), they do not provide any support for their position that those purchase orders constitute a binding contract. Consequently, Plaintiffs have failed to present sufficient evidence to warrant summary disposition on this issue.

E.

Finally, Defendant avers that its quote(s) constitute the parties' contract(s) and that the terms and conditions attached to those documents govern the parties' relationship. In response, Plaintiffs contend that Defendant's quote, and the terms and

conditions attached to the quotes, do not govern the parties' relationship. Both sides' arguments then focus on whether Defendant's quote(s), or Plaintiff's purchase order(s) constitute offers and acceptances.

Generally, an offer is a manifestation of one's intent to be bound, stating the essential terms with sufficient specificity that acceptance by another will conclude the bargain. See *Challenge Machinery Co. v. Mattison Machine Works*, 138 Mich App 15, 359 NW2d 232, 235 (1984). In *Challenge*, the Michigan Court of Appeals recognized that parties routinely use standardized forms and that use of the language employed by those forms is not always determinative. *Id.* at 21. Further, the Court held that Courts must look beyond the words employed by the parties' forms in favor of a test which examines the totality of the circumstances. *Id.*

Generally a price quotation is considered an invitation for an offer, rather than an offer to form a binding contract, and a buyer's purchase order submitted in response to the quote is usually deemed the offer. *Dyno Const Co v McWane, Inc.*, 198 F3d 567, 572 (6th Cir 1999). However, "a price quote may suffice for an offer if it is sufficiently detailed and it reasonably appears from the price quotation that assent to that quotation is all that is needed to ripen the offer into a contract." *Id.* [Internal quotation omitted.] "Thus, to constitute an offer, a price quotation must "be made under circumstances evidencing the express or implied intent of the offeror that its acceptance shall constitute a binding contract." *Id.*

In this case, Plaintiffs allege that Defendant's quotes are not offers because they provide that prices are subject to change without notice and that specific specifications are needed in order to complete a transaction. (See Plaintiffs' Exhibit 8, Defendant's

quote 110408.01 and Defendant's standard terms and conditions.) Further, the quotes are identified by "estimate no.", which indicates that that the quote is not a specific offer. In response, Defendant avers that the quotes are offers because they specify a description of the products, as well as prices, quantities and terms of payment. (See for example Defendants' Exhibits H and I.)

The Court is convinced that a genuine issue of material facts exists as to whether Defendant's quotes constituted offers, or whether Plaintiffs' purchase orders operated as offers or acceptances. Although Defendant's quote include pricing, product, quantity and terms of payment information, and while the inclusion of that information may indicate that a quote is an offer, "the determination of the issue depends primarily upon the intention of the person communicating the quotation as demonstrated by all of the surrounding facts and circumstances." *Dyno*, 198 F3d at 572. Although Defendant avers that it intended its quotes to operate as offers, its quotes also provided that additional information was needed from Plaintiffs in order to complete the transactions and that prices could change without notice. Accordingly, the Court is satisfied that a genuine issue of fact exists as to whether Defendant's quotes operated as offers. As a result, summary disposition on this issue is not appropriate.

F.

In addition, Plaintiffs assert that Defendant's Count III should be dismissed to the extent that it is a claim for promissory estoppel. Specifically, Plaintiffs contend that Defendant's promissory estoppel claim is not viable because of the parties' written contract. Promissory estoppel cannot be utilized to circumvent a clear and definite

written contract. *Novak v. Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999). However, in this matter the parties' dispute what constitutes their contract(s), if any, and the Court has not made a determination as to whether a contract was formed between the parties, nor have the parties stipulated to such a fact. Accordingly, because there has been no finding of a clear and definite contract between the parties, Defendant's promissory estoppel claim need not be dismissed at this time.

IV. Conclusion

For the reasons discussed above, Plaintiffs' motion for summary disposition of Count III of the Counter/Third Party Complaint is DENIED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Date: JUL 08 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge