ATTORNEYS FOR APPELLANT:

ALEX C. TURNER
ALEX E. GUDE
Bingham McHale, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

A RICHARD M. BLAIKLOCK
JASON M. LEE
Lewis Wagner, LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

FREUDENBERG-NOK GENERAL PARTNERSHIP,	)	
Appellant-Defendant,	)	
vs.	)	No. 49A04-1003-PL-141
ALLISON TRANSMISSION, INC.,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0909-PL-42360

September 23, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Freudenberg-NOK General Partnership ("FNOK") appeals the trial court's entry of a preliminary injunction requiring it to continue selling parts to Allison Transmission, Inc., ("Allison") pursuant to the terms of the parties' contracts. We affirm.

Issues

FNOK raises one issue, which we restate as:

I. whether Allison made a prima facie showing that the statute of frauds was satisfied; and

II. whether Allison made a prima facie showing that its contracts were enforceable requirements contracts.

Facts[1]

Since before 2000, FNOK has provided parts to Allison, which builds transmissions. Allison considered FNOK a "sole source" supplier. Tr. p. 26. As a sole source supplier, FNOK is the only supplier of that particular part to Allison. Each of the parts that FNOK supplied to Allison was unique and could not be immediately purchased from another supplier. Allison purchases all of each of its parts from one supplier to minimize the engineering and validation costs.

FNOK provided twenty-eight parts to Allison pursuant to twelve "scheduling agreements." Id. at 25. Among other terms, each scheduling agreement contained the beginning and end date of the agreement, with the various agreements scheduled to end between 2011 and 2013, the payment terms, the shipping terms, the material number and

[1] For purposes of the preliminary injunction and this appeal only, FNOK relies on the Contractual terms that Allison contends are controlling.

description, and the price. The scheduling agreements also allowed Allison to terminate the contract and purchase from another supplier without liability to FNOK if FNOK did not agree to sell the goods at a competitive price, or with comparable technology, design, or quality. Allison's boilerplate terms and conditions were attached to the scheduling agreements.[2] Neither the scheduling agreements nor the terms and conditions contained a specific quantity of parts that FNOK was to supply to Allison. Instead, via its website, Allison provided FNOK with a rolling forecast twelve months in advance and up-to-date firm purchase orders, which were referred to as "schedule releases." Id. at 42.

In 2009, FNOK and Allison became involved in a warranty dispute, and on September 14, 2009, Allison filed a complaint alleging that FNOK breached the scheduling agreements by failing to honor the warranty provisions. On January 11, 2010, FNOK filed its answer. On January 19, 2010, FNOK sent a letter to Allison explaining its belief that it had "the right and authority to discontinue its supply relationship." App. p. 248. FNOK stated it would stop shipping a certain part to Allison on February 18, 2010, and it would stop shipping all other parts on April 19, 2010.

On February 16, 2010, Allison filed a motion for a preliminary injunction requiring FNOK to continue to supply parts to Allison. The next day, Allison moved to amend its complaint to include another breach of contract claim based on FNOK's threat

[2] In 2007, General Motors sold Allison to private equity owners. In 2008, Allison consolidated the separate General Motors and Allison terms and conditions. Prior to this consolidation, one of the standard terms provided, "SELLER agrees to sell and Buyer agrees to buy at the price and upon and subject to terms and conditions contained herein. Unless otherwise noted herein, Schedule Agreements are for approximately 100% of BUYER's requirements during the effective date range." Exhibit 1, Tab 12. The current terms and conditions do not include this same language.

to stop shipping parts. The trial court granted Allison's motion to amend the complaint. That same day, FNOK responded to Allison's motion for a preliminary injunction.

On March 5, 2010, following an evidentiary hearing, the trial court entered a preliminary injunction requiring FNOK to continue supplying parts to Allison pursuant to the terms of the scheduling agreements and prohibiting FNOK from taking action inconsistent with terms of the scheduling agreements until further order of the court. The trial court issued findings and conclusions, which provided in part:

> 14. If FNOK fails to supply FNOK Parts to Allison beginning on March 4, 2010, as it [sic] Allison's best estimate is that it will run out of FNOK Parts from some product lines beginning March 9, 2010.
>
> 15. If FNOK is not required to continue to supply the FNOK Parts to Allison, and assuming Allison cannot use the same tooling and materials used by FNOK, it will take approximately 22 months for Allison to resource the 28 FNOK Parts to alternate suppliers. In general, the reasons it takes so long to find alternate suppliers is [sic] because a new supplier would have to get all necessary tooling and manufacturing capacities in place; and product quality/design validation have to be completed. It is possible that the timeline might accelerate if certain variables work in Allison's favor, but those variables are unknown at this time. Absent supply of the FNOK Parts, Allison cannot manufacture the vast majority of its transmissions.
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> 16. If Allison loses its ability to sell transmissions for any appreciable period of time, Allison's relationships with customers will be damaged, as will its reputation and goodwill in the industry. During the period of time that Allison is not manufacturing those transmissions, Allison will have to lay off workers, Allison's other suppliers would be adversely impacted, and Allison would lose substantial revenues. Allison will also not be able to supply transmissions for military vehicles being used by U.S. military personnel in current conflict areas.

* * * * *

> 19. Allison has demonstrated a likelihood of success on the merits. Allison is required to show "a reasonable likelihood of success at trial by establishing a prima facie case." Davis v. Sponhauer, 574 N.E.2d 292, 302 (Ind. Ct. App. 1991). Allison has established a prima facie case of breach by FNOK for all of the 12 scheduling agreements, that the scheduling agreements are valid contracts, and that the scheduling agreements are enforceable by Allison against FNOK through December 31, 2011 and December 31, 2013. Ind. Code § 26-1-2-609(4)("After receipt of a justified demand failure to provide within reasonable time not exceeding thirty (30) days such assurance of due performance is adequate under the circumstances of the particular case is a repudiation of the contract."); Ind. Code § 26-1-2-306.

Id. at 9, 10. FNOK now appeals.

Analysis

FNOK argues that the trial court improperly issued the preliminary injunction to Allison. To obtain a preliminary injunction, Allison, the moving party was required to demonstrate by a preponderance of the evidence: (1) a reasonable likelihood of success at trial; (2) the remedies at law were inadequate; (3) the threatened injury to Allison outweighed the potential harm to FNOK from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction. See Central Indiana Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 727 (Ind. 2008).

A trial court's decision to grant or deny a preliminary injunction is reviewed for abuse of discretion. Krueger, 882 N.E.2d at 727. "If the movant fails to prove any of these requirements, the trial court's grant of an injunction is an abuse of discretion." Indiana Family and Soc. Servs. Admin. v. Walgreen Co., 769 N.E.2d 158, 161 (Ind.

2002). For a preliminary injunction, the movant need only show a prima facie case on the merits.[3] AGS Capital Corp., Inc. v. Product Action Intern., LLC, 884 N.E.2d 294, 314 (Ind. Ct. App. 2008), trans. denied. "Preliminary injunctions are designed to protect the property and rights of the parties from any injury, usually by maintaining the status quo as it existed prior to the controversy, until the issues and equities in a case can be determined after a full examination and hearing." Id. "Such relief prevents harm to the moving party that could not be corrected by a final judgment." Id.

When granting or refusing a preliminary injunction, a trial court is required to make special findings of fact and state its conclusions thereon.[4] Zimmer, Inc. v. Davis, 922 N.E.2d 68, 71 (Ind. Ct. App. 2010); Ind. Trial Rule 52(A). When findings and conclusions are made, we must determine if the trial court's findings support the judgment. Zimmer, 922 N.E.2d at 71. A trial court's judgment will be reversed only when clearly erroneous. Id. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them, and a judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a

[3] Allison asserts that each factor does not need to be weighted equally and argues, "[b]ecause of the undisputed and significant irreparable harm, Allison's burden of establishing likelihood of success on the merits should be correspondingly reduced." Appellee's Br. p. 22. Although the issuance of a preliminary injunction may indeed involve a weighing of the four factors, we are not persuaded that Allison may prevail without making at least prima facie case.

[4] As FNOK points out, the trial court adopted Allison's proposed findings and conclusions as its own. Although a trial court's verbatim adoption of one party's proposed findings may have important practical advantages and is not prohibited, the wholesale adoption of one party's findings results in an inevitable erosion of our confidence that the findings reflect the considered judgment of the trial court. Parks v. Delaware County Dept. of Child Servs., 862 N.E.2d 1275, 1278 (Ind. Ct. App. 2007). Thus, while a trial court is certainly not prohibited from adopting verbatim a party's findings, we discourage this practice. Id.

mistake has been made.[5] Id. "We consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment." Id.

FNOK only challenges the trial court's conclusion that Allison has established the reasonable likelihood of success at trial. FNOK argues that the scheduling agreements were not enforceable contracts because they did not satisfy the statute of frauds and because they were not requirements contracts. FNOK contends that because the scheduling agreements were not enforceable contracts, it was free to reject the releases it had not already accepted without breaching the scheduling agreements. In the absence of any breach, FNOK asserts that Allison has not made a prima facie case on the merits.

I. Statute of Frauds

FNOK first argues that the scheduling agreements were not enforceable contracts because they did not satisfy the statute of frauds. Section 2-201 of the Uniform Commercial Code ("UCC") provides:

> (1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($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

[5] FNOK points out that the trial court's findings do not specifically state that the statue of frauds was satisfied or that the scheduling agreements included the elements of a requirements contract. "The purpose of special findings is to provide the parties and the reviewing courts with the theory on which the judge decided the case in order that the right of review for error may be effectively preserved." McGinley-Ellis v. Ellis, 638 N.E.2d 1249, 1252 (Ind. 1994). "Whether findings of fact are adequate depends upon whether they are sufficient to disclose a valid basis under the issues for the legal result reached in the judgment." K.B. v. S.B., 415 N.E.2d 749, 754 (Ind. Ct. App. 1981). When considering the adequacy of special findings of fact, we will consider them as a whole, and we will liberally construe them in favor of the judgment. Id. To the extent FNOK argues that the inadequate findings amount to reversible error, we disagree. The findings taken as whole provide us with the trial court's theory that the scheduling agreements were valid requirements contracts.

> 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 paragraph beyond the quantity of goods shown in such writing.

Ind. Code § 26-1-2-201. FNOK claims that the scheduling agreements did not contain a quantity term sufficient to satisfy the statute of frauds.

It is undisputed that the scheduling agreements do not include a specific quantity term. Instead, the terms and conditions state in part:

> 4. DELIVERY SCHEDULES
> Time is of the essence, and deliveries shall be made both in quantities and at times specified in the Contract or in Buyer's schedules. . . . . Where quantities and/or delivery schedules are not specified, Seller shall deliver goods in such quantities and times as Buyer may direct in subsequent releases and/or purchase orders. . . .

Exhibit 2 (emphasis added).

In Johnson Controls, Inc. v. TRW Vehicle Safety Systems, Inc., 491 F. Supp. 2d 707, 713-18 (E.D. Mich. 2007), the court considered the sufficiency of a reference to the term "AS REL." in the quantity column of the parties' purchase orders for purposes of the Michigan statute of frauds. The term "AS REL." undisputedly referred to one party's material releases, which were issued periodically to specify the exact quantities of parts needed. Johnson Controls, 491 F. Supp. 2d at 717. After analyzing the purpose of the statute of frauds,[6] various cases, and the policies of the UCC, the court observed, "[t]he

[6] The purpose of the statute of frauds is "'to preclude fraudulent claims which would probably arise when one person's word is pitted against another's and which would open wide those ubiquitous flood-gates of litigation.'" Pepsi-Cola Co. v. Steak 'N Shake, Inc., 981 F. Supp. 1149, 1159 (S.D. Ind. 1997) (quoting Summerlot v. Summerlot, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980)). As in Pepsi-Cola, such a concern is not present here. It is undisputed that the written scheduling agreements existed at the time the parties

term 'AS REL.' gives some indication that [Johnson Controls] intended to purchase and TRW intended to sell some quantity of parts. This is all the statute of frauds requires." Id. at 717. The court concluded, "that a quantity term appears in the writing, albeit an ambiguous one,[7] and that the offered writings provide a basis for believing that a contract in fact exists. Thus, the purpose of the statute of frauds has been satisfied, particularly to the extent performance has been rendered." Id. at 718.

FNOK attempts to distinguish Johnson Controls because the term "AS REL." appeared in a quantity column. We believe Johnson Controls is relevant to our consideration of whether the statute of frauds is satisfied. Although, as FNOK asserts, the scheduling agreements are silent as to quantity, the terms and conditions specifically require FNOK to deliver goods "in such quantities" as Allison directs in subsequent releases. Exhibit 2. Based on the rationale offered in Johnson Controls, the reference to the quantities in Paragraph 4 of the terms and conditions meets the minimum writing requirements of the statute of frauds. Allison has made a prima facie showing that the statute of frauds is satisfied.

II. Requirements Contracts

FNOK also argues that the scheduling agreements were not enforceable contracts because Allison was not required to purchase anything from FNOK and the scheduling

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negotiated the contracts. We are not convinced that FNOK's statute of frauds defense is availing given the procedural posture of this case.

[7] The court acknowledged that, if anything, the precise meaning of the quantity term was ambiguous. Johnson Controls, 491 F. Supp. 2d at 718. The quantity could be construed to reference the specific amount indicated in the releases or it could have been a requirements contract. Id.

agreements did not include exclusivity provisions. "A requirements contract is one in which the purchaser agrees to buy all of its needs of a specified material exclusively from a particular supplier, and the supplier agrees, in turn, to fill all of the purchaser's needs during the period of the contract." Indiana-American Water Co., Inc. v. Town of Seelyville, 698 N.E.2d 1255, 1259 (Ind. Ct. App. 1998). Requirements contracts lack a promise from the buyer to order a specific amount, but consideration is furnished by the buyer's promise to turn to the seller for all such requirements as do develop. Torncello v. U. S., 681 F.2d 756, 761 (Ct. Cl. 1982).

On the other hand, an indefinite quantities contract is a contract in which the buyer agrees to purchase and the seller agrees to supply whatever quantity of goods the buyer chooses to purchase from the seller. Indiana-American Water, 698 N.E.2d at 1259. Under an indefinite quantities contract, even if the buyer needs the commodity in question, the buyer is not obligated to purchase it from the seller. Id. at 1259-60. "Thus, an indefinite quantities contract, without at least the requirement that the buyer purchase a guaranteed minimum quantity from the seller, is illusory and unenforceable." Id. at 1260.

"Where the terms of a contract are clear and unambiguous, they are conclusive, and we will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions." Arrotin Plastic Materials of Indiana v. Wilmington Paper Corp., 865 N.E.2d 1039, 1041 (Ind. Ct. App. 2007). A contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation, not merely because the parties disagree as to their interpretation. Fackler v. Powell, 891

N.E.2d 1091, 1096 (Ind. Ct. App. 2008), trans. denied. If the contract terms are clear and unambiguous, the terms are conclusive and we do not construe the contract or look to extrinsic evidence, we will merely apply the contractual provisions. Id.

FNOK asserts that the scheduling agreements did not require Allison to buy anything, let alone all of its requirements, from FNOK. First, the UCC does not require the use of particular words or "buzz words" to enforce a requirements contract. Pepsi-Cola Co. v. Steak 'N Shake, Inc., 981 F. Supp. 1149, 1158 (S.D. Ind. 1997). Moreover, the requirement of good faith, specifically imposed by §2-306, "prevents requirement contracts from being illusory or too indefinite to be enforced." Indiana-American Water, 698 N.E.2d at 1260. Specifically, §2-306 provides:

> (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
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> (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

I.C. § 26-1-2-306. Comment 2 to §2-306 explains:

> Under this Article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade

> so that his output or requirements will approximate a reasonably foreseeable figure. Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. A shut-down by a requirements buyer for lack of orders might be permissible when a shut-down merely to curtail losses would not. The essential test is whether the party is acting in good faith.

I.C. § 26-1-2-306 cmt. 2. Said another way, "the buyer is not free, on any whim, to quit buying from seller." Indiana-American Water, 698 N.E.2d at 1260. "[I]f the buyer has a legitimate business reason for eliminating its requirements, as opposed to a desire to avoid its contract, the buyer acts in good faith." Id. at 1261.

To address FNOK's claim that §2-306 does not supply the missing duty of Allison to buy its requirements from FNOK, we consider whether Allison was required to buy exclusively from FNOK. See Indiana-American Water, 698 N.E.2d at 1259 (observing that "under a requirements contract the buyer agrees to turn exclusively to the seller to purchase his requirements as they develop."); Torncello, 681 F.2d at 761-62 ("The entitlement of the seller to all of the buyer's requirements is the key, for if the buyer were able to turn elsewhere for some of its needs, then the contract would not be distinguishable from an indefinite quantities contract with no stated minimum, unenforceable as we have stated."). A buyer's promise to purchase from seller exclusively will be implied where it is apparent that a binding exclusive requirements contract was intended. Indiana-American Water, 698 N.E.2d at 1260; Propane Indus., Inc. v. General Motors Corp., 429 F. Supp. 214, 219 (W.D. Mo. 1977) (observing, "an express promise by the buyer to purchase exclusively from the seller is not always

required. In construing a contract in which only the seller has agreed to sell, a court may find an implied reciprocal promise on the part of the buyer to purchase exclusively from the seller, at least when it is apparent that a binding contract was intended.").

The scheduling agreements specifically provided:

> Seller shall assure that the goods remain competitive in terms of price, technology, design and quality with similar goods available to Buyer. If, in the reasonable opinion of Buyer, the goods do not remain competitive, Buyer, to the extent it is free to do so, will advise Seller in writing of the area(s) in which another product is more competitive with respect to price, technology, design or quality. If, within 30 days, Seller does not agree to immediately sell the goods at a competitive price, or if applicable, with comparable technology, design or quality, Buyer may terminate this contract and purchase from another supplier without liability to Seller. . . .

Exhibit 1, Tab 1. Pursuant to this language, Allison could terminate the contract and purchase parts from another supplier without liability to FNOK if FNOK's parts did not remain competitive, Allison gave notice to FNOK, and FNOK did not agree to become competitive. Although FNOK asserts that Allison could exit the deal under nearly any circumstance, this paragraph also requires Allison's reasonable opinion that FNOK's goods are no longer competitive, not just any claim by Allison that the goods are not competitive. Thus, a plain reading of this section shows that Allison was obligated to buy exclusively from FNOK.

To the extent the scheduling agreements are ambiguous, parol evidence may be considered to determine the intent of the parties. See Zemco Mfg., Inc. v. Navistar Intern. Transp. Corp., 186 F.3d 815, 818 (7th Cir. 1999) (construing the terms of the contract in conformity with the parties' course of dealing and usage of trade where the

text of the contract, in what it affirmatively said and in what it omitted, rendered the parties' intent ambiguous). It is undisputed that significant amounts of time and money are required before a supplier can produce parts for Allison.

As an Allison representative explained at the preliminary injunction hearing:

> Some of these parts are very expensive to tool up, so that the tools that go into making the parts are very expensive—maybe a million dollar tasking tool—so spending twice the amount of money to tool up two suppliers doesn't make sense for us from a business case standpoint. I'd say we're highly engineered, highly validated too. There's a lot of cost in validating additional sources.

Tr. pp. 28-29. This is consistent with Paragraphs 19 and 20 of the terms and conditions discussing the ownership of machinery and tooling and Allison's obligation to reimburse FNOK for certain expenses related to tooling. Along those lines, Allison presented evidence that it could take almost two years to fully re-source a part and that Allison cannot buy the FNOK-provided parts "off-the-shelf" from another supplier.[8] Finally, according to Allison, FNOK has always been a "sole source supplier" of parts to Allison. Tr. p. 26. Thus, the course of dealing between the parties shows that Allison always purchased the parts supplied by FNOK only from FNOK. This evidence shows that the parties intended for Allison to continue to purchase the parts exclusively from FNOK.

In sum, the scheduling agreements required Allison to purchase the FNOK-provided parts exclusively from FNOK. Further, §2-306 required Allison to use good

[8] Allison also explained that it has adopted a "just-in-time" inventory system, in which they receive parts as quickly as they use them to avoid stockpiling inventory. According to Allison, the just-in-time inventory approach is the industry standard. See Johnson Controls, 491 F. Supp. 2d at 718 (explaining that the parties' contract may have been a requirements contract "in light of the practice among automotive suppliers to enter into long-term, just-in-time production arrangements that rely on a fixed price and a variable quantity, and provide flexibility to adjust to changing commercial conditions.").

faith to purchase all of its requirements from FNOK. Allison made a prima facie showing that the parties intended the scheduling agreements to be requirements contracts.

Conclusion

Allison has established a reasonable likelihood of success on the merits by making a prima facie showing that the statute of frauds was satisfied and the scheduling agreements were requirements contracts. The trial court did not abuse its discretion by preserving the status quo and issuing a preliminary injunction requiring FNOK to continue to provide parts to Allison. We affirm.

Affirmed.

BAILEY, J., and MAY, J., concur.