STATE OF MICHIGAN

COURT OF APPEALS

DART BANK,

Plaintiff/Counter-Defendant,

v

WILLIAM D. BYRUM, JR. and WILLIAM D. BYRUM, SR.,

Defendants/Counter-Plaintiffs,

and

GENESIS AG LTD,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellant,

and

COOPERATIVE ELEVATOR COMPANY,

Third-Party Defendant-Appellee,

and

MONSANTO COMPANY,

Intervening Defendant.

UNPUBLISHED
June 24, 2008

No. 277581
Ingham Circuit Court
LC No. 05-000302-CH

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Third-party plaintiff Genesis Ag Ltd (Genesis) appeals by right the circuit court's grant of summary disposition in favor of third-party defendant Cooperative Elevator Company (Cooperative). The court ruled that there was no genuine issue of material fact concerning whether Cooperative had a right, upon Genesis's default, to sell soybeans that it was storing pursuant to an agreement with Genesis. The court entered judgment for Cooperative in the amount of $38,972.80. We affirm in part and vacate in part.

Genesis was engaged in the business of producing, marketing, and selling hybrid corn, soybean, and wheat seed in various markets. At issue in this case is genetically modified soybean seed developed by Genesis under a licensing agreement with intervening defendant Monsanto Company. Prior to 2004, Genesis contracted directly with Cooperative's individual members to grow the specialized soybean seeds. Cooperative functioned as a middleman by soliciting its members to serve as contract growers for Genesis, and by processing, cleaning, storing, and bagging the seed after it was grown.

In 2004, however, the parties entered into a new contractual arrangement. Under the terms of the new contract, Cooperative was to pay its member-growers directly for growing Genesis seed, and Genesis was to reimburse Cooperative for these payments to the member-growers. In addition, Genesis was to reimburse Cooperative for the costs of soybean processing and storage. Under the new contract, the parties agreed that any grower fees not reimbursed to Cooperative by Genesis within 48 hours would accrue interest at a rate of 1½ percent per month until fully paid. Similarly, the parties agreed that any soybean processing and storage fees not reimbursed to Cooperative by Genesis within 10 days would accrue finance charges at a rate of 1½ percent per month until fully paid. Lastly, the parties agreed that Cooperative had the right to refuse to deliver the soybean seed to Genesis until Cooperative had received payment "in full."

Cooperative alleged that by March 2005, it had made payments of $552,778.24 to its member-growers for soybean seed on behalf of Genesis, and had incurred processing and storage costs of $61,142.50 and $15,024.50, respectively. Genesis paid Cooperative $70,000 in December 2004, and Genesis then hand delivered to Cooperative two postdated checks as additional, partial reimbursement in February 2005. One check was dated February 14, 2005, and was written for the amount of $162,505.15. The second check was dated February 16, 2005, and was written for the amount of $61,142.50.

According to Genesis, Cooperative's representative took possession of the postdated checks just as he or other Cooperative representatives had done on previous occasions. However, Cooperative's representative apparently telephoned defendant William D. Byrum, Jr. the following day and told him that Cooperative would not be able to accept the checks as partial payment. Cooperative's representative allegedly also told Byrum that Cooperative would not allow Genesis to take delivery of the soybean seed. Upon learning that Cooperative would not accept the checks as partial payment, Genesis stopped payment on the checks. Despite having told Genesis that it would not accept the checks, Cooperative apparently attempted to deposit them in late February 2005. However, the checks were not honored because Genesis had stopped payment on them. According to Cooperative, Genesis did not inform the company that it had stopped payment on the two checks until March 1, 2005. Cooperative, in an effort to mitigate its losses, eventually sold the soybeans to other parties as animal feed rather than as genetically modified seed.

The current litigation originates from an action filed by plaintiff Dart Bank against Genesis to enforce an underlying promissory note. Genesis moved to add Cooperative to the action as a third-party defendant. The motion was granted and Genesis set forth several claims, alleging that Cooperative had not been entitled under the parties' contract to seize or sell the soybeans that it had been storing. Cooperative then moved for summary disposition, arguing that there was no genuine issue of material fact concerning (1) whether it had been entitled under Article 2 of the Uniform Commercial Code (UCC) to sell the soybeans that it had been storing

for Genesis, and (2) whether its sale of the soybeans had been commercially reasonable. The circuit court ruled that Cooperative had obtained an Article 2 security interest in the soybeans "arising from the grower payments for which [it] sought reimbursement from Genesis," and that Cooperative was therefore entitled to retain possession of the soybeans and to sell them upon Genesis's default.

Genesis first argues that the circuit court erred by granting summary disposition in favor of Cooperative because there existed genuine issues of material fact concerning whether there was a course of dealing between the parties with respect to payment by postdated checks. We cannot agree.

We review de novo a circuit court's grant of summary disposition. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions, and any other evidence in a light most favorable to the party opposing the motion. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). Our review is limited to the evidence that was presented below at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition is properly granted under MCR 2.116(C)(10) when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

Under the UCC, MCL 440.1101 *et seq.*, a "course of dealing" between parties may "be regarded as establishing a common basis of understanding for interpreting [the parties'] expressions and other conduct." MCL 440.1205(1). In addition, "[a] course of dealing between parties and any usage of trade in the vocation or trade . . . give particular meaning to and supplement or qualify terms of an agreement." MCL 440.1205(3).

Cooperative argues that there could not have been a course of dealing regarding payment by postdated checks because this was the first time that the parties had operated under the new contract. This argument lacks merit because the UCC does not state that a course of dealing must be established with respect to any particular or specific agreement. Rather, the UCC provides that when parties have previously been involved in "a particular transaction," "a sequence of previous conduct" between them can serve "as establishing a common basis of understanding" and as a tool for "interpreting their expressions" embodied in a new or subsequent contract. MCL 440.1205(1). Moreover, as noted earlier, MCL 440.1205(3) provides that "a course of dealing between parties" can serve to "supplement or qualify terms of an agreement." This language necessarily encompasses subsequent or future agreements, and is not limited to agreements that the parties have already performed.

Clearly, in order to establish a course of dealing through evidence of previous transactions, the previous transactions must not have been entirely dissimilar, but rather must have been of a comparable character to the transaction presently at issue. See *Arnstine v Treat*,

71 Mich 561, 565; 39 NW 749 (1888).[1] Here, sufficient similarity is established. Although the parties had never before operated under the terms of the current contract, they had engaged in different but similar transactions in the past. Indeed, under the terms of their previous arrangements, both parties had many of the same responsibilities and duties as were provided by the new contract.

However, MCL 440.1205(4) provides:

> The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

The parties' contract explicitly provided that Genesis's reimbursements to Cooperative for both grower fees and for soybean processing and storage fees were to be made "via wire transfer." Although the parties did not define the term "wire transfer" in their agreement, it is beyond factual dispute that the two handwritten checks that were hand delivered to Cooperative's representative did not qualify as "wire transfer[s]" within the meaning of the parties' contract. Thus, regardless of whether the parties had previously used postdated checks as a means of payment, the check payments did not conform to the express terms of the agreement in this case. Because it would have been unreasonable to construe the hand delivery of Genesis's postdated checks as consistent with the contractual provision requiring payment "via wire transfer," the express provisions of the parties' contract controlled and any evidence concerning prior methods of payment between the parties was of little or no value in interpreting the new agreement. MCL 440.1205(4).

Even assuming arguendo that the parties had a past course of dealing that included payment by way of postdated checks, and even further assuming that Genesis's hand delivery of the postdated checks constituted a payment "via wire transfer," Cooperative would still have been entitled to retain the soybeans in its possession. As noted previously, the parties' contract expressly provided that Cooperative had the right to refuse to deliver the soybeans in its possession to Genesis until Cooperative had received payment "in full." It is undisputed that the two hand-delivered checks—even if honored for their full face values of $162,505.15 and $61,142.50—would not have constituted payment "in full" for the outstanding grower fees and soybean processing and storage fees. Because Genesis never even attempted to tender payment in full, Cooperative acted properly under the contract by retaining the soybeans in its possession.

Genesis next argues that the circuit court erred by finding that Cooperative stood in the position of a seller under Article 2 of the UCC and that it was therefore entitled to resort to UCC sellers' remedies in this case. We disagree.

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[1] We acknowledge that *Arnstine* is a pre-UCC case, but find that its reasoning is nonetheless applicable in the current context. Unless displaced by a particular section of the act, the principles of the common law supplement the provisions of the UCC. MCL 440.1103.

Genesis contends that the parties agreed to a penalty in the event of Genesis's failure to pay Cooperative in a timely manner and that this agreement represented a deviation from the remedies provided by the UCC. In support of this position, Genesis cites MCL 440.1102(3), which provides:

> The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

It is true that the parties' agreement provided that Genesis would incur interest penalties at a rate of 1½ percent per month if it had not reimbursed Cooperative for payments made to growers within 48 hours. Genesis also agreed

> [t]o reimburse Cooperative Elevator Co. for all processing and fees net 10 days, to be invoiced no earlier than Feb 1, 2005. Any fees not reimbursed within net 10 days will be subject to a 1½ % . . . per month finance charge until such fees are fully paid. Genesis Ag Ltd also agrees that Cooperative Elevator Co. may refuse Genesis Ag Ltd pickup of soybean seed until Cooperative Elevator Co is paid in full or other financing arrangements have been made that are satisfactory to Cooperative Elevator Co.

Genesis contends that these express penalty provisions in the parties' contract effectively displaced Cooperative's ability to resort to other remedies provided by the UCC. Cooperative counters by asserting that the contract was governed by the UCC and that it was consequently entitled to avail itself of the remedies set forth in the code. We agree with Cooperative, and find that the parties' agreed-upon penalty provision did not displace Cooperative's ability to resort to certain sellers' remedies provided by the UCC.

Cooperative claims that under MCL 440.2707(1), it was "in the position of a seller" with respect to the soybeans in its possession. MCL 440.2707 provides:

> (1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.
>
> (2) A person in the position of a seller may as provided in this article withhold or stop delivery (section 2705) and resell (section 2706) and recover incidental damages (section 2710).

The circuit court agreed with Cooperative that it was in the position of a seller based on the payments Cooperative made to its member-growers on Genesis's behalf.

The circuit court's analysis in this regard was correct. MCL 440.2707 provides that "an agent who has paid . . . the price of goods on behalf of his principal" stands in the position of a

seller and may therefore resort to certain statutory sellers' remedies. "An agent is . . . included within the category of a person in the position of a seller when the agent has paid . . . and is seeking reimbursement or indemnity from its principal." 4A Lawrence's Anderson on the Uniform Commercial Code 3d, § 2-707:6, p 210. Here, Cooperative paid its member-growers on behalf of Genesis, expecting to be timely reimbursed by Genesis pursuant to the terms of the parties' contract. The circuit court properly determined that Cooperative was in the position of a seller with respect to the soybeans in its possession.[2] MCL 440.2707(1). Cooperative was accordingly entitled to resort to certain sellers' remedies provided by the UCC in this case. MCL 440.2707(2). This included the right to resell the goods at issue and to "recover the difference between the resale price and the contract price together with any incidental damages allowed . . . ." MCL 440.2706(1).

Our decision in this respect is not affected by the express penalty provision contained in the parties' agreement. As previously noted, MCL 440.1102(3) permits parties to contract around any provision of the UCC unless expressly proscribed by the statute. However, the remedy provided by MCL 440.2706 and the penalty provision contained in the parties' contract were not mutually exclusive. It is true that an "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 article . . . ." MCL 440.2719(1)(a). But "resort to a remedy as provided [in the parties' contract] is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy." MCL 440.2719(1)(b). In this case, the parties did not agree that the financial penalties provided in their agreement would be the exclusive remedy available to Cooperative. Accordingly, Cooperative—who stood in the position of a seller under MCL 440.2707—was entitled to sell the soybeans and to "recover the difference between the resale price and the contract price together with any incidental damages allowed . . . ."[3] MCL 440.2706(1).

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[2] We reject Genesis's contention that Cooperative was not in the position of a seller under MCL 440.2707(1) because no agency relationship existed between Genesis and Cooperative. "[I]n its broadest sense agency 'includes every relation in which one person acts for or represents another by his authority.'" *St Clair Intermediate School Dist v Intermediate Ed Ass'n/MEA*, 458 Mich 540, 557; 581 NW2d 707 (1998), quoting *Saums v Parfet*, 270 Mich 165, 171; 258 NW 235 (1935). Under the parties' contract, which authorized Cooperative to hold the soybeans upon receipt from the individual member-growers, Genesis in effect transferred its right to the possession of the soybeans to Cooperative. An agency relationship was thereby created. See *Guggisberg v Otsego County Co-op Ass'n*, 258 Mich 553, 558; 242 NW 749 (1932); see also *Buhl Iron Works v Teuton*, 67 Mich 623, 629; 35 NW 804 (1888) (observing that a warehouse that is storing an owner's goods acts as the agent of the owner of the goods). Indeed, a grain elevator often acts as the agent of its principle with respect to grain that it is storing. See 93 CJS, Warehousemen & Safe Depositories, § 8, p 107; see also *Cool v Phillips*, 66 Ill 216 (1872).

[3] Genesis claimed below that Cooperative did not provide proper notice under MCL 440.2706(3) before it sold the soybeans. While a failure to provide notice would have been error, MCL 440.2706(3), Genesis has not raised this issue in its statement of the questions presented and we therefore decline to address it, MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). At any rate, it appears from the record that Genesis did have notice that

(continued…)

Lastly, both parties contend that the circuit court should not have entered judgment for Cooperative in the amount of $38,972.80 because Cooperative never sought a monetary award in this case. We agree. Cooperative sought only summary disposition of the claims against it, and never filed a counterclaim seeking judgment on the deficiency. Nevertheless, the circuit court proceeded to enter judgment in Cooperative's favor for the deficiency amount of $38,972.80.

By entering judgment with regard to the deficiency amount, the court effectively sua sponte amended the pleadings to add a counterclaim on Cooperative's behalf. *City of Bronson v American States Ins Co*, 215 Mich App 612, 619; 546 NW2d 702 (1996). "While issues not raised in the pleadings may be decided if the parties consent," Cooperative never consented to the inclusion of a counterclaim for the deficiency amount in this case. *Id*. We therefore conclude that the circuit court's judgment for Cooperative in the amount of $38,972.80 exceeded the scope of this case. *Id*. We vacate that portion of the judgment that awarded Cooperative the amount of $38,972.80. *Id*.

Affirmed in part and vacated in part.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

(…continued)

Cooperative planned sell the soybeans as animal feed upon Genesis's default. Moreover, we perceive no evidence that Cooperative's sale of the soybeans was not "made in good faith and in a commercially reasonable manner . . . ." See MCL 440.2706(1). Both parties fully concede that Cooperative was only entitled to sell the soybeans as animal feed, and not as seed, because Monsanto had terminated its licensing agreement with Genesis.