

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ALBU TRADING, INC.,)
)
 Plaintiff,)
)
 5.) C.A. No. 00C-05-131-JRS
)
 ALLEN FAMILY FOODS, INC.,)
)
 Defendant.)

Date Submitted: August 17, 2001
Date Decided: August 30, 2001

*Upon Consideration of
Defendant's Motion for Summary Judgment.*
GRANTED.

ORDER

This 30th day of August, 2001, upon consideration of Defendant's Supplemental Motion for Summary Judgment and the Response thereto, it appears to the Court that:

1. This is the Court's second pass at Defendant's Motion for Summary Judgment. The Court heard oral argument on the initial motion on January 5, 2001. That Motion was denied pursuant to Superior Court Civil Rule 56(f). The Court granted the parties additional time for discovery with the understanding that Defendant could again file its motion when the additional discovery was completed.

Additional discovery has been taken¹ and Defendant has now renewed its motion.

2. Plaintiff, Albu Trading, Inc. (“Albu”), purchased a quantity of frozen chicken backs from Defendant, Allen Family Foods, Inc. (“Allen”). After delivery, Albu exported the chicken to Romania where, upon arrival, the chicken tested positive for salmonella. The chicken was pronounced unfit for import under Romanian law and eventually was destroyed. Albu commenced this litigation to recover the purchase price of the chicken on the theory that the chicken was contaminated when delivered by Allen.

¹The discovery deadline passed on April 6, 2001.

3. When considering a motion for summary judgment, the moving party bears the initial burden of illustrating the absence of a material factual dispute.² If a motion for summary judgment is properly supported by affidavits or other record evidence, the burden shifts to the non-moving party to demonstrate that there are material issues of fact which remain in dispute.³ The Court must view the record in the light most favorable to the non-moving party.⁴ “[T]he moving party is entitled to summary judgment, as a matter of law, if the nonmoving party [after an adequate time period for discovery has passed] fails to make a sufficient showing on an essential element of his or her case with respect to which he or she has the burden of proof.”⁵

4. In support of its Motion, Allen has presented evidence which it contends establishes that the chicken was delivered to Albu on May 14, 1998, free of salmonella contamination and frozen at a temperature which would prevent future salmonella growth. To support its contention that the chicken backs were free of salmonella contamination when delivered to Albu, Allen relies primarily upon three

²*Moore v. Sizemore*, Del. Supr., 405 A.2d 679, 680 (1979)(citing *Ebersole v. Lowengrub*, Del. Supr., 180 A.2d 467 (1962)).

³*Brzoska v. Olson*, Del. Supr., 668 A.2d 1355, 1364 (1995).

⁴*United Vanguard Fund, Inc. v. Takecare, Inc.*, Del. Supr., 693 A.2d 1076, 1079 (1997); *Brzoska*, 668 A.2d at 1364.

⁵*Burkhart v. Davies*, Del. Supr., 602 A.2d 56, 60 (1991)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)).

documents, each entitled “Veterinary Certificate for Poultry Meat Exported to Romania,” issued by a veterinarian from the United States Department of Agriculture (“USDA”). All three certificates, dated May 18, 1998, declare after testing that: “meat . . . shows no evidence of infection with salmonella . . . on the surface of the

carcasses and in the thickness of the muscle or organ tissues”⁶ The USDA requires that chicken exported into Romania satisfy the USDA veterinarian’s examination, and the certificates signify that the chicken is fit for export and that no further testing is required.⁷

5. In addition to the USDA certificates, Allen has produced two affidavits supporting its Motion for Summary Judgment. The first affidavit, sworn by Patricia C. Sigler, Allen’s Corporate Director of Quality Control, avers that salmonella microorganisms are incapable of growth and reproduction at temperatures below 44 degrees Fahrenheit (“°F”). The second affidavit, sworn by Ronald K. Longhany, Plant Manager for United States Cold Storage, Inc. (“US Storage”), avers that Allen delivered the chicken to US Storage between February 4 and 13, 1998, and that it was

⁶The certificates actually contain two different dates. One date, found at the top of the document, indicates the inspection occurred on May 14, 1998. The second date, May 18th, is adjacent to the veterinarian’s signature. This date, apparently, is intended to document that the certificate was “made on” that date even though the actual inspection occurred four days earlier.

⁷The parties acknowledge that only two certifications are required to export poultry to Romania. The first certificate, “Meat and Poultry Certificate of Wholesomeness,” was issued on May 14. The second required certificate is the “Veterinary Certificate for Poultry Meat Exported to Romania.” These certificates were issued on May 18.

frozen upon delivery and maintained at 0°F thereafter. Further, the Longhany affidavit confirms that on May 14, 1998 (the day Albu assumed possession of the

chicken), a USDA inspector visually inspected the poultry and signed the USDA certificates.

6. Allen has satisfied its burden under Rule 56 by establishing the absence of a material factual controversy. It has demonstrated that Allen delivered the chicken to US Storage in a frozen condition, that the chicken showed no signs of salmonella contamination, that it was fit for export under USDA testing requirements, and that at all times between inspection and delivery it was maintained at a temperature where salmonella is incapable of growth and reproduction. Under 6 *Del. C.* § 2-509(2)(b), the “risk of loss” passed to Albu on May 14, 1998 when, presumptively, US Storage (as a bailee) acknowledged Albu’s right to possession in the chicken.⁸ Accordingly, Albu would be required at trial to convince the trier of fact that the chicken was contaminated with salmonella when it took possession of the chicken backs on May 14. Because Allen has met its burden under Rule 56 to show the absence of a material

⁸Since the transaction at issue concerned the sale of goods (*see* 6 *Del. C.* § 2-105(1)), this dispute is governed by the Uniform Commercial Code (“U.C.C.”). 6 *Del. C.* §§ 2-509 and 2-510 address when either party to a transaction bears the risk of loss with respect to the goods involved in the transaction. According to these provisions, if the chicken was contaminated with salmonella after the risk of loss passed to Albu, Allen would bear no responsibility for that contamination. Although the parties do not address the issue of when (or by what means) possession of the chicken shifted from US Storage (as bailee of the chicken, *see* 6 *Del. C.* § 7-102(1)(a)) to Albu, the Court may, nevertheless, dispose of the issue *sua sponte* as the determination can be made as a matter of law on the evidence of record. It is clear that on May 14, US Storage acknowledged Albu’s right to possession of the chicken, thus shifting the risk of loss to Albu under § 2-509(2)(b). This has been established in the record by undisputed evidence that Albu took possession of the chicken and shipped it to Romania on that date.

factual controversy by establishing a lack of record evidence of contamination prior to or on May 14, the burden shifts to Albu who must, in order to survive Allen's motion, establish the existence of a material factual controversy.⁹

⁹*Brzoska*, 668 A.2d at 1364.

7. To meet this burden, Albu offers several products of the discovery in this case. First, it offers a letter issued by a Freedom of Information Act (“FOIA”) officer at the USDA. Albu avers that this letter establishes that no salmonella testing took place prior to delivery of the chicken by Allen. The letter, however, fails to substantiate this contention; it suggests only that salmonella testing took place for the first time on May 18, 1998, instead of May 14, as Allen’s evidence initially indicated.¹⁰ The letter does present some factual controversy in that the FOIA officer indicates that the testing took place on a different date than indicated on the USDA certificates. This discrepancy, however, does not create a material factual controversy because it neither establishes that the inspection did not take place nor does it cast doubt on the accuracy of the USDA certificates or the testing results they report. The fact remains that the USDA certificates reveal that the chicken passed the test for contamination at the time (May 14) or after (May 18) the risk of loss passed to Albu.

8. Next, Albu asserts that “because [salmonella] is a pathogenic micro-organism, [it] is not susceptible to discovery upon sensory examination.” Albu

¹⁰Albu points out that Allen, as support for its initial motion, supplied an affidavit indicating that the chicken was tested and inspected at Allen’s plant in Harbeson, Delaware during February, 1998. The FOIA officer’s letter contradicts this assertion, specifically stating that no salmonella tests took place at Allen’s plant prior to packaging and shipment. Allen does not, however, rely on this affidavit in its Supplemental Motion for Summary Judgment. Additionally, Albu does not explain how the inaccuracy of the initial affidavit from Allen contradicts Allen’s assertion that the chicken was free of salmonella contamination upon USDA inspection at US Storage’s facility on May 14 (or May 18) as reflected in the USDA certificates.

apparently would like the Court to question the validity of the USDA's salmonella testing results. As support for its assertion, Albu presents evidence suggesting that a topical/sensory examination, such as the one preceding the issuance of the USDA certificates, would not reveal microscopic salmonella contamination. Albu's proffered evidence indicates that a laboratory test is required to establish (or rule out) the presence of salmonella within a chicken carcass.¹¹ This evidence fails to create a material factual controversy concerning whether the chicken at issue was contaminated with salmonella upon delivery to Albu.

¹¹The Court has considered Mr. Albu's untimely filed Affidavit which sets forth this information.

9. The only competent evidence presently before the Court indicates that the chicken was frozen at a temperature where salmonella reproduction does not occur and that the chicken was certified as fit for export on the day it was delivered to Albu.¹² Lacking from the record is any evidence indicating that the chicken was contaminated upon delivery. For example, the record does not indicate that Allen processed the chicken improperly, that Allen was encountering a salmonella outbreak at or around the time the chicken backs at issue were delivered to US Storage, that the temperature at US Storage exceeded 44°F, or expert evidence to support specifically any of Albu's claims.¹³ In short, no evidence has been presented upon which a

¹²Compliance with the export certification requirements, while not conclusive, is probative of compliance with warranties of fitness and merchantability. *See, e.g., Goodman v. Wenco Foods, Inc.*, N.C. Supr., 423 S.E.2d 444, 452 (1992)(compliance with government standards is pertinent to issue of whether any U.C.C. warranties were breached). *See also Blueflame Gas Inc. v. Van Hoose*, Colo. Supr., 679 P.2d 579, 591 (1984)(compliance with safety regulations evidence that product not defective); *Rucker v. Norfolk & W. Ry. Co.*, Ill. Supr., 396 N.E.2d 534, 536-37 (1979)(same).

¹³The general information which Albu has supplied in the form of an e-mail from a USDA technology center and a general discussion of the effectiveness of the USDA's poultry testing regimen printed by the USDA in the Federal Register is not sufficient to create a material factual dispute. Both of these pieces of evidence hint that organoleptic examination of poultry may not reveal all salmonella contamination. Since Albu has not linked this information with the specific testing done by the USDA inspector on May 14, however, it has failed to raise a material factual controversy with respect to these best results. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993)(When "[f]aced with a proffer of expert scientific [evidence] . . ." a court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."); *Pfizer Inc. v. Advanced Monobloc Corp.*, Del. Super., C.A. No. 97C-04-037, Quillen, J. (Sept. 2, 1999), Letter Op. at 7-11 (excluding expert opinion testimony under *Daubert* because it was "not grounded in sufficient facts to be reliable and helpful to the trier of fact.").

rational trier of fact could conclude that the chicken was contaminated when Albu took possession of it. Albu is the plaintiff in this breach of contract action and would be required at trial to prove the chicken failed to comply with the contract's provisions, express or implied, with respect to fitness of the product and merchantability when delivered.

10. Since the discovery deadline has long passed and Albu has presented absolutely no evidence supporting a key element of its claim, the resolution of this motion falls squarely within the holdings of *Burkhart* and *Celotex*. In *Celotex*, the United States Supreme Court stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.¹⁴

¹⁴*Celotex*, 477 U.S. at 322-23, 106 S. Ct. at 2552-53 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)). See also *Burkhart*, 602 A.2d at 59 (adopting *Celotex* language).

Since Albu has failed to present any evidence showing that the chicken more likely than not was contaminated at delivery, it has failed to demonstrate that a material factual controversy exists concerning an essential element of its case with respect to which it will have the burden of proof at trial. Consequently, summary judgment is appropriate.¹⁵

11. Based on the foregoing, Defendant's Motion for Summary Judgment is **GRANTED.**

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary

cc: Mark D. Olson, Esquire
David S. Lank, Esquire

¹⁵*Burkhart*, 602 A.2d at 60.