

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBU TRADING, INC.,	§
	§
Plaintiff Below-	§ No. 487, 2001
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
ALLEN FAMILY FOODS, INC.,	§ in and for New Castle County
	§ C.A. No. 00C-05-131
Defendant Below-	§
Appellee.	§

Submitted: April 21, 2003

Decided: April 29, 2003

Before **VEASEY**, Chief Justice, **WALSH** and **STEELE**, Justices

ORDER

This 29th day of April 2003, upon consideration of the briefs of the parties and the record below, limited to appellant’s appeal from the Superior Court’s August 30, 2001 order granting summary judgment to appellee, it appears to the Court that:

(1) The plaintiff-appellant, Albu Trading, Inc. (“Albu”), filed an appeal from the Superior Court’s August 30, 2001 order granting summary

judgment to defendant-appellee, Allen Family Foods, Inc. (“Allen”).¹ We find no merit to the appeal. Accordingly, we AFFIRM.²

(2) This matter began as a breach of contract action by Albu against Allen. Albu purchased a large quantity of frozen chicken from Allen. After delivery, Albu exported the chicken to Romania where it tested positive for salmonella and was destroyed. Albu sought to recover the purchase price of the chicken alleging that it was contaminated when delivered by Allen.

(3) In the instant appeal, Albu claims that the Superior Court erred in granting Allen’s motion for summary judgment because: a) there are material facts at issue, preventing the entry of summary judgment; and b) the risk of loss was improperly shifted to Albu following delivery of the chicken by Allen.

¹Albu also appealed from the Superior Court’s September 24, 2001 order denying Albu’s motion to alter or amend judgment.

²Following the filing of its notice of appeal from the Superior Court’s August 30 and September 24, 2001 orders, Albu filed a motion to stay the appeal and remand the matter to the Superior Court for consideration of a motion to reopen on the ground of newly-discovered evidence under Superior Court Civil Rule 60(b) (2). On February 20, 2002, this Court granted Albu’s motion and remanded the matter to the Superior Court. Following briefing by the parties, the Superior Court denied Albu’s motion to reopen. On November 22, 2002, following briefing and oral argument, this Court affirmed the Superior Court’s judgment. *Albu Trading, Inc. v. Allen Family Foods, Inc.*, Del. Supr., No. 487, 2001, Walsh, J. (Nov. 22, 2002). On December 9, 2002, Albu moved to reargue this Court’s decision on the ground that the Court had not yet addressed the issues raised in Albu’s original appeal. By Order dated January 24, 2003, this Court granted the motion for reargument, limiting its review solely to the Superior Court’s grant of summary judgment.

(4) This Court reviews the Superior Court’s grant of summary judgment de novo to determine whether, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there are no material facts in dispute and that it is entitled to judgment as a matter of law.³ On a motion for summary judgment, the moving party bears the initial burden of showing that there are no material facts in dispute.⁴ Once that burden is satisfied, through affidavits or otherwise, the burden shifts to the non-moving party to show the existence of disputed material facts.⁵ The moving party is entitled to summary judgment if the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it will bear the burden of proof at trial.⁶

(5) Allen, as the moving party, presented a number of documents in support of its motion for summary judgment, including three “veterinary certificates” dated May 18, 1998, issued by the United States Department of Agriculture (“USDA”). Each of the certificates confirmed that the chicken was

³*Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), cert. denied, 504 U.S. 912 (1992).

⁴*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁵*Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

⁶*Burkhart v. Davies*, 602 A.2d at 59 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

delivered to Albu on May 14, 1998, free of salmonella contamination and frozen at a temperature that would prevent the future growth of salmonella. Allen also presented two affidavits. The first, from Allen's corporate director of quality control, stated that salmonella is incapable of growth at temperatures below 44 degrees Fahrenheit. The second, from the plant manager of United States Cold Storage, Inc. ("USCS"), stated that Allen delivered the chicken to USCS between February 4 and 13, 1998, that it was frozen upon delivery, that the temperature was maintained at zero degrees thereafter, and that a USDA inspector inspected the chicken and signed the veterinary certificates on May 14, 1998, the day Albu took possession of the chicken.

(6) On the basis of these documents, the Superior Court correctly found that Allen had satisfied its initial burden of showing that no material facts were in dispute. The Superior Court also correctly observed that, under the Uniform Commercial Code, it was Albu's burden to demonstrate at trial that the chicken was contaminated with salmonella at the time it took possession on May 14, 1998.⁷

(7) In response to the documents presented by Allen, Albu offered a letter from the USDA, which it received pursuant to a Freedom of Information

⁷DEL. CODE ANN. tit. 6, §2-509(2) (b).

Act request. The letter suggested that the salmonella testing took place for the first time on May 18, and not May 14, 1998. The Superior Court correctly found that, while the letter reflected a discrepancy insofar as the test date was concerned, it failed to create an issue of material fact concerning whether the chicken was contaminated with salmonella at the time Albu took possession of it. In a further attempt to create an issue of material fact, Albu presented an affidavit from the president of the company asserting that the USDA test methodology was faulty because no laboratory testing was done.⁸ Again, the Superior Court correctly found no issue of material fact concerning whether the chicken was contaminated at the time Albu took possession of it.

(8) Concluding that there was no evidence in the record supporting Albu's claim that the chicken was contaminated at the time it took possession and that, therefore, Albu had failed to make a sufficient showing on an essential element of its case with respect to which it would bear the burden of proof at trial, the Superior Court granted Allen's motion for summary judgment. Upon

⁸The Superior Court considered the affidavit even though it was untimely and there was no evidence that Albu's president had expertise in this area.

an independent review of the record, we reach the same conclusion and affirm the Superior Court's grant of summary judgment.⁹

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. Pursuant to Supreme Court Rule 18, the time within which a motion for reargument may be filed in this matter is shortened to seven days from the date of this Order.

BY THE COURT:

s/ Joseph T. Walsh
Justice

⁹*Burkhart v. Davies*, 602 A.2d at 60-61.