STATE OF MICHIGAN

COURT OF APPEALS

CHRYSLER CORPORATION,

Plaintiff/Counter
Defendant-Appellee,

v

DICLEMENTE SIEGEL ENGINEERING, INC., a Michigan corporation,

Defendant/Not
Participating,

and

UHLMANN ASSOCIATES/ARCHITECTS, a Michigan corporation,

Defendant/Counter
Plaintiff-Appellant.

UNPUBLISHED
December 20, 1996

No. 184700
LC No. 93-00282-CK

Before: O'Connell, P.J., and Smolenski and T.G. Power,* JJ.

PER CURIAM.

Defendant Uhlmann Associates/Architects provided design and consulting services to plaintiff for a Cold Emissions/Driveability Test Facility ("CTF") project in Chelsea, Michigan. Plaintiff began experiencing problems with the CTF soon after its initial start-up. Defendant expended resources in attempts to correct these problems with varying degrees of success. Plaintiff eventually brought suit. Defendant filed a counterclaim predicated on its performance of ameliorative services, alleging that these services were beyond the scope of its contract with plaintiff, and that it was, accordingly, entitled to compensation. The circuit court found that the terms of the contract between the parties expressly

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* Circuit judge, sitting on the Court of Appeals by assignment.

precluded defendant's counterclaims, and granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant now appeals as of right, and we affirm.

We review an order granting or denying summary disposition de novo. *Grebner v Clinton* Twp, 216 Mich App 736, 740; 550 NW2d 265 (1994). In reviewing a grant of summary disposition pursuant to MCR 2.116(C)(10), this Court must give the benefit of reasonable doubt to the nonmovant and determine whether a factual record might be developed that would leave open a material issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 597 NW2d 185 (1995). Summary disposition of a breach of contract claim is appropriate where the relevant contract language is unambiguous. *Mt Carmel Hospital v Allstate Ins Co*, 194 Mich App 580, 588; 487 NW2d 489 (1992).

I

Defendant first argues that the Consultant Purchase Order ("PO") Rider, which contained language that the circuit court determined to govern changes to the initial contract,[1] was not part of the initial contract. The Consultant PO Rider provided that defendant was to be paid a lump sum for its work and that any changes to the contract had to be approved by plaintiff in writing. Defendant submits that because this rider was not part of the initial contract, subsequent changes to the terms of the contract need not have been in writing.

We find defendant's position unpersuasive. The purchase order that plaintiff placed with defendant for consultant services for the CTF project clearly indicated on its face that the Consultant PO Rider was to apply to the purchase order. Extraneous writings may be incorporated into a contract by reference. *Arrow Sheet Metal Works, Inc v Bryant & Detwiler Co*, 338 Mich 68, 78; 61 NW2d 125 (1953). Thus, the Consultant PO Rider was properly incorporated into the purchase order. Because it is undisputed that plaintiff gave no written approval for defendant's expenditure with respect to the work orders in issue, summary disposition was appropriate. *Mt Carmel Hosp, supra*.

Defendant brings several arguments designed to defeat the pertinent clauses of the Consultant PO Rider. First, defendant claims that the PO Rider was not in existence at the time the purchase order was issued, and, thus, could not have been incorporated by reference. The purchase order was issued in July 1991, and, defendant maintains, the booklet containing the PO Rider was not created until September 1992. However, the September 1992 date set forth in the purchase order refers to a forms booklet, not to the PO Rider in issue. The PO Rider was dated June 1989, and, therefore, existed at the time the purchase order was issued in 1991. Accordingly, it was subject to incorporation by reference.

Second, defendant complains that the PO Rider was not attached to the purchase order as indicated on the face of the purchase order. Defendant, therefore, concludes that the PO Rider was not properly incorporated by reference. However, our review of the record indicates that defendant offered no evidence in support of this allegation. The existence of a disputed fact must be established by

admissible evidence. *Cox v Dearborn Hts*, 210 Mich App 389, 398; 534 NW2d 135 (1995). Therefore, we decline to address this argument further where it is not supported by the record.

Finally, defendant contends that, regardless of the court's resolution of the issues set forth above, recovery is appropriate in quantum meruit. Following its notification that the CTF was not operating as anticipated, defendant issued bulletins and field orders to correct the problems. Defendant argues that such work was beyond the scope of the contract because the bulletins addressed changes to the completed CTF design work.

Defendant misapprehends the circumstances in which recovery in quantum meruit is warranted. Quasi-contractual theories of recovery are precluded where the parties are bound by an express contract which governs the matter at issue. *Martin v East Lansing School District*, 193 Mich App 166, 180; 483 NW2d 656 (1992). We noted above that the contract between the parties specified that any changes to the contract had to be approved by plaintiff in writing. Because the contract expressly addresses this contingency, it would defeat the intention of the parties to allow recovery for "extra-contractual" work where the contractual mechanisms for approving additional work were not followed. See *Martin*, *supra*. Hence, the trial court properly granted summary disposition with respect to defendant's quantum meruit claim.

II

Defendant next argues that the trial court erred in granting summary disposition with respect to its claim of breach of the implied duty of good faith. Defendant's claim is based on a blanket purchase order issued by plaintiff to defendant in February 1994, which plaintiff terminated three weeks later. This termination occurred in the wake of failed settlement negotiations. The circuit court refused to impose a duty of good faith upon plaintiff because the terms of the blanket purchase order provided that plaintiff had the right to terminate the purchase order "at any time without cause."

Defendant first argues that the termination language was not part of the parties' contract because it was not located in the purchase order, but rather in a separate document entitled "General Terms and Conditions." However, our review of the record indicates that the blanket purchase order expressly incorporated the "General Terms and Conditions" document by reference. The form number of the booklet containing the General Terms document was clearly indicated on the final page of the blanket purchase order. We conclude that the termination language was part of the parties' contract. *Martin*, *supra*.

Defendant argues that, regardless of whether the termination language was part of the contract, the general black letter rule that an implied duty of good faith and fair dealing cannot override express contractual terms should not be applied to the instant case due to the disparity in bargaining power between plaintiff and defendant. Defendant bases its argument on dicta found in *United Roasters Inc v Colgate-Palmolive Co*, 649 F 2d 985, 989 (CA 4, 1981). However, *United Roasters* is not binding on this Court because it is a federal case interpreting North Carolina law. Further, we do not find

United Roasters to be persuasive because Michigan law provides that a lack of good faith cannot override an express provision in a contract. *Eastway & Blevins Agency v Citizen Ins Co of America*, 206 Mich App 299; 520 NW2d 640 (1994); see also *General Aviation Inc v Cessna Aircraft Co*, 915 F 2d 1038, 1041 (CA 6, 1990). No evidence suggests that plaintiff and defendant entered into the blanket purchase order agreement other than voluntarily, with full knowledge of the applicable terms. Therefore, the termination language of the contract cannot be overridden by any lack of good faith.

In addition, we conclude that there is no indication in the record of plaintiff's alleged lack of good faith. Defendant offers little other than speculation with respect to plaintiff's lack of good faith, relying primarily on the timing of plaintiff's termination of the blanket purchase order. Without more, this amounts to a *post hoc ergo propter hoc* argument. We do not find defendant's position to be persuasive, nor sufficient to withstand plaintiff's motion for summary disposition.

III

Defendant also advances a fraud claim based upon two arguments. First, defendant argues that plaintiff never intended to tender performance of its obligations when it issued the 1994 blanket purchase order because it terminated the order just three weeks after issuing it. We disagree. Generally, an action for fraudulent misrepresentation may not be based upon future performance unless made in bad faith with no intention to perform. *Boston Piano & Music Co v Pontiac Clothing Co*, 199 Mich 141; 165 NW2d 856 (1917). The record indicates that plaintiff issued blanket purchase orders to defendant annually from 1981 to 1993. Plaintiff again issued a blanket purchase order to defendant on February 25, 1994, in spite of litigation pending between the parties. The trial court scheduled a settlement conference for March 14, 1994. After the settlement conference, it became apparent that the parties were not going to be able to reach a settlement and that the case would proceed to litigation. On March 16, 1994, plaintiff terminated the 1994 blanket purchase order because it had a policy of not doing business with firms involved in litigation against the company. It is apparent from this timeline that plaintiff had no way of knowing whether the case would settle at the time it issued the blanket purchase order. Defendant has failed to offer any evidence to this Court that plaintiff issued the 1994 blanket purchase order without any present intent to perform it.

Second, defendant claims that plaintiff made representations to defendant that it would continue to do business with defendant despite of the pending litigation and despite plaintiff's policy of not doing business with parties litigating against the company, thereby committing the tort of fraudulent concealment. We find no basis for a fraudulent concealment action. The elements of a fraudulent concealment action are (1) a material representation which is false; (2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; (3) that defendant intended plaintiff to rely upon the representation; (4) that, in fact, plaintiff acted in reliance upon it; and (5) thereby suffered injury. *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988). The false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose. *Id.*

Defendant cannot show that it relied to its detriment upon plaintiff's alleged representations of continuing business. Defendant alleges that plaintiff's representations were made in 1993. However, plaintiff issued the blanket PO to defendant in 1994. Defendant admits that plaintiff called defendant before the settlement conference and indicated that it intended to terminate the 1994 blanket PO if a settlement was not reached. Therefore, defendant had knowledge before the settlement conference of plaintiff's intended course of action. Defendant cannot now claim that it somehow relied on plaintiff's 1993 alleged representations of continuing business in making its decision not to settle the case. The trial court properly granted summary disposition of defendant's fraud claims.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power

[1] We refer to the agreement in issue, negotiated in July 1991 and memorialized in July 1993, variously herein as the initial contract and the purchase order.