STATE OF MICHIGAN

COURT OF APPEALS

BENEDICT MANUFACTURING CO., Plaintiff-Appellant,	UNPUBLISHED July 8, 2004
v	No. 242563 Jackson Circuit Court
AEROQUIP CORP., Defendant-Appellee.	LC No. 99-093245-CK

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition. Plaintiff claimed that defendant breached as many as 140 contracts for the sale of goods. The trial court granted summary disposition on the basis of the Uniform Commercial Code's (UCC) provisions concerning the statute of frauds. MCR 2.116(C)(7). We conclude that the trial court erred in determining that plaintiff was bound by the quantity expressed in the purchase orders and that there are genuine issues of material fact that must be submitted to the trier of fact. We therefore reverse.

I. Factual background

Plaintiff supplied defendant with various marine parts for many years. These parts could be broken down into two broad categories: "rings and bands" and "parts other than rings and bands." In 1990, defendant switched from ordering "spot buys," or purchases for a specific quantity of parts that are shipped on a specific delivery date, to "contract buys," purchases for a specific quantity of parts that are shipped over the term of the contract.

Defendant's buyer from 1990 to May 31, 1994, Lois Jones, attested that she had a "verbal understanding" with plaintiff that, for "parts other than rings and bands," she would order a specific quantity of parts that was approximately 80 percent of the parts that defendant would require for a period of one year. Jones further attested that she "had a verbal understanding with Benedict Manufacturing that the full quantity of parts shown on those purchase orders would be purchased by the end of one year whether or not Aeroquip had requirements for the parts." For "rings and bands," she attested that "it was intended that Aeroquip was committed to purchase the full quantity of parts shown on those purchase orders within a reasonable period of time, whether or not Aeroquip had requirements for the parts." In other words, Jones claimed that

Aeroquip agreed to purchase all the parts ordered—whether within one year or "within a reasonable period of time."

After Jones's retirement in 1994, Julia Corbett-Liles became defendant's buyer for marine parts. Plaintiff's principal, Thomas Benedict, testified that he thought that the purchase orders received from Corbett-Liles would be "business as usual," even though he did not discuss his prior verbal agreements with Jones. Moreover, Benedict also testified that he was aware that the purchase orders received from defendant after Corbett-Liles became defendant's buyer contained contract provisions. Benedict testified that he thought the parties' past practices controlled over those provisions. Thus, plaintiff's position was that defendant was obligated to purchase all parts that were ordered via the purchase orders, regardless of whether defendant actually needed the parts.

Defendant's position was that the purchase orders limited defendant's liability for parts to only those parts that it actually required. Thus, if defendant did not send releases for the shipment of the parts previously referenced in a purchase order, defendant would not have to pay for the parts.[1]

Ultimately, defendant's purchase orders referenced quantities of parts for which it never subsequently issued releases. Plaintiff, relying on its understanding of the estimated number of parts required and of the business practices followed in the past, apparently manufactured the entire number of parts referenced by the purchase orders, incurring labor and material expenses in the process. Defendant paid for the specific number of parts ordered in each release, but refused to pay for the additional parts. Plaintiff therefore filed the instant action, contending that defendant breached its contractual obligation to purchase the entire quantity of manufactured parts.

The trial court granted defendant's second motion for summary disposition pursuant to MCR 2.116(C)(7) ruling that plaintiff's claim was limited by the statute of frauds provision in the UCC to the quantity of parts specified in the purchase orders. MCL 440.2201(1).[2]

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[1] The orders in question were divided between orders prefixed with "NB" or "NC." The NB prefix referred to parts intended to fulfill a government contract for the manufacture of six ships by the Bath Iron Works in Bath, Maine, while the NC prefix orders related to parts sought to fill general customer requirements.

[2] At the time relevant to this appeal, MCL 440.2201(1) provided:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500.00 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 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.

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II. Standard of Review

"This Court reviews a grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(7) where the claim is barred by the statute of frauds.

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(C)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994). [*Maiden, supra* at 119.]

III. Relevant legal principles

The parties agree that the issues in this case are governed by the UCC as adopted in Michigan. MCL 440.1101 *et seq*. The UCC "is to be liberally construed and applied to promote its underlying purposes and policies." *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 180; 604 NW2d 772 (1999), quoting *Shurlow v Bonthuis*, 456 Mich 730, 737 n 12; 576 NW2d 159 (1998). One of the UCC's purposes is "to make uniform the law among the various jurisdictions." *Power Press, supra* at 180, quoting MCL 440.1102(2)(c). For that reason, it is appropriate to look to other jurisdictions to seek guidance when interpreting provisions of the UCC. *Id.* Additionally, MCL 440.1103 provides that principles of law and equity shall supplement UCC provisions unless displaced by particular provisions of the UCC itself. Therefore, in the absence of directly controlling UCC provisions, questions are resolved according to general legal principles, i.e., the law of contract interpretation. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 131-132; 602 NW2d 390 (1999). "The primary goal of contract interpretation is to honor the intent of the parties." *Id.*

Generally, the threshold issue whether contract language is clear or ambiguous is a question of law for the trial court. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). Courts must not create ambiguity where none exists. *Mahnick v Bell Co*, 256 Mich App 156, 159; 662 NW2d 830 (2003). A contract is ambiguous if the language is susceptible to more than one interpretation or is inconsistent on its face. *Petrovello v Murray*, 139 Mich App 639, 642; 362 NW2d 857 (1984). A contract, even if inartfully worded or clumsily arranged, is not ambiguous "if it fairly admits of but one interpretation." *Allstate Ins Co v Goldwater*, 163 Mich App 646, 648; 415 NW2d 2 (1987).

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The primary change accomplished by the 2002 amendment of this provision was to increase the dollar limit to $1,000. 2002 PA 15.

"Parol evidence is not admissible to vary a contract that is clear and unambiguous, *In re Skotzke Estate,* 216 Mich App 247, 251; 548 NW2d 695 (1996), but may be admissible to prove the existence of an ambiguity and to clarify the meaning of an ambiguous contract. *Goodwin v Orson E Coe Pontiac, Inc,* 392 Mich 195, 209; 220 NW2d 664 (1974)." *Meagher v Wayne State Univ,* 222 Mich App 700, 722; 565 NW2d 401 (1997).

IV. Analysis

Both parties agree that there was a contract between them for the purchase of marine parts[3]; however, they disagree regarding the form of the contract. Plaintiff contends that the contract was an oral contract negotiated over the telephone,[4] that its terms were defined by the parties' prior course of dealing, and that the purchase orders sent by defendant were simply confirmations of the contract. Plaintiff further asserts that, because the purchase orders contained additional terms that materially differed from the parties' established course of dealing, those material additions were not part of the contract. Defendant contends, on the other hand, that the purchase orders themselves were the contracts, that the contracts were clearly "requirements" contracts[5] under which defendant was only obligated to purchase the quantity specified in each individual contract, and that plaintiff was required to perform according to the terms specified in the purchase orders/contracts.

The court ruled that there was no written contract, as required by the statute of frauds, that the parties' oral contract was evidenced by the purchase orders submitted by defendant, and that plaintiff therefore could enforce the oral contract only to the amount specified in each purchase order. Because, in the trial court's opinion, each purchase order specified a particular quantity of parts, the court determined that the purchase orders satisfied the requirements of the statute of frauds, and therefore plaintiff was precluded from submitting parol evidence to contradict the quantity of parts stated in each individual purchase order.

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[3] There is no dispute that defendant ordered various marine parts from plaintiff and that defendant has paid for those parts it has actually obtained. In fact, even after this action commenced, defendant has continued to periodically send releases for additional parts plaintiff had previously manufactured based on its understanding of the parties' agreement. This lawsuit therefore concerns only those parts previously manufactured by plaintiff but as yet not purchased by defendant.

[4] The parties did not execute a writing incorporating the terms of their oral telephonic negotiations.

[5] A requirements contract has been described as one "in which the seller promises to supply all the specific goods or services which the buyer may need during a certain period at an agreed price in exchange for the promise of the buyer to obtain his required goods or services exclusively from the seller." *Propane Industrial, Inc v General Motors Corp,* 429 F Supp 214, 218 (WD Mo, 1977). The UCC accepts the validity of such contracts. MCL 440.2204(3) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."). See also MCL 440.2306.

The UCC statute of frauds provision applies to the sale of goods and the alleged contract(s) in this case concerned the sale of goods, i.e., marine parts; therefore, MCL 440.2201(1) applies to this case. The statute requires (1) a "writing sufficient to indicate that a contract for sale has been made between the parties" and (2) that the writing be "signed by the party against whom enforcement is sought." *Id.*

The only writing that appears to have been generated in this case is the succession of purchase orders that were sent to plaintiff by defendant to trigger manufacture of particular parts. Defendant listed the specific number of each part to be supplied in response to the purchase order, the number of each part being ordered in total, and the agreed upon price for the parts (apparently derived from the parties' oral negotiations). Plaintiff then performed the contract pursuant to its understanding of the agreement: it manufactured the requested number of parts and shipped them to defendant at the agreed upon price and in the agreed upon time frame when it received a release for a particular number of the manufactured parts.

Aside from the fact that the parties agree that a contract was formed for the manufacture and provision of marine parts, their behavior substantiates the existence of a contract because plaintiff manufactured the parts and supplied them to defendant on demand at a negotiated price when it received the purchase orders and releases. MCL 440.2204(1) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.").

Furthermore, while MCL 440.2201(1) provides that an enforceable contract for the sale of goods over $500 must be in writing, there are statutory exceptions to this requirement. The first exception concerns where a party sends, within a reasonable time, "a writing in confirmation of the contract and sufficient against the sender." MCL 440.2201(2). Because such "confirming writings" must be "sufficient against the sender," they must be "signed" by the sender and contain a statement of quantity. White and Summers, Uniform Commercial Code (4th ed) [White], § 2-5, p 5, see also, *Lorenz Supply Co v American Standard, Inc*, 419 Mich 610, 614; 358 NW2d 845 (1984) ("The requirements of § 2-201 are satisfied if the writing indicates that 'a contract of sale has been made between the parties' and 'specif[ies] a quantity.' 2 Anderson, Uniform Commercial Code (3d ed), § 2-201:97, p 61."). Case law indicates that an actual signature is unnecessary; rather, it is enough if the document contains the letterhead or the buyer's name and address. *Cf. Jem Patents, Inc v Frost*, 147 Ga App 839; 250 SE2d 547 (1978). The purchase orders sent by defendant to plaintiff displayed defendant's corporate logo as well as its plant name and address; this was sufficient to satisfy the "signature" requirement.

The purchase orders contained a statement of quantity. In fact, the dispute between the parties centers on the fact that at least some of the purchase orders contained *two* statements of quantity. Based on this difference in the quantity stated, plaintiff maintains that the contract was for the manufacture of a total number of each part that would then be furnished over a period of time as defendant provided individual releases for portions of that total. Plaintiff further claims that the terms of this contract may be explained by consideration of the parties' previous course of dealing or performance. MCL 440.2202(a). Conversely, defendant maintains that each individual purchase order was a contract that was satisfied by the supplying of the parts called for in the purchase order and that reference to the parties' course of dealing or performance was inappropriate because the terms of the contract(s) were contained in the purchase order(s). The

trial court concluded that the oral contract was enforceable to the extent of the quantity specified in the purchase orders. MCL 440.2201(3)(b); *Lorenz, supra* at 614.

The purchase orders contained a listing of the part number, a description of the part, a due date (although this was sometimes given as "TBA" – presumably signifying "to be announced" – or the typed date was replaced by a hand-written one), a quantity, a price, some further descriptive notations, and an account number. The "NB" purchase orders also contained the following language:

> This purchase order is issued to cover 100% of Aeroquip Division requirements. Specified quantities to be manufactured will be authorized on a release and shipping schedule. This order is subject to reduction or cancellation on evidence of failure to meet Aeroquip's delivery and/or quality requirements. Estimated annual quantities are to be reviewed by Aeroquip and adjusted in demand. Price is to remain firm for the life of this contract.
>
> Estimated annual quantity =
>
> Minimum release quantity =

The "NC" purchase orders followed the above language with statements such as: "Bath 3 yr prices" and "Total Contract = 278 pcs."[6] This created an ambiguity between the two different statements of quantity. Even the "NB" purchase orders were ambiguous with respect to the quantity terms because there was a stated order quantity at the top of the document, but there were also blank provisions for "Estimated annual quantity = ___" and "Minimum release quantity = ___" further down in the contract. Therefore, particularly with respect to the "NC" purchase orders, the typical order included a listing of quantity at the top and a subsequent listing of total quantity without an explanation of the significance of these two figures.

Given these two statements of quantity, and the purchase order language that "This purchase order is issued to cover 100% of Aeroquip Division requirements. Specified quantities to be manufactured will be authorized on a release and shipping schedule," it was equally reasonable to conclude that a purchase order constituted an order for only the quantity of parts listed at the top of the purchase order *or* that the purchase order requested provision of a total number of parts with only a portion of those parts to be sent in response to a subsequently filed release.

MCL 440.2202 provides, in relevant part:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a

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[6] It was also not explained why the "NC" orders – related to other customer orders – would make reference to "Bath 3 yr prices" when it was the "NB" orders that covered the orders for the Bath Iron Works.

> final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement *but may be explained or supplemented*
>
> (a) by course of dealing or usage of trade (section 1205) or by course of performance (section 2208)[.]

MCL 440.2202 permits the parties to explain or supplement the terms of a confirmatory memorandum "by course of performance" pursuant to MCL 440.2208(1).[7] Plaintiff has maintained that the parties' course of performance when executing previous similar contracts for marine parts clearly demonstrated that plaintiff was required to manufacture the total amount of parts initially estimated by defendant (which permitted plaintiff to provide the lowest possible cost-per-part estimate), supply specific quantities from this total as defendant presented a succession of releases, and that, in turn, defendant was required to ultimately purchase the total number of parts it had originally estimated.

The trial court ruled that consideration of the parties' course of dealing or performance was not permissible because there was no ambiguity in the contract to resolve by considering evidence of the parties' course of performance. But, given that the trial court concluded that the contract was an oral contract that was enforceable to the extent of the quantity listed in the purchase order, an ambiguity in the quantity term stated in the purchase orders would call for a parol evidence explanation. MCL 440.2202. Moreover, "Parol evidence . . . may be admissible to prove the existence of an ambiguity." *Meagher, supra* at 722. This Court in *In the Matter of the Estate of Frost*, 130 Mich App 556, 561; 344 NW2d 331 (1984), approvingly quoted the holding of two Washington cases:

> "'When quantity is not precisely stated, parol evidence is admissible to show what the parties intended as the exact quantity,' * * * but where the writing relied upon to form the contract of sale is totally silent as to quantity, parol evidence cannot be used to supply the missing quantity term. *Alaska Independent Fisherman's Marketing Ass'n v New England Fish Co*, 15 Wash App 154, 159-160; 548 P2d 348 (1976), quoting *Hankins v American Pacific Sales Corp*, 7 Wash App 316; 499 P2d 214 (1972).

Contrary to the trial court's view, we find that the listing of two different quantities (or a stated quantity followed by a blank provision for an "Estimated annual quantity" and a

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[7] MCL 440.2208(1) provides, in relevant part:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

"Minimum release quantity" was an ambiguity in the contract language. Parol evidence was therefore properly "admissible to prove the existence of [this] ambiguity and to clarify the meaning of an ambiguous contract." *Id.*

Moreover, defendant does not dispute that the parties had conducted business for a number of years with plaintiff manufacturing parts according to defendant's specifications or that the manufactured parts were supplied to defendant in accordance with the submission by defendant of purchase orders and releases. Pursuant to MCL 440.2208(1), this course of performance was relevant and admissible to explain or supplement the quantity terms that were contained in the purchase orders. *Frost, supra* at 564, citing MCL 440.2202, Comment 2 ("the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.").

Defendant points to the "requirements" language in its purchase order and asks this Court to conclude that this language limited plaintiff to manufacturing only the quantity listed at the top of the purchase orders. However, acceptance of this position would require us to focus on the "requirements" language while at the same time ignoring the "quantity" language that follows after the "requirements" language. This we will not do.

We therefore conclude that, although a quantity is stated in the purchase orders sufficient to take this case out of the statute of frauds, the quantity term is nonetheless ambiguous and parol evidence was admissible to explain the ambiguity. MCL 440.2202(a); *Frost, supra* at 562-563; *Meagher, supra* at 722. The trial court's decision granting summary disposition to defendant is therefore reversed and this case is remanded to the trial court for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood