NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

HOT LIGHTS, LLC, Appellant v. WEATHERFORD U.S. LP, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1245 MDA 2012

Appeal from the Order Entered June 6, 2012
In the Court of Common Pleas of Lycoming County
Civil Division at No(s): 11-00745

BEFORE: BOWES, OLSON, and WECHT, JJ.

MEMORANDUM BY BOWES, J.: Filed: March 12, 2013

Hot Lights, LLC ("Hot Lights") appeals from the June 6, 2012 order granting summary judgment in favor of Weatherford U.S. LP ("Weatherford") based on the statute of frauds. We reverse and remand.

Hot Lights commenced this civil action sounding in contract, promissory estoppel, and quantum meruit to recover damages arising from Weatherford's breach of an oral agreement between the parties for the rental, delivery, set-up and servicing of commercial light-tower units to be used in Marcellus Shale drilling operations. The trial court concluded that the agreement was predominantly a lease of goods, not a service contract, and that the Pennsylvania Uniform Commercial Code ("UCC"), Article 2A, the statute of frauds provision, 13 Pa.C.S. § 2A201 precluded enforcement of the oral agreement. After thorough review, we find a provision of the UCC

entitled, Exception for Leased Goods Received and Accepted, § 2A201(d)(3), to govern this case. Hence, we reverse.

Since we are reviewing the grant of summary judgment and are charged with viewing the record in the light most favorable to the non-moving party, ***Szymanowski v. Brace***, 987 A.2d 717, 721-722 (Pa.Super. 2009), we recite the facts as presented by Hot Lights. Hot Lights is a Texas corporation formed in 2010 for the purpose of the light-tower-unit project with Weatherford. Hot Lights' Response in Opposition to Weatherford's Motion for Summary Judgment ("Hot Lights' Response"), Affidavit of Toby Floyd, Exhibit 1. Weatherford is a limited partnership engaged in the business of operating and renting fishing tools and oilfield equipment. Weatherford's Response to Hot Lights' Interrogatory No. 1. In May 2010, Hot Lights President Toby Floyd learned from Tim Williamson, Weatherford's Operations Manager for its Well Testing Division, that Weatherford was soliciting bids for a light-tower project it had with Talisman Energy USA, Inc. Hot Lights' Response, Affidavit of Toby Floyd, Exhibit 1. Weatherford acknowledges that Mr. Williamson was its employee from March 1, 2010 through August 2, 2010, and that he was the person responsible for collecting and submitting bids for light tower rentals. Weatherford's Response to Hot Lights' Interrogatory No. 5. Mr. Williamson advised Mr. Floyd that if Hot Lights underbid two competing companies, it would receive the bid. Hot Lights' Response, Affidavit of Toby Floyd, Exhibit 1. Hot Lights

submitted a lower bid and, at a May 2010 face-to-face meeting in Williamsport also attended by Jason Everette, the Director of Operations for BEO Service Group, Mr. Williamson[1] told Mr. Floyd that Hot Lights had won the bid. ***Id***.

The agreement provided that, for a lease term of nine months, Hot Lights would furnish fifty new light-tower units and two back-up light-tower units, for a total of fifty-two units at a rental price of $62.50 per unit, together with diesel fuel at a cost of market value plus one dollar. ***Id***. Hot Lights was also responsible for fueling the units, transporting them to and from Weatherford work sites, setting up and breaking down the units, and servicing them.

Following that meeting, Mr. Floyd ordered 52 new light tower units from Robert Davis at Light Towers USA, a division of Turnkey Electric, LLC at a cost in excess of $400,000. Light Towers manufactured the units in June 2010 in order to meet Hot Lights' needs. Hot Lights also purchased two new pick-up trucks and other equipment and supplies necessary to perform the agreement. ***Id***.

On June 21, 2010, Hot Lights emailed Mr. Williamson, informed him that some light units were going to be delivered the next day, and asked that he provide the physical address of the yard. Hot Lights' Response,

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[1] Weatherford has not asserted that Mr. Williamson, admittedly its employee agent, lacked actual or apparent authority to contract on its behalf.

Exhibit 10. Within minutes, Mr. Williamson provided the requested information. ***Id***. When the light towers arrived, Weatherford personnel unloaded the lights and placed them in the yard under the direction of Mr. Williamson. Subsequent deliveries followed on June 25, 2010 and thereafter.

On Saturday, June 26, 2010, Mr. Floyd was advised by Mr. Williamson that the light-tower units had to be onsite, assembled and ready to be installed by Wednesday, June 30, 2010. Mr. Floyd, Dean Dittus, and Josh Nolan drove from Texas to Williamsport and arrived at Weatherford's Williamsport facility on June 28, 2010. Pursuant to Mr. Williamson's directions, Mr. Floyd and his team assembled and tested the units, and each one was fully functional. On June 30, 2010, Mr. Williamson informed Mr. Floyd that the project was delayed, but that he expected it to proceed shortly. Hot Lights' Response, Affidavit of Dean Dittus, Exhibit 6; Amended Complaint, ¶ 27. Throughout the month of July 2010, Mr. Williamson repeatedly told Hot Lights' personnel that the project was delayed. ***Id***.

Mr. Williamson's employment with Weatherford ended on or about August 2, 2010. Mr. Floyd was subsequently informed that Weatherford would not honor the contract made by Mr. Williamson, but that Weatherford hoped to enter into a new contract with Hot Lights for the light tower units. Hot Lights' Response, Affidavit of Toby Floyd, Exhibit 1. Emails between the parties indicate that on November 17, 2010, Lonny Tucker of Weatherford

advised Dean Dittus of Hot Lights that Weatherford was not awarded the Talisman contract. In that same email, Mr. Tucker asked Mr. Dittus to confirm his understanding that Mr. Dittus and "Chip" had worked out a deal to allow Hot Lights to store its equipment in the Fishing and Rental Yard. ***Id***. Emails also suggest that Weatherford was attempting to secure other contracts during this time that would require the use of the lights. When no opportunities materialized, Hot Lights removed the lights. Hot Lights' Response, Exhibit 8.

Hot Lights commenced this breach of contract action to recover approximately $500,000 in damages it sustained due to Weatherford's breach of the contract. Weatherford denied that Mr. Williamson entered into a contractual agreement with Hot Lights on its behalf and, raising a statute of frauds defense, averred that there was no signed writing evidencing such a contract. Furthermore, it maintained that the subject lights were never delivered to Weatherford, and that no one accepted the lights on behalf of Weatherford. Weatherford's Response to Hot Lights' Interrogatory No. 6.

Weatherford filed a motion for summary judgment on April 13, 2012, alleging that Hot Lights' claims were barred by the statute of frauds provision contained in 13 Pa.C.S. § 2A201 of the Uniform Commercial Code. The trial court held that the oral contract was a lease of goods subject to Article 2A of the UCC, 13 Pa.C.S. § 2A201(a), and that the exception for goods received and accepted did not remove the contract from the statute of

frauds, and hence, the contract was unenforceable. It held further that promissory estoppel could not be invoked to circumvent the statute of frauds, and that absent a showing of benefit to Weatherford, Hot Lights had failed to state a claim in *quantum meruit*. Hot Lights moved to amend its complaint to allege additional facts in support of its claims. On June 6, 2012, the trial court denied Hot Lights' motion, finding the proposed amendment insufficient to avert dismissal, and granted summary judgment.

Hot Lights timely appealed to this Court, raising six issues for our review:

A. Does Article 2A of Pennsylvania's Uniform Commercial Code govern Hot Lights' agreement with Weatherford concerning the light-tower-unit project when the agreement was a service agreement, whereby Hot Lights would provide Weatherford with delivery, set-up, and maintenance services?

B. Does the "received and accepted" exception to Article 2A's statute of frauds apply and allow Hot Lights to enforce the agreement with Weatherford concerning the light-tower-unit project when Weatherford took physical possession of the light-tower units, signified to Hot Lights that they were conforming and acceptable, and failed to effectively reject them after a reasonable time for inspection?

C. Does Article 2A's statute of frauds preclude enforcement of Hot Lights' agreement with Weatherford concerning the light-tower-unit project through the doctrine of promissory estoppel when it was a service agreement and Weatherford received and accepted the light-tower units?

D. Does Article 2A's statute of frauds preclude Hot Lights from recovering its reliance damages through its promissory estoppel claim?

E. Did Hot Lights confer a benefit on Weatherford?

F. Should Hot Lights have been permitted to amend its Amended Complaint when the proposed amendments were not against a positive rule of law, the applicable statute of limitations had not run and Weatherford would not have suffered any prejudice?

Hot Lights' brief at 7-8.

When reviewing an order granting summary judgment, our scope of review is plenary. We are not bound by the trial court's conclusions of law. ***Summers v. Certainteed Corp.***, 997 A.2d 1152 (Pa. 2010). Viewing all properly pled averments and facts of record in the light most favorable to the non-moving party, Hot Lights, summary judgment is proper only if there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. ***Stimmler v. Chestnut Hill Hosp.***, 981 A.2d 145, 153 (Pa. 2009). The trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion. ***Szymanowski***, ***supra*** at 721-722.

Hot Lights alleges first that the lease of goods and services was predominantly a service agreement and thus, not subject to the statute of frauds. In support of that proposition, it points to its bid, as well as the bids of its competitors, Light Tower and Land Star. Not only was there a daily rental price for each unit, the bids also included the cost of providing fuel, delivery, set-up, operation and maintenance of the units. According to Hot Lights, the services were so integral to the project that it was first and foremost a service contract, and the fact that the contract involved movable goods did not bring it within the ambit of the UCC.

Hot Lights directs our attention to this Court's decision in ***Cober v. Corle***, 610 A.2d 1036 (Pa.Super. 1992), where we held that in determining whether the UCC governs a contract that involves both the sale of goods and rendering associated services, the issue is which aspect of the contract predominated. We identified certain factors to be examined in making such a determination, including the contract's terms, the relationship of goods and services to the total contract price, and the factual circumstances surrounding the contract's negotiation, formation, and performance. ***Id***. at 1039. Therein, plaintiff sued the seller and assembler of a steel building on a breach of implied warranty theory when the building sustained damage due to condensation problems. Defendant seller maintained that the contract was primarily one for services, that the UCC did not govern, and thus, there were no implied warranties of merchantability and fitness for a particular purpose pursuant to that statute. This Court disagreed, finding that defendant sold a steel building that was delivered as a "kit," which simply had to be assembled. Since the plaintiff had others do all heating, electrical and plumbing work, and the defendant did nothing more than assemble the product he was selling, we held that the transaction was predominantly a sale of goods to which the provisions of Article 2 of the UCC properly applied. ***See also Turney Media Fuel, Inc. v. Toll Bros, Inc.***, 725 A.2d 836 (Pa.Super. 1999) (in a mixed contract for goods and services, counterclaim based on faulty installation of HVAC equipment, not defective

or substandard equipment, was held to be one predominantly for the rendition of services not governed by Article 2 of the UCC).

Hot Lights characterizes the agreement at issue as one predominantly involving the rendition of services. In support of that contention, it urges us to consider the overall project as defined by Talisman, which required Weatherford to provide not only light units, but also the personnel to operate and maintain them. All bids submitted to Weatherford included delivery, set-up, fueling, breakdown and maintenance of the units. In order to provide those services, Hot Lights purchased new vehicles and equipment at a cost exceeding $100,000. Hot Lights personnel traveled from Texas to Williamsport to assemble the units and a team remained to install and operate the light towers.

Weatherford counters that Hot Lights' attempt to circumvent the statute of frauds by characterizing the oral agreement as primarily a service agreement rather than a lease of goods is unpersuasive. It relies upon three federal court decisions applying Pennsylvania law and holding that "whether a contract is classified as sales or service turns on whether the goods or the services are the essential or predominant element of the transaction." ***Matthews v. Metro. Contract Carpets***, 1988 U.S.Dist.LEXIS 13008, at *4 (E.D. Pa. 1988) (finding MCC's contract to remove existing carpet and install a wood parquet floor was predominantly a construction contract not governed by the UCC Article 2); ***Advent Sys. v. Unisys Corp.***, 925 A.2d

670, 676 (3d Cir. 1991); ***KSM Assocs., Inc. v. ACS State Healthcare, LLC***, 2006 U.S. Dist. LEXIS 14261, at *14 n.2 (E.D.Pa. 2006) (holding that in mixed goods and services contracts, one determines which predominates by considering the contract's main objective and the compensation structure of the agreement).

Weatherford contends that one need only look at the alleged oral contract to see that the main objective of the contract was the rental of the light units for Weatherford sites. The daily rental of the lights comprised the bulk of the compensation, and, according to Weatherford, the services were merely incidental to the lighting. In further support for its position, Weatherford directs us to Hot Lights' own pleadings wherein it characterizes the oral agreement as one for the rental of fifty lighting units.

It appears that the main objective of the contract was the rental of lighting, which included the lights, transport, and the personnel to maintain and operate them on site. The trial court thusly concluded that the oral agreement was predominantly a long-term rental of goods governed by Article 2A of the UCC. We find support for that conclusion in the fact that the rental cost of the light units represented a significantly higher percentage of the contract price than the costs of delivery, set-up, maintenance and operation of the lights. However, even applying the statute of frauds provision of the UCC herein, we agree with Hot Lights that its requirements are satisfied and the oral agreement is enforceable because

Weatherford received and accepted the leased goods.[2] ***See*** 13 Pa.C.S. § 2A201(d)(3) ("A lease contract that does not satisfy the requirements of subsection (a), but which is valid in other respects, is enforceable: (3) with respect to goods that have been received and accepted by the lessee.").

Hot Lights argues that Weatherford received and took control of the light units when it permitted them to be delivered to its facility. Weatherford employees unloaded the light towers and placed them in the yard under Mr. Williamson's direction. Furthermore, Mr. Williamson told Mr. Floyd to assemble the lights by June 30, 2010, an indication that Weatherford treated the light towers and the Hot Lights servicing personnel as its own, establishing acceptance. ***See*** 13 Pa.C.S. § 2A515 (defining acceptance of leased goods as the lessee signifying that the goods are conforming or failing to make an effective rejection of the goods under § 2A509(b)). Furthermore, according to Hot Lights, Weatherford's failure to effectively reject the light shipments within a reasonable time for inspection constituted

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[2] In the instant case, although the record contains numerous writings, including a bid, emails, and signed delivery receipts, Hot Lights did not argue that the written memoranda were sufficient to satisfy the statute of frauds. A memorandum for statute of frauds purposes must be a "writing sufficient to indicate that a contract for sale has been made between the parties and signed. . . ," UCC § 2-201(1), and may include a confirmation following an oral contract. The purpose of the requirement is to ensure that "the offered oral evidence rests on a real transaction." UCC § 2-201, comment 1. However, memoranda that are sufficient to satisfy the statute of frauds do not automatically establish that a contract was made.

acceptance. As provided in the agreement, Hot Lights employees assembled and tested the light towers and there was no issue that the goods were non-conforming. More importantly, Hot Lights contends that a rejection based on lack of an agreement could and should have been communicated when Hot Lights asked for the address of Weatherford's facility for delivery purposes. Since more than thirty days elapsed before Weatherford advised Hot Lights that there was no agreement, Hot Lights maintains the untimely rejection constituted acceptance.

Weatherford counters that it neither received nor accepted the light tower units. Weatherford argues that it never took physical possession of the lights; they were merely stored at their facility and storage was not the equivalent of possession and acceptance. It is Weatherford's position that the transfer of possession would only have occurred when the lighting units were removed from the yard and placed on a worksite.

The trial court concluded that the "evidence shows that [the light towers] were simply being stored at that facility, however, and that [Weatherford] never took possession of them." Trial Court Opinion, 6/6/12, at 2. The trial court did not elaborate on the basis for its conclusion. To the extent that it relied upon the affidavit of Weatherford employee Lonny Tucker that the lights were stored as a courtesy to Hot Lights, that reliance was misplaced. Oral testimony alone, either through testimonial affidavits or depositions of the moving party or the moving party's witnesses, even if

uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact. ***See Nanty-Glo v. American Surety Co.***, 163 A. 523 (Pa. 1932); ***Penn Center House, Inc. v. Hoffman***, 553 A.2d 900 (Pa. 1989); Comment to Pa.R.C.P. 1035.2.

We look to UCC Article 2 for additional guidance in determining when purchased goods are received, finding it analogous to the lease of goods in this regard. The receipt of goods is defined as taking actual physical possession of them. 13 Pa.C.S. § 2103(a). Acceptance is either treating the goods in a manner inconsistent with the seller's ownership, signifying to seller that the goods are conforming, or failing to make an effective rejection. 13 Pa.C.S. § 2A515. For a rejection to be effective, the lessee must notify the lessor "seasonably", *i.e*. within a reasonable time after tender or delivery. 13 Pa.C.S. § 2A509. The comment to § 2-201(3)(c) of Article 2 states that "[r]eceipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists."

In the instant case, Hot Lights pled and offered evidence that it delivered the light towers and that Weatherford employees accepted delivery at their facility. Weatherford employees used their forklifts to unload the light units from the delivery trucks and, under Mr. Williamson's direction, placed them in the yard. Hence, Weatherford exerted overt physical control over the goods. Additionally, Weatherford manager Williamson directed Hot

Lights' employees to assemble and test the light towers. Such an order was consistent with Weatherford's assumption of control over both the light units and Hot Lights' personnel, who were obligated by the agreement to assemble and service the light-towers. Furthermore, the act of assembling and testing of the light units was itself more than mere storage. Weatherford's contention that there could be no transfer of possession until Hot Lights moved the light-tower units to a work site is inconsistent with the facts.

The trial court was compelled to consider the evidence and all reasonable inferences therefrom in the light most favorable to Hot Lights. It failed to do so. We find sufficient evidence of Weatherford's receipt and acceptance to satisfy the statute of frauds and thus, we find summary judgment to have been improperly granted on that basis.

The trial court held that the statute of frauds also applied to Hot Lights' promissory estoppel claim, that the requirements had not been met, rendering summary judgment was also proper on that claim. Having concluded that the statute of frauds does not operate to bar Hot Lights' breach of contract claim, it necessarily follows that it does not stand as an impediment to Hot Lights' promissory estoppel claim. Should Hot Lights be unsuccessful on its breach of contract claim, it may still be able to recover expenditures made in reasonable reliance on this alternative theory.

Next, Hot Lights contends that the trial court erred in concluding that Weatherford did not receive any benefit from Hot Lights' performance and dismissing its *quantum meruit* claim. It alleges that it is entitled to recover the damages it incurred in partial performance of a contract, even if that contract is unenforceable. ***See Stalnaker v. Lustik***, 745 A.2d 1245 (Pa.Super. 1999). This equitable doctrine "imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another. In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched." ***Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co., Inc.***, 933 A.2d 664, 668 (Pa.Super. 2007). A party who has been unjustly enriched at the expense of another must make restitution to the other for the value of the goods provided or the services performed.

> The elements of unjust enrichment are "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." The most significant element of the doctrine is whether the enrichment of the defendant is unjust; the doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff. Where unjust enrichment is found, the law implies a quasi-contract which requires the defendant to pay to plaintiff the value of the benefit conferred. In other words, the defendant makes restitution to the plaintiff in quantum meruit. ***Lackner v. Glosser***, 2006 PA Super 14, 892 A.2d 21, 34 (Pa.Super. 2006) (quoting ***AmeriPro Search, Inc. v. Fleming Steel Company***, 2001 PA Super 325, 787 A.2d 988, 991 (Pa.Super. 2001)). By its nature, the doctrine of quasi-contract,

> or unjust enrichment, is inapplicable where a written or express contract exists. ***Id***.

Id. at 668-669.

Hot Lights maintains that it conferred a business advantage upon Weatherford because the latter had ready access to fifty-two light-tower units and a crew to transport, install, operate, and maintain the lights. Thus, Weatherford could include lighting in bids and gain a competitive advantage over other companies that would have to wait for such units to be acquired and delivered. Hot Lights illustrated the benefit by referencing the Talisman deal. Talisman solicited a quotation from Weatherford that was to include not only the cost per unit and freight charge, but also the lead-time. Hot Lights' Response, Exhibit 2. Thus, the time it would take a bidder to procure and provide the requested equipment was a factor weighed in Talisman's award decision.

Weatherford denies that it received any tangible benefit from the presence of the light towers at its facility because it did not use the light units without making payment. However, the record confirms that Weatherford was still vying for the Talisman bid for several months after the delivery of the units. Emails exchanged between the parties indicate that the light units remained in the Weatherford yard in reliance upon Mr. Tucker's representations that the Talisman contract had not yet been awarded. The presence of the light units at Weatherford's facility, ready to

immediately deploy to a site designated by Talisman, implicitly offered an advantage to Weatherford in competing for that contract.

We find the record sufficient to raise genuine issues of material fact regarding whether the ready access to Hot Lights' light-towers at its facility conferred a benefit upon Weatherford. Hence, the trial court erred in entering summary judgment on this *quantum meruit* claim.

Finally, Hot Lights contends that the trial court abused its discretion in denying it permission to amend its amended complaint when the proposed amendments were not against a positive rule of law, the applicable statute of limitations had not run, and Weatherford would not have suffered any prejudice. The proposed amendment was intended to clarify the nature of the agreement and buttress Hot Lights' claim that the contract was primarily a service agreement rather than one for the lease of goods subject to the statute of frauds. The trial court denied Hot Lights permission to amend its complaint because the proposed amendments would not have altered its conclusion that the contract was primarily one for the lease of goods rather than services, and barred by the statute of frauds.

In light of our holding that the statute of frauds does not bar Hot Lights' claims, the trial court's rationale for denying the proposed amendment fails. While we suspect our disposition obviates Hot Lights'

desire to amend, we see no impediment to amendment.[3] As Hot Lights correctly points out, permission to amend is a matter of trial court discretion, but our Supreme Court has held on numerous occasions that such permission should be liberally granted to secure the disposition of cases on their merits. ***Piehl v. City of Philadelphia***, 987 A.2d 146 (Pa. 2009).

For all of the foregoing reasons, the order granting summary judgment is reversed and this matter is remanded for further proceedings.[4]

Order entering summary judgment reversed. Case remanded. Jurisdiction relinquished.

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[3] The proposed amendment was not contrary to law, nor did it state a new cause of action after the statute of limitations had run. Weatherford made no claim of prejudice or surprise. Weatherford's sole argument in support of the trial court's denial of the amendment was that such amendment would have been futile.

[4] We note that Hot Lights argued below that summary judgment was premature and complained that discovery had not been completed. It appears that no depositions were taken in this case, perhaps because the trial court had only just granted Hot Lights' motion to compel discovery that included the names and addresses of present and former Weatherford employees who may have knowledge of the dealings between the parties. According to the trial court's scheduling order dated July 26, 2011, the cut-off date for completion of discovery was July 6, 2012, and the last date for the filing of dispositive motions was July 16, 2012. The within motion for summary judgment was filed on April 13, 2012, long before either cut-off date. While the filing of a motion for summary judgment is sanctioned any time after the pleadings have closed, Pa.R.C.P. 1035.2, we discourage the practice of entertaining such motions before the parties have had an opportunity to engage in meaningful discovery that could flesh out what might be a valid claim.