IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ASSET RECOVERY SERVICES, INC., LLC, Plaintiff,	)	
v.	)	C.A. No. 1999-10-124
PROCESS SYSTEMS, INTEGRATION, INC., Defendant.	)	

Submitted: January 10, 2002

Decided: February 6, 2002

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FINAL ORDER AND DECISION

Plaintiff Asset Recovery Services, Inc., LLC ("ARS"), a Delaware limited liability company with its principal place of business in Wilmington, Delaware, brings this action for breach of contract and fraud against Defendant Process Systems Integration, Inc. ("PSI"), an Arkansas corporation with its principal place

of business in Fayetteville, Arkansas[1]. Trial took place on January 10, 2002. Following the receipt of testimony and evidence, the Court reserved decision. This is the Court's Final Decision and Order. For the reasons set forth below the court enters judgment in favor of the defendant. Each party shall bear their own costs.

The Facts

Following trial the Court finds the relevant facts to be as follows. ARS is in the business of selling industrial equipment, and is owned by Tony Mitlo ("Mitlo"), who is also the president. Richard G. Caywood ("Caywood") is the owner and president of PSI, which is in the business of repairing and re-selling manufacturing equipment. Mitlo basically liquidates idle surplus equipment. Campbell Soups is his main client who contacted him in this matter. Mitlo received a phone call from Campbell Soups legal department concerning selling a contaminated spiral freezer" and "CO2 holding tank" ("the equipment") to defendant. Sal Colangelo of Campbell Soup mentioned Caywood as a prospective buyer when he contracted Mitlo. During April of 1999, Mitlo and Caywood

[1] Count I of the complaint alleges breach of contract and debt. Count II alleges intentional misrepresentation to pay for the subject equipment as detailed in Exhibits "A" and "B" to the complaint. The complaint seeks $6,000 plus pre and post judgment interest at the legal rate and attorneys fees. Defendant has denied liability and asserts failure to mitigate and lack of personal jurisdiction.

subsequently negotiated with regard to the purchase of the equipment which was then located in Arkansas. The parties subsequently negotiated a contract where PSI would purchase the equipment from ARS for a total contract price of $6,000.00.

Within a short period of time, contract documents were drawn up and sent to Caywood. On April 29, 1999, Caywood signed and executed a sales contract as well as an equipment sales contract addendum. (Plaintiff's Exhibits 4 and 5). The sales contract sets forth the sales price for the equipment of $6,000.00, with a modification in writing indicating that removal of the equipment was "at Caywood's convenience". The addendum to the contract also specified that the equipment was to be sold "as is" and "where is." Additionally, the "Equipment Sales Contract Addendum" provided that if a dispute were to arise concerning the terms of the sale, the governing law and legal venue would be the State of Delaware. (Plaintiff's Exhibit #5) Attached to the sales contract was a "Sales Contract Detail" listing the items being purchased, namely the "Contaminated Spiral Freezer" and "CO2 Holding Tank" at a price of $6,000. (Plaintiff's Exhibit 6).

After Caywood signed the contract documents on April 29, 1999, he issued a check to Mitlo in the amount of $6,000.00. That same day, Caywood and Mitlo had further discussions concerning the possibility of purchasing additional equipment. However, an argument subsequently ensued between Mitlo and Caywood as to whether Mitlo allegedly made some allegations concerning

Batchmaster and Caywood operating as silent partners. Caywood believed Mitlo caused plant management to notify him that he would no longer be welcome on the Campbell Soup plant premises.

ASR was notified by PNC Bank on May 4, 1999 that PSI's $6,000 check deposited April 30, 1999 had been stopped by its maker, PSI. (Plaintiff's Exhibit 8). Thereafter, Milt Ney ("Ney") of ARS wrote Caywood on May 3, 1999 indicating, inter alia, that Caywood should honor the contract agreement and issue a cashier's check or wire transfer of $6,000.00 to ARS within 48 hours. (Exhibit #1). Ney also reminded Caywood of the sales contract provisions requiring venue in Delaware in the event litigation occurred between the parties.

In response, Caywood sent a letter by facsimile to Mitlo dated May 10, 1999. (Plaintiff's Exhibit 2). Caywood outlined in writing his concerns about the freezer belt and stated that he wanted further assurances that the belt was available before he issued another check. Caywood also represented that he remained ready, willing, and able to perform the terms of the contract. On May 13, 1999, a representative of ARS, Angelo Mitlo, Mitlo's son, issued a letter to Caywood stating the contract was "nil and void" and the equipment was no longer available to PSI. (Plaintiff's Exhibit 3). At this point, Caywood testified at trial that he considered this letter to indicate the contract was now cancelled. Mitlo testified at trial, however, that his son Angelo did not have authority to write such a letter even though the same was written on ARS letterhead and followed a business meeting and discussion directly with his son.

The parties did nothing further until October 13, 1999, when Mitlo filed the instant complaint with this Court. Between May 1999 and presently, Caywood has never taken constructive or actual possession of the equipment. According to Mitlo, the equipment remained at 2000 Pump Station Road in Arkansas for approximately four months.

On or about August 30, 1999, Mitlo purchased airline tickets and flew to Arkansas to oversee the process of loading and moving the equipment to be stored in a facility in Wilmington, Delaware. (Plaintiff's Exhibit 9). Mitlo stayed 2 nights at rate of $181.39. (Plaintiff's Exhibit 10). (Defendant's Exhibit 3). Mitlo testified at trial and submitted evidence of the additional cost to load and ship the equipment to Delaware. There were three separate bills; the first from Harris Transport Company in the amount of $2,228.00 and two from Multi-Craft Contractors in the amount of $2,760.00 and $4,180.00. (Plaintiff's Exhibits 11-13). Mitlo did testify at trial that approximately 10% of the equipment loaded and shipped was not that related to this case or the equipment. On or about September 28, 1999, the equipment arrived for storage in Wilmington at a warehouse owned by Mitlo where it still remains. Mitlo testified at trial that the equipment takes up approximately 5-6,000 square feet and that it costs $2.50 per square feet even though Mitlo owns the warehouse.

Discussion

Following trial, the parties raised three (3) issues for the court to resolve.

First, defendant raised again the issue of lack of personal jurisdiction as an affirmative defense. C.C.P.C.V.R. 12(b)(2). This matter was presented and argued to this judge on February 4, 2000 and was denied. Nothing new was presented at trial and this court again denies this motion with prejudice for the same reasons.

Second, the court must decide upon the trial record whether there was a material breach of contract executed between the parties on April 29, 1999 for the sale of the equipment.

Third, the court must decide if it decides material breach occurred and the appropriate measure of damages. The decision of the court with regard to the last two (2) issues shall be set forth in the final section of this Order and Opinion.

The Law

When there is a written contract, the plain language of a contract will be given its plain meaning. Phillips Home Builders v. The Travelers Ins. Co., Del. Super., 700 A.2d 127, 129 (1997). The party first guilty of material breach of contract cannot complain if the other party subsequently refuses to perform. Hudson v. D.V. Mason Contractors, Inc., Del. Super., 252 A.2d 166, 170 (1969). In order to recover damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract. Emmett Hickman Co. v. Emilio Capano Developer, Inc., Del. Super., 251 A.2d 571, 573 (1969). Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that party would have been in had the breach not

occurred. Delaware Limousine Service, Inc. v. Royal Limousine Svc., Inc., Del. Super., C.A. No. 87C-FE-104, Goldstein, J., 1991 WL 53449 (April 5, 1991). At the same time, however, a party has a duty to mitigate once a material breach of contract occurs. Lowe v. Bennett, Del. Super., 1994 WL 750378, Graves, J. (December 29, 1994).

Decision and Order

There is no dispute that the parties entered into a binding written contract regarding the purchase of the contaminated spiral freezer and CO2 holding tank. The central dispute in the instant action deals with whether there was a material breach of the contract by Caywood, and if so what are ARS's damages. It is clear from the testimony and evidence that Caywood breached the instant contract when he stopped payment on PSI's $6,000 check. This stop payment by Caywood amounts to a material breach of contract which would justify non-performance by ARS. Considering all the evidence and testimony presented at trial there is no question a material breach occurred of the contract by PSI.

At the close of the trial after closing statements the court requested argument from counsel. The court noted that plaintiff's client was in actual possession of the subject equipment but that the plaintiff was seeking the full value of the equipment, $6,000.00 as pled in ARS's complaint.

As defendant has set forth in its post trial brief and the following law applies:

> …If, on the breach of a contract promise, the now defaulting party is seeking damages to protect his expectation interest – that is, asking to be placed in the same financial position in which he would have been placed had the promesor performed – the loss or injury sustained because of the breach, agreed to be on full performance, is the general measure of damages. Simply because these damages are difficult to ascertain is no reason to allow recovery of the contract price.

22 Am. Jur. 2d Damages §49 (1988). See also J.J. White, Inc. v. Metropolitan Merchandise Mart, Del. Super., 107 A2d 892, 894 (1954); 5 Corbian, Contracts §992; McCormick Damages 5561; "Willisten, Contracts §1338." " The award of damages is meant to compensate the injured party with the losses caused and gains prevented by defendants breach." Restatement 2d. Contracts § 347. "… the traditional measure of damages is that which is utilized in connection with an award of compensatory damages, whose purpose is to compensate a plaintiff for its proven factual loss caused by defendant's wrongful conduct. To achieve that purpose, compensatory damages are measured by plaintiffs 'out-of-pocket' actual loss". Strassberger v. Eavly, Del.Ch. 752 A2d 557 (2000), See also American General Corp. v. Continental Airlines Corp., Del. Ch. 622 A2d 1(1992); aff'd. 620 A2d 856.

This court offered to plaintiff after closings statements to address the factual record as to damages by two (2) methods. First, the court offered to open the record and receive additional evidence. Second, the court offered to allow plaintiff to address the issue of damages by post trial affidavits. Plaintiff declined both offers from the Court.

It is clear that with regards to the issue of compensatory damages to the breach, plaintiff offered simply no evidence at trial as to the current or actual value of the equipment. Plaintiff has retained actual and/or constructive possession and control of the equipment since the breach by PSI on April 29, 1999. ARS offered no factual evidence at trial as to what actual loss or injury it sustained and now seeks at trial the full value of the equipment at the time of sale. Whether the equipment is of little or no value, no evidence appears in the trial record. In plaintiffs post trial memorandum it also seeks $26,843.39 as total damages resulting from defendant's breach of contract. Plaintiff lists $6,000 as lost profits from sale even though this figure represents the sales price of the equipment. Plaintiff never submitted any evidence in the trial record what "lost profits" to value of the equipment and sales price in order for the court to decide the issue.

With regard to the other damages set forth in plaintiff's post trial memorandum the court finds by a preponderence of the evidence that these items were, in part, speculative and that plaintiff failed to mitigate its damages. The Court finds ARS also failed to meet its burden by a preponderence of the evidence that these damages were proximately caused by the alleged breach by PSI, Lee v. Brown; Del. CCP, C.A. No. 1998-08-106, 2000 WL 332 75028. The subject equipment remained in Arkansas for over four (4) months from May 13, 1999 to September, 1999. No evidence in the trial record indicates that plaintiff attempted to advertise in a trade journal, newspaper or publicly offer for sale the equipment during this time period. Plaintiff is still in actual possession of the equipment and

no attempts in Arkansas were made to dispose of the equipment. All of the damages listed in plaintiff's post trial memorandum would have been avoided if any reasonable steps were made by plaintiff to avoid the losses. Hanner v. Rice, Del. Super., No. 98A-11-013, 2000 WL 303 458, Barron, J. (January 3, 2000). Only when the court received plaintiff's January 31, 2002 answering brief could the court understand the reason ARS traveled all the way to Arkansas, hired a rigging company to load and transport the equipment all the way back to Delaware. Plaintiff presented no testimony at trial on this reason; nor did ARS file affidavits or accept the Courts' offer to open the trial record to explain the issue. Based upon the evidence presented at trial, however, the court finds it cannot conclude these efforts in moving the equipment to Delaware four months later were reasonable or necessary by ARS as the non-defaulting party. No efforts were made to minimize ARS' damages by even attempting to sell or dispose of the equipment in Arkansas for four (4) months.

Clearly, the court must conclude that plaintiff as the non-defaulting party made no reasonable effects to avoid these losses which it seeks as damages. 22 Am.Jur 2d damages §505 (1988). Plaintiff should not be made whole for losses resulting from the default which could have been avoided "without undue risk, burden, or humiliation". 22 Am. Jur. 2d Damages §507; Restatement Second, Contracts §350 (a) (1979); Duncan v. Thera Tx, Inc; Del. Super., 775 A2d 1019, 1026 (2001).

Finally, the Court finds no evidence in the trial record exists by a preponderence of the evidence why plaintiff was compelled to move this equipment from Arkansas to Delaware and incur these additional costs. No affidavits appear in the post trial record and plaintiff has attempted to explain ARS's reason for moving the equipment outside of the trial record. To now seek $26,843.39 as damages for a contract the parties clearly intended to take place in Arkansas in April, 1999 has not been proven in this trial record. It is clear to this court that much of the transportation costs as wages for Mitlo in fall, 1999 were not proven by a preponderence of the evidence as actual losses or damages as a direct result of the breach of this contract of April, 1999 in Arkansas. Only oral argument was presented on the loss wages claim which the court specifically finds insufficient.

Plaintiff presented no argument or evidence as to the fraud allegations in Count II of the complaint. Nor were these allegations proven by a preponderence of the evidence at trial.

The Court finds that plaintiff failed to prove by a preponderence of evidence any actual loss or lost profits to the breach. The court also finds plaintiff failed to mitigate any alleged damages. No attorney's fees are warranted in the action. Each party shall bear their own costs.

IT IS SO ORDERED this _____ day of February, 2002.

_____
John K. Welch
Associate Judge