

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

RAPOCA ENERGY COMPANY, L.P.,)	
)	
Plaintiff,)	Case No. 1:00CV00162
)	
v.)	OPINION AND ORDER
)	
AMCI EXPORT CORPORATION,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Wade W. Massie, Penn, Stuart & Eskridge, Abingdon, Virginia, for plaintiff; James S. Chase, Hunton & Williams, Knoxville, Tennessee, for defendant.

In this case involving the validity and existence of certain contracts for the purchase and sale of coal, I deny the motion to amend my findings of fact and conclusions of law announced at the close of the liability bench trial.

I

Rapoca Energy Company, L.P. (“Rapoca”), filed a declaratory action seeking for this court to hold that certain contracts for coal claimed by AMCI Export Corporation (“AMCI”) were invalid and nonenforceable. AMCI counterclaimed for damages under the alleged contracts. The parties waived a jury, and I bifurcated the issues, leaving the claim for damages under the counterclaim for later resolution if

necessary. The trial to determine liability was held before me on March 1, 2 and 5, 2001. At the conclusion of the evidence, pursuant to Federal Rule of Civil Procedure 52(a), I made findings of fact and conclusions of law orally from the bench. Because I found that valid and enforceable contracts did exist between the parties, the case will proceed to trial to determine any damages owed by Rapoca under AMCI's counterclaim.

On March 7, 2001, Rapoca filed a Motion to Amend or to Make Additional Findings followed on March 9, 2001, with an Amended Motion to Amend or to Make Additional Findings. The motion, as amended, requests me to define the terms of the oral contract confirmed in writing by purchase order ("P.O.") 87300 in a manner favorable to Rapoca. (Joint Ex. 3,4.) The parties have presented written and oral argument on this motion, and it is ripe for decision.

Except for the addition of specific references to the record,¹ the findings and conclusions in section II reflect my oral announcement at the close of trial. Section III constitutes my discussion of the request for amended findings.

¹ Since trial, a transcript of the evidence has been prepared.

II

I have conducted a bench trial on the questions raised by Rapoca's declaratory judgment action. The central issue is whether or not there are enforceable contracts for the sale and purchase of coal outstanding between the parties.

In deciding this issue, I have determined that AMCI has the burden of proving the existence of the alleged contracts. While Rapoca is the plaintiff in the declaratory judgment action, under familiar principles, the burden of proof rests on the party that has the so-called coercive claim – that is, the party who is seeking traditional relief. *See Reasor v. City of Norfolk*, 606 F. Supp 788, 793 (E.D. Va 1984). A party seeking to recover under a contract has the burden of proving the existence of the contract by a preponderance of the evidence, that is, whether it is more likely than not that the contract exists. *See Valjar, Inc. v. Maritime Terminals, Inc.*, 265 S.E.2d 734, 736 (Va. 1980).

The parties are agreed that I must apply Virginia law in order to determine any legal questions as to the formation of the alleged contracts. Since these contracts involved the sale of goods, the Virginia version of the Uniform Commercial Code applies. The UCC has liberalized more traditional legal principles as to the formation of contracts. Under § 8.2-204, 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. *See* Va. Code Ann. § 8.2-203 (Michie 1991 & Supp. 2000). Moreover, under that section, even though one or more terms are left open, a contract does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. *See id.* Nevertheless, in the leading Virginia case on § 8.2-204, the Virginia Supreme Court cautioned that,

[w]hile it is true that the U.C.C. greatly modified the rigors of the common-law rules governing the formation of contracts, it remains a prerequisite that the parties' words and conduct must manifest an intention to be bound. Although they may make a contract which deliberately leaves material terms open for future determination, no contract results where their words and conduct demonstrate a lack of intention to contract.

Flowers Baking Co. of Lynchburg, Inc. v. R-P Packaging, Inc., 329 S.E.2d 462, 465 (Va. 1985).

The first and central question I must determine is whether there was an oral agreement between Gary Chilcot and Robert Moir made in July of 2000, and if so, what was the nature of that agreement. In reaching that factual decision, I rely not only as to my judgment as to the credibility of the witnesses, having had the opportunity to observe them testify, but on all of the underlying circumstances.

After careful review of the evidence, I accept as more credible Robert Moir's version of his conversations with Gary Chilcot, and specifically the conversations at O'Charley's restaurant, and the later telephone conversations, including the conversation in early July in which the deals were actually struck. I also accept Mr. Moir's and Mr. Porco's version of the events at the October 13 meeting in Bristol.

A key written piece of evidence offered by Rapoca to support its claim of an agreement only for a small "spot order" of coal in fact supports AMCI's position. This document is entitled "UCC Customer Order Information Sheet." (Joint Ex. 50.) Chilcot's explanation of the notation at the bottom of the page is not credible. The written comment, "Exact tonnage will be confirmed next week to Kathy with P.O. thru March 2001," more likely indicates that Rapoca expected a P.O. from AMCI which would confirm an agreement that had been made for Rapoca to provide AMCI with large quantities of coal through March 2001. Chilcot's explanation that this language was only hopeful or speculative (Tr. 1-121) is belied by the language of the document.

I believe AMCI's assertion that Gary Chilcot verbally agreed to sell coal of the qualities and amounts provided in P.O.s 87300 and 87400. As evidenced by the so-called O'Charley's note (Joint Ex. 43), Gary Chilcot knew that AMCI was in the market for a large order of coal to be delivered in 2000 and 2001. In an internal e-mail dated June 27, 2000, Moir reported to Ernie Thrasher that Rapoca had agreed to sell

them 90,000 tons of coal with specifications that substantially match those that eventually were indicated on P.O. 87300. (Joint Ex. 45, 3.) Bob Moir testified that because of the increase in the total amount of coal awarded under the Rautaruukki contract and because of additional needs that arose in July, the total tonnage was increased to 140,000, which was agreed to by Chilcot by phone. As indicated, I accept Moir's version of this conversation.

Rapoca claims that the P.O.s were so substantially different than any previous discussions that they appeared to be "a joke." (Tr. 1-98.) Yet, Rapoca never put any rejection of the P.O.s in writing until much later, in Ken Stacy's October 20, 2000, letter which said there was a "misunderstanding." (Joint Ex. 25.) This letter is significant. The letter itself references no previous conversations between the parties in which Rapoca rejected the P.O.s. (*Id.*) It does not say, "As I told Mr. Moir," or "As you were told in the meeting of October 13." Likewise, Ken Stacy's internal memorandum of November 3, 2000, (Pl. Ex. 1.), never states that the P.O.s were verbally rejected, as he now claims in his testimony. Instead, and significantly, he states in the memorandum that the P.O.s were merely "never signed or accepted." (*Id.*)

Additional evidence that the P.O.s were accepted consists of the two invoices issued by Rapoca which reference P.O. 87300. (Joint Ex. 12, 19.) Rapoca's explanation that Kathy Woodson acted alone and without any authority to mistakenly

put the P.O. numbers on the invoices is not believable. Ms. Woodson is an experienced executive with Rapoca's coal sales company, and I do not believe that she would have easily made a mistake of this significance. If the P.O.s were so drastically different from Rapoca's understanding of the deal, it is more likely that she could not have made the assumption that the P.O.s related to the shipments that had already been made. It makes more sense to me that, as indicated in Chilcot's "Customer Order Information Sheet" (Joint Ex. 50), Ms. Woodson was fully expecting a P.O. for a larger quantity of coal and that the July and August shipments were but the first of several to continue into 2001.

Finally, the parties have introduced a copy of P.O. 87300 found in Rapoca's custody, which reflects a handwritten change in response to an addendum sent by AMCI on August 10, 2000. (Joint Ex. 55.) The fact that Rapoca received an addendum to the P.O. and someone at Rapoca responded not by rejecting the validity of the P.O.s, but rather by amending a copy of the P.O., indicates that Rapoca had accepted the P.O.s and was using them in the normal course of business.

One of Rapoca's principal arguments is that the specifications for P.O. 87300 were internally inconsistent and thus a reasonable seller in Rapoca's position would never have agreed to this order. In addition, as to P.O. 87400, Rapoca argues that the sale price was too low for a reasonable seller to have agreed to it. Finally, Rapoca

argues that it would not have had the coal of this quality and type available in order to perform these contracts.

Of course, under the objective theory of contracts, a party's assent to a contract is determined only by its objective manifestations, and not by its internal considerations or intent. Thus, so long as the agreements were in fact made, the fact that they might be burdensome or unwise for Rapoca is irrelevant. Moreover, while I have considered this evidence in my determination of whose version of the events is more likely to be true, I do not find this evidence determinative. There is sufficient evidence that similar coal could be found, and the fact that a party may have made a misjudgment about price is not an uncommon experience. Moreover, in keeping with my acceptance of AMCI's evidence generally, I find that the prices contained in the P.O.s were not out of line with prevailing market prices.

The sum of these findings is that AMCI's version of the facts is better supported by the testimony and exhibits in evidence than Rapoca's.

The next question is whether Chilcot had the authority to enter into these oral contracts for the sale of coal on behalf of Rapoca. I find that at the least he had the apparent authority to bind Rapoca. I find that Moir was not aware of any limitation on Chilcot's authority at the time Chilcot agreed on behalf of Rapoca, or that Chilcot would have to seek further approval of the contracts within Rapoca. Chilcot was the

director of sales for the designed sales subsidiary for Rapoca and clearly was clothed with the apparent authority to enter into contracts such as this. In fact, I believe it is more likely than not that Clyde Stacy, with the highest authority in Rapoca, approved these contracts and either ratified Chicot's oral agreements after he had made them, or approved them ahead of time. For many of the same reasons that I find that Chicot made the agreements as claimed by AMCI, I find that Rapoca's management, including Clyde Stacy, initially approved the AMCI contracts and only later decided, for Rapoca's own economic or other reasons, to repudiate them.

The next question that I must resolve is whether the oral contracts are barred by the statute of frauds. The specific statute of frauds applicable here is that contained in § 8.2-201 of the Virginia Uniform Commercial Code. *See* Va. Code Ann. § 8.2-201 (Michie 1991 & Supp. 2000). That statute states in part as follows:

Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 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.

Id. The purpose of the statute of frauds is to prevent the assertion of contracts based solely on verbal understandings, in order to limit the opportunity that the legal system would be misused by fraud or perjury. The statute of frauds is not a rule of evidence

and is not involved in making the determination of whether or not an oral agreement was in fact made. It simply makes unenforceable those contracts that do not have the support of some signed writing.

It is clear that there is no writing signed by Rapoca in this case sufficient to indicate that the contracts in question were made. However, there is an exception to § 8.2-201. It provides in part that a signed writing is not required “between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents unless written notice of objection to its contents is given within ten days after it is received.” Va. Code Ann. § 8.2-201.

There is no question but that the parties were merchants within the meaning of this exception. Under the circumstances, I find that the two weeks in which these purchase orders were received by Rapoca was a reasonable time after the oral agreement between Moir and Chilcot. It is unlikely that memories would fade or that Rapoca would be unduly burdened by such a short period of time. The closer question is whether the purchase orders, which were not objected to in writing within ten days, were writings in confirmation of the contracts.

Whether a writing is in confirmation within the meaning of this statute is at least in part a question of fact. On the one side, the purchase orders here appear to require

the recipient to take some affirmative action, by virtue of the printed form language that states, “This order must be acknowledged by the return of the signed second copy” and because the purchase order contains a place for the recipient to sign below the words, “Accepted and Agreed.” (Joint Ex. 3,4,5.) In addition, the purchase orders contain printed form language that states that delivery of coal after the date of the purchase order constitutes acceptance of the order. (*Id.*)

Some courts have held that a purchase order, particularly with language like this, is more akin to an offer for a contract, rather than a confirmation of an existing agreement. *See Kline Iron & Steel Co. v. Gray Communications Consultants, Inc.*, 715 F. Supp. 135, 142 (D.S.C. 1989). Moreover, there is no reference in these purchase orders to any specific antecedent oral agreement, and some courts have found that the absence of such confirming language precludes the use of the writing as a confirmation. *See Int’l Commodities Export Co. v. Wolfkill Feed & Fertilizer Corp.*, 32 U.C.C. Rep. Serv. 687, 690-91 (9th Cir. 1981).

However, I find from the undisputed evidence in this case, that the clear trade practice was to use purchase orders such as these to confirm oral agreements. Gary Chilcot’s testimony supports this finding:

THE COURT: And why do you think you get a purchase order? What’s the . . . reason for that?

WITNESS: Well, it's, it's a reconfirmation of what was verbally agreed to.

THE COURT: So that in your experience there normally is an agreement as to the sale which is typically oral?

WITNESS: Typically.

THE COURT: And that . . . is followed by the purchaser sending you or your company a purchase order which confirms the terms?

WITNESS: Correct.

(Tr. 1-162.) In this business, at the time, purchase orders were rarely if ever signed and returned, which is further evidence that they were simply used as confirmations. The practice was not to use them as offers, and they were not offers in this case, but rather confirmations of the prior oral agreement. Thus, the fact that the purchase orders had the acceptance language does not preclude them, under the circumstances of this case, from being writings in confirmation within the meaning of the statute of frauds. *See Bazak Int'l Corp. v. Mast Indus., Inc.*, 535 N.E.2d 633, 637 (N.Y. 1989).

Thus, I find that the contracts in questions are valid and enforceable. I will deny Rapoca's request that I find that Rapoca has no liability or obligation to AMCI under the purchase orders in question.

In its Motion to Amend or to Make Additional Findings and its Amended Motion to Amend or Make Additional Findings, Rapoca seeks for me to find that the specifications for seam, oxidation, ARNU, and FSI did not become part of the contract which was confirmed by P.O. 87300. If I find from the evidence that these terms were orally agreed to by Moir and Chilcot, then they are enforceable terms of the contract. However, even if the terms were not discussed, the UCC provides that where a confirmatory writing, such as P.O. 87300 in this case, includes “terms additional or different from those offered or agreed upon,” the terms become part of a contract unless “they materially alter it.” Va. Code Ann. § 8.2-207(2) (Michie 1991 & Supp. 2000). Because I find from the evidence that the terms in question (with one exception) were expressly agreed upon in the verbal discussions, I need not apply UCC section 2-207 to this contract.

Rapoca has moved that I find that the specifications set forth in P.O. 87300 requiring the coal to come from the Hagy seam and the qualities of FSI, ARNU, and oxidation were not part of the oral contract formed between Moir and Chilcot. While I do not find that the parties had an understanding that the coal was to come from the Hagy seam, I do find that the parties had an agreement as to the specified levels of FSI, ARNU, and oxidation.

As I have previously stated, I find AMCI's version of events more credible than Rapoca's. Specifically, I find Moir's account of the negotiations and formation of the contracts to be more believable than Chilcot's denial that any agreements were made, other than for a small spot order.

Regarding the requirement that the coal come from the Hagy seam, P.O. 87300 does include this specification (Joint Ex. 3, 4.) However, Moir testified under cross examination that the Hagy seam was not discussed in his conversations with Chilcot:

Q Did you tell him, "I want the coal to come out of the Hagy seam?"

A No, sir.

Q So, that wasn't bargained for at all?

A . . . [T]he seam doesn't matter to me. . . .

(Tr. 2-182.) Moir went on to testify that as long as the other specifications were met, the source of the coal was immaterial. (*Id.*) I find Moir's testimony in this respect to be credible. In any event, the parties are agreed that the Hagy seam specification was not part of the contract, and AMCI has represented that it has no intention of enforcing it. Thus, it is not necessary for me to amend my findings to provide that the Hagy seam specification is not part of the contract that was formed between the parties.

I also find credible Moir's testimony that he specifically mentioned the levels for FSI and ARNU² during the phone conversation with Chilcot which formed the contract. Under cross examination, Moir testified that he told Chilcot over the phone that the specifications were to include "7 - 9 FSI." (Tr. 2-165.) The FSI level indicated on P.O. 87300, which I have held confirmed the oral agreement, is also "7 - 9." (Joint Ex. 3, 4.) Moir also testified that FSI was one of the specifications that was discussed with Chilcot in negotiations for the contract. (Tr. 2-180.) Based on this evidence, I find by a preponderance of the evidence that the 7 to 9 FSI level was in fact part of the oral agreement.

The evidence also indicates that an agreement was reached requiring an ARNU level of 160, as reflected in P.O. 87300. (Joint Ex. 3,4.) In an internal e-mail from Moir to Ernie Thrasher, president of AMCI, sent before a final agreement was reached, Moir anticipated that Rapoca could provide AMCI with 150 ARNU coal. (Joint Ex. 45.) Moir testified that the final figure of 160 was given to him by Chilcot during negotiations for the contract. (Tr. 2-128.) I find this e-mail and testimony to be

² FSI stands for Free Swelling Index and is a measure of the tendency of coal to swell when heated and an indication of the caking characteristics of coal when burned as fuel. *See Int'l Mining & Indus. Exch. Inc., Coal Definitions, at http://www.imixinc.com/coal/tools/tools_definitions.asp. According to Rapoca's coal expert, Seth Schwartz, ARNU is also a measure of the swelling properties of coal when heated. (Tr. 1-231.)*

persuasive evidence that the ARNU specification was in fact part of the negotiations and final agreement between the parties.

That Chilcot's "UCC Customer Order Information Sheet" reflects a different ARNU level, 120, is not compelling evidence to the contrary. (Joint Ex. 50.) The document is an undated copy, and the handwritten entry of "120 ARNU" appears to have been written over. (*Id.*) Because Rapoca could produce no original of this document, it is unclear whether the correction was made contemporaneously with the rest of the writing on the document or otherwise. As such, I find by a preponderance of the evidence that the 160 ARNU level indicated on P.O. 87300 is an accurate confirmation of the term previously discussed and agreed to by Moir and Chilcot.

The fact that ARNU was discussed also indicates that there was a meeting of the minds as to an oxidation level of 90.³ As Rapoca's own representative, Clyde Stacey, testified, ARNU is a specification that usually indicates that the coal will be used for metallurgical, as opposed to steam, purposes. (Tr. 1-87.) In fact, in previous dealings between the parties, whenever coal is indicated to be "steam coal," the ARNU level on the P.O. is either marked "N/A," or is blank. (Joint Ex. 30, 31, 32, 33, 34, 35.)

³ According to Rapoca's expert, Schwartz, the oxidation level measures the exposure of coal to elements such as air and water. The less exposure to air and water coal has, the higher the oxidation number is, and the higher the quality of the coal for metallurgical, or coking, purposes. (Tr. 1-220-21.)

Thus, I find it probable that Chilcot was fully aware that the coal sought by AMCI was metallurgical coal.

As such, I find from the evidence presented to me that Chilcot understood an oxidation level of 90 to be part of the contract between the parties. Chilcot himself testified that “90 is usually considered sort of a minimum of metallurgical coal.” (Tr. 1-142.) Both Jack Porco, vice president of AMCI, and Moir testified that an oxidation level of 90 is standard for metallurgical coal. (Tr. 2-17, 2-128.) I find that the weight of the testimony indicates that 90 oxidation is a known standard for metallurgical coal in the coal industry, and that Chilcot either expressly or impliedly agreed to that standard when he and Moir reached an agreement for metallurgical coal.

IV

For the foregoing reasons, it is **ORDERED** that the Motion to Amend or to Make Additional Findings (Doc. No. 70) and the Amended Motion to Amend or to Make Additional Findings (Doc. No. 71) are denied.

ENTER: April 17, 2001

United States District Judge

