

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

AAF-MCQUAY, INC.,)	CIVIL ACTION NO. 5:00CV00039
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
)	
MJC, INC.,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendants' motion for summary judgment, filed October 12, 2001. This matter was referred to United States Magistrate Judge B. Waugh Crigler for proposed findings of fact, conclusions of law, and a recommended disposition. See 28 U.S.C. §§ 636(b)(1)(B)(West 1993 & Supp. 2001). On November 16, 2001, the Magistrate Judge issued his Report and Recommendation, wherein he recommended that the court deny the defendant's summary judgment motion but dismiss the plaintiff's breach of contract claim. The parties filed timely objections. The court has reviewed *de novo* those portions of the Report and Recommendation as to which objections were made. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Having thoroughly considered the entire case and all relevant law, the court shall adopt the recommendation of the Magistrate Judge as it relates to the denial of the defendants' summary judgment motion, but reject the recommendation to dismiss the plaintiff's breach of contract claim.

I.

The following facts are undisputed, unless otherwise noted. The plaintiff, AAF-McQuay, Inc., a Delaware corporation with its principal place of business in Kentucky, manufactures, sells and services heating, ventilating and air conditioning equipment. At its plant in Staunton, Virginia, the plaintiff manufactures air conditioning units known as "chillers." The chillers are

cooled through an internal system of 20-foot-long finned tube condenser coils with as many as 16 metal fins per inch of coil. The plaintiff offers its customers the option of having an anti-corrosive coating applied to the condenser coils in the chiller. One such option was to purchase Heresite P-413, a baked phenolic coating, developed by Heresite Protective Coatings, Incorporated.

Under an agreement with Heresite Protective Coatings, the defendant, MJC, Inc., a Georgia corporation, held the exclusive regional license for use of the coating and the special application technique. The application process involved several stages. In the initial stage, the coils are degreased, sandblasted and etched. Afterwards, the coils are immersed multiple times in vats of the Heresite P-413 coating. After each of the first three immersions, the coating is partially cured by baking the coil in an oven. After the fourth immersion, the coil is sprayed with an additional coating and then cured.

From January 1995 until May 1998, the plaintiff sent those coils which required Heresite P-413 coating to the defendant. The plaintiff shipped the coils together with a corresponding purchase order. Certain terms and conditions were printed on the back of the purchase order, including, *inter alia*, that upon acceptance by seller, the purchase order constituted a contract, and that the seller expressly warranted the product or services to be delivered or performed. Upon receipt of the shipment, the defendant would issue a confirmation form which contained no additional terms and conditions and then proceed to coat the coils. The resulting invoice which the defendant subsequently sent to the plaintiff also contained no additional terms or conditions.

The plaintiff's coils, at 20 feet in length, were longer than the defendant's vats, which were 16 feet long. The defendant used a process, known as flooding, which involved spraying the coating onto the coils. The plaintiff maintains that the correct coating process in such cases

involves dipping half of the coil, revolving it, and dipping the other half. The defendant recognizes that special procedures are necessary to coat oversized coils, but argues that its approach, of spraying the coating onto the coils, was an acceptable application technique.

In January 1997, the plaintiff states that it received reports that the Heresite P-413 coating was peeling off the condenser coils of one of its units in Hawaii. The coating itself was being pulled into the condenser and restricting air flow. Moreover, the impact on the performance of the condenser caused failures in other parts of the unit, including condenser fan motors and compressors. Similar complaints were made by other customers two years later. According to plaintiff, problems have been reported on at least 31 units. The plaintiff attributes these problems to the defendant's improper preparation and application of the coating. The plaintiff further contends that the defendant failed to respond in a timely manner when the plaintiff contacted it about the coating failures.

The defendant asserts that its spray technique was a proper application process under its licensing agreement with Heresite Protective Coatings. It further represents that the plaintiff failed to provide it with specifics as to which coils had problems. Nevertheless, the defendant states it offered to perform field fixes with a new coating product, but before this could be arranged, the defendant learned that the plaintiff had filed a lawsuit against it.

On May 22, 2001, the plaintiff filed a four count complaint, in which it alleges breach of an express warranty, breach of an implied warranty of merchantability, breach of an implied warranty of fitness for a particular purpose and breach of contract. The defendant moved for summary judgment on October 12, 2001. Most of the defendant's grounds for summary judgment are premised on the argument that this is a common law breach of contract case, rather than a case under the Virginia version of the Uniform Commercial Code. Thus, the defendant argues, *inter alia*, that there was no meeting of the minds; that the statute of limitations for

unwritten contracts had run; and that no breach occurred because full performance was given. In addition, the defendant argues that the only warranty which should apply is a one-year express warrant which the defendant itself issues.

In finding that the UCC applied to the facts of this case, the Magistrate Judge recommended that the defendant's motion be denied. Furthermore, the Magistrate Judge recommended that Count IV of plaintiff's complaint, alleging breach of contract, be dismissed as surplusage and duplicative.

II.

A party is entitled to summary judgment when the pleadings and discovery show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact. See 477 U.S. at 248. All facts and inferences shall be drawn in the light most favorable to the non-moving party. See *Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000).

III.

The defendant moves for summary judgment on several grounds, including that the statute of limitations has run; that no meeting of the minds occurred between the parties; that even if a contract existed, no general breach occurred because it was fully performed; and that the only applicable warranty in this case is the defendant's written one-year express warranty. The defendant bases its arguments on the premise that the common law of contracts, and not the

Virginia version of the Uniform Commercial Code is the applicable law in this case. To reach this conclusion, the defendant contends that the transactions at issue in this case were for services, namely, for the service of applying the Heresite P-413 coating to the coils.

Thus, the threshold question for the court to address is whether the transaction was one for the sale of goods or the provision of services. *See Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 458 (4th Cir. 1983). While the UCC is intended to apply to transactions in goods, *see* Va. Code Ann. § 8.2-102 (Michie 2001), the Code may also apply to a transaction which involves a mixture of goods and services. *See Princess Cruises, Inc. v. General Electric Co.*, 143 F.3d 828, 832 (4th Cir. 1998). A court must examine the transactions and determine “whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).” *See id.* at 833 (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)). Among the factors for the court to consider are: “(1) the language of the contract, (2) the nature of the business of the supplier, and (3) the intrinsic worth of the materials.” *See Coakley & Williams*, 706 F.2d at 460.

In analyzing the language of the contract, a court looks for terms peculiar to goods. *See Bonebrake*, 499 F.2d at 958. These terms include “purchase order,” “buyer” or “seller,” as well as such references as “defects in workmanship and materials.” *See, e.g., id., BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322 (11th Cir. 1998) and *Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co.*, 980 F.Supp. 187, 189 (W.D.Va. 1987). In contrast, references to “service engineer” or “quotation for services” have led to the logical conclusion that a contract was for services. *See Princess Cruises*, 143 F.3d at 833.

In this case, the plaintiff issued a purchase order for the coils which were to be shipped

to the defendant. The forms provided columns for “quantity,” “product description” and “unit price.” (Def.’s. Ex. G, Tutwiler Aff., Ex. 5.) The invoices issued by the defendant for the work done contain the same terms. Thus, the vocabulary of the documentation in this case suggests terms peculiar to transactions in goods. The court recognizes the difficulty in ascertaining the significance of words found on a standard form. While the court will certainly weigh this factor in its analysis, it is an examination of the second factor which the court finds most helpful in determining what the predominant purpose of this transaction was.

The defendant contends that no goods were sold in the transactions with the plaintiff; rather, only the service of applying the Heresite coating was provided. However, an analysis of the defendant’s own marketing and sales literature reveals that the nature of the defendant’s business was more than that of a service provider. First, the defendant issued an estimated pricing schedule for “Heresite Coating for Coils” and offered the price of coating per square feet of tubes. (Def.’s Ex. H, Gieselman Aff., Ex. 22.) No separate calculation of cost for application of the coating is made. Second, in its marketing literature, the defendant promoted the coating with claims such as: “Heresite P413 is the only pure phenolic coils coating on the market with a plasticizer. The plasticizer allows for thermal expansion and contraction of the coil without cracking the coating.” (Def.’s Ex. H., Gieselman Aff. Ex. 10.) The defendant advertised that such coating “extends the life of any coil by at least three (3) times as compared to a non-Heresite coil” and claimed such a coating “is the BEST protection for your finned coils.” (Def.’s Ex. H., Gieselman Aff. Ex. 10.) Based on these representations, the court finds that the defendant is soliciting business as a provider of the Heresite coating. The court recognizes that the defendant offered a package deal in that a customer could not separately purchase the coating. The court further acknowledges that the application process of the coating is critical to making the coating as effective as is claimed. However, things are “not the less

‘goods’ within the definition of the act because service may play a role in their ultimate use.” *Bonebrake*, 499 F.2d 951 at 958. As the *Bonebrake* court reasoned, the fact that the transactions involved substantial amounts of labor, here in the form of applying the Heresite coating, does not remove them from inclusion under the Code. *See id.* at 959.

The defendant believes a different conclusion is required based on the third factor, the intrinsic worth of the materials, and in particular on how the Fourth Circuit analyzed this factor in *Princess Cruises*. In that case, the court noted that the value of the materials was never separately itemized on the purchase orders and price quotes. Instead, these documents “blend[ed] the cost of materials into the final price of a services contract, thereby confirming that services rather than materials predominated in the transaction.” 143 F.3d at 833-34. The defendant argues that because the purchase orders and invoices in this case fail to differentiate the cost of the coating from the cost of its application, this court should likewise find that services predominated in the transaction.

However, the failure to separate the cost of materials from the cost of application on a purchase order does not automatically mean that services predominate in a transaction. In *Princess Cruises*, the Fourth Circuit viewed the failure to list on the contract the small number of parts involved in that transaction as further support for its finding that services predominated in the case. *See id.* (having already noted that the price quote stated in large print, “Quotation for Services,” and actually listed the service functions to be performed). Thus, the *Princess Cruises* court looked at the third factor within the context of the other factors. This court shall do the same.

It is true that the purchase orders and invoices in this case do not provide separate prices for the coating and its application. However, the failure to provide a price for the application of coating only bolsters the court’s finding that it was the good, that is, the Heresite coating,

which was the predominant thrust of the transaction. As was already discussed above, the defendant indicated on its price list that the price being quoted was for coating. Moreover, the defendant's marketing materials clearly sell Heresite P-413 coating, not the application process. In *Princess Cruises*, the plaintiff purchased services which required the provision of some parts, while here, the plaintiff purchased a good, the coating, which required application.

The defendant also argues that the failure to differentiate the cost of the coating from the application costs provides proof that the coating is not a good because it is not "movable at the time of identification to the contract for sale..." Va. Code. Ann. § 8.2-105(1) (Michie 2001). According to the defendant, no unit of measure can be identified for the coating at the time of contracting, and as such, it does not fall under the definition of a good under the UCC. The court disagrees. Although the plaintiff could not purchase the coating separately, for example, by the gallon, the good itself at the time of the contract is in a movable form. See *BMC Industries, Inc.*, 160 F.3d at 1331 n.15. Indeed, the defendant's own licensing agreement stipulates that the defendant shall purchase the coating from Heresite Protective Coating at a price of \$26.00 for a U.S. gallon.

Accordingly, the court finds that the transactions at issue in this case were for goods, and as such, that the Virginia UCC applies. This finding moots the defendant's claim that the three-year statute of limitations for breach of an unwritten contract had run. Under Va. Code Ann. § 8.2-725(1), a claim for breach of a sales contract must be brought within four years after the cause of action accrued. Accrual occurs when the breach is or should have been discovered. See Va. Code Ann. § 8.2-725(2). As such, those claims of plaintiff, which accrued on or after May 22, 1997, are properly before the court.

With the defendant's contractual law grounds for summary judgment moot, what remains is a record replete with genuine issues of material fact. The court reiterates that it must examine

the facts in a light most favorable to the non-movant. *See Food Lion, Inc.*, 202 F.3d at 227. As such, the plaintiff argues that it never received the express written warranty which the defendants argue applies in this case. The defendant is free to dispute the plaintiff's claim at trial, but for the purposes of a summary judgment motion, the court considers that the issue concerning possible breach of the UCC warranties still exists. Furthermore, the central factual issues remains; namely, whether the spray technique was a proper method for application of the coating and whether this was responsible for the problems with the plaintiff's coils. Therefore, the court does not find that only one conclusion can be reached based on the facts and law of this case. *See Hawkins*, 203 F.3d at 279.

IV.

The court shall next address the objections concerning the plaintiff's warranty claims. The defendant objects to the extent that the Report and Recommendation can be interpreted as finding the existence of an express warranty. The plaintiff responds that the Magistrate Judge did make such a finding. The passage at issue in the report is found under a section entitled, "Express Warranties," and reads as follows:

There is no question that basic contract law, even that expressed in the UCC, requires a "meeting of the minds" to form a contract. However, the course of dealing between the parties – which includes plaintiff's purchase orders and defendant's subsequent acknowledgments, performance and invoicing based upon those purchase orders – certainly can satisfy the requirement for a "meeting of the minds" under the UCC.
(R&R at 12-13.)

It is clear that the Magistrate Judge is referring to whether a contract existed and not to whether an express warranty existed. As such, the defendant is correct in asserting that the Magistrate Judge made no finding as a matter of law that an express warranty existed, hence, its objection is sustained. The court cautions that this does not mean that no express warranty exists between the parties.

Under Va.Code Ann. § 8.2-313(1) (Michie 2001), a seller can create an express warranty under the following circumstances:

- (a) Any affirmation of fact or promise...which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

. . . .

The issue is considered generally to be one of fact. See Va. Code Ann. § 8.2-313(2), cmt. 3 (Michie 2001).

The plaintiff argues that the standard terms and conditions attached to the purchase order included an express warranty. In addition, the record contains the sales literature of the defendant with multiple claims of why Heresite is the best. The defendant challenges the applicability of those terms and conditions as well as the relevance of the sales literature. In addition, the defendant contends that it issued a limited one-year express warranty which should apply in the case, although the plaintiff denies having received it. The court considers these to be questions of fact which the parties can argue at trial. The existence of an express warranty is a question for the jury, as is the question of whether such a warranty was breached by use of an allegedly improper spraying application technique. Therefore, the plaintiff survives a summary judgment challenge to its express warranty claim. The defendant may challenge the plaintiff's contentions at trial, and the jury will be instructed accordingly.

The last of the defendant's objections addresses the Magistrate Judge's findings that the implied warranties of fitness for a particular purpose and of merchantability were applicable in this case so long as they complied with the cumulative and conflicting provisions set forth in Va. Code Ann. § 8.3-317 (Michie 2001). The UCC provides for these two warranties in a sale of

goods, unless modified or excluded, as set forth in the statute. See Va. Code Ann. §§ 8.2-314-316 (Michie 2001). The defendant contends that the warranties were excluded when the plaintiff provided its own specifications on coating the coils to the defendant. For support, the defendant relies on Official Comment 9 to Va. Code Ann. § 8.2-316 which states:

The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section (s 8.2-317) on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.

The plaintiff counters that its specifications merely repeated the instructions found in the Heresite marketing literature. An examination of the document reveals this to be true. (Def.'s Ex. G, Tutwiler Aff. Ex. 3.) The essential elements of the application procedure as specified by the plaintiff are the same as those found in the defendant's own materials. (Def.'s Ex. G, Tutwiler Aff. Ex. 4.) Thus, by following the plaintiff's specifications, the defendant would also be following its own. The court does not construe the UCC commentary to apply in such cases. See, e.g., *Layne-Atlantic Co. v. Koppers Co., Inc.*, 214 Va. 467, 474, 210 S.E.2d 609, 615 (1974) (involving damage caused when section of fiberglass well casing collapsed where casing was to be constructed solely in accordance with supplied specifications). Accordingly, the defendant's reliance on these grounds for exclusion of the UCC implied warranties is misplaced. The issue of whether these implied warranties were breached shall go to the jury.

V.

Finally, the plaintiff objects to the recommendation of the Magistrate Judge that the plaintiff's common law breach of contract claim be dismissed. The Magistrate Judge expressed reservations about allowing the plaintiff to proceed under both the UCC and common law contract principles and recommended dismissal of the plaintiff's common law claim as surplusage. While the court understands the Magistrate Judge's concern that the common law claim of breach of contract may be duplicative, the court nevertheless believes it improvident to dismiss *sua sponte* the common law claim at this stage in the proceedings. Namely, the court is persuaded by the reasoning in *Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co.*, 980 F. Supp. 187 (W.D.Va. 1997).

In that case, the plaintiff asserted both a UCC claim and a common law breach of contract claim which sought "recovery for breach of the express and implied warranties or promises, relating to the performance of the furnace." *Id.* at 190. The *Fournier* court found that the plaintiff would "not be entitled to double recovery, and the counts of its complaint may overlap and to that extent be surplusage, but that is no basis for summary judgment." *Id.* In as much as the breach of contract claim is interpreted similarly in this case, that is, a claim seeking recovery for breach of warranties relating to the performance of the coating, the *Fournier* reasoning applies. Moreover, the plaintiff also represents that the relief it seeks is not duplicative. The court can address this concern of duplicative remedies at trial. Therefore, the court rejects the Magistrate Judge's recommendation to dismiss the plaintiff's common law contract claim.

VI.

For the foregoing reasons, the court accepts the Magistrate Judge's recommendation to

deny the defendant's summary judgment and rejects the recommendation to dismiss the plaintiff's common law claim. The defendant's objections are sustained in part and overruled in part, and the plaintiff's objection is sustained.

An appropriate Order this day shall issue.

ENTERED: _____
Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

AAF-MCQUAY, INC.,)	CIVIL ACTION NO. 5:00CV00039
)	
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
MJC, INC.,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the presiding United State Magistrate Judge's November 16, 2001 Report and Recommendation on the defendant's motion for summary judgment. The parties have filed objections and responses thereto. Accordingly, the court has performed a *de novo* review of the Magistrate Judge's Report and Recommendation. See 28 U.S.C § 636(b)(1)(C). Upon thorough consideration of the Report and Recommendation, all relevant memoranda of the parties, the entire record, and the applicable law, and for the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The Magistrate Judge's Report and Recommendation, filed November 16, 2001, shall be, and it hereby is, ACCEPTED IN PART and REJECTED IN PART;
2. The defendant's objections, filed November 28, 2001, shall be, and they hereby are, SUSTAINED IN PART and OVERRULED IN PART;
3. The plaintiff's objection, filed on December 4, 2001, shall be, and it hereby is, SUSTAINED;
4. The defendants' "Motion for Summary Judgment," filed October 12, 2001, shall be, and it hereby is, DENIED.

The Clerk of the Court is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

Date